

TITLE CONDITIONS (SCOTLAND) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Community Burdens

Section 25: The expression “community burdens”

127. This section introduces Part 2 of the Act, which is concerned with community burdens. The label ‘community burden’ is a new term, but the types of burden that can be included under this name already exist in large numbers. The rules in Part 2 for community burdens are essentially designed to allow burdens affecting communities to be governed by majority rule. ‘Communities’ can take a variety of forms, for example, modern housing estates, tenements, terraces, sheltered and retirement housing and business parks. The term ‘community’ is used in the Act in a technical sense (for which see section 26(2)). A community is a group of four or more properties all subject to the same or similar burdens and which can be mutually enforced. Mutually enforced means that the owner of each property in the community will be able to enforce all or at least some of the burdens against the others. Part 2 applies to all community burdens, whether created before or after the Act comes into force (section 119(10)).
128. *Subsection (1)* defines ‘community burdens’. Its essence is the mutual enforceability of common burdens. A common scheme refers to the imposition of burdens that are normally, but not necessarily, exactly the same for each property. Community burdens only exist where burdens are imposed under a common scheme on four or more units and each of those units can enforce all or some of those burdens against the others. The meaning of ‘unit’ is given in section 122(1).
129. *Subsection (2)* is included to ensure that there is no doubt that where burdens have been imposed under a common scheme in relation to a sheltered or retirement housing development the fact that no burdens may have been imposed on a unit retained for special use (typically as a warden’s flat) would not prevent the whole development from being a community for the purposes of Part 2 of the Act. Section 26(2)(b), which defines the term ‘community’ in the legal sense used by the Act expressly provides that a unit, such as a warden’s flat, that is not subject to community burdens is nevertheless part of the community. This is an exception to the general rule that to form part of the community it is necessary for the unit to be a burdened property under the common scheme as well as a benefited property.

Section 26: Creation of community burdens: supplementary provision

130. Community burdens are real burdens and are generally subject to the same rules as other real burdens. Section 2 makes general provision as to what a real burden may do. *Subsection (1)* amplifies those provisions by giving a non-exhaustive list of possible content for community burdens. This is in recognition that communities may require a degree of regulation and management to put it beyond doubt that certain obligations can be validly created as community burdens. There is an equivalent provision in section 3(4) to make it clear that a community burden may be for the benefit of

the community rather than individual units. The meaning of ‘manager’ is given in section 122(1).

131. *Subsection (2)* defines ‘community’. This refers back to the definition of “community burdens” in section 25. A community is made up of units all burdened with obligations imposed under the same common scheme. It comprises the units which can enforce or are burdened by some - not necessarily all - of the burdens imposed under the common scheme. This means that a community remains the same notwithstanding that one or more units may cease over time to be subject to or entitled to enforce a particular burden. This may happen, for example, if the owner of a burdened property obtains a discharge. Paragraph (b) takes account of the fact that a unit in sheltered or retirement housing which is used in a special way (for example as a warden’s flat) might not itself be subject to the burdens. Nonetheless it is part of the community, and is, for example, counted for the purposes of majority decision-making (for which see sections 28 to 37).

Section 27: Effect on units of statement that burdens are community burdens

132. This section introduces a conveyancing shortcut. The effect of using the term ‘community burdens’ in a constitutive deed will be to create reciprocal enforceability. That is one of the two criteria for community burdens set out in section 25(1). Notwithstanding the use of the term, however, the burdens will not qualify as community burdens unless the other criterion (common scheme burdens imposed on four or more units) is also met. The term ‘community burden’ will not *have* to be used in order to create a community burden. It could simply be called a real burden: the criteria in section 25 are the decisive factors in every case.

Section 28: Power of majority to appoint manager etc.

