



Newtown St Boswells Melrose TD6 0SA Tel: 01835 825251 Fax: 01835 825071 Email: ITSystemAdmin@scotborders.gov.uk

Applications cannot be validated until all the necessary documentation has been submitted and the required fee has been paid.

Thank you for completing this application form:

ONLINE REFERENCE 100079721-001

The online reference is the unique reference for your online form only. The Planning Authority will allocate an Application Number when your form is validated. Please quote this reference if you need to contact the planning Authority about this application.

Applicant or Agent Details

Are you an applicant or an agent? * (An agent is an architect, consultant or someone else acting on behalf of the applicant in connection with this application)

Applicant Agent

Agent Details

Please enter Agent details

Company/Organisation:	Ericht Planning & Property Consultants		
Ref. Number:		You must enter a Building Name or Number, or both: *	
First Name: *	Kate	Building Name:	The Office - Gifford House
Last Name: *	Jenkins	Building Number:	
Telephone Number: *	07795 974 083	Address 1 (Street): *	Bonnington Road
Extension Number:		Address 2:	
Mobile Number:		Town/City: *	Peebles
Fax Number:		Country: *	United Kingdom
		Postcode: *	EH45 9HF
Email Address: *	kate@kjenkins.co.uk		

Is the applicant an individual or an organisation/corporate entity? *

Individual Organisation/Corporate entity

Applicant Details

Please enter Applicant details

Title:	Mr	You must enter a Building Name or Number, or both: *	
Other Title:		Building Name:	
First Name: *	David	Building Number:	47
Last Name: *	Lee	Address 1 (Street): *	Highgate
Company/Organisation		Address 2:	West Hill
Telephone Number: *		Town/City: *	LONDON
Extension Number:		Country: *	England
Mobile Number:		Postcode: *	N6 6DB
Fax Number:			
Email Address: *			

Site Address Details

Planning Authority:	Scottish Borders Council
Full postal address of the site (including postcode where available):	
Address 1:	THE PAVILION
Address 2:	COLDINGHAM
Address 3:	
Address 4:	
Address 5:	
Town/City/Settlement:	EYEMOUTH
Post Code:	TD14 5NZ

Please identify/describe the location of the site or sites

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Northing	666713	Easting	391647
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Description of Proposal

Please provide a description of your proposal to which your review relates. The description should be the same as given in the application form, or as amended with the agreement of the planning authority: *
(Max 500 characters)

Section 42 Application (17/01007/FUL) in relation to Planning Consent 10/00172/FUL. Application for a new planning permission with different conditions, namely amendment of condition 9 (Occupancy Condition).

Type of Application

What type of application did you submit to the planning authority? *

- Application for planning permission (including householder application but excluding application to work minerals).
- Application for planning permission in principle.
- Further application.
- Application for approval of matters specified in conditions.

What does your review relate to? *

- Refusal Notice.
- Grant of permission with Conditions imposed.
- No decision reached within the prescribed period (two months after validation date or any agreed extension) – deemed refusal.

Statement of reasons for seeking review

You must state in full, why you are seeking a review of the planning authority's decision (or failure to make a decision). Your statement must set out all matters you consider require to be taken into account in determining your review. If necessary this can be provided as a separate document in the 'Supporting Documents' section: * (Max 500 characters)

Note: you are unlikely to have a further opportunity to add to your statement of appeal at a later date, so it is essential that you produce all of the information you want the decision-maker to take into account.

You should not however raise any new matter which was not before the planning authority at the time it decided your application (or at the time expiry of the period of determination), unless you can demonstrate that the new matter could not have been raised before that time or that it not being raised before that time is a consequence of exceptional circumstances.

Please see Supporting Statement to Notice of Review

Have you raised any matters which were not before the appointed officer at the time the Determination on your application was made? *

Yes No

If yes, you should explain in the box below, why you are raising the new matter, why it was not raised with the appointed officer before your application was determined and why you consider it should be considered in your review: * (Max 500 characters)

Please provide a list of all supporting documents, materials and evidence which you wish to submit with your notice of review and intend to rely on in support of your review. You can attach these documents electronically later in the process: * (Max 500 characters)

Notice of Review Supporting Statement 17/01007/FUL Supporting Statement 17/01007/FUL Officer's Report 17/01007/FUL
Decision Notice 17/01007/FUL Site Plan

Application Details

Please provide details of the application and decision.

What is the application reference number? *

17/01007/FUL

What date was the application submitted to the planning authority? *

13/07/2017

What date was the decision issued by the planning authority? *

29/11/2017

Review Procedure

The Local Review Body will decide on the procedure to be used to determine your review and may at any time during the review process require that further information or representations be made to enable them to determine the review. Further information may be required by one or a combination of procedures, such as: written submissions; the holding of one or more hearing sessions and/or inspecting the land which is the subject of the review case.

Can this review continue to a conclusion, in your opinion, based on a review of the relevant information provided by yourself and other parties only, without any further procedures? For example, written submission, hearing session, site inspection. *

Yes No

Please indicate what procedure (or combination of procedures) you think is most appropriate for the handling of your review. You may select more than one option if you wish the review to be a combination of procedures.

Please select a further procedure *

By means of inspection of the land to which the review relates

Please explain in detail in your own words why this further procedure is required and the matters set out in your statement of appeal it will deal with? (Max 500 characters)

A site visit will be greatly beneficial in enabling Members to understand the holiday nature of the property and its context which are important aspects in this review.

In the event that the Local Review Body appointed to consider your application decides to inspect the site, in your opinion:

Can the site be clearly seen from a road or public land? *

Yes No

Is it possible for the site to be accessed safely and without barriers to entry? *

Yes No

If there are reasons why you think the local Review Body would be unable to undertake an unaccompanied site inspection, please explain here. (Max 500 characters)

A private walkway through a gate leads down to the site.

Checklist – Application for Notice of Review

Please complete the following checklist to make sure you have provided all the necessary information in support of your appeal. Failure to submit all this information may result in your appeal being deemed invalid.

Have you provided the name and address of the applicant? *

Yes No

Have you provided the date and reference number of the application which is the subject of this review? *

Yes No

If you are the agent, acting on behalf of the applicant, have you provided details of your name and address and indicated whether any notice or correspondence required in connection with the review should be sent to you or the applicant? *

Yes No N/A

Have you provided a statement setting out your reasons for requiring a review and by what procedure (or combination of procedures) you wish the review to be conducted? *

Yes No

Note: You must state, in full, why you are seeking a review on your application. Your statement must set out all matters you consider require to be taken into account in determining your review. You may not have a further opportunity to add to your statement of review at a later date. It is therefore essential that you submit with your notice of review, all necessary information and evidence that you rely on and wish the Local Review Body to consider as part of your review.

Please attach a copy of all documents, material and evidence which you intend to rely on (e.g. plans and Drawings) which are now the subject of this review *

Yes No

Note: Where the review relates to a further application e.g. renewal of planning permission or modification, variation or removal of a planning condition or where it relates to an application for approval of matters specified in conditions, it is advisable to provide the application reference number, approved plans and decision notice (if any) from the earlier consent.

Declare – Notice of Review

I/We the applicant/agent certify that this is an application for review on the grounds stated.

Declaration Name: Mrs Kate Jenkins

Declaration Date: 22/12/2017

PAVILION NORTH EAST OF DUNLAVEROCK HOUSE, COLDINGHAM

Supporting Statement to Notice of Review

in relation to Scottish Borders Council's refusal of:

**Section 42 Application (17/01007/FUL) in relation to Planning Consent 10/00172/FUL
Application for a new planning permission with different conditions, namely amendment
of condition 9 (Occupancy Condition)**

on behalf of: Mr David Lee, 47 Highgate, West Hill, London, N6 6DB "The Appellant"
21st December, 2017



SUMMARY

The fundamental aim of this appeal is to allow a London-based owner of holiday accommodation which is located in countryside above Coldingham Bay to use his property with his immediate family, his extended family and his friends for the holiday periods which they wish, typically being school holidays (including half term breaks), and occasional weekends.

The property, pictured on the cover page, gained planning permission in 2010, with a revised design to that originally consented in 2009. The Appellant has owned the property since 2016. This Notice of Local Review is submitted on behalf of Mr David Lee, the Appellant, against the decision of Scottish Borders Council to refuse application 17/01007/FUL on 29th November, 2017 which effectively sought amendment to condition 9 of the 2010 planning permission.

