

THE FUTURE OF REAL BURDENS IN SCOTS LAW

Kevin Gray and Susan Francis Gray

(1999) 3 *Edinburgh Law Rev* 229-239

In its recent Discussion Paper on *Real Burdens*,¹ the Scottish Law Commission has provided a deeply thoughtful and sensible guide to the possible reform of the Scots law relating to real burdens. The following comprises a comparative comment by two land lawyers, one Scots-Irish, one English, who though resident in Scotland have been professionally engaged in tilling the barbarian soil of the common law of real property.

At the heart of the Commission's proposals lie the suggestions, *first*, that 'feudal burdens' should in their present form disappear; *second*, that some distinction should perhaps be drawn, de lege ferenda, between 'neighbour burdens' and 'community burdens'; and *third*, that a 'sunset rule' should be introduced which would cause most existing and new real burdens (whether 'neighbour' or 'community' in character) to lapse after a specified period of time.

Little need be said about the first of these proposals save that it is, of course, timely that the last relics of feudal legal culture should be dismantled by the beginning of the 21st century. But, however sympathetic one may be to this process of modernisation, there was always a danger that other major thrusts of the Commission's work on real burdens could have been unduly affected by the wholly proper concern to set aside feudal structures and ways of thought.² Happily the Commission appears, so far, to have steered fairly skilfully between Scylla and Charybdis.

The Commission's distinction between neighbour burdens and community burdens broadly mirrors the terminology adopted by the English Law Commission in its report on covenants in 1984,³ the Scottish Law Commission emphasising perhaps even more clearly that the 'essential feature of a neighbour burden is an

¹ *Real Burdens* (Scot Law Com Disc Paper No 106, October 1998) (hereafter referred to as *Real Burdens*). This discussion paper was itself based on a *Draft Discussion Paper on Real Burdens* (hereafter referred to as *Draft Discussion Paper*), which was considered at a consultative seminar held at the Scottish Law Commission on 24 June 1998. An earlier version of the present comment was prepared as a contribution to that seminar.

² It must be borne in mind, as the Commission admits early in the Discussion Paper, that 'real burdens would have developed even without a feudal system' and that, indeed, 'real burdens in towns and cities have generally worked quite well' (*Real Burdens*, paras 1.16, 1.12 (n 23)).

³ *Transfer of Land: The Law of Positive and Restrictive Covenants* (Law Com No 127, 26 January 1984), paras 6.2 - 6.14.

absence of reciprocity' between dominant and servient owners.⁴ The neighbour burden is captured, stereotypically, as a one-off and entirely unidirectional imposition of one owner's user preferences upon his neighbour.⁵ By contrast, the vital characteristics of a community burden are 'both universal and reciprocal',⁶ since they relate to the cooperative regulation of communities of mutual interest and obligation. The latter form of burden, enforced within what the English lawyer calls a 'building scheme' or 'scheme of development', finds its deep roots in conscience-based notions of reciprocal obligation under a local law for the governance of an estate or tenement.⁷

In a move which is much to be welcomed, the Commission now seems to have withdrawn many of its reservations concerning the acceptability of the *neighbour burden* as a modern device of land use regulation. In its earlier *Draft Discussion Paper*, the Commission had opined that neighbour burdens evinced 'the potential to be oppressive'⁸ and that the effect of the relationship of dominance and servience obtaining in respect of neighbour burdens was 'to continue the feudal system by other means.'⁹ Such animus against the neighbour burden had led the Commission towards a preliminary view that, for the future, it 'should not be possible to create a neighbour burden with perpetual duration.'¹⁰ In the result, the *Draft Discussion Paper* proposed the introduction of a peremptory 40 year 'sunset rule' applicable, not to the community burden, but only to the socially unmeritorious neighbour burden.¹¹

Correspondingly, the *Draft Discussion Paper* had portrayed the community burden in terms which positively pulsated with public benevolence. (And as a matter of sheer terminology, the 'community burden' -- a subtle semantic mutation of the less obviously winsome English equivalent, the 'development obligation' -- does sound as though it really ought to attract the instinctive approval of all right-thinking, public-spirited persons.) Exactly like motherhood and apple pie, community burdens were 'conceived for the benefit of the community

⁴ *Real Burdens*, para 1.5.

