OUTER HOUSE, COURT OF SESSION

[2020] CSOH 22

P218/19

OPINION OF LADY CARMICHAEL

In the petition of

BRIAN RIZZA

Petitioner

for

for judicial review of a decision by the Scottish Ministers in relation to High Hedge Notice HHA-270-7

Pursuer: Crook, Currie Gilmour & Co
Defender: Charteris, SGLD

27 February 2020

Introduction

[1] The petitioner is the proprietor of Blair Lomond, Drummond Crescent, Inverness. Blair Lomond shares a boundary with 24 Drummond Circus, Inverness. There are a number of trees on the petitioner's side of the boundary along one part of the boundary. The proprietors of 24 Drummond Crescent, Roger and Catherine Niven, made an application on 15 October 2017 to Highland Council, asking Highland Council to find that the trees constituted a high hedge, and to issue a high hedge notice under the High Hedges (Scotland) Act 2013 ("the 2013 Act").

[2] On 21 June 2018 Highland Council issued a high hedge notice, with an effective date of 21 July 2018. The petitioner appealed to the Scottish Ministers. They appointed a reporter to determine the appeal. She issued her decision on 4 December 2018. She issued a revised high hedge notice. It is in relation to her decision that the petitioner now seeks judicial review.

[3] There were 17 trees in the area that the reporter required to consider. The layout of the site is best understood by reference to a plan prepared by Highland Council. There was no dispute that it illustrated adequately how the trees were distributed on the site, or that it might be used in this opinion for that purpose. I have therefore included a copy of the plan as an appendix to this opinion. The trees are numbered 1-18 (with no number 10) in the plan, and the reporter used the numbers in the plan in her decision.

[4] The reporter made a site visit. She also had before her a letter to Mr and Mrs Niven from the former proprietor of Blair Lomond. It was in the following terms:

> "With reference to [Blair Lomond], I can confirm that my wife and I resided there from 1978 until 1993. I can also confirm that we did own the gap site at 24 Drummond Circus, with a view to potentially using it as an alternative entrance to Blair Lomond. This was subsequently sold prior to the sale of Blair Lomond.
>
> With reference to your question relating to the trees on the boundary between Blair Lomond and 24 Drummond Circus, I have discussed the matter with my wife, and we can confirm that when we planted the Leylandii they were planted as a hedge as at the time there was absolutely no screening to that part of our boundary.
>
> If we had intended the trees to be anything other than a hedge, we would not have planted Leylandii but some other species."

Legislation

[5] The relevant provisions of the 2013 Act are these:

> **"1 Meaning of "high hedge"**
>
> (1) This Act applies in relation to a hedge (referred to in this Act as a 'high hedge') which—
>
> (a) is formed wholly or mainly by a row of 2 or more trees or shrubs,
>
> (b) rises to a height of more than 2 metres above ground level, and
>
> (c) forms a barrier to light.
>
> (2) For the purposes of subsection (1)(c) a hedge is not to be regarded as forming a barrier to light if it has gaps which significantly reduce its overall effect as a barrier at heights of more than 2 metres.
>
> (3) In applying this Act in relation to a high hedge no account is to be taken of the roots of a high hedge.
>
> **2 Application for high hedge notice**
>
> (1) Where subsection (2) applies, an owner or occupier of a domestic property (referred to in this Act as the 'applicant') may apply to the relevant local authority for a high hedge notice.
>
> (2) This subsection applies where the applicant considers that the height of a high hedge situated on land owned or occupied by another person adversely affects the enjoyment of the domestic property which an occupant of that property could reasonably expect to have.
>
> …
>
> **6 Consideration of application**
>
> (1) This section applies where a relevant local authority does not dismiss an application under section 5.
>
> (2) The authority must give every owner and occupier of the neighbouring land—
>
> (a) a copy of the application, and High Hedges (Scotland) Act 2013 page 3

(b) a notice informing the person to whom it is given of the matters mentioned in subsection (3).

(3) The matters are—

(a) that the authority is required to make a decision under subsection (5),

(b) that the person has a right to make representations to the authority in relation to the application before the expiry of the period of 28 days beginning with the day on which the notice is given,

(c) that the authority must give a copy of any such representations to the applicant,

(d) that the authority has power to authorise entry to the neighbouring land under section 18(1), and

(e) that it is an offence under section 21 intentionally to prevent or obstruct a person authorised to enter land from acting in accordance with this Act.

(4) If any representations are received by the authority during the period mentioned in subsection (3)(b), the authority must—

(a) give the applicant a copy of those representations, and

(b) take into account those representations in making its decision under subsection (5).

(5) After the end of the period of 28 days referred to in subsection (3)(b), the authority must decide—

(a) whether the height of the high hedge adversely affects the enjoyment of the domestic property which an occupant of that property could reasonably expect to have, and

(b) if so, whether any action to remedy the adverse effect or to prevent the recurrence of the adverse effect (or both) should be taken by the owner in relation to the high hedge (any action that is to be taken being referred to in this Act as the 'initial action').

