THE NATIONAL TRUST

The Potential of Conservation Covenants

A report by Green Balance to the National Trust

August 2008

Acknowledgements

Green Balance wishes to thank the staff of numerous NGOs around the world who responded to questions about conservation covenants, which made this report possible, particularly:

Royal Society for the Protection of Birds (UK)
Society for the Protection of Ancient Buildings (UK)
Woodland Trust (UK)
Land Trust Alliance (USA)
Trust for Public Land (USA)
American Farmland Trust (USA)
Queen Elizabeth II National Trust (NZ)
Historic Places Trust (NZ)
Royal Forest and Bird Protection Society (NZ)
Trust for Nature (Victoria, Australia)

Special thanks also to:
Larry Orman, GreenInfo Network (San Francisco)

Registered charity no.205846

ISBN 978-1-84359-351-5

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Designed by LEVEL Partnership
Printed by Acculith 76

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Foreword

We are living through a period of intense public debate over the development and use of land. In addition to the longstanding debates over new housing and infrastructure and public concerns over the loss of habitats, green spaces and landscapes; we are seeing new demands from leisure and tourism, shifts in farming and a growing recognition of the implications of climate change. There is also a new interest in the multiple benefits that land can provide – managing carbon and water and providing important health and quality of life benefits for us all.

The National Trust has been engaged with these issues for well over a century. As a practical champion of the benefits of a country rich in beauty, history and wildlife we are keen to play our part in helping make the most of the nation's scarce land resources. We know how complex the drivers for land use change can be and how important it is to get the right mix of regulations, incentives, policies and guidance in place so that change is in the interests of us all.

The focus of policy debate has tended to be on the role of the land use planning system and the influence of the Common Agricultural Policy. There is also an important role for outright ownership of land by conservation bodies, including the Trust's 250,000 hectares. These all remain critically important but we are keen to explore the potential of other measures. This is why we commissioned Green Balance to look at the potential of conservation covenants as one way of doing more to manage land use change in the public interest. Conservation covenants provide a legal agreement with other landowners (and their successors) that guarantees the environmental condition of an area of land will not be lost as a result of land use change or development

The National Trust already exercises conservation covenants over more than 36,000 hectares. We have found them to be an effective means of achieving conservation objectives when their purpose is clear and their management is resourced. This report explores the international experience. Drawing on evidence from the USA, New Zealand, Australia and Canada over three decades or more it reveals a more positive attitude to conservation covenants abroad than in the UK. With enthusiastic support from central and local government, covenants are achieving widespread and lasting conservation benefits in ways that complement the role of land use planning and other policy mechanisms in these countries.

The report indicates how conservation covenants can be made to work efficiently and effectively from the perspective of both the donor and the covenant-holder. Covenants are shown to have been used with a variety of different emphases, whether for keeping land open, promoting biodiversity, protecting historic buildings and structures, or sustaining small farms. The report shows that active management and monitoring keeps owners focused on the purposes of covenants, while enforcement, if ever necessary, remedies any damage to conservation interests, discourages further breaches, reassures potential donors and retains the support of Governments and the public.

The Trust believes the report makes a compelling case for the Government to express stronger support for the role conservation covenants can play in delivering public policy objectives. They can be more cost effective than the purchase of land and with the right fiscal incentives could promote a new culture of donations for conservation purposes. This would support the Government's objectives for a more "generous society" and stimulate new forms of charitable giving. We commend the report and look forward to your feedback.

Tony Burton
Director of Strategy and External Affairs

Summary

A conservation covenant is a legal agreement between a landowner and another party (such as The National Trust) which permanently limits the uses of the land affected in order to protect its environmental condition (typically from built development). The land does not change ownership, and it may be sold or passed on to heirs as normal. Covenants are voluntary promises in which certain rights are donated by the landowner, or possibly purchased by the covenant-holder. These restrict the use of the covenanted property in the ways agreed by the parties. The National Trust already owns covenants on over 36,000 hectares and is considering the scope for expanding this form of environmental protection, whether by itself or others. This report reviews the experience of conservation covenants in other countries and the implications for the UK.

The international experience is that landowners wish to donate many more covenants than covenant-holders have the capacity to accept. Acquisitions have accordingly been prioritised. In the USA alone there are over 1600 Land Trusts holding covenants on well over 6 million acres of conservation land, while further covenants protect 1.5 million acres of farmland and The Nature Conservancy alone additionally owns covenants on well over 2 million acres of priority habitat. In contrast, very few covenants are held in England by bodies other than The National Trust. This is mainly due to legislation which generally restricts this activity to landowners adjacent to the covenanted land.

Laws enabling conservation covenants around the world have considerable parallels with the powers given to The National Trust under The National Trust Act 1937 in the UK. Covenant programmes in the USA, Canada, Australia and New Zealand over the last three decades or more have successfully protected land from inappropriate development and contributed to benefits notably for landscape and wildlife protection, the preservation of heritage buildings, and support for farms and farmland. The vast majority of them internationally appear to be achieving what they set out to achieve. This suggests that the potentially expanded use of covenants in the UK is worthy of detailed attention.

In all four countries studied, there is enthusiastic support from central government, regional and local administrations for the operation of covenants, backed by financial assistance. In New Zealand the covenant-holders are grant-aided to acquire, monitor and manage covenants, whereas in the other countries most of the economic benefit passes to the landowner (whether by tax relief or through purchase of covenants). There is no such financial support in the UK: covenants are technically feasible without this, but much more could clearly be achieved if the Government were to follow the approach elsewhere of viewing covenants as a cheap and effective means of securing conservation benefits in perpetuity.

Expenditure on administering, managing and enforcing covenants is both substantial and essential. Each covenant must be tailored to the needs of the site, so that it will endure, and should then be supported by a close relationship between the landowner and covenant-holder. This not only monitors progress and heads-off difficulties, but builds support for the objectives of the covenant, gains wider community support, and is far cheaper than enforcement. Funding arrangements should be in place from the outset. Contributions or even full endowments can be sought from donors to pay for ongoing monitoring and management.

Covenants are cheaper to buy than the whole property as a means of securing controls over land in perpetuity, though there has been little analysis of the long term comparative costs of covenants compared with outright ownership. It is clear from New Zealand that donations of covenants can be

secured even if there are negligible tax incentives. With pressures on the planning system in the UK, the case for greater use of covenants is becoming stronger. Conservation covenants are fundamentally a matter of choice and priority for The Trust compared with alternative ways of using the money.

The Government could make a real contribution to conservation covenants if it announced its support in principle for their more extensive use by The National Trust and others for clear conservation purposes. This would provide a basis of stable political support which would encourage landowners to donate covenants and The Trust to invest in managing them. Financial incentives for covenants might take various forms which the Government could find attractive. Tax benefits for conservation covenants would be in line with other mechanisms used by the Government to incentivise the achievement of public policy purposes. Grants to The Trust to operate a covenanting programme would be cheaper (certainly in the short to medium term) than funding the purchase of conservation land. Consideration could also be given to adjusting the rules on charitable donations and inheritance tax to encourage the greater use of covenants.

1 Purposes

The National Trust has identified the potential role of conservation covenants as one of the means by which The Trust might help reduce the negative impact of development on open spaces and rural land, particularly by acquiring development rights. The Trust already uses such covenants and controls significant areas of land by this means. Against this background, this study has been commissioned to:

- review how easements* and covenants have been used for conservation purposes in the USA, Canada, Australia and elsewhere;
- assess the potential of a wider use of this power and its likely effectiveness in furthering conservation purposes in areas of existing or potential development pressure;
- identify the risks and practical implications of adopting a more proactive use of covenants for these purposes;
- suggest steps which central government might take to support the wider use of covenants, and the main implications of covenants for local government and other relevant stakeholders; and
- identify any practical measures which would make the proactive use of covenants more effective, such as the use of tax incentives.

* The term 'easement' is used in North America to apply to the instrument called a 'covenant' in the UK. The words are used interchangeably in this study in a North American context.

2 Introduction

For the purposes of this study, a conservation covenant is taken to refer to a legal agreement between a landowner and The National Trust (or other party) which permanently limits the uses of the land affected in order to protect its environmental condition (typically from built development). The land does not change ownership, and it may be sold or passed on to heirs as normal.

The National Trust already has available to it a legal vehicle which allows it to enter into conservation covenants with landowners. This is The National Trust Act 1937. An especially beneficial feature of this law is that it enables The Trust to enter into and enforce covenants in circumstances where it is not a neighbouring landowner to the land covenanted. This is an extremely valuable power not available to most other covenant-holders. There is therefore no need for legislation before action can be taken by The Trust (unless The Trust considers that additional powers are necessary before sufficient benefit could be obtained). The National Trust already owns covenants on over 36,000 hectares. Appendix 3 outlines the history of conservation covenants within The Trust.

2.1 Covenants mean different things to different people[1]

Covenants are promises contained within legal agreements or deeds. Familiar to many from commitments to make regular payments to charity, they have many other meanings, purposes and means of formalisation. Covenants affecting land appear in various forms, notably the following:

- *contractual covenants*: these could be contracts to pay money, such as in return for a grazing licence;
- *contracts between landlord and tenant*: these have reference to the subject matter of the lease, and might typically involve repairs and maintenance obligations, or management agreements such as for tree planting;
- *private covenants on freehold land*: these can cover such matters as rights of access over land or restrictions on the future use of land when it is sold, but they can be complex and potentially awkward arrangements which may be difficult to discharge by agreement (e.g. where the benefit becomes split amongst many people, all of whom would have to be traced and agree);
- *statutory covenants*: various bodies have been given enabling powers to enter into and take the benefit of covenants over land (including The National Trust), where both the obligation and the benefit (and those holding them) are clearly identifiable: this is essentially an enhanced version of private covenants on freehold land.

This study focuses on the last of these four categories, though there can be overlaps. For example, a conservation covenant could simply be a contract no more burdensome than one in the first category, even though authorised under a statutory covenant. They are also used to achieve various public purposes by public agencies, such as management agreements for land conservation or to bind the owners of Sites of Special Scientific Interest. However, differences can often be discerned between the likely role of The National Trust and of other covenant-holders – such as the possibility that a covenant may be discharged more readily if it is held by a public body whose priorities can change over time.

2.2 Key features

Essential features of a conservation covenant for the purposes of this study are:

- it is permanent and runs with the land;
- it is restrictive, preventing landowners from doing, or allowing, specified kinds of actions or land uses;

[1] This background section draws heavily on the report *Covenants as a conservation mechanism*, by Ian Hodge, Richard Castle and Janet Dwyer, 1993, Cambridge University Department of Land Economy Monograph 26.

- it can apply to any land where both parties agree to it, in the terms they agree (subject to the limits imposed by legislation);
- it is voluntary: the landowner may donate, of possibly sell, the covenant to a covenant-holder like The National Trust, but a covenant cannot be compulsorily acquired;
- once signed a covenant may thereafter only be varied by the landowner with the agreement of the covenant-holder;
- the terms of the covenant are enforceable by the covenant-holder;
- the covenant is registered on the register of title (though for older covenants in the UK which predate the requirement to register land, covenants may have been registered in the land charges register).

In addition, the study has considered briefly the applicability of covenants to buildings. There is considerable experience of applying covenants to heritage buildings, both in the UK and internationally, which should not be overlooked. In practice, the rules which applied to covenants over land were found to be broadly comparable to the rules affecting heritage buildings. Furthermore, the controls being exercised for the most part were no more than, and often significantly weaker than, those long established in the UK through Listed Building legislation. Section 4.5 outlines the main distinctive issues which apply to covenants over heritage buildings rather than land.

The study found that legislation everywhere required covenants to be registered. However, covenants in most jurisdictions lacked one or more of the other features and would therefore not be directly transferable to England for the purposes of this study. They may, however, have valuable alternative characteristics, so this study has taken a broad view of international experience. The kinds of difference that can be found are:

- some covenants last for a fixed period or apply only to the current land owner or occupant;
- some covenants oblige landowners to carry out specific actions by way of land management: in England these would be called positive covenants which under domestic legislation cannot bind successors in title to the person who signed the original covenant (unless enshrined in certain kinds of legal agreement which differ from those under priority consideration in this study) – and in any event are outside the scope of the National Trust Act 1937 and outside the terms of reference for this study;
- some covenants can only be entered into in places identified as meeting strict predetermined criteria – usually land established as having conservation value or land unaltered or barely altered by human interference;
- some covenants can be overridden by normal statutory controls for the regulation of land uses, in other words to insist on developments proceeding despite the terms of the covenant, whereas in England they are largely but not entirely additional to the current land use planning system in the ways in which they control land uses.