⁵ *Real Burdens*, paras 2.9, 5.79, 7.12.

⁶ *Real Burdens*, para 2.6.

⁷ See *Spicer v Martin* (1888) 14 App Cas 12 at 25 per Lord Macnaghten ('community of interest necessarily...requires and imports reciprocity of obligation').

⁸ *Draft Discussion Paper*, para 2.40.

⁹ *Draft Discussion Paper*, para 2.11. Later in the *Draft Discussion Paper*, space was found for the argument that 'burdens which do not regulate communities are not worth preserving' (para 5.70) and that neighbour burdens should therefore be allowed 'only under sufferance' (para 2.51).

¹⁰ *Draft Discussion Paper*, para 2.40. The Commission also spoke of 'a background in which quasi-feudal burdens are viewed as contrary to the public interest' (ibid, para 2.44) and was most anxious lest, by failing to limit the future longevity of neighbour burdens, it should preside over 'the creation of rights which are quasi-feudal in character' (ibid, para 2.41).

¹¹ *Draft Discussion Paper*, para 2.49.

as a whole',¹² and were entirely 'unobjectionable in principle'.¹³ Not least for this reason, the *Draft Discussion Paper* endorsed the proposition that it should be competent to create community burdens and that existing community burdens should remain enforceable more or less indefinitely.¹⁴

In the context of the neighbour burden the Commission's understandable distaste¹⁵ for possible autocratic dominance and mercenary holdout certainly echoes the insistence within wider European fora that landowners should not be facilitated in 'securing large sums in return for a waiver of obsolete restrictions'.¹⁶ But the Commission's initial full frontal assault on the neighbour burden as a desirable method of land use control severely threatened to obscure the salient reality that *both* neighbour *and* community burdens nowadays serve as crucial instruments of much needed environmental control. Moreover, it is easy to challenge the viability of any strict dichotomy between neighbour and community burdens. Just who, for instance, forms the 'community' implicated in the community burden? The pervasive benevolence attributed to the community burden at first seems to indicate a diffusion of concern for the general public interest which deserves to be upheld and reinforced. Yet, as the Commission admitted in the *Draft Discussion Paper*, a community burden may relate to nothing more significant or far-reaching than the number of domestic pets which one servient occupier is entitled to keep in his home,¹⁷ and the 'community' involved with a community burden could, in theory, 'consist of no more than two units'.¹⁸ Indeed, the smaller the 'community', the more closely the covenanted burdens resemble neighbour burdens¹⁹; and it is often less than clear that the beneficiaries of 'community' burdens feel particularly inclined to favour objectives intrinsic to the larger communal interest.²⁰ There is always a risk that superficial semantic associations may disguise the actual *dissociation* between 'community burdens' and general communitarian benevolence.²¹

¹² *Draft Discussion Paper*, para 2.6. See also *Real Burdens*, para 2.6.

¹³ *Draft Discussion Paper*, para 2.51. See also *Real Burdens*, para 2.6.

¹⁴ *Draft Discussion Paper*, para 2.7. The Commission went on to say that 'it is a sound policy to allow them to remain in force for as long as they are of use to the community as a whole' (ibid, para 2.51).

¹⁵ *Draft Discussion Paper*, paras 2.11, 2.12.

¹⁶ *S v United Kingdom* (1984) 41 DR 226 at 233 (European Human Rights Commission: Application No 10741/84).

¹⁷ *Draft Discussion Paper*, para 2.6. See now *Real Burdens*, para 2.6.

¹⁸ *Draft Discussion Paper*, para 2.8. See now *Real Burdens*, para 2.8.

¹⁹ For an English 'community burden' initially extending to three properties only, see *Re Manson & Gill Construction Ltd* (Lands Tribunal, LEXIS Transcript, 9 April 1991). Compare *Re Sheehy's Application* (1992) 63 P & CR 95, which involved the St Aubyn Discretionary Trust's imposition of 'neighbour burdens' on 7,650 separate properties.

