

REPORT

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Cllr Noeken : Cabinet Member for Planning & Economic Development

AMENDMENTS TO THE SCHEME OF DELEGATION

1. HIGH HEDGES LEGISLATION

2. MISCELLANEOUS

- **Reason for refusal and subsequent appeal**
- **Enforcement Action**
- **Tree Preservation Orders and Trees in Conservation Areas**

1. PURPOSE OF REPORT

- 1.1 To outline the new Statutory duty imposed upon the District Council in relation to complaints about high hedges and to put in place the necessary procedures, fees, delegations and authorisations in order to implement the requirements when brought into force. ODPM has indicated that this is likely to be by December 2004.
- 1.2 To amend the delegation scheme so as to minimise the risk of a legal challenge, to minimise items being presented to committee and enabling efficiencies within the service unit.

HIGH HEDGES LEGISLATION

2. Introduction and Background to High Hedges Legislation

- 2.1 Part 8 of the Anti-Social Behaviour Act 2003 contains the framework within which the District Council must consider complaints from owners or occupiers of domestic property, alleging that their reasonable enjoyment of that property is being adversely affected by the height of a high hedge situated on land owned or occupied by another person. It does not apply to any nuisance caused by roots of a hedge.
- 2.2 For hedges to be the subject of a complaint they must comprise a line of two or more evergreens and be a barrier to light or access and rise to a height of more than 2 metres above ground level. The legislation covers the affect of gaps, and includes "semi-evergreens".
- 2.3 Formal complaints to the Council are to be seen as a last resort, and the Council may decide not to proceed with them if the complainant has not previously taken all reasonable steps to resolve the matters complained of, or if they are frivolous or vexatious. All complaints must however be considered. They must be accompanied by a fee to be determined by the Council not being more

than a maximum to be prescribed in Regulations. At maximum the fee is expected to be in the order of £300. ODPM has calculated this on the basis of approximately 8 hours work per complaint. This does not, of course, take account of advisory and promotional work seeking resolution short of formal complaints.

- 2.4 If the District Council decides to proceed with the complaint, it must decide whether or not to issue a Remedial Notice with a view to remedying the adverse effect or preventing its reoccurrence. The procedures for issue, service, effective dates, compliance periods and appeals to the Secretary of State are similar to those for Planning Enforcement Notices, except that appeals may also be made against a decision not to issue a Remedial Notice by the complainant. Notices are registerable as Local Land Charges.
- 2.5 Notices must state the initial action to be taken within the compliance period and any preventative action at later times. They may not require removal of the hedge or the height to be reduced below 2 metres.

3. Powers of entry

- 3.1 The Council may authorise "a person" (i.e. not necessarily an Officer of the Council) to enter land to obtain information relevant to a complaint or Remedial Notice upon 24 hours prior notice (Section 74). Authorised persons may take with them such other persons as shall be necessary, equipment and materials and may take samples of trees or shrubs forming part of a high hedge. Obstruction of an authorised person is made a Level 3 offence (currently attracting a maximum fine of £1,000).

4. Offences

- 4.1 Failure to comply with a Remedial Notice also becomes a Level 3 offence. There are a number of limited statutory defences available. The Court may issue an Order to comply in addition to or instead of imposing a punishment. Continued failure to comply with a Court Order may lead to a fine not exceeding 1/20th of the Level 3 scale for each day that failure to comply has continued.

5. Works In Default

- 5.1 The Council may also authorise a person to enter land and take the action required in a Remedial Notice upon 7 days prior notice, in default of compliance. Again, necessary vehicles, equipment and other persons may accompany him or her. There is a requirement to resecure unoccupied property, and a further obstruction offence created.

6. Procedural Matters

- 6.1 As usual, the primary legislation is to be supplemented by Regulations and detailed guidance including the recommended methodology for calculating the height of a hedge that is likely to cause significant loss of light to a garden or house nearby. The new duty to consider complaints and decide whether or not to issue a Remedial Notice is considered to be Regulatory and it is therefore appropriate that the function be delegated to the Area Committees, subject to the ability to refer up to Planning and Regulatory Panel. As the area for discretion on whether or not a Remedial Notice should be served will be substantially reduced by the Guidance (see below), it is anticipated that there should be further delegation of the function to an Officer, who may decide that it is not appropriate for him or her to exercise their delegation and refer the decision to be made by the Area Committee. It is anticipated that complaints will, in the main, proceed by way of

written representations, however in some cases a hearing may be appropriate to accord with the principles of Natural Justice and Human Rights, or where the Officer feels unable to exercise his powers for some other reason.