The proposed amendment would enable occupation of the property only by genuine holiday makers and would prevent use of the property as a sole or main residence. It would, however, enable the Appellant, his immediate and extended family and friends to occupy the property as holidaymakers during holidays and occasional weekends and thus prevent the property being forced to stand empty for 36 weeks of the year.

The proposed condition reads:

"The occupation of the building shall be restricted to holiday purposes and shall be used by genuine holiday makers only. The building shall not be used as a sole or main residence. A register of holidaymakers shall be kept and made available for inspection by an authorised Officer of the Council at all reasonable times."

The Planning Authority's reasons for refusal of the Application are:

- Amendment would be contrary to Policy ED7 (rural tourism policy) of the Scottish Borders Local Development Plan in that it would enable the use of the building for purposes which would not constitute direct tourism purposes;
- This would result in loss of a tourism development that had the potential to generate year round economic benefit to the surrounding area.

The Appellant is NOT seeking permission to use the property as a main dwellinghouse; it will strictly be used for genuine holiday use only. The Planning Authority must acknowledge that the primary residence of persons is easily established, with relevant factors including: an occupier's correspondence address, where the occupier is registered with their GP, where an occupier's children attend school, where an

occupier is registered to vote, where an occupier pays full Council Tax and where an occupier's main place of employment is located. The Appellant's home is indisputably in London.

The concept of "second home" does not exist within planning law – it is thus not helpful or constructive to discuss that concept. The principles which should be discussed relate to (a) the status of the Appeal subjects in terms of being holiday accommodation as opposed to being a main residence/ full time dwelling and (b) rural tourism development policy and its aims and objectives.

The property is not let on a commercial basis. It is only used by the Appellant, his immediate and wider family and certain friends who travel there to play golf, use the beach at Coldingham Sands and generally behave as holidaymakers do. Occupation of the property is currently restricted by way of planning condition which (under the interpretation of the Planning Authority) only enables this group of people to occupy the property for a maximum four weeks in each quarter-year; thus a total of 16 weeks per year. For the remaining 36 weeks, the planning condition means that the property is unoccupied as it is not let on a commercial basis. There is thus a loss to the local economy.

The Lee family (The Appellant owner is one of five children) would like to be able to use the property, together with friends, more than the existing condition allows, for holiday purposes and considers it odd that policy, designed to encourage tourism, is being used to restrict holiday use by an extended family and friends.

The Appellant fully accepts that the property was permitted under "tourism" policy and not under "housing in the countryside policy" with the effect that the property must be used for 'holiday' uses and not as a full time/ permanent/ main residence. The Appellant only requires use of the property for "holiday purposes" together with his family and friends and would like it to be available for more holiday use rather than see it stand empty for 36 weeks – there is simply no other motive.

The remainder of this Statement explains the detail of the case and sets out three reasoned Grounds of Appeal.

Members are urged to agree to hold a **site visit** in order to understand the nature of the holiday accommodation and see for themselves that the premises would not constitute a suitable permanent dwelling.

1.0 INTRODUCTION – THE APPLICATION AND ITS REFUSAL

The Application – Identification of Planning Condition

1.1 The application which has been refused sought an amendment to a planning condition (an ‘occupancy condition’) which is attached to a 2010 planning permission (10/00172/FUL) for a holiday pavilion located above Coldingham Bay. The property has been owned by the Appellant since January, 2016.

1.2 The planning condition reads:

**The occupation of the building shall be restricted to holiday purposes only for individual periods not exceeding 4 weeks in total within any consecutive period of 13 weeks. A register of holidaymakers shall be kept and made available for inspection by an authorised officer of the Council at all reasonable times.
Reason: A permanent residential site in this location would conflict with the established planning policy for this rural area.**

1.3 The proposed planning condition reads:

The occupation of the building shall be restricted to holiday purposes and used by genuine holiday makers only. The building shall not be used as a sole or main residence. A register of holidaymakers shall be kept and made available for inspection by an authorised Officer of the Council at all reasonable times.

1.4 The application was refused by Scottish Borders Council on 17th January, 2017 on the basis set out below.

The proposed variation of Condition 9 of planning permission 10/00172/FUL would be contrary to Policy ED7 of the Scottish Borders Local Development Plan 2016 in that it would enable the use of the building for purposes which would not constitute direct tourism purposes, which would result in a loss of a tourism development that has the potential to generate year round economic benefit to the surrounding area. Other material considerations do not justify a departure from the Development Plan in this case.

2.0 BACKGROUND AND PRACTICAL EXPLANATION FOR APPLICATION 17/01007/FUL

- 2.1 The Appellant purchased the property with the specific aim of using it as holiday accommodation for him, his immediate family, his wider family and also friends during holiday periods. At present, it is not let on a commercial basis as self-catering holiday accommodation.
- 2.2 The Appellant has no intention of seeking permission to use the property by himself or by others as a permanent dwelling, recognising the basis under which the property was granted planning permission in 2009 and 2010. The use of the property as a 'mainstream' dwelling would be contrary to Local Development Plan policy as planning permission was granted under policy on "*business, leisure and tourism in the countryside*" for a holiday property, as opposed to being granted under "housing in the countryside policy" for a dwelling used as permanent accommodation.
- 2.3 The issue faced by the Appellant's family is a practical one. The Appellant's immediate family resides, works and is educated in and around London and visits Coldingham for extended holiday breaks away from the City and occasional weekends. The Appellant's extended family (in Scotland and the North East) also uses the property intermittently for holidays. Together, between the various family groups which include the Appellant's family, a sibling's family and a parent, desired use by the group as a whole can extend beyond 4 weeks in any quarter year, particularly given the variation in English/ Scottish school holidays. Friends also use the unit. At other times the unit is empty for extended periods.
- 2.4 Typical use of the accommodation, based on maximum permitted use, currently includes:
- Weekend visits e.g. Friday evening to Sunday evening once a month outside of school holidays;
 - Two week to four week stays over the summer and Easter periods;
 - Use by extended family (siblings of the Appellant and their own families and a parent) who live in Scotland and north-east England.

2.5 This use does not fulfill the users' needs, as illustrated in the examples below:

Example 1

2.6 If the Appellant's family spends 4 weeks at the holiday accommodation in the summer (the English School holidays ending in early September), then it is not possible, due to the planning condition, for anyone to return to the holiday accommodation for the October half-term break. Further, summer holidays can span from late June to early September; a period of approximately ten weeks. Extended family may wish to occupy the property for more than 4 weeks in total over the summer break.

Example 2

2.7 In the event that the Appellant's family spends the Easter school holidays at the accommodation it may not be possible to spend subsequent weekends there. English and Scottish school holidays put together usually span a 4 week period at Easter-time.

Example 3

2.8 Under the planning condition, the Appellant's family/ extended family are likely to be treated as one entity when there may, in fact, be overlapping stays by (a) the immediate London family, (b) a Newcastle based family, (c) an Edinburgh based family and (d) a Scottish-based parent. The Appellant may return to London for work, while the remainder of his family stays on in the summer holidays with other close family. Given the random combinations of occupants and overlapping stays it is rarely possible to clearly differentiate periods of occupancy unique to one or other aspect of the extended family.

2.9 Instead, therefore, of being used as often as a rental property (which is encouraged by the Planning Authority), the Appellant is forced to leave the property empty for extended periods when it could instead be being used by family and friends for genuine tourist purposes.

2.10 It cannot be right that "a tourist" has to pay rent to a third party to be considered as such.

3.0 GROUNDS FOR APPEAL

3.1 There are 3 Grounds for Appeal, the details of which are set out in this section:

Ground 1: The proposed amendment would not be contrary to rural tourism development policy: the proposed amendment would only enable use of the building for genuine tourism purposes, and the proposed use would not lead to loss of a tourism development;

Ground 2: The existing condition does not meet the Circular 4/1998* tests (**The Use of Conditions in Planning Permissions*);

Ground 3: The proposed condition is consistent with a recent Reporter decision.

GROUND 1 – THE PROPOSED AMENDMENT WOULD NOT BE CONTRARY TO RURAL TOURISM DEVELOPMENT POLICY. THE PROPOSED AMENDMENT WOULD ONLY ENABLE USE OF THE BUILDING FOR GENUINE TOURISM PURPOSES AND THE PROPOSED USE WOULD NOT LEAD TO LOSS OF A TOURISM DEVELOPMENT.

