

DERBYSHIRE COUNTY COUNCIL

**MEETING OF CABINET MEMBER – JOBS, ECONOMY AND
TRANSPORT**

18 June 2013

Report of the Acting Strategic Director – Environmental Services

**LAW COMMISSION CONSULTATION PAPER ON
CONSERVATION COVENANTS**

(1) **Purpose of the Report** To bring to the attention of the Cabinet Member the Consultation Paper No 211, published by the Law Commission on Conservation Covenants, and to seek approval to a draft proposed response to the Commission.

(2) **Information and Analysis** This Law Commission paper examines the case for introducing “conservation covenants” to the law of England and Wales, and considers how a scheme of conservation covenants might be framed. The attached summary (Appendix 1) explains the key aspects.

A conservation covenant is an agreement entered into by a landowner who promises to do something or not do something to achieve a conservation objective on his or her land.

The paper notes how conventional covenants involve an estate in land subject to the covenant, and another benefitting from it, and explains that conventional covenants promising to do something may not be enforceable when ownership changes.

It examines the use of types of conservation covenant in the USA, Canada, Australia and New Zealand.

The paper proposes an introduction of conservation covenants in England and Wales, and that the bodies to be responsible for their enforcement include registered charities whose objects include conservation purposes, and local authorities, with the Secretary of State having power to nominate or exclude responsible bodies.

The outcome of such a national legal reform could affect the Council, as a provider of countryside facilities, and as a potential responsible body for enforcement of conservation covenant. It could also have wider consequences for conservation of environment and heritage in Derbyshire.

Responses to the paper are invited by 21 June 2013. A proposed response on behalf of the Council is attached as an appendix to this report (Appendix 2).

(3) **Financial Considerations** The potential financial implications from the proposals under the paper are addressed in the suggested response.

In preparing this report the relevance of the following factors has been considered: legal, prevention of crime and disorder, equality and diversity, human resources, environmental, health, property and transport considerations.

(4) **Key Decision** No

(5) **Call-In** Is it required that call-in be waived in respect of the decisions proposed in the report? Yes. Since the closing date for consultation responses is 21 June 2013, the Chair of Improvement and Scrutiny - Places is being requested to approve waiver of the call-in period.

(6) **Background Papers** The Paper and the summary of the consultation paper, available on the Law Commission website:- www.lawcom.gov.uk. Officer contact details – Stephen Brent, extension 38370.

(7) **OFFICER'S RECOMMENDATION** That the Cabinet Member approves the sending to the Law Commission of the draft response which is annexed to this report.

Mike Ashworth
Acting Strategic Director – Environmental Services



**Law
Commission**
Reforming the law

Conservation Covenants A Summary

THE LAW COMMISSION'S CONSULTATION PAPER ON CONSERVATION COVENANTS

EXECUTIVE SUMMARY

Introduction

- 1.1 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.
- 1.2 Over the years different methods have been used to protect land in order to conserve and restore our natural and built environment. This project examines a legal tool which is used for conservation purposes, known as a “conservation covenant”. Conservation covenants are used in many other jurisdictions, but do not exist in the law of England and Wales. They allow landowners voluntarily to create binding obligations on their own land to meet a conservation objective, such as preserving woodland, cultivating a particular species of plant or animal, or farming land in a certain way.
- 1.3 The Law Commission has examined whether there is a case for introducing conservation covenants into the law; and if so, what elements a new statutory scheme might need. Our findings and provisional proposals for reform are set out in a Consultation Paper, *Conservation Covenants*.¹ This Executive Summary sets out some of the main issues we have considered and our initial findings. The purpose of this consultation is to seek information about conservation and development practices, and generate responses to our discussion and provisional proposals. We invite responses to this Consultation Paper by Friday 21 June 2013. After the consultation period we will review how to take the project forward in the light of consultees’ views. If the project proceeds to a final Report with a draft Bill, we anticipate that publication will be in late 2014.

The need for reform

- 1.4 A conservation covenant is a voluntary agreement entered into by a landowner, who promises to do something or not do something to achieve a conservation objective on his or her land. A conservation covenant is usually perpetual; that is, both the current landowner and any future landowners will be bound by the promise. Why is this not already possible? 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 because (it is said) each subsequent owner of that 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 This can be downloaded at <http://lawcommission.justice.gov.uk/areas/conservation-covenants.htm>.

