PLANNING

There goes the neighbourhood

Peter Edwards

St Ives in Cornwall has made the most determined effort yet to block second homes. But fundamental questions remain

» A convincing majority of voters in the Cornish seaside resort of St Ives backed a ban on the building of second homes – enshrined in *The St Ives Area Neighbourhood Development Plan 2015-2030* – in a referendum earlier this month. A Neighbourhood Development Plan (NDP) is part of the statutory development plan and for that reason is an important document.

The plan's attempt to block the building of second homes in the area has attracted the attention of national media. That is also one of the grounds on which a local firm of architects has lodged a judicial review of the decision of local planning authority (LPA) Cornwall Council to allow the St Ives plan to go to a referendum.

While the implementation of the plan may be subject to High Court proceedings, the people of St Ives clearly want a planning solution to the problem of second homes and consider that a neighbourhood plan policy is the most effective means of doing so.

Other neighbourhood plans, both in Cornwall and beyond, such as *The Roseland Plan 2015-2030* and *The Lyn Plan (Lynton and Lynmouth) 2013-2028*, have sought to put in place policies with the same objective. So what, if anything, makes the St Ives NDP any different? It is interesting to note the different approaches taken at the examination stage of each of these neighbourhood plans.

Roseland plan

The submission draft of this plan contained a policy (Policy HO7) stating that any new open market housing be subject to a 'full-time principal residence' requirement.

However, the examiner decided that no evidence had been provided to support such a policy and that it could not be demonstrated to have a sustainable impact. She therefore 'downgraded' Policy HO7 to a statement of intent. As a result, Action HO7 – Encouraging Full Time Principal Residence of Homes merely encourages reliance on other policies that provide for affordable housing.

There is therefore no planning policy in the adopted version of the plan that makes any provision for new-build, open-market dwellings, either with or without a principal residence restriction. The implication is that in the plan area, planning permission can only ever be granted for affordable housing. This approach has already run into trouble, as the housing policies in the plan have been challenged for not being compliant with the National Planning Policy Framework (NPPF).

Lyn plan

The approach taken at the examination of the Lyn plan in 2013 was more favourable. Although some minor modifications were made to its Policy H3 – Principal Residence Housing, the policy and its obvious objective survived in the adopted version of the plan.

Policy H3 makes planning permission for any open-market housing in the plan area subject to three positively evidenced criteria (including that the development is necessary to cross-subsidise affordable housing) and a restriction 'to ensure occupation as a principal residence'.

St Ives NDP

The submission draft took a direct approach to this issue, with Policy H2 – Full Time Principal Residence Requirement. That stipulated that planning permission for new open-market housing would only be considered if subject to a planning condition requiring occupation 'for at least 270 days per year'.

It is clear from the NDP examination report that the examiner had significant concerns about the policy which she nonetheless resolved positively: 'After much deliberation and on balance I have concluded that due to the adverse impact on the local community/economy of the uncontrolled growth of second homes, the restriction of further second homes does in fact contribute to delivering sustainable development. In terms of "delivering a wide choice of quality homes", I consider that the restriction could in fact be considered as facilitating the delivery of the types of homes identified as being needed within the community.'

She went on to conclude that Policy H2 needed amendment to 'deliver the desired outcome', so the policy that went forward to referendum was the result of a significant modification at the examination stage.

St Ives: referendum followed a surge in holiday homes

Policy H2 stipulates that 'new open-market housing… will only be supported where there is a restriction to ensure its occupancy as a principal residence [and that] sufficient guarantee must be provided of such occupancy restriction through the imposition of a planning condition or legal agreement… [and furthermore, that] occupiers of homes with a principal residence condition will be required to keep proof that they are meeting the obligation or condition… proof of principal residence is via verifiable evidence which could include, for example (but not limited to) residents being registered on the local electoral register'.

Is there anything new in the St Ives approach?

