

Appeal Decision Notice

T: 01324 696 400
F: 01324 696 444
E: dpea@scotland.gsi.gov.uk



High Hedges (Scotland) Act 2013

Appeal under section 12(1)

Decision by Sinéad Lynch, a Reporter appointed by the Scottish Ministers

- High hedge appeal reference: HHA-290-2
- Location of the hedge: 15 Cairnbank Road, Penicuik, EH26 9DR
- Owner of the hedge: Ms. Fiona McKinnon
- Appellant's address: 20 St. James's View, Penicuik, EH26 9DZ
- Application for a high hedge notice 14/00332/HH dated 29 April 2014
- Appeal by Mr and Mrs Jamieson against the decision by Midlothian Council that there is no adverse effect from the high hedge
- Date of site visit by Reporter: 11 November 2014

Date of appeal decision: 6 January 2015

Decision

I confirm the decision by Midlothian Council that the hedge has no adverse effect on the reasonable enjoyment of the appellant's property.

Reasoning

1. The appellant's property at 20 St. James's View (the property) is a detached two-storey house, with gardens to the east, west and south. The southern elevation of the house contains windows to a sunroom and a kitchen on the ground floor, with bedroom windows on the floor above. The main reception rooms face east and west. It is a corner property, forming the junction of St. James's View and St. James's Gardens.

2. The hedge comprises a row of eight trees planted in a straight line on the north-west boundary of 15 Cairnbank Road, Penicuik, EH26 9DR. The hedge comprises five sitka spruce, two apple trees and one birch tree. The under branches of the five sitka spruce have recently been removed to a height of 4 metres in connection with another planning matter. The total hedge length is approximately 22 metres and the height of the high hedge is approximately 23 metres. Between the hedge and the property there is a public road (St James's Gardens) with footpaths on both sides and an area of grassed public open space to the south of the road. The property lies opposite the hedge at an oblique angle, the hedge, and the distance between the hedge and 20 St. James's View is approximately 19 metres to the property boundary. The property sits higher than the hedge and Lower Bank



House, whose garden grounds slopes down towards the River Esk. There is a difference in ground level of some 0.7 metres between the base of the hedge and the southern part of the garden of the property. All parties are agreed that for the purposes of this appeal and in accordance with the definition in the High Hedges (Scotland) Act 2013 (the Act), the hedge is a high hedge and I see no reason to disagree.

3. In this case, the appellants are seeking the removal of the trees; or a reduction in height of the trees; or a limit of the current height of the trees to be imposed. The hedge owner has stated that she wishes to retain the trees and is willing to maintain them.

4. The appellant made an application to Midlothian Council (the Council) for a high hedge notice seeking a reduction in height of the sitka spruce to 3 or 4 metres. The Council declined to issue a high hedge notice, having concluded that the hedge by means of its form and its proximity and orientation with the application property did not have an adverse effect on the reasonable enjoyment of the applicant's property. The Council further noted that the potential of the trees to continue growing may require future action.

5. In determining appeals for high hedges, the test to be applied follows from section 6(5)(a) of the Act, being "*whether the height of the high hedge adversely affects the enjoyment of the domestic property which an occupant of that property could reasonably expect to have*". The Scottish Government's "Guidance to Local Authorities" (2014) on the Act makes clear that a range of factors, including but not restricted to loss of light, may be relevant in determining whether there is a loss of reasonable enjoyment arising from the height of a high hedge.

6. The appellant's agent has submitted a full assessment of the perceived and actual impact on the property. He has carried out a number of tests and calculations to determine the potential impact of the high hedge on the daylight and sunlight available to the kitchen window on the southern elevation of the property.

7. In carrying out a Vertical Sky Component test, the appellant's agent has followed the Building Research Establishment (BRE) guidelines as set out in "Hedge Height and Light Loss" (2005), which is recommended as a tool for such calculations in The Scottish Government's "Guidance to Local Authorities" (2014). Included in the appellant's calculation are other obstructions not related to the high hedge such as the existing sunroom at the property, the adjacent house to the west being 1 St. James's Gardens and the southern boundary hedge at the property itself. The outcome of the calculation is that the high hedge vertical sky component is within the parameters set by the BRE guidelines and is acceptable.

