

## ***High Hedges Consultation: Implementing Pt 8 of the ASBA***

### ***Response of the Isle of Wight Council***

Q1.

The maximum fee set should certainly reflect the full cost to the local authority of processing and determining the average complaint. As the Act provides for local authorities to reduce this fee if they see fit, it seems sensible for the regulations to set the maximum reasonable amount that could be charged. There would be little benefit in setting it lower, but a risk that the implementation of the regulations could impact upon other existing services. In practice any amount allocated by central government through the local government finance settlement is not normally passed to the implementing department unless the sums involved are very large indeed.

Whilst councils may chose to set a lower figure in some circumstances, it is my view that the onerousness of this task combined with the likelihood that a proportion of complaints will undoubtedly be contemplated which will fall within the category of 'vexatious or frivolous', it is unlikely that the normal level of fee will be set particularly low.

Q2.

(see table 1)

I have calculated the estimated cost of implementing the regulations on the Isle of Wight. I believe that the cost will be more in the region of £550 per complaint – about double the minimum estimate in the Regulatory Impact Assessment. My costings are drawn from our experience of TPOs and registering Town and Village Greens. In particular I am mindful of the recent Local Government Ombudsman's report on our council (March 2003 01/B/15370) which found, in connection with protected trees, deficiencies in our enforcement procedures and handling of complaints. We have been obliged to adopt a much more rigorous and hence costly procedure for both of these. The proposed complaints procedure for high hedges is not dissimilar to the system we used before the Ombudsman's report, and which was subject to severe criticism. Because of this I believe that the situation envisaged in the RIA is not a realistic one.

I agree with the RIA in that it may well take an officer some 8 hours (actually I estimate 7, based on 1 day's work) to investigate a complaint and to decide whether to take action; however this is only one part of the process, and very much underestimates the whole cost, excluding as it does the input of administrative staff; senior officers and legal advisors, all of which I am certain, from my experience of neighbour disputes, will be required at various parts of the process (see table1).

In particular I differ from the assessment in that I believe that the nature of these complaints will lead to a very high proportion of appeals, and subsequent enforcement investigations – although many of these may not

lead to further action. For example, in cases where future preventative remedial action is required, this may lead to a number of further complaints by the complainant in future years, each of which will require administrative work to establish the facts of the case, and a site visit, even if no offence is committed. Referring back to my comments about the Ombudsman's report above, I strongly dispute the assertion in s38 of the RIA that the legislation will be self policing. All complaints must be investigated, and the word of a complainant or landowner cannot be relied upon uncorroborated. Once a remedial notice has been served there will be essentially an indefinitely 'open door' for a complainant to make further complaints, for example, that the landowner has not complied with the preventative action requirements of the notice. If a council refuses to investigate a complaint other than by telephone there would, in my view, be a prima facie case for an Ombudsman's judgement of maladministration, possibly with injustice if there was subsequently proven to be proper grounds for complaint.

I have not included any action for which the costs are recoverable from the landowner.

Q3. Not applicable.

Q4. What if the presumed landowner wishes to assert that he is not the landowner or does not have control of the hedge? See Q22.

Q5-6. These are acceptable.

Q7. Yes.

Q8. The role of interested persons is a tricky one, and in this process must be less than in others where a public interest is at stake. As this process will almost certainly relate to entirely non-public land and amenity, I do not see that it is necessary at any point in the process to involve any parties who are not, in the sense of s9.6, a party to the process. I would include the LPA, the complainant/s and the landowner and/or occupier as parties. I would like to exclude other neighbours (unless they have made a valid complaint), local town and parish councils, campaigning bodies and indeed any other third parties. The parties might wish to offer evidence, and of course this could originate from a third party –e.g. a complainant or appellant could get advice from an arboriculturalist, or from Hedgeline, and submit it themselves. But such third parties should not be able to do so independently.

I accept the role of the Inspector in considering the admissibility of input from interested persons. Nevertheless I would be anxious to see excluded from both complaints and appeals the submission of written evidence or supporting documentation from third parties. This is to prevent the raising of petitions, letter-writing campaigns etc from supportive neighbours or other persons. This occurs from time to time in TPO matters, and rarely if ever affects the outcome of a decision –thus increasing frustration on the part of those people who rallied to the cause. It occurs often when there is ill-feeling on the part of one or both parties (as may often be the case in these complaints) and has

much potential to divide communities and multiply a specific altercation between two parties into a much larger, more expensive, and more generalised dispute between many.

Accordingly I do not believe that interested parties should be informed about an appeal (s9.36, s9.59, s9.69) as a matter of course, but only if, based on what has been submitted at the time of the complaint, the Inspector deems it appropriate.

Q9. These are acceptable

Q10. (See also Q8) S9.78: It would be a good idea to hold the site visit before the hearing, rather than afterwards, so that the Inspector can have some idea of the location about which he will be hearing.

Q11. These are acceptable.

