

Environment Bill—how practical is the proposed conservation covenants system?

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Property analysis: The Department for Environment, Food & Rural Affairs' (Defra) Environment Bill has passed its second reading unopposed by any MP. However, concerns have been raised regarding the practicality of applying Part 7 of the Bill relating to conservation covenants. Under Part 7, conservation covenants will become legally binding contracts for conservation purposes between a landowner and a responsible body. Victoria Du Croz, partner at Forsters, explains the changes proposed by Part 7 and warns relevant parties that the negotiation and agreement of conservation covenant contracts 'may not be as straight forward as initially anticipated' by the Law Commission.

Original news

Second reading of Environment Bill unopposed by MPs, [LNB News 29/10/2019 66](#)

The Department for Environment, Food & Rural Affairs (Defra) has revealed that the Environment Bill has passed its second reading unopposed by any MPs and will now progress to Committee stage.

What does Part 7 of the Environment Bill propose?

There has been growing frustration, particularly from bodies such as the Woodland Trust, English Heritage and Natural England, that currently conservation obligations are only personal agreements and do not bind successors in title. Restrictive covenants can bind successors, but often conservation obligations require the land owner to carry out works rather than just be prevented from doing certain activities. This has resulted in conservation bodies having to acquire the freehold of sites solely to secure the long-term conservation or preservation of the land or buildings.

In addition, other parts of the Bill propose two new types of mitigation plans—local planning authorities will be required to produce spatial 'nature recovery strategies' and developers must prepare biodiversity net gain plans to support planning applications. Both are likely to result in an increased need for long term positive covenants over land. Part 7 of the Environment Bill provides the statutory framework for such covenants.

Under Part 7, conservation covenants will be legally binding contracts for conservation purposes between a landowner (or lessee with a leasehold interest of at least seven years) and a responsible body. The first point to note is that the covenants are not intended to just cover the conservation of the natural environment. The Bill defines 'conserving' as including protecting, restoring and enhancing and 'conservation purpose' as also

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including conserving land as a place of archaeological, architectural, artistic, cultural or historic interest and conserving the setting of land with such interests. The covenant must be for the public good, but it was made clear in the [report](#) this will not always mean that public access is required.

Another key definition is that of a 'responsible body' being the Secretary of State and any body designated by him. The latter must be 'suitable' to be a responsible body and at least some of its main activities, purposes or functions must relate to conservation. The Secretary of State is to publish the criteria used to determine if a body is suitable to be designated as a responsible body. In terms of the operation of the conservation covenants, they will be registered as local land charges and are expressly stated to bind successors in title and those deriving an interest from the covenanting party. The Bill also sets out the remedies for breaches of conservation covenants including specific performance, injunctions and damages. The default duration of conservation covenants is indefinite (or the remainder of the leasehold interest), although a shorter period can be agreed between the parties. There are also provisions to vary and discharge the obligations and what happens if the responsible body ceases to be designated as such or wants to appoint a replacement body.

How do the proposals in the Bill regarding conservation covenants differ from the previous draft Bill prepared by the Law Commission in 2014 and the changes proposed by Defra in 2019? Why have these changes been made?

Very few changes were made to the draft Conservation Covenants Bill prepared by the Law Commission. The Law Commission's Bill covered both England and Wales whereas Part 7 of the Environment Bill just relates to England. The Defra [consultation](#) sought views on requiring leasehold interests to have at least 15 years remaining on their leases in order to enter into a conservation covenant, but in the Bill the government reverted to the Law Commission's proposals for leasehold interests to have at least seven years remaining on their lease.

The main difference between the Law Commission's report and the Bill is the definition of 'responsible body' and whether it should apply to the private sector. The Law Commission's [report](#) identified that this was one of the most difficult issues they had to consider. They acknowledged the pressures of the public and charity sector at the moment and therefore the benefit of the private sector facilitating the need for increased conservation.

However, their proposals had been prepared with a limited group of potential responsible bodies in mind and they argued that if the scope for responsible bodies was widened, this would necessitate changes to the proposed safeguards, oversight and enforcement. For example, concerns were raised over private bodies' decisions not being subject to judicial review or the requirements of the freedom of information regime. Contrary to the Law Commission's recommendations, the Environment Bill enables a private sector body whose main activities relate to conservation to be capable of being designated. It will be interesting to see if the Secretary of State's subsequent criteria for determining if a body is suitable narrows the scope for private sector involvement.

How workable are the proposals?

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In theory the covenants could be relatively short contracts and therefore should not take a long time to agree between the parties. The Law Commission recommended any non-statutory guidance includes conservation covenant templates and, while this sounds a good idea, given the wide scope for the use of conservation covenants and how site specific they are likely to be, we query how useful generic template covenants will be. As a result, we anticipate each responsible body having their own preferred drafting which will often need to be further amended for each site. The negotiation and agreement of these contracts therefore may not be as straight forward as initially anticipated.

For the contracts to have any meaningful effect, responsible bodies will need to have available resources to properly monitor and enforce the covenants. We share the Law Commission's concerns over current resourcing issues in the public and charity sector and anticipate the contracts will need to include a monitoring payment by the landowner/lessee to cover some of these costs.

Finally, there is the concern that conservation covenants could be used to prevent redevelopment. While our natural and built environment should be protected, this needs to be balanced with the need for land to be available for redevelopment to help meet our current housing crisis. Public scrutiny over the 'conservation purpose' to which the conservation contract relates will be necessary to prevent land being inappropriately sterilised.

Is this a welcome development for property law practitioners? Why?

The responses to the Law Commission's consultation indicate a high level of support from established conservation bodies and the charity sector as the covenants will provide a mechanism that enables them to control activities over or on land without the need to acquire the land. Accordingly, the proposals are to be welcomed, but the actual operation of the covenants—in particular around private sector involvement and the potential to use the covenants to frustrate development—will need to be carefully considered and kept under review.

Interviewed by Samantha Gilbert.

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