

REPORT TO: POLICY AND RESOURCES COMMITTEE - 10TH MAY 2004
REPORT ON: ABOLITION OF THE FEUDAL SYSTEM
REPORT BY: DEPUTE CHIEF EXECUTIVE (SUPPORT SERVICES)
REPORT NO: 329-2004

1.0 PURPOSE OF REPORT

- 1.1 To advise the Committee of the implications of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (the 2000 Act) and the Title Conditions (Scotland) Act 2003. (the 2003 Act).

2.0 RECOMMENDATIONS

The Committee is recommended to -

- 2.1 Note the terms of the report and approve the approach recommended by the Depute Chief Executive (Support Services) to welcome the abolition of the Feudal System and the modernisation of the law of property in Scotland.

3.0 FINANCIAL IMPLICATIONS

- 3.1 The Council currently pays and receives the following annual sums in respect of feuduties:-

	Payments	Receipts
General Fund Services	£ 9,400	£1,800
Housing Revenue Account	£ 4,800	£1,000
Charities	£ 200	£1,800
	<u>£14,400</u>	<u>£4,600</u>

The Council will no longer be able to obtain monies for Minutes of Waiver nor will the Council require in certain circumstances to pay monies for Minutes of Waiver. If the Council decide to register Notices under the Act there will be administration fees and legal fees.

- 3.2 The Council may receive notices requiring a compensatory payment to be made by the Council, and the financial implications of complying with these notices will be reported back to Committee, as and when required.

4.0 LOCAL AGENDA 21 IMPLICATIONS

- 4.1 There are no Local Agenda 21 implications.

5.0 EQUAL OPPORTUNITIES IMPLICATIONS

- 5.1 There are no Equal Opportunities implications.

6.0 MAIN TEXT

6.1 Background to Abolition to the Feudal System

The Feudal System is an archaic form of land tenure dating back to the middle ages with land ownership terms such as Superior and Vassal which are equivalent to Master and Serf. The Feudal System can unduly restrict the development of land and prevent an owner from fully enjoying their land. In addition, remote Superiors with no real attachment to land have used the Feudal System to ensure that they receive financial benefit when development takes place. The Scottish Parliament took a decision to abolish the Feudal System in order to free land and modernise Scottish Land Law. The Scottish Parliament decided that any controls which were necessary would be retained under the new Title Conditions (Scotland) Act 2003 and under the planning system.

6.2 Implications of the Act

The 2000 Act abolishes the right of a Superior to enforce burdens. On the appointed day (28 November, 2004), the Council, as Superior, will be unable to enforce many conditions in Feu Dispositions which have previously been granted. Even if there is a burden stating that a piece of ground is to be used, say, for recreation purposes only, the Council will no longer be the Superior and may be unable to enforce this restriction.

It is considered that in many cases, burdens which previously existed in favour of the Council will be extinguished on the appointed day and will be unable to be enforced. However, it must also be remembered that many of the burdens which were imposed in the title deeds would be unenforceable today as a result of other legislation, by the fact that they were unfair or by the fact that the Council could not prove that it had sufficient interest to enforce such burdens.

However, the legislation does provide a means of preserving some burdens which exist in titles to properties which are already sold. These exist in certain strict circumstances. In order to preserve these burdens, they must first be identified and then notices served to preserve the burdens. The various types of burdens which require to be considered, are detailed below.

6.3 Feuduties

On the appointed day the Council will not have to pay any further feuduties and no feuduties will be received by the Council. However, within two years of the appointed day, i.e. 28th November 2006, the Council may serve notice on the person who pays the feuduty requiring that a compensatory payment amount be paid to the Council. Similarly, such notices may be served on the Council requiring a compensatory payment to be paid by the Council. The Depute Chief Executive (Finance) is investigating the likely implications on a cost basis for the loss of revenue on feuduties and the potential costs of payment of compensatory payments of feuduties prior to 28th November 2006. Notices will only be served where the amount of compensatory payment outweighs the administration involved. It should be noted that at present the Council receives £4,600 in feuduty and pays £14,400. It is therefore likely that the abolition of the feudal system will benefit the City Council financially in respect of feuduty.

6.4 Land which has been Sold by Feu Disposition

There are a number of implications for land which has been sold by Feu Disposition:-

6.4.1 Rights of Pre-emption

These are rights to purchase land and buildings.

These have sometimes been reserved in Feu Dispositions and in terms of the 2000 Act a notice can be served on the owner of the land requiring rights of pre-emption to be preserved. However, as a right of pre-emption only exists between the Council and the original purchaser these rights will survive the appointed day. Once a property has been sold on and the Council has chosen not to exercise the right of pre-emption, the right falls and the title is then free from burdens. The effect of the legislation will not affect the relationship between the Council and the first purchaser of the land and therefore it is considered that serving preservation notices for rights of pre-emption would not be necessary.

6.4.2 Common Facilities Burdens

These burdens are a particular type of burden, for example, the obligation on six proprietors to pay a share of maintenance of a common access road or a common stairwell. These rights will automatically be preserved on the appointed day. Whilst these burdens will no longer be enforceable by the Council, all of the proprietors with the same burden in their title deeds will be entitled to enforce this burden against each other. The reasoning behind this is that the Council may no longer have any interest in the property but each proprietor can ensure that common facilities are maintained by all proprietors.

- 6.4.3 As regards other burdens, if they are to continue in force, they will require to be preserved and notices must be served prior to the appointed day. Burdens which can be preserved are as follows:-

6.4.4 Conservation Burdens

Conservation Burdens are burdens which are created for the benefit of the public to protect either the architectural or historical characteristics of any land or any other special characteristics of any land (including the special characteristics derived from the flora, fauna or general appearance of the land). The Council will be designated as a conservation body and therefore a notice could be served preserving burdens of this type.