Q12, Q13. This guidance is acceptable in its format, but in the light of the way similar guidance is used (e.g. the TPO 'Blue Book' 1999 and the guide to the Hedgerows Regulations 1997) it should be borne in mind that the document will not only be used by local government officers, but also by the parties in many cases.

Some specific points:

5.25 Presumably these buildings would not be outside the scope if they fall within a domestic property as defined in s5.23. This section is slightly misleading as it could imply that a shed in a garden would be outside the scope.

6.60 This is slightly ambiguous with two different uses of 'this'. Make into one sentence to make it clear what it is that cannot be taken into account.

Q14. All of these are required and will be very helpful. It would have been useful to have had an opportunity to comment on these, too.

Q15. I am concerned by the exchange of representations proposed. It is similar to the practice (established by custom, rather than statute) for deciding applications to register Town and Village Greens. In these applications, the applicant is usually opposed by the landowner or another interested party (e.g. a developer), creating three parties to the decision in a similar way to the proposals for the High Hedges regulations. In such cases the application is sent to the objector, for comment, and then when the comments return, they are sent to the applicant, for comment, and so on, in an endless game of administrative tennis, which has a tendency to escalate with use of consultants, barristers, and experts as the process continues – often taking many months and causing distress and expense to the applicant, who is usually a lay person with no particular resources. I do not suggest that the High Hedges process will go to these extents, as much less is at stake. The process, however, is analogous. In the case of hedges, with the enthusiasm that antagonistic neighbours will no doubt show for nit-picking, any opportunity to set up an open-ended 'tennis match' of claim and counter-claim should be resisted. I would prefer that the hedge-owner be invited to respond to the

application once, say within 28 days. After they have done so, only at the invitation of the Council either party could be asked to submit further information. There must be a set date after the service of a complaint on the hedge owner by the council after which no further submissions will normally be received, in a similar way to the way in which appeals are organised –see s9.38 and s9.20.

Q16. Yes.

Q17. Certainly not. There is little or no direct public interest in this matter, and if there is, for example if the hedge belongs to a local authority, then there will be existing mechanisms within that body for public involvement –for example, by the involvement of local elected members. I see the public role in these decisions as a very limited one- similar in scope, say, to the role in a request from a householder to the Council to deal with a faulty streetlight, or an abandoned car.

Q18.

6.70 – the calculations as set out by BRE in “High hedges, daylight and sunlight: final report” and previous publications are anything but simple, despite the rather self-conscious statement contained in it that “The procedure was intended to be simple enough for householders to use.” Although the published guidelines are very thorough technical working documents, they are certainly not suitable for the average householder to calculate the ‘action height’ of a hedge, nor, I would suggest, for the average local authority officer without some careful training. At the very least, to demonstrate that the test has been applied using this formula will be a very considerable burden of work on the local authority, and equally upon the applicant and landowner in the case of any dispute.

The status of these guidelines needs to be made clear in the Regulations. If there is any expectation that they will be used as a matter of course, this should be clearly stated. Situations when a decision can be made without reference to them should also be clearly outlined. For example, is it ever possible for an officer to make a subjective decision about the required height of a hedge, or must it always be calculated using these guidelines? Whilst the spirit of the draft regulations seems to lean towards the subjective and holistic consideration of a wide range of factors, a tenacious appellant with a deep pocket and enthusiastic counsel could certainly make a lot of trouble by testing all decisions against this convoluted formula. I am concerned that there is scope for all decisions - even the most obvious ones – to end up being necessarily tested against these guidelines, even if it is simply to demonstrate that they do not apply. This would be a substantial burden and cause for dispute.

In my opinion the BRE guidelines are too complex to be of any practical use in this scenario. They should be left as background documents but it should be clearly stated that any decision or complaint which includes reference to obstruction of sunlight need not necessarily rely upon BRE or similar

calculations, as other factors can make such an objective stance inappropriate in many cases.

Q19. None known.

Q20. These are acceptable.

Q21. It would be a great deal easier to enforce if remedial notices could specify the size range which would be acceptable for a hedge; rather than the actions which are necessary to maintain it. For example, it could be placed in a notice that a hedge should be maintained at height of no more than 2.5m, which would be extremely easy to measure and determine whether or not the notice was being complied with at any time. However if, on the other hand, as seems to be suggested in the present draft, the notice read something more like 'the hedge will be trimmed to a height of 2.0m at least once per annum' this will be much harder to police, easier to cause complaints, and easier to raise the defence of 'well, I cut it 11 months ago but it grew 1m anyway'.

Whilst the legislation may require such detailed actions to be specified, it would be helpful to know whether other specifications, such as a specific size limit, could be included. If so, I would strongly advocate their use to ease enforcement.

Q22. I am concerned about the case where a hedge is in disputed ownership. This is often the case where hedge disputes between neighbours become particularly bitter. In fact, several of the more high-profile domestic hedge dispute cases (e.g. the Lincoln case, the Groombridge case) have not been primarily over the height of the hedge, but over its ownership. The two issues seem to be quite intertwined and yet the draft regulations make no direct reference to this problem.