8. The appellant's agent then assessed the impact on external daylighting on the kitchen window at the property, which is intended to demonstrate the blockage of direct sunlight by the high hedge. The calculation concludes that the kitchen window experiences a blockage of sunlight, directly attributable to the high hedge, for approximately 2.5 hours each day for 5 months of the year (the winter months). The BRE guidance suggests that external daylight should not be blocked for more than 20% of the hours already available to the particular window. In this case, the decrease in available daylight hours to the kitchen window would be approximately 33%. The appellant suggests that to achieve the BRE

guidance level of no more than a 20% decrease, the height of the high hedge would need to be reduced to 15 metres.

9. The action hedge height has been calculated by the appellant's agent. In doing so, he has adjusted the orientation factor to take account of the higher latitude of Scotland, which implies that a lower action hedge height would be required to allow the same amount of light that a higher action hedge height would allow at lower latitude. An effective length of hedge of 22 metres is assumed and an effective garden depth of 14.5 metres. Based on the appellant's agent's calculations, the adjusted action hedge height would be 23.5 metres. This means that the existing high hedge, at a maximum height of 23 metres, is lower than the guidance suggests.

10. The appellant also contends that the height of the high hedge prevents a reasonable amount of solar gain to the property for at least half of the year. There is no evidence before me to substantiate such a claim, as the conclusions of the tests carried out by the appellant's agent demonstrated that the BRE guidelines are broadly met in relation to the high hedge, and evidence has only been produced demonstrating an impact on one kitchen window for 2.5 hours per day for five months of the year. I do not consider that an impact on passive solar gain has been demonstrated, to the extent that it could have an impact on the enjoyment of the property that an occupant could reasonably expect to have.

11. The owner of the high hedge has not carried out the same calculations as the appellant, but is relying on the calculations made by the Council during the application process in assessing daylight, action hedge height and vertical sky components. Lower Bank House is the owner's property. The high hedge forms part of the northern boundary of Lower Bank House to St James's Gardens, being planted behind a wooden boarded fence. The garden grounds of Lower Bank House slope away from St James's Gardens, and I estimate that the high hedge is located at one of the highest parts of the garden. The owner considers that the high hedge does not constitute a solid barrier to light at the appellant's property, as they contend that filtered light is available through the high hedge. They are of the opinion that the under cutting of the branches of the sitka spruce up to a height of 4 metres is to the benefit of the appellant. The amenity and privacy offered to the garden and enjoyment of Lower Bank House is considered by the owner to be at risk if the trees are removed, and they consider that they have demonstrated the value of the trees to them by the works they carried out in protecting the trees when constructing the new summer house. The owner states the advice they have been given suggests that it is not possible to reduce the height of the sitka spruce without causing damage which may kill the trees.

12. The owner of the high hedge considers it to be an important feature in the locality. I note from my site visit that there are a number of groups of large evergreen trees spread across the area. However, the high hedge does not relate to the woodland or green spaces around Penicuik or any pattern of trees within the local area. The character and amenity of the area would, in my view, be maintained with the high hedge at its current height or if it were removed. It is unrelated to any historic location, landscape or event of note and consequently, has little cultural significance. I can appreciate the value of the hedge to the owner, but taking into consideration the location of Lower Bank House on the plot, the existing wooden board fence and the change in ground level, I conclude that should the

high hedge be removed, there would be little adverse impact on the owners' enjoyment of their property.

13. In assessing the potential impact of the high hedge on the property, the Council have carried out similar numerical tests to the appellant. Their conclusions are that the vertical sky component test is satisfied in terms of daylight and sunlight to the kitchen and sunroom, that the overshadowing of the southern and western parts of the garden is not significant being for 2 hours per day in the 5 winter months, and that the action hedge height when calculated in accordance with the BRE guidance was at or above the actual height of the high hedge. They conclude that overall, there is no justification for issuing a high hedge notice.

