

ANGUS COUNCIL – HOUSING COMMITTEE – 7 OCTOBER 2004

ABOLITION OF FEUDAL TENURE ETC (SCOTLAND) ACT 2000

TITLE CONDITIONS (SCOTLAND) ACT 2003

TENEMENTS (SCOTLAND) BILL

**REPORT BY THE DIRECTOR OF LAW AND ADMINISTRATION
AND DIRECTOR OF HOUSING**

ABSTRACT

The purpose of this Report is to advise members of the legislative changes brought about by The Abolition of Feudal Tenure Etc (Scotland) Act 2000, The Title Conditions (Scotland) Act 2003 and the Tenements (Scotland) Bill.

1. RECOMMENDATIONS

The Committee is recommended to note the terms of this Report and the implications of the Acts and Bill and to approve the approach recommended by the Director of Law and Administration and Director of Housing.

2. INTRODUCTION AND BACKGROUND TO THE REFORMS

Report No 1195/00 was approved by the Personnel and Property Services Committee of Angus Council on 17 October 2000 and the Policy and Resources Committee of Angus Council on 24 October 2000. This Report set out the main background of the Abolition of Feudal Tenure Etc (Scotland) Act 2000.

Report No 335/04 was approved by the Resources and Central Services Committee of Angus Council on 11 March 2004. This Report set out the implications of the legislative changes in respect of Angus Council property. Report No 335/04 advised members that a separate report would be brought to the Housing Committee to deal with the specific implications for Council housing.

The Abolition of Feudal Tenure Etc (Scotland) Act 2000 ("the 2000 Act") and the Title Conditions (Scotland) Act 2003 ("the 2003 Act") have both received Royal assent and are now partially in force. The remainder of the Acts will come into force on 28 November 2004. This date is known as the "Appointed Day". In addition, it is expected that the Tenements (Scotland) Bill will obtain Royal Assent shortly and will also come into force on the Appointed Day.

3. IMPLICATIONS OF THE 2000 AND 2003 ACTS

3.1 The 2000 Act abolishes the right of a Superior to enforce burdens. On the Appointed Day, the Council, as Superior, will be unable to enforce many burdens contained in the Feu Dispositions of houses and areas of ground which have been sold.

It is considered that in the great majority of cases, burdens which previously existed in favour of the Council which were created in these Feu Dispositions will be extinguished on the Appointed Day and will be unable to be enforced. However, it must also be remembered that many of the burdens imposed in Feu Dispositions would be unenforceable today as a result of other legislation, or by the fact that the Council might not be able to prove that it still had sufficient interest to enforce such burdens.

However, the legislation does provide a means of preserving some burdens which exist in titles to properties which are already sold. These exist in limited circumstances. In order to preserve these burdens, the burdens must firstly be identified and thereafter a notice must be served to preserve the burdens. In relation to Council housing there are specific burdens which could be preserved which are detailed in Sections 3.2 and 3.3 below.

3.2 Common Facilities Burdens

These burdens are a particular type of burden, for example the obligation on six proprietors to pay a share of maintenance of a common access road or a common stairwell. These rights will automatically be preserved on the Appointed Day. Whilst these burdens will no longer be enforceable by the Council, all of the proprietors with the same burden in their title deeds will be entitled to enforce this burden against each other. The reasoning behind this is that the Council may no longer have an interest in the property but each proprietor can ensure that common facilities are maintained.

3.3 Amenity Burdens

These burdens are a particular type of burden, for example the prohibition on keeping more than one dog or cat or using the house as a dwellinghouse only.

It may be possible in certain specific situations to have burdens of this nature re-allotted as neighbour burdens. This means that the burden would then become enforceable by the neighbouring proprietors, rather than by the Council as Superior. In order for the Council to retain control in this situation the Council would need to own neighbouring land which has a building on it within 100 metres from the boundary of the burdened land. This is a technical preservation and it is considered that it is extremely difficult to preserve burdens of this type in Council housing estates. It is possible that in some estates, the Council will still own properties within 100 metres of ex-Council houses but there will also be a considerable number of properties where the Council has no properties within 100 metres. Therefore some ex-Council houses may have burdens preserved and others will not. This would potentially create a two tiered system.