(6) If the authority decides under subsection (5)(b) that initial action should be taken, the authority must—

(a) specify a reasonable period of time within which the initial action is to be taken (the 'compliance period'), and

(b) decide whether any action to prevent the recurrence of the adverse effect should be taken by the owner in relation to the high hedge at times following the end of the compliance period while the hedge remains on the land (the 'preventative action').

(7) In making a decision under subsection (5)(b), the authority must have regard to all the circumstances of the case, including in particular—

(a) the effect of the high hedge on the amenity of the area, and

(b) whether the high hedge is of cultural or historical significance.

…

8 High hedge notice

(1) Where a relevant local authority decides under section 6(5)(b) that action should be taken, it must issue a high hedge notice as soon as is reasonably practicable after making that decision.

(2) A high hedge notice is a notice—

(a) identifying the high hedge which is the subject of the notice and the neighbouring land,

(b) identifying the domestic property in relation to which the authority has decided under section 6(5)(a) that an adverse effect exists,

(c) stating the date on which the notice is to take effect,

(d) stating the initial action that is to be taken by the owner of the neighbouring land and the compliance period for that action,

(e) stating any preventative action that is to be taken by the owner of the neighbouring land,

(f) informing the recipient that there is a right to appeal under section 12(2)(a),

(g) informing the recipient that the authority is entitled to authorise a person to take action under section 22 where there is a failure to comply with the notice and that the authority may recover the expenses of that action, and

(h) informing the recipient that it is an offence under section 24 intentionally to prevent or obstruct a person authorised to take action from acting in accordance with this Act.

(3) The date referred to in subsection (2)(c) must be at least 28 days after the date on which the notice is given.

(4) The authority must—

(a) give the persons mentioned in subsection (5) a copy of the high hedge notice, and

(b) notify those persons of the reasons for its decision.

(5) Those persons are—

(a) the applicant, and

(b) every owner and occupier of the neighbouring land.

…

12 Appeals

…

(2) A person mentioned in subsection (3) may appeal to the Scottish Ministers against—

(a) the issuing by a relevant local authority of a high hedge notice, or

…

(3) Those persons are—

(a) every owner and occupier of the domestic property identified in the high hedge notice, and

(b) every owner and occupier of the neighbouring land.

14 Determination of appeal

…

(2) Where an appeal is made under section 12(2), the Scottish Ministers may—

(a) confirm the high hedge notice or decision to which the appeal relates,

(b) quash the high hedge notice or decision, or

(c) vary the high hedge notice issued under section 8(1) or, as the case may be, 10(6)(a).

(3) A high hedge notice issued or varied under this section is to be treated as if issued or varied by the relevant local authority.

15 Person appointed to determine appeal

(1) An appeal may be determined by a person appointed by the Scottish Ministers for that purpose instead of by the Scottish Ministers.

(2) An appointed person has, in relation to the appeal, the same powers and duties as the Scottish Ministers have under this Act.

(3) Where an appeal is determined by a person appointed by the Scottish Ministers, the decision is to be treated as if it were a decision of the Scottish Ministers.

16 Notice of determination

(1) As soon as is reasonably practicable after determining an appeal the Scottish Ministers must—

…

(b) where they have made a determination in accordance with section 14(2)(c)—

(i) issue a revised high hedge notice,

(ii) give a copy of the revised notice to the persons mentioned in subsection (2), and

(iii) notify those persons of the reasons for their decision,

…

(2) Those persons are—

(a) the relevant local authority,

(b) every owner and occupier of the domestic property identified in the high hedge notice or, as the case may be, the revised high hedge notice, and

(c) every owner and occupier of the neighbouring land.

31 Guidance

(1) The Scottish Ministers may, after consulting such persons as they consider appropriate, issue guidance about this Act.

(2) A local authority may, after consulting such persons as the authority considers appropriate, issue guidance on—

(a) the duty imposed by section 3(1),

(b) any other provision of this Act.

(3) A local authority must have regard to any guidance issued under subsection (1) when—

(a) issuing guidance under subsection (2),

(b) carrying out its functions under this Act."

The decision

[6] The reporter issued a revised high hedge notice is respect of trees extending approximately 17 metres along the northern boundary of Blair Lomond as shown in the plan, excluding trees 1 and 18. Highland Council's notice had not encompassed all the trees which had been the subject of the high hedge application. No issue is taken with that aspect of her decision.

[7] The notice required the petitioner to take initial action by reducing trees numbered 2 to 17 on the plan to a height of 2 metres, to be measured from ground level at the base of the trees in the petitioner's garden.

[8] The material paragraphs of the reporter's decision are these:

"3. The appellant considers that any trees which are the subject of the notice do not constitute a hedge, and they are in fact part of the wooded area in the grounds of Blair Lomond. The council had previously determined that the trees did not form a high hedge for the purposes of the High Hedges (Scotland) Act 2013 and the appellant considers that there has been no change in circumstances since then that would cause the hedge to now fall under the definition or meet the tests as set out in the Act.

4. The applicants for the high hedge notice consider that the trees on the shared boundary have an unacceptable impact on the rear garden and habitable rooms at the rear of their property. They consider that the trees along the 17 metre shared boundary are a hedge, and that those trees are distinct from the remainder of the wooded area as they were planted to form a boundary when the house plot at 24 Drummond Circus was created some 35-40 years ago.