3.2 It is accepted that a condition which prevents the full time occupation of the accommodation as a permanent residence is necessary for a planning purpose. The development was permitted for use as a holiday unit and not as a permanent dwelling. The Appellant, however, is not seeking to be able to occupy the unit as a full time, main or permanent residence: it is simply the case that the wording of the condition at present does not permit the reasonable holiday use desired by the Appellant.

3.3 The Officer's Report clearly states that "*Neither the condition, nor the Planning Authority's interpretation of it, makes any differentiation between owners of the accommodation or other holidaymakers.*" The Appellant disputes this statement. Owing to the relatively small 'pool' of extended family members and friends, as compared to a potential pool of commercial holiday makers, the condition is considered to discriminate against genuine *family and friends* holiday use. Family holidaymakers can only use the property for 16 weeks a year; it must remain unoccupied for the rest of the year (36 weeks) if use by family and friends is the only use.

- 3.4 It is not unreasonable for the Appellant's family and friends to seek to use the property for more than 16 weeks a year. Rather, the Appellant believes that it is odd to require the property to stand empty for such extended periods just to evidence something that is easily proved (i.e. that the unit is not a main residence). The primary residence of persons is easily established, with relevant factors including: an occupier's correspondence address, where the occupier is registered with their GP, where an occupier's children attend school, where an occupier is registered to vote, where an occupier pays full Council Tax and where an occupier's main place of employment is located. The Appellant's home is indisputably in London.
- 3.5 The Appellant's desired use is reasonable and genuine holiday use. There is no risk of the property being used as a permanent dwelling if the proposed planning condition is implemented.
- 3.6 It is an undisputable fact that the Appellant, his immediate and his wider family and friends only seek to use the Pavilion for holiday purposes. The wording of the proposed condition is clear – use is to only be by genuine holidaymakers. The Appellant is also willing to provide the Planning Authority with a record of occupation, as stated in the proposed condition. The Appellant is not seeking to establish a permanent dwelling “by the back door”; he is merely seeking to be able to use his property as a genuine holiday maker along with family and friends – a situation which will benefit the local economy just as much as if someone was renting the property.
- 3.7 Planning conditions are frequently used to control/ restrict use. The Planning Authority states that there would not be sufficient protection to prevent the building being used for a use which was contrary to policy (i.e. as a main residence). This is disputed – the wording of the condition could not be clearer as to who may use the property, namely only “genuine holidaymakers”. There is no desire or suggestion that the Appellant seeks to establish a permanent dwelling, indeed the proposed condition states that it cannot be used as a sole or main residence. It is much easier to verify that the property is not a permanent dwelling than to verify the current unclear situation.
- 3.8 The introduction of discussion, within the Officer's Report of the ‘second home’ or ‘holiday home’ concepts is not constructive. The Officer himself acknowledges that *“Planning law does not distinguish between a permanent dwellinghouse for use as a main residence and a holiday/ second home”*. What is relevant is that the Appellant is seeking to be able to use his property, and have friends and family use it, for holiday

purposes and not have the property stand empty for the thirty-six weeks which the current condition requires. Debate must be about acceptability of use in terms of 'rural tourism development' policy as opposed to against terms which have no foundation in planning law (or in Scottish Borders adopted planning policy) such as "second home".

- 3.9 The Officer's Report states that the proposal would more reasonably be considered through an application for change of use to a dwellinghouse, following his logic that the Appellant is seeking use as a "holiday/ second home" and thus as a "permanent dwelling". This point is strongly disputed by the Appellant. The Appellant does not desire or seek a change of use to a permanent dwellinghouse and is willing to accept a planning condition which clearly restricts use to use for holiday purposes by genuine holiday makers. The Pavilion is firmly holiday accommodation. The Planning Authority has made it clear that there is no differentiation between 'owner tourists' and other types of tourists yet insists on an unduly restrictive rotational requirement (effectively requiring the property to stand empty for thirty-six weeks) which is wholly unsuited to owner holiday makers and to the local economy.
- 3.10 On that basis that the Planning Authority claims to treat 'owner holidaymakers no differently to 'other holidaymakers' the Appellant, his immediate family, his extended family and his friends should be regarded no differently to other potential (commercial) holidaymakers. This appears, however, not to be the case, illustrated, in part, by comments relating to economic benefits deriving from different types of holidaymakers. The Planning Authority appears to believe that the 'owner holidaymakers', in terms of each stay, would not bring equal economic benefit to the area as 'other holidaymakers'. This is asserted without any evidence and is, by definition, imposing a differentiation between the two types of holidaymakers, both of which are as genuine as each other.
- 3.11 According to the Oxford English Dictionary "A tourist" is "*a person who is travelling or visiting a place for pleasure*". It is thus clear that when the Appellant, his immediate or his wider family and friends are visiting the property on holiday they are, by definition, "tourists". They play golf at Eyemouth, go horse riding, swim and surf on the beach, as do other visitors. A "tourist" does not have to be paying rent to a third party to be defined as such.
- 3.12 The Appellant wishes it to be noted that his direct contribution to the local economy includes the hiring of builders to do maintenance, hiring of a gardener to plant and maintain the garden, hiring of a cleaner to clean and hiring of a window cleaner to

keep the considerable amount of glazing clean (all needed due to the fact that he lives in London) as well as the more usual expenditure locally when on holiday such as using local shops, playing golf and visiting pubs and restaurants.

- 3.13 The Planning Officer, in his Report, cites the Scottish Government Reporter's decision in case PPA-140-2057 where the Reporter imposed an occupancy condition (on timber camping lodges) which restricted occupation for genuine holiday makers/ tourists for "individual periods" not exceeding 3 months in total within any consecutive period of 12 months. Whilst this condition is worded with the same ambiguity as that being challenged (see Ground 2), it is understood that this condition would allow a total of 12 weeks occupation by the Appellant in any one year had the Planning Authority's "offer" to accept this condition been taken up by the Appellant. This is more restrictive than the total of 16 weeks which are currently available so was not acceptable.
- 3.14 The proposed use would certainly not lead to **loss of a tourism development** as is stated in the ground for refusal. The property will remain as a tourism development and will be used for genuine tourism purposes by the Appellant, his immediate family, his wider family and his friends. In future years, it may well be that the unit is let on a commercial basis.

GROUND 2: THE EXISTING CONDITION DOES NOT MEET THE CIRCULAR 4/1998* TESTS. * "THE USE OF CONDITIONS IN PLANNING PERMISSIONS"

- 3.15 The following words, extracted from the existing occupancy condition (below) are ambiguous. *"The occupation of the building shall be restricted to holiday purposes only for individual periods not exceeding 4 weeks in total within any consecutive period of 13 weeks."*

The occupation of the building shall be restricted to holiday purposes only for individual periods not exceeding 4 weeks in total within any consecutive period of 13 weeks. A register of holidaymakers shall be kept and made available for inspection by an authorised officer of the Council at all reasonable times.

Reason: A permanent residential site in this location would conflict with the established planning policy for this rural area.

PLANNING & PROPERTY CONSULTANTS

- 3.16 **Meaning 1:** This could reasonably be interpreted to mean that **holiday use can only be made for 4 weeks out a 13 week block**. That is, after all, exactly what the condition says. It does not refer to use for that period by set 'individuals' or 'groups of individuals' or even tourists. This interpretation would mean that the unit could only be occupied for holiday purposes for a total maximum of 16 weeks in an entire calendar year. For the remaining 36 weeks, the unit could not be used for holiday purposes – that is what the condition actually says, even if it may not be the intention.
- 3.17 **Meaning 2:** It is understood from discussions with the Planning Authority that their intended meaning is different from the above meaning. The Officer is of the view that the meaning is that that **any particular individual occupant or group of occupants could only reside in the unit for a maximum of 4 weeks in any 13 week (quarter year) period**. This is, however, not what the condition says.
- 3.18 In terms of Circular 4/1998 '*The Use of Conditions in Planning Permissions*', planning conditions should only be imposed where they are:-
- Precise;
 - Necessary;
 - Relevant to planning;
 - Relevant to the development to be permitted;
 - Enforceable;
 - Reasonable in all other respects.
- 3.19 Given that the meaning of the condition is not precise, the enforceability of the condition is also questionable. The Officer's Report offers the defence that the condition is widely used within the Scottish Borders. Such 'established use' appears to prevent the Planning Authority reviewing what the condition *actually* says and noticing its consequent ambiguity. Habitual use of an imprecise and potentially unenforceable condition in different circumstances to this should not make such use acceptable everywhere and at all times.
- 3.20 A maximum stay (by an individual or group of individuals) of 4 weeks within any 13 week period (a maximum 16 week annual occupancy) is an extreme way of providing the Planning Authority with sufficient reassurance that the unit will not be used as a permanent dwelling (and discriminates against owner-holiday makers). It only succeeds in restricting the amount of tourist use, as the property stands empty for extended periods if this approach is followed. The condition is considered to be unreasonable in its highly restrictive nature in seeking to achieve its fundamental aim of preventing the property being used as a main or permanent residence. It is thus

not clearly (or logically) related to the planning purpose of preventing the unit being a permanent residence.