- 1.5 A large body of law has, as a result, built up restricting 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 be able to endure beyond the landowner who created it. The courts have said that it is only possible to create a binding (that is, perpetual) 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 from their land 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)
- 1.6 Against this background, there has been increasing interest in landowners being able to create binding positive and restrictive obligations not for the benefit of their neighbour, but for the purpose of conservation generally (which is for the benefit of the public). In fact, for some time there have 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.
- 1.7 As well as these statutory exceptions, people have started to develop quite complex and unwieldy ways to get around the restrictive rules about covenants. For example, people can enter into 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.
- 1.8 So we know that there are ways to get around the rules about covenants; but they are either limited to certain special organisations, or they involve using complex, insecure and potentially expensive workarounds. Should it then be possible to create a covenant that is especially for the purpose of conservation, and not limited by the rules about covenants?
- 1.9 In several other jurisdictions the law has created an exception for covenants which are intended to help conservation: these are generally referred to as “conservation covenants”. Conservation covenants are used in places like Scotland, the USA, Canada, Australia and New Zealand. Many of these places 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. This means that individual landowners have the opportunity, using a private agreement, to contribute to conservation efforts.

- 1.10 We examine the statutory exceptions, the workarounds currently being used, and the extensive use of conservation covenants overseas in Chapters 2 and 3 of the Consultation Paper. We conclude on the basis of that analysis that there is a gap in the law. We think that reform is needed in the form of a new statutory scheme for conservation covenants. We make a number of provisional proposals for reform and ask for consultees' comments on whether conservation covenants should be made available in England and Wales, and on the detail of how they should operate. We also seek consultees' views on certain conservation practices, as well as areas where there is more than one option for reform. We summarise our main proposals below, but stress that this is only a summary – readers should refer to the Consultation Paper for details.

A statutory scheme for conservation covenants

- 1.11 What should be the key elements of a statutory scheme for conservation covenants? In considering this question we draw on the experiences of other jurisdictions (outlined in Chapter 3), as well as examples of statutory covenants which exist in England and Wales (which we consider in Chapter 8 and Appendix A).

Who can create a conservation covenant?

- 1.12 It may seem obvious that a person who owns land should be able to create obligations over it: but in fact, there are different ways that land can be “owned”. It seems clear that a freehold owner should be able to create a conservation covenant over their land; but are there cases in which leaseholders should be able to do the same? We examine this in Chapter 4, and provisionally propose that both freeholders, and leaseholders whose lease has at least seven years still to run, should be able to create a conservation covenant over their own land.
- 1.13 What about the other party to the conservation covenant? Under a traditional covenant a landowner's neighbour has an incentive to ensure that the landowner fulfils his or her obligations. But with a conservation covenant, there is no neighbouring landowner; who should monitor the obligations and ensure that they are fulfilled? We think that the best approach is to limit the range of potential holders to organisations which are sufficiently permanent, securely-resourced, and whose decisions are open to scrutiny. We propose that the Secretary of State, or the Welsh Ministers, should have the power to designate an organisation as a “responsible body”, if it is:
- (1) a public body (that is, an organisation created by statute) whose objects include the purposes we discuss below;
 - (2) a registered charity whose objects include the purposes we discuss below; or
 - (3) a local authority.

What should a conservation covenant be for?

- 1.14 Keeping relatively tight control over who can be a responsible body is one way to ensure that conservation covenants are not created inappropriately. Another way to do this is to have a defined list of the purposes for which a conservation covenant may be created. We expect that a responsible body will only enter into conservation covenants whose purposes align with the statutory definition. But finding the precise wording for that definition is challenging, because of the many different activities which fall within the concept of “conservation”. In Chapter 4 we propose a relatively simple set of purposes which we think captures the different ways in which conservation covenants should be used. We propose that the purpose of a conservation covenant should be an obligation to do or not do something on land, for the public benefit, to preserve, protect, restore or enhance the land’s:

- (1) natural environment, including its flora and fauna;
- (2) natural resources; or
- (3) cultural or built heritage features.