…

7. The trees must meet all three tests in section 1 in order for them to be considered a high hedge for the purposes of the Act. If they do not, they are not covered by the Act and are not a high hedge. Section 1(2) of the Act goes on to state that a hedge is not to be regarded as forming a barrier to light if it has gaps which significantly reduces its overall effect as a barrier to light at heights of more than 2 metres.

a. Row of 2 or more trees or shrubs

8. At my site visit, I was able to view the trees from both sides of the boundary fence. I found that trees numbered 4, 6 and 8 are in a row, trees numbered 5, 7 and 9 are in a row, trees numbered 12 and 13 are in a row and trees numbered 15, 16 and 17 are in a row. Trees 1 and 18 are outliers to the group and not in a row, trees 2, 3, 11 and 14 are part of the group but not in a row.

9. Accordingly, when I consider all of the trees together, I find that the trees meet the first test set out in the Act.

b. More than 2 metres above ground level

10. Blair Lomond lies approximately 1 metre higher in terms of ground level than 24 Drummond Circus. When viewed from either property, the trees are all substantially higher than 2 metres. The parties agree that all of the trees are in the region of 15 to 22 metres in height. I conclude that the trees meet the second test set out in the Act.

c. Barrier to light

11. On my site visit, I noted that the foliage on the leylandii started generally 1.5 2.5 metres on the trunk, with an overhanging canopy to the garden to the north. The ash tree, number 14, has relatively sparse foliage. I was able to walk through the trees. Although there are varying distances between the trees, the foliage is full and there are no substantial gaps in the foliage on the boundary with 24 Drummond Circus which might allow light to penetrate.

12. I accept that the trees cause overshadowing. I observed on my site visit the extent of overshadowing to both the garden and to habitable rooms at the rear of the applicant's house on a late summer morning, and I have been provided with a calculation assessing the impact of the trees on daylighting.

13. I note that some of the overshadowing experienced by 24 Drummond Circus appears to be caused by trees to the east and west of those trees which are the subject of this high hedge notice.

14. I conclude that the trees are a barrier to light and meet the third test set out in the Act.

15. Overall, I conclude that the trees, for the purposes of the Act, constitute a high hedge. Whilst the overall planting at Blair Lomond could be considered woodland, this particular part of the planting differs from the remainder in that it has a higher concentration of leylandii, the trees are planted in discernible rows and the deciduous specimens are clearly self seeded. There is a written submission to this appeal which suggests that after the plot at 24 Drummond Circus was sold to create a house, the leylandii were specifically planted to form a boundary between the two properties. I am not aware of any other planting at Blair Lomond was carried out for this purpose. I find that the circumstances relating to the trees which are the subject of the high hedge notice are particular to those trees only, and I have not considered any other trees at Blair Lomond."

The reporter went on to make findings as to the adverse effect of the hedge on the enjoyment of 24 Drummond Circus. Those findings are not challenged. She went on:

"23. Overall, I conclude that the hedge adversely affects the enjoyment of the domestic property which the occupant of that property could reasonably expect to have.

24. I have also assessed the effect of the notice on the reasonable enjoyment of the appellant's garden. The hedge when lowered could still provide an adequate privacy screen to Blair Lomond, given the orientation of the house and the difference in ground levels between the two properties. The trees which are subject of the high hedge notice are adjacent to an existing break in the planting on the boundary, where the garage is, and so in these circumstances, I do not find that the visual impact of a

> lower hedge in this location would outweigh the need to reduce to adverse effect on the adjacent property.
>
> …
>
> Conclusions
> 28. I find the high hedge to be a barrier to light reducing the reasonable enjoyment of the house at 24 Drummond Circus and impacting on both the windows of habitable rooms and the garden to the rear of the house. A reduction in the height of the hedge would not significantly alter the privacy or outlook of the hedge owner and I therefore find the high hedge notice, subject to my variations, to be proportionate and reasonable. I have set a period of 10 months from the date of this notice as being the period within which action must be taken, to account for any potential impact on nesting birds."

Summary of submissions

Petitioner

[9] The petitioner submitted that the trees which were the subject of the decision did not satisfy the criteria for a high hedge in terms of section 1 of the 2013 Act. The reporter had erred in law. She had found that trees which formed four separate rows, and trees which were not in any row, could, when considered together, meet the requirements of section 1(1)(a).

[10] The statute referred to a row of trees, in the singular. The plain and unambiguous meaning of the statute should be given effect: *Williams* v *Central Bank of Nigeria* [2014] UKSC 10, Lord Neuberger, paragraph 72. The statute did not define "hedge", but used it as part of the definition of "high hedge". The word "hedge" therefore had its ordinary meaning. The Oxford English Dictionary defined it as "a row of bushes or low trees (eg a hawthorn or privet) planted closely to form a boundary between pieces of land or at the sides of a road". The drafter could have chosen to refer to a hedge formed wholly or mainly by two or more rows of trees, but had not done so.

[11] A decision maker such as the reporter should keep at the back of her mind that she was applying a test designed to identify a hedge: *R (Castelli)* v *London Borough of Merton* [2013] EWHC 602 (Admin), Deputy High Court Judge Nicholas Paines QC at paragraph 22, under reference to section 66 of the Anti-Social Behaviour Act 2003.