7. Guidance

- 7.1 The draft Guidance contains 14 pages of formulae and diagrams for calculating the "action hedge height". Hedges higher than 1 metre above this line are likely to already be causing a substantial loss of light and should be trimmed to at least 1 metre below it.
- 7.2 The "action hedge height" is calculated having regard to:
- (i) Loss of daylight to main house windows – these calculations take account of the geographical orientation, distance, window positions, type of room inside the property, whether the hedge is directly opposite or to one side or oblique to the window and whether the window is ground floor or not. Sloping ground also has to be taken into the calculation.
 - (ii) Loss of sunlight to nearby gardens – as well as orientation there is a formula to allow for the relative size of the affected part of the garden to the whole, and whether the hedge is on or set back from the boundary. Again, calculations need to be revised to take account of sloping ground.
- 7.3 In both cases Summer and Winter variations will also have to be taken into consideration.

8. Other Relevant Factors

- 8.1 In reaching a decision as to whether to issue a Remedial Notice other relevant factors are to be taken into account such as:-
- Extent to which a high hedge affords privacy to adjoining occupier
 - Contribution of the hedge to the amenity of the neighbourhood
 - Any legal obligation in relation to the hedge
 - Hedge on more than one side of a garden
 - History – e.g. whether hedge has remained at present height for a number of years, previous complaints, was hedge at present height when complainant purchased or his property was built.
 - Other options such as thinning, crown lifting, etc.
 - Proximity of a building behind the hedge blocking as much light as the hedge itself.
 - Partial obstruction of window only
 - Topiary hedges
 - Trees in hedges
 - Acoustic screen hedges
 - Protection of wild life, such as nesting birds

MISCELLANEOUS

9. In addition to the above, there are issues that in the interests of both area committee and unit effectiveness, require amendment to the constitution.
- a) **Reasons for refusal and subsequent appeal**

Once a planning application has been refused and the proposal is subsequently appealed we are encouraged as a planning authority to minimise the time spent at the inquiry by trying to overcome reasons for refusal and agreeing points of fact.

If for example a highway reason is overcome by the submission of an amended plan it would not be reasonable for the authority to pursue this line of argument without the support of the highway authority.

At present there is no clear authority given to the HDS to disregard a reason for refusal once it has been imposed. In practice a pragmatic stance has been taken in order to mitigate costs, however it is considered that it would be best practice to rectify the current position to prevent the authority being legally challenged.

Conclusion

That the HDS be authorised to disregard a reason for refusal, where an appeal to the Secretary of State has been lodged and the appellant has overcome that reason/s through further work or that new information has been tabled that would make pursuance of the case, in this respect unreasonable.

b) Enforcement Action.

Member support for the enforcement element of the planning process is understood and appreciated. At present the HDS has the authority not to take enforcement action but has no authority to commence proceedings.

In a number of cases where issues have been presented to an area committee, the issues are clearly supported and there has been little debate. Where a breach of planning law has been identified and the local ward member is supportive it is considered prudent for the HDS to be able to initiate action without further redress to an area committee. It is proposed that this should include subsequent prosecutions in the event of an enforcement notice not being complied with.

Additionally, Members will be aware that unauthorised signage is an increasing problem, particularly in rural areas. Display of such signage has often resulted in a proliferation of unauthorised signs. The display of such signage is an offence and the only remedy available to the Council to secure its removal/ regularise the position is to prosecute those responsible for its display. In order to speed up the enforcement process and make the display of signs without consent less attractive, it is therefore recommended that the decision on whether to instruct Legal and Property Services to prosecute should rest with the HDS.

Conclusion

That the HDS be authorised to initiate enforcement action, including subsequent prosecutions, on behalf of the District Council subject to the local ward member calling it in on behalf of the public or parish council, the HDS considering it expedient to exercise such powers and subject to the Head of Legal and Property Services being satisfied as to the evidence.

c) Tree Preservation Orders and Trees in Conservation Areas

The authorisation to make Tree Preservation Orders already exists within the constitution but the modifying, variation or revocation of the same does not. Where authorisation is given to fell a tree subject to a TPO the option is to impose a replacement tree or not as a condition to the consent. In the former the order may require modification, or variation and in the latter revocation.

