

TITLE CONDITIONS (SCOTLAND) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 Conservation and Other Personal Real Burdens

175. **Part 3** of the Act is concerned with the new class of burden called personal real burdens: these are conservation burdens, rural housing burdens, maritime burdens, economic development burdens and health care burdens. There are other types of personal real burden, namely manager burdens, personal pre-emption burdens and personal redemption burdens. Sections 47 and 48 apply to all personal real burdens. The other provisions in Part 3 relate to specific burdens. Manager burdens are dealt with primarily by section 63 rather than Part 3 (they are not pure personal real burdens as while not tied to any one benefited property they are only enforceable if the holder owns a related property (see section 63(2)). Personal pre-emption burdens and personal redemption burdens are dealt with primarily by the new section 18A, inserted into the 2000 Act by section 114 of this Act, as it will not be possible to create these types of burden after the appointed day. The 2000 Act allowed some feudal burdens to be preserved under the classes of conservation burdens, maritime burdens, economic development burdens and health care burdens. The purpose was to preserve valuable rights, for the benefit of the public, which would otherwise have been lost on the appointed day. Personal real burdens do not require a benefited property. These burdens cannot however be created in favour of any person. A conservation burden may only be created in favour of a conservation body or the Scottish Ministers, a rural housing burden may only be created in favour of a rural housing body, a maritime burden may only be created in favour of the Crown, an economic development burden may only be created in favour of a local authority or the Scottish Ministers and a health care burden may only be created in favour of a National Health Service trust or the Scottish Ministers. Part 3 is to be brought into force on the day appointed by an order, or orders, made by the Scottish Ministers (section 129(4)). While, unlike the other types of personal real burden dealt with by Part 3, rural housing burdens do not have a direct equivalent in the 2000 Act, a right of pre-emption which is converted on the appointed day into a personal pre-emption burden by (or which later comes to be held by) a rural housing body will become a rural housing burden (see the definition of rural housing burden in section 122(1)).
176. The provisions on the nomination of bodies as conservation bodies and the operation of conservation burdens in the future supersede those in the 2000 Act. Sections 26 and sections 29 to 32 of the 2000 Act are essentially repealed and re-enacted by the Act. The provisions in the Act thus apply both to new conservation burdens created under section 38 of the Act, and also to former feudal burdens converted into conservation burdens under the 2000 Act (see the definitions of ‘conservation burden’ in section 122(1)). The same is essentially true for the other types of real burden dealt with by Part 3.

Section 38: Conservation burdens

177. **Section 38** allows the creation of new conservation burdens. This section along with the rest of Part 3 comes into force on a day to be appointed by order by the Scottish

Ministers. *Subsection (1)* sets out the type of burden which may be created and in favour of whom it may be created. A conservation burden may be created by anyone but may be created only in favour of a conservation body or the Scottish Ministers. A conservation burden is one which preserves or protects, for the benefit of the public, the architectural or historical characteristics of the land or any other special characteristics of the land (including, without prejudice to the general rule, a special characteristic derived from the flora, fauna or general appearance of the land). Subsections (4) to (7) provide for the establishment by the Scottish Ministers of a list of conservation bodies. Names may be added to or removed from the list.

178. *Subsection (2)* provides that if someone other than a conservation body or the Scottish Ministers wish to create a conservation burden they must first obtain the consent of the body which it is intended will hold the right to enforce the burden.
179. *Subsection (3)* prohibits the creation of a standard security over a conservation burden. Following the amendment made (on the appointed day) to section 9 of the Conveyancing and Feudal Reform (Scotland) Act 1970 by paragraph 4(2) of Schedule 14 to the Act, it would notwithstanding *subsection (3)* be incompetent to grant a standard security over any real burden, including a conservation burden. *Subsection (3)* extends the prohibition to any conservation burden created under section 38 before the appointed day.
180. *Subsection (4)* provides for the Scottish Ministers to prescribe by subordinate legislation a list of conservation bodies who will be entitled to hold the right to enforce conservation burdens preserved (under the 2000 Act) or created in their favour. In addition to the bodies on this list, the Scottish Ministers will in terms of *subsection (1)* be entitled to hold the right to enforce conservation burdens preserved or created in their favour.
181. *Subsection (5)* sets out the criteria for a body to be included on the list. The definition of the type of body which may be prescribed as a conservation body is intended to be broad enough to catch all the bodies who have a function or object of preserving or protecting for the benefit of the public the architectural, historical or other characteristics of land.
182. Since trusts are not separate legal persons, *subsection (6)* makes it clear that in relation to a trust the conservation body would be the trustees.
183. *Subsection (7)* allows bodies to be removed from the list.

Section 39: Assignment

184. Since a conservation burden is a personal real burden the right to enforce is not tied to a benefited property. Provision is therefore made for the transfer of the right to enforce a conservation burden. This is done by assignment. *Section 39* provides that the benefit of a conservation burden can be assigned to another conservation body or the Scottish Ministers and assignment will be completed by registration of the assignment.

