

DEED OF CONDITIONS

Guidance Notes



Introduction

This document is intended to be used as a template for a Deed of Conditions, which could apply to a development such as a retail park, housing development or industrial estate. It is intended to provide a structure that addresses the principal issues that need to be taken into account to ensure that the Deed complies with the provisions of the Title Conditions (Scotland) Act 2003 (the "2003 Act"), such as the need to identify real burdens and servitudes separately, identifying relevant burdens as community burdens, providing for variation and discharge and a suitable manager burden. It is left to the individual drafter to produce wording for the actual community burdens that are to be imposed on the development according to circumstances.

1 Narrative

Although no narrative of the circumstances of the development to which the Deed of Conditions relates is strictly necessary, it can assist understanding of the provision if a brief "scene-setting" description is provided. This may be no more than "in connection with the development by us of a retail park".

2 Condition 1: Definitions, Interpretation and Construction - General

All necessary definitions should be inserted in this part of the Deed according to the particular circumstances of the Development to which the conditions will apply. Generally this will include a definition of the Development itself, using a conveyancing description, as well as definitions of such things as common parts and the plan.

3 Condition 1: Definition of Manager

One of the definitions we have suggested in the style is that of "Manager". This expression is used for simplicity but may be substituted by "Managing Agent" or "Management Company" if preferred according to circumstances.

"Manager" can mean not only the person appointed in terms of the manager burden in Condition 7, but also any manager appointed by an Owners' Association, once the manager burden has expired. The drafting of the definition will allow you to add in reference to other general appointment provisions you may produce elsewhere in the Deed.

4 Condition 1: Definition of Consent

Deeds of Conditions frequently contain conditions that permit something to be done with the consent of others in the Development, or prohibit something from being done without such consent. In the days of feudal tenure, the consent of the feudal superior was usually specified, and in non-feudal Deeds of Conditions, the consent of the Developer is often stated, although

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the Deed may provide that the consent of other proprietors in the Development, or "successors of the Developer as proprietors of the Development" may also be required.

To cover the situation that usually arises, namely that the Developer wants to retain control while it is developing the Development and still owns parts of the Development, but thereafter other proprietors or adjoining proprietors are more appropriately the parties from whom consent should be sought, the Deed provides a definition of "Consent" which defines those Owners whose consent would be required in the latter circumstances, but for so long as the Developer owns parts of the Development, its consent is required. The defined term can be incorporated in the drafting of any specific real burdens where consent in this form is required.

5 Condition 2: Community Burdens

The purpose of this Condition is to identify which of the conditions in the Deed are real burdens (to comply with the requirements of Section 4(2) of the 2003 Act). Where the real burdens are being imposed on two or more units the burdens can be created as community burdens. By using this expression Section 27 of the 2003 Act provides that each unit will be both a benefited and a burdened property automatically without the need to express this in the Deed. Not all of the burdens that are imposed in a Deed of Conditions will necessarily be a community burden, and it will be necessary to differentiate those that are not, to ensure that the appropriate benefited and burdened properties are correctly defined.

6 Condition 2: The Community

When identifying the property to which the community burdens will apply, care must be taken to ensure that no parts of the Development, which may be held in separate ownership, but which do not form part of one of the Units, are inadvertently included as a burdened or a benefited property. The Development may for example consist of a number of Units which are conveyed to individuals, and extensive Common Parts which are retained in the ownership of the Developer or held by a Management Company. It is not the intention for the Common Parts either to have burdens imposed on them, or to be entitled to enforce the burdens against the Units. In such a case, the community burdens should be imposed on the Units in the Development rather than the whole Development.

7 Condition 2.2: Date of Creation and application

Section 4(1) of the 2003 Act allows the deed creating the real burden (called the "constitutive deed" in the 2003 Act) to provide for postponement of the coming into effect of a real burden by reference to some fixed date or the date of registration of a specified deed. Otherwise the conditions contained in the Deed of Conditions will be effective against all the land affected by the Deed on registration of the Deed. The Developer may be content for that to be the case, in which case this Condition may be deleted. However, if this Condition is included in the Deed, to allow the Developer flexibility in the future, should it wish to change the conditions that apply to other parts of the Development, then it will be necessary to ensure that a clause applying the terms of the Deed of Conditions to particular units is included in the Dispositions by the Developer (or any successor in title) of individual Units.

8 Variation and discharge

Section 33 of the 2003 Act provides a mechanism for variation or discharge of community burdens by a majority of owners in the Development, or such proportion as the constitutive deed specifies. If a larger percentage than a straight majority is to be required, this can be specified in this condition, or authority can be given to the Manager within the Deed – although it might be preferred to restrict the Manager's power to vary to certain specific burdens only.

9 Application to the Lands Tribunal

If the parties agree the clause preventing applications to the Lands Tribunal to vary the terms of the burdens or servitudes for up to a maximum of five years can be included. This will then have the statutory effect provided for in section 92 of the 2003 Act.

10 Manager Burden

This Condition provides for a manager burden in favour of the Developer of the type identified in Section 63 of the 2003 Act. It allows the Developer to be or to appoint a Manager, to act as the manager of related properties, such as the Units in the Development, and means that such Manager may not be dismissed by the owners until the expiry of the statutory 5 year period unless the Developer ceases to own one of the related properties prior to expiry of that period. The meaning of "related properties" for this purpose is outlined in Section 66 of the 2003 Act. In the case of sheltered housing the period is 3 years and there are special provisions relating to right to buy housing.

11 Servitudes

All of the servitudes affecting the Development are assembled together in Condition 8 of the Deed. Often, different types of servitude will apply to different categories of property in a typical Development and not all servitudes will apply to all of the Units in the Development. The template identifies different types of servitude and in each case nominates the benefited and burdened properties (dominant and servient tenements) particular to that category of servitude.

12 Statutory Undertakers

We have incorporated in this draft the typical condition, which appears in most Deeds of Conditions, providing for access rights to be preserved in favour of statutory undertakers. Strictly speaking this is not a real burden, as there is no benefited property, nor is it a community burden. However we consider that it might be useful to continue to include such a provision, if only to highlight the position to individual purchasers who may not have realised that such statutory rights existed, and may try to claim against the Developer.