

**November 2004** 

## **Property Law Reform and Retirement Housing**

**Ref IS/103**

This information sheet gives an overview of the legislation and how it might affect owners of retirement housing. It relates to Scotland only. It is intended to provide informal guidance to owners of retirement housing and other interested parties. It should not be used as an alternative to legal advice.

### ***What happened on 28 November 2004?***

Three pieces of legislation were passed by the Scottish Parliament, granted royal assent and fully enacted on this day. These Acts are:

- The Abolition of Feudal Tenure etc. (Scotland) Act 2000
- The Title Conditions (Scotland) Act 2003
- The Tenements (Scotland) Act 2004

These new Acts relate to property ownership in Scotland and are intended to modernise the framework in which the rights and responsibilities attached to property ownership operate.

### ***How will the legislation affect owners of retirement housing?***

Owners are affected in different ways depending on what is contained within their existing title deeds or deed of conditions. In many cases owners will have greater control over how their

development is managed. The relationship which existed between owner and manager has changed.

Looking at each of the three Acts there are some key points to note:

#### The Abolition of Feudal Tenure etc. (Scotland) Act 2000

- the feudal system (*the system of land ownership in Scotland in which the owner of property holds his property in perpetual tenure from a superior*) is abolished
- there is no feudal superior ( the person from whom land is held under feudal tenure) and all purely feudal burdens (*obligations affecting property or land which are enforced by the feudal superior*) have ceased to exist
- non feudal burdens affecting a community (*the owners of property within a development*) are enforceable by the owners of the properties within that community. This may include the former superior but only if that person is an owner of property.

#### The Title Conditions (Scotland) Act 2003

- provides a legal framework for the real burdens (*obligations affecting property or land which are conditions of ownership*) contained within the title deeds
- it identifies core burdens which are the essential elements of retirement housing
- if the deeds make no provision for decision making, rules are set out under the Act
- there are provisions for owners to make decisions about the management of their development and to change or dispose of conditions within their title deeds
- the owners of at least 25% of properties in a community may apply to the Lands Tribunal to vary or discharge a burden including core burdens
- a two thirds majority of owners can vote to vary a core burden
- if the deeds are silent (*make no provision*) a simple majority (51%) of owners can vote to dismiss their management

company three years after the date of the first sale of a retirement flat within the development

- if the deeds specify a higher majority then a two thirds majority can vote to dismiss their management company
- the age restriction cannot be changed using majority rule, however owners could apply to the Lands Tribunal under section 91 of the Title Conditions Act.

### The Tenements (Scotland) Act 2004

The Act requires every tenement in Scotland to have a management scheme which will allow owners to make decisions about carrying out repairs and on matters of mutual interest. In most retirement developments the deeds will continue to apply. The rules of the tenement management scheme will only apply if the deeds are silent on this matter. In retirement housing it is very unlikely that the Tenement Act will apply to any great extent.

Most management companies are working to address these changes in property law. They recognise that the relationship that they have with owners of retirement housing has changed. Some are consulting with owners and have prepared drafts of management contracts which will operate alongside the existing deeds and provide the basis of a new contractual relationship with each owner. Most of the conditions contained within the deed of conditions will still apply.

### ***What has happened to feudal burdens?***

The rights of the feudal superior to enforce burdens has disappeared. However, if the former feudal superior owns property within the community he will have the same right to enforce burdens as any other owner. Some burdens relating to the management and maintenance of the development have survived as community burdens mutually enforceable by all the owners. Burdens which apply to all properties will be enforced by all the owners.

### ***What are community burdens?***

Community burdens apply to all properties in a development and are mutually enforceable by and against all the owners of those properties. A community burden can be enforced by just one member of the community. This includes the owner of the resident manager's accommodation and any other parts of the development which are not retirement flats. All owners are responsible for enforcing community burdens such as contributing to the cost of repairs and maintenance. Some burdens, such as the age restriction, will not apply to the resident manager's accommodation.

### ***What are core burdens?***

The core burdens in retirement housing are defined in the Title Conditions Act (section 54). A core burden refers to a facility, such as the guest room, or a service, such as the resident manager, which is one of those which make a retirement development particularly suitable for older people. To change a core burden using majority rule requires a majority of two thirds under section 33 of the Act. Alternatively owners of at least 25% of properties in a community may apply to the Lands Tribunal to change a core burden.

### ***What is the manager burden?***

The Title Conditions Act limits the developer's power to appoint the management company to three years from the date that the first flat is sold in the retirement development. This means that after three years, the manager burden automatically expires and owners can vote to dismiss their manager. If all the properties are sold before the end of the three year period the developer's power to appoint will expire.

### ***What should owners do next?***

Owners should obtain a copy of their Title Deeds and/or Deed of Conditions to determine the burdens which apply to their property before and after 28 November. It might also be useful to obtain copies of other documents produced by the management company which refer to the management of the development, for example, the owners' handbook and any code of management practice that the management company has adopted. This will give a broader picture of how the management company intends to operate and will address some of the practical issues relating to management not covered by the legislation.

