
GUIDANCE ON THE APPLICATION OF SUCCESSFUL CLIMATE CHANGE BURDENS

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Summary



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Aithearachd is Dealbhadh na h-Alba

WHAT IS A CLIMATE CHANGE BURDEN?

Our uses of land and buildings of all kinds are directly responsible for the release of a huge percentage of the country's Greenhouse Gas (GHG) emissions. It follows that changing the way assets are used holds some of the most important keys for evolving a low carbon society.

The Climate Change Burden (CCB), as part of the Climate Change (Scotland) Act 2009, provides, for the first time, a legal mechanism to ensure that future development of any piece of land or building in Scotland meets defined requirements for greenhouse gas reduction. A Burden is included with the title deeds to a property and is binding on both current owners and their successors. When a property is sold, the burden will still apply to it.

Crucially, this requirement in principle remains with the title deed in perpetuity, regardless of land banking, change of use, or resale, and can only be discharged by the party who has the power to enforce the burden or when the requirement has been met and is fully evidenced by a predefined mechanism stated in the burden. So a property owner can dispose of their asset in the knowledge that any subsequent development has to meet requirements specified in the burden. Examples of requirements a Climate Change Burden could include:

- Installation of renewable energy generation, or district heating systems;
- improvement of thermal performance of a building;
- steps to safeguard an asset from the impact of climate change locally;
- increase of forestry to sequester carbon;

- protection of peat land against the release of its methane.

Unlike promises 'made in good faith' about meeting broader institutional or planning objectives, these requirements cannot be negotiated away by third parties at a later date when the mood or accountable individuals have changed.

Burdens provide the opportunity for individuals and organisations to expressly link their promoted values to assets they are able to control and influence and how those assets go forward over time. Contrary to concerns that Climate Change Burdens may have the effect of reducing the receipts at the point when the land or buildings are sold, many requirements are likely to give a good payback to new and future owners. Much depends on the type of burden imposed, which in turn is likely to reflect the individual or organisational values and priorities of the body disposing of its asset.

Who Enforces?

Section 8 (1) of the Title Conditions (Scotland) Act 2003 lays down that 'a real burden is enforceable by any person who has both title and interest to enforce'. A Climate Change Burden may be created by any property owner in favour of either the Scottish Ministers or in favour of a 'public body' or trust.

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WHO CAN USE IT AND WHY?

Any owner of any property in Scotland may voluntarily introduce a Climate Change Burden to their property at any time to place requirements on future owners to reduce the greenhouse gases associated with the use of the asset. Applying burdens may particularly interest:

Public sector

The Climate Change (Scotland) Act emphasises the responsibilities of all public bodies. The application of Public Duties, progressive annual reporting and the increasing scrutiny of the policies, actions, choices and leadership as legally based climate charge targets start to bite, make Climate Change Burdens a potentially useful tool in planning for the disposal of public assets.

Local authorities own and control large quantities of Scotland's publicly held assets: greenfield; brownfield and built assets and are often the most publicly accessible and immediate face of government.

Attaching Climate Change Burdens to assets at point of sale can reinforce local planning and sustainability policies, set an example for others on practical advancements and direct improvements along lines local authorities believe most effective and valuable to their communities. Importantly, the legal requirement of fulfilling a Climate Change Burden would also remove later pressures on planning officials and council committees to negotiate downwards climate change standards as per the intentions of the burden, in the face of demands from those developing the assets.

Public sector agencies, Non-Departmental Public Bodies (NDPBs) and government departments may gain many of the same benefits by applying burdens as local authorities. This may be particularly true for those holding significant quantities of land and buildings.

Private sector – Businesses Holding Corporate Social Responsibility values, Estates

The private sector has increasingly become engaged in Corporate Social Responsibility actions, rather than words, which demonstrate their concern for and their commitment to their host communities, their customers and the environment. Applying burdens can make these positions tangible, evidence climate change understanding and may also provide a sense of long-term legacy for the business, a stake in the future they can point to over time.

Private sector – Communities

Communities increasingly are taking ownership of land and assets in Scotland. In future, communities may wish to release some assets to enable new purchases and investments, while wishing to advance or maintain a local low carbon agenda.

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Climate Change Burdens may also be useful where communities hold assets as a result of agreements or gifts and grants where the benefactors made low carbon development a condition of release.

Third sector – Higher and Further Education

Many larger institutions own land and buildings beyond those which form their main campus structure. The 'Universities and Colleges Climate Commitment for Scotland' (2009), commits institutions to proactive behaviour, leadership and reduced emissions with particular attention focussed on buildings, campuses and their roles and responsibilities within their communities. Adoption of Climate Change Burdens would reflect these values in a similar way to that set out above for local authorities, where parts of those campuses become surplus but the institution wishes to see the acquirer abide by their standards.

Third sector – Charities, Trusts and NGOs

Charities, Trusts and NGOs may historically hold land and built assets through purchase or gifting. For many the control and stewardship of such assets may be their *raison d'être* but may, at times, need to sell off some assets. Climate Change Burdens can provide safeguards in terms of future development. In fact, there may even be some bodies that choose to apply the Climate Change Burden as a mechanism that allows for the purchase, long term safeguarding (through the imposition of a burden) and resale of assets (a kind of rotating fund).

Organisations that recognise the potential value of specific types of Climate Change Burdens that firmly reflect their priorities may also choose to encourage many of the above public, private and third sector, as well as their own membership, to place burdens on assets in favour of their trust or another named body, consistent with the charity's value/goals.

As such they may wish to identify and promote examples of innovative and successful burdens as part of their public outreach activities.

