Conservation Burdens and Covenants

Reid, Colin T.

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The recent report from the Law Commission for England and Wales proposing the introduction of conservation covenants ('Conservation Covenants', Law Com No 349) draws attention to the fact that in Scotland the equivalent mechanism, conservation burdens, already exists but is little used. This article outlines the basics of these devices and their possible role as conservation policy evolves.

The idea of dedicating areas of land to conservation, securing them for future generations, has some appeal, but modern land law has not favoured the existence of long-term limitations on the use of land except where these exist for the benefit of neighbouring land. This has been because of concern about the proliferation of enduring restrictions on land and about their impact on land as an asset which can be freely used and transferred by the current holder. A further concern, especially in the past before more widespread registration of title, has been the difficulty of keeping track of what rights exist and who can enforce them. Thus the view has been taken that only those restrictions which benefit neighbouring land should exist in a form which can 'run with the land' and bind successive owners.

That view was the initial conclusion of both the Scottish Law Commission in its consideration of the abolition of the feudal system ('Property Law and the Abolition of the Feudal System: Discussion paper' (Scot Law Com DP No 93), 1991, paras 3.30-3.32) and the English Law Commission in a report considering all aspects of easements and other rights over land ('Making Land Work: Easements, Covenants and Profits à Prendre' (Law Com 327) 2011), para 2.24). In both cases though, opinions have changed. In Scotland this has led to the recognition of conservation burdens in the legislation that completely reshaped our land law at the start of this century (Abolition of Feudal Tenure etc (Scotland) Act 2000, ss. 26-32; Title Conditions (Scotland) Act 2003, ss 38-48). In England the Law Commission has now recommended that something very similar be introduced there.

Several statutory exceptions had already been recognised where specific bodies could benefit from and enforce such enduring restrictions on the management and use of land even though they did not own nearby land. Planning agreements are one obvious example, but the bodies able to make such agreements include local authorities, the National Trust, the Forestry Commission, the statutory conservation bodies, and Ministers. Such exceptions exist to further specific public policy goals that require land to be looked after in certain ways over prolonged periods. The wider availability of conservation burdens extends these exceptions in three ways, making this mechanism available to a wider range of bodies, broadening the purposes for which the mechanism can be used and allowing for permanent, or at least open-ended, restrictions to be imposed as opposed to the fixed-term nature of many of the statutory agreements.

The burdens and proposed covenants are, however, limited in two important ways. First they can be used only to serve a conservation purpose. This is fairly widely drawn in the Scottish legislation (Title Conditions (Scotland) Act 2003, s 38):

> '... for the purpose of preserving, or protecting, for the benefit of the public–
>
> (a) the architectural or historical characteristics of any land; or
> (b) any other special characteristics of any land (including, without prejudice to the generality of this paragraph, a special characteristic derived from the flora, fauna or general appearance of the land).'

Similar burdens can also be created for the purpose of reducing greenhouse gas emissions (Title Conditions (Scotland) Act 2003, s 46A as inserted by the Climate Change (Scotland) Act 2009, s 68).

Second, the burdens can be entered into only by a limited range of bodies designated by statute. In Scotland a burden can be in favour only of the Scottish Ministers or one of the conservation bodies designated for this purpose by the Ministers (Title Conditions (Scotland) Act 2003, s 38). The burden is extinguished if the holder of it ceases to be a conservation body and burdens can be assigned only to another conservation body or the Scottish Ministers. The bodies designated include all Scottish local authorities, the National Trust for Scotland, a number of heritage and building preservation trusts and, in relation to the natural environment, Scottish Natural Heritage, Plantlife, the John Muir Trust, the Royal Society for the Protection of Birds, the Scottish Wildlife Trust and the Woodland Trust (Title Conditions (Scotland) Act 2003 (Conservation Bodies) Order 2003 (SSI 2003 No 453)).

Thus, this exceptional mechanism is available only for a limited range of purposes and parties, a feature which serves several ends. It limits the proliferation of such burdens and their use to serving the public interest in conservation. The scope is further constrained by the need to operate within the legitimate powers of the bodies listed, which should be a protection against inappropriate burdens since the listed bodies and Ministers are hardly likely to accept terms which are thought unworkable or to place inappropriate obligations on either party. Further, such bodies can be expected to maintain adequate records and to take their responsibilities seriously in terms of enforcement, not least because of the extent to which they can be called to account, legally (and politically in some cases), by the public and/or their members and beneficiaries. In other words, by limiting the purposes and those who can hold the burden, some aspects which might otherwise have to be regulated are essentially taken on trust, but in a way that does open up the process to a degree of scrutiny by at least a portion of the public.