This brief introduction illustrates that covenants can become legally complex. The requirements of them for the current purposes of The National Trust are fairly precisely defined and tied to the circumstances in different parts of the UK. Covenants in other jurisdictions must be analysed closely for their wider applicability. Attention also needs to be paid to other legal powers operating in parallel to covenanting

Table 1 Features of conservation covenants internationally

Covenant system/country	A	B	C	D	E	F	G	H	I	J	K	Notes
Conservation easements held by typical Land Trusts (Uniform Conservation Easements Act) (USA)	Y	Y1	N	Y2	–3	Y	Y	Y4	N	N	Y	Includes scope for a third party right of enforcement
Agricultural conservation easements promoted by the American Farmland Trust (USA)	Y	–1	–	Y	Y	Y	Y	Y	–5	N	Y	Aims to keep land in farming and prevent fragmentation and damage
Conservation covenants held by The Nature Conservancy (USA)	Y	Y	N	Y2	N	Y	Y	Y	Y	N	Y	
Nova Scotia Nature Trust [Conservation Easements Act 2001]	Y	Y	N	N	N6	Y	?	Y	Y	N	Y	
The Land Trust Alliance of British Columbia [Land Title Act 1996]	Y	Y	N	Y	Y	Y	Y	Y4	N	Y	Y	The landowner can be required to indemnify covenant-holder
Agriculture Western Australia Program [Soil and Land Conservation Act 1945]	Y	–7	?9	N	Y10	Y	?	N	N14	N14	–8	A town planning scheme to regulate land use can vary or extinguish covenants
National Trust program [National Trust of Australia (Western Australia) Act 1964]	Y	Y	Y	Y	Y	Y	?	Y	N	N	–8	A town planning scheme to regulate land use can vary or extinguish covenants
Program of Dept of Conservation & Land Management [Transfer of Land Act 1893 (of Western Australia)]	Y	Y	Y	N	Y10	Y	?	N	N	N	–8	A town planning scheme to regulate land use can vary or extinguish covenants
Heritage Agreement Scheme [Native Vegetation Act 1991] (of South Australia)	Y	Y	N	N	N	Y	?	N	Y	N	Y	
Trust for Nature (Victoria) [Victorian Conservation Trust Act 1972]	Y	Y	N	N	N11	Y	Y	Y	Y	N15	Y	Minister must approve each covenant
QEII National Trust [QEII National Trust Act 1977]	Y	Y	N	N	Y12	Y	?	Y	Y	N	N	A fairly close parallel to the UK (esp. no national tax incentives)
New Zealand Historic Places Trust [Historic Places Act 1993]	Y	Y	N	–13	N	Y	Y	Y	Y	N	N	Focuses on heritage buildings (and land)

Y = Yes, N = No, – = variable or partial, ? = Not clear

Assessment criteria

A Benefits not exclusive to adjoining landowners
B Usually runs with the land permanently
C Restrictive only
D Aims primarily to prevent inappropriate physical development
E Any land where parties agree (i.e. scheme not particularly targeted)
F Registered
G Buildings can be covered as well as land
H Covenant can held by independent body
I Secure from being overridden by a challenge allowed within the scheme
J Covenant-holder may rescind the covenant unilaterally without a Court Order
K Deliberate tax incentive

Notes

1. Land trusts almost exclusively use permanent covenants, which attract tax benefits, but official programmes occasionally use fixed-term ones.
2. Some aim to preserve biodiversity, or farming, or to require sustainable forestry practices.
3. Must satisfy Internal Revenue Service if tax benefits are to be obtained, but that should not be unduly difficult.
4. The majority are held privately, but Government-sponsored bodies may also operate them.
5. Provision to review covenants in principle is rare, but one State law which allows it is Pennsylvania, after 25 years
6. The land must be designated by the Province as a 'natural area' to be eligible for a covenant: landowners can apply for this.
7. Covenants may be expressed to have effect for a period of time or in perpetuity: in practice they have usually been devised for 30 years.
8. No powers for rates or taxes to be reduced in Western Australia, but Federal tax incentives apply.
9. Positive covenants not specifically provided for, but the purpose is to allow the 'management' of vegetation, implying positive actions.
10. The legislation imposes no restrictions, though the Department using the covenants will have its own policy objectives.
11. Applies only to land of high ecological (or historical) conservation value.
12. The requirements are not set out in law, but the QEII National Trust only protects land meeting its criteria.
13. Protection is provided against adversities such as neglect, demolition or damage: these could arise from development pressure.
14. The Act specifically provides that conservation covenants are "irrevocable": otherwise the instrument is an "agreement to reserve".
15 The Minister (rather than a Court) may approve the release of a covenant on application by the Trust for Nature.

powers, as it is unlikely that covenants are the only legal power shaping the use of land. That analysis of context has not always been practicable in this short study, so the conclusions should be treated with some caution.

2.3 Selection of international comparisons

In addition to investigating the use of conservation covenants in the USA, Canada and Australia, this study has extended to other territories known to make use of the arrangement. In particular New Zealand has a selection of laws enabling conservation covenants (see Box 1).

A wider search has also been made through the international community. Conservation covenants most relevant to the study are most likely to be relevant in jurisdictions founded on the English legal system and common law. With this in mind, enquiries have been made within the Commonwealth, through the Commonwealth Association of Planners, taking advice on countries likely to be the most appropriate from the International Affairs Manager of the Royal Town Planning Institute. This has been supported by selected enquiries amongst the fraternity of National Trust-type organisations in selected countries.

The Nature Conservancy in the USA, a leading NGO working to protect ecologically important lands and waters around the world, reports its outreach activities in other countries. The first conservation covenant and Land Trust in Latin America were established in Costa Rica in the early 1990s, advised by The Nature Conservancy. Today The Conservancy owns covenants on at least 30,000 acres in Latin America, the Caribbean and Canada, and is helping to establish covenant programmes in 12 countries. None of these regions have been investigated for this study (other than Canada).

The response to enquiries sent to specific organisations has been mixed. The result is that, coupled with work on the internet, this study has established sufficient information to be able to draw conclusions from the experiences in the USA, Canada, Australia and New Zealand but not elsewhere. In view of the large numbers of laws and covenant-holders in these countries, and the limited duration of this study, more detailed assessments have been made of twelve cases (laws or beneficiaries) in the four countries. A summary of their key features follows in Table 1 as an introduction to this report, while the text also draws from these cases.

Box 1 · Laws enabling covenants over private land in New Zealand

Queen Elizabeth the Second National Trust Act 1977 (sections 22-23)

Reserves Act 1977 (sections 77 and 77A)

Conservation Act 1987 (sections 27 and 27A)

Resource Management Act 1991 (section 108(2)(d))

Historic Places Act 1993 (sections 6-8)

3 Compatibility with the National Trust Act 1937

For the experiences of conservation covenants around the world to be transferable to the UK and of immediate value to The National Trust, their formal structure would need to be compatible with the powers of The National Trust Act 1937. Those covenanting powers which were studied in some detail were therefore considered against this criterion.

3.1 Provision to hold covenants as if a neighbour of the covenanted land

All covenanting laws studied made similar provision, without exception. It is difficult to see how effective covenanting could operate without this power. This did not seem to be controversial. International experience is therefore compatible with The National Trust's requirements on this point. Recent legislation in Scotland has similarly overcome the problem faced by other NGOs in England of being unable to hold conservation covenants unless themselves an owner of neighbouring property (see the note on the Woodland Trust in Appendix 1).

One law, the Victorian Conservation Trust Act 1972, which unusually requires the Minister to approve covenants before they come into effect, goes further, so that impacts on neighbours can be evaluated before a covenant is signed. This formally provides that other landowners nearby may be allowed to comment on the proposals. Section 3A states:

> "(6) Where the Minister considers that owners of land in the vicinity of the land concerned may be affected by the proposed covenant or variation of covenant he may direct the Trust to give such notice of the details of the proposed covenant or variation of covenant to such owners as he directs.
>
> (7) Notice given pursuant to a direction under subsection (6) shall state that submissions with respect to the proposed covenant or variation of covenant may be made to the Minister within one month of the date of the notice.
>
> (8) The Minister shall consider any submissions received from a person to whom notice is given by the Trust under subsection (6) within one month of the date of the notice and may approve or refuse to approve the proposed covenant or variation of covenant."

3.2 Covenants can run with the land in perpetuity

Virtually all laws empowering conservation covenants allow them to run with the land in perpetuity and be enforceable against subsequent owners. This, it might be said, is arguably the main purpose of covenants in the first place. Anything short of this is basically a management agreement rather than a long term conservation measure. In the USA, the model Uniform Conservation Easement Act of 1981, which is the foundation for many State laws in the USA, suggests that "a conservation easement is unlimited in duration unless the instrument creating it otherwise provides". With tax incentives only available for donating permanent easements, fixed-term ones are rare.

Easement purchase schemes are not constrained in this way and fixed-term schemes are occasionally found in the agricultural support sector: for example, the Massachusetts Department of Agricultural Resources offers a model covenant for a period of years (to be negotiated). Outside the USA, only one law, the Soil and Land Conservation Act 1945 of Western Australia, was found under which covenants frequently lasted for defined periods, typically for 30 years, rather than in perpetuity, through the Agriculture Western Australia Program. As covenants can, unusually, be extinguished by land use planning decisions in Western Australia, it was probably the weakest of the cases reviewed.
In some jurisdictions, for example at least 22 States in the USA, separate laws provide statutory term limitations on restrictions on land unless the arrangements are renewed at intervals.

Covenant-holders must be alert to taking the necessary steps, typically every 20 to 50 years.

3.3 Covenants are restrictive only, and may not require positive actions

This feature of the 1937 Act accords with the principle that positive covenants under English law cannot bind successors in title. This does not appear to be a conceptual problem in most other parts of the world. Many laws were found to make overt provision for positive covenant obligations, some of them deliberately to overcome this difficulty under English common law. Others did not comment specifically, but nonetheless empowered management activities which clearly implied the taking of actions rather than simply the avoidance of actions. Only a minority were worded simply in terms of what they 'restricted'.

Nonetheless, the practicalities of enforcing positive covenants are the same throughout the world: this is very difficult if the landowner is resistant. The reality therefore was that covenant-holders were found to be cautious about the use they made of the powers available to them. For example, the Trust for Nature in Victoria, Australia, although aiming primarily at encouraging the management of property sympathetically for wildlife and having positive covenants at its disposal, expressed its positive obligations carefully. Landowners would be required to adhere to a management plan (with maintenance works, etc.) but these were generally expressed in terms of "make reasonable efforts" and were accompanied by a supportive approach from the Trust rather than an emphasis on conformity. The Trust also tended to avoid taking covenants on properties with lower quality vegetation which would require more work, mainly as a result of the difficulty of enforcing positive obligations. Covenant-holders also often offer direct assistance with positive interventions that are desirable or necessary, such as paying for stock-proof fencing, more than trying to enforce positive obligations. In the heritage building sector, positive obligations can be less easily avoided due to the importance of sufficient and correct maintenance (see section 4.5).

These findings suggest that there is not a great difference in practice between the actions taken by covenant-holders around the world and those which The National Trust is empowered to take under the 1937 Act, even if the legislative principles vary. International experience is therefore broadly compatible with The National Trust's requirements on this point.

Even if a landowner is not required to carry out positive actions, covenants will need to provide the covenant-holder with rights to take positive actions, at least to enter the property for monitoring and enforcement purposes. The National Trust might further wish to carry out scientific or educational studies, conduct tours of the property, or even implement aspects of land management itself. These affirmative rights and obligations can complicate the covenant and expose the covenant-holder to new liabilities. They may also be difficult to enforce, especially against subsequent owners. The additional activities are therefore likely to be achieved more effectively through leases, licences or management agreements separate from the covenant.

3.4 Covenants control buildings as well as land

This study is primarily concerned with covenants over land, where buildings are incidental. However, conservation of land should also recognise the role of associated buildings, where a change of building use or its enlargement could have significant environmental implications in its own right distinct from any change to the use of the surrounding land. Section 8 of the 1937 Act refers only to 'land', but in the law of England and Wales this includes the buildings attached to it (rather than just the 'surface and subsurface of the holding'). The same term is used in many other laws around the world, where any

intention to include or exclude buildings will depend on the interpretation of 'land' in those jurisdictions. However, in every instance studied where buildings were specifically referred to, they were always within the scope of the covenanting powers.

Covenant-holders were generally very cautious about their references to buildings in their covenants, whatever the legal basis. Some made reference to excluding existing buildings (both dwellings and farm or other structures) from the area covered by a covenant or from its terms. Some required landowners to seek their approval for new buildings, but clearly expected to be sympathetic to the owner's needs. Some volunteered to omit land on which further structures might need to be built by the donor, including for instance dwellings for the next generation, or to allow dwellings for the donor's family and staff on a prescribed basis. The clear message was that the ongoing management of enterprises and conveniences of donors would not be challenged. The emphasis was on covenants as voluntary agreements out of the generosity of the donor, and covenant-holders had no desire to exercise controls over matters which were not relevant to the reasons for wishing to secure the covenant. These are probably sentiments with which The National Trust would concur in cases where covenants are being sought to protect land from outside development pressures more than from damage to heritage by their owners.

A small number of covenanting powers studied addressed heritage in a wide sense of the environs of heritage features (meaning landscape features and identifiable locations, not simply buildings) and wider 'cultural lands'. These were particularly apparent in areas where native peoples were present. The Historic Places Act 1993 in New Zealand is one such law, providing wide-ranging powers relevant to both land and buildings, and focusing particularly clearly on the risks posed by the intrusion of new built development (rather than damage through inappropriate management). This depth of vision on the meaning of heritage could have its attractions for The National Trust.

3.5 Powers conferred on an independent body, not just Government bodies

The National Trust is an organisation independent of the Government, and the 1937 Act confers special powers upon it. Covenants around the world were considered for their management by independent bodies rather than by the state.

Only three laws were identified where the covenants could only be held by state governments or their agencies, all in Australia (the Soil and Land Conservation Act 1945 and Transfer of Land Act 1893 in Western Australia, and the Native Vegetation Act 1991 in South Australia). In all other cases the legislation empowered non-government organisations (and sometimes government bodies too) to hold covenants.

Schemes run by or at arm's length from the state can function very effectively, as the Heritage Agreement Scheme in South Australia appears to demonstrate (with more than 1,400 agreements protecting over 600,000ha since 1980). Nonetheless, private covenant-holders tend to have attractions over public bodies from the perspective of prospective donors, which increases the likelihood of long term stability in conservation covenants:

- the perspective of private bodies is less likely to change over time, while government can change their policies as well as their political leaders;
- private bodies with clear conservation objectives tend to be viewed as more trustworthy than public bodies; and

- private bodies through their activists are likely to be more closely tied to the communities where they operate.

A small number of laws are specific in empowering a single named body to hold covenants, similar to the National Trust Act 1937. These include National Trust Acts in other jurisdictions (especially Australia and New Zealand), the Victorian Conservation Trust Act 1972 (specific to the Trust for Nature) and the Historic Places Trust Act 1993 (specific to the New Zealand Historic Places Trust).

Most laws empower a range of organisations to enter into conservation covenants with landowners. Jurisdictions may be selective in the organisations on whom they confer the power, or may authorise any organisation which can satisfy predetermined criteria. Box 2 gives an example from Nova Scotia of a range of bodies empowered to hold covenants under the principal legislation there on covenants over land.

The laws in the USA are generally very wide-ranging in who they empower – government and non-government – which has resulted in an explosion in numbers of Land Trusts over the last twenty years, now numbering over 1,600. The definition of a 'holder' under the model Uniform Conservation Easement Act is given in Box 3.

There can be important differences between laws regulating state-sponsored covenant-holders and those regulating private bodies. This has recently become acutely apparent in the USA, where a case has emerged which appears on the surface to relate to the regulation of mineral rights but in reality is a measure of the weakness in law of government-affiliated covenant-holders. This is reviewed in Appendix 2.

