

APPENDIX 2

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ADVICE NOTE

for

CAIRNGORMS NATIONAL PARK AUTHORITY

in respect of

SALE AND OCCUPANCY RESTRICTIONS

IN SECTION 75 AGREEMENTS

APRIL 2010

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Use of Section 75 Agreements for Occupancy and Sale Restrictions

Introduction

In terms of Section 75 of the Town and Country Planning (Scotland) Act 1997 Planning authorities are empowered to enter into legally binding contracts with developers. The Act provides that:-

'a planning authority may enter into an agreement with any person interested in land in their district (in so far as the interest of that person enables him to bind the land) for the purpose of restricting or regulating the development or use of that land... any such agreement may contain such incidental and consequential provisions (including financial ones) as appear to the planning authority to be necessary or expedient'.

We are being asked to provide advice on the use of Section 75 Agreements for imposing occupancy restrictions on properties, and restrictions on the sale of properties separate from a larger landholding or business, having regard to the impact such restrictions may have on the value of the property, and the ability to obtain finance over the property.

This advice note is broken down into three sections, namely:-

1. Purpose behind occupancy and sale restrictions
2. Background behind Section 75 Agreements
3. Planning Conditions as an alternative to Section 75 Agreements

Purpose behind occupancy and sale restrictions

We will start with an explanation of what we mean when referring to occupancy and sale restrictions.

An occupancy restriction would apply to ensure a house is only occupied by a particular category of person. This could include people on a council waiting list, etc, but most commonly, from CNPA's perspective, it would apply to restrict the occupation of a property to an agricultural worker employed (or last employed) in a particular rural enterprise, and their family, or a crofter engaged in crofting.

A sale restriction is used to restrict the sale of the house separately from a larger area of land on which the rural enterprise or crofting justification has been made. This means the house cannot become an independently owned unit, separate from the business or croft.

Unless material considerations provide otherwise, planning authorities are required to follow the Development Plan in determining applications, and apply the policies contained in the Plan.

"Occupancy" and "sale" restrictions are therefore applied to planning consents where required in terms of the policies contained in the Development Plan.

This is most common when an applicant is seeking to build a home in the countryside, and relying on an rural enterprise or crofting justification for doing so. Until CNPA's own Local Plan is adopted, CNPA currently rely on the local plans of the respective local authorities, and their policies on housing in the countryside.

The respective local plans which presently cover the Park vary in terms of their content. Aberdeenshire Local Plan states that:-

"The erection of new housing in the Countryside will be approved, in principle IF:

- a) it is for a full time worker in an enterprise which itself is appropriate to the Countryside;*
- b) the presence of that worker onsite is essential to the efficient operation of the enterprise;*
- c) there is no suitable alternative residential accommodation available;*
- d) the proposed house is within the immediate vicinity of the worker's place of employment"*

It goes on to state that:-

"for some people it is essential they live in the countryside because of economic need. To ensure any new house approved under Part 1 of this Policy is never sold on to a non-essential worker, developers may be required to enter into a Section 75 Agreement with the Council"

Likewise, the policy in CNPA's own Local Plan in its 2nd Mods version is as follows:-

"Developments for other new housing outside settlements will be permitted where:

- a) - the accommodation is for a worker in an occupation appropriate to the rural location; and*
- the presence of the worker on site is essential in order to provide 24-hour supervision of the rural business; and
- there is no suitable alternative residential accommodation available including reuse and conversion of other buildings on site; and
- the proposed dwelling is within the immediate vicinity of the worker's place of employment; or
- b) The dwelling is for a retiring farmer or crofter, on land managed by them for at least the previous ten years or for a person retiring from other rural businesses, where their previous accommodation is required for the new main operator of the farm, croft or rural business. Where relevant such proposals will be secured through planning condition or legal agreement;"*

Therefore we are dealing with houses which would not ordinarily be granted consent, without the rural enterprise or crofting justification. This requires the house to remain connected to the rural enterprise or croft, and not be sold to a non-essential worker. This will inevitably have an impact on the open market value of the house.

Because the rural enterprise justification has been made during the application process, the applicant accepts that the house is to be inextricably linked to the rural enterprise, and cannot be compared to open market houses.

