

**NORTHERN IRELAND VALUATION TRIBUNAL**

**THE HIGH HEDGES ACT (NORTHERN IRELAND) 2011 AND THE VALUATION  
TRIBUNAL RULES (NORTHERN IRELAND) 2007 (AS AMENDED)**

**CASE REFERENCE NUMBER: 82/12**

**WILLIAM McCURDY & PATRICIA McCURDY - APPELLANTS**

**AND**

**DOWN DISTRICT COUNCIL - RESPONDENT**

**Northern Ireland Valuation Tribunal**

**Chairman: Mr James V Leonard, President**

**Member: Mr Tim Hopkins FRICS**

**Hearing: 23 July 2013, Belfast**

**DECISION**

The unanimous decision of the tribunal, for the reasons provided below, is that the appellants' appeal against a determination made 2 January 2013 by Down District Council not to issue a Remedial Notice under Section 5 of the High Hedges Act (Northern Ireland) 2011 is not made out and the appeal is dismissed and the tribunal Orders accordingly.

**REASONS**

**Introduction**

1. This is a reference under the High Hedges Act (Northern Ireland) 2011 ("the 2011 Act"). The statutory regime is prescribed by the 2011 Act and by the regulations made thereunder, amending the tribunal's rules of procedure. The regime provides for a site visit by the Valuation Member of the tribunal and thereafter for a consideration of the appeal by a tribunal constituted of a Legal Member and the Valuation Member. There is no oral hearing and any evidence is taken from the papers placed before the tribunal and as a result of the Valuation Member's site visit.

**The Background and the Complaint**

2. This appeal arises from a complaint about what is stated to be a high hedge situated upon property at 5 Rockmount Park, Saintfield, Co Down BT24 7DP ("the subject property"). The appellants, Mr William McCurdy and Mrs Patricia McCurdy, are the owners of the property situated at 13 Kirkwood Park, Saintfield, County Down BT24 7DP ("the appellants' property") and are neighbours of the owner or occupier of the subject property, a Mr Mark McNeill. For convenience, that latter person shall be

referred to in this decision as the “hedge owner” The background is that the appellants made a complaint to the Respondent to this appeal, Down District Council (“the Council”), under the 2011 Act. The complaint was made using the Council's high hedges complaint form and was dated 29 August 2012 and was received by the Council.

3. The essential part of the complaint to the Council reads:

*“ The hedge in question is evergreen and is at least 3.5 metres high. NB The ground level on my neighbour’s side has been raised since planting and this can be seen from my garden. The hedge acts as a barrier to light. It has an adverse impact on my reasonable enjoyment of my garden”.*

4. In this decision, the tribunal does not need to go into the detail of the preliminary endeavours by the appellants to address issues of concern with the hedge owner, for the reason that the Council has accepted that proper endeavours had been made by the complainants to resolve matters with the hedge owner prior to the formal complaint being made to the Council. Agreement was not reached between the parties and the complainants accordingly proceeded to lodge their complaint with the Council.

### **The Council’s Action**

5. Upon receiving the complaint the Council determined that the requirements of section 2 of the 2011 Act were met and corresponded with the hedge owner (who was invited to complete a questionnaire and who did so) and the appellants. The Council arranged further to investigate the matter and conducted a site visit and site survey on 20 November 2012.
6. The Council, in the light of any information gathered concerning the complaint, wrote on 2 January 2013 to Mr McCurdy, the first-named appellant, outlining the Council’s findings and the determination. The Council’s letter (“the Decision Letter”) addresses the main considerations and conclusions and confirms the formal decision taken by the Council. Appended to the Decision Letter is a copy of the Council’s report and map and this provides details of technical calculations concerning loss of light respectively to the garden and to the window of the appellants’ property. The Council’s Decision Letter and appended documents provide some detail regarding such matters as the main considerations taken into account and the Council’s perceived role in such cases and factors considered by the Council and the conclusion and the formal decision made by the Council in the Decision Letter, together with advice upon possible appeal procedures. The decision made by the Council was a determination that the height of the hedge in question was not acting as a barrier to light in accordance with the “Technical Guidance”. That latter is a reference to the Department of Environment for Northern Ireland’s High Hedges “Technical Guidance”. That document is readily available to all, including any appellant, and is published in electronic form, together with other High Hedges guidance documentation and information, upon the Department’s website and is available in hard copy form also. The outcome was that no remedial notice was to be

issued under Section 5 of the 2011 Act. This outcome was confirmed in the Decision Letter.