3.6 Legislation in the USA

The National Trust Act 1937 aims to overcome a range of limitations which would otherwise apply to covenants under common law. The USA has a similar legal background to the UK and similar common law restrictions apply there. However, a comparable effort has been made to overcome those restrictions so that covenants can apply there. Most individual states now have legislation addressing this, the majority having had laws for many years. In 1981 the US National Conference of Commissioners on Uniform State Laws drafted model legislation for widespread use on easements: the Uniform Conservation Easements Act.

Section 4 of that Act in 1981 covers similar matters to those legal issues resolved in the UK by the 1937 Act. It provides that a conservation easement is valid even though:

Box 2 · Eligible bodies under the Conservation Easements Act 2001 of Nova Scotia

The Province of Nova Scotia or any of its agencies

The Canadian Federal Government

Any municipality or any of its agencies

Any conservation organisation designated under an earlier Act of 1992

Any organisation designated pursuant to regulations, currently:

- Nova Scotia Nature Trust
- Nature Conservancy of Canada
- Bras d'Or Preservation Foundation
- Ducks Unlimited Canada
- Federation of Nova Scotia Naturalists
- Kingsburg Coastal Conservancy Association
- Blomidon Naturalists Society
- Schubencadie Canal Commission

Box 3 · Uniform Conservation Easement Act 1981 (USA): Definition of 'holder'

"(i) a government body empowered to hold an interest in real property under the laws of this State or the United States; or

(ii) a charitable corporation, charitable association, or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic, or open-space values of real property, assuring the availability of real property for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property."

- it does not benefit another piece of property,
- it can be or has been assigned to another holder,
- it is not of a character that has been recognized traditionally at common law,
- it imposes a negative burden,
- it imposes affirmative obligations upon the owner of an interest in the property burdened by the easement or upon the holder,
- the benefit does not touch or concern real property, or
- there is no specific contract between the easement holder and a subsequent landowner that is not a party to the original easement agreement.

So far 24 States have adopted the 1981 model Act or close variants of it, and the remainder have their own laws. As a result, there is a reasonably close parallel between US experience and the needs of The National Trust in the UK. Although the tax systems of the two countries are very different, so US practice cannot necessarily be applied directly in the UK, there is nevertheless a sufficient compatibility of legal foundation for the US experience to be highly relevant to the UK. This is particularly important as this study will indicate below the special relevance of the US to the objectives now under consideration by The Trust.

4 The purposes of covenants

4.1 Introduction

A key purpose of this study is to examine the effectiveness of covenants in furthering conservation purposes in areas of existing or potential development pressure. The National Trust's objective is to protect land from inappropriate built development and its associated activities. A brief study has therefore been made of the purposes of covenants and the forces which gave rise to the legislation empowering them. Most legislation was found to be clearer about the qualities of land to be protected than about the threats to that land to be resisted. The National Act 1937 is therefore unusual in stating that The Trust may enter into a covenant for: "restricting the planning development or use thereof [of land] in any manner the National Trust … thinks fit".

Legislation on the purposes and scope of covenants indicates the circumstances in which Governments considered priorities for covenants to lie at the time of enactment. Some of these have placed considerable faith in the covenant-holder by providing wide-ranging powers. As indicated in the previous paragraph, The National Trust's own legislation provides a particularly wide frame of reference.

Others laws have attempted varying degrees of specificity to focus covenants on places where they are expected to do the most good, though in the case of the Conservation Easements Act 2001 (Nova Scotia) these are so numerous that the powers are wide-ranging in practice. This allows covenants "for the purpose of protecting, restoring or enhancing land that:

(i) contains natural ecosystems or constitutes the habitat of rare, threatened or endangered plant or animal species,

(ii) contains outstanding botanical, zoological, geological, morphological or palaeontological features,

(iii) exhibits exceptional and diversified scenery,

(iv) provides a haven for concentrations of birds or animals,

(v) provides opportunities for scientific or educational programs in aspects of the natural environment,

(vi) is representative of the ecosystems, landforms or landscapes of the Province, or

(vii) meets any other purpose prescribed by the regulations."

The legislation in the USA is also often widely drawn, particularly if based on the Uniform Conservation Easement Act 1981 which defines a "conservation easement" in remarkably wide enabling terms as meaning:

> "a nonpossessory interest or a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological or cultural aspects of real property."

The purposes of individual covenants in the USA can easily comply with legal requirements such as these. As a result, covenant-holders with a wide range of objectives have emerged, some of them very specific such as to promote recreation or to protect individual species. The covenant-holder as well as the landowner must be clear about the commitment being entered into. The Land Trust Alliance in the USA comments: "Unless the land trust exercises care in choosing its projects, it may

find itself stuck with a conservation easement that serves little public interest, is very costly to manage, or does not really fit with the land trust's purposes. A land trust that does not carefully select its projects may open itself to public criticism, credibility problems and even legal problems" (*Frequently Asked Questions*, on www.lta.org).

While the emphasis of individual covenant-holders can vary, four popular groups of purposes are outlined in the following three sections, all of them usually relying in the USA on the same broad legal base: to restrict encroachment by development, to support farming, to conserve nature, and to preserve heritage buildings.

4.2 Encroachment by development

The number of conservation covenants in place in the USA probably far eclipses the combined number in the rest of the world. The majority of US covenants are held by Land Trusts and aim at 'protection' of the covenanted land, particularly but not exclusively from built development. In this they are similar to the covenants currently held by The National Trust. The types of conservation covenant operated by Land Trusts in north America can be seen in part as substituting for an effective land use planning system. There is no doubt that a central intention of conservation covenants here is to channel built development away from lands considered worthy of 'protection'. This amounts to a privately operated and definitive planning control of its own, in the areas where it operates.

There are a limited number of other covenant-holders around the world which focus on the protection of land from inappropriate development. Most appear to emulate either the Land Trust movement in the USA (such as schemes run by member-organisations of the Land Trust Alliance of British Columbia in Canada) or The National Trust in the UK (e.g. the National Trust of Australia (Western Australia) Act 1964, which refers to "conditions restricting the planning, development or use thereof [of land] in any manner The Trust.... thinks fit"). Other broad laws allowing covenants to protect land include:

- the Transfer of Land Act 1893 (Western Australia), which refers to "affecting or restricting the use of land";
- the Queen Elizabeth the Second National Trust Act 1977 (of New Zealand) which refers to land which "ought to be established or maintained as open space"; and
- the Historic Places Act 1993 (New Zealand) which allows "for the execution of a heritage covenant to provide for the protection, conservation, and maintenance of that place, area, or wahi tapu".

These are the covenant schemes which on first look appear to offer the most direct parallels to the arrangements from which The National Trust might wish to learn for their relevance in the UK.

The success of schemes in the USA at directing development elsewhere is mixed. They have been spectacularly successful in respect of area protected. The amount of land permanently protected by land trusts through easements doubled between 2000 and 2005 to 6.2 million acres (see Box 8 for achievements in New Zealand). Most covenants in the USA, as elsewhere, are obtained on lands in rural areas rather than on the urban edge, simply due to the prohibitive cost of purchase there and the reluctance of many landowners to donate land with considerable development value. As a result, the pattern of covenanted land has tended to reflect the location of supportive landowners and, through an increasingly strategic approach to acquisition, those rural areas which most need protecting for their

benefits such as landscape, wildlife or farming. These may not necessarily be the areas at greatest risk of inappropriate built development.

Covenants have almost certainly prevented random outbreaks of inappropriate development and saved locally valuable places. However, making up for weaknesses in the public regulation of land use is difficult and probably impossible for conservation covenants to achieve. This is especially the case outside the USA, where the numbers and areas of covenants are relatively modest. Compared with the flow of new construction, the likelihood is that even in the USA protected land could become islands in a sea of bad development rather than shape the pattern of urban growth. Respondents to this study often mentioned the importance of land use planning policies which should avoid designating for development land having conservation merit.

4.3 Farmland support

A second group of covenants is specifically aimed at farmland: to keep farmers farming. This sector can be under pressure from changing world markets, subsidy systems, climate change and (in some countries) especially property taxes. More than the other two sectors, this one is more intimately tied into the financial incentive systems which accompany the covenants. Farmers who donate easements are eligible for income tax benefits in the usual US manner, but if their incomes are low the benefits may not be great (though the 16 years for recovering the value of easements set in the Pension Protection Act 2006 was clearly expected to benefit this group – see section 7.2). The purchase of easements in the USA is therefore particularly pronounced in the farmland sector, and public agencies are often the easement-holders. A survey in 2004 by the American Farmland Trust counted 9,453 easements on nearly 1.5 million acres of farmland, held primarily by state and local agencies (*The Conservation Easement Handbook*, 2nd Edition, 2005, Trust for Public Land & Land Trust Alliance, page 8).

A major subsector of conservation easements has built up in the USA to assist farmland through programmes called the Purchase of Agricultural Conservation Easements (PACE), sometimes also known as the Purchase of Development Rights (PDR). Being restricted to purchases of easements, these are distinct from those aiming to help farmers take advantage of Internal Revenue Service tax incentives where more complex drafting is often required. (Land trusts, of course, can and do operate more normal easements over farmland where donation is incorporated.) Thirty states have authorised PACE programmes over the last thirty years, with the support of the State Department of Agriculture. The American Farmland Trust describes PACE schemes in the following terms:

> "State and local governments can play a variety of roles in the creation and implementation of PACE programs. Some states have passed legislation that allows local governments to create PACE programs. Others have enacted PACE programs that are implemented, funded and administered by state agencies. Several states work cooperatively with local governments to purchase easements. A few states have appropriated money for use by local governments and private nonprofit organizations. Finally, some local governments have created independent PACE programs in the absence of any state action.
>
> Cooperative state-local PACE programs have some advantages over independent state or local programs. Cooperative programs allow states to set broad policies and criteria for protecting agricultural land, while county or township governments select the farms that they believe are most critical to the viability of local agricultural economies and monitor the land once the

easements are in place. Involving two levels of government generally increases the funding available for PACE. Finally, cooperative programs increase local government investment in farmland protection" (*The Farmland Protection Toolbox*, February 2008).

PACE is largely a financial mechanism which provides landowners with liquid capital that can enhance the economic viability of individual farming operations and help perpetuate family tenure on the land. In many ways these easements are very similar to those controlling development, in that the restrictions included very often relate to the control of housing and other non-farm developments and of uses inconsistent with commercial agriculture. The environmental controls tend to be relatively light – perhaps requiring soil or water conservation practices. An illustration of the purpose of an agricultural covenant is given in Box 4, from a model provided by in Massachusetts.

Box 4 · Commonwealth of Massachusetts Agricultural Covenant: Statement of Purpose

"By obtaining this Agricultural Covenant, it is the intent of the Commonwealth to protect and preserve agricultural lands, encourage sound soil management practices, preserve natural resources, and maintain land in active agricultural use through improving the agricultural economic viability of the Premises. No activity detrimental to actual or potential agricultural use of the Premises, or detriment to water conservation, or to good agricultural and/or forestry management practices or which is otherwise wasteful of the natural resources of the Commonwealth of Massachusetts shall be permitted."

The opportunities for terminating 'permanent' covenants, however, tend to be somewhat greater for those over farmland: if the land or neighbourhood changes and farming becomes impractical to achieve, then a Court may set aside the covenant. Occasionally such covenants are for a defined period, as with the Massachusetts example, or build in the opportunity for legal challenge by farmers to the permanency of covenants: the PACE law in Pennsylvania is highlighted in section 6.4, for example.

On a wider scale, covenanting programmes – particularly agricultural ones – may be able to capitalise on sympathetic planning regulations (which inhibit development) to stabilise whole rural landscapes. A major study of agricultural easements in the USA, drawing on a sample of 46 programmes in 15 states, concluded that easements effectively helped to redirect or influence urban growth in just half a dozen of the communities served by the sample programmes. Here they worked largely in conjunction with local government planning policies, zoning and other land use regulations (and capitalised on limited availability of services). In these few cases, substantial easement acquisitions in strategic locations had helped to firm up urban growth boundaries, redirect residential development or create protected farmland areas between growing cities (A. Sokolow, December 2006, *A National View of Agricultural Easement Programs: Report 4 – Measuring success in protecting farmland*, American Farmland Trust, Agricultural Issues Center (University of California), Farm Foundation).

One area where agricultural easements have had particular success is in Marin County, California (immediately north of the Golden Gate Bridge and within San Francisco's metropolitan area). A large rural area of the County was zoned for development on 1 acre lots in the 1960s, but following a political

change strong planning policy was introduced and the land zoned instead for ranching with a minimum parcel size of 60 acres. The Marin Agricultural Land Trust has now secured conservation covenants over 40,000 acres of this land on 61 farms and ranches, creating a stable land base for mainly family run dairy farms there.

The possibility of separating the development value of farms from their agricultural value as a means of subsidising and therefore sustaining long term farming might be given consideration by The National Trust in the UK. This could be valuable as a means of protecting open country where farming, particularly traditional farming, is necessary for the overall sustenance of a wider landscape, but where individual farms might struggle to meet criteria of environmental merit normally required to justify conservation covenants. The US programme is based on heavy state subsidy in a context of taxation of farmland, so is not immediately replicable in the UK; however, it is tied to a weaker planning system than in the UK which may well have been holding back its performance as a tool for shaping urban development patterns. The stronger planning policies available in the UK also raise the prospect of development values on agricultural land being held down, so that the financial gap to be bridged by a covenanting programme might be more achievable. However, under these conditions, it might be argued that the planning system alone, and not the agricultural covenants, should be credited with retaining landscapes in agricultural production.

4.4 Nature conservation

Most covenanting schemes other than those outlined above are in a third group set up to protect natural or semi-natural environments from adverse change. The principal threat may well be change of management rather than built development. In many parts of the world outside the UK there are strong emotional attachments to original 'wilderness' or 'bush'. Many covenants are therefore operated principally for nature conservation and related purposes (as a clear manifestation of what is distinctive about these areas), sometimes – but not always – by nature conservation NGOs. In many cases, particularly in the USA, these interests may well be adequately covered by wide-ranging definitions of the scope of covenants.