[12] Counsel acknowledged the submission for the respondents as to the effect of section 22 of the Interpretation and Legislative Reform (Scotland) Act 2010 ("the 2010 Act"), which made provision that words in an act of the Scottish Parliament in the singular include the plural. He submitted that the exception in section 1(2)(b) of the 2010 Act applied. Section 22 was disapplied where the context of the act or instrument in question otherwise required. That was the case here. If the singular included the plural, there would be an absurd result. A hedge would have the capacity for infinite depth, and be indistinguishable from woodland planted in rows.

[13] There was a presumption against a construction which led to absurdity: *R (Edison First Power Ltd)* v *Secretary of State for the Environment, Transport and the Regions* [2003] UKHL 20, Lord Millet, paragraph 116. Where there was an absurdity, it was open to the court to consider the legislative history and preparatory materials: *Pepper (Inspector of Taxes)* v *Hart* [1993] AC 593, at 640. The court might also have regard to explanatory notes in the way described in Bennion on Statutory Interpretation (7th edition), at paragraph 24.14.

[14] The respondents had produced guidance in accordance with section 31 of the 2013 Act in 2014 and 2016. Nothing in either version supported the contention that "row" included "rows". In any event, the guidance could not supplant the plain meaning of the words used in the statute. Counsel made a similar submission in relation to the Explanatory Notes and the Policy Memorandum to the bill.

[15] Counsel referred also to debates during the passage of the legislation. Much of the discussion had been as to whether the definition of a high hedge should be confined to hedges formed wholly or mainly of a row of two or more evergreen or semi-evergreen trees and shrubs. The reference to evergreen or semi-evergreen trees and shrubs had been deleted, so as to broaden the definition to include deciduous trees and shrubs. Counsel did, however, place some reliance on the following statement by Mark McDonald, MSP, the promoter of the bill:

> "The bill's definition of a high hedge has been the subject of much discussion. The bill as introduced mirrors the definition that is used elsewhere. It defines a high hedge as a hedge – that word is important in making it clear that the bill will not usually impact on forests or woodland …" (Official Report of the 3rd Stage Debate on the High Hedges (Scotland) Bill, 28 March 2013).

Counsel submitted that this passage emphasised the importance of the word "hedge" in the definition.

[16] Counsel referred to literature about hedging produced by the respondents. It included information to the effect that hedges could be planted in two staggered rows (a zig-zag pattern of planting) in order to provide density. What it referred to, however, was planting at intervals of 12 to 24 inches, not the sort of planting of trees at much greater distances from each other at issue in this case.

[17] The reporter had failed to take into account relevant considerations. She had failed to consider the effect of each of the rows that she identified in forming a barrier to light in terms of section 1(1)(c). She had failed to consider whether removing one of the rows that she identified would be sufficient to prevent there being a barrier to light. The growth of one row of trees would affect the growth of another row of trees. Removal of some trees would create gaps that would prevent the rows from being classified as a high hedge because they would not create a barrier to light.

[18] She had failed to consider whether the space between the trees indicated that they were woodland, rather than a hedge. She had found that she could walk between the trees, but had not explained how, in the face of that finding, the trees could properly be regarded as a hedge. She had failed to consider photographs provided by Highland Council.

[19] The reporter had taken into account irrelevant considerations in taking into account the species of the trees, the purpose for which they were planted and that they were planted in discernible rows.

[20] The reporter had acted irrationally by finding that trees with space between them such that she could walk through and whose foliage started at between 1.5 and 2.5 metres would not significantly alter the privacy or outlook of the hedge owner when reduced to two metres, and in making the order that she had as to the action she had ordered to be taken by the petitioner.

Respondents

[21] The respondents submitted that the reporter had not erred in her construction of section 1(1)(a) of the 2013 Act. Like the petitioner, they submitted that section 1(1) logically required consideration as to whether the trees or shrubs in question were a hedge, before the decision maker went on to consider whether the hedge satisfied the criteria in section 1(1)(a), (b) and (c). A hedge might be deeper than a single row of trees or shrubs. That was within judicial knowledge. It was in any event well supported by relevant literature. The respondents produced a number of publications which referred to planting hedges in staggered or multiple rows where a deep hedge was desired. Some, but not all, of the literature related specifically to hedgerows.

[22] Section 1(1)(a) was directed at preventing applications being made in respect of single trees or shrubs, whatever size those might be. The use of the word "row" was intended to exclude single trees.

[23] "Wholly or mainly" was intended to refer to the type of tree or shrub. That was apparent from the terms of paragraph 42 of the Policy Memorandum to the bill, which included the following:

> "Deciduous plants are likely to form a barrier only at certain times of the year. The Bill does not rule out deciduous plants from being part of a high hedge which need only be "wholly or mainly" evergreen or semi-evergreen. This means that a mainly evergreen hedge that contains some deciduous plants would be captured in the definition."

[24] Counsel referred to the Oxford English Dictionary definition of "mainly" and the Chambers Dictionary definition of "row". "Row" was defined in this way: "line or rank of people or things … of a single or double line of houses".