Owners should consider what the implications might be for their development by familiarising themselves with their deeds and any management agreement or contract proposed by their management company. If possible, owners should discuss issues of mutual concern together and try to reach agreement about how they would like their development to be managed.

Every opportunity should be taken to ask questions and discuss terms with the management company.

### ***Does the deed of conditions have to be redrawn?***

There is no requirement contained within the legislation to update the deeds. Most conditions within the deeds will still apply even if the language is outdated. However owners may wish to seek legal advice on this matter. Some management companies and groups of owners are considering redrafting the deeds so that they accurately reflect the current legal position. This approach has the advantages of clarifying the relevant terms and making it easier for everyone to interpret the deeds in the future. However, the agreement and cooperation of every owner will be required. Preliminary legal advice and costing is advisable.



### ***Do owners have to employ a lawyer?***

It is important to consider obtaining a qualified opinion if seeking advice on a legal matter. If you are concerned about how much this will cost you can ask your solicitor to give you an estimate. Prepare your questions before you meet with your solicitor and be clear about what your objectives are. Some owners have shared the costs of legal advice between them. There is a leaflet produced by the Law Society of Scotland called “Getting the Best from Your Solicitor”. Copies can be obtained from The Law Society of Scotland, 26 Drumsheugh Gardens, Edinburgh, EH3 7YR tel: 0131 226 7411 or from the advice service INNIS. (details under other sources of information.)

If owners are intending to change conditions within their deeds legal advice is essential. If owners decide to enter a new management contract with a new management company it may also be advisable to seek a legal opinion.

### ***What should the management company be doing?***

Most management companies have been making preparations for the changes to property law. Many will have sought their own legal advice and identifying what action is required. If new management agreements or contracts are being written owners should be involved in consultation before finalising terms to ensure that the completed document is satisfactory to both parties. This process should be open and transparent and there should be adequate opportunity to inform and discuss issues at every stage.

### ***Do owners need to have a new written contract with the management company?***

There is no requirement by law to have a management contract in place. Some owners and management companies may be content to leave things as they are. However there are practical reasons why owners might want to have one:

- to address gaps in provision when the feudal superior rights are abolished in the title deeds for example the provision of a capital repairs fund.
- to address “grey areas” within the title deeds which may be vague and open to interpretation
- to ensure that the development is managed properly
- to consolidate the new relationship that owners have with the management company
- to have an easily read and relevant document setting out the terms agreed between you and your management company as to how the development is going to be managed.

### ***How can owners change the management company?***

Owners who wish to change their management company should first check their deed of conditions to establish their position. There may still be a manager burden in force or there may be some provision within the deeds as to how to proceed. If the deeds make no provision a simple majority of owners can vote to change the management company. If a majority higher than two thirds is required by the deeds then only a two thirds majority will be

required. Guidance on transferring to another management company is provided within the Scottish Executive's "A Framework Code of Management Practice"

### ***What should owners consider before deciding to dismiss the management company?***

The process of dismissing a management company and appointing a new one is likely to be a major undertaking. There are some things it would be helpful for owners to consider before proceeding.

- The provision of essential services that are set out in the deeds must be maintained even if a new manager is appointed, unless owners go through the separate process of changing their deed of conditions
- What are the things that owners do not like about the current management company?
- Are there ways in which these problems could be addressed without changing the manager?
- Not all owners might agree with the proposal to dismiss the manager and this may cause divisions between owners.
- What are the implications of property ownership for example, who owns the resident manager's accommodation? Could this be an obstacle?
- What will happen to existing resident manager? What are their employment rights?
- Who are the alternative management companies that could be approached? Will any of the alternatives deliver a better service at an affordable cost?
- What will it cost owners in money, time and effort?

### ***What should owners consider when they have decided to appoint a new management company?***

There is some guidance in the Scottish Executive's code of management practice.

If owners have voted to dismiss the management company there are things to consider when selecting a new manager:

- What are the essential aspects of service delivery that must be maintained?
- What are the standards of service delivery that owners want?

- Does the management company operate to a code of good management practice?
- How many years will the management contract operate?
- What are the terms stated in the management contract?
- How much will the service charge be if a direct comparison is made with the charge made by the current management company?
- Taking everything into account does the management company foresee any large increases in the service charge beyond the first year of management?
- Does the management company have a proven track record of good service delivery to owners? Is it possible to meet with owners who already receive management services from the company?
- If there are particular matters of concern in the development, for example major repairs expected in the future, how does the management company plan to address them?
- Are there any proposals to change the way the management company is run which could affect the quality of service?

### ***What other management companies are there?***

There are approximately 15 managers of retirement housing in Scotland. Between them they provide management services to over 6500 properties in over 150 developments. Managers comprise: private management companies, factors and housing associations. A list of managers who currently manage retirement housing can be obtained from INNIS. It may be that, as a result of the new legislation, there are other management companies who will be willing to provide factoring services in the future.