It is certainly encouraging to see the St Ives examiner supporting a planning policy that the people of St Ives (and no doubt those of the Roseland too) want to guide development in their area. That, after all, is the essence of neighbourhood planning, which some may argue is being diluted by slavish adherence of NDP examiners and planning inspectors to ministerial guidance in the form of the NPPF and National Planning Policy Guidance – neither of which is part of the statutory development plan.

It is also to be applauded that the examiner made significant and detailed modifications to Policy H2 with a view to making it a more effective planning policy. In this respect, it goes further than Policy H3 of the Lyn plan by suggesting the type of evidence needed to prove compliance with the planning restriction imposed.

However, the real problem with an 'anti-second homes' planning policy has always been what the effect of such a policy would actually be, whether or not it is enforceable and, therefore, whether it would even be valid.

Nature of the principal residence restriction

Before considering if the St Ives NDP really takes us any further forward, or whether the principal residence restriction is enforceable, it is worth considering the nature of the restriction and what its effect would be.

Policy H2 imposes a restriction on occupancy very similar in type to the 'local occupancy' clauses that became the precedents for the affordable housing restrictions now used to keep affordable housing affordable. However, the principal residence restriction allows incomers to occupy because it does not restrict occupation to those with a pre-existing local connection, and neither – almost by definition – does it prevent ownership of more than one dwelling.

Therefore, although the Policy

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H2 restriction does not have price controls, just like the original 'local occupancy' clauses that inevitably affected market value, the principal residence restriction is likely to create a middle tier of the housing market in the area; one that sits between affordable and open-market dwellings. The examiner of the Roseland plan appears to have been fearful of this effect, while the St Ives examiner considered that it could increase the 'wide choice of quality homes' of which the NPPF seeks delivery.

However, the inherent difficulty with the principal residence restriction, unlike the controls on affordable housing, is that it implies the occupier owns or is at least allowed to own, other residences. Implicitly, there is no objection to the occupier owning as many second or holiday homes as they like, even within the same neighbourhood plan area, provided the subject property is the principal residence. In terms of planning principle, this creates no problem at all; planning for new housing stock of the type required must start somewhere.

Is the St Ives 'principal residence' restriction enforceable?

The real problem here lies in the criteria used to define the term 'principal residence' and whether or not those criteria are capable of being fulfilled by evidence that can be easily assessed as credible and reliable. Leaving aside those occupiers who may deliberately want to confuse the issue, there may be cases where identifying the principal residence is genuinely not straightforward.

It is obviously important to be able to determine if a restriction is being observed in compliance with the policy aims. But perhaps even more to the point is how a breach may be proved. A planning condition, or obligation in a section 106 agreement, is only valid if enforceable and only enforceable if a breach is capable of proof.

This brings us back to the criteria used to define the term principal residence. Policy H2 of the St Ives NDP does not actually define what it means by principal residence (any more than Policy H3 of the Lyn plan does). The only evidence of occupation as a principal residence suggested by the policy itself is registration on the electoral roll or for local services, such as schools and GPs. However, these are not conclusive forms of evidence of principal residence occupation. It is quite legitimate, for example, to be on the electoral roll in more than one district (although it is an offence to vote more than once in a general election or national referendum, there is nothing to outlaw voting in more than one local council election).

The minimum 270-day occupancy requirement (of the submission version Policy H2) amounts to a definite criterion, albeit one that would be difficult to monitor accurately or reliably prove one way or the other. It may also be regarded as a rather arbitrary test of a principal residence.

It may not be critical that principal residence, or the type of evidence used to prove such occupation, is not precisely defined in Policy H2. But it is essential for the defining criteria and acceptable types of evidence to be clearly stipulated in the planning conditions and/or legal agreements used to support the policy when planning permissions are issued.

It may be that a number of different criteria are applied to assess compliance with the restriction, including enrolment of children in local schools and declarations made by occupiers on prescribed matters such as ownership and occupation of other properties.