133. This is the first of a group of sections (sections 28 to 31) which set out some basic rules for the management of a community. The rules are **default rules** – or in other words, they apply **only** to the extent that *alternative (or contrary)* provision **is not made** in the titles.
134. *Section 28* itself confers on the owners of a majority of units various powers in relation to managers. The meaning of “manager” is given in section 122(1).
135. *Subsection (1)* sets out the powers in question. Since acts carried out under paragraphs (a) and (b) bind both the dissenting minority and also successors (section 30), it is necessary – through paragraphs (c) and (d) – to allow the acts to be undone if a different majority can be assembled. Although paragraph (a) permits the majority to specify the terms of a manager’s appointment and paragraph (b) permits a majority to confer powers exercisable by a majority on a manager, this has to be read alongside the opening paragraph of the subsection which provides that it is *subject to the terms of the community burdens*. This means that paragraphs (a) and (b) do not permit a majority to interfere through a manager with the basic management regime set out in the titles. There is no limit on who can be appointed as a manager under paragraph (a): it could be one of the owners or a professional property manager. The reference to section 54(5) (a) means that in sheltered or retirement housing a majority of at least two thirds of the units will be required in order for them to use the power under paragraphs (b) or (c). The ability of a majority to dismiss a manager under paragraph (d) is to apply only where the title deeds do not provide for an alternative majority (but this should be considered alongside section 64 which provides for a default two thirds majority for dismissal that overrides the title deeds). The power to dismiss a manager under paragraph (d) will not be operational where a valid manager burden is in existence, hence subsection (1) is subject to section 63(8).
136. *Subsection (2)* gives a non-exhaustive list of the powers that might be conferred on a manager. Paragraph (b) of subsection (1) provided that only “their” powers (i.e. the powers of a majority, whether collectively or individually) may be conferred on a manager. The majority would obviously be unable to confer on a manager the power

to do something that they themselves could not. The powers mentioned in paragraphs (a) and (c) in subsection (2) are collective powers of a majority, and include powers given by virtue of sections 29 and 32 to 37. The power mentioned in paragraph (b) is an individual power: it is of the very essence of a community burden (section 25(1)(b)) that the owner of each unit has a right to enforce the community burdens. The conferral of powers may be subject to qualification. The extent of the powers delegated is a matter for the majority's discretion. Section 54(5)(a)(ii) provides that power to vary burdens under paragraph (c) may only be delegated to a manager in a sheltered or retirement housing complex if the burdens are not core burdens (as defined by section 54(4)). The power to discharge community burdens may not be conferred on a manager in this situation.

137. *Subsection (3)* makes provision for voting in a case where a unit is owned in common. The most frequent example of this is where husband and wife own the property together, but it is possible for other arrangements to occur and for ownership to be split unequally e.g. on a 75%/25% basis. Subsection (3) means that the owner of more than a one half share of a unit, would be able to exercise the vote in respect of the property for the purposes of subsection (1). If several co-owners taken together owned more than a one half share of the unit, then they would be able to collectively exercise the vote attached to the unit (provided, of course that they shared the same voting intention). Where, however, the unit is held in equal shares and the owners who wish to use section 28 do not own a majority share of the unit, that unit would not count towards a majority. Where husband and wife own equal *pro indiviso* shares in a unit they would both have to agree for the unit to be included in the calculation of the majority.
138. *Subsection (4)* allows the powers in subsection (1) to be used for managers appointed in some other way (i.e. other than by a majority of owners). Thus a manager might have been nominated in the constitutive deed either as a first manager (under section 26(1)(d)) or by virtue of a manager burden (under section 63).

Section 29: Power of majority to instruct common maintenance

139. *Section 29* applies where there is no provision in the title deeds of a particular community for decision making on common maintenance. It provides a default mechanism to allow the owners of a majority of units to arrange for maintenance to be carried out and paid for. In order for this to be fully effective, the section provides that a majority would be able to require each owner to deposit a contribution in advance of that person's estimated share of the cost. 'Maintenance' is defined in section 122(1) and includes repairs. However, the section does not apply to improvements unless they are reasonably incidental to the maintenance. 'Unit' is also defined in section 122(1).
140. As *subsection (1)(a)* makes clear, section 29 is concerned with **common** maintenance, that is to say, with maintenance obligations imposed by community burdens on more than one unit. Paragraph (a) makes clear that there must be a community burden providing for common maintenance in the title deeds for section 29 to operate. The section is only concerned with majority *enforcement* of these burdens: it is not *creating* new maintenance obligations where none existed previously. Paragraph (b) of subsection (1) requires the cost of carrying out the works to be fully apportioned by the community burdens.
141. *Subsection (2)* sets out a list of powers. These are exercisable, not by a majority of units in the community, but by a majority of the units *subject to the particular maintenance obligation* (which may not be the same thing). The powers allow the majority to require each owner to deposit a contribution in advance based on an estimate of that person's share of the cost. Paragraph (b) allows the money to be collected in advance of the repair. Paragraph (e) allows owners to change their minds. The powers are default provisions and the community burdens may provide for different mechanisms to apply.
142. *Subsection (3)* makes provision for voting in a case where a unit is owned in common. The most frequent example of this is where husband and wife own the property together,