With particular regard to amenity burdens, there are numerous other ways in which these burdens can be enforced by the Council. It is considered that all of the burdens which have been created as amenity burdens in Feu Dispositions can be enforced by means other than by the Council as a neighbouring proprietor and in fact in most cases the remedies would be more effective. For example, the obligation that a house should be used as a dwellinghouse only and not for any commercial purposes will be governed by Planning Law and therefore any proposed change of use of the property would require a planning application.

Appendix 1 contains a table detailing the burdens contained in Feu Dispositions of ex-Council houses which may not be enforceable by the Council after the appointed day. The third column of the table provides details of how many of these would be enforced by other means.

In addition, it would be a huge task to check Feu Dispositions for approximately 9,000 ex-Council houses and additional areas of ground to identify whether there are any burdens which could be preserved and thereafter to serve notices on owners of ex-Council houses.

In light of the foregoing comments, it is recommended that no preservation notices are served on the proprietors of ex-Council houses or additional areas of ground. If issues arise affecting the Council in Council housing estates, then there are other legal mechanisms for dealing with them.

A Working Group of the Society of Local Authority Lawyers and Administrators in Scotland (SOLAR) comprising legal representatives from many local authorities has been set up to look into the issues surrounding the new legislation, with particular emphasis in this area. The Working Group has recently produced a draft Report which agrees with the position set out above in that there is sufficient control by the Council in terms of other legislation and therefore it would not be practicable or sensible to embark on an exercise in serving notices on ex-Council houses.

The SOLAR Working Group have also obtained an Opinion from Professor Roddy Paisley of Aberdeen University which confirms this point of view and agrees that there are sufficient other controls in law.

4. FUTURE DISPOSALS

After the 2003 Act comes into force on the Appointed Day, the Council will no longer be able to grant Feu Dispositions and therefore all properties will require to be sold by Disposition. This makes it harder for the Council to enforce burdens as of right. However, certain burdens will still be able to be imposed.

The best policy for all new developments is to record a Deed of Conditions which will contain burdens affecting the whole site. This will not allow the Council to enforce burdens forever but, providing the Council still owns properties within the estate, then the burdens should be able to be enforced by the Council.

The main difficulty with Council housing is that it is extremely unlikely that there are any estates where no properties have been sold and therefore the Council will be in a situation where some properties within the estate have been sold by Feu Disposition and some have been sold by Disposition. The 2003 Act has specific provisions to deal with these mixed tenure estates.

After the Appointed Day, it will be possible to continue to insert burdens in descriptions but the Council may not be able to enforce them as of right. However, all properties within a "community" for example, a block of flats, will be able to enforce the burdens in their title deeds against each other. Although the Council may not be able to enforce burdens, it is important that when houses are sold under the new legislation that similar burdens are inserted into their titles, to ensure that neighbours have rights to enforce burdens against one another. Therefore it is recommended that similar burdens are set out in Dispositions although it is acknowledged that these may not be enforceable by the Council.

Report No 335/04 suggested registering Deeds of Conditions over the remainder of housing estates still in Council ownership. This was considered by the SOLAR Conveyancing Working Group but has largely been discredited by as being unsuitable in a mixed tenure estate. Therefore the recommendation is that Deeds of Conditions are not generally used in estates where ex-Council houses have already been sold.

The SOLAR Working Group is actively working on producing documentation which will operate to protect the Council and its tenants.

The Legal Services Section of the Law and Administration Department are currently drafting new documents for the sale of Council houses after the Appointed Day and the new systems will be brought into effect immediately following the Appointed Day.

5. SUPERIOR'S APPROVAL

After the Appointed Day, an owner of an ex-Council house will not require to seek the consent of the Council as Superior to carry out alterations to their property. It is expected that the Council will still be asked to grant approval for alterations where the Council is the owner of a neighbouring property.

6. TENEMENTS (SCOTLAND) BILL

The Tenements (Scotland) Bill ("the Bill") is the third part of the major property reform legislation which comes into force this year.

The Bill governs the common rights of owners of flats in tenement buildings which are in separate ownership. The intention of the legislation is to restate and extend the existing common law of the tenement. The law of the tenement only applies to title deeds of properties in a tenement where there is no express provision for common rights or where the titles are silent, for example if the title fails to provide for maintenance responsibilities of the roof.