In addition Trees in Conservation Areas are covered by lesser legislation and the owner has to by law give six weeks notice to the LPA of the works intended. This is not a planning application and the LPA have only six weeks to come to a decision. If this decision is not given within that period, automatic consent exists. The LPA cannot refuse the notice only impose a TPO if appropriate. The applicant then has to make a planning application under the TPO legislation to undertake works to the tree, with the normal public and parish involvement. The current system is that parish Council's are notified of the notice of intent at the beginning of the process, which causes confusion. It is considered that due to fact that the works become authorized after the six-week period that the Parish Council is informed of the decision made by the LPA on notice of intent matters within Conservation areas.

Conclusion

That the HDS be authorised to modify, vary or revoke a Tree Preservation Order where required after consent has been granted to fell the tree, or the tree has died due to natural causes.

That the HDS be authorised to only notify Parish Councils on the outcome of any notice of intent applications

10 RECOMMENDATIONS

HIGH HEDGEROWS

10.1 That Cabinet recommends to the Council that:

- (1) the following function be added to paragraph 1.1 of the Area Committees' functions:-
 - functions relating to high hedges pursuant to Part 8 of the Anti-Social Behaviour Act 2003.
- (2) the following powers be delegated to the Head of Development Services:-
 - (i) to deal with and determine all complaints in relation to high hedges made pursuant to Part 8 of the Anti-Social Behaviour Act 2003 and any regulations issued thereunder
 - (ii) to authorise persons to exercise the power of entry pursuant to Section 74 and 77 of the Anti-Social Behaviour Act 2003.
 - (iii) That the Council charges the maximum permitted fee in relation to High Hedge complaints under Section 68 of the Anti-Social Behaviour Act 2003 and regulations to be made thereunder.
 - (iv) That consideration be given whether to set different rates for different groups of people (for example, those on low income support benefits) and whether any

refund should be allowed (for example if the matter is subsequently settled through medication),, if this is not covered in the forthcoming Regulations.

MISCELLANEOUS

(a) Reasons for refusal and subsequent appeal

- (v) New 14.2 (b) That the HDS be authorised to disregard a reason for refusal, where an appeal to the secretary of state has been lodged and the appellant has overcome that reason/s through further work or that new information has been tabled that would make pursuance of the case, in this respect unreasonable.

(b) Enforcement Action

- (vi) New 14.23 (b) That the HDS be authorised to initiate enforcement action, including subsequent prosecutions, on behalf of the District Council subject to the local ward member calling it in on behalf off the public or parish council, the HDS considering it expedient to exercise such powers and subject to the Head of Legal and Property Services being satisfied as to the evidence.
- (vii) 14.4 delete “following consultation with ward members”

(c) Tree preservation orders and Trees in Conservation Areas

- (viii) New 14.31 (b) That the HDS be authorised to modify, vary or revoke a Tree Preservation Order where required after consent has been granted to fell the tree, or the tree has died due to natural causes.
- (ix) New 14.31 (c) That the HDS be authorised to notify Parish Councils on the outcome of any notice of intent applications

II. IMPLICATIONS

II.1 Financial – High Hedges

It is hard to estimate number of complaints, or costs of handling each as this is a new type of responsibility for the Council. However, the OPDM has recommended a maximum fee of £300. It will be necessary to review resources dependant on actual demand. It would be hoped to be able to contain this within current budgets, otherwise it will necessitate either a further report to members requesting a supplementary estimate or an item of unavoidable costs for inclusion in the budget setting process.

Additionally, set up, advisory and promotional costs are not covered by the proposed fee. Considerable, hard to estimate number of complaints, or costs of handling each as this is a new type of responsibility for the Council. There will certainly be set up, advisory and promotional costs not covered by the proposed fee.

Miscellaneous

None

- 11.2 **Legal-** This is a Statutory process at the "cutting edge" of neighbour disputes and is likely to be subjected to close scrutiny, complaint and appeals requiring legal support in set-up and ongoing advice and administration.
- 10.3 **Human Rights** – Impacts upon Article 6 Rights to a Fair Hearing, determination within a reasonable time and the giving of reasons for decisions. Article 8 Interference with home and family life and the first protocol Article 1 regulating the way in which land or property is used.
- 10.4 **Personnel** – The Act imposes an additional call on staffing resources, and dependant upon case load, a further report may be anticipated.
- 10.5 **Community Safety** – the relevant legislation has been included in the Anti-Social Behaviour Act 2003. ODPM web sites cites the recent case in Lincolnshire where a death resulted from a dispute over a hedge.
- 10.6 **Environmental** – There are environmental considerations in relation to hedges and the wildlife they may harbour.
- 10.7 **Council Core values:**
- Providing excellent service
 - Being environmentally conscious
 - Being fair and equitable
 - Communicating with the public
- 10.8 **Wards effected** - all