Forms a Climate Change Burden Could Take

Ideally a Climate Change Burden should seek to conserve, or generate, heat and/or power, or alternatively to preserve or increase the capture of carbon, on a property. This could take the form of imposing positive obligations such as the installation of renewable energy systems or insulation materials and double-glazing. It could also include passive measures such as making use of natural light, stack ventilation or an efficient use of water in either capture or disposal. Likewise it could focus on opportunities for carbon sequestration through expansion of suitable forestry or conservation of peat lands.

The title deeds affected may cover any type of property in Scotland. To illustrate the opportunities of these burdens some examples of property types and potential likely burdens are provided below. It should be reemphasised that the sample text will not be appropriate for direct application to specific properties and individual legal advice must be taken before applying a burden to title deeds.

- 1). Existing building (historic or contemporary) with no significant surrounding land.

A simple drafting example of a Climate Change Burden could read as follows:

'The Disponees shall within six months of the commencement of the development of the Subjects improve the area weighted thermal performance of Walls, Floors, and Roof to all have maximum U values of $\leq 0.30W/m^2K$ which burden is described as a Climate

Change Burden enforceable by [Scottish Ministers (which would include Scottish Building Standards Division and/or Historic Scotland), a specific buildings Trust, a local authority]’.

2.) Land requiring remediation - former industrial sites.

A simple drafting example of a Climate Change Burden could read as follows:

‘The Disponees shall reduce the methane released from the property to a level of X by means of Y shall within twelve months of the commencement of the development of the Subjects and maintain the land at no higher than this level in future operations, which burden is described as a Climate Change Burden enforceable by [local authority, Scottish Ministers (SEPA)]’.

3.) Community assets, etc. – village halls, village greens, potential renewables sites.

A simple drafting example of a Climate Change Burden could read as follows:

‘The Disponee shall, as part of the proposed development of the Subjects, be obliged to connect to the District Heating Scheme [as defined] and contribute thereafter to the maintenance, repair, upgrade and where necessary renewal of the said District Heating Scheme in accordance with the share allocated by the [Benefited Proprietor/ Enforcing Authority]’.

4.) Undeveloped land - forestry or peatlands held by private or public sector.

A simple drafting example of a Climate Change Burden could read as follows:

‘The Disponees shall within six months of the commencement of the development of the Subjects maintain or increase the sequestration value of X mature deciduous trees/ha equivalent to X/ha by re-planting any felled trees with X [number and species

of tree], which burden is described as a Climate Change Burden enforceable by [Scottish Ministers (Forestry Commission Scotland), Trust]’.

RELATIONSHIPS WITH OTHER LEGISLATION AND POLICY

There will likely be interplay between the application of the burdens and of some other existing and emerging legislation which include:

- Existence of other burdens;
- Regulations, Building Standards and Planning Guidance;
- Evolving climate change obligations - UK Climate Change Committee;
- Alleviation of Requirement to Achieve Best Price in Best Value (June 2010);
- Trust duties.

Current legislation and regulatory requirements will always take precedence but burdens allow owners to extend and expand upon these, often, minimum requirements. Climate Change Burdens must also respect any pre-existing within the title deeds and Trust duties. All of the above areas are examined in detail in the full report.

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...include passive measures such as making use of natural light, stack ventilation or an efficient use of water ...

...focus on opportunities for carbon sequestration through expansion of suitable forestry or conservation of peat lands.

IDENTIFYING LIMITATIONS OF BURDENS

The adoption of a Climate Change Burden will not be suitable in all cases or to achieve all related ends. It is a tool that will be appropriate when actions which reduce the greenhouse gas produced by the asset can be made explicit and their achievement clearly evidenced.

The construction of a burden will require sound legal and climate change advice to determine what changes can reasonably be made to the asset to avoid the risk of being overturned at a later date on a legal challenge.

Climate Change Burdens are a new and evolving mechanism as are means of measuring and accounting for carbon. Over time standard versions of burden text will become proven and more widely understood. Early burdens will test new legal ground and therefore will need to be carefully defined and constructed using expert legal and technical advice. Some will succeed and others may be challenged and either varied or discharged by application to the Lands Tribunal, but the opportunities are large and the benefits of high potential value.

It is also worth bearing in mind that the very nature of climate change means that the conditions of and impacts on land and buildings is likely to alter over time, in predictable and less predictable ways (see UK Climate Impact Programme data).

Therefore it may be wise to build a level of flexibility into burdens which anticipates likely areas of change and drafts to address them.

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CREATING CLIMATE CHANGE BURDENS

1 Identify desire to reduce impacts of Climate Change via held buildings and land in own ownership or that of one's organisation.

2 Assess own Climate Change policies, aspirations, targets and strategies for key drivers and priorities.

3 Determine priority best linked to asset's strengths and weaknesses.

4 Identify tool for measurement and key points for determining success that meet the 'Four Corners Rule'.

5 Consult legal advisor to support draft of burden.

6 Gain acceptance of that party who will have power to enforce.

7 Gain sign-off from any necessary parties within ownership organisation.

8 Authorise lawyer to write burden into title deeds of asset, including restriction for early discharge of burden if desired (Section 92).

9 Notify any parties soon to be working with or potentially advertising the asset for sale.

10 Promote, if desired, creation of burden to stakeholders and community.

Climate Change Burdens are a legal instrument to ensure the reductions of greenhouse gas emissions in the development of buildings and land and set binding requirements for all future owners to meet specified adaptation or mitigation standards.

This guidance provides an overview of the purpose and function of the newly established Climate Change Burden, introduced in the Climate Change (Scotland) Act 2009. It offers practical support to those wishing to attach these to assets they control or may wish to influence how development will take place in the future.

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DISCLAIMER

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