²⁰ See eg *Re John Horsfall & Sons (Greetland) Ltd* (Lands Tribunal, LEXIS Transcript, 24 July 1990), where the participants in a building scheme originally involving twelve properties successfully frustrated a proposed conversion of one of the properties into a residential home for the elderly, notwithstanding that the inspector had found the property well-positioned for the purpose.

On further reflection the Commission has now muted many of the distinctions drawn in the earlier *Draft Discussion Paper* between neighbour and community burdens. The Commission, whilst noting that community burdens are 'necessary and should continue to form part of our legal system' and whilst asserting that the case for neighbour burdens 'seems less self-evidently strong',²² has nevertheless expressed its preliminary view in favour of the retention of neighbour burdens.²³ It does not follow, however, that neighbour burdens 'should continue on their present terms'.²⁴ If, the Commission says, restrictions on ownership require to be justified, then 'it may be that restrictions conceived in the private interest require to be justified more carefully than restrictions in the public interest'.²⁵ It is on this basis that the Commission, whilst now accepting that a 'sunset rule' should apply to *both* neighbour *and* community burdens, has mooted the possibility of differential 'sunset' times, observing that neighbour burdens may 'merit less favourable treatment'.²⁶

It is, however, the primacy of the concern with environmental quality which ultimately overrides any pejorative distinction between publicly and privately inspired modes of land regulation.²⁷ It is deeply questionable whether neighbour burdens are, in fact, directed exclusively towards the unilateral promotion of private self-interest and should, on this ground, merit only the diminished respect of, and protection from, the state. There is, in the comparative English law, increasing reason to believe that the so-called neighbour burden is beginning to come into its own, not as a device for the imposition of the selfish or isolated or eccentric individualist protectionist impulse, but rather as the longstop guardian of a more general, community-spirited, conservationist concern.

In the final analysis the distinction between neighbour and community burdens may turn out not to be terribly sharp or helpful -- and certainly no sure basis for a watershed distinction between differing regimes for the

²¹ The Commission itself acknowledges that 'community burdens' apply to 'discrete communities' as distinct from the public at large (*Real Burdens*, para 1.6). For an example of how easily the advantage conferred by 'community burden' becomes conflated with 'the benefit of the community as a whole', see *Real Burdens*, para 7.12.

²² *Real Burdens*, para 2.9.

²³ *Real Burdens*, para 2.34.

²⁴ *Real Burdens*, para 2.35.

²⁵ *Real Burdens*, para 2.1.

²⁶ *Real Burdens*, para 7.12. See also *ibid*, para 5.79.

²⁷ "Property" no longer articulates the arrogance of entitlement, but expresses instead the commonality of obligation ... It follows, on this view, that the deep structure of property is not absolute, autonomous and oppositional ... So analysed, this community-oriented approach to property in land plays a quite obviously pivotal role in the advancement of our environmental welfare' (Gray and Gray, 'The idea of property in land', in Bright and Dewar (ed), *Law and Land: Themes and Perspectives* (Clarendon Press, Oxford, 1998), p 41).

extinction of covenanted obligations. In England the Law Commission's 1984 proposals for a restructuring of land covenants (both positive and restrictive) as 'neighbour' and 'development' obligations have not yet been brought on to the statute book. It is well known that the English Law Commission has since proposed an 80 year 'sunset rule' for neighbour burdens,²⁸ whilst envisaging that most community burdens will eventually be brought under the aegis of a rather different regime of commonhold. But no one in England has gone so far as to advocate that an intrinsic qualitative difference underlies the kinds of covenanted burden entered into under, respectively, a unilaterally assumed *neighbour burden* and the kind of reciprocal burden which arises under a *development obligation*. The furthest English authorities have gone is to suggest that, when the statutory discharge or variation jurisdiction is invoked before the Lands Tribunal, there is, with a building scheme, 'a greater presumption that restrictions imposed under it will be upheld and therefore a greater burden of proof on the applicant to show that the requirements of [the statute] are met.'²⁹