6.4.5 Economic Development Burdens

If a burden has been created in a title for the benefit of promoting economic development, a notice can be served preserving this type of burden.

6.4.6 Neighbour Burdens

If the Council has sold off land by Feu Disposition and remains a neighbouring proprietor of the land which has been sold then it is possible for certain burdens to be preserved by having the burden re-allotted as a burden in favour of the neighbouring proprietor rather than a burden in favour of the Council as Superiors. This is a more technical preservation and requires that the land still owned by the Council must have on it a building for human habitation within 100 metres from the boundary of the burdened land.

6.4.7 Reservation of Development Value

In certain circumstances, compensation may be claimed in situations where property has been sold at less than development value. This may be of use to the Council in a number of cases. The amount of compensation is determined with regard to the potential development value of the site, not the actual value of the development. The amount payable is based on the valuation of the property at the date on which the land was originally sold by the Council. The rights to claim compensation will be triggered by the owner of the land realising the development of the land. However, the development must occur within 20 years of the appointed day and the claim for compensation must be raised within 5 years of the date of the development.

6.5 Council Housing

This is a separate area of concern in that the rules described above also apply to all sales of Council Houses. Quite apart from the huge task of searching through all the Council titles to find out whether there are any burdens which require to be preserved, it is a huge task to even consider serving notices on all owners of ex-Council houses.

The burdens which matter most for Council Housing will now be known as Common Facility Burdens. (See paragraph 6.5.2)

However, as common facilities burdens will automatically be preserved after the appointed day, the only burdens which may require to be preserved will be amenity burdens, for example, to use ground adjacent to the house as garden ground. As this type of restriction is governed by planning law, it is a matter for consideration whether there is any merit in preserving these burdens.

A working group of the Society of Local Authority Lawyers and Administrators in Scotland (SOLAR) comprising legal representatives from most local authorities has been set up to look into the issues surrounding the new legislation, with particular emphasis in this area. The working group is currently producing a report and following this report a further report will be prepared for Committee regarding housing burdens.

6.6 Future Disposals

After the 2003 Act comes into force on the appointed day, the Council will no longer be able to grant Feu Dispositions and therefore all properties will require to be sold by Disposition. This makes it harder for the Council to enforce burdens as of right. However, certain burdens will still be able to be imposed.

The best policy for all new developments, for example housing or industrial/commercial developments, is to record a deed of conditions with burdens affecting the whole site and then the properties can be sold by disposition. This will not allow the Council to enforce burdens forever but, providing the Council still owns properties within the estate, then burdens should be able to be enforced by the Council.

The Council will also be able to impose conservation burdens which may be created in favour of the Council for the benefit of the public to protect the architectural or historical characteristics of any land or any other special characteristics of any land (including a special characteristic derived from the flora, fauna or general appearance of the land).

The Council will also be able to impose economic development burdens. These burdens can be imposed in favour of the local authority for the purpose of promoting economic development. The 2003 Act says no more than this and there is no definition as to what will constitute an economic development burden and therefore this will, at some point, be tested by the Courts. However, there are situations within the Council where it would be clear that burdens require to be imposed in respect of economic development projects. Such burdens can then be imposed in a disposition of the land.

6.7 Policy

The policy of the legislation is to stop Superiors enforcing burdens from a distance when they have no real interest in the land. From the Council's point of view, it will therefore be important to sell land at full market value, given that the Council will often not be able to enforce burdens in the title. Consideration should also be given to the granting of long leases of land in appropriate circumstances rather than conveying property outright.

6.8 How Are Burdens Preserved?

Before the appointed day, there is a considerable amount of work which requires to be done to ensure that any burdens which exist at present are preserved if appropriate.

The first task which the Council has to complete is to identify whether it should be attempting to preserve any burdens on land which has been sold and thereafter to identify which burdens should be preserved. However, carrying out a full trawl of the Council's title deeds to attempt to ascertain those parcels of land which have been sold over the years would be extremely resource-intensive. Also, it is considered that there may only be a small percentage of burdens which can properly be preserved. Although the power is available at present, experience across Scotland is that few, if any, landowners are serving preservation notices preferring to accept the implications of the Abolition of the Feudal System rather than circumvent its application. Many burdens will simply be unable to be preserved in terms of the new rules and there will be others that are already unenforceable and therefore there would be no merit in preserving these. It is therefore considered that it would not be an appropriate use of resources to carry out a full audit of all of the titles.

As there may be some land over which the Council would wish to serve notices, it is suggested that the bank of "local knowledge" be tapped. Officers require as much information as possible from within the Council, from elected members and officers who have knowledge of areas of land which have been sold and which may be burdened. In particular, information would be welcomed about land which has been sold for less than full value, such as parts of industrial estates and areas of park land which have been sold, for example, for football pitches or bowling greens where it is likely that burdens regarding the use have been imposed. The Depute Chief Executive (Support Services) and the Director of Economic Development have been working on this issue for some months now but any further information would be helpful.

It is also proposed that we consult with community councils who may have local knowledge as to areas which previously formed part of Council property but which are now used for community purposes.

Subject to the agreement of this Committee, therefore, a letter will be sent shortly to all elected members and all community councils with a short summary of the type of land on which burdens could be preserved, asking for any information regarding any areas of land sold by the Council's predecessors which should be investigated.

7.0 CONSULTATIONS

- 7.1 The Chief Executive, Depute Chief Executive (Finance), Assistant Chief Executive (Community Planning) Director of Housing and Director of Economic Development have been consulted in the preparation of this report.

8.0 BACKGROUND PAPERS

- 8.1 There are no background papers to this report.

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