GROUND 3: THE PROPOSED CONDITION IS CONSISTENT WITH A RECENT REPORTER DECISION.

Appeal Decision: PPA-170-2094. Decision date 04/09/14

- 3.21 The Appellant wishes to draw Member's attention to a recent (2014) Scottish Government Reporter decision which is directly in line with the condition being sought.

Proposal: Campsite including 12 pitches, 4 of which were static ('shepherd's hut) style caravans and manager's temporary accommodation.

1. No caravan or tent pitches hereby granted planning permission shall be used as a sole or main residence; they shall be for holiday use only. The operator of the site shall maintain a register of guests (including the name, address, dates of arrival and departure) of those staying at the site. On request, this guest register shall be made available to the Council as planning authority for inspection.

Reason: to define the consent and ensure that the site is not used for permanent residential occupation.

- 3.22 There is no reference to a 'no return' period or a specific time period on the 'shepherd's hut' holiday units or the pitches. The Reporter has assessed that **the restrictions set out within the condition are sufficient to restrict the use to holiday accommodation and appropriate to meet the tests set out within Circular 4/1998.** The proposed condition in respect of the Appeal subjects is clearly consistent.
- 3.23 The original Supporting Statement pertaining to application 17/01007/FUL provides several further recent examples where rural Planning Authorities have been willing to impose planning conditions very similar to that being proposed. The restrictions prevent the property being used as a permanent / sole or main residence and generally require there to be an up to date register of guests maintained. Reference should be made to pages 15 to 19 of the Application Supporting Statement which is included with this Appeal.

TOWN AND COUNTRY PLANNING (SCOTLAND) ACT 1997

Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013

Application for Planning Permission

Reference : 17/01007/FUL

**To : Mr David Lee per Erich Planning & Property Consultants Per Kate Jenkins 57 Northgate
Peebles EH45 8BU**

With reference to your application validated on **18th July 2017** for planning permission under the Town and Country Planning (Scotland) Act 1997 for the following development :-

Proposal : Variation of planning condition 9 of planning consent 10/00172/FUL relating to occupancy of building

At : The Pavilion Coldingham Eyemouth Scottish Borders TD14 5NZ

The Scottish Borders Council hereby **refuse** planning permission for the **reason(s) stated on the attached schedule**.

**Dated 29th November 2017
Regulatory Services
Council Headquarters
Newtown St Boswells
MELROSE
TD6 0SA**

Signed



.....
Depute Chief Planning Officer

APPLICATION REFERENCE : 17/01007/FUL**Schedule of Plans and Drawings Refused:**

Plan Ref	Plan Type	Plan Status
	Location Plan	Refused

REASON FOR REFUSAL

- 1 The proposed variation of Condition 9 of planning permission 10/00172/FUL would be contrary to Policy ED7 of the Scottish Borders Local Development Plan 2016 in that it would enable the use of the building for purposes which would not constitute direct tourism purposes, which would result in the loss of a tourism development that has the potential to generate year-round economic benefit to the surrounding area. Other material considerations do not justify a departure from the Development Plan in this case.

FOR THE INFORMATION OF THE APPLICANT

If the applicant is aggrieved by the decision of the Planning Authority to refuse planning permission for or approval required by a condition in respect of the proposed development, or to grant permission or approval subject to conditions, the applicant may require the planning authority to review the case under Section 43A of the Town and Country Planning (Scotland) Act 1997 within three months from the date of this notice. The notice of review should be addressed to Corporate Administration, Council Headquarters, Newtown St Boswells, Melrose TD6 OSA.

If permission to develop land is refused or granted subject to conditions, whether by the Planning Authority or by the Scottish Ministers, and the owner of the land claims that the land has become incapable of reasonably beneficial use in its existing state and cannot be rendered capable of reasonably beneficial use by the carrying out of any development which has been or would be permitted, the owner may serve on the Planning Authority a purchase notice requiring the purchase of his interest in the land in accordance with the provisions of Part 5 of the Town and Country Planning (Scotland) Act 1997.

SCOTTISH BORDERS COUNCIL

**APPLICATION TO BE DETERMINED UNDER POWERS DELEGATED TO
CHIEF PLANNING OFFICER**

PART III REPORT (INCORPORATING REPORT OF HANDLING)

REF : 17/01007/FUL

APPLICANT : Mr David Lee

AGENT : Ericht Planning & Property Consultants

DEVELOPMENT : Variation of planning condition 9 of planning consent 10/00172/FUL relating
to occupancy of building

LOCATION: The Pavilion
Coldingham
Eyemouth
Scottish Borders
TD14 5NZ

TYPE : FUL Application

REASON FOR DELAY:

DRAWING NUMBERS:

Plan Ref	Plan Type	Plan Status
	Location Plan	Refused

NUMBER OF REPRESENTATIONS: 0
SUMMARY OF REPRESENTATIONS:

No representations were received.

CONSULTATIONS:

Community Council: No response.

Legal Services: No response.

PLANNING CONSIDERATIONS AND POLICIES:

Local Development Plan 2016:

ED7: Business, Tourism, and Leisure Development in the Countryside#

HD2: Housing in the Countryside

HD3: Protection of Residential Amenity

IS2: Developer Contributions

Other considerations

Scottish Planning Policy

Circular 4/98 'The Use of Conditions in Planning Permission'

Recommendation by - Paul Duncan (Assistant Planning Officer) on 24th November 2017

SITE DESCRIPTION

The Pavilion is a detached holiday development of contemporary design which sits on steeply sloping ground above Coldingham Sands bay. The building is predominantly glazed to the front elevation which is prominent on the hillside when viewed from the beach below. The building features a modern V-shaped metal roof and timber and stone finishes to the rear and side elevations. The building is accessed by foot via a popular path which runs from the group of dwellinghouses on higher ground to the west of the site down past the site towards the beach to the south-east.

PLANNING HISTORY

The development has a lengthy and complex planning history. Approval for a new holiday pavilion (08/01490/FUL) was first granted in 2009, replacing a derelict building which previously sat on the site and was adversely affecting both the amenity of the area and the setting of the bay. The use of the development, which was assessed against the relevant tourism policies of the time and was approved as a holiday development, was controlled by two conditions:

7. This purpose-built holiday unit shall not be occupied for the purposes of human habitation between the 9th January and 9th February, in each calendar year.

Reason: The establishment of a permanent residential unit on this site would conflict with the established policy for new dwellings in this location.

8. The occupation of the building shall be restricted to holiday purposes only for individual periods not exceeding 4 weeks in total within any consecutive period of 13 weeks. A register of holidaymakers shall be kept and made available for inspection by an authorised officer of the Council at all reasonable times.

Reason: A permanent residential site in this location would conflict with the established planning policy for this rural area.

In 2009 an application (09/00959/FUL) to remove condition 7 was approved.

In 2010 an amended design was granted approval (10/00172/FUL) and condition 8 of the previous planning permission controlling use of the building was also attached to that consent. The 2010 approval was implemented and that condition (condition 9) controls the use of the development today. Condition 9 reads as follows:

"The occupation of the building shall be restricted to holiday purposes only for individual periods not exceeding 4 weeks in total within any consecutive period of 13 weeks. A register of holidaymakers shall be kept and made available for inspection by an authorised officer of the Council at all reasonable times.

Reason: A permanent residential site in this location would conflict with the established planning policy for this rural area."

This current application seeks to vary this condition to afford the current owner use of the building for holiday purposes in line with the requirements of the current users, who are the applicant, his family and his friends.

POLICY PRINCIPLE

The original redevelopment proposal in 2008 was for a holiday/ tourism development and was assessed against the relevant tourism policies of the time, including Local Plan policy D1.