Certainly no one has argued in England that, as a species, neighbour covenants represent an unworthy object of aspiration and that their use should, in the public interest, be restrained or discouraged. Instead the English Law Commission, in its major Report of 1984, was only too ready to endorse the facility which the law offers for imposing private restrictions on land use. The Commission noted that such covenants 'are still felt by the public to meet a real need' and observed that any constriction of this power would 'curtail a freedom which people do in fact exercise to a very considerable degree'.³⁰ Even in the English Law Commission's deliberations in 1991 on the removal of obsolete covenants,³¹ there was no hint that neighbour obligations should be regarded as an inherently improper means of land use regulation.³² Overseas experience likewise supports the ongoing utility of privately imposed neighbour burdens, with the result that the Scottish Law Commission might perhaps be thought a little grudging when, in its Discussion Paper, it says that '[t]o say that everyone else has restrictive conditions, and wants to keep them, is not, precisely, an argument in favour of real burdens. Everyone else might be wrong.'³³

The most obvious empirical evidence of the modern utility of land use covenants -- not least of neighbour obligations -- is provided by the experience gained in the context of the statutory jurisdiction to discharge or

²⁸ *Transfer of Land: Obsolete Restrictive Covenants* (Law Com No 201 (July 1991), paras 3.1, 3.18.

²⁹ *Re Lee's Application* (1996) 72 P & CR 439 at 444. See also *Re Bromor Properties Ltd's Application* (1995) 70 P & CR 569 at 583.

³⁰ Law Com No 127 (1984), paras 2.8, 2.10. See also para 6.19.

³¹ Law Com No 201 (July 1991).

³² Indeed, the English Commission, in its typically understated fashion, merely described as 'radical' the view expressed in 1979 by the Royal Commission on Legal Services (*Final Report* (Cmnd 7648, Vol 1, para 21.1, Annex 21.1, paras 3, 12) -- a view now generally agreed to have been unacceptably maverick -- that the time had come for a constriction of the role of private covenants (Law Com No 201, para 2.6 (n 2)).

³³ *Real Burdens*, para 2.30.

modify burdens. In 1991 the English Law Commission reported³⁴ that it had surveyed a decade of case law -- spanning the period 1981 to 1990 -- on the jurisdiction under section 84 of the Law of Property Act 1925.³⁵ Accordingly, we have carried out a similar research project covering the period 1991 to date, which examines a gathered field of some 42 English cases (compared with the English Commission's analysis of 32 cases over the ten-year span to 1990). Some interesting patterns emerge. Of the 42 cases in our field a *discharge* of the covenants affecting the application land was awarded in only six instances (ie, 14 per cent). *Modification* (usually in fairly minor respects) was allowed in 16 cases (that is, just over one third of the sample). And in a total of 20 instances -- of which at least seven involved neighbour burdens in the strict sense -- the Lands Tribunal refused outright to grant *any* discharge or modification at all.³⁶

Further notable features were produced by our survey. As had been found by the English Commission in respect of the earlier sample of cases, very few of the applications involved covenants of any great antiquity. In fact, only 16 cases of the total of 42 involved covenants predating 1950; and only four concerned covenants which were over 80 years old. The bulk of the covenants in question seemed to have been created during the post-war housing boom of the 1950s and 1960s, although several had arisen as recently as the late 1980s.

Even more interesting were the circumstances in which the Lands Tribunal had totally rejected applications for discharge or modification. Almost without exception the applications in our sample were, significantly and perhaps predictably, supported by planning permission for the development in question. Yet, despite classic judicial statements to the effect that it is no proper role of the Lands Tribunal to 'act as a substitute for the planning authority',³⁷ it is now quite obvious that the Lands Tribunal in England has begun to function as the residual guarantor of a degree of environmental amenity which the individual citizen can no longer count on receiving at the hands of his or her local planning authority. And if there is one person in England less sensitive than local planners to the preservation of local environmental amenity, it must be the Secretary of State on appeal. Of the 20 cases in our sample in which discharge and modification were alike refused by the Lands Tribunal, exactly half involved a development sanctioned by the Secretary of State. To adapt the words of the Psalmist, 'Put not your trust in planners, nor in the Secretary of State, in whom there is no help.'

³⁴ Law Com No 201 (July 1991), para 3.19.

³⁵ See Law of Property Act 1925, s 84, as significantly amended and extended by Law of Property Act 1969, s 28. Compare, in Scotland, the Conveyancing and Feudal Reform (Scotland) Act 1970, Part I.

