

## CONSERVATION COVENANTS AND THEIR POTENTIAL FUTURE USE BY DEVELOPERS

Conservation covenants are to be introduced in an attempt to provide relevant parties with a new legal tool for the conservation of nature and to facilitate sustainable development. The proposed scheme creates a new private-law right, allowing the enforcement of commitments to conservation outcomes in the long-term. This device may be used by developers to comply with current and future environmental regulations including the recently confirmed biodiversity net gain requirements.

### Key issues

- Conservation covenants will be permitted to protect sites of cultural or natural value
- They will be capable of binding successors in title with positive obligations
- Developers may consider using conservation covenants to meet biodiversity net gain targets

### CONSERVATION COVENANTS – THE PROPOSAL

On 24 June 2014, following a 2013 consultation on the matter, the Law Commission published a report on the potential format, application and impact of a new form of legal covenant tailored to the protection of natural and cultural heritage. Picking up on the earlier report, the Department for Environment Food and Rural Affairs launched their own consultation in February 2019. DEFRA was supportive of introducing a new legal mechanism for parties to secure the protection of natural and cultural heritage assets into the future, without such parties being burdened by the need to own adjacent land.

On 23 July 2019, DEFRA published its report on the consultation, in which it confirmed that conservation covenants will be legislated for in the Environment Bill and set out its final position on the key details of the new legal mechanism:

- **A New Private Law Right** - A conservation covenant will be a private, voluntary, but legally binding agreement between a landowner and a beneficiary, imposing positive and/or restrictive obligations on the landowner for the purposes of a conservation objective (e.g. for the preservation of an area of valuable natural biodiversity).
- **Positive Covenants Run With the Land** - One of the key advantages of a conservation covenant over a traditional covenant is that a conservation covenant will bind subsequent landowners, regardless of whether the obligation imposed is positive or negative. Without putting in place additional burdensome legal documentation, a positive covenant would not usually 'run with the land' in this way.

- **Covenant Need Not Benefit Land** - Another key difference between a conservation covenant and a traditional covenant is that the beneficiary of a conservation covenant need not hold land adjacent to the site burdened by the covenant, allowing entities without land holdings to enforce the conservation commitments made under the covenant.
- **Beneficiaries of Covenants** - Only certain institutions designated as "responsible bodies" by the Secretary of State will be able to act as beneficiaries under the proposed covenants. Interestingly, DEFRA's 23 July 2019 response to the consultation suggested that for-profit bodies will be able to be designated as responsible bodies by the Secretary of State. It is expected that many responsible bodies will be wildlife conservation not-for-profits, seeking to secure natural heritage assets for protection in the future.
- **Enforcement of Covenants** - Conservation covenants may be modified or ended by agreement between the landowner and the beneficiary, or by the Lands Chamber of the Upper Tribunal in the event of a dispute between the beneficiary and landowner. Enforcement of the covenants will take place in the courts, with possible remedies including injunctions to prevent breach, orders for specific performance to compel the landowner to deliver on positive obligations and damages for breach.

## **POINTS TO NOTE FOR DEVELOPERS**

It has been speculated that conservation covenants will become an increasingly common element of property developments as adoption of biodiversity net gain kicks in and the broader market for green development continues to grow in England. We are of the view that these covenants may be used by developers, local planning authorities and other parties to enhance and accompany existing processes.

### **Potential Uses in a Planning Context**

In the 2019 Spring Statement the UK Government announced its intention to legislate to require all new developments to demonstrate 'biodiversity net gain', which it then confirmed in the Government's response to the relevant consultation. While the government has not yet provided full detail as to how this policy will be measured or enforced, conservation covenants may be capable of providing an avenue for developers to demonstrate that net gain will be achieved and maintained for the required period.

Use of conservation covenants might occur at any stage of the planning mitigation hierarchy, i.e. to demonstrate (i) long term net gain on the site itself, (ii) the creation of local compensatory habitat in conjunction with development or (iii) the securing of biodiversity enhancement nationally strategic habitat sites linked to the Government's sale of 'statutory biodiversity units'. Of these three, level (i) of the hierarchy is unlikely to involve conservation covenants, since developers are more likely to favour using more flexible section 106 agreements in relation to any onsite biodiversity net gain. In relation to level (iii), it is envisaged that developers will simply achieve net gain for their developments by obtaining statutory biodiversity units from the compensation market as envisaged by the biodiversity net gain proposals. We therefore

anticipate the main use of conservation covenants directly by developers for biodiversity net gain purposes as being at level (ii) of the hierarchy, i.e. demonstrating that local compensatory habitat, once created, has been properly secured and will not later be degraded. It is possible that conservation covenants will be used by landowners separately from specific development projects in conjunction with establishing national biodiversity enhancement sites which allow the sale of statutory biodiversity units into the above-mentioned compensation market. It is not yet clear whether landowners securing local biodiversity enhancement sites with conservation covenants would be able to offer biodiversity units to local developers to help them achieve their net gain obligations (i.e. at level (ii)). For more information about biodiversity net gain, see our separate briefing: "[New Planning Requirements for Biodiversity Net Gain](#)".

There may also be circumstances in which a wider area or piece of land is being developed, and there is interest in preserving certain cultural or natural aspects of the developed land in a permanent way such that those cultural or natural aspects remain in place even after the relevant sites are sold off. In such circumstances, conservation covenants could prove a useful private law mechanism available to developers.

### **How to Use a Conservation Covenant**

In order to make use of the covenants in the ways described above, developers could either:

(i) take ownership of a site of conservation value (e.g. a green area on the development site itself or a plot of land containing valuable biodiverse habitat elsewhere) and enter into a conservation covenant, as landowner, with a responsible body in respect of that site. The developer could then sell on the site to a third party, whilst still being able to demonstrate that the biodiversity gain remains and that the new landowner is bound; and/or

(ii) enter into a tripartite agreement with the owner of land away from the development site and a responsible body, in order to procure that the landowner commit to conservation covenants on their land, thereby demonstrating to the local planning authority that required biodiversity gains will be made and preserved.

### **Other Points to Note**

Developers will also need to be mindful of conservation covenants when conducting due diligence on potential development sites. Where conservation covenants have been put in place on a site with the agreement of a predecessor in title, this will be discoverable through the Local Land Charges Register, rather than being reflected on the title of the relevant land.

In cases where a conservation covenant does affect land, developers may want to steer clear, as from a commercial perspective the beneficiary responsible body would seem unlikely to release such a covenant. Of course, there may be cases where an agreement could be reached between a developer and a responsible body (e.g. where a developer is willing to secure biodiversity or cultural heritage gains elsewhere in return for releasing an existing covenant).

We are still considering how developers may be able to take best advantage of this new form of covenant, but would be happy to discuss with you the ways in which the mechanism could be used. Please contact us if you would like

further information about how conservation covenants might be made use of by your business.

## CONTACTS



**Nigel Howorth**  
Partner  
Real Estate

**T** +44 20 7006 4076  
**E** Nigel.Howorth  
@cliffordchance.com--



**Ben Hatton**  
Director  
Property Litigation

**T** +44 20 7006 4519  
**E** Ben.Hatton  
@cliffordchance.com



**Adam Eagle**  
Associate  
Property Litigation

**T** +44 20 7006 1404  
**E** Adam.Eagle  
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

[www.cliffordchance.com](http://www.cliffordchance.com)

Clifford Chance, 10 Upper Bank Street,  
London, E14 5JJ

© Clifford Chance 2019

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street,  
London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to [nomorecontact@cliffordchance.com](mailto:nomorecontact@cliffordchance.com) or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Moscow • Munich • Newcastle • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.