



**REPORT of  
DIRECTOR OF SERVICE DELIVERY**

to  
**NORTH WESTERN AREA PLANNING COMMITTEE  
10 FEBRUARY 2021**

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| <b>Application Number</b>                             | <b>20/01154/FUL</b>   |
| <b>Location</b>                                       | Barns Adjacent to Mosklyns Farm, Chelmsford Road, Purleigh  |
| <b>Proposal</b>                                       | Retention of existing dwelling.   |
| <b>Applicant</b>                                      | Mr & Mrs Strathern  |
| <b>Agent</b>  | -   |
| <b>Target Decision Date</b>                           | 14.01.2021  |
| <b>Case Officer</b>                                   | Hayleigh Parker-Haines  |
| <b>Parish</b>   | <b>PURLEIGH</b>   |
| <b>Reason for Referral to the Committee / Council</b> | Member Call In by Councillor Mrs J L Fleming<br>Reason: D1A, D1E, S1.12 and S8<br><br>Resubmitted to the Committee following consultation with the Monitoring Officer |

**1. PURPOSE OF REPORT**

- 1.1 This report has been prepared with the purpose of providing Members with an update which, in Officers' view, is considered material to the determination of application 20/01154/FUL which members resolved to approve contrary to Officer's recommendation, subject to conditions to be approved in consultation with the Chairman and Ward Members, on the 13 January 2021. The committee report can be found at **APPENDIX 1** to this report. This report is presented having regard to provisions within the Town and Country Planning Act 1990 (as amended), sec 70(2).

**2. APPLICATION HISTORY**

- 2.1 The Area Planning Committee, in carrying out the functions of the Local Planning Authority (in this case, the determination of a planning application) are bound by the Town and Country Planning Act 1990 as amended, and any relevant subordinate legislation. Members of the Area Planning Committee:
- are required to make decisions having regard to the development plan for the area (the Maldon Local Development Plan 2017).
  - must have regard to the report of Officers' submitted to that Area Planning Committee in carrying out their duty in making a decision on the recommendation in that report, having regard to the policies and any other matters considered material to that proposal and as set out in the report (the material considerations).

- are, however, not bound to follow Officers’ recommendations and can give different weight to different aspects as they understand the proposal, having regard to development plan policies and material considerations.
- 2.2 In this case, on the basis of the Officer’s report, Members determined to approve the proposal contrary to Officers’ recommendation on the basis of the policies within the report and the weight they gave to the material considerations set out therein and any other matters that they considered to be material to the proposal. The draft reason for approval states:
- ‘Since the determination of the last planning application the Council is no longer able to demonstrate a 5 Year Housing Land Supply. This is considered to weigh in favour of the proposed development. Furthermore, the previous reason for refusal regarding private amenity space has now been overcome’*
- 2.3 The Committee had resolved to approve the application, but at this time a formal decision of the Council, in the form of a decision notice, has not been issued. The decision will not be made, by the Council, until the decision notice has been prepared, signed and issued following due process. In part that time, and due process, is accounted for by confirming the reason for approval and any conditions proposed with the Chairman of the Area Planning Committee and Ward Members. After the Area Planning Committee on 13 January 2021, an appeal decision (**APPENDIX 2**) was received that is similar in nature to this application.
- 2.4 It is accepted that Section 70(2) of the Town and Country Planning Act 1990 (as amended) requires a planning authority, in dealing with an application, to have regard (among other things) to all ‘material considerations. It is incumbent therefore that, any new and relevant material consideration should be fully considered by the ‘decision maker’ prior to the determination of an application. This includes when additional information is made available in the period between an Area Planning Committee coming to a resolution and the decision notice being issued. This stance is supported in the case of *Kides V. South Cambridgeshire District Council* whereby the Judge provided clarity in regard to section 70(2) of the Town and Country Planning Act 1990, which required a planning authority, in “dealing with” an application, to “have regard to” (among other things) all “material consideration”.
- 2.5 The judge determined that *“dealing with” includes anything done by or on behalf of the planning authority which bears in any way, and whether directly or indirectly, on the application in question. “dealing with” is not limited to the particular acts of the authority in granting or refusing permission. In temporal terms, the first act of a planning authority in “dealing with” an application will be its receipt of the application; and its final act will normally be the issue of the decision notice’.*
- 2.6 He opined that a consideration is “material”, if it is relevant to the question whether the application should be granted or refused; that is to say if it is a factor which, when placed in the decision-maker’s scales, would tip the balance to some extent, one way or the other. In other words, it must be a factor which has some weight in the decision-making process, although plainly it may not be determinative. The test must, of course, be an objective one in the sense that the choice of material considerations must be a rational one, and the considerations chosen must be rationally related to land use issues.