In other cases nature conservation objectives are formally written into the laws establishing the programmes. For example:

- The Soil and Land Conservation Act 1945 (Western Australia) refers to "the protection and management of vegetation";

- The Victorian Conservation Trust Act 1972 (Victoria, Australia) allows covenants on "any land which the Trust [for Nature] considers to be ecologically significant, of natural interest or beauty, of historic interest or of importance in relation to the conservation of wildlife or native plants";

- The Native Vegetation Act 1991 (South Australia) allows heritage agreements:

  "(a) where native vegetation is growing or situated and the Minister considers that provision should be made for the preservation or enhancement of the native vegetation; or

  (b) where the land has been revegetated with plants of one or more species indigenous to the local area so as to be representative of a naturally occurring plant community…"

Covenants aimed at protecting original habitats and environments tend to have their origins in resistance to agricultural subsidy systems and other pressures on farmers and land managers to bring additional land into production. For example, the QEII

National Trust Act 1977 in New Zealand was in part a response to farmers being subsidised in the 1970s to clear 'bush' and bring it into cultivation. Similarly, the covenant scheme now under the Native Vegetation Act 1991 was originally begun in 1980 to address concern about over-clearance of 'bush' in the agricultural region of South Australia.

Covenants for nature conservation purposes are making a significant impact. For example:

- The Nature Conservancy owns covenants on well over 2 million acres (800,000 hectares) in the USA (in addition to the land held by Land Trusts and through farmland easement programmes noted above);

- the Heritage Agreement Scheme in South Australia has ensured long-term protection for over 600,000 hectares of original vegetation: although this represents under 1% of the State, in some regions it protects relatively significant proportions of native vegetation communities; and

- the Trust for Nature in Victoria, Australia has protected 35,000 hectares of habitat.

Despite this opportunity to use covenants for nature conservation purposes, this study has found that their use by nature conservation bodies in the UK is very limited (see Appendix 1). In view of the enthusiasm for using covenants for this purpose elsewhere in the world, their limited appearance here is perhaps surprising (though constrained by the obligation to own neighbouring land).

4.5 Heritage building preservation

The permanent protection of heritage buildings and their environs can be secured through conservation covenants. In all four of the main countries studied, covenants over heritage buildings are for the most part achieved through legislation established for that specific purpose. In only a few cases is legislation sufficiently widely drawn to be effective in protecting heritage buildings as well as open space. The present study included in the analysis one law which covered both heritage open space and heritage buildings: the Historic Places Act 1993 from New Zealand. The kinds of change which building preservation covenants protect against are inevitably somewhat different from those potential changes affecting land. They include protection from demolition and inappropriate additions, as well as protection from inappropriate development elsewhere on the property. The changes which are or are not allowed to properties will also be highly specific in each case and much more detailed than typically required in open space covenants.

Heritage building covenants are a special-purpose application of covenanting powers and tend to be held by bodies with expertise on the topic. Many of the tasks involved in establishing and managing these covenants can only be carried out by expert or suitably trained people, which may constrain the use of volunteers and place more emphasis on qualified staff or hired specialists. This includes establishing the baseline condition of the property at the time the covenant is registered, specifying the terms of the covenant to protect the heritage interest, monitoring compliance, evaluating proposals for works permitted within the terms of the covenant or for variations to it, and any enforcement.

Section 3.3 noted the difficulty of enforcing positive covenants. Nonetheless, covenants over heritage buildings are likely to require positive intervention by landowners and occupiers. This may be required to bring a deteriorated property back to good condition at the start of the covenant, and will certainly be needed to maintain the quality of the fabric in sound condition using the materials and techniques appropriate to the building. Given the impracticality of positive covenants under The

National Trust Act 1937, other means of delivery must be found. Elsewhere in the world, maintenance provisions are more acceptable than they would be under the 1937 Act (see Table 1 above), but even so there is a tendency is to use 'side agreements' – rehabilitation agreements or management agreements – to make up for the difficulties of enforcing positive covenants.

Covenants over heritage buildings in use generally require a more sophisticated approach to flexibility than do covenants over land. Buildings need to be usable, and responsive to new needs while respecting the qualities which enshrine their heritage value. Ascendant issues such as cabling for computers, satellite dishes to receive television signals, disabled access, and microgeneration of renewable energy all illustrate how pressures for change can affect heritage buildings in unforeseen ways. There may also need to be scope for new uses of old non-residential buildings. Covenants must be sufficiently carefully drafted to protect the character-defining elements of the property (which may be comprehensive) but without limiting activity at the property so drastically that it becomes uneconomic to maintain in use and without imposing excessive monitoring burdens on the parties. Covenants typically need to provide for: absolute prohibitions on specified types of change; actions that may be undertaken only with prior notice to and approval by the covenant-holder; and reserved rights retained by the owner. Attention should be paid to the controls legally feasible and prepared to be donated by the owner over fixtures and fittings – matters which rarely arise with covenants over land.

Measuring the performance of covenants is particularly difficult with heritage buildings: avoiding upsetting the character of a building through insufficient feeling for its merits is more difficult to control by specification than is avoiding upsetting the character of land. One solution that can be employed is to specify in a covenant the application of accepted standards rather than attempt to state measurable standards. For example, in the USA, easements over heritage buildings may require adherence to the Secretary for the Interior's *Standards for the Treatment of Historic Properties*, which may be updated from time to time. The National Trust might refer to its own guidance or that issued by English Heritage or specialist NGOs such as the Society for the Protection of Ancient Buildings. Special provisions are likely to be required in heritage building covenants to constrain repairs to 'emergency repairs only' any necessitated by major damage such as fire or subsidence. Sufficient insurance cover is likely to be a necessary parallel obligation in the covenant.

4.6 Focusing covenants on priority areas

Legislation defining the land to which covenants may apply, and the kind of agreements which may be placed over such land, sets the scope of activities for any covenant-holder. This establishes where public benefit lies. The more tightly defined the circumstances, the greater will be the need for a covenant-holder to demonstrate that its covenants have met the legal requirements. Some laws enshrine user benefits (such as visibility or public access) in the scope of covenants as well as thematic benefits (such as protection of wildlife or landscapes), or give a strong hint in that direction. For example, the Historic Places Act 1993 in New Zealand states that "a heritage covenant may include such terms and conditions as the parties think fit, including provision for public access" (s6(2)).

The experience identified by this study is that many covenant-holders not only have procedures which clearly meet the formal obligations, but go much further with elaborate criteria and procedures. The prevalence of this process indicates that there are far more landowners willing to enter into covenants than there are resources for covenant-holders to

acquire and manage them. It performs the additional and usually more demanding function of prioritising the body's own activities so that the resources it can devote to covenant management are applied in the most effective places. For example:

- The Nature Conservancy in the USA has often turned down offers of donations of conservation easements on lands that do not fulfil the Conservancy's mission, even though the lands may have important ecological values;

- The QEII National Trust in New Zealand assesses potential new covenants against at least 16 criteria despite its widely-drawn legal powers to enter into them; and

- The Land Trust Alliance of British Columbia lists a range of practical as well as resource-quality factors which a land trust is likely to take into account, which go well beyond the requirements of the authorising legislation.

Considerable work is usually put into assessing proposals for covenants offered by landowners. This is especially true of bodies focusing on nature conservation and the protection of natural and semi-natural habitats. Clarity of the covenant-holder's purpose is important for all stages of a project, from understanding precisely why a covenant is negotiated in the first place to establishing a basis upon which a Court may later determine the intentions of the parties in an enforcement case. The costs of management and the organisational issues and finance-raising burdens have increasingly encouraged Land Trusts in North America too to refine their objectives and priorities, despite often operating under legislation having broad scope.

The National Trust already benefits from very loosely-drawn legislation that enables it to enter into covenants largely as it sees fit. However, the findings from international experience suggest that The Trust will benefit from establishing and refining its own objectives and procedures for accepting land under covenant. It will then be able to assure itself that the resources available for covenant management are being applied appropriately for priority purposes.

A further tier of prioritisation is provided in those jurisdictions which support the use of covenants by providing tax benefits to donors (as noted above in the case of farmland protection covenants). This is additional to the legislative requirements and the objectives of the covenant-holder. Governments will, clearly, only wish to offer tax benefits for those covenants which meet their own priorities. The issues are outlined in section 5.2.2 below.

5 Landowner contributions (and benefits)

5.1 Donations, purchases and acquisitions of covenants

Donation is the method of covenant creation favoured by all NGO covenant-holders: this is obviously cheaper than buying them, and indicates likely goodwill towards the future management of the property for conservation purposes.

Purchase is nonetheless an alternative. Some covenant-holders may be keen to acquire covenants over specific areas of land (e.g. to complete the control of a species migration route, or of a water catchment, or of valuable land especially vulnerable to damage), and be prepared to pay for them in those circumstances if they have access to the necessary money. As but one example, a US land trust bought covenants on nearly 2,000 acres of contiguous farmland near Sacramento (the state capital of California) to buffer rapid growth in Yolo County and to protect a three-mile stretch of riparian habitat along Cache Creek.

Purchase is often the favoured mechanism by which public agencies establish easements in the USA, using taxes raised for the purpose. "In 2003 alone, voters nationwide approved 100 measures on local or state ballots that dedicated funds to land conservation projects. These funding measures, approved in 23 states, generated $1.8 billion in local and state funding for land protection" (*The Conservation Easement Handbook*, 2nd Edition, 2005, Trust for Public Land & Land Trust Alliance, page 9). Also, the National Park Service alone, as just one of the federal easement-holding agencies, holds easements on over 0.25m acres in addition to its very large land ownership.

Some landowners may be asset-rich but cash-poor and, particularly if they are struggling to pay property taxes on their land, may welcome the opportunity to sell a covenant in the land while retaining ownership. Furthermore, a jurisdiction with generous tax incentives for covenant donations need be no worse off if it funds the covenant purchase rather than foregoes the same amount of tax revenue.

Provision is occasionally made in law for conservation covenants to be required compulsorily, though this is unusual as most law and practice emphasises the voluntary nature of covenants. The Historic Places Act 1993 in New Zealand, which established the New Zealand Historic Places Trust (with covenanting powers), allows a heritage covenant to be imposed in association with other benefits conferred on the owner. In practice, these will usually emerge from negotiation, with the landowner accepting a 'compulsory' covenant in exchange for an alternative gain. Acquisition can be as a condition:

- as a result of a mediated outcome arising from a resource consent*;
- as a result of a resource consent application or court decision**;
- of a grant from the NZHPT National Heritage Preservation Fund Scheme***.

* This appears to be similar to a section 106 agreement in English planning law.

** This appears to be similar to a condition on a planning permission.

*** This appears to be similar to a grant from a body such as English Heritage.

Compulsory purchase ('eminent domain' in the USA) of a right over land might theoretically be taken in the form of a covenant over land acquired for public benefit against the will of a landowner. This has not been encountered by this study (other than in the circumstances noted in the previous

paragraph) and does not appear to be desired by the vast majority of covenant-holders. Compulsory purchase is viewed by them as far more of a threat to conservation than a potential benefit: covenanted land may be under (increasing) risk of damage by utilities and state agencies compulsorily acquiring land for public projects, such as power transmission cables, road building and fire protection. Compulsory acquisition in these circumstances was a possibility in all cases studied where the information was readily available (though in a number of cases the matter was not addressed). The UK legislation therefore appears to be typical.

5.2 Incentives to donate covenants

Throughout the world the main incentive to donate covenants is charitable, based on a desire to protect the donated land in largely its current form and, sometimes to contribute to protecting the character of land over a wider area that has conservation merit. This applies whether or not there are tax benefits on offer for making such donations. However, financial incentives can also arise.

5.2.1 Impacts on property values

Conservation covenants have a value, due to their impact on the market value of the property and due to the implications this has for liability to pay taxes. This has a range of consequences, intended or otherwise. The separation of development and similar rights from a property will tend to reduce the remaining value of that property. The financial impact this has will depend on the taxation laws in that jurisdiction, such as the following.

- A common effect, and one that applies in the UK, is that the land will then be subject to a lower rate of inheritance tax, so donating a conservation covenant in a will can contribute to good estate finance planning. Historically this is understood to have been an important reason for at least some of the covenants held by The National Trust.
- Where property taxes apply, and these are levied at rates which depend on market value, the reduced land value will result in a lower tax liability. However, in some jurisdictions agricultural land is taxed at an agricultural rate regardless of its market value (i.e. neglecting its 'hope value' to transfer to higher value uses), so the donation of a covenant would have no impact on that tax liability.
- Some administrations tax property by category of use. A covenant which caused property to be reclassified as 'conservation land', for instance, might reduce property taxes. However, one which prohibited agricultural use might cause a reclassification of land into a class paying a higher tax rate than before, such as 'recreational land'. Outcomes often depend on decisions at the municipal level.

Some covenant-holders use a converse argument that is familiar from listed buildings in England: that the value of the property will actually be raised, due to the formal acknowledgement of conservation merit inherent in the covenant and the certainty that this quality will be protected in perpetuity. For example the Trust for Nature (Victoria, Australia) states that "covenanting may lead to an increase in the value of the land because of the superior land management practices which often result". Similarly the State Government of South Australia claims that "Heritage Agreements have not detrimentally affected property values or sales. In some cases now, farms with bushland command a premium over properties that have been fully cleared." The QEII National Trust in New Zealand also emphasises this, perhaps because tax relief is very modest and limited to reductions in the rates burden in some municipalities. The answer to one of the Trust's *Frequently asked questions about conservation covenants* – 'Do covenants affect property values?' – is:

"Some landowners are concerned that covenanting

land could devalue their property. In fact, protecting an area often enhances a property's value as it can:

- aid the farm operation by fencing off a sensitive or hard-to-manage area;
- provide benefits such as shelter and shade for stock in adjacent paddocks, and improve water quality;
- beautify the property and encourage bird life;
- satisfy a resource consent condition for subdivision (i.e. when protection is required as a consent condition)."

5.2.2 Tax incentives

While the previous financial benefits tends to be quite broadly available, more immediately tangible and large scale incentives are available to covenant donors in those jurisdictions which provide tax incentives. The logic for governments is that private landowners are performing a conservation function which the state supports, and are doing so at a fraction of the cost of the state attempting this itself; furthermore, private landowners continue to pay taxes. The Government of South Australia also notes that retaining remnant natural vegetation is cheaper than attempting rehabilitation (see Box 5). The central points of interest in each case surround the covenants which qualify for tax relief, the tax benefits on offer, and the eligibility of donors.

