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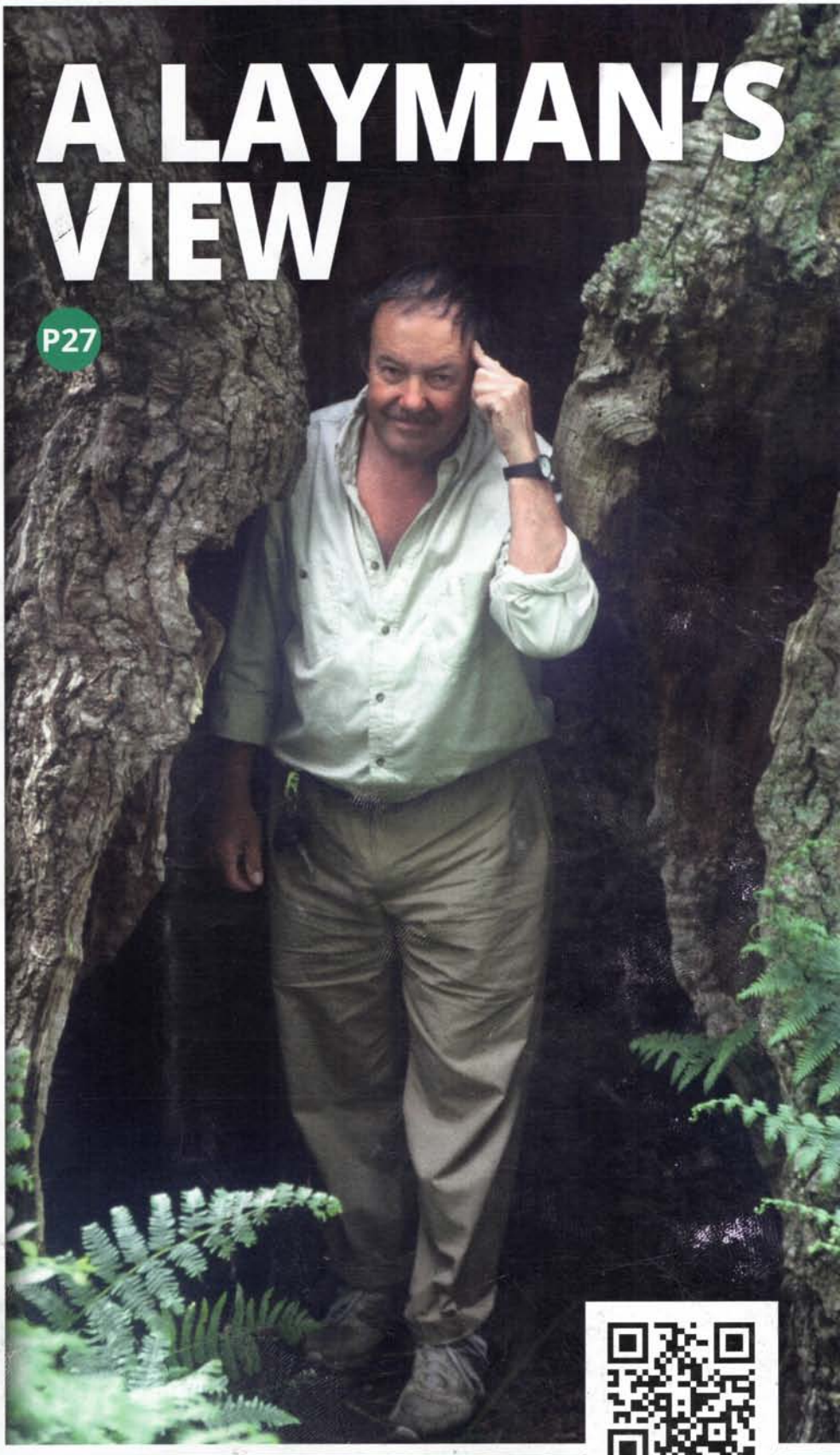
IN THIS ISSUE:



NEWS – EVENTS – SCIENCE – OPINION

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High Hedges (Scotland) Act – two summers on

Julian Morris

The Scottish High Hedges legislation has been live for 18 months. It has been a busy period for councils around the country.

