Subject: Dealing with nuisance trees and hedges

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This note sets out the options available to homeowners to deal with nuisance trees and hedges. It includes details of high hedges legislation.

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1 High hedges

A procedure for dealing with complaints from home owners about high hedges was introduced in the *Anti-Social Behaviour Act 2003* (Part 8). The provisions created a procedure for dealing with complaints from owners or occupiers of domestic properties about high hedges, to be administered by councils in England and Wales. The complaints procedure was expected to be used as a last resort when people have tried and failed to solve disputes by negotiation with their neighbours.

1.1 Regulations

The relevant section of the Act (Part 8) came into force in June 2005, following a consultation process. Three Statutory Instruments were passed to implement the regulations in England:

- Local Authorities (Functions & Responsibilities) (Amendment) (England) Regulations2005 Statutory Instrument 2005 No. 714. Specify that decisions relating to high hedges complaints cannot be taken by council executives.

- The High Hedges (Appeals) (England) Regulations 2005 Statutory Instrument 2005 No. 711. These establish the grounds on which complainants and hedge owners can appeal against local authorities' decisions under the legislation, and the procedure for determining appeals.

- The Anti-social Behaviour Act 2003 (Commencement No. 5) (England) Order 2005 Statutory Instrument 2005 No. 710 (C.31). Brings all of Part 8 of the *Anti-social Behaviour Act 2003* into effect.

The *Anti-Social Behaviour Act 2003* also enabled the Welsh Assembly to legislate for the implementation of high hedge procedures. The legislation was passed on 31 December 2004, although definitive guidance for local authorities was not produced until later.

1.2 The complaints process

What are the grounds for complaint?

A complaint can only be made to the council as a last resort. The council can refuse to intervene if it believes the complainant has not done all they should do to informally resolve the dispute. The Government has published a guide setting out the criteria that must be satisfied for the council to be able to intervene:

About the hedge

• Is it growing on land owned by someone else?

• Is the hedge – or the portion that is causing problems – made up of a line of 2 or more trees or shrubs?

• Is it mostly evergreen or semi-evergreen?

• Is it more than 2 metres tall?

• Even though there might be gaps in the foliage or between the trees or shrubs, is the hedge still capable of obstructing light or views?

Who can complain?

• Are you the owner or occupier (e.g. tenant) of the property affected by the hedge?

• Is the property residential?

Grounds of complaint

• Does the hedge detract from the reasonable enjoyment of your home or garden because it is too tall?[1]

When determining whether the height of the hedge is detracting from the reasonable enjoyment of a home or garden the council will:

- take into account all relevant factors and other interests—they will not base their decision solely on the complainant's concerns. Such interests might include the hedge owner's need for privacy or shelter.
- try to assess what the complainant can reasonably expect. This might differ from the complainant's expectations.[2]

Complaints about tree roots are specifically excluded.

A tool to help assess whether the height of a hedge is blocking too much light from the garden or windows of a property has been produced by the Government. It can help resolve disputes, although the local authority will consider other factors:[3]

Investigating a complaint

Complaints must be made to the council whose area contains the land on which the hedge is situated. Complaints must also be accompanied by any fee set by the authority.

The council may reject the complaint if they consider that the complainant has not taken all reasonable steps to resolve the matter without involving the authority, or if they consider that the complaint is frivolous or vexatious. If the council decides not to proceed with the complaint, they must inform the complainant as soon as is reasonably practicable and must explain the reasons for their decision.

If the council decided to proceed with the complaint, it will seek to determine whether the height of the high hedge is adversely affecting the complainant's reasonable enjoyment of their property. If so, they then have to consider what, if any, action needs to be taken to remedy the adverse effect and to prevent it recurring. The council is required to inform the parties of their decision and the reasons for it as soon as is reasonably practicable.

Remedial notices

If the council finds that the hedge is having an adverse effect, and action should be taken, it may issue a remedial notice. This will require the hedge-owner to take action to remedy the problem and to prevent it recurring. This could include long-term maintenance of the hedge at a lower height—but may not involve reducing the height of the hedge below 2 metres, or its removal. It would be binding on the owner or occupier of the land where the hedge was situated at the time the notice was issued as well as their successors.

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[1] ODPM, *High hedges: Complaining to the Council*, 2005
[2] ODPM *High hedge complaints: prevention and cure*, 2005
[3] ODPM *Hedge high and light loss*, 2005

The remedial notice:

- must describe the hedge it relates to and where it is situated;
- state that a complaint has been made to the Council about the hedge and that the Council have decided that the height of the hedge is adversely affecting the complainant's reasonable enjoyment of their property;
- it must specify the property affected by the hedge;
- explain what action must be taken in relation to the hedge in order to remedy the adverse effect and, if necessary, to prevent it recurring ("initial action") and by when ("the compliance period");
- what further action, if any, is required to prevent longer-term recurrence of the adverse effect ("preventative action");
- what date the notice takes effect ("the operative date"); and
- the consequences of failure to comply with the requirements of the notice.[4]

While the remedial notice is in force, there is an obligation on the council to register it as a local land charge. A council can withdraw a remedial notice or waive or relax its requirements. If this happens it must notify the complainant and the owner/occupier of the neighbouring land.