- 2.7 In developing his position, he further stated that ‘an authority’s duty to “have regard to” material considerations is not to be elevated into a formal requirement that in every case where a new material consideration arises after the passing of a resolution (in principle) to grant planning permission but before the issue of the decision notice there has to be a specific referral of the application back to committee.’
- 2.8 The above decision provides clear guidelines in relation to where new material considerations arise before the decision notice is issued. Stating *‘where the delegated officer who is about to sign the decision notice becomes aware (or ought reasonably to have become aware) of a new material consideration, section 70(2) requires that the authority have regard to that consideration before finally determining the application. In such a situation, therefore, the authority of the delegated officer must be such as to require him to refer the matter back to committee for reconsideration in the light of the new consideration. If he fails to do so, the authority will be in breach of its statutory duty’*.
- 2.9 Taking into account the above, on 14 January 2021 an appeal decision was issued by the Planning Inspectorate which is considered to be a material consideration of great weight in the determination of this application. This appeal decision can be found at **APPENDIX 2** to this report.

### **3. KEY POINTS**

- 3.1 As detailed within the original Officer report attached at **APPENDIX 1**, application 20/01154/FUL seeks planning permission to regularise the change of use of an agricultural barn to C3 residential. The change of use was allowed under the terms of a prior approval application 15/01096/COUPA. However, to date these works have yet to be carried out and therefore fail to comply with condition one attached to this prior approval consent. Furthermore, the conversion has not been carried out in accordance with the plans approved as part of the prior approval application and therefore, the previous prior approval consent does not provide a fall-back position for residential development on this site.
- 3.2 Appeal APP/X1545/W/18/3216373 (**APPENDIX 2**) relates to a Section 73A application (an application for works carried out not in accordance with an approved plan on a decision notice) for the change of use of barns to three dwellinghouses. This appeal decision relates to a development carried out not in accordance with the plans as approved by the prior approval application and therefore, the Inspector determined that the previously granted prior approval provided no fall-back position for residential development on the site. For clarity, an approval under permitted development by way of the Prior Approval process, is an approval under a Development Order (the General Permitted Development Order 2015 as amended (GPDO)), and not the Development Plan (in this case the Maldon Local Development Plan 2017). While an approval under a Development Order may be a material consideration, in this case (as is the case with the application the subject of this determination see paragraph 3.1 above), the development was not carried out in accordance with the Prior Approval (see also paragraph 3.5 below).

3.3 It should be noted that like the subject dwelling seeking planning permission, the three dwellings the subject of the decided appeal at **APPENDIX 2** are all occupied. During the Committee meeting Members resolved to approve the development due to the Council's inability to demonstrate a Five Year Housing Land Supply and therefore awarded significant weight to this consideration in favour of the subject development. It is considered pertinent to note that the following points of the attached appeal decision which directly relate to the reasons for approval:

- Point 26 of the appeal decision states; 'The prior approval scheme was not commenced and then carried out. The three year time limit for completion of the prior approval scheme has not and cannot be met. That being the case the prior approval is no longer extant'. Just like the dwelling the subject of this application, the development the subject of the appeal had not been carried out in accordance with the plans as approved by the prior approval. The Inspector concluded that the prior approval was no longer extant and, as such, did not form a basis for the **principle** of residential development in this location, as was the case with the current application before Members.
- Point 71 of the appeal decision states; A prior approval under the GPDO for a material change of use under Class Q is for a specific proposal that does not fall within any of the exceptions or limitations and which meets all the stated conditions. Unlike an outline planning permission, the prior approval did not establish the acceptability of a residential use on the appeal site and allow for details to be submitted at a later date.' This point provides further clarification in relation to the purpose of a prior approval application under Class Q. The principle of the development of the site and the sustainability of a site are not considerations (let alone material considerations) under a prior approval application and therefore any prior approval application does not result in the principle of a residential use of the site or the sustainability of the site being accepted. This is the distinct and fundamental difference between development under a Development Order to which policies and guidance do not apply, and development by virtue of a planning permission in accordance with the Development Plan (Local Plan) and the National Planning Policy Framework (NPPF 2019). Furthermore, as stated above, due to the prior approval application no longer being extant, there is no fall-back position for the use of the site as residential in the form which was approved. Again, and to be clear, no principle exists for the use of the site as residential under a prior approval application.
- Point 73 of the appeal decision states; 'The 2016 prior approval has no weight and is not a factor that weighs in favour of the built development.' 'There is no valid fallback position.' As previously stated, this is considered to be the same circumstances as the development the subject of the application before Members.
- Point 84 of the appeal decision states; 'The final element of Policy S1 in effect adopts the tilted balance expressed in the Framework. The most recent annual update of the District's five year housing land supply shows a slight shortfall at 4.90 years. This follows on from the years when a five year supply of deliverable housing sites has been demonstrated. A comparison of the

position in 2019/20 with 2018/2019 indicates that the change is part due to a reduction in anticipated supply from major sites of 10+ dwellings and strategic allocations. Small sites and windfalls are in a healthy position. The record on completions shows an upward trend. With these factors in mind I attach limited weight to the identified shortfall in this case.’ As stated above, members attached significant weight to the Councils inability to demonstrate a Five Year Housing Supply. However, the findings of the Inspectorate are wholly different to this whereby due to the limited shortfall, limited weight should be afforded to this. Members are also reminded that, as stated above, the appeal properties are currently occupied, and their circumstances and human rights were taken into consideration by the Inspector.