[25] The reporter had found that there were individual rows of tees, an additional group of trees and some outliers. She considered all of the trees together and found that they met the test in section 1(1)(a). Her approach was consistent with the 2016 Guidance, at page 12, which stated that two or more trees or shrubs did not have to form a precisely straight line to qualify as a hedge, and that as long as they were roughly in line they might be considered as a hedge.

[26] Section 22 of the 2010 Act applied. "Row" therefore fell to be interpreted as "rows". There was nothing in the context of the 2013 Act to require otherwise.

[27] It was permissible to refer to background material, explanatory notes, policy memoranda and parliamentary debates only to supply context or identify the mischief at which the 2013 Act was aimed: *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the General Counsel for Wales* [2015] UKSC 3; *Presidential Insurance Co Ltd* v *Resha*

St Hill [2012] UKPC 33. The situation which Parliament sought to address involved fast-growing conifers in suburban areas, and the word "row" was chosen to exclude single trees. The mischief at which the legislation was aimed was not limited to high hedges consisting of a single row of trees or shrubs.

[28] The reporter did not require to consider the impact of each individual tree or of separate component parts of the hedge. The question was whether the trees that the reporter found constituted a hedge formed a barrier to light. The reporter had found that the foliage was full and that there were no substantial gaps in the foliage which might allow light to penetrate.

[29] Provided that a decision maker took into account all relevant factors, the weight to be given to them was a matter for her: *Tesco Stores Ltd* v *Secretary of State for the Environment* [1995] 1 WLR 759, Lord Hoffman, 780F. The reporter was entitled to take into account the concentration of Leylandii, the purpose for which the trees were planted, and the ways in which they differed from the overall woodland planting at the property. It was within the contemplation of the legislature that a high hedge might be part of a group of trees or woodland: section 11 of the 2013 Act.

[30] The complaint about failure to take into account the space between the trees was an attack on the conclusions of the reporter, and did not amount to an error of law. She had carried out a site visit and assessed matters for herself. It was particularly important that she had considered what the hedge looked like above 2 metres.

[31] The reporter had been entitled to reach the conclusion that she did regarding the privacy and outlook of the petitioner having regard to a number of features regarding the layout and situation of Blair Lomond and the surrounding properties.

Decision

Interpretation of section 1(1)(a) of the 2013 Act

[32] The reference in section 1(1)(a) of the 2013 Act to "row" includes the plural. That is the effect of section 22 of the 2010 Act. There is nothing in the context of the 2013 to require otherwise. I do not accept the petitioner's contention that the application of section 22 would produce absurd results because of the risk that a hedge might be formed of an indefinite number or rows and therefore be indistinguishable from woodland.

[33] There is no real risk of absurdity arising from the possibility that a high hedge might have an indefinite number of rows. Section 1 requires an assessment as to whether the trees and/or shrubs in issue in a given case are a hedge. Looking at the language and structure of section 1, trees and/or shrubs must be a hedge before they can be a high hedge. A hedge is a high hedge if it meets the criteria in paragraphs (a), (b) and (c) of section 1(1). Whether trees and or/shrubs are a hedge is a qualitative assessment which may involve a number of different considerations. If that assessment is carried out in a way that is reasonably open to a decision maker, there should be no real risk that a wood or a forest is found to be a hedge.

[34] It would, however, be perverse and absurd if the owner of a hedge were able to avoid a finding that it was a high hedge because he had planted more than one row of trees or shrubs so as to achieve a more dense and effective screen.

[35] I do not consider that the reference to "row" was required in order to exclude single trees or shrubs. The use of the words "2 or more" achieve that end. It does indicate a requirement that the two or more trees or shrubs in question be planted in a linear fashion relative to each other.

[36] Both parties referred to *Castelli*. I note that that the definition of a high hedge in the Anti-Social Behaviour Act 2003 is not identical to that in the 2013 Act. In particular it does not define "high hedge" as a hedge with specified characteristics. Instead, it is defined as:

> "so much of a barrier to light or access 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 meters above ground level".

As in the 2013 Act, there is a reference to the effect of gaps affecting its overall effect at heights of more than two metres above the ground. It is with that definition in mind that the comments of the Deputy High Court Judge must be read. There is no explicit requirement, as there is in the 2013 Act, that the decision maker have in mind whether or not the trees were a hedge. The passage at paragraph 22 does not assist with the construction of section 1 of the 2013 Act.

[37] There is no ambiguity or absurdity that requires or permits recourse to parliamentary materials as an aid to construction on the basis explained in *Pepper (Inspector of Taxes)*. Explanatory notes may be referred to with a view to casting light on the context of an enactment, and the mischief at which it is directed, as may records of parliamentary debates: Bennion, sections 24.12, 24.14. Amendments to bills may throw light on the meaning of the resulting Act: Bennion, section 23.14.

[38] I have considered what light, if any, the additional materials referred to by parties cast on the construction of section 1(1)(a). In case I am wrong about the absence of ambiguity or absurdity, I have considered whether the parliamentary materials assist with construction.

[39] Much of the material about the bill relates to discussion about the inclusion of "evergreen or semi-evergreen" in what became section 1(1)(a) and is not relevant to the construction of "row".