The discussions of the proposals in England have highlighted some drawbacks and gaps in this Scottish model which may be worthy of reflecting upon here. First, the limited scope of the scheme excludes some potential applications where enduring restrictions might be widely recognised as serving a valuable purpose. Thus limiting land use within the catchment areas of water supplies in order to preserve water quality does not fall within the scope of the mechanism, whether for public water

supply (which is, of course, in the hands of commercial bodies in England) or private use (for example, for distilleries).

A second issue that prompted considerable discussion was whether it was acceptable for the parties to a covenant to be able to extinguish it simply by agreement. This is what one would expect in relation to what is a private law obligation (and is the position in Scotland), but several respondents to the Law Commission's consultation paper argued for some procedural or substantive obstacle to ensure that this step could not be taken lightly. The context for this concern was the potential use of covenants to give effect to what are intended to be long-term compromises between different interests.

In particular this was raised in relation to biodiversity offsetting, which has also been the subject of reform proposals in England (DEFRA, 'Biodiversity Offsetting in England: Green Paper', 2013). Under an offsetting scheme development resulting in losses to biodiversity in one place can be permitted on the basis that there will be no net loss to biodiversity overall as a result of measures taken to ensure conservation gains elsewhere (guaranteed by a covenant). The fear is that if a covenant to provide an offset is agreed with Ministers or a local authority, at some time in the future one of the many other priorities which such bodies must serve will come to the fore and the measures compensating for the permanent harm at the original site will be abandoned. The gains that are being provided to compensate for the losses would thus not be guaranteed, undermining the whole basis of the offsetting scheme. The Law Commission noted this concern but concluded that the scrutiny inherent in the selection of a limited number of bodies as being able to use covenants provides a sufficient safeguard.

These discussions highlight the fact that what is appropriate for the details of the scheme for burdens or covenants depends on the uses foreseen. The open-ended duration of these burdens, as opposed to the shorter life-span of most statutory management agreements, is a major feature but does call for care in drafting the terms to allow for effective enforcement decades into the future and to ensure a balance between permanence and flexibility in view of the likelihood of changing circumstances.

So far in Scotland, conservation burdens appear to have been used rarely and predominantly in relation to 'cultural' rather than 'natural' heritage, particularly in relation to historic buildings, and with the burdens being of comparatively short duration rather than for decades or in perpetuity. There is scope for more use to be made of them, but this depends, of course, on landowners being willing to agree to such limitations on the use and management of their land, although this could be encouraged by financial incentives from the state or provided by those seeking to offset biodiversity losses arising from their own activities. In the USA, this mechanism (known as conservation easements) is widely used, but this reflects the comparative absence of direct regulatory controls on land use and generous tax reliefs for owners committing their land in this way (although the rules on tax relief, which treat entering an easement as a charitable donation, shape the detailed arrangements, for instance requiring any easement to be in perpetuity).

Conservation burdens can be a conservation tool in their own right or the legal mechanism through which effect is given biodiversity offsetting or other schemes such as payment for ecosystem services (where landowners are paid to recognise the benefits such as water resources that land provides for society even when not providing direct produce such as crops or timber). Greater awareness of their potential will expand the options to be discussed when the long-term future of land is being considered and might provide the vehicle for new approaches to conservation which allow people other than statutory authorities to make lasting arrangements to conserve our heritage for future generations.

Colin T Reid
University of Dundee

For more information on biodiversity offsetting, payment for ecosystem services and conservation covenants see: http://www.dundee.ac.uk/law/research/archivedevents/

Know-How

Amenity notices

Planning authorities were first empowered by the Housing and Planning Act 1986 to issue notices where amenity of an area is being adversely affected by the condition of land (which includes any structure or erection or part of a building upon land). The current legislative regime is set out in the Town and Country Planning (Scotland) Act 1997 ('the 1997 Act'), at ss 179–181 and the provisions refereed to therein. Guidance is included in Circular 37/1986: Housing and Planning Act 1986 ('Circular 37/1986') and Circular 10/2009: Planning Enforcement.

Issuing an amenity notice does not constitute taking enforcement action as defined in s 123(2) of the 1997 Act. Unlike south of the border, there are no criminal sanctions if there is a failure to comply with an amenity notice.

Circumstances in which a planning authority may issue an amenity notice

If a planning authority considers that the amenity of any part in its district, or an adjoining district, is adversely affected by the condition of land in its district, it may serve a notice (an 'amenity notice') requiring steps for abating the adverse effect(s) as are specified in the amenity notice to be taken within the period(s) specified in the notice. However an amenity notice cannot be issued with reference to any building which is designated as an ancient monument.

Circular 37/1986:

- refers to planning authorities being able to require proper maintenance of land in their administrative areas; and
- states that planning authorities should use this power with discretion to deal with 'relatively isolated severe cases of neglected or unsightly land'.