³⁶ Thus outright rejection now occurs in an even higher proportion of cases than the 14 instances out of 32 disclosed by the English Law Commission's case law sample from the period 1981 to 1990 (Law Com No 201, para 3.19), suggesting that the resistance of the Lands Tribunal has, if anything, hardened over recent times.

³⁷ *Re Sheehy's Application* (1992) 63 P & CR 95 at 107, following *In re Ghey and Galton's Application* [1957] 2 QB 650 at 662 per Lord Evershed MR. See also *Gilbert v Spoor* [1983] Ch 27 at 34F-G; *Re Willis's Application* [1998] JPL 497. For a characteristic description of the role of the Lands Tribunal, see *Re Bromor Properties Ltd's Application* (1995) 70 P & CR 569 at 579 ('... my function is not to act as a tribunal of appeal as to the correctness of these [planning] permissions, nor are they conclusive or even necessarily persuasive evidence that I should grant this application. These permissions are evidence to be taken into consideration under section 84(1B) but go no further'). For the adoption of a similar stance in Western Australia, see *Kort Pty Ltd v Shaw* [1983] WAR 113 at 115.

Rarely is the protection sought by the individual objector to a section 84 application entirely self-directed or self-interested. Instead, resistance to the discharge or modification of existing covenants tends to be a shared concern, with objectors gathering together to oppose threatened developments which will degrade their neighbourhood, usually by devastating quiet residential enclaves.³⁸ So often the relevant planning department has granted permission for proposed developments within a locality, nonchalantly cutting through conservation areas,³⁹ or areas of green belt or special character,⁴⁰ only to have the Lands Tribunal come ultimately to the rescue by refusing to relax private covenants originally created for the precise purpose of securing the threatened amenity.

It used to be that the Lands Tribunal's discharge and modification jurisdiction provided longstop protection against narrowly conceived private interests which might frustrate proposed developments promising clear benefit to the entire community. Nowadays it is much more likely that the private interests which merit careful scrutiny are those of large property development corporations which, armed with relatively easily obtainable planning permissions,⁴¹ seek to overturn covenanted arrangements which were originally designed to secure that most modern of objectives -- the environmental quality of urban neighbourhoods. The relationship between public and private planning regimes has been thoroughly transmuted, with the private covenant-based regime taking over much of the social or community-directed function of public planning schemes.⁴² (An even more recent innovation in England is the use of the private law device of the trust for the purpose of ensuring the conservation of areas of special character⁴³.)

It has, of course, been long acknowledged that existing planning control, operating under conditions of increasing pressure, cannot concern itself with all the detailed matters for which private covenants make

³⁸ See eg *Re Peck* (Lands Tribunal, LEXIS Transcript, 31 December 1992).

³⁹ See eg *Re Manson & Gill Construction Ltd* (Lands Tribunal, LEXIS Transcript, 9 April 1991).

⁴⁰ See eg *Re Page's Application* (1996) 71 P & CR 440.

⁴¹ See the wry observation that a local planning authority, although 'sympathetic to the protection of a special area', has to be 'careful' in dealing with applications 'because of the risk of appeal against a refusal (and the associated risk of having to pay the applicant's costs)' (R. Cooper and T. O'Donovan, *Covent Garden: A Model for Protection of Special Character?* [1998] JPL 1110 at 1111).

⁴² The point has recently been made, in grudgingly conservative fashion, in *McMorris v Brown* [1998] 3 WLR 971 at 974E, where the Privy Council indicated that 'a restriction tending to preserve the quality of a particular environment is clearly not to be deemed obsolete because it frustrates proposals which, were it not for the covenant, would seem entirely reasonable.'