[40] The reference by the respondents to the terms of the policy memorandum accompanying the bill does not assist in the way that their counsel suggested. The bill as originally drafted used the phrase "is formed wholly or mainly by a row of 2 or more trees or shrubs". The reference to evergreen or semi-evergreen trees or shrubs was removed. The legislature chose to leave the words "wholly or mainly" in the definition notwithstanding that deletion. They could have been deleted. The passage in the policy memorandum therefore casts no light on the construction of the provision as it is now worded. In the words of the statute, as a matter of grammar, the adverbs "wholly or mainly" modify the verb "formed". That means that one of the requirements of a high hedge is that it be formed wholly or mainly "by a row of 2 or more trees or shrubs". Unless the word "mainly" is entirely without meaning, it follows that a high hedge may be formed in a smaller part by something other than a row of two or more trees or shrubs. That is not inconsistent with a construction of row whereby the singular includes the plural. It is also possible that the words "wholly or mainly" were left in the provision per incuriam, or thoughtlessly, after the deletion to which I have referred, leaving the text to some extent in an unsatisfactory state (Bennion, section 24.13). If that is the case, there is again no inconsistency with construction in accordance with section 22 of the 2010 Act.

[41] So far as the context of the 2013 Act and the mischief at which it is aimed are concerned, the materials produced are of limited value because they relate to the way in which the provision was originally drafted. They do support the proposition that the mischief at which the bill was aimed was fast growing conifers in suburban areas. That is

apparent from, for example, paragraphs 10-12, 26, and 40-44 of the policy memorandum. There was a concern to keep the definition fairly simple. It was modelled on similar legislation elsewhere in the United Kingdom. There are a number of passages to similar effect as to the matters which informed the definition in the bill in the Minutes of the Local Government and Regeneration Committee, 1 February 2012, the Official Report of the 1st Stage Debate on 5 February 2013, and the Official Report of the 3rd Stage Debate on 28 March 2013. I do not quote any of these passages because I have not found them to be of assistance.

[42] It is also clear that there was an intention to exclude single trees, despite representations that single trees could be the source of difficulties: Official Report of the 1st Stage Debate, 5 February 2013. That intention is, however, also clear from the terms of the statute itself.

[43] Parliament, however, chose to delete the reference to evergreen and semi-evergreen trees or shrubs, with the result that a hedge need not contain any trees or shrubs of that sort in order to qualify as a high hedge. Interesting as the rationales for that requirement originally and as to the decision to dispense with it may be, I do not consider that they assist with the construction of the word "row". The deletion means also that the reference to the bill and some of the associated materials with a view to discovering the mischief at which the bill was aimed is of limited use, given that the alteration of the definition of high hedge meant that a rather broader category of mischief came to be included.

[44] Both parties referred to the guidance produced in terms of section 31 in 2013 and 2016. Guidance of this sort cannot supplant the words used in the statute, and words used in guidance cannot be used as a substitute for the meaning achieved by construction of the statute. There is in any event nothing in the documents in question that casts light on the

construction of "row", and whether it includes the plural. The only portion that might be of any assistance is this, at page 12:

> "Two or more trees or shrubs do not have to form a precisely straight line to qualify as a hedge. As long as they are roughly in line, they may be considered as a hedge under the Act."

The drafter of the guidance has used the word "line" rather than "row". The most that can be said about that passage in this context is that it is not inconsistent with the notion that a linear relationship between the plants, rather than planting in a single row, is required.

[45] The respondents submitted that the 2019 version of the guidance includes a reference to two staggered rows. While it is not inconsistent with the view I have reached, it is of no assistance in forming that view.

[46] As use of the word "row" includes the plural, it follows that the reporter did not err in law by reason of finding that a collection of trees in four identifiable rows was a high hedge.

Failure to consider relevant considerations/taking into account irrelevant considerations

[47] The petitioner complains that the reporter did not consider the effect of each of the rows individually, and the effect that removing a single row or trees might have on whether the remaining trees formed a barrier to light. This submission is predicated on the idea that a high hedge must be constituted of a single row of trees or shrubs, so that the reporter should have considered each row individually. It is at odds with what I have concluded is the correct construction of section 1.

[48] The decision maker must assess whether the trees she is considering are a hedge. She must consider whether the hedge is formed wholly or mainly by a row (or rows) of two

or more trees. She must consider whether it rises to more than 2 metres above ground level, and whether it forms a barrier to light. If it fulfils these criteria it will be a high hedge. Once the decision maker has decided that the trees are a hedge, there is no warrant for looking at particular parts of the hedge in isolation. She must look at the whole of what she has decided is a hedge in order to see whether it fulfils the criteria to be a high hedge. She must consider whether it – that is the hedge – has gaps which significantly reduce its overall effect as a barrier at heights of more than 2 metres. It follows that I do not accept that the reporter erred in the respect alleged. The 2016 Guidance takes an approach which is consistent with the approach that I consider the statute requires. I quote the relevant portion from page 13 elsewhere in this opinion.