Oversight of conservation covenants

- 1.15 Some countries impose extra checks on the creation of conservation covenants; for example, Government approval might be required. This ensures that conservation covenants are not created inappropriately (for example, where land is not genuinely being conserved). It can also mean that the public has a greater role: because after all, conservation covenants are for the public benefit. On the other hand, additional oversight may create barriers to the use of a statutory scheme, and would add an unnecessary level of regulation.
- 1.16 A related concern arises in Chapter 6 where we look at remedies available for a breach of a conservation covenant. In addition to a responsible body, should Government, or a statutory body, have the power to bring proceedings for a breach? This might be necessary, for example, if a responsible body is unwilling or unable to. As we note in Chapters 4 and 6, the arguments on these issues are finely balanced, and we encourage consultees to share their views.

Creating and registering a conservation covenant

- 1.17 In Chapter 5 we look at some technical issues. We propose that conservation covenants should be statutory obligations rather than traditional property rights. We also look at how a conservation covenant could be made, how long it should run for, some terms which we think should be excluded, and how conservation covenants would interact with other statutory schemes binding land (such as Sites of Special Scientific Interest). We also examine the importance of registration: we think that conservation covenants should be registered as local land charges. This means that any would-be purchaser of land can easily find out if that land is subject to a conservation covenant.

Managing and enforcing a conservation covenant

- 1.18 As we note in Chapter 6, the creation of a conservation covenant is merely the beginning of the work. Once it is in place the parties will have different responsibilities. The landowner will have obligations, but the responsible body will also need to monitor the performance of those obligations, and if necessary, take steps to ensure they are completed. There will be a range of ways in which responsible bodies will manage conservation covenants. Because of this, we do not think it is appropriate to provide for management powers in a statute; instead, these provisions should be agreed between the parties.
- 1.19 In rare cases landowners may breach their obligations, and responsible bodies will need to consider how to address the breach. A breach may have serious and possibly irreparable consequences, such as the destruction of a habitat or historic building. It is therefore important that there is a robust system to address failures to comply with conservation covenants. Having considered what would qualify as a breach of a conservation covenant, we then look at two potential remedies: injunctions, and damages.
- 1.20 An injunction is likely to be the main remedy sought by a responsible body; this is targeted at remedying a landowner's action or inaction. We think that a responsible body should be able to seek an interim or final injunction for a breach of a conservation covenant. We also look at cases where a responsible body might seek damages for the breach of a conservation covenant. If a responsible body seeks compensatory damages the court should aim to put the responsible body in the position it would have been in (so far as money can do so) had the contract been performed.
- 1.21 But often the damage to a responsible body will be minimal, and so will the amount of damages which can be awarded. What about the more significant damage to conservation in the public interest? We explore the concept of "exemplary damages", which are punitive in nature, and propose that a responsible body should be able to seek punitive damages for a breach. But we are keen to hear consultees' views on which circumstances should lead to an award of exemplary damages being made.

Modifying or discharging a conservation covenant

- 1.22 Our statutory scheme aims to combine permanence (to ensure conservation goals are realised) with sufficient flexibility so that land remains useful. For this reason, we have considered ways that a conservation covenant should be able to be modified and, if necessary, brought to an end. These are found in Chapter 7, and we outline some of them below.
- 1.23 We begin by considering whether a responsible body should be able to bring a conservation covenant to an end. It might do this in consultation with a landowner; or it may decide of its own accord that the agreement should cease. So, for example, if migration patterns change and a species which is protected by a conservation covenant has moved away from land, a responsible body might decide that its funds are better spent on other conservation work. Whilst we think it is right to allow a responsible body to take this action, we would like to hear from consultees about whether they think this sort of step should be limited to certain circumstances.