but it is possible for other arrangements to occur and for ownership to be split unequally e.g. on a 75%/25% basis. Subsection (3) means that the owner or owners of more than a one half share of a unit would be able to exercise the vote in respect of their property for the purposes of subsection (2).

143. Subsection (2) requires a notice to be sent to each owner detailing the sum of money to be deposited. Subsection (4) provides that when this happens owners must be given certain additional details in order to provide them with information regarding the nature of the works, the cost, and timescale for the works, and the apportionment of the cost and how and where the monies collected will be held.
144. Subsection (5) provides that the monies must be held in an interest bearing bank or building society account. The money is to be held by the account holders in trust for owners who have deposited money (subsection (8)). The account holders do not have to be owners of units within the community: the account holder could be, for example, a solicitor acting as agent or a manager. The account should only be operable by those authorised by the majority to do so in terms of paragraph (c) of subsection (2).
145. Subsection (6) requires the owners to be notified of any modification or revocation that affects the information given under subsection (4).
146. Subsection (7) makes provision for exhibition of tenders received for the works and for a refund if the work has not commenced within a certain period. If, however, the works have commenced before the demand for a refund is received, then there is no obligation to repay the monies even if work commenced after the date stated in the timetable.
147. Subsection (8) makes provision for the refunding of any monies left over after the work has been completed. In the absence of alternative written agreement, each owner should receive the amount contributed by him or her plus accrued interest less his or her share of the cost of the works.

Section 30: Owner's decision binding

148. Section 30 confirms the principle of majority rule. Decisions, and acts (such as the appointment of a manager), bind both the dissenting minority and also incoming owners. An incoming owner would, for example, be liable for maintenance costs which had already been agreed to (and see sections 9(1) and 10). The section is *not* confined to the default code but applies also to decisions and acts carried out in terms of the title deeds.

Section 31: Remuneration of manager

149. If a professional manager is used, a fee will be due, probably at regular intervals. The amount is a matter for negotiation with the manager. Section 31 apportions that amount equally among owners in the community (subject to different provision in the titles). The second half of section 31 provides rules for apportioning liability between co-owners. The manager is entitled to payment in full from a co-owner. The co-owners are only liable in a question amongst themselves for a share equal to their share of ownership of the unit.

Section 32: The expressions “affected unit” and “adjacent unit”

150. An individual owner, or a small group within the larger community, may wish to discharge or vary one of the burdens affecting their property. Alternatively, a majority group within the community may wish to vary or discharge the burdens affecting the whole community, for example, to update or correct an existing deed of conditions. Under the present law, a deed of variation or discharge, even for a single unit, must be granted by the owners of all the units in the community. Sections 33 to 36 introduce two new mechanisms which may be used to vary or discharge a community burden in circumstances where this is not provided for in the relevant title deeds. A variation or

discharge under sections 33 or 35, if unopposed, can affect the enforcement rights of the whole community in respect of one or several units even although not all owners in the community have signed the deed. A section 33 deed of variation or discharge may also vary the burdens affecting, or even impose new burdens on, properties in the community without the owners of those units signing the deed. This is not possible for a section 35 deed of variation or discharge as the owners of the affected units must sign. (See section 35(1)). If opposed, such a deed can still operate as an “ordinary” deed of discharge or variation to discharge or vary the enforcement rights of those units whose owners have all signed the deed. A deed of discharge or variation under section 33 is particularly suitable where there are changes to be made to the burdens affecting all or many of the units. A deed under section 35 is more suited to a variation or discharge of a burden affecting one or a few units only.