Section 40: Enforcement where no completed title

185. A real burden may be enforced only by a person who has both title and interest to do so (section 8(1)). *Section 40* is concerned with title. The relevant conservation body will have title to enforce the burden even if its right has not been registered. The meaning of 'holder' is given in section 122(1) as the person who has right to the title condition. The holder of a conservation burden is thus the relevant conservation body or, as the case may be, the Scottish Ministers.

Section 41: Completion of title

186. Where title to enforce a conservation burden passes to a successor body on the reorganisation of that body the new holder can complete its title as holder of the burden under section 41. Standard cases are likely to be the assumption by a conservation body

of new trustees or a reorganisation of a body by statute. The appropriate conveyancing procedure is then to use a notice of title, and paragraph (a) allows this. A notice of title is unnecessary in the case of conservation burdens registered in the Land Register (see section 3(6) of the Land Registration (Scotland) Act 1979 (as amended by schedule 14, paragraph 7(3) of this Act)). Paragraph (b) allows an unregistered holder to grant assignments and discharges. Section 15(3) of the 1979 Act (as amended by schedule 14, paragraph 7(6) of this Act) dispenses with deduction of title in cases where the conservation burden is registered in the Land Register, but otherwise deduction of title is necessary.

Section 42: Extinction of burden on body ceasing to be conservation body

187. This section makes clear that a conservation burden is extinguished if the holder ceases to be a conservation body or if the holder ceases to exist.

Section 43: Rural housing Burdens

188. This section introduces a category of personal real burden to be known as “rural housing burdens”. Such burdens are to be created in favour of a ‘rural housing body’. Rural housing burdens are included in the definition of personal real burdens in section 1(3). As a result, the holder has a presumed interest to enforce, and the burden need not operate in favour of other land. *Subsection (1)* sets out the type of burden which may be created. Only rights of pre-emption can be created as rural housing burdens. Feudal rights of pre-emption which are converted into personal pre-emption burdens by the registration of a notice under section 18A of the 2000 Act will also be rural housing burdens if the holder is a rural housing body (section 122(1)). A rural housing burden may be created by anyone but may only be in favour of a rural housing body. A rural housing body is one which has as one of its main objects or functions the provision of housing on rural land or to provide rural land for housing. Subsections (5) to (8) provide for the establishment by the Scottish Ministers of a list of rural housing bodies. Names may be added to or removed from the list.
189. A rural housing burden will allow the rural housing body a personal pre-emption right when selling land. This will give them the right to repurchase the property in the event of it coming up for sale, and as a consequence, the ability to control future sales. Rural housing burdens differ from normal pre-emption burdens in two ways. The first is that instead of having 21 days in which to accept an offer, a body would have 42 days to accept (section 84(3)). Secondly, the body will not lose the right of pre-emption if it is not exercised (section 84(1)). If the right of pre-emption is not exercised when the property is being resold it will lie dormant until the next sale. Under section 84(1) most rights of pre-emption are allowed only one opportunity to repurchase. The rural housing body will not therefore *have* to step in and use the pre-emption only to recreate the burden in a subsequent resale. Because the pre-emption will survive not being used when a sale occurs, section 18 on prescription provides that a failure to offer the property back to the rural housing body will not eliminate the pre-emption by 5 year prescription. Section 83(1) will allow a rural housing body to give a pre-sale undertaking in relation to a particular sale without extinguishing the burden.
190. The terms of the rural housing burden, as with other rights of pre-emption, will be freely negotiated with the purchaser and could detail the terms and price at which the property could be bought back. It is possible in the creation of a pre-emption to specify the price at which the property can be repurchased. That provision could be used in these circumstances to allow the rural housing body to buy back the property at a similar price to that of the original sale.
191. *Subsection (2)* provides that if someone other than a rural housing body wishes to create a rural housing burden they must first obtain the consent of the body which it is intended will hold the right to enforce the burden.

*These notes relate to the Title Conditions (Scotland) Act
2003 (asp 9) which received Royal Assent on 3 April 2003*

192. *Subsection (3)* ensures that a rural housing burden cannot be used when a body is selling under the right to buy legislation.
193. *Subsection (4)* prohibits the creation of a standard security over a rural housing burden. Further explanation of this can be found in the note on subsection (3) of section 38 which deals with conservation burdens.
194. *Subsection (5)* provides for the Scottish Ministers to prescribe by subordinate legislation a list of rural housing bodies who will be entitled to hold the right to enforce rural housing burdens created in their favour.
195. *Subsection (6)* sets out the criteria for a body to be included on the list. Only a body which has as one of its main functions or objects the provision of housing on rural land or the provision of rural land for housing may be prescribed as a rural housing body.
196. Since trusts are not separate legal persons, *subsection (7)* makes it clear that in relation to a trust the rural housing body would be the trustees.
197. *Subsection (8)* allows bodies to be removed from the list.
198. The effect of *subsection (9)* is that the definition of rural land is drawn from section 33 of the Land Reform (Scotland) Act 2003.
199. *Subsection (10)* imports the provisions on assignation, enforcement where no completed title, completion of title and extinction which apply to conservation bodies.