What should a local authority do when a complaint is received where the hedge is in disputed ownership? This is a particular problem in that often, only one party will consider there to be a dispute - or indeed both parties might consider that the ownership is undisputed, but have different opinions! Therefore such a dispute may not be apparent at the complaint stage.

This sort of difference of opinion is surprisingly common in TPO cases, although in such a case the ownership is not critical. In the case of the High Hedges regulations, establishing the ownership of the hedge IS critical. There are two reasons for this.

- a) Because the Local Authority may be required to recover costs from the landowner –if this cannot be identified or is in dispute, there may be no way of economically making such a recovery thus making it very disadvantageous for the LA to proceed with enforcement.
- b) Because any enforcement must be undertaken against the landowner, if there is a dispute about who this person is, it would not be possible to enforce any remedial notice.

This issue will be most acute in those cases where a large hedge divides two owners, and perhaps both deny ownership, without clear documentation, because neither wishes to pay for the works. It is quite common for such undefined boundaries to exist, and, perhaps not surprisingly, on such boundaries there also exist hedges – often, as neither party wants to admit responsibility, badly maintained ones. It would be unfortunate if in such cases there was no way to ensure that the ownership of the hedge was established before a complaint could be processed.

A suggested partial remedy would be to include in the complaint form a requirement that the complainant make an assertion that he does NOT own the hedge in question, preferably with a copy of his deeds (although that should not be obligatory as it could be too onerous). Equally, he should be asked to provide any evidence he might have that establishes the ownership of the hedge in question – e.g. letters from a landowner admitting responsibility, past planning consents, or copy of HM Land Registry entry.

There must to be some guidance in the guidelines to prevent complaints becoming mired on this legal point, which would appear to make progress in any direction difficult. Some specific questions must be answered:

1. To defeat a complaint is it enough for the presumed landowner to show that the hedge does not appear on his deeds?
2. Is the onus upon the landowner to disprove he owns the hedge, or, conversely, is the onus upon the complainant to prove that the landowner does own it? Or, in the worst scenario, is it for the local authority to determine this?
3. Will it be necessary for the local authority to make a Land Registry search as a matter of course, in every case? If not, what will be sufficient evidence of ownership?
4. Can a presumed landowner be obliged to reveal the extent of his ownership?
5. What is the way to progress a complaint if the land is unregistered?
6. If there is an ownership dispute, what is the role of the local authority in resolving it?

In my experience it is a very common occurrence for landowners in dispute to appeal to the local authority to resolve the matter, even if there is no specific legislative reason to involve the authority in the first place (e.g. a current planning application). Such a task could be massively complex and consuming of time and resources, and have nil public benefit. I am anxious for some provision to be made to ensure that such a dispute be by necessity solved between the various parties concerned prior to any complaint being accepted, without the Council needing make any judgement. This would then be analogous to the situation in TPO legislation where the Council is able to avoid any involvement in resolving ownership matters; and indeed to development control where the applicant is obliged to actively assert his ownership (or demonstrate consent of the landowner if different) to make the application. Otherwise we may have the situation where a council may be obliged to use its own resources to resolve a complex private dispute, and attempt to essentially make a ruling upon who owns a disputed piece of land

–a most dangerous assertion to make – as a result of a relatively unimportant complaint.

Q23. Undoubtedly. To facilitate our travelling to it please make it further south than London, for example, Guildford or Winchester.

Q24. A practical introduction suitable for staff who will be making the determinations on the ground, with some examples to cite when deciding what is a hedge, what is a high hedge, and so on.

**Table 1**

**Projected cost of implementing High Hedges regulations: Isle of Wight Council**

Part of Complaint process	Proportion of complaints where required	Net # incidents pa	Admin officer (hrs per complaint)	Team leader (hrs per complaint)	Senior officer (hrs per complaint)	Legal services (hrs per complaint)	Admin officer (hrs per year)	Team leader (hrs per year)	Senior officer (hrs per year)	Legal services (hrs per year)
Register and record complaint	100%	42	0.5				21	0	0	0
Negotiation	100%	42	1	5			42	210	0	0
Investigate complaint	70%	29.4	2	7			58.8	205.8	0	0
Make & serve notice	30%	12.6	1	2	1	1	12.6	25.2	12.6	12.6
Respond to appeal	25%	10.5	1	4	0.5	0.5	10.5	42	5.25	5.25
Enforcement enquiries and visits	20%	8.4	1	3			8.4	25.2	0	0
<b>Subtotals</b>			<b>6.5</b>	<b>21</b>	<b>1.5</b>	<b>1.5</b>	<b>153.3</b>	<b>508.2</b>	<b>17.85</b>	<b>17.85</b>
(Officer rate and number of cases extrapolated from Regulatory Impact Assessment)						Officer hourly rate	£15	£37	£45	£100
						Cost pa	£2,300	£18,803	£803	£1,785
						Total staff cost per annum	£23,691			
						<b>Average cost per complaint</b>	<b>£564</b>			

See notes to accompany Q2.