⁴³ See, for instance, the creation in London of the Covent Garden Area Trust in a context 'where the general planning law is likely to prove an inadequate protector' (R. Cooper and T. O'Donovan, [1998] JPL 1110 at 1111). Cooper and O'Donovan assert that '[i]f the character of Covent Garden, with all its listed buildings and conservation area status, were to depend solely on the planning system for protection from untrammelled commercial activity, this article would be a draft obituary.'

provision.⁴⁴ In one case⁴⁵ the Lands Tribunal indicated that 'vigilant insistence on the covenants has preserved the character and amenity of the estate to a standard which planning control would lamentably have failed to achieve.' As long ago as 1975 G.H. Newsom, QC spoke of the way in which planning standards 'are still too often below the standards imposed by restrictive covenants.'⁴⁶ Even the Scottish Law Commission concedes that any abolition of neighbour covenants would require that further resources be made available to planning authorities 'to ensure a more stringent enforcement of planning law'.⁴⁷ Ironically, as observed by the Lands Tribunal in Scotland in *Lothian Regional Council v George Wimpey & Co Ltd*,⁴⁸ 'certain changes of use ... do not even require planning permission', with the frequent result that only local regulation by contract can avert disadvantageous development.⁴⁹

So far from there being strong and persistent doubt as to the social propriety of the neighbour burden as a device for the expression of land use preferences, it could be asserted instead that neighbour burdens (together with community burdens) secure the protection of our environmental quality more effectively than any other available means. The neighbour burden certainly enables land use preferences to be targeted accurately -- at minimal transaction cost -- by the very persons best positioned to assess the environmental utility required in given contexts.⁵⁰ Seen in this light, it is less than obvious that the neighbour burden is as deserving of suspicion as the Commission was initially minded to suggest.

Something depends, of course, on the extent to which local planning authorities can ultimately be trusted to safeguard our environmental welfare. In this context we must look briefly at the fate accorded the sorts of 'planning agreement' entered into pursuant to section 75 of the Town and Country Planning (Scotland) Act 1997.⁵¹ The planning agreement has, in recent times, become a particularly prolific source of land burdens,

⁴⁴ See Law Com No 127 (1984), para 2.6; *Real Burdens*, para 2.24. Likewise, according to Cooper and O'Donovan, 'covenants can be drawn so as to apply rigorous standards of control which the listed building control system would struggle to replicate' ([1998] JPL 1110 at 1111).

⁴⁵ *Re Hornsby's Application* (1968) 20 P & CR 495 at 503.

⁴⁶ *Preston & Newsom's Restrictive Covenants Affecting Freehold Land* (6th edn by G.H. Newsom, Sweet & Maxwell, 1976), p vii.

⁴⁷ *Real Burdens*, para 2.33.

⁴⁸ 1985 SLT (Lands Tr) 2 at 3.

⁴⁹ Such is the breadth of jurisdiction of the modern local planning authority that '[w]hat is good policy for the area as a whole may be damaging to a particular part. This is particularly the case now that development control is more plan-based' (R. Cooper and T. O'Donovan, [1998] JPL 1110 at 1111).

⁵⁰ See eg *Re Everett's Application* (Lands Tribunal, LEXIS Transcript, 19 June 1992).

⁵¹ Formerly Town and Country Planning (Scotland) Act 1972, s 50. In England and Wales, for what is now called a 'planning obligation', see Town and Country Planning Act 1990, s 106(1), as substituted by Planning and Compensation Act 1991, s 12(1) [formerly a 'planning agreement' under Town and Country Planning Act 1971, s 52(1); Town and Country Planning Act 1962, s 37(1)]

given that a statutory power is conferred on local authorities to enter into an agreement with 'any person interested' in land in their area for the purpose of 'restricting or regulating the development or use of the land'.

Where planning agreements limit the nature or extent of the future development allowed the servient owner, an important mantle is cast upon the shoulders of the local authority. In England it has been forthrightly maintained that the local authority, in respect of its planning agreements, acts as the 'custodian of the public interest'.⁵² Curiously, cases are now increasingly frequent in which local authorities, despite having sanctioned a proposed development by way of a planning permission granted by its planning arm, have nevertheless attempted to reassert control over the development by refusing to agree to any later statutory discharge or modification of covenants of which they stand as the public or nominal beneficiary.⁵³ This is sometimes said to provide a 'good illustration of the differences in the criteria to be applied on the one hand in the context of a planning appeal and on the other in the context of the statutory regime under section 84'.⁵⁴ And, to be sure, there are in the case law many assertions of the proposition that two different regimes exist in parallel.⁵⁵ It is also interesting to note the increasing degree of distrust evidenced by local authorities, pursuant to their role as 'custodians of the public interest', in relation to decisions taken by their planning arm - and, even more markedly so, in relation to planning permissions granted on appeal by the Secretary of State.⁵⁶