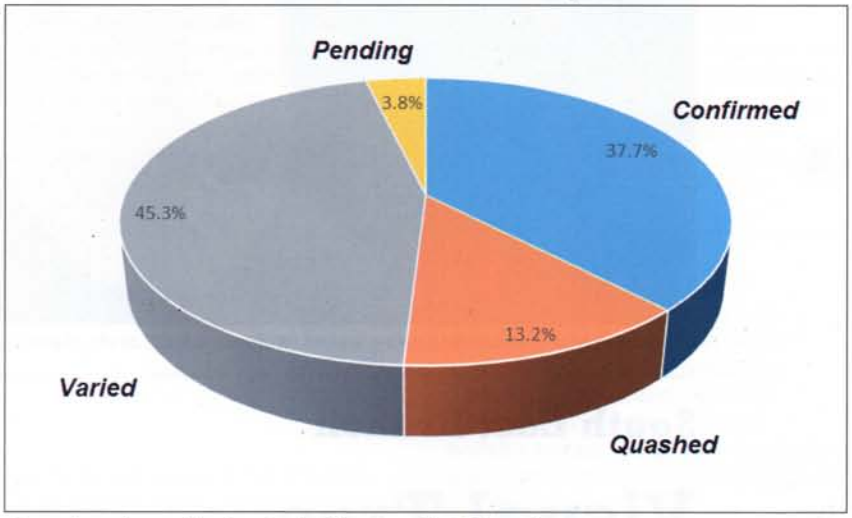
Because few councils publicise the applications they have received, so far there are no published or discoverable records of how many applications have been submitted. The Directorate of Planning and Environmental Appeals does publish all appeals it handles (referred to rather euphemistically in its last annual review as 'a not insignificant proportion of our case work'); these give some idea of the level of activity and the issues that are emerging and either being resolved or becoming perennial problems.

At the time of writing almost 100 cases had been opened. Of these around 20 were time-barred, *ultra vires*, withdrawn or are pending. A whopping 20 appeals were put in for one hedge, with multiple appeals elsewhere too, so the true number of hedges against which appeals have been processed is in reality just over 50. Some areas have been busier than others, with over a quarter of appeal hedges being in the Stirling and Perth & Kinross council areas.

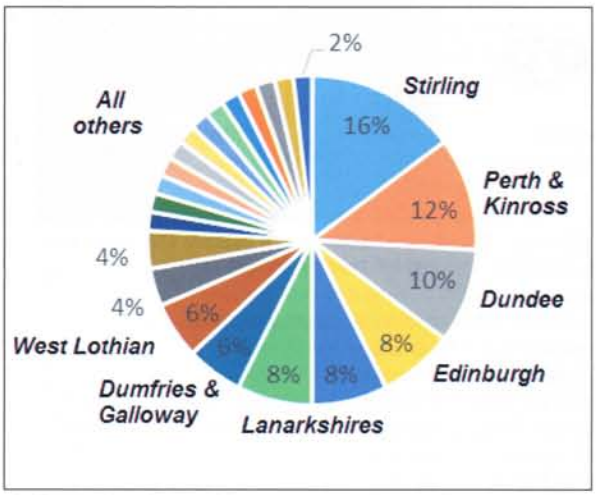
So how well is the Act standing up to scrutiny? Overall about 60% of council decisions have been quashed or varied by reporters. But in fairness to councils, a few of the variations of notices have been nothing but changes to the timescale for compliance with a High Hedge Notice, necessitated by the delay caused by the appeal. Roughly speaking, it seems to be about level pegging on the merit of cases.

Understandably, pent-up frustrations about high hedges led to a flurry of applications when the Act went live. After a very short lag, this resulted in a surge of appeals. That this is tailing off almost as quickly might suggest that the backlog of frustrations has been cleared and that we can expect little ongoing activity, at least on the appeals side. But are there other less obvious explanations? From my direct experience in dealing with appeals, making applications, resolving disputes or advising clients on whether to apply, I think so.

Firstly, there is some evidence that councils are getting better at handling applications. Observation of appeal decisions allows for a degree of 'custom & practice' to emerge, and for learning by others' mistakes and successes. Right-first-time decisions may be resulting in fewer appeals. Secondly, the almost complete absence (unlike in every other part of the UK) of householder guidance means that some would-be applicants are unwilling to pay fees to councils if they cannot first gauge whether their application is likely to succeed. Thirdly, many parties are disillusioned with the inconsistency of council and reporter decisions. The latter can only be challenged at judicial review in the Court of Session, costed recently by a client at an almost five-figure sum. There is no doubt in my mind that several reporter decisions would have been overturned on review, but the financial obstacle for the ordinary



Proportion of appeal hedges by decision type, first 18 months.