Problems in Obtaining Funding

We are aware of anecdotal evidence that owners of houses subject to occupancy restrictions or restrictions on separate sale may have difficulty in securing funding.

There is no doubt that a house subject to such a restriction will have a lower value than an unrestricted house. However it would be unreasonable to equate a "restricted house" with an "open market house". A house with such restrictions will have been approved for a very specific purpose – to provide accommodation for a key worker involved in an adjacent rural enterprise or croft. It is therefore not simply a house, but essential accommodation forming part of the business. To suggest the market value should be the same as an unrestricted house is an unrealistic comparison.

Without the relevant policy, no house would be permitted. Therefore it is unreasonable to suggest that the restrictions "reduce" the value of the house. Rather the policies "enable" the erection of a house where there would otherwise be none.

We accept that many applicants will require to seek external funding in order to build such a house. Although in years gone by lenders may have been more willing to lend against restricted properties, we are aware that this is no longer the case. A bank's criteria for lending will take into account restrictions in the property's title deeds, and such restrictions may either reduce the amount they are prepared to lend, or refuse to lend against it altogether.

It is not hard to see why. If a bank was to call up the security and try to sell the property, due to the restrictions, there may only be a very limited (if any) market, in which they could sell. This would limit the property's value.

In seeking funding, the anecdotal evidence is that applicants may have difficulties in a residential mortgage over the house. However, as the house has been justified on the basis of a rural enterprise, any application for borrowing should be secured against the value of the rural enterprise, and not just the house itself. If this is a croft, the security should cover the whole croft, and any lending based on the value of the croft with the house attached. If it is a farm, the security should cover the whole farm, etc.

It may be the case that the erection of a house does not increase the overall value of the rural enterprise sufficiently to cover the construction costs, but this is a commercial decision for the applicant. If that was the case, it is not surprising that banks are hesitant to lend. However CNPA should not be seen to relax their planning policy because of an applicant's financial situation.

Property in separate ownership

Problems can arise when, after making an "agricultural justification", the applicant proposes that the new house is to be held in separate ownership from the remainder of the agricultural business. This can occur, for example, where a farmer's son is looking to build a house on a farm, but the farm itself remains in the ownership of the father (or mother).

Where a "rural enterprise" justification is made, the purpose of the local plan policies is to ensure that houses remain connected to the rural enterprise in question. If they are in separate ownership, it is not possible to enforce that connection. There would be nothing to stop the owner of the rural enterprise from selling up, moving on, or diversifying, all beyond the control of the owner of the house.

Any restriction on the house becomes impossible to comply with, and therefore cannot be enforced. This goes against the purpose of the policy.

Although an occupancy restriction alone can be imposed, this would have to be broad to have any continuing effect (for example, by stating that the house could only be occupied by someone involved in agriculture in the local parish).

While this may be acceptable to some planning authorities, it would not pass the test set in either of the Local Plans detailed above to justify planning consent.

Background Behind Section 75 Agreements

Section 75 Agreements are voluntary contracts between the planning authority and the landowner. The liability for such planning obligations transfers with the land. Importantly being a voluntary agreement they are not open to challenge through the appeals process.

The original purpose of planning agreements was to effect greater control over the nature, phasing or impact of development than could be achieved by the use of conditions alone.

Planning agreements under Section 75 run with the land, and may be registered to bind successors in title. Thus if the site is sold to another party, that new party will be bound by the agreement.

A Section 75 Agreement forms part of the title deeds to a house and therefore any restrictions will be obvious to a purchaser. Any provision tying the house to a larger enterprise would also appear in the titles to that larger enterprise. This provides an element of monitoring, as a purchaser's attention will be drawn to the restriction.

Scottish Government policy on the use of Section 75 agreements was previously set out in Circular 12/1996 (*Town and Country Planning (Scotland) Act 1972: Planning Agreements*). This has now been superseded by Circular 1/2010 which was published in January 2010.

This states that planning agreements have a limited but useful role to play in the development management process, where they can be used to overcome obstacles to granting planning permission.

