

ANGUS COUNCIL

RESOURCES AND CENTRAL SERVICES COMMITTEE – 11 MARCH 2004

ABOLITION OF FEUDAL TENURE ETC (SCOTLAND) ACT 2000
TITLE CONDITIONS (SCOTLAND) ACT 2003

REPORT BY DIRECTOR OF LAW AND ADMINISTRATION

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 and the Title Conditions (Scotland) Act 2003.

1. RECOMMENDATION

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

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.

The Abolition of Feudal Tenure etc (Scotland) Act 2000 ("the 2000 Act") and the Title Conditions (Scotland) Act 2003 ("the 2003 Act") have now both received Royal assent and are now partially in force.

The bulk of the legislation comes into force on 28 November 2004 (known as "the appointed day"). The main effect of the Acts is to abolish the estate of the superiority and therefore, there will cease to be any superiorities after the appointed day. On this date the Council will cease to be superior for all properties which have been sold previously by Feu Disposition.

3.1 IMPLICATIONS OF THE ACT

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 conditions in Feu Dispositions which have previously been granted. Even if there is a burden stating that a piece of ground is to be used, say, for recreation purposes only, the Council will no longer be the Superior and may be unable to enforce this restriction.

It is considered that in a great majority of cases, burdens which previously existed in favour of the Council 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 which were imposed in the title deeds would be unenforceable today as a result of other legislation, by the fact that they were unfair or by the fact that the Council could not prove that it 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 strict circumstances. In order to preserve these burdens, they must first be identified and then notices served to preserve the burdens. The various types of burdens which require to be considered, are detailed in section 3.3 below

3.2 FEU DUTIES

On the appointed day the Council will not have to pay any further feu duties and no feu duties will be received by the Council. However, prior to the appointed day, the Council may serve notice on the person by whom a feu duty is paid, requiring that a redemption amount is paid to the Council. Similarly, notices may be served on the Council requiring redemption of feu duty. The Directors of Finance and Property Services are investigating the likely implications on a cost basis for the loss of revenue on feu duties and the potential cost of payment of redemption values for feu duties prior to 28 November 2004.

3.3 LAND WHICH HAS BEEN SOLD BY FEU DISPOSITION

There are a number of implications for land which has been sold by Feu Disposition as this is the standard way in which the Council has burdened land to ensure that we can retain control of the land, for example, restricting the use of the property. There are a number of different areas to be considered:-

(a) Rights of Pre-emption

These have often been reserved in Feu Dispositions and in terms of the 2000 Act a notice can be served on the owner of the land requiring rights of pre-emption to be preserved. However, as a right of pre-emption only exists between the Council and the original purchaser these rights will survive the appointed day. Once a property has been sold on and the Council has chosen not to exercise the right of pre-emption, the right falls and the title is then free from encumbrances. The effect of the legislation will not affect the relationship between the Council and the first purchaser of the land and therefore it is considered that serving preservation notices for rights of pre-emption would not be necessary.

(b) 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 any interest in the property but each proprietor can ensure that common facilities are maintained by all proprietors.

As regards other burdens, if they are to continue in force, they will require to be preserved and notices must be served prior to the appointed day. Burdens which can be preserved are as follows:-

(c) Conservation Burdens

Conservation Burdens are burdens which are created for the benefit of the public to protect either the architectural or historical characteristics of any land or any other special characteristics of any land (including the special characteristics derived from the flora, fauna or general appearance of the land). The Council will be designated as a conservation body and therefore a notice could be served preserving burdens of this type.

(d) Economic Development Burdens

If a burden has been created in a title for the benefit of promoting economic development, a notice can be served preserving this type of burden.

(e) Neighbour Burdens

If the Council has sold off land by Feu Disposition and remains a neighbouring proprietor of the land which has been sold then it is possible for certain burdens to be preserved by having the burden re-allotted as a burden in favour of the neighbouring proprietor rather than a burden in favour of the Council as Superiors. This is a more

technical preservation and requires that the land still owned by the Council must have on it a building of human habitation and repute within 100 metres from the boundary of the burdened land.

(f) Reservation of Development Value

In certain circumstances, compensation may be claimed in situations where property has been sold at less than development value. This may be of use to the Council in a number of cases. The amount of compensation is determined with regard to the potential development value of the site, not the actual value of the development. The amount payable is based on the valuation of the property at the date on which the land was originally sold by the Council. The rights to claim compensation will be triggered by the owner of the land realising the development of the land. However, the development must occur within 20 years of the appointed day and the claim for compensation must be raised within 5 years of the date of the development.

3.4 COUNCIL HOUSING

This is a separate area of concern in that the rules described above also apply to all sales of Council Houses. Quite apart from the huge task of searching through all the Council titles to find out whether there are any burdens which require to be preserved, it is a huge task to even consider serving notices on all owners of ex-Council houses. Provisions have been put in place in the 2003 Act which will allow Councils to record a deed of conditions in respect of parts of estates which they still own. This would allow the Council as owners within the estate (not as Superior) to continue to enforce burdens against owner occupiers.

While some concerns have been expressed that this part of the statute may not operate in the way intended, the Scottish Executive have confirmed that this section of the 2003 Act was an amendment introduced specifically for this purpose.