Proportion of appeal hedges by council area, first 18 months.

Number of high hedge appeals per quarter.

In Scotland

person is too great and the fairness of the appeals system is, for some, merely an illusion.

It is with a little hesitation then that one could say any issues have truly been resolved, but there have been some clarifications.

- Unlike in England (and quite rightly due to a significant difference in the wording of our Act), residential views and outlooks have in the right circumstances been allowed as grounds for hedge reduction.

- The Chief Reporter wrote to councils asking them to make it clear to applicants that there was no right of appeal by applicants if the council has decided the trees or hedge do not constitute a high hedge. This in itself highlights a great frustration for complainants, who can only challenge this at judicial review. Conversely, the hedge owner can lawfully appeal the decision that the trees or hedge are a high hedge. On the face of it this is inequitable.

- A number of decisions were found to be null and void due to ambiguous or uncertain stipulations, particularly regarding thinning or crown lifting. Some early appeal decisions would by now be deemed similarly null and void.

- A few cases have been decided where the council has specified an action such as thinning or crown lifting, which the complainant then considers wholly inappropriate, not to mention undesirable, as an alternative to height reduction; this suggests that councils should consult with complainants where some action other than height reduction is proposed, saving trees and owners unnecessary work.

- Complete removal of one or more trees to create a gap has been deemed appropriate (by councils, unmodified by reporters) as an alternative to height reduction, particularly where the remaining trees are of amenity value to the area.

- More generally, the survivability of hedge trees has been considered unimportant in some cases and of material importance in others; the difference is in whether the survivability is crucial to private or public amenity.

- A couple of cases have involved the hedge owner cutting it after the appeal and before the decision, leaving the complainant out-of-pocket but without an ongoing obligation in place over the hedge owner, effectively requiring an expensive application to the council every time the hedge is to be reduced; this abhorrent loophole could be closed.

- Reporters have been prepared to decide cases based on no – or fairly superficial – evidence about habitat for protected species, particularly bats, and so a High Hedge Notice could oblige hedge owners to do work that may cause an offence under the Wildlife & Countryside Act and Habitats Directive.

The biggest and most difficult issue of all is, and probably always will be, light. Unlike every other country in the UK, the Scottish Government has not provided technical guidance to householders or local authorities. The failure to provide a one-off, centralised means of determining adequate light is regrettable as it has left every local authority to come up with its own means, resulting in inefficiency and inconsistency of decisions.

The written guidance to local authorities leaves it for councils to decide whether the English *Hedge Height and Light Loss* guidance is suitable for evergreen hedge daylighting to buildings but does not do the same for daylight to gardens where such guidance would have been most useful. Unfortunately, it can be shown that the *Hedge Height and Light Loss* guidance does not work in anything other than the simplest garden layouts. It also sets a threshold chosen by the English Government based on English latitudes and the wording of the English Act, as well as a conscious decision there to set hedge heights that are significantly (25%) lower than the Building Research Establishment's (BRE) objective recommendations. Reporters generally have been unable or reluctant to apply it without modification to Scottish cases. It remains unclear whether Parliament intended its citizens to be bound by the standards of another country.

Instead, the Scottish guidance suggests using the British Standard (BS 8206: 2008 *Lighting for buildings. Code of practice for daylighting*). Such an objective standard is very welcome, but for the difficulty that the standard does not fully address daylight to gardens. The internationally acclaimed BRE publication *Site Layout Planning for Daylight and Sunlight* provides fairly simple means of determining most daylighting situations indoors and out but has not been referenced by the guidance. However, in a recent appeal decision the reporter rejected its use by an appellant on the basis that daylight obstruction by hedges, particularly partially or wholly deciduous ones, cannot be compared to that of buildings. In effect this leaves councils and reporters, not to mention complainants and hedge owners, with no objective means of assessing appropriate hedge heights in Scotland nor the mitigating effects of introducing gaps.

In conclusion, 18 months on the High Hedges Act is producing results, but they are somewhat inconsistent and subjective and much frustration has been generated along the way. There can be little doubt that the Act and the guidance could be improved and useful householder guidance published. The government has said that it would not be practical to wait five years before review as provided for in the Act, but to date there are no signs of it taking action.

A boundary of sycamore, birch, pine, holly, cherry laurel and *Pyracantha*, deemed on appeal to be a high hedge and a barrier to light.