Enforcement action

Failure to comply with a remedial notice is an offence that could result in a fine up to level 3 (£1000) on the standard scale in the Magistrate's Court. The court might then—in addition to or in place of a fine—issue an order for the offender to carry out the required work within a set period. Failure to comply with the court order would be another offence, liable to a level 3 fine. From this point, the court would also be able to set a daily fine of up to one twentieth of a level 3 fine for every day that the work remained outstanding.[5]

The council has default powers to do the work itself, and recover its costs from the hedge owner. The council would be able to use these powers whether or not court action was pursued.

Appeals

Both the hedge owners and complainants have rights of appeal against the council's decision. The appeal authority is the Secretary of State in England and the National Assembly in Wales. In practice, the Planning Inspectorate (PI) carries out the role of appeals authority.

The PI has provided guidance for appellants in England. There is no charge for submitting an appeal but appellants have to pay their own costs e.g. the costs of a professional adviser such as a solicitor.The PI cautions that appeals are expensive to administer and time – consuming for everyone so "should not be made lightly".[6]

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[4] Ibid
[5] Ibid
[6] Planning Inspectorate, *Appeals under section 71 of the Anti-Social Behaviour Act 2003: A guide for Appellants (High Hedges)*, October 2012

The appeal authority may allow or dismiss an appeal, either in total or in part. If the appeal authority decides to allow the appeal, it may quash or vary the relevant remedial notice. It may also issue a remedial notice in those cases where the council decided not to do so in response to the original complaint. Whatever its decision on the appeal, the appeal authority may correct any defect, error or misdescription in the original remedial notice if it considers that this will not cause injustice.

1.3 Fees

Objections have been raised to the fees that councils are able to charge for the complaints service:

> Under the new laws, the owners of hedges that are more than two metres tall can be fined up to £1,000 by their local authority if they refuse to cut them down.
>
> The only problem is that some councils will charge those who complain about their neighbour's hedges a fee of up to £550 to investigate and rule on the matter. One protest group has described the charges as "deplorable".
>
> "If I throw a brick through your window, when the police come, they don't charge you a fee, do they?" said Clare Hinchliffe, a spokeswoman for Hedgeline, which lobbies on behalf of victims of high hedges. "Why should you have to pay when you have a serious grievance?"
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> She said a nominal charge to deter frivolous complaints was reasonable enough, but objected to high fees, such as the £550 that Cotswold district council is planning.
>
> "We don't see why the innocent victim has to bear the cost of resolving the anti-social problem caused by their neighbour. These high fees are deplorable and likely to deter many well-founded complaints."
>
> She added: "Some councils will definitely be making money out of helpless people."
>
> A Cotswold district council spokeswoman said individual authorities had set the fees according to their own costings.
>
> "The Cotswolds is a large area, so it is just a case of making sure we can cover the cost," she said. "But the new law is a bit of an unknown and if it turns out to be less then we will revise our charges down. The law has come in and we have to implement it but we still hope people will resolve their disputes amicably."
>
> She said people with low incomes and those on benefits would pay only £100 to have their complaints investigated. [7]

A PQ explained why the fees were introduced:

> Baroness Scott of Needham Market: My Lords, why is it that, having decided that a high hedge can be a nuisance under some circumstances, complainants have to pay between £400 and £500 to have their concerns looked at but that people who complain about other issues, such as noise, simply have the problem dealt with?
>
> Baroness Andrews: My Lords, the main thing is that it is not an offence to grow a high hedge. It is an offence to fail to comply with a remedial notice that requires you to cut it down. As a neighbour, you are asking the local authority for a service. There was a lot of debate during the consultation period about who should pay and it was thought that

[7] *Law to cut out unneighbourly hedge wars*, Guardian, 1 June 2005.

it was fairer for the complainant to do so. Fees vary—they can be £650 but usually are about £300. We have not found that the fee makes any difference to the number of complaints.[8]

1.4 Further guidance

The Department for Communities and Local Government provided a number of guidance notes:

Over the garden hedge

High Hedges: complaining to the Council

High Hedges: appealing against the Council's decision

1.5 2010 review of high hedge legislation

The high hedges provisions of the *Anti-Social Behaviour Act 2003* were to be reviewed five years after their introduction, in 2010. The Government asked councils to maintain records of high hedges complaints and their outcomes in order to inform this review.[9] However, the review has not been carried out and the scope and timing of any review has yet to be agreed.[10] In response to a Parliamentary Question in June 2012, DCLG Minister Baroness Hanham stated that the Government had no current plans to undertake a specific review of this part of the 2003 Act.[11]