The Bill states that a tenement is a building which comprises two or more flats in separate ownership and contains a model management scheme which would apply to the maintenance of the tenement, in situations where the title deeds are silent. The Bill states that various parts of the tenement block including the roof, foundations, external and load bearing walls and any part of the tenement owned in common form are "scheme property". The Bill provides that in the event that the titles are silent, a majority of flat owners can make a decision regarding such scheme property, for example to carry out maintenance.

The main difference is that under the existing law of the tenement, all proprietors in a block of flats would require to consent before repairs are carried out. This now allows a majority of proprietors to carry out repairs (always remembering that this is only in a situation if the title deeds are silent).

The draft Bill also provides a Tenement Management Scheme which would apply in the event that the title deeds are silent on particular issues, for example the management and maintenance of tenemental property. Appendix 2 sets out the main requirements for the Tenement Management Scheme. It should be noted that this will only apply in the event that the title deeds are silent.

7. FINANCIAL IMPLICATIONS

There are no financial implications arising from this Report. In the event that it was decided to register notices, the cost for registering notices would be between £25 - £50 for each property.

8. HUMAN RIGHTS IMPLICATIONS

There are no Human Rights implications arising from this Report.

9. CONCLUSION

Members are asked to note the terms of this Report and to approve the approach recommended.

10. CONSULTATION

The Chief Executive, Director of Finance and Director of Property Services have been consulted in the preparation of this Report.

CATHERINE A COULL
Director of Law and Administration

No background papers, as defined by Section 50D of the Local Government (Scotland) Act 1973 (other than any containing confidential or exempt information), were relied on to any material extent in preparing this report.

Appendix 1

**FEUDAL REFORM
AUDIT OF BURDENS IN COUNCIL HOUSE SALES FEU DISPOSITIONS**

	Description of Burden	Type of Burden	Will this survive the appointed day?	Alternative Means of Enforcement
1.	Statutory Undertakers right of access	Servitude Right	Yes	Statutory undertakers will always have a right of access for maintenance purposes. Servitude rights are not affected.
2.	Right to Amend Feuing Plan	Amenity Burden	No	Unnecessary in established developments.
3.	House to be used as a dwelling, consent require for operation of a business	Amenity Burden	No	This would be regulated by Planning Law/Law of nuisance.
4.	Maintain property and obtain Superiors Consent for alterations	Amenity Burden	No	Any extensions or change of use would be regulated by Planning Law. Any major alterations would be governed by Planning Law.
5.	Mutual and Common Rights e.g. common roof/common fences etc	Common Facility	Yes	
6.	Use of garden/other ground	Amenity Burden	No	This would be governed by Planning Law.
7.	Maintenance/Renewal of boundary fences/walls/hedges exclusive to one house	Amenity Burden	No	Walls, fences and hedges on private land would be the responsibility of the owner. Powers exist in terms of environmental health legislation to force repairs and Civic Government (Scotland) Act 1975. Statutory undertakers have rights to carry out repairs.
8.	Rights of access over adjoining properties	Servitude Right of Access	Yes	Servitudes not affected by reforms.

	Description of Burden	Type of Burden	Will this survive the appointed day?	Alternative Means of Enforcement
9.	Superiors consent required for alterations of boundary walls/fences/hedges	Amenity Burden	No	This would be covered by Planning Law.
10.	Responsibility for maintenance of drains, gutters etc.	Amenity Burden`	No	Powers exist in terms of environmental health legislation to force repairs and Civic Government (Scotland) Act 1975. Statutory undertakers have rights to carry out repairs.
11.	Responsibility for unadopted roads/pavements	Common Facility	Yes	
12.	Obligation to maintain canopy	Amenity Burden	No	This is part of private property and could be enforced through other means, for example Civic Government (Scotland) Act or Housing (Scotland) Act if dangerous or in need of repair.
13.	TV replay service	Common facility	Yes	
14.	Clothes poles	Common facility	Yes	
15.	Animals/Domestic pets - 1 dog or cat/no breeding	Amenity Burden	No	This could be covered by Planning, statutory nuisance, environmental health legislation.

TENEMENT MANAGEMENT SCHEME

The Tenements (Scotland) Bill restates the common Law of the Tenement and provides rules for managing tenements where the titles deeds are silent. The Bill provides a Tenement Management Scheme which will operate in any situation which is not adequately covered by the title deeds. The main aspects of the Tenement Management Scheme which is contained within the Bill are noted within this appendix.

The Tenement Management Scheme provides for the management and maintenance of the Scheme Property of a tenement.