- 1.24 We also think it is important that the parties – that is, a landowner and the relevant responsible body – should be able to agree between themselves that a conservation covenant should be amended. This gives flexibility to the parties, and reflects the private nature of a conservation covenant; but the involvement of the responsible body also ensures that decisions will be taken appropriately.
- 1.25 Finally, we look at the situation where a landowner wishes to modify or terminate a conservation covenant, but cannot obtain the agreement of the responsible body. In these cases a form of external adjudication is needed, and we propose that the Lands Chamber of the Upper Tribunal (which already has the power to amend or discharge freehold covenants) should provide this. The Lands Chamber's existing power under section 84(1) of the Law of Property Act 1925 is considered, but we conclude the grounds for applications under this section are not adequate in this context. Instead we propose new grounds under which an application to modify or discharge a conservation covenant should be considered. These aim to balance the different interests of conservation and private land ownership.

The potential impact of conservation covenants

- 1.26 In Chapter 9 we discuss potential impacts of the current law and of our provisional proposals, and we ask for consultees' help in assessing these potential impacts.

Responding to our Consultation Paper

- 1.27 Copies of the Consultation Paper are available to download free of charge from our website at <http://lawcommission.justice.gov.uk/areas/conservation-covenants.htm>. We seek responses to the Consultation Paper by 21 June 2013:
- (1) by email to propertyandtrust@lawcommission.gsi.gov.uk; or
 - (2) by post to Luke Campbell, Law Commission, Steel House, 11 Tothill Street, London SW1H 9LJ
- 1.28 We will treat all responses as public documents in accordance with the Freedom of Information Act 2000 and we may attribute comments and include a list of all respondents' names in any final Report we publish. If you wish to submit a confidential response, you should contact us before sending the response. Please note that we will disregard automatic confidentiality statements generated by an IT system.

LAW COMMISSION
CONSULTATION PAPER No 211

CONSERVATION COVENANTS

RESPONSE FORM

This optional response form is provided for consultees' convenience in responding to our Consultation Paper on Conservation Covenants.

You can download the Consultation Paper free of charge from our website at: www.lawcom.gov.uk (see A-Z of projects > Conservation Covenants).

The response form includes the text of the questions and provisional proposals in the Consultation Paper, with space for answers. You do not have to respond to every question or proposal. Answers are not limited in length (the box will expand, if necessary, as you type).

Each question and provisional proposal is followed by a reference to the Chapter of the Consultation Paper in which that question or proposal is discussed, and the paragraph at which it can be found. Please consider the discussion before responding.

We invite responses from **28 March 2013** to **21 June 2013**.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk or

by post to: Luke Campbell, Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ

Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, wherever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

Your details

Name:
SD-ES?
Email address:
Postal address:
Telephone number:
Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):
Derbyshire County Council
If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:
As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

We invite views from consultees on ways in which they could use conservation covenants to conserve land for environment or heritage purposes.

Consultation Paper, Chapter 2, paragraph 2.30

The Council, in common with other upper tier authorities and the national parks, has experience gained many over years as an active conserver of land in its ownership, which secures a diverse range of environmental and heritage assets for the public. Conservation covenants would appear to be most useful for other landowners, who are willing and able either to complement existing environmental and heritage assets or to create new ones.

We would be interested to hear from consultees about legal mechanisms they have used to secure conservation covenants. We invite consultees to tell us:

- (1) whether they have used any of the “workarounds” we describe, and the benefits and disadvantages of those approaches; and
- (2) whether there are other ways in which they have attempted to create binding obligations in respect of land for a conservation purpose (and how successful those measures have been).

Consultation Paper, Chapter 2, paragraph 2.47

Section 106, as identified in the paper, can be used on occasions to create legally binding obligations for conservation (and other objectives).

We invite views from consultees on:

- (1) how long-term biodiversity offsetting activity can currently be secured on an offset site;
- (2) whether existing methods for securing biodiversity offsetting activity are satisfactory;
- (3) whether conservation covenants would be a useful addition to the methods available to deliver biodiversity offsetting activity; and
- (4) what advantages conservation covenants might offer relative to existing methods.

Consultation Paper, Chapter 2, paragraph 2.54

1. "Offsetting" to preserve or mitigate loss of biodiversity can already be built into development proposals, and can enable proposals to be permitted on occasions where the proposed offsetting measures have a sound evidence base to predict success. Whilst offsetting is an established tool for prevention or mitigation of biodiversity loss, resort to offsetting may not provide environmentally acceptable means of achieving conservation benefits.
2. 3. 4. Existing legal methods available to underpin offsetting (land acquisition, planning conditions, s106 obligations) do not seem particularly unsatisfactory. In any event biodiversity offsetting proposals will need careful appraisal regardless of legal method. No clear advantage is apparent with regard to offsetting from introduction of conservation covenants.

