

TITLE CONDITIONS (SCOTLAND) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 6: Development Management Scheme

301. **Part 6** of the Act reintroduces the Development Management Scheme which formed part of the recommendations made by the Scottish Law Commission. The Scheme proposed by the Commission can be found in schedule 3 to the draft Bill attached both to the Commission's Report on Real Burdens and the Executive's Consultation Paper on the draft Bill [<http://www.scotland.gov.uk/consultations/justice/dtcb-00.asp>]. The Commission's Scheme recommended the creation of a new form of corporate body to form the Owners Association to run a development in accordance with the terms of the Scheme. As the creation and regulation of such a corporate body is in terms of the Scotland Act 1998 reserved to the Westminster Parliament, the Scheme itself does not form part of the Act. The Scheme will be set out in a statutory instrument made by the Secretary of State under section 104 of the Scotland Act 1998. Part 6 provides for the manner in which the Scheme can be applied and disapplied. As the Scheme is made up of rules rather than real burdens section 72 applies various of the provisions relating to real burdens to the rules in the same manner to the way the provisions apply to community burdens.

Section 71: Development management scheme

302. *Subsection (1)* of **section 71** allows the owner or owners of land to apply the Development Management Scheme to that land. The Development Management Scheme is applied by the registration of a deed of application. The Scheme only applies if a deed of application is registered: it has no automatic application. There is no special form of deed of application. It must be granted by the owner of the property in question. "Owner" includes a person who has right to the property but has not completed title by registration (section 123(1)(a), but (section 60 applied by section 72) there then must, unless the land is already registered on the Land Register, be a deduction of title. An 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. The Scheme takes effect, either immediately on registration, or on a date identified in terms of paragraph (a) or (b). This follows the pattern of section 4(1). The Scheme is defined in subsection (3). The Scheme is to be set out in an order made under section 104 of the Scotland Act 1998. Insofar as that order permits the Scheme may be applied with variations to a particular development. All the rules of the Scheme for any particular development will therefore be set out in the order or in the deed of application itself. For ease of reference and drafting the rules set out in the order may be repeated in full in the deed of application. Variations to the rules set out in the order may include additional rules as well as changes (to the extent permitted) to the rules in the order.
303. *Subsection (2)* requires the deed of application to include certain information. The deed of application must describe the development, define Scheme property and unit for the purposes of the particular Scheme and give the name of the owners association to

be established by the Scheme. The name of the owners association must begin or end with the words “Owners Association” in order to ensure that any party dealing with the body can be made aware of its status. The deed of application must also name the first manager of the owners association.

304. *Subsection (3)* defines the Development Management Scheme by reference to the order to be made under the Scotland Act 1998. The definition also takes account of the fact that the Scheme is likely to be applied with variations to any particular development with the result that there may be many different versions of the Scheme. While, therefore, it is only possible to apply the Scheme set out in the order (with variations), once applied each different version of the Scheme is included within the definition of the Development Management Scheme. The need for this distinction is clear from section 73 which makes provision for the particular Scheme applied to a development to be disapplied.

Section 72: Application of other provisions of this Act to rules of scheme

305. Although the rules of the Scheme are not real burdens, they have a close functional resemblance, particularly to community burdens. This is acknowledged by *section 72*, which applies a number of provisions from parts of the Act concerned with real burdens. Scheme rules are not covered by the definition of “title condition” in section 122(1) but it is possible for an order to be made under section 122(1) to prescribe as title conditions other conditions relating to land, such as the rules of a Development Management Scheme.

Section 73: Disapplication

306. Once applied to a development by a deed of application under section 71, the Scheme continues to apply unless or until it is formally disapplied. Disapplication means removing the Scheme completely so that it no longer affects all or part of the development. Disapplication is to be distinguished from the discharge or variation of individual rules of the Scheme. *Subsection (1)* provides a mechanism to disapply the Scheme. Essentially a Development Management Scheme is disapplied by registering a deed of disapplication against the development. There is no special form of deed required. The deed is granted by the owners association for the development in accordance with the Scheme. For example the Scheme may provide for the Scheme only to be disapplied following a special majority of owners at a general meeting.
307. *Subsection (2)* enables the deed of disapplication not only to disapply the Development Management Scheme but to impose real burdens to replace the Scheme. The deed of disapplication is a constitutive deed but the normal requirements of section 4 are relaxed to allow the owners association rather than all the owners of the individual parts of the development to grant the deed.
308. *Section 74* requires the owners association to intimate a proposal to disapply the Development Management Scheme to all the owners of the individual units in the development. In terms of section 74(3) each owner has 8 weeks in which to object to the disapplication of the Scheme by making an application for preservation of the Scheme to the Lands Tribunal. *Subsection (3)* introduces safeguards for the owners of units who may not wish to see the Development Management Scheme disapplied. Registration of a deed of disapplication will not either disapply the Scheme nor create real burdens unless it is endorsed with a certificate from the Lands Tribunal stating either that no applications for preservation of the Scheme have been received by the Tribunal or any such application has been withdrawn. If an application is made to the Tribunal for preservation of the Scheme then it is granted as of right if not opposed (section 99). If the application for preservation fails then the Scheme is disapplied not by registration of the deed of disapplication but by registration of the order of the Tribunal.
309. *Subsection (4)* means that before submitting the deed of disapplication for registration the owners association must swear or affirm before a notary public (and endorse

the deed accordingly) as to the date on which the objection period expires and that section 74 has been complied with. *Subsection (5)* means that an authorised person may so swear or affirm for the owners association.

Section 74: Intimation of proposal to register deed of disapplication

310. *Subsection (1)* requires the owners association to intimate any proposal to disapply the Development Management Scheme to all the owners of the units in the development.
311. *Subsection (2)* provides that intimation is to be given by “sending” a copy of the deed along with a notice. There is no prescribed form of notice but the notice must both state the effect of registration of the deed of disapplication and inform the owner of the right to object to the disapplication of the Scheme by making an application for preservation of the Scheme to the Lands Tribunal. It must also state the date by which an application to the Tribunal has to be made.
312. *Subsection (3)* provides that an owner who has not already agreed (perhaps because they were not present at a general meeting) may apply for preservation of the Scheme during the period of 8 weeks following the last date of intimation to the owners. While intimation must be given to all owners not all owners will therefore have a right to object.