

# TITLE CONDITIONS (SCOTLAND) ACT 2003

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 1: Real Burdens: General**

##### *Section 16: Acquiescence*

93. The three paragraphs of *subsection (1)* restate the pre-conditions for acquiescence. Paragraph (c) provides for either active or passive consent. There is no specific form of words that active consent must take: a casual word exchanged over the garden fence would be sufficient, if awkward to prove. Passive consent requires knowledge (actual or constructive) of the activity coupled with an absence of opposition. In both cases (and by contrast with section 15) the consent is to the activity itself rather than to the breach of the burden. Neither party need know that the burden is being breached.
94. By contrast with the rules for voluntary discharge (set out in section 15), consent is required from all enforcers (including in the case of passive consent tenants and others with subsidiary rights under section 8(2)(a) and (b)), and in respect of all benefited properties. This means that a burden cannot be extinguished in respect of some enforcers, or benefited properties, but not in respect of others. If all those able to enforce a burden do not acquiesce, then the burden cannot be discharged by section 16, even in respect of those who have given their consent. The two types of consent may be mixed, so that some enforcers give active and others merely passive consent. If active consent is obtained from the owners of all the benefited properties which have title and interest to enforce the particular breach of the burden then the burden would, to the extent of the breach, be extinguished without the need for either active or passive consent, or indeed even in the face of actual objection from an person with a right to enforce other than an owner. Passive consent, likewise, is only needed from those benefited proprietors who have both title and interest to enforce the particular breach. An objection by a benefited proprietor with title but no interest to enforce will not prevent extinguishment of the burden. The test for interest to enforce is set out in section 8(3)(a). The requirement for interest to enforce reinforces the presumption introduced by subsection (2) that an enforcer was aware or ought to have been aware of the activity constituting the breach. If the nature of the breach is such that an enforcer will suffer material detriment to the value or enjoyment of their interest in the benefited property then it will be difficult to rebut the presumption that the enforcer ought to have been aware of the activity constituting the breach.
95. Because of the difficulty in establishing acquiescence under the existing law, *subsection (2)* introduces a presumption that after the expiry of 12 weeks from the substantial completion of the activity breaching the burden those entitled to enforce the burden knew of the breach, but did not make any objection. This presumption could be rebutted by a benefited proprietor.