In the United States, according to the Fifth Amendment of the Constitution, taking of private property for public use by the government requires due process of law and just compensation to the owner for the value of the property taken. Controls over land uses on private land to a large degree qualify as 'takings' under US law and must therefore be compensated. As the money is not available to buy out development rights on any scale, land use planning controls over land in the USA are weak.

Box 5 · Heritage Agreements in South Australia: the rationale for public funding

"The Scheme has been a major investment in the future of the State, and during the life of the program the State Government has allocated over $80 million. This money has been paid from public funds in recognition of the fact that the protection of bush, the conservation of biodiversity, and good land management are to the benefit of the whole community. Rather than being viewed as a high price to pay, this is a cost-effective and economical investment; for in the longer term it is cheaper to keep remnant bush rather than to try to rehabilitate degraded land in later years" (*Ecosystem Conservation – Conserving Biodiversity – The Heritage Agreement Scheme*, May 2006, at www.environment.sa.gov.au).

This is in contrast to the United Kingdom, where development rights were nationalised in 1947 so that there is no right to compensation when development opportunities are denied through planning decisions. In consequence, achieving public objectives on private land in the USA revolves around incentives to the landowner, which often take the form of tax benefits. This is central to the way in which conservation covenants operate in the USA.

The Code of the Internal Revenue Service in the USA specifies that the general 'conservation purposes' which a conservation covenant must perform to qualify for tax benefits (section 1.170A-14(d)(1)) means:

> "(i) The preservation of land areas for outdoor recreation by, or the education of, the general

public, within the meaning of paragraph (d)(2) of this section,

(ii) The protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem, within the meaning of paragraph (d)(3) of this section,

(iii) The preservation of certain open space (including farmland and forest land) within the meaning of paragraph (d)(4) of this section, or

(iv) The preservation of a historically important land area or a certified historic structure, within the meaning of paragraph (d)(5) of this section."

There are numerous other stipulations, including that:

- the conservation purpose must be protected in perpetuity;
- the covenant must be held by a qualified body with "a commitment to protect the conservation purposes of the donation";
- a tax deduction will not be allowed "if the terms of the easement permit a degree of intrusion or future development which would interfere with the essential scenic quality of the land or with the governmental conservation policy that is being furthered by the donation" (subsection (d)(4)v)); and
- 'baseline' documentation on the condition of the property at the time of the gift must be provided in the (quite likely) event that the donor retains rights in the property which, if exercised, could impair the conservation value of the property;
- if there is a mortgage over the land, the lender must agree to become junior to the covenant (which can be awkward as the lender has no incentive to offer this).

The donor of a covenant is, generally, entitled to set the whole value of the donation against federal income tax. This is on the basis that donors can deduct the value of their gift at the rate of 30% of their adjusted gross income, and any tax benefit remaining after the first year can be carried forward for five years. (These incentives have recently been increased for a fixed period: see section 7.2 below.) In effect the development value of land is handed over with the covenant and this can be set against tax. On top of this, at least 12 states provide for state income tax credits for gifts of conservation easements or exempt the sale of conservation easements from state income tax. At the local level there can be variations in property taxes to encourage conservation easements (though not always, as noted in section 5.2.1).

Outside the USA the arrangements vary. Elsewhere too there can be generous federal tax incentives to donate covenants, notably in Australia (outlined in Box 6) and to a lesser extent Canada (Box 7) [overleaf].

Each State in Australia has its own additional tax arrangements affecting covenants. Each law empowering covenants will set these out. Some offer no incentives at all. For example, in Western Australia, there are no incentives under the Soil and Land Conservation Act 1945, the National Trust of Australia (Western Australia) Act 1964 or the Transfer of Land Act 1893, though a parallel covenanting law focusing on heritage buildings, the Heritage of Western Australia Act 1990, gives the Governor the power to remit the whole or part of any land tax, local government rates or charges, and water rates.

The Victorian Conservation Trust Act 1972 includes in its financial provisions the power for the Minister to waive the whole or part of any land tax and rates due on covenanted land if he agrees with the recommendation of the Trust for Nature that "the

Box 6 · Assistance for landowners entering into conservation covenants in Australia

Key features of the Federal incentives are as follows.

To qualify for tax relief, conservation covenants must:

- be in perpetuity;
- be part of an approved covenant programme or approved by the Minister;
- result in the property losing market value by at least $5,000;
- be held by an eligible covenanting body, which includes official public bodies.

Two types of tax concession are offered to landowners:

- an income tax deduction for the decrease in land value (provided the covenant was gifted), which can be spread over a five year period as the donor chooses;
- Capital Gains Tax provisions apply as if the covenant were a sale or gift (so that landowners not eligible for an income tax deduction are not disadvantaged).

Landowners may also obtain financial assistance (according to the scheme and its location) for:

- specialist technical advice (e.g. vegetation mapping and fauna surveys);
- management costs;
- rate relief and/or property tax reductions at the State or municipal level;
- reimbursement for establishment costs.

Box 7 · Assistance for landowners entering into conservation covenants in Canada

Landowners who make a charitable gift of a conservation covenant are entitled to a tax credit. The Federal rate is 29% (on gifts of over $200). However, most Provinces offer a further tax credit. For example, in British Columbia, the combined Federal and Provincial tax credit is 43.7%. Unused tax credits can be carried forward for up to five years.

A charitable gift of a covenant is, unusually, treated as the disposal of property having a deemed capital gain, incurring a tax liability (for which Revenue Canada has created a formula). The tax credit noted above can, however, also be set against capital gains tax: it is calculated as a percentage of the total value of the donation up to a maximum of:

75% of the taxpayer's income for the year, plus

25% of the taxable capital gain, plus

25% of the recaptured capital cost allowance.

Where land has increased in value, this is treated as a capital gain of which 50% must be included in the donor's income for the year, (though the above benefits will usually more than offset that additional tax).

Where landowners donate covenants on land certified by the Minister as ecologically sensitive, the 75% income limitation noted above does not apply. Also, only 25% of any gain in the land's value must be added to the donor's income.

preservation of such land in its natural state is not economically feasible and that such preservation is thereby endangered" (section 3B(i)). In South Australia the Native Vegetation Council similarly encourages landowners to enter into Heritage Agreements by indicating that local rates and taxes are usually waived, and that the Council may be able to offer financial assistance through its own funding programme, such as for management of an issue threatening the integrity of native vegetation, re-establishment of native vegetation, or perhaps for conducting research into a management issue.

Although conservation remains a primary motivating force for many landowners, this is difficult to disentangle from the tax incentives. The Land Trust Alliance has found that conservation activity is higher in states which offer tax credits (in addition to the federal tax incentives). Also the 2006 increase in federal tax incentives has caused conservation activity nationwide to increase according to anecdotal evidence.

There can be little surprise that a large body of practice, and litigation, has built up in the wake of this largess. The valuation of covenants has become a major consideration in the whole process, and further consequences have arisen to prevent fraud and to articulate the public benefit which is supported by the tax incentives. Tax incentives can affect potential donors' motives and therefore their degree of enthusiasm to adhere to the long term land management commitments they have promised after receiving their total tax benefit at the outset. These issues could be pursued in more detail, but this is recommended for the future if necessary: The National Trust will first need to evaluate whether the merit and likelihood of securing a covenanting system in the UK with accompanying tax incentives is desirable or realistic.

5.2.3 Incentives without tax benefits

The National Trust will wish to consider particularly the experiences of those covenants held in jurisdictions where tax incentives are not available. The two main laws empowering covenants in New Zealand (the Queen Elizabeth the Second National Trust Act 1977 and the Historic Places Act 1993) provide no tax incentive to donors. In that sense they are similar to the UK, and their experience may be particularly instructive for the UK. The covenant-holders using these laws explain the benefits of covenants in significantly different terms from those operating in jurisdictions with tax incentives.

The QEII National Trust describes the opportunities for:

- property value increases not decreases (see above);
- itself covering the costs of the covenanting process (e.g. surveys);
- offering assistance to landowners with fencing to keep stock off open space;
- offering advice and assistance with practical land management; and
- "many authorities offer some form of rates relief for open space covenants".

The New Zealand Historic Places Trust (NZHPT) describes the benefits of a heritage covenants as follows:

"Benefits are both public and private. Public benefits include:

- communities seeing a variety of properties safeguarded for future generations;
- in some cases, limited public access to historic sites is provided for.

Property owners can also benefit:

- having peace of mind, knowing that that property will continue to be cared for by supportive owners in the future;
- in some cases NZHPT may be able to offer specialist advice with regard to maintaining the property;
- in some cases there is rates relief."

Limited though these benefits are compared with the tax incentives in the USA, Canada and Australia, the New Zealand schemes can nonetheless demonstrate worthwhile support and achievements (see Box 8). These experiences illustrate that much can be achieved without tax incentives, though in both cases annual Government grants have been a significant factor behind the achievements.

5.3 Separation of development rights

Conservation covenants have the effect of separating from the rights of land ownership those development and associated rights which are enshrined in those covenants. These rights pass to the covenant-holder, not so that they can be used or sold but so that they be permanently extinguished: the body holds not the rights given up, but the power to enforce the landowner's promise not to exercise them. Covenants then have no market value to the covenant-holder, provided they are restrictive only. (At least in the USA, though, covenants do have a realisable value if they are ever extinguished.) However, development rights are not the only rights which can be separated from land. In the UK fishing rights and mineral rights are frequently split off. In some other countries hunting rights can similarly be separated.

An appropriate relationship would need to be established between conservation covenants and particularly mineral rights if the arrangements are to be effective. This will be affected by the purpose of the covenant and also depend on the degree of control which a landowner can exercise over the implementation of any mineral development within the separated rights. Problems can arise. In the USA, the Internal Revenue Service rules on tax deductions for conservation covenants have apparently strict stipulations to ensure that donations are enforceable in perpetuity so that the conservation interest in the land is sustained. It is clear (1.170A–14 paragraph (g)(4)(i)) that no tax deduction is allowed when the donor retains the mineral rights "if at any time there may be extractions or removal of minerals by any surface

Box 8 · Covenants secured in New Zealand without tax incentives

NZHPT has entered into over 100 covenants with property owners. About one third apply to residential properties, seven to former post offices (covenanted before the Government disposed of them), nine to Maori pa sites and the remainder to various building types, rock art sites and archaeological sites. Funds for this activity derive from private donations and drawing on a central government annual grant of $500,000, administered by NZHPT, to assist the preservation of heritage of national significance in private ownership (from which covenanted property can benefit provided it is Category I listed for historic importance).

The QEII National Trust has done more. After 30 years it now has open space covenants with over 3,200 landowners protecting over 100,000 hectares in perpetuity. The New Zealand Government currently invests about $3 million annually in this venture, though this covers land purchases as well, and accounts for 70% of the Trust's income, the remainder being from non-government sources including donations.

mining method." Nonetheless, this is promptly watered-down later in the paragraph by the statement:

> "However, a deduction under this section will not be denied in the case of certain methods of mining that may have limited, localized impact on the real property but that are not irremediably destructive of significant conservation interests. For example, a deduction will not be denied in a case where production facilities are concealed or compatible with existing topography and landscape and when surface alteration is to be restored to its original state."

These conditions may not be too difficult to fulfil, so there is some question about the legitimate scope for mineral working within the context of a tax-deductible conservation covenant. Where the mineral rights are severed from the surface rights, and the probability of another party exercising the mineral rights is so remote as to be negligible, the Treasury Rules in the USA make an exception and allow tax-deductible covenants to proceed. Appendix 2 reports an unfortunate case which was triggered by conflicts between mineral rights and a conservation covenant. The case reinforces the importance of establishing the scope for the exercise of other separated rights when conservation covenants are agreed. The relationship between covenants and separated rights has not been studied in detail, though within the covenanting systems in Table 1 it is clear that mining cannot be prevented on land covenanted under the Heritage Agreement Scheme in South Australia or to the Trust for Nature in Victoria, Australia.

5.4 Flexibility

Most covenants are written with the clear intention that, once agreed, they should last permanently, and that their objectives will not be compromised. For example, the guidance notes accompanying Heritage Agreements under the Native Vegetation Act, by the Department of Water, Land and Biodiversity Conservation (in South Australia) state: "A Heritage Agreement can only be varied or cancelled by agreement of both the landholder and the Environment Minister. The approval of the Native Vegetation Council is also required. Cancellation of an Agreement should be regarded as extremely unlikely."

The covenanting legislation may also reinforce permanency. For example, the Conservation Easements Act 2001 in Nova Scotia specifically provides that a conservation easement does not lapse by reason of:

- non-enforcement;
- the use of the land for a purpose inconsistent with the purposes of the easement; or
- a change in the use of adjacent or surrounding land.

Various types of flexibility can nonetheless sensibly be built into conservation covenants. Bodies promoting and holding covenants, such as The National Trust, should consider carefully at the outset how much flexibility in each covenant will be appropriate. On the one hand, little flexibility provides certainty and largely guarantees the perpetuation of the objectives established at the outset of a covenant. This can be valuable in reassuring donors of the enduring nature of their contribution, and assist in gathering local support. On the other hand, circumstances change, and flexibility to adjust to the changing economics and priorities of land management and to new environmental concerns can be valuable, or possibly even essential to the effective management of property by its owner.

Virtually all conservation covenants enshrine the right for the donor and the covenant-holder, and their successors in title, to amend conservation covenants by mutual agreement. Covenant-holders would not expect to agree variations unless conservation benefits were retained or improved, and may be constrained in

law to avoid any financial benefit to the landowner (e.g. where tax benefits have been claimed by the landowner). Many, but not all, covenants may be rescinded by agreement, though of course covenant-holders enter into covenants on the basis that this will not happen, and the extinguishing of a covenant would only be contemplated in highly limited circumstances. The effect of these arrangements is to ensure that the objectives of the covenant-holder are protected.