In *Re Jones' and White's Application*,⁵⁷ the Lands Tribunal pointed out that the effect of a planning agreement is to 'give to the council a means of control of development additional to that provided by the 1971 Town and Country Planning Act', adding trenchantly that it affords 'a means of control untrammelled by interference by the Secretary of State.' The Tribunal observed that, by entering into a planning agreement, the local authority was 'enabled to consider matters from a subjective point of view whereas in exercising its functions in relation to applications for planning permission it must be objective'. Thus, in justifying opposition

⁵² *Re Jones' and White's Application* (1989) 58 P & CR 512 at 517; *Re Hopcraft's Application* (1993) 66 P & CR 475 at 483. See also *Re Wallace & Co's Application* (1993) 66 P & CR 124 at 127.

⁵³ The objector may be the planning arm of the council, where the covenant in question is contained in a planning agreement, or the housing committee in respect of restrictive covenants imposed under the 'right to buy' legislation.

⁵⁴ *Re Hunt's Application* (1997) 73 P & CR 126 at 135. See also *Re Wallace & Co's Application* (1993) 66 P & CR 124 at 127.

⁵⁵ See eg *Re Martins' Application* (1988) 57 P & CR 119 at 124-125; *Re Bewick's Application* (1997) 73 P & CR 240 at 248.

⁵⁶ The protective intervention of the Lands Tribunal may be short-lived. Once five years have elapsed since the date of a planning obligation entered into on or after 25 October 1991, the discretion to discharge or modify will be exercisable, not by the Lands Tribunal, but initially by the local authority which took the covenant, with appeal to the Secretary of State (see Town and Country Planning Act 1990, ss 106A, 106B). In other words, the more independent scrutiny of the Lands Tribunal is available only during the first five years of the life of any planning obligation created on or after 25 October 1991.

⁵⁷ (1989) 58 P & CR 512 at 516.

to a discharge or modification of a planning agreement -- even against the background of a subsequent planning permission granted by itself -- the council is 'entitled to look at matters from its own point of view and from that of members of the public whom it represents'.⁵⁸

Many are the cases in which a local authority's low view of the conservationist potential of planning processes appears to have been justified. In *Hopcraft's Application*,⁵⁹ for example, the Lands Tribunal accepted that the local planners had in 1991 given permission for the extension of a caravan site which would have damaged severely the visual amenity of a pleasant tract of open countryside in Hampshire. The Tribunal nevertheless held that the District Council, the only objector to a section 84 application to remove a planning agreement of 1980 affecting the same land, had been entirely correct, 'as custodian of the public interest', to oppose the application. Said the Tribunal: 'the public interest requires that the application land be kept free from development'.⁶⁰ Equally significantly, in *Bewick's Application*,⁶¹ the evidence quite plainly revealed that the local council, after granting planning permission for limited occupancy only, had imposed a planning agreement to the like effect precisely because they had been 'apprehensive that they might subsequently lose an appeal against the occupancy condition and wished to retain control by a separate agreement'.⁶²

Enough has been said earlier to point up the fallacy that neighbour burdens are necessarily anti-social devices aimed at the satisfaction of isolated private preferences as distinct from more attractive concerns with local environmental management and conservation. A question mark must therefore be placed against the Commission's view, stated in the Discussion Paper, that 'we do not think that, in Scotland, the proper role of neighbour burdens is to advance matters of public policy'.⁶³ At the level of both principle and practice, there is increasing evidence that the unifying motivation of modern land use regulation -- whether its imposition be unilateral or multilateral -- is the promotion of environmental values. It is this paramountcy of environmental quality which today causes the concerns of individuals and the benefit to the larger community to coalesce. There is a danger that a law reform proposal preoccupied with the defaults of a feudal past may overlook the single most important, overarching, land issue of the immediate future.

A similar engagement with the past animates the Commission's proposed introduction of a 'sunset rule' which would cause most existing and new real burdens to be automatically extinguished on the expiry of a statutorily fixed period following their creation.⁶⁴ The sunset rule would apply whether the burden is 'neighbour' or

⁵⁸ (1989) 58 P & CR 512 at 517.