1. SCHEME PROPERTY

What is Scheme Property?

This is any part of a tenement which is owned by 2 or more owners or any common part of the tenement which must be maintained by 2 or more owners. If there is no specific provision within the title deeds then the scheme costs will be divided equally between the owners of the tenement. Any new owners will be expected to contribute to the scheme maintenance.

What is included in Scheme Property?

- the ground on which the property stands
- the foundations
- the external walls
- the roof or any rafters or structure supporting the roof
- any wall or load bearing column
- a gable wall of a tenement building

What is NOT included in Scheme Property?

- Door
- Window
- Skylight
- Vent or other openings serving only 1 flat
- Any chimney stack or flue

In the Tenement Management Scheme, maintenance includes

- Repairs and replacements
- Cleaning
- Painting
- Gardening
- Small maintenance work (excluding demolition, alteration or improvement)

2. MAKING DECISIONS ABOUT SCHEME PROPERTY

If owners decide that something requires to be done with regard to Scheme Property, the Tenement Management Scheme provides a mechanism for holding meetings and deciding whether anything requires to be done to Scheme Property. Decisions regarding Scheme Property are known as Scheme Decisions.

If an owner requests a Scheme Decision, the owner must give the other owners 48 hours notice of the date, time, purpose and location of meeting. If a meeting is not held, the owner must consult with all owners and take account of the majority votes.

Owners or their agents would be consulted in writing either by mail, hand delivered or electronically and can be addressed to the owner or proprietor of the property.

3. MATTERS ON WHICH SCHEME DECISION MAY BE MADE

3.1 Owners can make basic scheme decisions on any of the following:-

- carry out maintenance to Scheme Property
- arrange an inspection of Scheme Property
- appoint a manager or organisation to manage the tenement
- to dismiss the appointed manager or organisation
- delegate a manager to instruct works to a specified amount
- to arrange a tenement common policy of insurance
- exclude any owner not included in the scheme costs
- authorise works already carried out by an owner
- to modify or revoke any scheme decision

3.2 Scheme Decisions relating to maintenance

If the owners of the scheme decide to carry out maintenance, the owners can make decisions on any of the following:-

- appoint an owner or agent
- to instruct or arrange for the maintenance
- require each owner to deposit an estimated share of costs
- ensure maintenance standard and completed satisfactory

If the owners decide to authorise persons to operate a maintenance account on their behalf, a description of the works required and the following information, should be expected. An owner is entitled to inspect any tender in connection with the proposed maintenance work.

- an estimated cost of maintenance
- consider any comparison of estimates
- the apportionment of shares
- the names and date of works approved
- the proposed and completion dates
- names & addresses of 2 persons authorised to operate financial affairs, normally via a bank or building society

Provision for refund

If the maintenance is not carried out by a set date or 28 days after the proposed date, an owner who has deposited their share can request a refund with interest from the maintenance account. If the maintenance is carried out before the appointed person or agent as received the notice, then no refund will be allowed.

Any actual spent costs will be deducted, if a refund is awarded.

4. SCHEME COSTS: LIABILITY AND APPORTIONMENT

4.1 The liability of costs are generally apportioned among owners equally, unless an individual flat is one and half times larger than the smallest flat, then consideration should taken of the total floor areas and apportioned accordingly.

4.2 The following costs should be taken into consideration:-

- ✓ any costs arising from as Scheme Decision
- ✓ any fee payable to person appointed to manage the scheme
- ✓ any running costs
- ✓ any costs recoverable by a local authority
- ✓ any common insurance costs covering the tenement
- ✓ any costs relating to floor area calculations, normally the roof costs

5. SCHEME COSTS: SPECIAL CASES

5.1 If a shared cost cannot be recovered or liable from an owner, then the remaining owners must pay the relevant owner's share.

5.2 If the owner is liable, but cannot be traced, identified or is sequestrated, then the other owners would pay their share and the owner would then be in debt to the remaining scheme tenants.

If for any reason an owner is affected by any irregular management decision, then they would not be liable for the costs. The owner would be omitted from the scheme account.

6. SCHEME EMERGENCY WORK

6.1 Any owner may instruct emergency work and owners responsible for payment, if the work requires to be carried out to the property:-

- (a) to prevent damage to any part of the tenement
- (b) due to health and safety

7. SCHEME ENFORCEMENT

7.1 A Scheme Decision binds the owners and future owners.