2 Nuisance trees

Single trees are not covered by the *Anti-Social Behaviour Act 2003.* However, a common law remedy may be sought for nuisance trees. This complicated process should not be entered into lightly. The Government provides the following advice:[12]

> A tree or hedge belongs to the owner of the land it is growing on and, under common law, that person is responsible for managing and maintaining it so that it is not a nuisance to anyone else - in the same way that they are responsible for looking after any other part of their property.
>
> Where the branches of a tree or hedge cause a nuisance by trespassing onto an adjoining property, the common law allows the neighbour to remedy this by cutting back to the boundary any overhanging branches - provided there are no other legal restrictions in place, such as Registration under the Tree Preservation Act 1993. (A copy of this Act can be accessed via the Department‟s website).
>
> The other way of enforcing these common law responsibilities is through the civil courts, by pursuing an action against the owner of the tree or hedge for trespass, nuisance and/or negligence. The law on nuisance/negligence is complicated and so such a step is not to be taken lightly. Anyone considering such action would be well advised to seek specialist legal help.

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[8] HL Deb 18 February 2008 c3
[9] DCLG, *Matters relating to high hedges: Notes to local authorities*, July 2008
[10] Personal communication, DCLG, 5 October 2010
[11] HL Deb 12 June 2012 WA 243
[12] gov.uk, *Trees and Hedges: Frequently Asked Question page* as on 23 January 2013

> A middle route is to use the small claims procedure court to seek recovery of the costs of professional cutting back of overhanging branches of neighbouring hedges. Other ways of settling the matter should, of course, be tried before issuing a claim at court - for example, by writing to the hedge owner to ask for recompense. Hedgeline have published on their website a procedure to help people who are considering pursuing such a course of action.

If a person decides to prune back overhanging branches, they must consider the future stability of the tree—they may be liable for any damage that occurred because of the pruning. A person has similar rights and responsibilities with respect to encroaching roots.[13]

2.1 Damage by tree roots—Law Lords ruling

Encroaching roots from a neighbouring property may cause damage to foundations, drains, or lightly loaded structures such as walls, drives and garages. However, if roots cause damage to built structures, an action for an injunction and damages against the owner or occupier will depend on the extent to which damage was foreseeable.

A high profile ruling by the House of Lords in 2001 against Westminster City Council made the situation clear in respect of tree damage from roots. The owners of a building took action against Westminster City Council where a single plane tree owned by the Council had damaged the foundations. Westminster Council had refused to remove the tree and the claimant spent over £570,000 carrying out underpinning works which they then sought to claim from the council. The council lost its appeal to the House of Lords and the claimant recovered the cost of the repairs.

The Lords ruled that if it is clear that if there is a continuing nuisance, which a defendant knows about or ought to know about, the claimant is entitled to recover the reasonable costs of eliminating the nuisance if he has given notice of the problem to the defendant and a reasonable opportunity to deal with it.[14] The unanimous opinion of the Law Lords summarises the major English case law relating to damage to property, particularly foundations, caused by tree roots belonging to trees on a neighbouring property.

2.2 Dangerous trees

Duty of care

The British Standards Institution has developed a draft standard that provides guidance and recommendations for "the assessment and reduction of potential structural failure" of trees.[15] This draft went to consultation in 2008 and is liable to be reviewed in the light of studies carried out by the National Tree Safety Group.[16]

One of the "legal considerations" detailed in the draft standard are the *Occupiers Liability Acts 1957 & 1984*. These place a duty of care on occupiers to ensure that their trees are not a danger to others:

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[13] Lemmon v Webb [1894] 3 Ch 1, affirmed [1895] AC 1, where it was held that a neighbour could lop boughs overhanging his property without notice to the owner of the tree, provided that he could do so without entering the owner's land, Lindley, Lopes and Kay LJJ all said that a similar right of abatement by cutting applied to encroaching roots (see [1894] 3 Ch 1, 14, 16 and 24)

[14] See House of Lords ruling HL55, Delaware Mansions Ltd v. Lord Mayor & Citizens of Westminster, 25 October 2001