We provisionally propose the introduction of conservation covenants into the law of England and Wales. This scheme of conservation covenants should include:

- (1) no requirement for there to be benefited land;
- (2) the ability to impose positive as well as negative obligations; and
- (3) provision for those obligations to bind successors in title.

Do consultees agree? Yes

Consultation Paper, Chapter 2, paragraph 2.72

We invite feedback from consultees who have used the Scottish system, on:

- (1) the types of land protected by conservation burdens;
- (2) the number of new conservation burdens created; and
- (3) their experience of the Scottish system of conservation burdens generally.

Consultation Paper, Chapter 3, paragraph 3.17

We provisionally propose that the holder of a freehold estate in land, or of a leasehold term with at least seven years left to run, should be able to create a

conservation covenant that would bind their successors in title and those with interests derived from their own.

Do consultees agree? Yes

Consultation Paper, Chapter 4, paragraph 4.7

We provisionally propose that conservation covenants should be capable of being held by any Secretary of State (for England) or the Welsh Ministers (in Wales). We further propose that in England, a single Secretary of State should have the power to nominate or exclude responsible bodies. The Welsh Ministers should have the same power in Wales. Responsible bodies should be:

- (1) a public body whose objects include some or all of the purposes set out at paragraph 4.40;
- (2) a registered charity whose objects include some or all of the purposes set out at paragraph 4.40; or
- (3) a local authority.

Do consultees agree?

Consultation Paper, Chapter 4, paragraph 4.22

The proposed range of responsible bodies seems appropriate. Given the limited range, a reserve power to the Secretary of State to exclude bodies as responsible bodies might be unnecessary. Involvement as responsible bodies could have significant financial impacts on the public bodies charities and local authorities concerned which would require assessment. There would clearly be a risk of conservation covenants being created but subsequently flouted in the absence of sufficient funds for their proper administration and enforcement.

We invite views from consultees on whether there is a case for giving the Secretary of State and the Welsh Ministers the power to include for-profit companies whose objects include some or all of the purposes set out at paragraph 4.40 as responsible bodies.

Consultation Paper, Chapter 4, paragraph 4.24

Any such inclusion would appear to risk creating conflict between impartial exercise of the responsible body function and the commercial interest

We provisionally propose that a conservation covenant should be capable of being transferred from one responsible body to another.

Do consultees agree? Yes

Consultation Paper, Chapter 4, paragraph 4.26

We invite consultees' views on what should happen to a conservation covenant where the responsible body which holds it ceases to exist, or ceases to be a responsible body. In particular:

(1) should there be a holder of last resort? see comment

(2) if so, who should take on this responsibility?

Consultation Paper, Chapter 4, paragraph 4.29

Another solution to this event would be empowering any other responsible body having a relevant interest in the locality to take action to uphold the covenant

We provisionally propose that the purposes for which a conservation covenant may be created are an obligation to do or not do something on land for the public benefit, to preserve, protect, restore or enhance in relation to that land:

(1) its natural environment, including its flora and fauna;

(2) its natural resources; or

(3) any cultural, historic or built heritage features of that land.

Do consultees agree? Yes

Consultation Paper, Chapter 4, paragraph 4.40

We invite views from consultees as to whether a scheme of conservation covenants for England and Wales should include any form of public oversight for the creation of new conservation covenants.

Consultation Paper, Chapter 4, paragraph 4.49

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We provisionally propose that conservation covenants shall be statutory burdens on land, rather than proprietary interests or contractual agreements.

Do consultees agree? Yes

Consultation Paper, Chapter 5, paragraph 5.8

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We provisionally propose that a conservation covenant must be created in writing and signed by the parties.

Do consultees agree? Yes

Consultation Paper, Chapter 5, paragraph 5.10

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We provisionally propose that a conservation covenant should bind land in perpetuity, unless a shorter period is expressed in the conservation covenant.

