



**Law
Commission**
Reforming the law

Conservation Covenants Executive Summary

Law Com No 349 (Summary)

CONSERVATION COVENANTS

EXECUTIVE SUMMARY

INTRODUCTION

- 1.1 The Law Commission's Report *Conservation Covenants* recommends the introduction of a new statutory scheme of conservation covenants in England and Wales. A conservation covenant is a voluntary agreement entered into between a landowner and a conservation body; the landowner promises to do something, or not do something, on his or her land to achieve a conservation objective such as preserving a historic building, cultivating a particular species of plant, protecting a habitat, or farming land in a certain way. A conservation covenant is a long-term arrangement; the current landowner and any future landowners will have to abide by the agreement. Conservation covenants are in use in many places around the world, but they do not yet exist in the law of England and Wales.
- 1.2 Our recommendations would create a new legal tool, enabling landowners to protect land in order to conserve and restore our natural and built environment. The proposed statutory scheme would give individual landowners the opportunity, using private agreements, to contribute to conservation efforts being made across England and Wales and to preserve important features of their property for the public and for future generations.
- 1.3 Our recommendations are informed by a public consultation, based on our Consultation Paper published in March 2013, and on extensive discussions with conservation organisations and legal practitioners.

THE CURRENT LAW AND THE NEED FOR REFORM

- 1.4 Green spaces and unique habitats, remarkable buildings, and historic places are valuable to us. They give us a sense of identity and community, they help us to be healthier, they broaden understanding of our social and cultural heritage, they provide opportunities for recreation and relaxation, and they contribute to our economy. Over the years different methods have been used to protect land in order to conserve and restore our natural and built environment but currently there is no system of conservation covenants in England and Wales.
- 1.5 For hundreds of years the law has been extremely cautious about allowing people to create perpetual obligations on their land, because of concerns about "dead hand" control: allowing landowners to dictate what happens on their land, long after their death. This caution is based on the view that each subsequent owner of land should have the freedom to make his or her own decisions about how the land is used; and land should be controlled by the living, who can adapt its use to whatever is most efficient for that particular time.
- 1.6 A large body of law has, as a result, built up concerning the circumstances in which binding obligations on freehold land (known as "covenants") can be created. In general, there are very limited circumstances in which an obligation will endure beyond the landowner who created it. The courts have said that it is only possible to create such a covenant on freehold land if:

- (1) it is created for the benefit of the neighbouring land (for example, a promise by a landowner not to build above a certain height so that his or her neighbour's view is preserved); and
- (2) it is a promise not to do something (a restrictive obligation), rather than a promise to do something (a positive obligation).

- 1.7 In recent years, however, there has been increasing interest in landowners being able to create binding positive and restrictive obligations not for the benefit of a neighbour but for the purpose of conservation generally and for the benefit of the public. For some time there have also been statutory exceptions to the rules about covenants that relate to conservation. For example, the National Trust can create statutory covenants with landowners for the purposes of conserving land, even where the National Trust does not hold neighbouring land. A National Trust covenant will bind the landowner who agrees it, and all subsequent owners of the land, but can only impose restrictive obligations. A similar arrangement can be made with the Forestry Commission.
- 1.8 As well as these statutory exceptions, people have started to develop unwieldy ways to circumvent the restrictive rules about covenants. Our consultees have told us about their use of complex schemes whereby a landowner gives or sells the freehold to a conservation organisation, which in turn grants a very long lease back to the landowner; other consultees relied on personal contracts with landowners. In explaining their current practices a number of consultees expressed the view that these workarounds were unsatisfactory. So while there are ways to get around the rules about covenants, they are either limited to certain special organisations, or they involve using complex, insecure and potentially expensive workarounds.
- 1.9 In several other jurisdictions the law has made special provision for covenants which are intended to help conservation: these are generally referred to as "conservation covenants". Many of these jurisdictions, including Scotland, the USA, Canada, Australia and New Zealand, also have the traditional rules about covenants which exist in England and Wales; but they have decided to make a special exception for conservation covenants, which allow binding obligations to be created on land for the purposes of conservation.
- 1.10 Consultation, research and the overseas picture indicate that there are a number of potential uses for conservation covenants. These can be grouped into the following categories (although we do not think this list is exhaustive):
 - (1) philanthropic uses;
 - (2) securing heritage and community assets;
 - (3) alternatives to purchase by conservation organisations;
 - (4) disposals by conservation organisations;
 - (5) payment for eco-system services and agri-environment schemes; and
 - (6) biodiversity offsetting.

- 1.11 The many different contexts that have been identified in which a conservation covenant might be used are testimony to the strength of interest that has been shown in the statutory scheme by consultees. The examples below demonstrate the potential uses of conservation covenants in practice.

Example 1: Philanthropic uses

- 1.12 A landowner has inherited extensive moorland which includes a crag much used by rock climbers. The landowner intends to leave the land to her children, but wants to ensure that the moorland is properly looked after and that the public continue to have access to the crag. The landowner could bequeath the freehold to her children, subject to a conservation covenant held by a third party conservation organisation to preserve the moorland and public access to the crag. Alternatively, a conservation covenant would enable the landowner to negotiate a sale subject to obligations which achieve those aims.