⁵⁹ (1993) 66 P & CR 475.

⁶⁰ (1993) 66 P & CR 475 at 484.

⁶¹ *Re Bewick's Application* (1997) 73 P & CR 240.

⁶² (1997) 73 P & CR 240 at 247.

⁶³ *Draft Discussion Paper*, para 2.45 (n 104).

⁶⁴ *Real Burdens*, paras 5.72, 7.14.

'community' in character, but could be averted, at any time prior to lapse in the case of existing burdens, by an application to the Lands Tribunal for renewal.⁶⁵ This proposal for the systematic removal of supposedly redundant land burdens embodies a perfectly sensible disinclination to allow the dead hand of the past to order the affairs of the present in circumstances never imagined, let alone foreseen. But it is good that the Commission has eschewed its initial impulse to impose a brutal 'one-off cull' of all real burdens created before a prescribed date (such as 1900),⁶⁶ since such a move would have disabled many wide-ranging Victorian covenants against 'any nuisance or act which may injure the amenity of the place and neighbourhood' which provide more comprehensive protection than contemporary planning control is able to afford.⁶⁷

Likewise, whilst hinting that 'neighbour' burdens should be less enduring than 'community' burdens,⁶⁸ the Commission's projected lifespan for real burdens now envisages a substantial period of possibly 100 or 150 years⁶⁹ (rather than the originally proposed period, in relation to 'neighbour' burdens,⁷⁰ of 40 years). The Commission's initial proposals for sunsets and culls would virtually have returned the law of covenants to the period, in English law predating the decision in *Tulk v Moxhay*,⁷¹ when land use covenants were binding upon only the covenanting parties. One and a half centuries of conceptual development would have been suppressed, since the short dateline on existing and new neighbour burdens would have made such burdens, in many cases, a matter of mere contractual privity and not the source of the more generally binding proprietary entitlement to which they were elevated, in both Scotland and England, by mid-19th century judicial intervention. If one accepts the principle of automatically deemed redundancy, the time scale proposed by the Scottish Commission will at least be sufficient to preserve the useful life of the tranche of land burdens which arose during the general development boom of the 1950s and 1960s. Yet it remains ultimately questionable how easily the Commission's generously framed 'sunset rule' (with the possibility of renewal) will

⁶⁵ *Real Burdens*, paras 5.73-5.75.

⁶⁶ *Draft Discussion Paper*, para 5.68.

⁶⁷ See eg *Re Hoyle* (Lands Tribunal, LEXIS Transcript, 9 December 1992) (restrictive covenants dated 1870). In regarding as 'spent' the detailed conditions imposed by the standard Victorian building charter (*Real Burdens*, para 5.64), the Commission may be wrong. The buildings to which such charters relate are now in need of sympathetic repair or refurbishment and not every Victorian building is listed or situated in a conservation area.

⁶⁸ Compare *Real Burdens*, paras 5.78-5.82, 7.6-7.14.

⁶⁹ *Real Burdens*, paras 5.78 - 5.79.

⁷⁰ *Draft Discussion Paper*, para 2.49.

⁷¹ (1848) 2 Ph 774, 41 ER 1143. See Gray, *Elements of Land Law* (2nd edn Butterworths, 1993), pp 149, 1136-1138.

sit alongside its concern lest the accumulation of past burdens 'clutter up the register and create unnecessary transaction costs.'⁷²

So much for sunsets. It is undoubtedly the case that, in the Scottish Law Commission's paper on *Real Burdens*, many of the murky distinctions and caveats which marked its *Draft Discussion Paper* have now rightly disappeared in the full sunshine of the overriding environmental motivations which ought to characterise the emergence of a new law of real burdens in a new and self-determining Scotland.

⁷² *Real Burdens*, para 5.66. There is a danger that the fierce prevalent modern rhetoric about not cluttering up registers is really part of a hidden agenda which is ultimately concerned with promoting the de-skilling of the conveyancer by simplifying and removing much of the detail requiring to be considered prior to a purchase of title. The immediate effect may be measured possibly in terms of so-called efficiency gains and cost savings, but such short-term outcomes may one day appear to be a rather false economy.