Covenants generally seek to avoid the uncertainty of future variation, and the costs, administrative difficulties, possible precedents and impact on goodwill which that can involve. This is usually done by careful discussion between the parties at the outset to agree issues which are either outside the scope of the covenant (e.g. certain land is omitted from the covenanted area so that change can take place there), or specifically allowed in defined ways as part of the arrangement (e.g. the landowner retains the right to build a dwelling at a specified location in future). The core features of the covenant are then not likely to be controversial and can endure.

Sections 6.3 and 6.4 review the effectiveness of these measures in practice, in terms of the need for enforcement of the terms of covenants and legal challenges to them.

5.5 The impact of covenanting opportunities on landowners and others

In 1993, Hodge, Castle and Dwyer identified three categories of landowner who might be particularly likely to respond to a wider opportunity to make covenants under the legislation which operates in the UK (*Covenants as a conservation mechanism*, Cambridge University Department of Land Economy, Monograph 26). Nothing significant appears to have changed to require amendment to these. Their categories can be summarised as:

- country estate owners who face capital taxation and inheritance taxation problems;
- smaller landowners, probably without successors, who wish to ensure that their property retains its environmental value, perhaps fearing that future owners might remove landscape features or habitat or sell the land for urban development;
- cash-poor environment-rich landowners who might aim to exploit their environmental quality by selling a covenant, perhaps in order to enable them to continue farming at all.

The impact of the more extended use of covenants on local authorities and other stakeholders – notably other landowners – would vary from place to place according to circumstances. Some of the forces affecting responses would be:

- the attitudes of the parties to the built development being resisted;
- controls over covenanted land may increase the likelihood of development on other land;
- the greater the quantity of land covenanted in an area the greater would be the increase in the value of remaining land, making covenants over that remaining land increasingly difficult to secure;
- the value of land adjacent to covenanted land could increase if the covenanted land provided an environmentally protected backdrop to developable land, or decline if the adjacent land became undevelopable without the covenanted land being developed first;
- increased use of covenants would strengthen the role of conservation-minded landowners in shaping the pattern of built development regulated by the town and country planning system, generating mixed reactions.

6 Covenant management by covenant holders

6.1 Active management and monitoring

Covenant-holders widely view their relationship with donor landowners as wholly co-operative. They are aiming to assist landowners to fulfil the promises they have made by donating the covenant. For example, the Nova Scotia Nature Trust has commented "Ultimately we are trying to build a positive, trusting, long term relationship with landowners. Showing respect for landowners and their concerns, questions and ideas, and a genuine interest in them, is a large part of successful private land conservation."

The process starts with careful attention to the content of the covenant, providing comprehensive information about the scheme and the baseline condition of the property at the outset, and respecting landowners' needs so far as practicable. A covenant will restrict development and activities to the degree necessary to protect the significant conservation values of that particular property. The more restrictive the covenant or the more sensitive the resources, the more specific the documentation needs to be. Construction may be totally prohibited or perhaps limited to the landowner's immediate needs. Traditional uses of the land, like farming, are likely to be allowed to continue, perhaps subject to conditions. The objectives may be highly targeted, such as to protect the habitat of grizzly bear, or designed more broadly, such as to buffer more sensitive core conservation areas in public ownership. Public access to covenanted land is not usually required, which can be a distinctive difference between land acquired by NGOs or government bodies for conservation purposes and that conserved while still in private hands. In practice, some covenants are becoming quite complex as they aim to address multiple conservation values on single sites. Covenants will in any event need to be specific and clear, quantifiable where practicable and supported by photographs, plans and other documents providing precision.

Covenanted agreements must be monitored. In the cases examined, this was by visits every one, two or three years. These provide the chance for building up the relationship between the parties, assessing the condition of properties, addressing any threats to conservation values, and discussing other issues which have arisen. Covenant-holders are keen to maintain close engagement when properties change hands, particularly so that subsequent owners are well aware of the objectives and terms of a covenant before acquiring the land and then engaged in management planning immediately afterwards. The Trust for Nature in Victoria, Australia additionally provides a property advertising service to increase the likelihood of finding sympathetic buyers.

Effective stewardship of covenants is essential. "Inadequate attention to stewardship puts the conservation values of the property and the holder's reputation at risk. Even one mishandled stewardship task can haunt a holder for years into the future. If holders are perceived as not adequately safeguarding the resources protected by easements they hold, public conservation in conservation easements may be eroded. Easement holders owe it to the land, to easement donors, to the public, to themselves, and to each other to operate strong stewardship programs" (*The Conservation Easement Handbook*, 2nd Edition, 2005, Trust for Public Land & Land Trust Alliance, page 117).

Covenant-holders are increasingly co-operating with landowners in the ongoing management of land covered by covenants. Management plans may be needed to fulfil the objectives of the covenant. Assistance may be given to landowners, whether educational, practical, technical or financial, either within the terms of the covenant or, more likely, as an additional support. Whereas stewardship was once an after-thought, it is now widely regarded as central simultaneously to achieving the conservation objectives of covenants, building partnerships, maintaining the credibility of covenanting, and

heading-off enforcement problems. High levels of engagement with landowners are likely to be expensive, so covenant-holders must be sure to have sufficient expertise and resources for their promotional activities and to respond to new management proposals by the landowner. Efficient record keeping for long term use is also vital.

6.2 Paying for management

Funding the ongoing cost of managing conservation covenants is expensive, and usually much more than covenant-holders expect. This is an enduring problem for covenant-holders. It is widely seen as one of the most important aspects of their work. For example, The Nature Conservancy, probably the largest covenant-holder in the world, has argued that "If management funding cannot be arranged and assured up front, the easement will not live up to its potential, no matter how well-crafted it starts out to be" (*Final Report: Conservation Easement Working Group*, April 2004). The Nature Conservancy's policy is for funds to be set aside for the perpetual monitoring of the easement. There must also be initial amounts sufficient to cover stewardship 'start-up' costs and to provide an endowment that will generate income to cover at least half the projected annual stewardship needs for the foreseeable future. In New Zealand, the QEII National Trust devotes one third of its annual expenditure to monitoring and managing covenants (and the other two thirds to new covenants through to the point of registration).

Like The National Trust in the UK, covenant-holders generally rely on donations, individual members, grants from foundations, bequests and other sources to fulfil their obligations. However, there is increasing interest in securing funds from the donor landowners themselves, which may have particularly useful lessons for covenants in the UK.

There is a case for landowners paying for, or at least contributing to, the management of the oversight of the covenants on their own land. Landowners will have entered into the arrangement knowing that such management is desirable, not least because it supports the conservation objectives which justified their donation in the first place. Funding contributions on an annual basis may well be small in relation to the value of the covenant donated, and therefore not unduly burdensome. Annual or other regular payments from the landowner may nevertheless be risky. There may be times when the landowner is unable or unwilling to pay, and trying to resolve this may create more problems than if there had been no such commitment in the first place (whether formal or voluntary).

Another option, familiar to The National Trust from gifted properties, is for the covenant-holder to ask the donor for an initial capital endowment to pay for the costs of management in perpetuity: although costly, this resolves the problem for all time and can avoid the need for intermittent payments. One-off lump sum payments, sometimes called a stewardship fee, are often requested by covenant-holders in the USA and elsewhere (e.g. by the Trust for Nature in Victoria, Australia and by the Nova Scotia Nature Trust in Canada), and added to the value of the covenant donated. The Maine Coast Heritage Trust, for instance, requests a donation of $6,000 - $10,000 which, at an assumed interest of 5%pa generates the $300 - $500 which the Trust estimates its covenants to cost to monitor annually. Donors may be able to set the fee against tax, though this is a matter for tax advice in individual cases: in the USA, for example, covenant-holders generally 'request' a contribution (which is tax-deductible under Federal rules) rather than 'require' one (which is not).

Only one case was identified from the international study which allows endowments to be levied as a matter of legal entitlement within the covenanting law. This is the Land Title Act 1996 of British Columbia, Canada, which provides at section

219(6)(a) for an indemnity of the covenant-holder by the landowner. This is essentially an endowment used to cover the covenant's management costs. Its role is described by the Land Trust Alliance of British Columbia as follows:

> "When a land trust accepts a Conservation Covenant, it incurs costs for surveys, appraisals, baseline reports and legal fees. It is also taking on a perpetual obligation to monitor and enforce the covenant. For this reason, land trusts normally require a contribution to an endowment fund. Income from the fund is then used to cover the costs of ongoing monitoring. The amount of the endowment will be site-specific, but a $10,000 one-time donation is considered a minimum amount for a straightforward covenant on a simple and easily accessible property. The amount of the endowment fund is usually based on the size of the covenanted areas and the extent of work required. It is designed to cover the ongoing costs of monitoring such as film, tools and supplies, staff and volunteer travel expenses, baseline & monitoring reporting, and updating records and maps on Geographic Information Systems (GIS) and the BC Lands in Trust Registry. In addition, a one time charge of $100 may be added for the Land Trust Alliance of BC's Covenant Defense Fund, set up to help cover costs of mediation or legal challenges in future." *An Introduction to Conservation Covenants: A Guide for Developers and Planning Departments*, 2007.

The transferability of this practice to the UK would at present be somewhat inhibited because of the different tax regimes. The tax benefits available to donors of covenants in British Columbia mitigate the financial impact of an endowment in a way which would not apply in the UK. A more detailed financial appraisal of the tax implications in the two countries would be needed before taking this arrangement further. Nonetheless, the principle is established.

A novel option for raising finance to support ongoing management is transfer fees. The landowner and the covenant-holder agree that if or when the property is sold in future, a proportion of the sale price – perhaps one or two percent – is transferred to the holder (*The Conservation Easement Handbook*, 2nd Edition, 2005, Trust for Public Land & Land Trust Alliance, page 127). This provides an inflation-proofed contribution at a time when it can be afforded and when extra revenue is useful (as extra management costs are incurred with new owners).

6.3 Enforcement: landowners and neighbours

Covenanted arrangements can and do go wrong. Most of the time the problems arise from misunderstandings and errors, either by the landowners or by their neighbours. The Trust for Nature in Victoria, Australia, for example, noted that it experienced one serious breach typically once a year, due to misunderstanding or ignorance, and that intentional breaches were relatively unknown. This emphasises the need for effective and continual monitoring to minimise the risks of breaches and so far as possible to spot problems at an early stage and avoid relationship breakdown with landowners. Education and promotional programmes can help too. Breaches may be caused by original owners, subsequent owners, visitors, contractors, neighbours or trespassers.

Reviewing the incidence of breaches of covenants has been beyond the scope of this study, though the results of a major survey in the USA in 1999 have been reported (see Box 9, overleaf). One analysis has been readily available from the exemplary reporting of the Queen Elizabeth the Second National Trust in New Zealand. Its Annual Report 2007 identifies just 4.3% of covenants requiring remedial action to ensure that terms and conditions are met (though lower figures have been recorded before). (The Trust visits landowners in alternate years, and in 2006-07 monitored 1,162 covenants.) This figure did not vary

Box 9 · Survey of the enforcement of easements in the USA

The Land Trust Alliance carried out a USA-wide survey of 7,400 easements in 1999. This found that holders had experienced breaches in 498 cases, less than 7% of them. Of these, 383 were considered to be minor. Of the 115 major breaches, 94 were resolved without litigation, but lawsuits were filed in the remaining 21 cases. Of these, 15 were settled out of court to the satisfaction of the land trusts involved, and the easements were upheld in five decisions. In the single unsuccessful case, the judge felt that the landowner, who was not the original donor, did not fully understand the terms of the easement and had acted in good faith when building outside a designated building envelope. The land trust was subsequently able to reopen discussions with the landowner and impose additional restrictions on the easement to mitigate the impact of the new structure (*The Conservation Easement Handbook*, 2nd Edition, 2005, Trust for Public Land & Land Trust Alliance, page 158).

between the original covenant donor and successors in title, suggesting that the effort by the Trust put into meeting and educating successor landowners had paid dividends. Monitoring also showed that in a remarkable 79.2% of covenants monitored that year the landowners had exceeded the requirements of the terms and conditions of their covenants. Given that there are no significant financial incentives to covenant land in New Zealand, and the overall high level of compliance, a 2-4% shortfall in adherence to covenants may realistically be the minimum that covenant-holders should expect.

The Land Trust Alliance reports that research shows the probability of an easement in the US being breached increases when a property is handed on, whether this is to an heir or a buyer. The LTA is currently researching the feasibility of creating a conservation easement insurance programme for land trusts. The implication is that, as time passes and property changes hands, the burdens of enforcement are likely to increase. As covenants are a relatively recent phenomenon (mostly established within the last 30 years and many still held with the original donor), there may well be a stored-up risk for the future.

Conservation covenants work best when there is close communication and co-operation between the parties to covenants, and when there are sympathetic attitudes amongst landowners, neighbours and the local community. Where problems do arise the aim is therefore to resolve them by negotiation as amicably as possible. The response to breaches of covenants is important. In the USA, land trusts are required by law to demonstrate an ability to enforce any of their conservation easements, and must carry out sufficient monitoring (perhaps annually).

In most cases where problems arise, the offending party can be told not to repeat the infringement (such as allowing stock to graze native vegetation), or to remedy the damage (such as replanting trees). Evidence of poor management contrary to the purposes of a covenant, such as soil erosion, may prompt discussions with the landowner and the provision of conservation and agricultural management advice, and perhaps even practical assistance with mitigation and restoration. Covenant-holders appeared to take a graded response, increasing the monitoring and engagement, and only later threatening legal action for continued breaches. Nonetheless, this is a poor way to achieve conservation and is a measure of difficulty rather than success, however necessary it may be. Court action can become essential in response to

serious breaches: communication may break down completely, excluded activities continue, or the terms of the covenant be ignored on an ongoing basis. A zero-tolerance approach to significant breaches is important: if landowners and neighbours can upset covenants with impunity, this not only damages the conservation resource that is supposedly being protected, but sends a worrying message to landowners both inside and outside the scheme that covenants are worthless and that the covenant-holder is ineffective.

Remedying serious breaches of control is likely to be very expensive if this requires action in the Courts. It may well include large amounts of professional time, legal fees, and travelling time and cost, much of which may never be recoverable. The Land Trust Alliance's 1999 survey, noted in Box 9, found that cases resolved only through actual or threatened litigation cost between $5,000 and $100,000, though more cases reported since then have had costs exceeding $100,000 or even $200,000. Some voluntary sector covenant-holders have established special funds for enforcement, typically adding a fixed sum to each new stewardship contribution request for this purpose with the aim of building up a reserve fund. Others have stewardship funds which may also be used for the defence of their easements. Even if action is successful, achieving remedial action required by the Court and obtaining any actual or punitive damages awarded may also be problematic. This is why prevention is better than cure.