The lack of any clear definition of, or defining criteria for, a principal residence will inevitably make monitoring and enforcement difficult, particularly with borderline cases. However, making clear that a number of factors will be considered will at least act as a deterrent and make possible the enforcement of determined abuse.

Planning condition or legal agreement?

The St Ives Policy H2 allows for either method of control – but there are significant differences between the two in terms of notice to purchasers, monitoring, enforcement and how easily the restriction may be avoided.

Occupation in breach of a planning condition, if monitored and detected, can usually be addressed relatively simply, either by an enforcement notice or a breach of condition notice provided, that is, the LPA has the will and available resources to take such enforcement action.

However, continuous occupation lasting for 10 years or more in breach of a planning condition may become lawful and immune from enforcement action. In these circumstances, the control on occupancy imposed by the condition is lost.

The 'legal agreement' referred to in Policy H2 is a section 106 agreement, or planning obligation, which is binding on every owner of the land or property to whom it relates. If contained in a section 106 agreement, the principal residence restriction would continue to be effective even if immunity from enforcement of the planning condition were acquired. The section 106 obligation could be enforced via the albeit more difficult and costly route for the LPA of a county court injunction.

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Another disadvantage of imposing a condition only is that the condition will generally only appear on the planning permission itself, which is often only considered by the solicitors of the first purchasers after construction. By contrast, a section 106 agreement will be on the Register of Local Land Charges (and may be noted on the registered title) so should come to the notice of all future purchasers.

Making the occupancy restriction the subject of a section 106 obligation renders it almost impossible for any owner to sell the property free from the restriction, even if they have gained immunity from the effect of a planning condition.

How effective will Policy H2 be in controlling second homes?

This question should be considered in a number of different contexts.

First of all, will Policy H2 and the principal residence restriction be applied to all new planning permissions for open-market dwellings in the St Ives area – that is, for all dwellings that are not affordable housing?

That is obviously the intention, but although the policymaker is the qualifying body for the NDP, St Ives Town Council, Cornwall Council as the LPA will continue to issue planning permissions in the area. It will be for Cornwall Council to ensure that all relevant permissions contain an effective principal residence restriction as prescribed by Policy H2. This raises the next crucial question:

By what means, and in what terms, will the principal residence restriction be imposed?

To ensure maximum effect the restriction will need to be imposed via planning condition and a section 106 agreement in terms that specify exactly what is meant by the restriction and what evidence will be required to prove compliance with it.

It will be important that any such evidence is capable of being presented reasonably easily and assessed so that compliance can be effectively monitored and any breach enforced against. Otherwise, the restriction would not be merely ineffectual; whether a planning condition or a section 106 obligation, it runs the risk of being declared invalid (if not enforceable). In this worst-case scenario, Policy H2 would be completely undermined and serve no purpose at all.

How will the restriction be monitored and enforced?

Effective monitoring and enforcement is likely to depend on close liaison between St Ives Town Council, which represents those with the interest in making Policy H2 work, and the LPA – Cornwall Council – with its statutory enforcement powers.

In practice, the town council will probably have to monitor compliance with the restriction and collaborate with Cornwall Council in gathering and assessing evidence of any breach that may lead to enforcement action.

Conclusions

While the St Ives NDP may represent the most determined effort yet to produce a planning policy that is effective in preventing the occupation of newly built houses as second homes, fundamental questions remain.

It appears that Policy H2, despite the best efforts of the NDP examiner whose modifications were clearly aimed at making the policy work, may not have dealt with the most fundamental question of all: what precisely is meant by a principal residence and how should it be defined?

In this respect any shortcomings in the policy will need to be addressed by the terms of the restriction actually imposed on relevant planning permissions. That restriction will then need to be carefully and closely monitored by, or with the full support of, the LPA to ensure that St Ives NDP Policy H2 has the intended effect.

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