### ***Can owners manage the development themselves?***

It may be possible for owners to dispense with the manager and to self manage the development. However serious consideration would have to be given to the implications of this. Owners would have to take on responsibility for every aspect of management and adhere to the relevant legislation as managers and employers. This covers, for example:

- Organising and planning building maintenance
- employing staff
- collecting and managing service charges

- providing accounts and budgets
- dealing with disputes between owners over management issues, ensuring compliance with employment, health and safety and other legislation.

### ***What is the Code of Practice?***

“A framework code of management practice for owner occupied sheltered housing” was produced by the Scottish Executive in 2000. It is a voluntary code designed to promote best practice in the management of retirement housing. It sets out guidance on procedures and sets standards for the service which owners should expect to receive.

Some management companies have devised their own code which may be complementary to the framework code. You should check with your existing management company and any prospective one to see if they operate according to a code.

Copies of the code are available from the advice service INNIS.

### ***How can owners change or get rid of burdens?***

The ways in which owners can vary or discharge burdens are:

- a. A majority of owners can sign a variation or discharge of the deed
- b. 25% of owners can apply to the Lands Tribunal

In case (a), following intimation of a Community Consultation Notice (see below), a deed of variation must be drawn up and signed by the majority. It must then be intimated to all the proprietors of the community (see schedules 4, 5 and 6 to the Act for styles of intimation). Those who do not sign the deed may then apply to the Lands Tribunal (under section 90(1)(c) of the Act) for preservation of the burden *as far as it affects their properties*. A fee (probably £150) will be charged for making such application. A judicial process will then begin which will ultimately lead to a decision of the Tribunal on whether to preserve the burden or not. If there are no objections raised in this fashion, the Lands Tribunal will duly certify this on the deed of variation and the certified deed will be registered in the Land Register, making the variation legally binding. The whole process might take several months to complete.

In case (b), the Tribunal will notify all owners of the application made to it and give an opportunity (3 weeks) for representations or objections to be made. Again a fee (amount to be decided) will be charged for making such representation. If objections are made the application will probably proceed to an oral hearing after which the Tribunal will issue a written decision as to whether the condition should be discharged or not. If no objection is made, an order discharging the condition will be issued immediately.

In both cases it is likely that owners will require legal advice and representation.

### ***Who can vote?***

There is one vote allocated to each property. The terms of the Title Conditions Act state that an owner is a person who has a legal right to the property. There will be more than one owner where the title is held in joint names or where there is a shared ownership property. In cases where there is more than one owner, each owning not more than half the property, agreement must be reached on how to vote. In cases where one share is more than 50%, for example in a shared ownership property where one owner has a 75% share, then the vote of that owner will count. The Act does not set out the procedure for voting.

### ***What is a Community Consultation Notice?***

The Act requires the owners who are wishing to change a condition in the deeds to issue a Community Consultation Notice to all property owners informing them that a proposal has been made to vary or discharge a burden. This consultation process lasts for three weeks. The format of a Community Consultation Notice is set out in Schedule 8 of the Title Conditions Act.

### ***What about property owned by the former feudal superior?***

In many developments the feudal superior owns the scheme manager's accommodation and sometimes other communal areas such as the guest room. Property owned by the former feudal superior will remain in their ownership. They will have the same voting rights as any other property owner within the development. In some cases the former feudal superior may be willing to transfer

the title to the resident owners. There are likely to be legal costs associated with this.

### ***What does the Lands Tribunal for Scotland do?***

The Lands Tribunal for Scotland is the independent judicial body which adjudicates on certain types of disputes regarding land and property. Under the Title Conditions Act the Lands Tribunal has been given updated powers to deal with applications to vary and discharge conditions within title deeds. It should be noted that the Tribunal charges fees for applications, certificates, hearings and final orders.

The Lands Tribunal can be contacted at: 1 Grosvenor Crescent, Edinburgh, EH12 5ER, tel: 0131 225 7996. Their website address is: <http://www.lands-tribunal-scotland.org.uk/>.

### ***What is a land certificate?***

When a property is sold the change of ownership is recorded by the Registers of Scotland. A Land Certificate is issued to the new owner. This is a copy of the title sheet held by Lands Register of Scotland and contains a description of the property, together with any rights and responsibilities.

### ***Other sources of information***

Scottish Executive Guidance (not yet available)

Abolition of Feudal Tenure etc. (Scotland) Act 2000, HMSO

 Title Conditions (Scotland) Act 2003, HMSO

Tenements (Scotland) Act 2004, HMSO

“A Framework Code Of Management Practice For Owner Occupied Sheltered Housing”, Scottish Executive

“A Guide to the Abolition of Feudal Tenure etc (Scotland) Act 2000 and the Title Conditions (Scotland) Act 2003”, Scottish Executive

“Land Tenure Reform”, Professor Robert Rennie, Thomson W Green 2003

“The Abolition of Feudal Tenure in Scotland”, Kenneth G C Graham, LexisNexis 2003

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