## **The Appeal**

7. In exercise of their statutory entitlement to appeal, the appellants, by appeal notice dated 25 January 2013 and received by the Office of the Tribunal on 29 January 2013, appealed to this tribunal.
8. The tribunal shall comment in some further detail below concerning the appellants' specific grounds of appeal. The appellants in the appeal notice identified appeal grounds, stated in paragraph 6 of the appeal form, which paragraph reads as follows:-

*“Contrary to the decision of the council the hedge in question is adversely affecting our reasonable enjoyment of our rear vegetable and flower garden and that the adverse effect warrants action being taken in relation to the hedge. The council decision claims that the case report explains how they assessed and weighed the various issues raised by me (e.g. loss of sunlight, shading of my greenhouse and the general the (sic) effect on my ability to grow and enjoy plants) but there is no evidence of how this was done and only the inputs and outputs of the Spreadsheet for the High Hedges Act 2011 Technical Guidance have been provided. The Technical Guidance itself, states that the advice in this document is not mandatory. Only the portion of the hedge between our property and 5 Rockmount Park was included, despite me asking face to face on the inspection date and during a previous phone conversation, that the portion of the hedge that borders 15 Kirkwood Park be included, as it is also a barrier to light in my garden, even though the text in the Guidance For Complainants on the “location of the Hedge” advises “in particular, the hedge does not have to be next Door”. At no time did the Council advise me of the use of the Technical Guidance or the weight they would place on this. I am severely disabled. Gardening as recreation and exercise is very important for my physical and mental well being”.*

## **The Statutory Provisions**

9. The statutory provisions concerning the high hedges regime are to be found in the 2011 Act. In respect of the technical definition of what constitutes a "high hedge" for the purposes of the 2011 Act, it is provided as follows: –

### **High hedge**

2.—(1) In this Act “high hedge” means so much of a barrier to light as—

- (a) is formed wholly or predominantly by a line of two or more evergreens; and
- (b) rises to a height of more than two metres above ground level.

- (2) For the purposes of subsection (1) a line of evergreens is not to be regarded as forming a barrier to light if the existence of gaps significantly affects its overall effect as such a barrier at heights of more than two metres above ground level.
- (3) In this section “evergreen” means an evergreen tree or shrub or a semi-evergreen tree or shrub.
- (4) But nothing in this Act applies to trees which are growing on land of 0.2 hectares or more in area which is forest or woodland.

In respect of remedial notices it is provided as follows: –

### **Remedial notices**

5.—(1) For the purposes of this Act a remedial notice is a notice—

- (a) issued by the council in respect of a complaint to which this Act applies; and
- (b) stating the matters mentioned in subsection (2).

(2) Those matters are—

- (a) that a complaint has been made to the council under this Act about a high hedge specified in the notice which is situated on land so specified;
- (b) that the council has decided that the height of that hedge is adversely affecting the complainant’s reasonable enjoyment of the domestic property specified in the notice;
- (c) the initial action that must be taken in relation to that hedge before the end of the compliance period;
- (d) any preventative action that the council considers must be taken in relation to that hedge at times following the end of that period while the hedge remains on the land; and
- (e) the consequences under sections 10 and 12 of a failure to comply with the notice.

(3) The action specified in a remedial notice is not to require or involve—

- (a) a reduction in the height of the hedge to less than two metres above ground level; or
- (b) the removal of the hedge.

(4) A remedial notice shall take effect on its operative date.

(5) “The operative date” of a remedial notice is such date (falling at least 28 days after that on which the notice is issued) as is specified in the notice as the date on which it is to take effect.