If deeds of conditions are recorded over the properties which the Council still owns then this will permit the Council along with other owners within the estate to enforce burdens against one another. It should however be remembered that the Council in this situation is not enforcing as the Superior but as an owner of houses within the estate.

The only other burdens which could be preserved in respect of Council housing would be burdens that could be re-allotted as neighbour burdens. However, the recording of deeds of conditions should provide the Council with the same comfort as trying to preserve burdens to re-allot as neighbour burdens.

The drawback of recording deeds of conditions is that the deed of conditions will affect the whole development and the burdens will therefore be able to be enforced against the Council by other owners. It is considered that the only time that this could potentially be a problem is if owners within a block of flats wish to carry out common repairs, then the Council will be required to pay their share.

However, as common facilities burdens will automatically be preserved after the Appointed Day, the only burdens which may require to be preserved will be amenity burdens, for example, to use ground adjacent to the house as garden ground. As this type of restriction is governed by planning law, it must be considered whether there is any merit in preserving these burdens.

A working group of the Society of Local Authority Lawyers and Administrators in Scotland (SOLAR) comprising legal representatives from most local authorities has been set up to look into the issues surrounding the new legislation, with particular emphasis in this area. The working group is currently producing a report and following this report a further report will be submitted to this Committee and to the Housing Committee regarding housing burdens.

3.5 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, for example housing or industrial/commercial developments, is to record a deed of conditions with burdens affecting the whole site and then the properties can be sold by disposition. This will not allow the Council to enforce burdens forever but, providing the Council still owns properties within the estate, then burdens should be able to be enforced by the Council.

The Council will also be able to impose conservation burdens which may be created in favour of the Council for the benefit of the public to protect the architectural or historical characteristics of any land or any other special characteristics of any land (including a special characteristic derived from the flora, fauna or general appearance of the land).

The Council will also be able to impose economic development burdens. These burdens can be imposed in favour of the local authority for the purpose of promoting economic development. The 2003 Act says no more than this and there is no definition as to what will constitute an economic development burden and therefore this will, at some point, be tested by the Courts. However, there are situations within the Council where it would be clear that burdens require to be imposed in respect of economic development projects. Such burdens can then be imposed in a disposition of the land.

The Department of Law and Administration is currently in the process of ensuring that all sales of new land are by Disposition rather than Feu Disposition and the Council house sales procedure is also being revised in light of the changes.

It should be noted that for future sales, Reports being presented to Committee will not refer to a disposal of the feudal estate and burdens will only be able to be inserted into a disposition in the limited circumstances described above.

4. POLICY

The policy of the legislation is to stop Superiors enforcing burdens from a distance when they have no real interest in the land. From the Council's interest, it will be important to consider selling land at full market value, given that we can no longer sell at reduced value with a burden in the title. Consideration should also be given to granting of long leases of land in certain circumstances rather than conveying property outright.

5. HOW ARE BURDENS PRESERVED?

Before the appointed day, there is a considerable amount of work which requires to be done to ensure that any burdens which exist at present are preserved if possible.

The first task which the Council has to complete is to identify whether we should be attempting to preserve any burdens on land which has been sold and thereafter to identify which burdens should be preserved. However, carrying out a full trawl of the Council's title deeds to attempt to ascertain those parcels of land which have been sold over the years would be extremely resource-intensive. Also, it is considered from the initial investigations into the post reorganisation transactions, that there may only be a small percentage of burdens which can properly be preserved. Many burdens will simply be unable to be preserved in terms of the new rules and there will be others that are already unenforceable and therefore there would be no merit in preserving these. It is therefore considered that it would not be an appropriate use of resources to carry out a full audit of all of the titles.

A significant amount of work has already been carried out by the Department of Law and Administration with regard to the land sold since reorganisation and it is proposed that this work is completed and the Department will endeavour to preserve any burdens which can be properly preserved. However, it is important that this work is supplemented with as much information as possible from within the Council, from elected members and officers who have knowledge of areas of land which have been sold and which may be burdened. In particular, information would be welcomed about land which has been sold for less than full value, such as parts of industrial estates and areas of park land which have been sold, for example, for football pitches or bowling greens where it is likely that burdens regarding the use have been imposed.

It is also proposed that we consult with community councils who may have local knowledge as to areas which previously formed part of Council property but which are now used for community purposes.

Subject to the agreement of this Committee, therefore, a letter will be sent shortly to all elected members and all community councils with a short summary of the type of land on which burdens could be preserved, asking for any information regarding any areas of land sold by the Council's predecessors which should be investigated.

6. FINANCIAL IMPLICATIONS

There are no financial implications arising directly from this Report. There will be a cost implication for registering any notices which are required. The cost for registering notices is between £25 and £50 for each property. There may also be cost implications regarding feu duties and a separate report will be brought to Committee regarding these implications.

7. HUMAN RIGHTS IMPLICATIONS

There are no human rights implications arising from this Report.

8. CONCLUSION

Members are asked to approve this Report and to note that many burdens will be unenforceable after the appointed day. Members are also asked to note that consultation will take place with elected members and Community Councils to identify any potential areas which should be investigated.

9. CONSULTATION

The Chief Executive, Director of Finance, Director of Property Services and Director of Housing have been consulted in 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.