Planning agreements can provide an alternative and more effective means of enforcement without the risk of having a condition overturned or modified at appeal.

The guidance identifies a number of criteria which a Section 75 agreement should meet, including the following tests to help determine the reasonableness of an agreement:-

- Necessity - Is an agreement needed to enable a development to go ahead?
- Is the requirement in the agreement so directly related to the regulation of the proposed development that the development should not be permitted without it?

Imposing occupancy restrictions, and restrictions on sale of a property in Section 75 Agreements appears to pass both of these tests.

A Section 75 Agreement is a contract and the normal contractual remedies are available to a planning authority, rather than relying on enforcement procedures under the 1997 Act. These remedies could include specific implement (requiring the proprietor to do something) interdict (preventing them from doing something) or payment of damages.

As Section 75 Agreements do not rely on the enforcement mechanisms under the 1997 Act, there are no equivalent time limits for enforcement if there is a breach of a Section 75 Agreement.

Planning Conditions as an Alternative to a Section 75 Agreement

In terms of Scottish Government guidance, Section 75 Agreements should only be used where other measures, such as conditions on planning permission cannot be lawfully used to address an obstacle to granting planning permission.

Local authorities have the power to enter into "Section 69 Agreements" under the Local Government (Scotland) Act 1973, and roads agreements under the Roads (Scotland) Act 1984. These agreements are not, however, registered against the title of the land and are therefore only personal to those entering into the agreement and not their successors in title to the land. Therefore, for matters such as occupancy restrictions which are intended to be perpetual, they are not appropriate. Also, powers under these Acts do not apply to the National Park Authorities.

Therefore the only "other measure" available to CNPA for imposing restrictions is a Planning Condition.

Planning authorities can grant planning consent subject to such conditions as they think fit. Section 41(1) of the 1997 Act lists specific types of condition which can be imposed. These may regulate the development or use of any land under the control of the applicant, so far as appears to be expedient.

The first point we would make is that planning conditions are open to challenge through the planning appeals process. Therefore, after consent is granted, the option is available to the applicant to appeal a specific condition, on grounds that it is not necessary, relevant, enforceable, precise or reasonable.

In addition, although a planning condition can regulate the use of any land within the control of the applicant, it does only relate to the grant of that specific consent. Therefore the value is limited. Even if a planning condition stated that a new house could not be sold separately from the remainder of a farm or croft, this in itself could not prevent the sale of the farm or croft. It would only be the house owner that was in breach, and enforcement action could only be taken against the house owner. However, once the farm or croft was sold off, the house owner could argue that the condition was no longer enforceable and should be discharged.

Also, there is a problem with monitoring. A planning condition does not appear in the title deeds of a house, only in the planning consent itself. The purchasers of a house several years down the line may not look closely at the conditions in the original planning consent.

It is therefore up to the planning authority to ensure that any restrictive planning conditions are being complied with. The planning authority will not necessarily be aware of whether land is being sold or who is living in particular properties, and therefore monitoring becomes a particularly difficult task.

This difficulty is further enhanced by the time limits imposed on planning authorities for enforcement action. If there is a breach of a condition affecting a single dwelling, then enforcement action can only be taken by the planning authority within 10 years of the breach (or 4 years in certain circumstances).

Therefore, if restrictions were only contained in planning conditions, and either occupancy restrictions were breached or the house was sold (to a relative or third party) then they could argue the condition was no longer enforceable.

Conclusion

There are obvious disadvantages in the use of planning conditions in trying to impose occupancy and sale restrictions on houses, where required in terms of the local plan policies.

Section 75 agreements offer enhanced protection and are far more effective in ensuring the policies are, and remain, complied with throughout the lifetime of the house.

Although Scottish Government guidance encourages planning authorities to use planning conditions over Section 75 agreements where possible, this is mainly aimed at "developer contributions". We consider there to be adequate justification to continue to require Section 75 agreements in the case of occupancy and sale restrictions in the National Park.

Given the key aim of the development plan policies is to ensure that such houses are not transferred to a non-essential worker, we recommend CNPA continue to use Section 75 Agreements, to ensure the perpetuity of the restrictions.

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