#### **4. CONCLUSION**

- 4.1 All resolutions for planning applications should be based on evidence. As case law has shown (Stringer) the remit for what can be a material consideration is extensive. However, (Tesco) it is also a basic point of planning law that the weight to be attributed to a material consideration is up to the decision maker as long as it is not Wednesbury Unreasonable. Case law also sets out the principle and considerations to be taken into account when new material is presented following a resolution to approve and before the issuing of a decision notice, and the requirement of what is incumbent on the Local Planning Authority to have regard to this information where it considers it is material to do so. The above-mentioned appeal decision provides a material consideration that should be afforded significant weight in the determination of this application. This appeal decision is considered to provide further justification for the refusal of this application in line with the Officers recommended reason for refusal as found below:

*‘The proposed development, by reason of its location and design would substantially alter the character of the area and have an unacceptable visual impact on the countryside through the urbanisation and domestication of the site. As such the proposal is contrary to the National Planning Policy Framework's "presumption of sustainable development". The poor sustainability credentials of the site and its locality would significantly and demonstrably outweigh the benefits of the proposal when assessed against the compliant policies of the Maldon District Local Development Plan (2017) including policies S1, S8, D1 and H4 and Government advice contained within the National Planning Policy Framework (2012)’.*

- 4.2 Should Members be minded to Approve the application, the following conditions are recommended:

- 1 Unless within six months of the date of this decision, a scheme is provided detailing the siting, height, design and materials of the treatment of all boundaries including existing hedging, gates, fences, walls, railings and piers, including a timetable for implementation, has been submitted to and approved in writing by the Local Planning Authority the occupation of the dwelling, shall cease until such time as a scheme is submitted and approved in writing by the local planning authority. The details approved shall be implemented as approved.

REASON In the interest of local amenity and in accordance with policy D1 of the Maldon District Local Development Plan

- 2 Unless within six months of the date of this decision details of both hard and soft landscape works, to be carried out shall have been submitted to and approved in writing by the Local Planning Authority the occupation of the dwelling, shall cease until such time as a scheme is submitted and approved in writing by the local planning authority. These details shall include the layout of the hard landscaped areas with the materials and finishes to be used and details of the soft landscape works including schedules of shrubs and trees to be planted, noting the species, stock size, proposed numbers/densities and details of the planting scheme's implementation, aftercare and maintenance programme. The hard landscape works shall be carried out as approved and within a timeframe agreed as part of the submission. The soft landscape works shall be carried out as approved within the first available planting season (October to March inclusive) after the date of the details being agreed. If within a period of five years from the date of the planting of any tree or plant, or any tree or plant planted in its replacement, is removed, uprooted, destroyed, dies, or becomes, in the opinion of the Local Planning Authority, seriously damaged or defective, another tree or plant of the same species and size as that originally planted shall be planted in the same place, unless the Local Planning Authority gives its written consent to any variation.

REASON To ensure that the details of the development are satisfactory in accordance with policy D1 of the Maldon District Development Local Plan and the guidance contained in the Maldon District Design Guide Supplementary Planning Document (SPD).

- 3 Unless within nine months from the date of this decision, details of the vehicle parking area to be associated with the dwelling have been submitted and approved in writing by the Local Planning Authority and the approved scheme implemented the occupation of the dwelling shall cease until such time that a scheme has been submitted and approved in writing by the local planning authority. The approved scheme shall be retained in this form at all times. The vehicle parking shall not be used for any purpose other than the parking of vehicles that are related to the use of the development.

REASON To ensure that suitable onsite parking provision is provided in the interests of highway safety and that appropriate parking is provided in accordance with policies D1 and T2 of the approved Local Development Plan.

- 4 Unless within six months of the date of this decision, the private footpath as shown on plan MOCM36QP-SP1.0 has been constructed in accordance with the details as approved, the occupation of the dwelling shall cease until such time that this footpath has been constructed.

REASON To ensure the site is accessible by sustainable, safe modes of transport, in accordance with policy T2 of the LDP

- 5 Notwithstanding the provisions of Article 3 of the Town & Country Planning (General Permitted Development) Order 2015 (or any Order amending, revoking or re-enacting that Order) no garages, extensions, alterations or openings to any elevations, separate buildings, or fencing shall be carried

out/erected within the site without planning permission having been obtained from the Local Planning Authority.

REASON To protect the character and appearance of the area in accordance with policies D1 and H4 of the Maldon District Local Development Plan.