This current application does not formally seek permission to use the property as a dwellinghouse (either as a main residence or a holiday/ second home), which would require a change of use and assessment against relevant housing in the countryside policies, nor does the proposal seek permission for any other use. The building is therefore to remain a holiday development and any proposal must be assessed accordingly.

As the use has not changed, any modification of Condition 9 must continue to satisfy the aims and requirements of relevant rural tourism policy. The current relevant tourism policy is Local Development Plan

Policy ED7 (Business, Tourism and Leisure in the Countryside). Any modification of Condition 9 which could mean the development would not be used directly for tourism purposes, would be not comply with this policy. Inherent in the aims of tourism policy is the potential economic benefit that tourism development can offer. The existing condition ensures a regular rotation of holidaymakers to the property, which is considered to support this aim, given patterns of activity and spend associated with medium and short-stay holidaymakers. This would not be the case if the property was used as a permanent residential site (either as a main residence or a holiday/second home). It should be noted however that use of the property is not required to be for commercial holidaymaking purposes only, so long as the rotational requirements of the policy are met. Neither the condition nor the Planning Authority's interpretation of it makes any differentiation between owners of the accommodation or other holidaymakers. Owners of the accommodation are equally entitled to use the accommodation within the time period specified by the condition.

PROPOSAL

The proposal being considered by this application is to modify Condition 9 with the aim of affording more practical use of the property to the owner, who purchased the property for use as holiday accommodation for himself, his immediate and wider family and also friends. The supporting statement provided with the application states that the property is not currently let on a commercial basis as self-catering holiday accommodation. It also states that there is no intention to occupy the unit as a permanent dwelling and that this would be contrary to Local Development Plan policy.

The purpose of modifying the condition is instead to enable more flexible use of the property. The supporting statement sets out three problematic circumstances where Condition 9 controls use which the applicant wishes to change. These are summarised as follows:

- (1) if the applicant's family spends 4 weeks at the property in the summer it is not possible to return in the October break or extend the summer holiday beyond 4 weeks;
- (2) if the applicant's family spends the Easter holiday at the property it may not be possible to spend subsequent weekends there; and
- (3) where overlapping visits to the property occur by different parties it is difficult to identify when the 4 week block starts and stops.

The supporting statement also argues that the existing conditions fails the six tests of planning conditions as set out in Circular 4/98 'The Use of Conditions in Planning Permission'.

The applicant has asked for the application to be determined against the following proposed modification to Condition 9:

"The occupation of the building shall be restricted to holiday purposes and used by genuine holiday makers only. The building shall not be used as a sole or main residence. A register of holidaymakers shall be kept and made available for inspection by an authorised Officer of the Council at all reasonable times."

ASSESSMENT

It is fully accepted that the applicant has no intention to occupy the unit on a permanent basis as a sole residence. However, as noted above, any variation to Condition 9 should not lead to the use of the development conflicting with the aims and requirements of Policy ED7 (Business, Tourism and Leisure in the Countryside). The proposed condition would remove all rotational requirements of the existing condition. Some degree of rotational requirement is considered essential to achieving the economic benefits associated with tourism development and to ensure year round occupation for self-catering accommodation is secured whilst preventing long term occupation. . Instead, the proposed condition could allow the use of the property as a holiday home/ second home for up to six months a year. Whilst use would be restricted to 'genuine holidaymakers only', this wording alone may not prevent the use of the building for purposes which would be in conflict with tourism policy. Furthermore, as planning law does not generally distinguish between a permanent dwellinghouse for use as a main residence and a holiday home/ second home, this proposal, which would essentially allow use as a holiday home/ second home, would more reasonably be considered through an application for change of use to dwellinghouse. This would be assessed against relevant housing policies and would likely incur development contributions for education.

This proposed modification cannot therefore be supported. The issues identified within the supporting statement in terms of the 'six tests' of planning conditions are noted, but the existing planning condition is regularly used within the Scottish Borders and is considered an appropriate and reasonable means of achieving planning policy aims and requirements. It is noted that a Scottish Government Reporter recently applied a condition similar to Condition 9 (PPA-140-2057 condition 4) to an unrelated tourism development elsewhere in the Scottish Borders. This condition allowed occupation for genuine holidaymakers/ tourists for individual periods not exceeding 3 months in total within any consecutive period of 12 months, whilst also maintaining that the property should not be used for permanent residential occupation. Given that this less restrictive rotational requirement would seem to address many of the applicant's concerns, and given it would still satisfy planning policy aims and requirements, the applicant was offered the opportunity to modify Condition 9 to a similar effect, but this was ultimately declined.

CONCLUSION

The Planning Authority has been open to finding a mutually agreeable modification to the condition which might allow more practical use of the property in line with the applicant's wishes, without undermining policy aims and requirements. The Planning Authority has also previously allowed the removal of one of the two conditions which originally controlled the use of the building. The proposed modification to the remaining condition would however severely weaken control of the development, conflicting with Policy ED7 in failing to ensure the future use of the development for direct tourism purposes. This would risk the loss of an existing tourism development which has the potential to generate year-round economic benefit to the surrounding area, in conflict with planning policy aims and requirements.

REASON FOR DECISION :

The variation of condition 9 of planning permission 10/00172/FUL would be contrary to Policy ED7 of the Scottish Borders Local Development Plan 2016, in that the proposed variation of condition would enable the use of the building for purposes which would not constitute tourism. Other material considerations do not justify a departure from the Development Plan in this case.

Recommendation: Refused

- 1 The proposed variation of Condition 9 of planning permission 10/00172/FUL would be contrary to Policy ED7 of the Scottish Borders Local Development Plan 2016 in that it would enable the use of the building for purposes which would not constitute direct tourism purposes, which would result in the loss of a tourism development that has the potential to generate year-round economic benefit to the surrounding area. Other material considerations do not justify a departure from the Development Plan in this case.

“Photographs taken in connection with the determination of the application and any other associated documentation form part of the Report of Handling”.

PAVILION NORTH EAST OF DUNLAVEROCK HOUSE, COLDINGHAM

Supporting Statement

**Section 42 Application in relation to Planning Consent 10/00172/FUL
Application for a new planning permission with different conditions from those attached
to the previous permission including amendment of condition 9 (Occupancy Condition)**

on behalf of

Mr David Lee, 47 Highgate, West Hill, London, N6 6DB "The Applicant"

12th July, 2017

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1.0 INTRODUCTION

The Application – Identification of Planning Condition

- 1.1 This Supporting Statement supports an application to amend a planning condition which is attached to a 2010 planning permission for a holiday pavilion to the north east of Dunlaverock House. The application reference is 10/00172/FUL, granted on 7th April, 2010.
- 1.2 This application seeks a new planning consent for the development, with the amended condition, as per the definition of a Section 42 application within Circular 3/2013. *“An application for a new planning permission or new planning permission in principle for a development but with different conditions from those attached to a previous permission for that development.”*
- 1.3 The planning condition which the Applicant is seeking to be amended is condition no. 9 which reads:
- The occupation of the building shall be restricted to holiday purposes only for individual periods not exceeding 4 weeks in total within any consecutive period of 13 weeks. A register of holidaymakers shall be kept and made available for inspection by an authorised officer of the Council at all reasonable times.
Reason: A permanent residential site in this location would conflict with the established planning policy for this rural area.
- 1.4 The occupancy condition applies to the holiday pavilion to the north east of Dunlaverock House, which has been in the ownership of the Applicant since January, 2016.

2.0 BACKGROUND AND PRACTICAL EXPLANATION FOR APPLICATION

2.1 The Applicant purchased the property with the specific aim of using it as holiday accommodation for him, his immediate family, his wider family and also friends. At present, it is not let on a commercial basis as self-catering holiday accommodation. This situation may change in future years.

2.2 The Applicant wishes to stress that he has no intention of seeking occupation of the unit by himself or others as a permanent dwelling, recognising that permission for a 'mainstream' dwelling would be contrary to Local Development Plan policy. It is also noted that the owner/ family must be treated the same as any other 'visitor occupant' in the implementation of the condition in order to ensure that the condition is as relevant to any potential future scenario and on the basis of fairness and consistency.

2.3 The issue faced by the Applicant's family is a practical one. Two examples are provided below. The Applicant's immediate family resides, works and is educated in and around London and visits Coldingham for extended breaks away from the City. The Applicant's extended family also uses the property intermittently. Together, between the various family groups which include the Applicant's family, a sibling's family and a parent, desired use can extend beyond 4 weeks, particularly given the variation in English/ Scottish school holidays. Friends also use the unit. At other times the unit is empty for extended periods.