(6) “The compliance period” in the case of a remedial notice is such reasonable period as is specified in the notice for the purposes of subsection (2)(c) as the period within which the action so specified is to be taken; and that period shall begin with the operative date of the notice.

(7) Subsections (4) to (6) have effect in relation to a remedial notice subject to—

- (a) the exercise of any power of the council under section 6; and
- (b) the operation of sections 7 to 8 in relation to the notice.

(8) While a remedial notice has effect, the notice—

(a) shall be a statutory charge; and

(b) shall be binding on every person who is for the time being an owner or occupier of the land specified in the notice as the land where the hedge in question is situated.

(9) In this Act—

“initial action” means remedial action or preventative action, or both;

“remedial action” means action to remedy the adverse effect of the height of the hedge on the complainant’s reasonable enjoyment of the domestic property in respect of which the complaint was made; and

“preventative action” means action to prevent the recurrence of the adverse effect.

Under section 7 of the 2011 Act appeals against remedial notices and other decisions of councils may be made in the prescribed manner to the tribunal and in this instance the appeal by the appellants is against the Council's failure to issue a remedial notice. Section 8 of the 2011 Act provides for determination of appeals and the material part is as follows:

#### **Determination or withdrawal of appeals**

8—(1) On an appeal under section 7 the Valuation Tribunal may allow or dismiss the appeal, either in whole or in part.

(2) Where the Valuation Tribunal decides to allow such an appeal to any extent, the Tribunal may do such of the following as it considers appropriate—

(a) –

(b) -

(c) - in a case where no remedial notice has been issued, issue on behalf of the council a remedial notice that could have been issued by the council on the complaint in question.

(3) -.

(4) Once the Valuation Tribunal has made a decision on an appeal under section 7, the Tribunal must, as soon as is reasonably practicable—

(a) give a notification of the decision, and

(b) if the decision is to issue a remedial notice or to vary or correct the requirements of such a notice, send copies of the notice as issued, varied or corrected, to every person falling within section 7(2) and to the council.

(5) Where, in consequence of the decision on an appeal, a remedial notice is upheld or varied or corrected, the operative date of the notice shall be—

(a) the date of the decision; or

(b) such later date as may be specified in the decision.

(6) -

(7) In any case falling within subsection (5) or (6), the compliance period for the notice shall accordingly run from the date which is its operative date by virtue of that subsection (and any period which may have started to run from a date preceding that on which the appeal was made shall accordingly be disregarded).

In regard to the specific amendments to the Valuation Tribunal Rules (Northern Ireland) 2007 ("the Rules") the Valuation Tribunal (Amendment) Rules (Northern Ireland) 2012 introduced a number of amendments after rule 5 of the Rules which include the following material provisions:-

### **High hedges grounds of appeal - Unfavourable decisions**

**5D.** An appeal under section 7(3) of the 2011 Act (where the council decides otherwise than in the complainant's favour), may be made on either of the following grounds—

(a) that the council could not reasonably conclude that the height of the high hedge specified in the complaint is not adversely affecting the complainant's reasonable enjoyment of the domestic property so specified; or

(b) that, having concluded that the height of the high hedge specified in the complaint is adversely affecting the complainant's reasonable enjoyment of the domestic property so specified, the council could not reasonably conclude that no action should be taken with a view to remedying that adverse effect or preventing its recurrence."

### **The Evidence and Submissions**

10. The tribunal noted the written evidence adduced and arguments advanced. The tribunal had before it all of the papers which were made available to the Council in connection with the complaint at the time of the Council's determination being made. These papers included the appellants' complaint made to the Council, copies of correspondence between the appellants and the hedge owner and the Council. The content of the Council's Decision Letter dated 2 January 2013 concerning the application of the 2011 Act was noted, together with the report concerning the matter prepared by the Council and the information gathered by the Council and information as to how the Council had addressed the issues raised. In addition, the tribunal had before it and considered the appeal documentation and any submissions made by the appellants. The tribunal's Valuation Member, in accordance with the applicable procedure, attended the site on 21 June 2013 and conducted a site survey and inspection. Any information and evidence gained as a result of that survey and

inspection was considered by the tribunal together with the other evidence available in reaching a determination in the matter.