[49] The petitioner makes additional complaints as to the reporter's assessment that the trees were a hedge. He submits that the reporter failed to consider whether the space between the trees indicated that they were woodland rather than a hedge, and failed to take into account that she could walk between the trees, or explain how, that being so, the trees could be a hedge. She failed to take into account certain photographs. She had erred in taking into account the species of the trees, the location in and purpose for which they were planted and that they were in discernible rows.

[50] The petitioner's contention in the appeal was that the trees did not constitute a hedge, but were part of a wooded area: paragraph 3 of decision. The reporter addressed that contention directly in her decision. Although it appears under the heading "Barrier to light", paragraph 15 of her decision sets out her consideration of whether the trees were woodland or not. While the overall planting at Blair Lomond could be considered woodland, the part of the planting in respect of which she issued a revised high hedge notice differed from the remainder of the planting. She explained that she took this view

because it had a higher concentration of leylandii, the trees were planted in discernible rows, and the deciduous trees were self-seeded. She referred to the letter quoted above as to the original purpose of the planting.

[51] The considerations on which she founded are ones which she was entitled to take into account. None of them is conclusive as to the question she required to address, and they may have explanations other than the presence of a hedge. They are, however, relevant to the question of whether the trees were a hedge as opposed to woodland. It is a matter of public notoriety that leylandii are used to form hedges. While the circumstance that leylandii are planted will not be conclusive as to whether there is a hedge, it is a relevant consideration. It may well be, as the petitioner submitted, that woodland is sometimes planted in discernible rows. The pattern of the planting in rows was nonetheless a relevant consideration in discerning whether the trees were a hedge. Hedges are generally planted in a line of some sort. It was, further, relevant to whether they were a high hedge, as the word "row" forms part of the definition of a high hedge.

[52] The reporter was entitled to take into account information placed before her indicating that the leylandii had been planted in order to form a hedge, and the circumstance that they were located at the boundary between the two properties. Again, that the planter had an intention to create a hedge is not conclusive as to whether, at the time the reporter was considering the trees, they were a hedge, but it is a relevant consideration. The location at a boundary is relevant. The function of a hedge in forming a boundary is recognised in the dictionary definition of hedge to which the petitioner referred in his submissions. I note that the drafter of the 2016 Guidance took a similar view (2016 Guidance, page 12):

> "The Act applies to hedges and is not designed to affect woodland and forests, which may not always be planted as hedges. For example, well-spaced tree lines are not generally considered as a hedge, even if the trees join to form a canopy. It is not normally expected that trees planted between properties would be classified as either woodland or forests, so local authorities should consider whether the trees and shrubs were planted with the intention of forming a boundary between two gardens in order to separate neighbouring properties."

[53] The reporter narrated, at paragraph 11, that the foliage on the leylandii started generally 1.5-2.5 metres on the trunk, and that the ash tree, number 14, had relatively sparse foliage. She recorded that she was able to walk through the trees. She noted that although there were varying distances between the trees, there were no substantial gaps in the foliage on the boundary which might allow light to penetrate.

[54] The reporter carried out an inspection of the site. She took her own photographs of the trees. Given that she visited and was in a position to make her own assessment on the basis of an inspection, I would not have regarded the circumstance that she did not specifically refer in her decision to two photographs taken by Highland Council as of any significance. I note, for what it is worth, that she confirmed in an affidavit in these proceedings that she had before her the photographs in question, which cross reference images of trees to the numbering on the plan.

[55] One of the matters the reporter required to consider was whether the trees formed a barrier to light at heights of more than 2 metres above ground level. It was therefore relevant for her to note the height above ground level at which the foliage began, and that there were no substantial gaps in the foliage on the boundary which might allow light to penetrate. The gaps between the trees at ground level was one of the potentially relevant considerations. The reporter noted it, but reached the conclusion that there was a barrier to light which met the requirements of section 1 in the light of her findings regarding the level

and quality of the foliage. That was an entirely legitimate approach, and she was entitled to form the conclusion that she did.

[56] Again, the Guidance is consistent with what I have concluded was a legitimate approach (2016 Guidance, page 13):

> "The Act applies to hedges that, despite any gaps above the 2 metre mark, act as a barrier to light. This issue is about the physical appearance of the trees and shrubs in question and whether or not they form a hedge. The local authority must decide whether a particular hedge meets this condition by considering the trees or shrubs that make up the hedge, including its shape, its growth habit, and, most importantly, what it looks like above 2 metres. Even though there might be gaps in the foliage or between the trees or shrubs, the local authority must consider whether the hedge is obstructing light.
>
> The trees or shrubs in the hedge may have been closely planted and become so entangled that they appear as a solid green wall. In these circumstances, the matter may be straightforward as the hedge is evidently capable of blocking light. Other cases may be more difficult to judge. The trees or shrubs may be more widely spaced so their branches are not touching. Branches may have fallen off or been removed so the canopy is lifted or the growth might be straggly, with few leaves or greenery. Local authorities must assess each case individually. If individual trees or shrubs are so widely spaced, or the gaps in the leaves are so big that it is possible to see what lies behind them, the hedge may not be covered by the Act, but this decision must be based on the circumstances of each case.
>
> In some cases, it may be possible to tell from photographs or other evidence whether a hedge forms a barrier to light. In other case, a local authority may need to visit the property to see the hedge before making a decision."