2.4 Typical use of the accommodation, based on maximum permitted use, currently includes:

- Weekend visits e.g. Friday evening to Sunday evening once a month outside of school holidays;
- Two week to four week stays over the summer and Easter periods;
- Use by extended family (siblings of the Applicant and their own families and a parent) who live in Scotland and north-east England.

2.5 This use does not fulfill the users' needs. Examples are provided below.

Example 1

2.6 As matters currently stand, if the Applicant's family spends 4 weeks at the holiday accommodation in the summer (the English School holidays ending in early September), then it is not possible, due to the planning condition, to return to the

holiday accommodation for the October half-term break as such would fall within the “no return” 13 week period. Further, summer holidays can span from late June to early September; a period of approximately ten weeks. The Applicant may wish to allow his extended family to occupy the property for more than 4 weeks in total over the summer break.

Example 2

- 2.7 In the event that the Applicant’s family spends the Easter school holidays at the accommodation it may not be possible to spend subsequent weekends there.

Example 3

- 2.8 Mr Lee, the owner, may return to London for work reasons, while the remainder of his family stays on in the summer holidays with other close family. The ‘start and stop’ time of stays is difficult to determine, and given the 4 week restriction in any 13 week period, this is problematic. Under the planning condition, the Applicant’s family/ extended family are likely to be treated as one entity when it may, in fact, give rise to overlapping stays by (a) the immediate London family, (b) a Newcastle based family, (c) an Edinburgh based family and (d) a Scottish-based parent. Given overlapping stays it is rarely possible to clearly differentiate/ define periods of occupancy unique to one or other aspect of the extended family. It should also be noted that English and Scottish school holidays put together usually span a 4 week period at Easter-time.

3.0 PLANNING HISTORY

2008: Planning Permission 08/01490/FUL

- 3.1 This permission established that the principle of redevelopment at this location as a holiday unit was acceptable. The permission carried two conditions which related to occupancy as shown below, together with reasoning for imposition:

Condition 7: *This purpose built holiday unit shall not be occupied for the purposes of human habitation between 9th January and 9th February, in each calendar year.*

Reason: *The establishment of a permanent residential unit on this site would conflict with the established policy for new dwellings in this location*

Condition 8: *The occupation of the building shall be restricted to holiday purposes only for individual periods not exceeding 4 weeks in total within any consecutive period of 13 weeks. A register of holidaymakers shall be kept and made available for inspection by an authorised officer of the Council at all reasonable times.*

Reason: *A permanent residential site at this location would conflict with the established planning policy for this rural area.*

2009: Planning Permission 09/00959/FUL

- 3.2 This permission allowed the removal of condition 7 pertaining to 08/01490/FUL as set out above. The condition restricted habitation between 9th January and 9th February each year and was considered, by the Applicant's agent, to be: unduly restrictive, not to serve a planning purpose and also to be unreasonable.

- 3.3 The reason for the decision included the wording:

(The remaining) "condition 8 of the planning permission ref. 08/01490/FUL is adequate to enable the Planning Authority to retain effective control over the nature and duration of accommodation within this unit of holiday accommodation."

- 3.4 Within the Officer's Report it is stated

"It must be acknowledged that the British self-catering market is now a year-round operation and that it would be unreasonable to reject this proposal".

- 3.5 The Officer's report also sets out the Council's position as to why the unit should not become a permanent accommodation – a principle which the then-Applicant and the current Applicant accept.

"It would conflict with rural housing and other environmental policy principally because purpose-build holiday accommodation has less of a demand on its locale in terms of space needed for amenity, and the inevitable alterations that are made to increase comfort and easy access to permanent dwellings, which have a visual impact of their own. For example, fencing, storage buildings, washing lines, play areas and equipment."

- 3.6 It was further reiterated that permitted development rights had been removed by way of condition 10 of 08/01490/FUL, linked to issues surrounding visual impact.

2010: Planning Permission 10/00172/FUL

- 3.7 This permission allowed the replacement of a derelict pavilion with a holiday pavilion which was a change in type from that previously approved by way of 08/01490/FUL.

- 3.8 The Decision Notice sets out an identical condition to condition no. 8 of 08/01490/FUL and identical reasoning for its imposition. For completeness this states, as condition 9 of 10/00172/FUL:

***Condition 9:** The occupation of the building shall be restricted to holiday purposes only for individual periods not exceeding 4 weeks in total within any consecutive period of 13 weeks. A register of holiday makers shall be kept and made available for inspection by an authorised officer of the Council at all reasonable times.*

- 3.9 Permitted development rights relating to extension, enlargement and other alterations including the creation of detached outbuildings, were once again, removed by way of condition as in the original 08/01490/FUL permission.

2015: Correspondence between Planning Authority and Seller (2015)

- 3.10 In 2015, the holiday unit was in the process of being sold. Following discussions between purchaser and seller, the seller approached the Planning Authority to discuss amendment of condition 9. The alternative condition suggested by the seller was not deemed to be suitable in terms of the Circular 4/1998 tests. The condition proposed by the then-seller is set out below.

"The occupation of the building shall be restricted to holiday purposes only. The average period of occupation for any person that year, other than the owner and immediate family, shall not exceed a month for that year, excluding periods of school holidays. The owner and immediate family may not occupy the building (other than for essential maintenance) for the period from 10th January to 10th February in a year".

- 3.11 Particular parts of the suggested wording were considered by the Planning Authority to be vague and thus not "precise" or "enforceable", and the lack of clear restriction sought for family members resulted in a view that the proposed wording was "not relevant to planning" in that the condition did not serve the planning function of ensuring the accommodation met with development plan policy.

- 3.12 **2016: Correspondence between Planning Authority and Applicant's legal agent**
In October, 2016 Davidson Chalmers, the Applicant's legal agent, corresponded with the Planning Authority, requesting that condition 9 of 10/00172/FUL be amended by way of non-material variation. The proposed wording of the condition is set out below:

"The building shall be used for holiday use only and shall not be used as a person's sole of main residence or as temporary or permanent residential accommodation. The applicant shall maintain an up to date register of the names of all holiday makers staying in the [cabin/ chalet] and their home addresses and shall make this information available for inspection by an authorised officer of the Planning Authority at all reasonable times."

- 3.13 In October, 2016 the Planning Authority responded to Davidson Chalmers' request for amendment of condition 9. Mr Aikman refers to a letter of 10th December, 2014 in which he indicated that the following was stated:

"While the wording could perhaps have been expressed more clearly, the intent is clear in that its purpose is to prevent the building from being occupied as a persons' full time residence, which would have been contrary to policy in this location. The condition therefore restricts the use of the development for holiday makers only, but it is the use of the words "individual periods not exceeding 4 weeks in total" that should be afforded the greatest emphasis in the condition: It is the intention of the condition to allow occupancy of the building by holiday makers/ groups of holiday makers but only for periods of no more than 4 weeks within any consecutive 13 week period. Our view is that this would still permit continuous occupancy of the building within the stated 13 week period, but not by the same people (who cannot return until that 13 week period

is complete). This is to enable the development to provide for year-round self-catering accommodation while preventing any long term occupancies. This is consistent with the decision taken on 09/00959/FUL which acknowledged the aspiration for all-round occupancy of the property, but subject to the limitation set out in condition 9 of 10/00172/FUL."

- 3.14 No variation was made to the condition, it being noted that any request for variation would appropriately be dealt with by way of formal application.

4.0 GROUNDS FOR AMENDMENT TO CONDITION NO. 9 OF APPLICATION 10/00172/FUL

4.1 Consideration is now given to the condition's wording and its implications against the Planning Authority's requirements, adopted policy and guidance and the Circular 4/1998 tests.

4.2 Conditions imposed on a grant of planning permission can enable many development proposals to proceed where it would otherwise have been necessary to refuse planning permission. In terms of Circular 4/1998 '*The Use of Conditions in Planning Permissions*', planning conditions should only be imposed where they are:-

- precise
- necessary
- relevant to planning
- relevant to the development to be permitted
- enforceable
- reasonable in all other respects.

4.3 The present wording of the condition is considered to be, (i) not precise (ii) not relevant to planning purpose and therefore (iii) unreasonable. These grounds are set out below.