Section 44: Maritime burdens

200. *Section 44* allows the creation of new maritime burdens. *Subsection (1)* states that it is only competent to create a maritime burden in favour of the Crown and over land which is part of the seabed or the foreshore. It is possible for conservation burdens to be created over foreshore sold by bodies other than the Crown.
201. *Subsection (2)* applies both to new maritime burdens created under subsection (1), and also to former feudal burdens which survive under section 60(1) of the 2000 Act (see the definition of ‘maritime burden’ in section 122(1)). Its effect is to prevent alienation by the Crown.

Section 45: Economic development burdens

202. This section introduces a new category of personal real burden to be known as “economic development burdens”. These burdens may be created by anyone but can only be in favour of a local authority or the Scottish Ministers. It will only be possible to create such a burden for the purpose of promoting economic development. Economic development burdens are included in the definition of personal real burdens in section 1(3). As a result, the holder has a presumed interest to enforce, and the burden need not operate in favour of other land.
203. Section 18B of the 2000 Act, as inserted by section 114 of this Act, will allow a feudal burden imposed in the past that meets the economic development criteria to be converted into an economic development burden. The form of notice to convert the burden will be contained in schedule 5B of the 2000 Act (inserted by schedule 13 of the Act).
204. *Subsection (2)* provides that if someone other than a local authority or the Scottish Ministers wishes to create an economic development burden they must first obtain the consent of the body which it is intended will hold the right to enforce the burden.
205. *Subsection (3)* allows local authorities (or Scottish Ministers) to include a clawback condition so that they will be able to receive a further payment if the value of the land increases, for example due to a change in use. It is not possible to create an obligation to make a periodical payment as an economic development burden. Periodical payments

under title conditions are prohibited by section 2 of the Land Reform (Scotland) Act 1974 (amended by paragraph 6 of Schedule 14) except where it is a payment in defrayal of or contribution towards some continuing cost related to the land.

206. *Subsection (4)* prohibits the creation of a standard security over an economic development burden. Further explanation of this can be found in the note on subsection (3) of section 38 which deals with conservation burdens.
207. *Subsection (5)* imports the provisions on enforcement where there is no completed title and on completion of title which apply to conservation bodies.

Section 46: Health care burdens

208. This section introduces a new category of personal real burden to be known as “health care burdens”. These burdens may be created by anyone but can only be in favour of a National Health Service trust or the Scottish Ministers. National Health Service trusts are bodies established by order under section 12A of the National Health Service (Scotland) Act 1978. It will only be possible to create such a burden for the purpose of promoting the provision of facilities for health care. Health care burdens are included in the definition of personal real burdens in section 1(3). As a result, the holder has a presumed interest to enforce, and the burden need not operate in favour of other land. Health care burdens can be created where land is being sold but it is intended that it should continue to be used for health care purposes. This could, for example, occur where land is being sold to a developer to build accommodation for hospital staff and nurses. A health care burden could allow the health body to ensure that the land is developed for that purpose, and to secure compensation if another type of development occurs.
209. Section 18C of the 2000 Act, as inserted by section 114 of this Act, will allow a feudal burden imposed in the past that meets the health care criteria to be converted into a health care burden. The form of notice to convert the burden will be contained in schedule 5C of the 2000 Act (inserted by schedule 13 of this Act).
210. *Subsection (2)* provides that if someone other than a National Health Service trust or the Scottish Ministers wish to create a health care burden they must first obtain the consent of the body which it is intended will hold the right to enforce the burden.
211. *Subsection (3)* allows National Health Service trusts (or Scottish Ministers) to include a clawback condition so that they will be able to receive a further payment if the value of the land increases, for example due to a change in use. As with economic development burdens, it is not competent to create an obligation to make a periodical payment as a health care burden. Periodical payments under title conditions are prohibited by section 2 of the Land Reform (Scotland) Act 1974 (amended by paragraph 6 of Schedule 14) except where it is a payment in defrayal of or contribution towards some continuing cost related to the land.
212. *Subsection (4)* prohibits the creation of a standard security over a health care burden. Further explanation of this can be found in the note on subsection (3) of section 38 which deals with conservation burdens.
213. *Subsection (5)* imports the provisions on enforcement where there is no completed title and on completion of title which apply to conservation bodies.
214. *Subsection (6)* provides that health care facilities include ancillary facilities, for example, accommodation for staff would be an ancillary facility to a hospital.

Section 47: Interest to enforce

215. A real burden may be enforced only by a person who has both title and interest to do so (section 8(1)). *Section 47* provides that such interest is presumed in the case of personal real burdens.

Section 48: Discharge

216. This section is based on section 15. That section provides for the discharge of real burdens by obtaining a deed of discharge from the benefited proprietor(s) and registering it. This mechanism is available for the discharge of personal real burdens. The term “holder of the burden” includes a person who has right to the burden but has not completed title by registration (section 122(1)), but deduction of title may then be necessary (section 41(b)). No particular deed or form of deed is specified.
217. *Subsection (2)* makes clear that partial discharge is included. For example, a prohibition against building on a conservation site could be varied to allow the construction of a bird watching hide. The condition would still be in force, and would prevent any other types of construction.