

# TITLE CONDITIONS (SCOTLAND) ACT 2003

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part 2: Community Burdens

##### *Section 35: Variation and discharge of community burdens by owners of adjacent units*

163. *Section 35* introduces a second default mechanism for the discharge and variation of community burdens. It permits a burdened proprietor to obtain a variation or discharge of a community burden from the benefited proprietors of properties lying within 4 metres of the burdened property, if there are any. It is subject to a notification procedure. The procedure is essentially the same as for a deed of variation or discharge granted under section 33. In this case the deed must be signed by the owners of those units lying within a 4 metre radius of the burdened property and by the burdened proprietor. Notification is then given to other owners within the community who have 8 weeks in which to raise the matter before the Lands Tribunal if they wish to preserve the burden. Section 36 makes provision for intimation of a proposal to register a section 35 deed. After these requirements are met an oath or affirmation that intimation has been duly given should be endorsed on the deed. In addition, a certificate must also be obtained from the Lands Tribunal confirming that no application has been made to preserve a burden mentioned in the deed. Once this is done, the deed may be registered against the affected unit. The deed is effective against the whole community except in respect of any burden that is described on the Lands Tribunal certificate as the subject of an application for preservation.
164. *Subsection (1)* provides that a burdened proprietor wishing to vary or discharge a community burden may do so by obtaining a discharge from all ‘adjacent units’. Owners of “affected units” must also sign the deed. See the note for section 32. Paragraphs (a) and (b) provide for some circumstances in which the procedure cannot be used. Paragraph (a) prevents a section 35 discharge from affecting facility or service burdens or burdens imposed on sheltered or retirement housing development. Paragraph (c) requires notification under section 36 of a proposal to use section 35 to all the other benefited proprietors in the community.
165. *Subsection (2)* ensures that an owner (or owners collectively owning more than half of a unit owned in common) can grant the deed for the purposes of section 35. Co-owners who did not sign the deed would require to be notified under the procedure in section 36. If under section 37 the Lands Tribunal finds in favour of preservation so that the deed cannot be registered as effective against all units, it could still be registered as an “ordinary” discharge but only if it complies with section 15, which would require the signature of all the owners of each benefited property which was losing enforcement rights. Likewise, an “ordinary” deed of variation would only be effective against the burdened property if all the owners of that property had signed it.