Do consultees agree? Yes

Consultation Paper, Chapter 5, paragraph 5.14

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We provisionally propose that, subject to two exceptions, a statutory scheme for conservation covenants should not limit the obligations which parties may include in a conservation covenant, provided they do not go beyond the purposes for which such a covenant can be created.

Do consultees agree? Yes

Consultation Paper, Chapter 5, paragraph 5.16

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We provisionally propose that any provisions of a conservation covenant made by a leaseholder which conflict with the provisions of his or her lease should be void.

Do consultees agree? Yes

Consultation Paper, Chapter 5, paragraph 5.18

We provisionally propose that if land which is the subject of a conservation covenant is subdivided, the owners of the subdivided land should be jointly and severally liable for the conservation covenant obligations, unless the conservation covenant has provided otherwise (or it is modified or discharged).

Do consultees agree? Yes

Consultation Paper, Chapter 5, paragraph 5.20

We provisionally propose that a statutory scheme for conservation covenants should be accompanied by non-statutory guidance for those who create and hold conservation covenants. This guidance should include model terms.

Do consultees agree? Yes

Consultation Paper, Chapter 5, paragraph 5.22

We invite consultees' views on who should formulate non-statutory guidance (for example, Government departments, advisory bodies, or conservation organisations).

Consultation Paper, Chapter 5, paragraph 5.23

Appropriate governmental agencies (e.g. Natural England and English Heritage), following consultation with conservation, landowner organisations, other relevant public bodies, etc.

We provisionally propose that a conservation covenant should be registrable as a local land charge, and that from the date when a conservation covenant is so registered it will be enforceable against successors in title to the original covenantor.

Do consultees agree? Yes

Consultation Paper, Chapter 5, paragraph 5.31

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<p>We provisionally propose that there should not be a statutory requirement for central recording of conservation covenants; but that responsible bodies should be encouraged to publish this information voluntarily, with the agreement of the relevant landowner.</p> <p>Do consultees agree? Yes</p> <p>Consultation Paper, Chapter 5, paragraph 5.32</p>
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<p>Do consultees foresee difficulties with the interaction of statutory designations for conservation purposes and conservation covenants?</p> <p>Consultation Paper, Chapter 5, paragraph 5.34</p>

<p>Not particularly, provided the legislation robustly addresses any potential for conflict, e.g. providing that responsibilities of owners and occupiers with regard to statutory designations take precedence over conservation covenants</p>

<p>We invite consultees' views on how obligations under a conservation covenant should be managed, and in particular:</p> <p>(1) what sort of management action is likely to be needed; and</p> <p>(2) whether in some cases it would be useful for a management agreement to be used in addition to a conservation covenant.</p> <p>Consultation Paper, Chapter 6, paragraph 6.10</p>
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<p>We provisionally propose that the parties should be free to agree management actions as part of a conservation covenant, but that no management powers should be provided for in the statute.</p> <p>Do consultees agree?</p> <p>Consultation Paper, Chapter 6, paragraph 6.15</p>

It would seem useful for responsible bodies to have default powers to enter undertake management to secure the objects of conservation covenants whether the owner has not done so after reasonable opportunity

We provisionally propose that, under the terms of a conservation covenant, a person who is bound by a restrictive obligation breaches it by doing something which it prohibits, or by permitting or suffering someone else to do so; and a person who is bound by a positive obligation breaches it if the obligation is not performed.

Do consultees agree? Yes

Consultation Paper, Chapter 6, paragraph 6.20

We provisionally propose that, on proof of a breach of a conservation covenant, the court should have the power to issue a final injunction.

Do consultees agree? Yes

Consultation Paper, Chapter 6, paragraph 6.40

We provisionally propose that the court should have the power to issue an interim injunction in respect of a breach of a conservation covenant. In determining whether an interim injunction should be issued, the court should be required to consider the public interest.

Do consultees agree? Yes

Consultation Paper, Chapter 6, paragraph 6.41

We provisionally propose that, on proof of a breach of a conservation covenant by a landowner, the court should have the power to order:

(1) the payment of compensatory damages to the responsible body; and

(2) the payment of exemplary damages to the responsible body. We invite consultees' views on the way this remedy should be framed in a statutory scheme, and the circumstances in which such an award should be made.