## **The Technical Evidence and the Tribunal's Determination in that regard**

### **The Council's Assessment and Determination**

11. The tribunal noted that the Council in the Decision Letter indicated as a result of the Council's assessment and findings that the action hedge height had been calculated at 4.80 metres. In measuring loss of light to the garden the Council assessed a basic action hedge height of 6.234 metres. In measuring loss of light to the appellants' windows the Council assessed a basic action hedge height of 4.80 metres. Taking the lower of the two action hedge heights, the Council had assessed the Effective Hedge Height at 4.80 metres. The Council's technical assessment was as follows.

#### Loss of light to garden

Effective garden area	223.40 sq metres
Length of hedge	21.50 metres
Orientation North	0.65
Orientation North-West	0.50
Interpolation	0.60
Orientation (0.60 x 10.39)	6.234 metres
Basic action hedge height:	6.234 metres

#### Loss of light to Window

Line of Hedge parallel to window wall	
Distance from house to boundary	7.60 metres
Half that figure	3.80 metres
Add 1.00	4.80 metres
Action hedge height:	4.80 metres

The Council had adopted the lower of the two action hedge heights, namely 4.80 metres for loss of light to windows, and concluded Action Hedge Height at a figure of 4.80 metres.

## **The Tribunal's Assessment and Calculations:**

### Loss of light to garden

Garden area (7.60 x 21.50)	163.40 sq metres
Effective length of hedge	21.50 metres
Effective depth of garden (163.40/21.50)	7.60 sq metres
Orientation factor North North West	0.60
Orientation (0.60 x 7.60)	4.56 sq metres
Basic action hedge height	4.56 metres, say 4.60 metres

### Loss of light to windows

Distance from house to boundary	7.60 metres
Half that figure	3.80 metres
Add 1.0	4.80 metres
Action hedge height	4.80 metres

Assuming the lower of the two action hedge heights, the action hedge height should be 4.60 metres.

The height of the hedge was assessed using clinometer and measuring tape at 3.50 meters. This hedge height is therefore below the assessed action hedge height.

## **The Tribunal's Decision in Regard to the Technical Calculations**

12. One of the issues raised in this appeal by the appellants was that the hedge had been incorrectly measured by the Council at 21.50 metres. The tribunal's calculations, as will be noted, differ from those of the Council in the manner stated above. The appellants have endeavoured to include in the subject matter of this appeal a portion of hedge that does not form part of the boundary hedge between subject property and the appellants' property in regard to which matter the tribunal makes the observations mentioned in paragraph 17 below. However, the tribunal has assessed the hedge length at 21.50 metres and the Council has made no error in this regard.
13. The tribunal has nonetheless identified a difference in measurement of loss of light to the garden to the assessment by the Council. The Council has adopted the lower of the two action hedge heights mentioned above, namely 4.80 metres for loss of light



to windows and has concluded an action hedge height of 4.80 metres. The tribunal has assessed an action hedge height of 4.60 metres relating to loss of light to the garden (being the lower of the tribunal's two calculations). The hedge height at 3.50 metres is therefore below the applicable action hedge height of 4.60 metres, as calculated. Thus no reason presents itself as to why any remedial notice ought properly to have been issued by the Council, upon these assessments. Thus the tribunal upholds the Council's decision in this appeal not to issue a remedial notice upon the basis of site assessment and consequent calculation of applicable action hedge height, upon the determined facts of the matter.

