

**EXPLANATORY MEMORANDUM TO
THE TITLE CONDITIONS (SCOTLAND) ACT 2003 (DEVELOPMENT
MANAGEMENT SCHEME) ORDER 2009**

2009 No. 729 (S.2)

1. 1.1 This explanatory memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of Her Majesty. This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the Instrument

2.1 This Order makes provision consequential on the Title Conditions (Scotland) Act 2003 (“the 2003 Act”), an Act of the Scottish Parliament. The aim of the Act is to make provisions to provide for the establishment of a model Development Management Scheme. The Scheme can be applied to any type of housing or commercial development, including tenements. The 2003 Act provides for the manner in which the scheme can be applied and disapplied.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The Order is to be made in exercise of the powers conferred by sections 104, 112(1) and 113(2), (3) and (7) of the Scotland Act 1998 (“the 1998 Act”). The Order is, by virtue of section 115(1) and paragraphs 1 and 2 of Schedule 7 to that Act, subject to negative resolution procedure. Section 104 of the 1998 Act provides for subordinate legislation to be made in the UK Parliament, which contains provisions that are necessary or expedient in consequence of an Act of the Scottish Parliament, in this case the 2003 Act.

3.2 This section 104 Order is expedient in consequence of the 2003 Act and will make provision for the creation of Development Management Schemes to regulate the management of property developments and including common property and will set out the rules to govern the Development Management Schemes, which are intended to provide an optional mechanism for managing property where there is a shared interest. The management of the scheme is entrusted to an owners’ association, the membership of which consists of all the owners of the units in the development and the Order provides that the owners’ association will be a body corporate. The Development Management Scheme is a model scheme for future property developers to use when drawing up title deeds for new developments. The Scheme could also be applied to existing developments, but only with the agreement of all the owners within the development.

3.3 Property law is devolved to the Scottish Parliament. However, because the owner’s associations will establish a new form of business association and the creation, operation and regulation of business associations is a reserved matter under the Scotland Act 1998 an Order under section 104 of the Scotland Act is the most appropriate legislative mechanism to make provision for Development Management Schemes. The Order will provide that these Development Management Schemes may be established as a new form of business association which will not have the same formality associated with a company. The Order in the

main takes its lead from the provisions of the 2003 Act and also the draft Scheme contained in the Scottish Law Commission's Report on Real Burdens (2000).

4. Legislative Context

4.1 The Title Conditions (Scotland) Act 2003 received Royal Assent on 3 April 2003 and the main provisions of the Act became fully effective at the same time as the Abolition of Feudal Tenure etc. (Scotland) Act 2000, on 28th November 2004. The 2003 Act makes provisions to provide for the establishment of a model Development Management Scheme. The Scheme can be adapted for use in other developments with shared facilities including tenements. The 2003 Act provides for the manner in which the Scheme can be applied and disapplied.

4.2 The 2003 Act achieves greater clarity in the law. It creates a statutory framework for the creation of real burdens over land and for the way in which individuals may impose their own controls on property. The 2003 Act includes provisions regulating real burdens that affect a group of properties and sets out default mechanisms for the variation or discharge of such burdens.

5. Territorial Extent and Application

5.1 This instrument extends to Scotland only.

6. European Convention on Human Rights

6.1 The Parliamentary Under Secretary of State at the Scotland Office has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

In my view the provisions of the Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009 are compatible with the Convention rights.

7. Policy background

7.1 The Title Conditions (Scotland) Act 2003 ("the 2003 Act") largely implemented the recommendations of the Scottish Law Commission *Report on Real Burdens* (Scot Law Com No 181), published in October 2000. It aimed to achieve greater clarity in the law and reduce the number of outdated burdens by making it easier to vary or discharge them. Part 6 of the Act made provision for a model Development Management Scheme, based upon the Scottish Law Commission's *Report on the Law of the Tenement* (Scot Law Com No. 162).

7.2 The 2003 Act, at Part 6 made provision for the Development Management Scheme, which is a model scheme for future property developers to use when drawing up title deeds for new developments. The Scheme could also be applied to existing developments but only with the agreement of all the owners within the development. It is intended for use in more complex developments, and aims to reduce conflict by clearly setting out where obligations and liabilities lie, for example for maintenance, in relation to shared facilities. It can be applied to tenements.

8. Consultation outcome

8.1 The Scottish Law Commission recommended use of the Development Management Scheme model. The Scheme as 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 was included in the Scottish Executive's Consultation Paper on the draft Bill.

9. Guidance

9.1 The Scottish Ministers intend to raise awareness of the Order with relevant organisations such as individual solicitors, housing officers within local authorities, the Law Society of Scotland and the Scottish Law Commission. Information will be published online.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument. The 2003 Act did not require a Regulatory Impact Assessment to be submitted to the Scottish Parliament, as the legislation primarily aimed to clarify the existing common law provision in this area. It is concerned with the private regulation of land between individuals and bodies who are contracting freely with each other.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The purpose of this instrument is to provide a new model scheme for future property developers to use when drawing up title deeds for new developments. Its aim is to reduce conflict by setting out clearly where obligations and liabilities lie, for example in relation to shared facilities. As the Order is concerned with the private regulation of land between individuals and bodies who are contracting freely with each other, there is no intention for the Scottish Ministers to monitor or review its use, unless once implemented, any concerns are raised by stakeholders about its practical implementation.

13. Contact

13.1 Jennifer Manton at the Scotland Office (jennifer.manton@scotlandoffice.gsi.gov.uk), tel: 020 7270 6749 can answer any queries regarding the instrument.

Scotland Office
March 2009