

IN THE MATTER OF
DEVON COUNTY COUNCIL

AND

THE USE OF PLANNING CONDITIONS TO CONTROL NEW OPEN MARKET
HOUSING – EXMOOR NATIONAL PARK AUTHORITY

ADVICE

1. My advice is sought with respect to the legality of a proposed planning condition to be attached to a grant of permission for new open market housing drafted along the following lines:

“The dwelling-house hereby permitted shall not be occupied otherwise than by a person as his or her only or principal home. The occupant shall supply to the local planning authority (within 14 days of the local planning authority’s request to do so) such information as the local planning authority may reasonably require in order to determine compliance with this condition. For the avoidance of doubt the dwelling shall not be occupied as a second home or for holiday letting accommodation”.

2. Those instructing me have sent me a copy of a paper drafted by the Council’s Head of Planning and Community Services which addresses the question of whether such a condition would meet the relevant tests of lawfulness of planning conditions and concludes that it does. In the officer’s view, that is to say, the proposed condition would be necessary, relevant to planning, relevant to the development to be permitted, enforceable, precise and reasonable in all other respects.
3. The Annex to Circular 11/95: The Use of Conditions in Planning Permissions does not deal expressly with the type of condition contemplated by those instructing me. An indication of the sort of concerns to which such a condition might be regarded as giving rise can be gleaned, however, from paragraph 96 of the Annex. This deals with “Domestic occupancy conditions” and states that

(subject to the advice contained in the Annex about affordable housing, staff accommodation, agricultural dwellings and seasonal use):

“if the development of a site for housing is an acceptable use of the land there will seldom be a good reason on land-use planning grounds to restrict the occupancy of those houses to a certain type of person (eg those already living or working in the area). To impose such a condition is to draw an artificial and unwarranted distinction between new houses or new conversions and existing houses that are not subject to such restrictions on occupancy or sale. It may deter housebuilders from building homes for which there is a local demand and building societies from providing mortgage finance. It may also impose hardship upon owners who subsequently need to sell. It involves too detailed and onerous an application of development control and too great an interference in the rights of individual ownership. In the view of the Secretaries of State, such conditions should therefore not be imposed save in the most exceptional cases where there are clear and specific circumstances that warrant allowing an individual house (or extension) on a site where development would not normally be permitted”.

4. The proposed condition specifically does not purport to restrict the occupancy of the dwelling house to which it would be attached to a “certain type of person”, It does, however, impose a restriction on occupation which is liable to be taken into account by housebuilders and mortgage lenders in making their own decisions with respect to the property concerned, and involves a considerable interference in the rights of ownership associated with it.
5. Nevertheless, the Annex does allow for similarly restrictive conditions in certain circumstances, namely, those pertaining to “Granny” staff annexes, staff accommodation, agricultural dwellings, and, most pertinently, seasonal and holiday occupancy. In my view, it is difficult to see why, if a condition specifying the use of a dwelling as holiday accommodation only is permissible, and capable of meeting the tests of legality set out in the Circular, a condition requiring a dwelling to be occupied as a person’s only or principal home should not be regarded as similarly acceptable.
6. As the paper to which I have referred above suggests, such a condition could plainly be regarded as necessary in the interests of sustainable development; relevant to planning; and relevant to the development to be permitted. I agree with the author of the paper that the most thought-provoking issue to which the proposed condition gives rise concerns its enforceability (and relatedly,

precision). Again, however, if (as is the case) it is possible to take enforcement action to prevent holiday accommodation from being used by a person as his or her (only or principal) home, it would be equally practicable, at least in the majority of instances, to take such action with a view to preventing a dwelling from being used as holiday letting accommodation or otherwise than as a person's only or principal home.

7. There may, of course, be borderline cases, or, that is to say, cases in which there is a degree of uncertainty as to whether it could be said that a dwelling house is being used as a person's principal home or second home. It is presumably such a consideration that has led other planning authorities, in effect, to define what is meant by a person's principal home by reference to the time-period within any given year for which it requires to be occupied in order to meet the condition. As to this, however, I agree with the view of the officer that there is room for doubt as to whether it would be reasonable for a condition to require a dwelling house to be occupied for any particular time.
8. I have given some consideration to the question of whether it would be practical and/or desirable to define in some other way, within the wording of the condition, what is meant by a person's "principal" home, on the one hand, and "second" home, on the other (no ambiguity arises, in my view, with respect to the concept of holiday letting). Having considered the matter, I have concluded that this objective would not be practicable (nor, therefore, desirable). As the Council's officer has pointed out in his paper, when dealing with the issue of precision, in the majority of cases people only have one home and live in it. In cases in which there is room for dispute, it would be for the occupants of the relevant house to prove their case (eg on an appeal against an enforcement notice) by reference to relevant evidence as to the nature of their use and occupation of the relevant house in the normal way.
9. It follows from the fact that the proposed condition would be lawful that it would also be lawful for the Council to incorporate a policy within the development plan dealing with such a condition, for example, by explaining the reason for it and the circumstances in which it will be imposed.
10. My Instructing Solicitor should not hesitate to contact me in Chambers if he wishes to discuss this matter further.

LISA BUSCH

**LANDMARK CHAMBERS
180 FLEET STREET
LONDON EC4A 2HG**

22nd January 2013