Irrationality

[57] The petitioner's case is that the reporter was irrational in ordering all the trees identified in the decision to be reduced to 2 metres without considering the effect of one row on another, and in concluding that that reduction in height would not significantly alter the privacy or outlook of the hedge owner.

[58] The reporter was deciding what action was required to remedy the adverse effects of the height of the hedge on the enjoyment of 24 Drummond Circus that its occupant could

reasonably expect to have: 2013 Act, section 6(5). There is no criticism of her findings regarding the adverse effects on the property, which appear at paragraphs 21-23 of her decision. Having reached the conclusion she did as to the adverse effects, it was reasonably open to her to decide that the appropriate remedy was to require that the whole hedge be reduced in height.

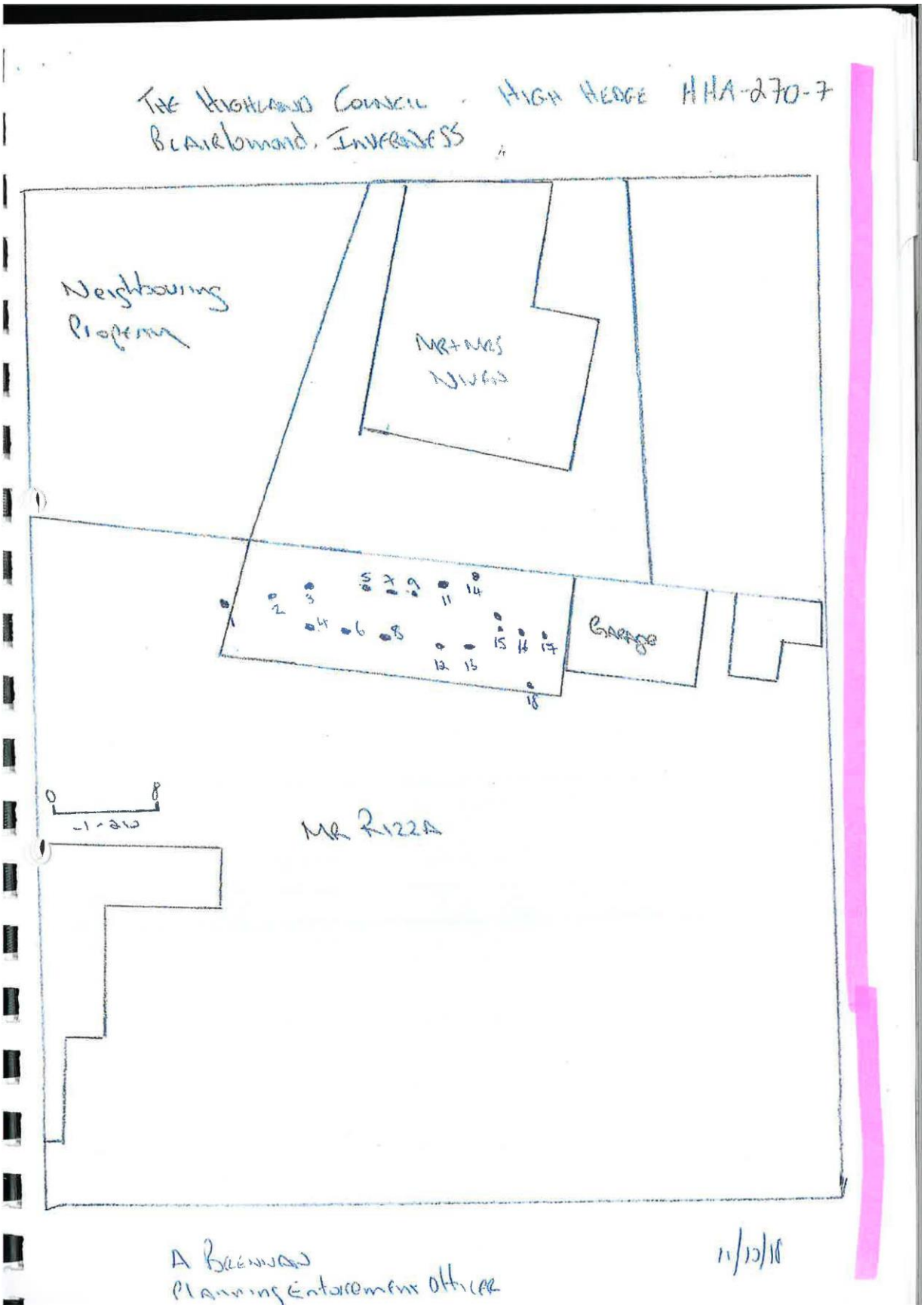
[59] In determining the effect of the required action on the petitioner's garden, the reporter took into account the layout and orientation of the properties in question, as she explained at paragraph 24 of her decision. Those appear to be relevant considerations. The statute requires the decision maker in making a decision under section 6(5)(b) to take into account all the relevant circumstances: section 6(7).

[60] I am satisfied that the reporter reached her conclusion as to the action required on the basis of relevant considerations, and that her conclusion was one reasonably open to her in the circumstances.

Disposal

[61] I refuse to grant the orders sought in the petition.

Appendix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