14. As mentioned above, Rule 5D as provided for by the Valuation Tribunal (Amendment) Rules (Northern Ireland) 2012, in a case such as this where the Council has decided otherwise than in the complainant's (in this case the appellants') favour, provides for an appeal to be made on either of the following grounds— (a) that the Council could not reasonably conclude that the height of the high hedge specified in the complaint is not adversely affecting the complainant's reasonable enjoyment of the domestic property so specified; or (b) that, having concluded that the height of the high hedge specified in the complaint is adversely affecting the complainant's reasonable enjoyment of the domestic property so specified, the Council could not reasonably conclude that no action should be taken with a view to remedying that adverse effect or preventing its recurrence. Clearly the second possibility does not apply. Can the tribunal uphold this appeal upon the first ground? As mentioned in paragraph 13 above, the tribunal in this appeal finds against the appellants and upholds the Council's decision not to issue a remedial notice upon the basis of site assessment and consequent calculation of action hedge height, upon the facts of the matter. Are there any other grounds available upon which the tribunal might potentially find in favour of the appellants in this appeal?
  
15. The appellants state that the Council, whilst having provided the calculations, has not provided an explanation as to how such calculations were assessed. The tribunal notes that, in this matter, the Council has quite permissibly applied a widely recognised and recommended method of calculation of action hedge height. It is noted that this calculation and assessment method is based upon a considerable body of technical and academic research and the method is, for example, used extensively in the implementation of the high hedges statutory regime existing in England and Wales, which regime has now been in place for a number of years. Both in regard to this specific case and also, more generally, in respect of any cases brought before the tribunal under the statutory regime of the 2011 Act, it is important to say that this tribunal is quite happy to accept evidence, for statutory purposes, based upon such technical calculations achieved by such methods as have been employed in this case. The tribunal's resultant calculations might, upon the facts of this matter, have differed from the Council's, but the basic methods of calculation and any resultant assessed calculations are properly to be made upon the basis of the method described in the Department of Environment's "Technical Guidance". It would be for any individual appellant in any case brought under the statutory regime of the 2011 Act to present sufficiently persuasive reasons and argument to the tribunal as to why an alternative method of calculation and assessment ought properly to be employed under the statutory regime.

16. The tribunal in this appeal has conducted a full assessment of the site and has revisited the Council's calculations and the tribunal has made the findings as above outlined. The tribunal notes that in this appeal the appellants have referred to the "Technical Guidance" and the "Guidance for Complainants" and, from these references, the appellants would appear to be familiar with these documents, to a degree (see paragraph 8 above). These particular documents are readily available from the Department of Environment for Northern Ireland. The Council's assessment is made, it appears, by means of the Council employing the Department of Environment's "Technical Guidance" and "Guidance for Councils", documents which are readily available to all, including appellants, and which provide technical details and other information concerning methods of site assessment and applicable calculations. Nothing arises from this issue upon which to find in favour of the appellants.
17. The appellants, furthermore, have asserted in this appeal that part of the hedge lies between the appellants' property and 15 Kirkwood Park, Saintfield, an adjoining property. The appellants assert that this is also a barrier to light and suggest that the Council has failed to take this matter into consideration. The complaint was made concerning a high hedge situated upon the subject property, that located at 5 Rockmount Park, Saintfield. The consideration of this complaint by the Council and resultant determination has been made in regard to the hedge located upon the subject property. The tribunal's determination is that the Council is quite correct in disregarding that portion of hedge located between the appellants' property and the adjoining property at 15 Kirkwood Park, Saintfield. This is an entirely separate matter which cannot be addressed in taking account of the issues as between the appellants' property and the subject property. The Council was, in the view of the tribunal, correct to exclude from consideration, in this specific complaint and in the resultant determination, this other portion of hedge. As mentioned above, one of the issues raised in this appeal by the appellants was that the hedge had been incorrectly measured by the Council at 21.50 metres. Insofar as that contention might relate to inclusion of this additional portion of hedge, that is not upheld by the tribunal. The tribunal has assessed and has found to be correct the hedge length at a measurement of 21.50 metres. The Council has made no error in this respect.
18. This accordingly addresses the issues raised by the appellants in this appeal. As a consequence of the foregoing, the tribunal Orders that the appellants' appeal be dismissed.

Mr James V Leonard, President  
Northern Ireland Valuation Tribunal

Date decision recorded in register and issued to parties: