

# TENEMENTS (SCOTLAND) ACT 2004

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### *Boundaries and Pertinents*

##### *Section 1 – Determination of Boundaries and Pertinents*

9. *Section 1* provides that where neither the title nor other legislation sets out the boundaries of a flat or another sector of a tenement or which parts of a tenement are pertinents of a sector then *sections 2 and 3* will apply to determine the boundaries and pertinents of a sector of a tenement. These provisions will apply to all tenements, whether existing or new. The other legislation that will most commonly apply for these purposes is the Prescription and Limitation (Scotland) Act 1973.
10. “Tenement” is defined in *section 26* and “flat” and “sector” are defined in *section 29*. A sector can be a flat or some other separate part of a tenement such as the close or the roofspace. The use of the term “sector” is a convenient way of describing the different areas which go to make up a tenement building.
11. *Subsection (2)* explains that the “title to the tenement” means any conveyance or reservation of property, or any title sheet comprised in the Land Register of Scotland which affects the tenement or any sector of the tenement. Paragraph (b) is included because under section 3 of the Land Registration (Scotland) Act 1979, title to registered property is vested by registration and not by the conveyance or other deeds that gave rise to the registration.

##### *Section 2 - Tenement Boundaries*

12. *Section 2* is concerned with the boundary features in tenement buildings and restates the common law rules of ownership of parts within a tenement. These rules will apply only where the title deeds to the property or any other enactment do not make different provision.
13. *Subsection (1)* describes the boundary between sectors as the middle of the structure which separates them. If a sector is not adjacent to another sector, it extends to and includes the solum or any structure which is the outer surface of the tenement building; or it extends to the boundary that separates the tenement from another building. “Solum” is defined in *section 29* as the ground on which a building is erected.
14. *Subsection (2)* states that a structure which wholly or mainly serves one sector will be considered as belonging to that sector only. This means that, for example, the front door of a flat leading to the close is part of the flat and not of the close.
15. *Subsections (3) and (4)* restate the special rules of the common law in relation to the top and bottom flats in a tenement. The boundary of a top flat extends to include the roof over that flat (*subsection (3)*) while *subsection (4)* provides that the boundary of the bottom flat extends to and includes the solum under that flat. *Subsection (5)* sets out that the boundary of a close extends to and includes the roof over, and the solum under,

the close. The “close” includes, under [section 29](#), the passage, stairs and landings in a tenement where they provide common access to two or more flats.

16. *Subsection (6)* restates the common law rule that ownership of the airspace above the building goes with ownership of the solum. If a sector of the tenement includes the solum of the building, or a part of it, then that sector will also have within its boundaries the airspace above the building and that directly over the solum (or the part of the solum that is included in the sector). Where, under the titles, the solum is the common property of all of the owners in the tenement, the airspace is likewise common property.
17. *Subsection (6)* is qualified by *subsection (7)*. If the roof of the building slopes, ownership of the triangle of airspace lying between the surface of a sloping roof and an imaginary horizontal plane passing through the highest point of the roof, goes with the ownership of the roof and not with the ownership of the solum. This is important where the top floor flat wishes to build a dormer window into the airspace. Where the title deeds provide that the roof is common property, then the triangle of airspace is also common property.

### ***Section 3 – Pertinents***

18. *Section 3* deals with the pertinents to tenement buildings. These are the parts of the tenement building which are not within the boundaries of individual flats. The ownership of these parts of the building requires to be apportioned among the various flats. The rules in [section 3](#) will only apply where provision for ownership is not made in the title deeds or in any other enactment.
19. Under *subsections (1)* and *(2)* the owners of all the flats which obtain access by way of a close or a lift (where the lift allows access to more than one flat) will have a right of common property in the close and lift. Both “close” and “lift” are defined in [section 29\(1\)](#). *Subsection (5)* explains that the rights of common property are held in equal shares.
20. *Subsection (3)* provides for the ownership of land adjoining the tenement building. It sets out that any land pertaining to a tenement building will be owned by the flat or flats nearest to that land or piece of land. This rule does not apply to a path, outside stair or other piece of land that acts as a means of access.
21. *Subsection (4)* deals with any other part of the tenement which is not provided for in *subsections (1) to (3)*. Examples given are a path, outside stair, fire escape, rhone, pipe, flue, conduit, cable, tank or chimney stack.
22. Ownership of these residual parts is allocated according to a service test. Where a part of a tenement serves one flat, under *subsection (4)(a)*, it will be a pertinent of that flat only. Where two or more flats are served by a part, a right of common property in that part will attach as a pertinent to those flats. The shares of common property amongst those owners whose flats are served by the pertinent will be equal, regardless of the extent of service.
23. *Subsection (5)* apportions rights of common property into equal shares, except in the case of a chimney stack. If a chimney stack is considered common property under the provisions of the Act, then shares will be apportioned according to the ratio which the number of flues serving a flat bears to the total number of flues in the stack. “Chimney stack” is defined in [section 29\(1\)](#).