151. *Section 32* explains some of the terminology used in sections 33 to 36. ‘Communities’ consist exclusively of ‘units’ (section 26(2)). For the purposes of these sections ‘**affected** unit’ is used to describe the property/properties for which the burden is to be changed, i.e. the burdened property. An ‘**adjacent** unit’ is one that is near to an affected unit: it must be within 4 metres of the unit. The 4 metre distance is subject to section 125, which makes provision for disregarding any pertinent of either property and the width of any intervening road if less than 20 metres. Roads and pertinents are, however, ‘disregarded’ in different ways – see the note to section 125(b). ‘Discharge’ is the extinction of a burden, while ‘variation’ includes both changes to an existing burden to impose a new obligation (section 122(1)) and also the imposition of a new burden.

Section 33: Majority etc. variation and discharge of community burdens

152. The procedure in *section 33* allows a community burden to be discharged or varied in relation to any or all of the units in a community. Section 33 both allows a constitutive deed to make provision for the variation or discharge of community burdens (subsection (1)(a) and provides a default rule (subsection (2)). Essentially, the default procedure involves: signature of a deed by the owners of a majority of the units; notification of the proposal to those owners who did not sign; a period of 8 weeks in which those owners can raise the matter in the Lands Tribunal and if they do not, the endorsement on the deed of an oath by the person proposing to register the deed that the intimation procedure has been complied with and a certificate by the Tribunal. The deed can then be registered and is effective against the whole community. The unit(s) which are to have the burden modified or removed - ‘*affected units*’ - will each require to have the deed of variation or discharge registered against them. *Subsection (1)* prescribes those who may grant the deed. Paragraph (a) provides that an express provision in the title deeds specifying those who may grant such a deed will apply. Where the titles do not make provision, subsection (2) will operate. An express provision in the title deeds nominating certain properties would have to comply with the requirements of section 3 on what constitutes a valid real burden. The procedural requirements set out in section 34 only apply to deeds granted under subsection (2) and do not apply where there is express provision in the constitutive deed for owners to vary or discharge burdens as envisaged by section 33(1)(a). However, it should be noted that in terms of section 55, before the procedure under section 33(1) or (2) can be used in sheltered or retirement housing, a community consultation notice must be issued and the consultation period observed.
153. *Subsection (2)* provides that variation and discharge is granted either by the owners of a majority of units or, where authorised to do so, by the manager. Authorisation to the manager might be contained in the constitutive deed (section 26(1)(c)), or might be given following a decision by a majority of owners (section 28(1)(b) and (2)(c)). Paragraph (a) ensures that the majority must always consist of at least 2 owners, regardless of the number of units one owner may have.
154. *Subsection (3)* ensures that if the owner(s) of the affected unit(s) (i.e. the grantee(s)) sign, their unit(s) count for the purposes of assembling a majority.

155. *Subsection (4)* provides that an owner (or owners collectively owning more than half of a unit owned in common) can grant the deed for the purposes of section 33. Where, however, a unit is held in equal shares and the owners who are willing to sign the discharge do not own a majority share of the unit, that unit would not count towards a majority. It is possible for other ownership arrangements to occur and for ownership to be split unequally e.g. on a 75%/25% basis. Unlike under the present law, 'owner' includes a person who has right to the property but has not completed title by registration (section 123(1)(a)); but (section 60(1)) there must then be deduction of title (other than for units on the Land Register). A manager, however, need not deduce title (section 60(2)). The owner 'grants' a deed by subscribing it in accordance with section 2 of the Requirements of Writing (Scotland) Act 1995, and in practice the deed will also be witnessed under section 3 of that Act. A grantee is not required (section 69(1)) but would be normal in practice. No particular deed or form of deed is specified. Registration can be by a grantor as well as by a grantee (section 69(2) and (3)); and while the deed need only be registered against the affected unit, the Keeper has power to make a corresponding entry against the title sheets of the other units in the community (section 105).
156. *Subsection (5)* refers to the provisions in section 54 for 'core burdens' within sheltered or retirement housing. The effect is that a deed under section 33(2) can only vary and not discharge a "core burden" as defined in section 54(4). Furthermore, a two thirds majority would be needed rather than a simple majority. In relation to non-core burdens a simple majority would suffice. The modifications made by section 54(5) do not apply to a deed of variation or discharge granted in accordance with provisions made in the constitutive deed (i.e. under section 33 (1)(a)).