14. Returning to the test at section 6(5)(a) of the Act, I need to consider if the high hedge has an adverse impact on the reasonable enjoyment of the property. The tests that have been carried out by the parties demonstrate that the high hedge has a marginal impact on direct sunlight to the southern kitchen window of the property, for approximately 2.5 hours per day for 5 months of the year. All parties test results demonstrate that the other measurable potential impacts of the high hedge are within the guidelines set out in BRE "Hedge Height and Light Loss" (2005). Although the appellant has raised the issue of the potential impact of the high hedge on the sunroom, I have not been provided with any of the numerical calculations of the potential impact of a high hedge on the sunroom as set out in the BRE guidance, as I have been for the kitchen window. I note from appendix 2 of the appellant's submission, that although the sunroom is plotted as an obstruction to light on the kitchen window, there is no analysis of the potential impact on the sunroom itself.

15. However, the determining issue is the enjoyment an occupant could reasonably expect to have, not simply the satisfying of numerical tests. I note from my site visit that in addition to the south facing window which has been the subject of the BRE tests, the kitchen at the property benefits from a south facing glazed external door to the garden and an horizontal window on the west elevation. I have no evidence before me of the potential impact of the high hedge, if any, on either the glazed door or western window in the kitchen. Given that the demonstrated loss of sunlight is at most 2.5 hours per day in the 5 winter months to one of three glazed areas in the kitchen, with no demonstrable impact on the east/west facing reception rooms or the sunroom, I can conclude that the height of the high hedge has a minimal but not adverse impact on the enjoyment of the property that an occupant could reasonably expect to have.

16. The appellant has suggested that a high hedge notice could be issued requiring the high hedge to be maintained at its current height. I consider that the Act is specific in its terms in relation to the circumstances in which notices can be issued. At section 6(5)(b) of the Act it states "*initial action that is to be taken by the hedge owner and the compliance period for that action*" must be set out in the notice. As I have found no adverse impact arises from this high hedge, there is no notice and therefore no initial action. The Act then makes provision at section 6(6)(b) for "*any preventative action that is to be taken by the hedge owner to prevent the recurrence of the adverse effect at times following the compliance period for the 'initial action'*". From that, it is clear to me that preventative action is to prevent the recurrence of the adverse effect, not to pre-empt the adverse effect which has not actually taken place. For that reason and in these circumstances, I do not agree that a high hedge notice could be issued. However, I appreciate that the unchecked growth

of the sitka spruce could in time have an adverse impact and so would draw the appellants attention to Part 2 of The Scottish Government's "Guidance to Local Authorities" (2014) which states *"If an initial application is rejected by the local authority but subsequently the situation changes, for example where the applicant extends their house or there have been changes to the high hedge, the applicant is entitled to submit a new application for a high hedge notice, drawing attention to the material change in circumstances."*

17. A representation was made by an adjoining property owner. He supports the application for the issuing of a high hedge notice and this subsequent appeal. All of the matters raised in the representation have been addressed in the above paragraphs.

18. The appellant has raised the issue of the wording of the high hedges section of Midlothian Council's webpage. Council has responded to these criticisms. My decision does not rely on the content of the Council webpage. My duty is to consider only the merits of the case in relation to the Act. I have no remit to assess the council's administrative processes and procedures. Should the appellant wish to pursue these matters, a complaint can be made to the Scottish Public Services Ombudsman (SPSO). Responsibility for deciding whether or not to investigate complaints rests with the Ombudsman who is entirely independent from the Scottish Government. The SPSO can be contacted at Freepost EH641, Edinburgh EH3 0BR, by telephone on 0800 377 7330 or online at www.spsso.org.uk.

19. I therefore conclude, for the reasons set out above, that the high hedge does not adversely affects the enjoyment of the domestic property which an occupant of that property could reasonably expect to have, in accordance the relevant provisions of the legislation and the guidance.

20. I have considered all the other matters raised, but there are none which would lead me to alter my conclusions.


Sinéad Lynch
Reporter