Recovering the costs of enforcement action from a landowner may be awkward. One remedy appears to be that provided in the Land Title Act 1996 of British Columbia, Canada. This provides at section 219(6)(b) that "A covenant registerable under this section may include, as an integral part:... a rent charge charging the land affected and payable by the covenanter and the covenanter's successors in title." The Land Trust Alliance of BC describes the rent charge as a standard clause within a covenant enabling remedy of a breach of the terms of the covenant.

Fraud is an additional issue which can occasionally arise in cases where landowners receive payment or tax benefits for entering into covenants (which is the large majority internationally). This has inevitably prompted a series of further checks that must be applied in the process of setting up and managing covenants, adding to the cost and effort of the procedures. In April 2004 The Nature Conservancy in the USA published a response to difficulties with enforcement and fraud which had been highlighted in the press, indicating the main matters to be addressed (*Final Report: Conservation Easement Working Group*) and subsequently proposed *Legislative Changes to Improve Conservation Transactions* (April 2005). This matter would only need to be addressed further by The National Trust if financial incentives were introduced for covenants in a UK context.

Covenant-holders in the UK sometimes worry that Courts may be unreliable in upholding the terms of covenants. This arises partly from the inclination of Courts to offer equitable remedies (financial compensation) rather than discretionary remedies (requirements for practical works) where breaches of agreements are identified. There can also be difficulties if Courts consider that an undue period of time has passed before Court action has been instigated, which is entirely foreseeable in cases where covenant-holders are likely to invest time in trying to find solutions by negotiation before being sufficiently exasperated to go to law. This is an area where clarity in government policy could well be of assistance to legal practitioners: an announcement by the Justice Minister on the importance of upholding the terms of covenants more than compensating for breaches could well set an appropriate tone to be considered by the judiciary.

6.4 Legal challenges to covenants

Most laws around the world only allow covenants to be varied or annulled by agreement between the two main parties (or their successors in title). Only a small minority specifically build in arrangements for challenge by the donor, against the wishes of the covenant-holder (in addition to cases of compulsory purchase and the exercise of other development rights). The study identified three:

- Pennsylvania is one of the few States in the USA which allows challenge to covenants: the Agricultural Area Security Law (Act of 1981) allows that, after 25 years, a covenant may be bought back by the current owner at its current value if the State board can be convinced that the land "is no longer viable agricultural land";

- in British Columbia, Canada, a conservation covenant can be modified on application of a person interested in the land under the Property Law Act 1996 if the court is satisfied that, amongst other reasons:

  - for any of a variety of reasons the covenant is obsolete;

  - the reasonable use of the land would be impeded (without practical benefit to others); or

  - the person entitled to benefit from it would not be 'injured'.

- under the Victorian Conservation Trust Act 1972, the first owner of the covenanted land may appeal to the Governor in Council if unable to agree the release of the covenant with the Trust for Nature.

However, jurisdictions may have other laws which allow legal challenge to private agreements, whether or not the opportunity for challenge is written into the covenanting law. This is generally on the basis that covenants no longer serve a useful purpose.

The limited investigations made for this study suggested that legal challenges to covenants were rare. Problems tended to be reflected in a need for enforcement much more often than in formal procedures to challenge covenants in Court. This may reflect either the greater cost and risk of legal challenges, or a high standard of drafting of covenants in the first place.

7 Review: options, advantages and disadvantages

7.1 Relationship with the land use planning system and development

One concern underlying The National Trust's interest in covenants is that the town and country planning system in the UK appears to be becoming less reliable as a means of protecting countryside from inappropriate development. Covenants offer an alternative mechanism through the voluntary and private sectors for addressing this. The assertion is that planning policies may be insufficiently strict to protect land from inappropriate built development, and also that policies apparently offering protection may not be implemented rigorously, but covenants provide definitive protection and last in perpetuity.

This immediately raises two issues.

First, the assertion can be used to argue either for more covenants or for stronger planning practices (or both). The superior benefit of strong and effective planning is an argument put to this study in the case of South Africa: land use planning and other controls there – over land management and use as well as over physical development – are claimed by a respondent to this study to be so strict that, in effect, covenants are not needed. The case as presented is not entirely convincing, though worthy in intent.

Second, there is ultimately some difficulty in escaping the merit of a strong planning policy background. If planning is weak, then it gives rise to the forces which make covenants more desirable. However, it also makes covenants more difficult to acquire in the first place because of the higher development value of land. Furthermore, those covenants which are held may be more difficult to secure in perpetuity because of the pressures arising from weakly regulated development on surrounding land. If planning policies are stronger, and these problems more controlled, then covenants schemes are easier to operate, but less necessary.

One issue to consider is whether a conservation covenant is intended to achieve much the same objectives as the planning system (but do this better), or to achieve something that the planning system could not do. Restrictions on the way that land is managed or in the exercise of what would otherwise be Permitted Development Rights would be additional to normal planning powers. Those, however, would be modest objectives if the central intention is to constrain built development. The precise strategic objectives of covenants would need to be established at the outset. (This is in addition to the need to establish objectives for the purposes of prioritising expenditure noted in section 4.6 above.)

Furthermore, the scope for securing covenants in the UK must respond to the reality of land values and to the development value that a landowner interested in donating a covenant might have to forego. In areas under actual or potential pressure for development, land acquires a 'hope value' of a change of use to a more valuable purpose being granted planning permission. This is reflected in the market price of the land. If, therefore, a landowner is considering donating a conservation covenant on the land, the difference between its market value and its current use value would in effect be the value of the covenant donated. Few landowners will wish to forego this potentially very significant benefit unless there is a clear and sufficient incentive of some kind. Areas where this benefit is minor, and land would therefore be more readily released, would be areas under little development pressure. The advantage to The National Trust of securing control over development in such locations would not arise until far into the future, if then, despite administration costs in the interim. The Trust's focus of attention is therefore likely to be on both securing covenants over land which is under at least some development pressure and also aiming to overcome the impediment of the land's development value.

Solutions to the problem of development value are most likely to be found through financial and other incentives (discussed in section 5). Nonetheless, the land use planning system may be able to contribute by reinforcing the benefit of covenants, perhaps by incorporating covenants as a notation on development plans or in the GIS databases which increasingly underpin planning practice (such as LANDMAP in Wales). As an illustration, advice from the Nova Scotia Nature Trust notes that local governments can include protected property in their master planning (*Land Securement and Stewardship Guidebook,* 1999, page 3 - 7).

Attention should also be given to the impacts that covenants might have on the development process on land not subject to covenants. In most of the areas studied, the extent of conservation covenants is small in relation to the total area of land that might be suitable for built development. There is then still plenty of opportunity for development to proceed. This means that covenants impose little constraint on overall development when few of them are present, valuable though they may be in protecting specific places. The impact on overall development of covenants which might in future be held by The National Trust is likely to be very small. The Trust is expected only to be interested in obtaining covenants over land which ought not to be developed in any event, and is highly unlikely to obtain such concentrations of covenants that development potential in an area could be thwarted rather than redirected. Meanwhile, valuable protection could be provided to land of conservation merit.

7.2 Political acceptability and practicability

The starting point for this commentary is that evidence around the world shows that covenants have achieved significant conservation benefits. Many of these international experiences are just as attractive in the UK too, including the notions of:

- identifying land conservation objectives;
- encouraging conservation;
- financially rewarding conservation.

These are appreciated in many countries, with all the cases examined offering significant financial incentives to support them, either through tax incentives or grant aid. Some of these countries, such as Australia and New Zealand, have advanced planning systems alongside, so covenants in these areas are clearly viewed as adding value rather than duplicating alternative regulatory and incentive systems. This section examines how the same perspective might become more practicable in the UK.

To some extent, of course, similar benefits to those noted above are promoted in the UK. So far as built development is concerned, the planning system regulates the location and nature of development, in part shaped by policies restraining inappropriate development on land having conservation merit. In addition, financial rewards are offered through grants for land management and one-off improvements to property having conservation merit, and by sympathetic tax benefits in respect of donations to charity. The starting point for the greater domestic use of covenants is therefore no worse (and often better) than in many other jurisdictions.

A key issue for The Trust is therefore likely to be the prospects for an expanded use of covenants under the current administrative arrangements. The vast majority of covenants in the areas studied appear to be achieving what they set out to achieve. The Trust will need to evaluate the implications both for landowner donations of covenants and for its own financial strategy prior to promoting an expanded programme of conservation covenants:

- Much has been achieved even in parts of the world where jurisdictions offer negligible financial benefits to landowners who donate covenants (for

example under the main laws empowering covenants in New Zealand). The National Trust should investigate the likelihood of landowner donations, noting that overseas experience suggests that landowner willingness should not be an impediment.

- The critical practical issue would be for The Trust to ensure that it could obtain or allocate to the task sufficient resources for establishing, managing, monitoring and enforcing covenants. In this it would differ from the other covenant-holders in jurisdictions without tax incentives for landowners, in that it would not at present be able to call on Government funds for a substantial fraction of its expenditure. Conservation covenants are therefore fundamentally a matter of choice and priority for The Trust compared with alternative ways of using the money.

The Government could make a real contribution to conservation covenants if it announced its support in principle for their more extensive use by The National Trust. This would provide a basis of stable political support which would encourage landowners to donate covenants and The Trust to invest in managing them. An opportunity has recently arisen for the Government to make such an announcement, arising from proposed amendments to section 237 of the Town and Country Planning Act 1990.

In the Planning Bill currently in Parliament, the Government is promoting a change to the detail of planning law as it affects covenants. This covers the specific circumstances where a local authority has acquired land for planning purposes – typically regeneration schemes – and has planning permission to carry out development. The law at present enables an authority to override covenants, easements and other rights in such cases (paying compensation), but for certain only during the construction phase. The proposed amendment would allow those covenants, easements and other rights to be overridden permanently, in favour of the new use of the site (which is perhaps implied by the law but not precisely stated). A consultation document has set out the background and the proposals in more detail (Department for Communities and Local Government, August 2007, *Overriding Easements and Other Rights: Possible Amendment to Section 237 Town and Country Planning Act 1990: consultation*).

The Government notes that the constrained wording of the current law has the unfortunate result of cutting back on what might have been thought to be the presumed purpose. To that extent, the proposal is simply remedying a drafting difficulty. The circumstances in which the new power could be exercised would also be quite limited. Nonetheless, in case anyone might think that the proposed change had wider implications for the overriding of covenants – for which there is at present no evidence – the Government could usefully allay such fears as there might be. Reassurance would be provided to those organisations and individuals holding covenants, easements and other rights if the Government could make a statement openly endorsing the use of these instruments as a matter of general practice and utility.

For the international experience of conservation covenants to be applied significantly more extensively in the UK there would need to be a more effective system of financial incentives, either to support the covenant-holder (i.e. The Trust) or to support landowner donations. These could be modest grant systems of the kind used in New Zealand or major tax advantages familiar from north America and Australia. The area where current practice in the UK is more compatible with international experience, and therefore suggests a modest gap to be bridged, is in respect of tax advantages for charitable donations. This has been

beyond the scope of this study but would be an issue likely to repay detailed investigation for its overt preferential application to conservation covenants. Associated with this is the relationship between inheritance tax law and conservation, which is a matter that Natural England had been investigating.

Financial incentives for covenants might take various forms which the Government could find attractive. The Government has indicated its support for using market mechanisms to achieve public policy purposes, through devices such as carbon trading, Landfill Tax, Non-Fossil Fuel Obligation, petrol duty, etc. These create financial incentives to act in environmentally preferable ways, and tax benefits for conservation covenants would do the same. This would bring the Government into line with the direction set in other jurisdictions where conservation covenants have been viewed as a cheap and effective means of providing State support for environmental conservation in the wider public interest. Other major Governments are strengthening their already considerable support for conservation covenants. For example:

- in 2006 President George Bush in the USA passed into law the Pension Protection Act which, for an initial two year period, would allow donors of conservation covenants to deduct the value of their gift at the rate of 50% of their Adjusted Gross Income (100% for landowners with more than 50% of their income from farming), with any tax benefit remaining after the first year being carried forward for fifteen further years: this raised the benefits to landowners from 30% of AGI and from a carry-forward period of five years;

- in Canada, an increasingly favourable tax climate for conservation covenants has been created since 1995, with an independent review concluding "During the course of the past few years, Canada has witnessed unmistakable signs of governmental willingness to facilitate conservation – with conditions... the Federal Government was not the only government that was active in this field. The ten provinces have property tax arrangements which affect conservation lands; and notable progress has occurred over the last decade" (Marc Denhez, *Giving nature its due – tax treatment of environmental philanthropy: recent improvements, remaining barriers and current opportunities*, 2003, North American Wetlands Conservation Council (Canada), page 7).

The National Trust should also consider the alternative financial merits of acquiring covenants and acquiring outright ownership of land. Even in the USA there has been insufficient study comparing long term costs of covenants and acquisition. Covenants are certainly cheaper to buy in the first instance, though highly restrictive covenants on land under development pressure may have values which are close to the market value of the property. Particularly in these circumstances, covenants may only be attractive if donated rather than purchased. Full ownership may also be superior as a conservation tool if:

- the property contains highly sensitive resources that need careful management or restoration;

- public access is highly desirable over a large portion of the land; or

- surrounding properties are owned outright and there is an opportunity for landscape scale resource management (*The Conservation Easement Handbook*, 2nd Edition, 2005, Trust for Public Land & Land Trust Alliance, page 48).

8 Conclusions and recommendations

The international experience is that the vast majority of covenants appear to be achieving what they set out to achieve.

In many respects there are sufficiently close parallels between the international experience and the opportunities available to The National Trust to believe that a more extensive programme of covenants would be practicable in the UK. The priority which The Trust might give to conservation covenants is fundamentally a matter of choice compared with alternative ways of using the money.

