

TITLE CONDITIONS (SCOTLAND) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Community Burdens

Section 34: Variation or discharge under section 33: intimation

157. *Section 34* provides for the intimation of a proposal to vary or discharge a community burden by a deed signed in accordance with section 33.
158. *Subsection (1)* requires notification of a proposal to vary or discharge a burden under section 33 to all the owners in the community who did not grant the deed. This could include an owner of a less than one half share of a unit who did not grant the deed (see section 33(4)) notwithstanding that the unit counts towards the assembly of a majority because the other owners of that unit signed the deed.
159. *Subsection (2)* provides for the intimation of the notice. A copy of the executed deed and an individual written notice in, or near to, the form in schedule 4 must be sent to each owner of units in the community that did not grant the deed. Rules for sending are given in section 124. The notice advises owners of their right under subsection (3) to make an application to the Lands Tribunal to preserve the burden. Such an application is made under section 90(1)(c).
160. *Subsection (3)* allows any owner in the community who did not grant the deed to apply to the Lands Tribunal for its preservation, provided the application is made within eight weeks of the date of the last intimation under section 34(1). Unlike a notice of termination under sections 20 to 24, a successful application for preservation preserves enforcement rights for all those benefited properties whose owners did not all sign the deed of discharge or variation regardless of whether or not a particular owner of such a benefited property actually made an application for preservation to the Tribunal. It also preserves unvaried the burden in the title of any burdened property whose owners did not all sign the deed. However, where all the owners of a benefited property have signed the deed of discharge it operates and can be registered under section 15 as a valid discharge in respect of the enforcement rights of that property.
161. *Subsection (4)* adopts the provisions in subsections (2) to (4) of section 37 subject to the modifications in *subsection (5)*. This means that a deed of variation or discharge is not effective under section 33 (that is it does not vary or discharge burdens enforceable by or against proprietors who have not signed the deed) unless when registered it has endorsed on it a certificate from the Lands Tribunal. In addition it will not vary or discharge any burden described in the Lands Tribunal certificate, as that burden is the subject of an application for preservation (section 37(3)). A certificate would only be endorsed after the expiry of the 8 week period referred to in subsection (3) in which applications for preservation can be made and would only be available if no application is made (or all applications made have been withdrawn) or if applications received do not seek to preserve all the burdens which form the subject matter of the deed. The application of subsection (4) of section 37 means that the person who proposes to register the deed has to swear or affirm that the intimation requirements in subsections (1) and (2)

*These notes relate to the Title Conditions (Scotland) Act
2003 (asp 9) which received Royal Assent on 3 April 2003*

of section 34 have been carried out and also provide under oath/affirmation, the date on which the 8 week period expired. It should be noted that all this is only required before registration but in practice it will have to be endorsed before sending the deed to the Lands Tribunal for a certificate as the Tribunal will only in some cases know of the existence of the deed and the final date for application from the terms of the endorsement on the deed submitted.

162. *Subsection (6)* provides for situations where the granter is unable to swear or affirm in person.