GROUND 1: THE CONDITION IS NOT PRECISE

4.4 The meaning of the condition is ambiguous.

The occupation of the building shall be restricted to holiday purposes only for individual periods not exceeding 4 weeks in total within any consecutive period of 13 weeks. A register of holidaymakers shall be kept and made available for inspection by an authorised officer of the Council at all reasonable times.

Reason: A permanent residential site in this location would conflict with the established planning policy for this rural area.

"The occupation of the building shall be restricted to holiday purposes only for individual periods not exceeding 4 weeks in total within any consecutive period of 13 weeks."

- 4.5 **Meaning 1:** This could reasonably be interpreted to mean that **holiday use (“purposes”)** can only be made for **4 weeks out a 13 week block**. That is, after all, exactly what the condition says. It does not refer to ‘individuals’ or ‘individual groups’ of people. This interpretation would mean that the unit could only be occupied for holiday purposes for a total maximum of four 4 week periods in an entire calendar year. For the remaining 36 weeks, the unit could not be used for holiday purposes.
- 4.6 **Meaning 2:** An alternative intended meaning, (but a less obvious one given the wording), could mean that **any particular occupant or group of occupants could only reside in the unit for a maximum of 4 weeks in any 13 week (quarter year) period**. This is, however, not what the condition says, but apparently what was intended by the Planning Authority given the content of Mr Aikman’s email referred to in parag. 3.13 above.
- 4.7 Given that the meaning of the condition is not precise, the **enforceability** of the condition is also questionable.

GROUND 2: THE CONDITION IS NOT RELEVANT TO PLANNING PURPOSE

- 4.8 It is accepted that a condition which prevents the full time occupation of the unit as a permanent residence is necessary for a planning purpose; that planning purpose primarily being set out by Local Development Plan policy. The development was permitted as a holiday unit and not a permanent dwelling as the latter would have been, and would still be, contrary to adopted policy HD2. This is accepted.
- 4.9 The Applicant is not seeking to be able to occupy the unit as a full time or permanent residence: it is simply the case that the wording of the condition at present does not permit the holiday use required by the Applicant, as outlined in section 2.
- 4.10 For the purposes of this section, it has been assumed, on the basis of previous correspondence with the Planning Authority (see parag. 3.13) and planning history which has been highlighted, that the second potential meaning of the condition set out above (parag 4.6) is that which was intended by the Planning Authority, despite there being considerable ambiguity in the condition’s wording.

- 4.11 There is significant ground between the extremes of (a) a maximum stay (by an individual or group of individuals) of 4 weeks within any 13 week period combined with a “no return” restriction within that 13 week period and (b) providing the Planning Authority with sufficient reassurance that the unit will not be used as a permanent dwelling or sole or main residence. For this reason, the condition is considered unnecessarily restrictive in seeking to achieve its fundamental aim of preventing the property being used as a sole, main and/ or permanent residence and it is thus not directly related to the planning purpose of preventing the unit being a permanent residence.
- 4.12 Various reasons which have been expressed by the Planning Authority, (in Decision Notices and available written correspondence), for the imposition of condition no. 9 of 10/00172/FUL (and the identical earlier condition no. 8 within 08/01490/FUL) between 2008 and 2016 are quoted below.

1. ***“A permanent residential site at this location would conflict with the established planning policy for this rural area.”***

Comments

The Applicant agrees with the principle of this reason.

2. ***“In order to retain effective control over the nature and duration of accommodation within this unit of holiday accommodation.”***

Comments

It is necessary to retain such effective control, but the restriction of 4 weeks’ occupation of the unit within a 13 week period is not necessary in order to do this. The fundamental purpose is to prevent the unit being used as a sole or main residence or as permanent accommodation.

3. Without the condition ***“It would conflict with rural housing and other environmental policy principally because purpose-build holiday accommodation has less of a demand on its locale in terms of space needed for amenity, and the inevitable alterations that are made to increase comfort and easy access to permanent dwellings, which have a visual impact of their own. For example, fencing, storage buildings, washing lines, play areas and equipment.”***

Comments

The reasoning stated here is imprecise. A holiday unit could have the same requirements for fencing to keep children/ pets safe and is likely to require a washing line. The impact on visual amenity was dealt with in the design process and by the removal of permitted development rights within a separate planning condition. This stated reason for the condition would appear to have no bearing on the restriction of a maximum 4 weeks stay within any consecutive 13 weeks period.

4. ***"To prevent the building from being occupied as a persons' full time residence, which would have been contrary to policy in this location. The condition therefore restricts the use of the development for holiday makers only".***

Comments

It has been established through previous correspondence with the Planning Authority that the Applicant and his family/ extended family are no different (in planning terms) to other potential holiday makers for planning purposes. A family group, is however (even in the largest families) a smaller group than the overall pool of potential holiday renters. Return is therefore more likely with family and friends using a property, whilst being a long way in circumstantial terms from being a permanent residence.

A restriction of a 4 week stay within in a consecutive 13 week period is therefore unreasonable and unnecessary to ensure that the unit does not become a permanent dwelling. The condition discriminates against family holiday use due to the point made in the above paragraph. The restriction is not reasonably related to the purpose which the Planning Authority is seeking to achieve. The Applicant has demonstrated the practical problems which the condition gives rise to and it is preventing reasonable holiday use of the unit by the Applicant and his extended family.

5. ***"To enable the development to provide for year-round self-catering accommodation while preventing any long term occupancies."***

Comments

The Applicant acknowledges the removal of the previous '9th January to 9th February' restriction and agrees that, were the unit ever let on a commercial basis in the future by a different owner, it is reasonable, and reflects

demand, to be able to offer year-round use by holiday guests. It is also agreed that, for planning policy reasons, long term occupancies (including by way of a short assured tenancy/ future Scottish Private Residential Tenancy) or permanent/ near-permanent occupation by the owner must be prevented.

The 4 week restriction in any 13 week period, is however unnecessarily restrictive in terms of the planning purpose which the Planning Authority seeks to achieve. It is possible to meet the aims of planning policy without imposing this restriction and thus enabling the Applicant and his extended family to use the property as they require, particularly to meet with the timings and durations of school holidays and mid-term breaks.

GROUND 3: THE CONDITION IS UNREASONABLE

- 4.13 On the basis of the points made under Grounds 1 and 2, the condition is also considered to be unreasonable in terms of its unnecessarily restrictive nature and the fact that it does not relate directly to the fundamental planning purpose of preventing a permanent residence.
- 4.14 It has been asserted by the Planning Authority (Mr Aikman's email of 28th October, 2016) that *"The wording of the condition, nor our interpretation of it, makes any differentiation between owners of the accommodation or other holidaymakers."* Owing to the relatively small 'pool' of extended family members, however, as compared to the pool of holiday makers who may wish to rent a beach holiday unit, the condition is considered to discriminate against *family* holiday use (as compared to 'mainstream' commercial letting holiday use). There is an inevitability of the Applicant wishing to return within a 13 week period after a stay of only 4 weeks in any single quarter-year. This is by no means unreasonable holiday use of the unit and there is no risk of the unit becoming a permanent dwelling if the planning condition, as proposed at the end of this document (parag. 4.36), is used.

REVIEW OF RELEVANT DECISIONS**Appeal Decision: PPA-170-2094. Decision date 04/09/14**

- 4.15 Proposal: Campsite including 12 pitches, 4 of which were static ('shepherd's hut') style caravans and manager's temporary accommodation.

1. No caravan or tent pitches hereby granted planning permission shall be used as a sole or main residence; they shall be for holiday use only. The operator of the site shall maintain a register of guests (including the name, address, dates of arrival and departure) of those staying at the site. On request, this guest register shall be made available to the Council as planning authority for inspection.

Reason: to define the consent and ensure that the site is not used for permanent residential occupation.

- 4.16 **Comment:** There is no reference to a 'no return' period or a specific time period on the 'shepherd's hut' holiday units or the pitches. The Reporter has assessed that the restrictions set out within the condition are sufficient to restrict the use to holiday accommodation and appropriate to meet the tests set out within Circular 4/1998. A condition to this effect, worded to apply to the Coldingham holiday unit, is considered to be appropriate.

- 4.17 A selection of examples of conditions used by certain rural Planning Authorities are noted below. In order to ensure the examples are of relevance, they generally comprise independent holiday accommodation, as opposed to being functionally ancillary or tied to a 'parent' dwelling.