The National Trust is particularly well-placed to obtain covenants over properties facing:

- inheritance tax or other capital taxes, mainly country estates, whose liabilities would be reduced if the development value of the land was extinguished;

- the termination of an ownership, notably by a smaller landowner, where there is no obvious successor, and the land might otherwise be acquired by speculators contrary to the wishes of the current owner;

- the break-up of environmentally attractive property for economic reasons, where the purchase (rather than donation) of a covenant could enable existing activities to continue.

The National Trust in these circumstances may be able to use covenants to constrain built development in the open countryside while at the same time achieving other objectives such as:

- assisting long term farming in traditional farming areas; and

- protecting rural environmental resources such as landscape, wildlife, archaeology, water catchments and floodplains, and other heritage interests. The National Trust Act 1937 provides The Trust with widely-drawn powers which enable it to enter into covenants largely as it sees fit. However, to make the best use of its available resources, The Trust would benefit from establishing its own priorities, objectives and procedures for accepting land under covenant.

The Government should make a statement announcing its support in principle for the more extensive use of covenants, in particular by The National Trust. This would make a real contribution by providing a basis of stable political support which would encourage landowners to donate covenants and The Trust to invest in managing them. With a small amendment to the relationship between planning law and covenants currently proposed in the Planning Bill, there is currently a good opportunity for doing this.

In all the main countries examined – USA, Canada, Australia and New Zealand – there is financial support for covenanting systems. This support is substantial and increasing. In the first three countries the main assistance is tax relief for those donating covenants plus, in the USA especially, programmes for purchasing covenants from landowners (notably over farmland), whereas in New Zealand the principal assistance is by grant aid to the covenant-holding bodies to enable them to acquire, monitor and manage covenants. There is some history in the UK of offering financial assistance to landowners to secure conservation benefits, though there is a risk that introducing this route for covenants would inspire landowners to offer covenants for the economic benefits as much as for the conservation benefits. That route would also necessitate a substantial body of rules and regulations to protect the public interest in the expenditure of taxes. A more likely mechanism by which the Government could support covenants in this country would be by

the New Zealand means of direct payments to The National Trust for securing conservation benefits over land, in the context of freely donated covenants.

The Government should therefore support conservation covenants primarily by providing grant aid to The National Trust to acquire, monitor and manage covenants. Additional attention should also be given to adjusting the rules on charitable giving to assist covenant donations, and to the rules affecting inheritance taxation of environmentally valuable property.

There is a balance to be struck in drafting covenants between enshrining certainty of conservation benefits and flexibility of ongoing land management. Even if covenants make legal provision for variation or termination, they should be entered into in perpetuity and with every effort made at the outset to avoid the need for later amendment by agreement.

Positive covenants are desirable at some properties, particularly where heritage buildings are involved, but are outside the powers of The National Trust Act 1937. Separate management agreements, leases or licences are likely to be needed, alongside a covenant, to achieve the intended conservation objectives in these cases.

International experience provides generally different legislative paths for open space covenants and heritage building covenants. However, The Historic Places Act 1993 in New Zealand is one law which contains wide-ranging powers relevant to both land and buildings, and addresses the risks to heritage posed by the intrusion of new built development rather than just damage through inappropriate management. This vision across the heritage spectrum suggests that The National Trust may well be able to use covenants under the 1937 Act to tackle a wide range of heritage purposes across buildings as well as land.

The relationship between the donor and the covenant-holder should be wholly co-operative. Holders should aim to assist landowners to fulfil the promises they have made by donating the covenants. This will help with drafting and monitoring the covenant, dealing with any issues that arise and heading off difficulties before they become problems. Nonetheless, covenants should be clearly drawn up so that they are capable of accurate monitoring, always against a baseline survey of the condition of the property at the outset. They should also be subject to clear recording of conditions over the years so that enforcement is practicable should the need ever arise.

Monitoring and managing covenants in perpetuity is expensive. The National Trust should take steps to ensure that sufficient resources are available for the task. In particular, financial contributions should be sought from the donor at the outset, ideally in the form of an endowment sufficient to fund the ongoing supervision of the covenant.

The National Trust should work with landowners to resolve all minor breaches of covenants and take a zero-tolerance approach to significant breaches. This is essential to sustain the credibility of the covenanting programme: it will discourage breaches in the first place, demonstrate commitment to the conservation purposes for which covenants were established, and retain the support of the Government and the public for the principles.

The cost of enforcing new covenants should be planned for from the outset. The probability is that enforcement will become a bigger issue with subsequent landowners than with the original donor, which should be borne in mind in financial planning.

The National Trust should consider the alternative financial merits of acquiring covenants and acquiring outright ownership of land, which has been surprisingly little-studied.

The Government should encourage the identification of properties affected by conservation covenants on maps and GIS-based electronic records (e.g. through the Planning Portal) so that covenants and planning practices can reinforce each other. As all covenants would be registered, this should not be difficult.

Key references

Ian Hodge, Richard Castle & Janet Dwyer, 1993, *Covenants as a conservation mechanism*, Cambridge University Department of Land Economy, Monograph 26.

Elizabeth Byers & Karin Marchetti Ponte, 2005, *The Conservation Easement Handbook*, 2nd Edition, Trust for Public Land & Land Trust Alliance.

Judy Atkins, Ann Hillyer & Arlene Kwasniak, *Conservation easements, covenants and servitudes in Canada: A Legal Review*, 2004, North American Wetlands Conservation Council (Canada).

Marc Denhez, *Giving nature its due – tax treatment of environmental philanthropy: recent improvements, remaining barriers and current opportunities*, 2003, North American Wetlands Conservation Council (Canada).

Appendix 1

Conservation covenants held by NGOs in the UK

Woodland Trust

The Woodland Trust holds no restrictive covenants with landowners in England. It suffers from an inability in law to hold such covenants unless it is an adjacent landowner, but even so the Woodland Trust prefers freehold ownership to covenanted rights. As a result, it occasionally buys land in England and sells it on with restrictions on long leases (up to 299 years).

The position in Scotland is different. Under the Title Conditions (Scotland) Act 2003, voluntary organisations registered with the Minister, including the Woodland Trust, are entitled to hold 'conservation burdens' over land which is not adjacent to land they own (i.e. similar to the position of The National Trust in England). This power has been used twice by the Woodland Trust, over woodlands in Dundee and Perthshire. Although only enacted recently, the arrangements have apparently been successful.

Royal Society for the Protection of Birds

The RSPB has used covenants on a variety of occasions, but not as a covenant-holder for a restriction on the use of land by another landowner. This is constrained not least by the need to own neighbouring land. Instead, the RSPB has:

- had restrictive covenants imposed on it when acquiring land;
- imposed covenants on leases of ecologically valuable land (e.g. so that the land can only be used for a specific purpose and only if occupied by a body having conservation as its primary purpose, such as a Wildlife Trust);
- benefited from positive covenants under s106 of the Town and Country Planning Act 1990 signed with local authorities, notably as compensatory habitat for land developed at Lappell Bank on the Isle of Sheppey: in that case RSPB was subsequently also able to acquire further adjacent land for wildlife purposes.

RSPB provides an annual report on all its sites, including leased ones. It has a computerised terrier system which works well. Each leased property is visited at least once annually by RSPB. The covenant cases have been simple and held by like-minded bodies, so no problems have been experienced.

County Wildlife Trusts

Enquiries suggested that the County Wildlife Trusts hold no conservation covenants with landowners.

Society for the Protection of Ancient Buildings

In 1929 Ernest Cook gave SPAB £10,000 to buy and repair historic buildings and to let them to tenants. Further bequests enabled SPAB to extend this activity. After the war, these properties were gradually shed: there had been problems with tenants, and SPAB had not found being a landlord easy. The properties were progressively sold off, with a degree of protection through the imposition of covenants. These covered matters such as restrictions on the types of paint to be used and obligations to maintain properties.

The aim of the covenants had been to protect the properties. The covenants mainly date from a period when listed building controls were not entirely reliable. However, the covenants do go a little beyond listed building control and therefore offer some added value. SPAB currently relies on listing alone as sufficient to protect the interest of properties for disposal.

The covenants have not been a great success. The early covenants were not registered as land charges, so occasionally there may be covenants over a building

of which one or other party is unaware. SPAB does not monitor its covenants as it has no means of paying for inspections. The covenants themselves can be disputed, not because they are unclear but because their age alone can be held by lawyers to be a problem and there may be doubt about their technical validity. Two significant challenges have arisen on SPAB-owned covenants, though both were eventually resolved by negotiation. In one case an owner affected by a covenant from the 1940s wished to demolish a dovecote. In the other, an owner affected by a 1970s covenant failed to notify SPAB in advance of proposed works and carried them out anyway. There remains a certain perception of weakness in covenants over historic buildings, deriving from a few unsympathetic decisions of Courts many years ago.

An alternative, of selling buildings on long leases, has also been used by SPAB but is not much more attractive: these may not really offer long term control because the Leasehold Reform Act allows leaseholders to buy the freehold, and the controls imposed would then dissolve.

Appendix 2

Hicks v. Dowd, Johnson County, Wyoming, USA

National Public Radio in the USA has recently reported (11th March 2008) a case in which mineral owners entered onto land to explore for and work minerals on land covered by a conservation covenant. In the early 1990s, land at a ranch called Meadowood in Johnson County, Wyoming was covenanted to the Johnson County Scenic Preserve Trust, a government-affiliated body. The ranch was sold on in 1999, but shortly afterwards the mineral company appeared and the new owners of the ranch sought to have the covenant released. In 2002 the County agreed, on the basis that the covenant was not fulfilling its task. This prompted a strong reaction locally to the loss of a 'permanent' restriction on development (which also happened to provide a windfall gain to the new owners and waste the original federal income tax deduction of over $1m). The owner of the local newspaper mounted a law suit, generating the news item.

The key issue in this case is that the law controlling covenant-holders differs between governmental and private bodies. Had a private land trust rescinded the covenant in the way which the Jackson County trust did, it would have been exposed to stiff financial penalties and possible revocation of its charitable status. However, these penalties do not apply to government-supported land trusts.

Advice from the Land Trust Alliance, the national umbrella body, is that the case illustrates the need for bringing legislative controls (penalties and reporting requirements) over such bodies into line with those for private trusts in the USA (as this is not just a Wyoming issue). More active engagement by the trust with the landowner would also have assisted as well. The case does not mean that the permanency of conservation covenants in the USA is at risk but, rather, that this was a bad case.

Appendix 3

The history of conservation covenants in the National Trust

A. Background

During the 1930s the National Trust became increasingly concerned about the enforceability of restrictive covenants which had been donated to the Trust for the protection of land and buildings against development. Under the terms of the 1932 Planning Act, local authorities were given the right to enforce restrictive covenants without owning adjoining land. The Trust's legal advisers encouraged the Trust to seek the same powers.

B. The 1937 National Trust Act

A campaign was launched in 1934, and in October 1936 *The Times* reported that *"Members of the National Trust, at a meeting held at Lincoln's Inn Old Hall yesterday, decided to secure the promotion in Parliament in the new session of a Bill to confer further powers on the Trust. The most important clauses of the Bill deal with the preservation of historic country houses, and with the preservation of land by covenants".*

According to *The Times*, *"The Trust had recently realised that there were many cases in which they could achieve all that was necessary for the preservation of places of natural beauty, or the amenities of places of historic interest, by restrictive covenants designed to prevent unsightly or undesirable building or the shutting out of views. Preservation by covenant was less expensive than preservation by purchase… The proposed new clause would greatly simplify the procedure, and strengthen the hands of the Trust in making voluntary arrangements of this kind between themselves and Landowners. They had a special interest in the preservation of natural beauty, and anything that they could do in this way was designed to strengthen, or supplement in special areas, the work done by planning authorities …or to come in where there was as yet no effective planning scheme. It was, and would be, done in close collaboration with planning authorities and the Ministry of Health."*

The new National Trust Act was approved by Parliament in June 1937. Although Clause 8, which dealt with covenants, was primarily aimed at the protection of landscape, the Trust's Country House Committee agreed in January 1938 that the scheme should be extended to cover individual houses. It was hoped that covenants would provide a means to control the character of wider areas of landscape and larger groups of buildings (such as villages) than the Trust could ever envisage owning.

C. A Successful Policy

Covenants were seen as a cheap and effective means of achieving the Trust's aims: from the Trust's perspective no acquisition or maintenance funds were required, while the donor could ensure their property could be protected from inappropriate development in perpetuity without surrendering ownership. Donors came forward offering covenants over everything from castles and manor houses with surrounding estates of several thousand acres, to single fields and cottages in areas of outstanding beauty.

The number of covenanted properties grew slowly but steadily over the ensuing years: in 1939 11,040 hectares were protected by covenants; in 1945 16,356; in 1974 28,624; in 1997 34,233 hectares; to 36,614 in 2004. Covenant campaigns were particularly successful in the Lake District, the Peak District, and Pembrokeshire, and received a new boost in 1965 with the launch of Enterprise Neptune, when a host of coastal covenants were donated or purchased by subscription.

D. Types of Covenant

Four categories of conservation covenant can be distinguished on National Trust land:

- *Protection against inappropriate development*
  The vast majority of the Trust's covenants (approximately 89%) are protective in purpose,

designed to prevent inappropriate development of land or buildings. These are the covenants which can legitimately be called conservation covenants. They can be donated, or acquired. Money for covenant acquisition has often been raised by local appeal, or (for coastal covenants) from Enterprise Neptune.

- *Control of anticipated development*
  A very small proportion (approximately 1%) are intended to control the appearance or scale of development on land already designated for development. One of the rare examples of this is the Tunnelfields site at Ashridge, where the Trust was given covenants over land with existing approval for the development of one house per acre.

- *Imposed by the National Trust on alienable or investment property*
  A slightly larger proportion (approximately 7%) have been imposed by the Trust on alienable or investment property. These have the dual purpose of protection against inappropriate development and retention of financial benefit. Key examples include the Hardwick Estate in East Midlands, the Bankes Estate Endowment Properties in Wessex and the Woollacombe Estate in Devon.

- *Landowners covenants established by former owners*
  A final category (approximately 3%) were imposed by former landowners for a variety of personal reasons, and are now beneficially exploited by the Trust where possible. The largest single example of this is the covenants imposed by Lord Stamford in 1973 on sections of the former Dunham Massey estate, which bring in an annual revenue of up to £50,000.