Section 34: Variation or discharge under section 33: intimation

157. *Section 34* provides for the intimation of a proposal to vary or discharge a community burden by a deed signed in accordance with section 33.
158. *Subsection (1)* requires notification of a proposal to vary or discharge a burden under section 33 to all the owners in the community who did not grant the deed. This could include an owner of a less than one half share of a unit who did not grant the deed (see section 33(4)) notwithstanding that the unit counts towards the assembly of a majority because the other owners of that unit signed the deed.
159. *Subsection (2)* provides for the intimation of the notice. A copy of the executed deed and an individual written notice in, or near to, the form in schedule 4 must be sent to each owner of units in the community that did not grant the deed. Rules for sending are given in section 124. The notice advises owners of their right under subsection (3) to make an application to the Lands Tribunal to preserve the burden. Such an application is made under section 90(1)(c).
160. *Subsection (3)* allows any owner in the community who did not grant the deed to apply to the Lands Tribunal for its preservation, provided the application is made within eight weeks of the date of the last intimation under section 34(1). Unlike a notice of termination under sections 20 to 24, a successful application for preservation preserves enforcement rights for all those benefited properties whose owners did not all sign the deed of discharge or variation regardless of whether or not a particular owner of such a benefited property actually made an application for preservation to the Tribunal. It also preserves unvaried the burden in the title of any burdened property whose owners did not all sign the deed. However, where all the owners of a benefited property have signed the deed of discharge it operates and can be registered under section 15 as a valid discharge in respect of the enforcement rights of that property.
161. *Subsection (4)* adopts the provisions in subsections (2) to (4) of section 37 subject to the modifications in *subsection (5)*. This means that a deed of variation or discharge is not effective under section 33 (that is it does not vary or discharge burdens enforceable by or against proprietors who have not signed the deed) unless when registered it has endorsed

on it a certificate from the Lands Tribunal. In addition it will not vary or discharge any burden described in the Lands Tribunal certificate, as that burden is the subject of an application for preservation (section 37(3)). A certificate would only be endorsed after the expiry of the 8 week period referred to in subsection (3) in which applications for preservation can be made and would only be available if no application is made (or all applications made have been withdrawn) or if applications received do not seek to preserve all the burdens which form the subject matter of the deed. The application of subsection (4) of section 37 means that the person who proposes to register the deed has to swear or affirm that the intimation requirements in subsections (1) and (2) of section 34 have been carried out and also provide under oath/affirmation, the date on which the 8 week period expired. It should be noted that all this is only required before registration but in practice it will have to be endorsed before sending the deed to the Lands Tribunal for a certificate as the Tribunal will only in some cases know of the existence of the deed and the final date for application from the terms of the endorsement on the deed submitted.

162. *Subsection (6)* provides for situations where the granter is unable to swear or affirm in person.

Section 35: Variation and discharge of community burdens by owners of adjacent units

163. *Section 35* introduces a second default mechanism for the discharge and variation of community burdens. It permits a burdened proprietor to obtain a variation or discharge of a community burden from the benefited proprietors of properties lying within 4 metres of the burdened property, if there are any. It is subject to a notification procedure. The procedure is essentially the same as for a deed of variation or discharge granted under section 33. In this case the deed must be signed by the owners of those units lying within a 4 metre radius of the burdened property and by the burdened proprietor. Notification is then given to other owners within the community who have 8 weeks in which to raise the matter before the Lands Tribunal if they wish to preserve the burden. Section 36 makes provision for intimation of a proposal to register a section 35 deed. After these requirements are met an oath or affirmation that intimation has been duly given should be endorsed on the deed. In addition, a certificate must also be obtained from the Lands Tribunal confirming that no application has been made to preserve a burden mentioned in the deed. Once this is done, the deed may be registered against the affected unit. The deed is effective against the whole community except in respect of any burden that is described on the Lands Tribunal certificate as the subject of an application for preservation.
164. *Subsection (1)* provides that a burdened proprietor wishing to vary or discharge a community burden may do so by obtaining a discharge from all ‘adjacent units’. Owners of “affected units” must also sign the deed. See the note for section 32. Paragraphs (a) and (b) provide for some circumstances in which the procedure cannot be used. Paragraph (a) prevents a section 35 discharge from affecting facility or service burdens or burdens imposed on sheltered or retirement housing development. Paragraph (c) requires notification under section 36 of a proposal to use section 35 to all the other benefited proprietors in the community.
165. *Subsection (2)* ensures that an owner (or owners collectively owning more than half of a unit owned in common) can grant the deed for the purposes of section 35. Co-owners who did not sign the deed would require to be notified under the procedure in section 36. If under section 37 the Lands Tribunal finds in favour of preservation so that the deed cannot be registered as effective against all units, it could still be registered as an “ordinary” discharge but only if it complies with section 15, which would require the signature of all the owners of each benefited property which was losing enforcement rights. Likewise, an “ordinary” deed of variation would only be effective against the burdened property if all the owners of that property had signed it.