Do consultees agree? Yes

Consultation Paper, Chapter 6, paragraph 6.51

<p>We provisionally propose that a statutory scheme for conservation covenants should not include an ability for the court to award damages in substitution for an injunction.</p> <p>Do consultees agree? Yes</p> <p>Consultation Paper, Chapter 6, paragraph 6.55</p>

<p>We invite consultees' views on whether Government or a statutory conservation body should have the power to enforce conservation covenants where a holder has failed or is unable to do so.</p> <p>Consultation Paper, Chapter 6, paragraph 6.59</p>
<p>We suggest providing concurrent enforcement powers for either to act</p>

<p>We provisionally propose that, on proof of the breach of a responsible body's obligations under a conservation covenant, the court should have the power to order remedies in accordance with general principles of contract law.</p> <p>Do consultees agree?</p> <p>Consultation Paper, Chapter 6, paragraph 6.61</p>

<p>We provisionally propose that unless a conservation covenant expressly provides otherwise, its responsible body may unilaterally discharge the obligations contained in it.</p> <p>Do consultees agree?</p> <p>Consultation Paper, Chapter 7, paragraph 7.10</p>
<p>Yes</p>

<p>We invite consultees' views on whether the responsible body's ability to discharge should be limited to certain circumstances, and, if so, what circumstances would be</p>

appropriate.

Consultation Paper, Chapter 7, paragraph 7.11

No

We provisionally propose that the parties to a conservation covenant for the time being may agree to modify it.

Do consultees agree?

Consultation Paper, Chapter 7, paragraph 7.16

Yes

We provisionally propose that where a responsible body in respect of a conservation covenant acquires land which is subject to that covenant, the conservation covenant should cease.

Do consultees agree?

Consultation Paper, Chapter 7, paragraph 7.20

Yes

We provisionally propose that the Lands Chamber of the Upper Tribunal should have the power to determine applications for the modification and discharge of statutory conservation covenants.

Do consultees agree?

Consultation Paper, Chapter 7, paragraph 7.48

In the absence of a suitable specialist environmental court or tribunal, yes

We provisionally propose that on the application of a landowner, the Lands Chamber of the Upper Tribunal may modify or discharge a conservation covenant where it is reasonable to do so, having regard to all of the circumstances and in particular the following matters (where relevant):

- (1) any change in circumstances since the conservation covenant was created (including changes in the character of the property or the neighbourhood);
- (2) the extent to which the conservation covenant confers a benefit on the public;
- (3) the extent to which the purposes for which the conservation covenant was created, or any other purposes for which a conservation covenant may be created, are served by the conservation covenant;

(4) the extent to which the conservation covenant prevents the landowner's enjoyment of the land;

(5) the extent to which is it practicable or affordable for both the landowner and future landowners to comply with the conservation covenant; and

(6) 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.

Do consultees agree?

Consultation Paper, Chapter 7, paragraph 7.63

Do consultees envisage any situations in which compensation should be payable to a responsible body for modification or discharge of a conservation covenant by the Lands Chamber of the Upper Tribunal?

Consultation Paper, Chapter 7, paragraph 7.68

We provisionally propose that it should not be possible for a responsible body to apply to the Lands Chamber of the Upper Tribunal for modification or discharge of a conservation covenant.

Do consultees agree?

Consultation Paper, Chapter 7, paragraph 7.71

No – it seems unreasonable for a responsible body not to have the same opportunities to seek modification or discharge as a landowner would have.

We provisionally propose that the existing jurisdiction of the court under section 84(2) of the Law of Property Act 1925, and the proposed jurisdiction of the Lands Chamber of the Upper Tribunal, should be extended to include conservation covenants.

Do consultees agree?

Consultation Paper, Chapter 7, paragraph 7.74

In the absence of a suitable specialist environmental court or tribunal, yes

We provisionally propose that section 237 of the Town and Country Planning Act 1990 should enable the overriding of conservation covenants.

Do consultees agree?

Consultation Paper, Chapter 7, paragraph 7.80

We invite consultees to tell us whether covenants made under section 8 of the National Trust Act 1937 present any advantages for the National Trust or for the public that are not replicated in our provisional proposals for a statutory conservation covenants scheme.