Example 1: The Highland Council: 17/00289/S42. Decision date 20/04/17

- 4.18 Proposal: Application under S42 to amend Condition 3 (occupancy) of planning permission 05/00511/FULRC- Erection of Holiday Letting Unit. This decision is very recent and was made over 2 years after the above noted appeal decision.
- 4.19 Planning permission was sought under Section 42 to amend the wording of the occupancy condition within a 2007 planning permission (05/00511/FULRC). The development approved under that permission involved the erection of an independent holiday letting unit. The original occupancy condition stated:

"The units hereby approved shall not be made available for occupation as a permanent residence, nor shall they be occupied for more than three consecutive months, nor for more than six months in total in any calendar year by the same persons or groups of persons. Reason: In order that the Planning Authority can retain effective control over the site in recognition of the Development Plan Policies regarding housing in the countryside. The site is located in an area where Council policy restricts new housing and in the interests of compliance with this restriction, it is expedient to preclude permanent occupancy of the units."

- 4.20 It was accepted that there was a continuing requirement, in the interests of maintaining compliance with the development plan, that occupancy of the accommodation be restricted. It was, however, acknowledged by the Planning Authority that there should be a degree of flexibility in the manner in which the accommodation may be occupied, **provided that it not used as permanent unrestricted accommodation or as a primary place of residence.**
- 4.21 The wording of the condition was amended to:

"Notwithstanding Class 9 of the schedule to the Town and Country Planning (Use Classes) (Scotland) Order 1997, the residential unit shall be used to provide holiday accommodation only and shall not be used as permanent unrestricted accommodation or as a primary place of residence.

The amended wording continues to restrict the occupancy, as required by the development plan policies and statutory supplementary guidance, thereby ensuring that the development continues to accord with the development plan."

- 4.22 **Comment:** There is no reference to a 'no return' period or a specific time period. The Planning Authority has assessed that the restrictions set out within the condition are sufficient to restrict the use to holiday accommodation and appropriate to meet the tests set out within Circular 4/1998. A condition to this effect is considered to be suitable for the Coldingham holiday unit and such would be consistent with the above-noted DPEA decision.

Example 2: Dumfries and Galloway. 16/P/4/0109. Decision date 14/07/16

- 4.23 Proposal: Erection of three holiday chalets, installation of septic tank and soakaways and alterations to existing access. Howslack, Moffat

That none of the chalets hereby granted planning permission shall be occupied as the sole, main or permanent residence of the occupant(s) and they shall be used for holiday use only.

In order to define the terms of this planning permission and to comply with the requirements of Policy ED10 of the Local Development Plan, which has a presumption against tourism accommodation being used for permanent residence.

- 4.24 **Comment:** There is no reference to a 'no return' period or a specific time period. The Planning Authority has assessed that the restrictions set out within the condition are sufficient to restrict the use to holiday accommodation and appropriate to meet the tests set out within Circular 4/1998. A condition to this effect is considered to be suitable for the Coldingham holiday unit and such would be consistent with the above-noted DPEA decision.

Example 3: Dumfries and Galloway. 15/P/2/0310. Decision date 24/02/15

- 4.25 Proposal: Erection of holiday lodge with associated access track, car parking and landscaping. Kipp Paddock, Kippford, Dalbeattie.

That the lodge hereby granted planning permission shall not be occupied as the sole or main residence of the occupant and it shall be used for holiday use only. The operator of the said lodge shall maintain a register of guests (including the name, address, dates of arrival and departure) of those staying at the lodge. On request, this guest register shall be made available to the Council as planning authority for inspection.

In order to define the terms of this planning permission.

- 4.26 **Comment:** There is no reference to a 'no return' period or a specific time period. The Planning Authority has assessed that the restrictions set out within the condition are sufficient to restrict the use to holiday accommodation and appropriate to meet the tests set out within Circular 4/1998. A condition to this effect is considered to be suitable for the Coldingham holiday unit and such would be consistent with the above-noted DPEA decision.

Example 4: Scottish Borders Council: 16/00842/FUL. Decision date 08/09/16

- 4.27 Proposal: Erection of log cabin for holiday let. Land south east of Priestrig Croft, Hawick

The holiday cabin shall be occupied for holiday use only and shall not be used as a person's sole or main residence or as temporary or permanent residential accommodation. The applicant shall maintain an up-to-date register of the names of all holiday makers staying in the cabin and their main home addresses, and shall make this information available for inspection by an authorised officer of the Planning Authority at all reasonable times. The cabin shall be used in connection with Priestrig Croft and kept within the same ownership as that dwellinghouse and not to be sold from that dwellinghouse.
Reason: The accommodation on the site is not designed for permanent occupation and permanent residential use would be contrary to the Council's housing in the countryside policies.

- 4.28 A similar condition was imposed in **16/00424/FUL. Decision date 31/05/16**
Proposal: Erection of holiday chalet. Land North Of Singdean Shop, Newcastleton
- 4.29 **Comment:** The first part of these conditions would be acceptable to the Applicant, would meet the Circular 4/1998 tests and would be consistent with the above-noted DPEA decision.
- 4.30 The second part is not relevant because the holiday unit is not associated with an existing dwelling. The position which appears to be asserted by Scottish Borders Council (in email correspondence from Mr Aikman to Davidson Chalmers dated 28th October, 2016) that a planning distinction can be made between (a) functionally ancillary holiday accommodation or (b) holiday accommodation in close geographical proximity to an existing 'parent' house and (c) a standalone holiday property (such as the subject of this application) is disputed.
- 4.31 The Officer stated that the above two referenced Scottish Borders Council planning permissions "*appear to relate to holiday accommodation which is associated with a dwellinghouse by ownership and location. As far as I am aware, the Pavilion is a standalone property therefore there is no dwellinghouse to tie this holiday accommodation to. While these examples are of some relevance, they also demonstrate that each application has to be assessed on its own merits and in the case of this proposal, planning conditions must be relevant to each specific development and remain enforceable. Ultimately, the suitability of the alternative condition must be fully considered through the application process and the final decision could rest with the Planning Committee.*"

4.32 The Applicant’s planning and legal agents share the view that there is no planning distinction to be made between the two scenarios. In terms of ‘planning purpose’ and ‘relevance to the development’ it is simply necessary to prevent both from being used as permanent accommodation in order to comply with development plan policy. The issue with both is thus identical. The imposition of a maximum continuous stay of 4 weeks in any 13 week period where there is no ‘parent’ house/ facility is unnecessary and unreasonable, particularly as it has not been used in the above examples.

Summary of Occupancy Restriction Examples

4.33 Based on the examples illustrated within this statement, a summary of the key aspects of occupancy planning conditions imposed recently by decision makers is provided below.

DECISION MAKER	KEY COMPONENTS OF RESTRICTION	COMMENT
DPEA (Appeal)	Holiday use only and maintain register of holiday guests. (Note: NO time limit, NO no-return period).	Appropriate.
Scottish Borders	Maximum stay of 4 weeks in 13 weeks, holiday use only and maintain guest register OR tie to an existing dwelling, holiday use only, not sole of main residence and maintain guest register.	Unreasonable, not precise, not relevant to planning purpose.
Highland	S42 decision: holiday accommodation only and not permanent/ sole or main residence.	S42 decision is wholly in line with DPEA decision. Appropriate.
Dumfries & Galloway	Not sole or main residence, holiday use only and maintain guest register.	In keeping with DPEA decision. Appropriate.

4.34 The Planning Authority must acknowledge that the **primary residence** of persons is easily established, with relevant factors including: an occupier’s correspondence address, where the occupier is registered with their GP, where an occupier’s children attend school, where an occupier is registered to vote and where an occupier pays full Council Tax.

- 4.35 The appropriate occupancy restriction is considered to be one based upon the principles set down in the DPEA decision noted herein. The DPEA decision appears to have been followed, in the examples provided, by two predominantly rural planning Authorities: Highland Council and Dumfries and Galloway Council.
- 4.36 The existing and the proposed planning conditions are set out below.

Existing condition 9 of 10/00172/FUL

The occupation of the building shall be restricted to holiday purposes only for individual periods not exceeding 4 weeks in total within any consecutive period of 13 weeks. A register of holidaymakers shall be kept and made available for inspection by an authorised officer of the Council at all reasonable times.
Reason: A permanent residential site in this location would conflict with the established planning policy for this rural area.

PROPOSED CONDITION 9

The occupation of the building shall be restricted to holiday purposes only and it shall not be used as a sole or main residence. A register of holidaymakers shall be kept and made available for inspection by an authorised Officer of the Council at all reasonable times.