Section 36: Variation and discharge under section 35: intimation

166. *Subsection (1)* requires notification of a proposal to discharge a burden under section 35 to all the owners who did not grant the deed. This will include any benefited properties that are not adjacent units (i.e. are outwith the 4 metre distance), any co-owners of adjacent units who did not sign the deed and any owner of an affected unit who did not sign the deed.
167. *Subsection (2)* provides for the intimation of the notice. A choice may be made to use either (or indeed a mixture of both) of the methods in paragraphs (a) and (b). Individual notification may not always be possible if the extent of the community and therefore of the benefited proprietors is not known. The methods are by either “sending” (as defined in section 124) an individual written notice as set out in schedule 5 or by affixing a conspicuous notice as set out in schedule 6 to a clearly visible part of the burdened property and to lamp posts. Paragraph (c) provides that where it is not possible to display conspicuous notices, intimation requires to be given by newspaper advertisement.
168. *Subsection (3)* provides for the required details of any advertisement used under subsection 2(c).
169. *Subsection (5)* adopts the provisions in section 21 on affixing a notice to the burdened property and to the appropriate lamp posts. The words “by virtue of subsection (2) (b)” mean that the date specified is the date specified in the affixed notice required by subsection (2)(b). This requires the notice to be in the form set out in schedule 6 and that form requires the specification of the date on which the period set out in section 37(1) expires. The result is that when reading section 21(6)(a)(ii) for the purposes of a notice affixed in accordance with section 36(2)(b) the reference to renewal date is to be taken as a reference to the date set out in the notice affixed under section 36(2)(b) on which the period set out in section 37(1) expires.

Section 37: Preservation of community burden in respect of which deed of variation or discharge has been granted as mentioned in section 35(1)

170. *Subsection (1)* allows any owner of a benefited property (or an owner of the burdened property: see the note on section 36(1)) who did not grant the deed to apply to the Lands Tribunal for its preservation, provided the application is made within 8 weeks of the date of the last intimation under section 36(2). Subsection (6) provides that intimation by affixing is given on the first day when the notice is affixed. A successful application means that the enforcement rights and the burdens in the titles of all those units whose owners have not all signed the deed are unaffected by the registration of the deed.
171. The deed of variation or discharge will vary or discharge the community burden in respect of any unit whose owner has granted it, or if there are several co-owners, where they have all granted the deed. In respect of benefited properties whose owners did not grant the deed (or for burdened properties where there was a co-owner who did not sign), *subsection (2)* provides that the burden will not be varied or discharged unless a certificate is endorsed on the deed by the Lands Tribunal stating that no application for preservation has been received by the Tribunal (or all such applications have been withdrawn) or the application only relates to some of the burdens referred to in the deed. The Tribunal cannot give a certificate until after the 8 week period has expired. For practical purposes the oath or affirmation required by subsection (3) will need to be endorsed before sending the deed to the Tribunal in order to provide the Tribunal with sufficient information as to the date the 8 week period expired.
172. *Subsection (3)* provides that the enforcement rights of and the burdens in the titles of those units whose owners have not all signed the deed are not affected by the deed in respect of a burden described in the Lands Tribunal certificate, that is one which is the subject of an application for preservation.

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

173. *Subsection (4)* provides that a person, before submitting a deed of variation or discharge under section 35 for registration, must swear or affirm before a notary public that the proposal to register the deed has been duly intimated.
174. In *subsection (5)* the provisions of section 22(2) are adopted in relation to circumstances in which the granter is unable to grant in person.