Example 2: Securing heritage and community assets

- 1.13 A farmer, who is also a keen amateur archaeologist, permits a local archaeological society to undertake a dig on his land. The society has found artefacts, which both the farmer and the society want to remain in the land. In this instance the landowner could agree in a conservation covenant to refrain from activities that are likely to damage or result in the removal of the artefacts. That covenant would bind future owners of the land.

Example 3: Alternatives to purchase by conservation organisations

- 1.14 A wildlife charity identifies a plot of land as containing the habitat of a native bird species. It makes a financial offer to the landowner in return for the land being maintained as a habitat; the landowner agrees. In this way, a conservation covenant could be used to protect land without the conservation organisation having to buy the freehold. Currently, the outright acquisition of the freehold (or a long leasehold) is sometimes the only workable way to achieve these objectives.

Example 4: Disposals by conservation organisations

- 1.15 A heritage group has invested funds in buying and restoring a Tudor house. The organisation wishes to sell the land but ensure that the work it has undertaken, and the heritage value of the property, is preserved. In such circumstances a conservation covenant could be agreed as part of the sale of the property to secure the commitment of future owners to its preservation.

Example 5: payment for eco-system services and agri-environment schemes

- 1.16 A landowner's decision to remove an area of woodland upstream of a river which passes near homes has contributed to localised flooding. After negotiations, the landowner agrees to adopt different land management practices, restoring and maintaining the woodland in return for a yearly payment. A conservation covenant could be used to provide a secure way of making sure that a beneficiary's payment to a landowner for the eco-system services provided is well spent and produces the desired outcome.

Example 6: biodiversity offsetting

- 1.17 Offsetting is the practice of compensating for harm to the conservation interest of a site by providing an equivalent gain to the conservation interest of another site. The offset site must be a long-term arrangement, properly supervised. The owner of the offset site – whether the developer or, more likely, a different owner – must be obliged to agree to carry out certain activities to develop or maintain the site’s environmental value, and to refrain from undertaking certain activities to maintain that value. A conservation covenant could be used to secure permanent and binding obligations on an offset site.

THE PROPOSED CONSERVATION COVENANTS SCHEME

- 1.18 In light of the lack of available, straightforward mechanisms for the creation of perpetual agreements for conservation purposes and due to overwhelming support for our proposals from our consultees, we have recommended the introduction of conservation covenants into the law of England and Wales by statute.

Core elements of the scheme

- 1.19 The core elements of our proposed conservation covenants scheme, devised following consultation, are set out below.
- (1) A conservation covenant can only be formed by the agreement of two parties: a landowner (a person with a freehold estate or leasehold estate of more than seven years), and an (unconnected) organisation which must be one of a limited class of organisations known as responsible bodies. The responsible body with which the conservation covenant is made takes on responsibility for monitoring and, if necessary, enforcing the landowner’s obligations. It may also undertake obligations itself as part of the agreement.
 - (2) The agreement must be made for a conservation purpose.
 - (3) There is no need for the responsible body to hold neighbouring land.
 - (4) A conservation covenant can contain both restrictive and positive obligations.
 - (5) A conservation covenant will remain in force after the land has changed hands. We consider this to be particularly important given the long-term nature of much conservation work.

Responsible bodies

- 1.20 Conservation covenants straddle the public and the private sphere. The landowner takes on an obligation and imposes it on future owners of the land; but the agreement is made for the public good, and will be made not with a private individual but with one of a defined class of “responsible bodies”. Responsible bodies will be charged with making informed and important decisions as to the creation, management, enforcement and (in some cases) discharge of conservation covenants.

- 1.21 We have recommended that limits should be placed on the organisations which may be responsible bodies. This ensures that responsible bodies are organisations for whom conservation is an important priority and who have the skills and resources needed to support conservation covenants. This restriction of the range of responsible bodies, and the element of quality control that entails, enables us to propose a regime that leaves choice and control with the responsible bodies.
- 1.22 We recommend that the following should be able to be responsible bodies:
- (1) the Secretary of State (for England);
 - (2) the Welsh Ministers (in Wales);
 - (3) any of the following listed as responsible bodies by the Secretary of State or Welsh Ministers by order (in the form of a statutory instrument):
 - (a) a local authority;
 - (b) a public body whose purposes or functions are, or are related or connected with, at least one of the conservation purposes set out below; or
 - (c) a registered or exempt charity whose purposes or functions are, or are related or connected with, at least one of those conservation purposes.

Conservation purposes

- 1.23 An obligation entered into between a landowner and a responsible body will only qualify as a conservation covenant if it is entered into for specific purposes and is for the public good. It is these requirements that justify creating an exception to the usual property rules.
- 1.24 We recommend that a conservation covenant (taken as a whole) should be made for the public good and for the purpose of conserving, protecting, restoring or enhancing:
- (1) the natural environment, including flora, fauna or geological features of the land;
 - (2) the natural resources of the land;
 - (3) cultural, historic, archaeological, architectural or artistic features of the land; or
 - (4) the surroundings, setting or landscape of any land which has any of these features.