Consultation Paper, Chapter 8, paragraph 8.16

We provisionally propose that section 5 of the Forestry Act 1967 should be replaced by a statutory conservation covenants scheme.

Do consultees agree?

Consultation Paper, Chapter 8, paragraph 8.25

Do consultees agree that the statutory covenants set out in Appendix A should not be replaced by a statutory scheme for conservation covenants?

Consultation Paper, Chapter 8, paragraph 8.28

Do consultees agree that conservation covenants will be more widely used in rural areas than on urban land?

Consultation Paper, Chapter 9, paragraph 9.3

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We invite consultees to indicate how widely used conservation covenants would be in England and Wales, or how frequently they might use covenants in the course of their work. Consultation Paper, Chapter 9, paragraph 9.7
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See above

Do consultees agree that conservation covenants will lead to an increase in the opportunities for development and resource management, whether through encouraging the release of land or facilitating development via biodiversity offsetting? What would the financial benefit of such an increase be (for example to developers or those working in the biodiversity sector)? Consultation Paper, Chapter 9, paragraph 9.11

See above

Do consultees agree that the introduction of conservation covenants will have a positive impact on conservation, leading to benefits such as the protection of natural capital, and enhancement of a green economy and better availability of recreational activity for the public? We would welcome information consultees are able to provide on monetisation of these benefits. Consultation Paper, Chapter 9, paragraph 9.15

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Do consultees agree that removing the need for a conservation organisation to purchase land, and for landowners to sell land, will reduce the costs involved in protecting it? We invite consultees to provide us with details of specific costs they have incurred in using this workaround. Consultation Paper, Chapter 9, paragraph 9.18
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Do consultees agree that removing the need for lease-back arrangements will reduce the costs involved in protecting land? We invite consultees to provide us with details of specific costs they have incurred in using this workaround.
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Consultation Paper, Chapter 9, paragraph 9.20

We invite consultees to provide details of how a conservation covenant could affect the value of land (whether the site itself, or neighbouring properties).
Consultation Paper, Chapter 9, paragraph 9.23

We invite consultees to provide details of the likely costs of managing a conservation covenant, particularly where this can be drawn from existing management actions that they undertake or are aware of.
Consultation Paper, Chapter 9, paragraph 9.25

We invite views from consultees as to the likelihood of enforcement action being needed for conservation covenants in England and Wales.
Consultation Paper, Chapter 9, paragraph 9.27

We invite consultees to provide details of the likely costs of enforcement action such as seeking damages or an injunction.
Consultation Paper, Chapter 9, paragraph 9.28

Do consultees agree that the cost of training for legal professionals and the judiciary will be absorbed by existing training and professional development?
Consultation Paper, Chapter 9, paragraph 9.30
Not entirely. Each professional involved will need to devote a few additional hours of study to become familiar with the new system.
Do consultees agree that the transitional impact on local authorities of registering

new conservation covenants would be minimal and in any event absorbed by the fee payable?

Consultation Paper, Chapter 9, paragraph 9.32

Yes

Do consultees agree that the transitional impact on responsible bodies would be minimal?

Consultation Paper, Chapter 9, paragraph 9.34

No – if the introduction is successful then numerous inquiries could be generated

Do consultees agree that the transitional impact on the Lands Chamber of the Upper Tribunal would be in the region of £7,500?

Consultation Paper, Chapter 9, paragraph 9.36

We invite views from consultees as to the range of likely costs of an application to modify or discharge a conservation covenant.

Consultation Paper, Chapter 9, paragraph 9.40

We invite views from consultees as to the likely increase in applications to the Lands Chamber of the Upper Tribunal following the introduction of a statutory scheme for conservation covenants.

Consultation Paper, Chapter 9, paragraph 9.43

Do consultees agree that conservation covenants provide benefits in terms of opportunities for increased engagement on the part of individuals and communities?

Consultation Paper, Chapter 9, paragraph 9.45

Yes

We invite consultees to advise us of areas which constitute likely costs or benefits of a statutory scheme for conservation covenants.

Consultation Paper, Chapter 9, paragraph 9.47