[15] Information on BS 8516, BSI website, viewed 3 July 2008

[16] Personal communication, DCLG, 8 March 2010

> Section 1(1) of the 1957 Act and section 1(1)(a) of the 1984 Act define the scope of the Acts in regulating the duty which an occupier of premises owes "in respect of dangers due to the state of the premises or things done or omitted to be done on them".
>
> The 1984 Act extended the scope of duty of care to "others" (i.e. those present on land uninvited), though three additional criteria need to be met before any duty is owed. These criteria are set out at section 1(3) of the 1984 Act:
>
> > "An occupier of premises owes a duty to another (not being his visitor) in respect of any such risk as is referred to in subsection (1) above if – (a) he is aware of the danger or has reasonable grounds to believe that it exists; (b) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned or that he may come into the vicinity of the danger (in either case, whether he has lawful authority for being in that vicinity or not); and (c) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection."
>
> The duty under both Acts applies to those who occupy the land, i.e. those who have a sufficient degree of control over it such that they ought to realize that any failure on their part could result in injury to those visiting (whether invited or not) or passing by. Two or more parties can simultaneously be occupiers, each with the same duty towards visitors/passers by.
>
> The duty should be thought of as a requirement to take what care is reasonable, under all the circumstances, to ensure that the visitor/passer by is reasonably safe. This includes a consideration of the circumstances of the occupier(s) and the reasonable availability of measures to prevent injury.[17]

If an accident is caused by a tree and a case is taken to court, "the commonest arguments are then over what is a reasonable inspection regime, which usually involves detailed analysis of how it should be done, how often it should be done and who is competent to do it".[18] Jeremy Barrell, an expert witness in a number of legal cases on tree management, said:

> There are no simple answers to all these questions; a recipe-based approach does not work and the final decisions are made from the subjective interpretation of all the evidence by the Judge in the context of relevant case law.
>
> In the event that an owner/landlord is found neglectful of their duty of care in terms of inspection, i.e. they did not have their trees inspected when a significant potential for harm existed, it does not automatically follow that they will be liable for any harm that arises. Liability will only flow from that negligence if it can be established that a competent inspection would have identified the potential for harm and resulted in remedial works that would have prevented that harm occurring. If a defect that resulted in failure would not have been found in a competent inspection then, irrespective of any negligence from not carrying out an inspection, the owner is unlikely to be held liable for the consequences of the failure. This is a common scenario and often results in court examinations focusing on the competence of inspectors and whether causes of harm would have been discovered before the event.[19]

Mr Barrell argued that the competence of an inspector was not dependent on their having relevant qualifications:

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[17] BS 8516, Recommendations for tree safety inspection

[18] The emerging duty of care relating to trees; a practitioner's perspective, Barrell Tree Consultancy, RICS website, 2010

[19] ibid

> In summary, my experiences... indicate that a consensus is emerging on the characteristics of a competent inspector. A simple credential-based recipe approach is unlikely to guarantee competence. Instead, the capacity of an individual to identify and understand the importance of tree weaknesses is more likely to be the primary determinant. The ultimate test of competence will be a thorough examination in court, a formidable prospect and something that all aspiring tree inspectors should be mindful of.[20]

Local government powers

The *Local Government (Miscellaneous Provisions) Act 1976* gives local authorities powers to take action in respect of trees which are thought to be dangerous. The following notes made available by Lewes District Council give a brief explanation of the Act and apply equally to other local authorities:

> **Responsibility for Trees**
> Trees are the responsibility of the person who owns the land on which they are growing, but this Act gives a local Council powers to deal with dangerous trees not owned by them. It is normally used as a last resort if the owner appears not to be doing anything about a dangerous tree, which might cause harm to someone else or their property. The Act is intended for use where there is imminent danger – it is not intended for use where the danger might be long term or where it is only a vague possibility (such as "it might fall down if we get a strong wind"!)
>
> **The Council's Responsibility**
> If a Council receives a written request from an adjoining landowner to make a tree safe then it can use the Act to investigate and if necessary take appropriate action. Under normal circumstances the Council's Tree Officer will want to make a site visit to inspect the tree(s).
>
> **Notice To Make A Tree Safe**
> In the event that the Council believes that the tree(s) are indeed imminently dangerous, we can then serve a Notice on the tree owner or the occupier of the land. The Notice will tell the owner/occupier of the land about the condition of the tree and why action is needed. It will also state the minimum amount of work that is necessary to make the tree safe. It will also state when the work needs to be done by – this cannot be less than 21 days from the date of the Notice. It finally states that if the works are not undertaken, the Council can come and do it and charge you for doing so.
>
> **Appealing Against the Notice**
> You can appeal against the Notice to the County Court within 21 days of the date of it being served. The Notice will specify the grounds for appeal.
>
> **Failure To Comply With the Notice**
> If the works are not completed within the time specified, (and you have not appealed) then the Act authorises the Council to employ a contractor to do the work in default. It also authorises us to recover costs from the owner/occupier of the land. Because we will charge administrative costs, as well as the contractors fees, it will almost certainly be cheaper for you to arrange the work yourself. [21]

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[20] ibid

[21] Dangerous trees, Lewes District Council, viewed 10 November 2008