- 1.25 A conservation covenant must be made for the benefit of the public, and not only for a private individual or family. Our definition of conservation purposes captures what consultees regarded as important, spanning the historic built environment as well as the natural landscape, and including geological and archaeological features. In some cases a conservation covenant will include an obligation to allow public access to the land; in other cases, particularly in a sensitive environment (for example, a habitat for rare birds), this will not be appropriate.

Non-statutory guidance

- 1.26 In reviewing the use of conservation covenants in other jurisdictions, we discovered the frequent use of non-statutory guidance, as well as academic critique in favour of such guidance. We recommend that non-statutory guidance be produced by collaboration between central Government and those likely to use the scheme. Guidance, of course, is not law; it would be produced to assist landowners and responsible bodies but would not address issues which are for the courts to decide under the statutory scheme.
- 1.27 We think that non-statutory guidance for a conservation covenants scheme could usefully include a conservation covenant template (covering issues such as the parties to the agreement, specific obligations, duration, and procedures for registration, management and enforcement). We anticipate that guidance could also set out an explanation of the statutory scheme, refer to further resources (including overseas models), and encourage the publication of information about existing conservation covenants.

The enforcement of conservation covenants

- 1.28 Our report sets out detailed recommendations for the enforcement of conservation covenants. These are designed to ensure that the responsible body can take swift and effective action to ensure that a landowner's obligations are carried out. It will be possible to apply to the court for an injunction, if necessary on an emergency basis. There is also provision for exemplary damages to be awarded in certain circumstances so as to ensure that it will not be in a landowner's interests to breach a conservation covenant.
- 1.29 However, we have also recommended that in some cases the landowner will have a defence to the enforcement of a conservation covenant, particularly where action was taken in an emergency or where there was a natural disaster.

Modification and discharge of conservation covenants

- 1.30 The parties can define the scope of their obligations in a conservation covenant, so it should also be possible for them to change those obligations. It is, however, important to ensure that any modifications are not for convenience, but are for the public good. We recommend that conservation covenants can be modified or discharged by agreement between the parties or by application (by either party) to the Lands Chamber of the Upper Tribunal. We recommend that a responsible body should only be able to discharge a conservation covenant unilaterally if express permission is given in the terms of the conservation covenant.

1.31 The Lands Chamber of the Upper Tribunal will be able to modify or discharge conservation covenants where it is reasonable to do so, having regard to all of the circumstances and in particular:

- (1) Any change in circumstances since the conservation covenant was created, including:
 - (a) changes in the character of the property or the neighbourhood;
 - (b) changes which affect the landowner's enjoyment of the land; and
 - (c) changes in the extent to which it is practicable or affordable for both the landowner and future landowners to comply with the conservation covenant.
- (2) The extent to which the conservation covenant is in the public interest and designed to benefit the public.
- (3) The extent to which the purposes for which the conservation covenant was created when it was entered into are served by the conservation covenant.
- (4) Whether the purposes for which the covenant was created could be achieved to an equivalent extent and within the same period of time by an alternative scheme on a different site which the landowner owns, and it is possible to create a new conservation covenant on that site in substitution for the covenant to be discharged.

THE BENEFITS OF THE NEW SCHEME

1.32 The conservation of our environmental and heritage assets remains a serious challenge. In spite of the publicly-funded measures which exist, more could be done to aid the protection and enhancement of our environment and built heritage. A large proportion of land in England and Wales is not protected: National Parks cover only 9.3% of land in England and 19.9% in Wales. Furthermore, our natural environment is in a delicate state, with biodiversity continuing to decline and along with it a range of ecosystems and habitats. The built heritage of England and Wales is also under threat from climate change and pollution.

1.33 The role played by landowners, communities and the voluntary sector in attempting to overcome these challenges cannot be overlooked. In recent years there has been an appreciation – both in this and other countries – of the contribution that the conservation industry can make to a nation's conservation efforts through agreements with landowners. As a result many countries have given legal recognition to voluntary conservation agreements in the form of conservation covenants. In these countries, conservation covenants have been used to drive and deliver a bottom-up approach to conservation.

- 1.34 There are two main benefits that will flow from the introduction of conservation covenants: missed conservation opportunities will be realised, and the need to use workarounds to create private conservation obligations will be reduced, if not eliminated. Conservation covenants will assist the efforts of private individuals and communities who seek to conserve, protect, restore or enhance our historical and environmental assets. They will also be a cheaper way to realise conservation aims than the existing workarounds. In particular, conservation bodies and public bodies will no longer have to purchase land in order to protect it or undertake conservation activities in relation to it.
- 1.35 Our proposed statutory scheme will create a versatile, simple and cost-effective legal tool capable of:
- (1) unlocking currently missed conservation opportunities by overcoming the legal difficulties faced when seeking to create long-term binding obligations;
 - (2) facilitating better ways to deliver existing conservation objectives; and
 - (3) providing assurance of long-term conservation benefits.