



**REPORT of
DIRECTOR OF SERVICE DELIVERY**

to
**SOUTH EASTERN AREA PLANNING COMMITTEE
25 MAY 2023**

Application Number	23/00266/VAR
Location	Paton Place, Nipsells Chase, Mayland
Proposal	Variation of condition 2 (plans) and removal of condition 13 (dormer windows) on approved Planning Permission 21/01240/VAR (Variation on condition 2 and removal of condition 8 on approved planning application 21/00628/FUL (Proposed construction of a single storey self build live/work dwelling)).
Applicant	Mr and Mrs Kenny Paton
Agent	None
Target Decision Date	31.05.2023
Case Officer	Devan Hearnah
Parish	MAYLAND
Reason for Referral to the Committee / Council	Councillor / Member of Staff

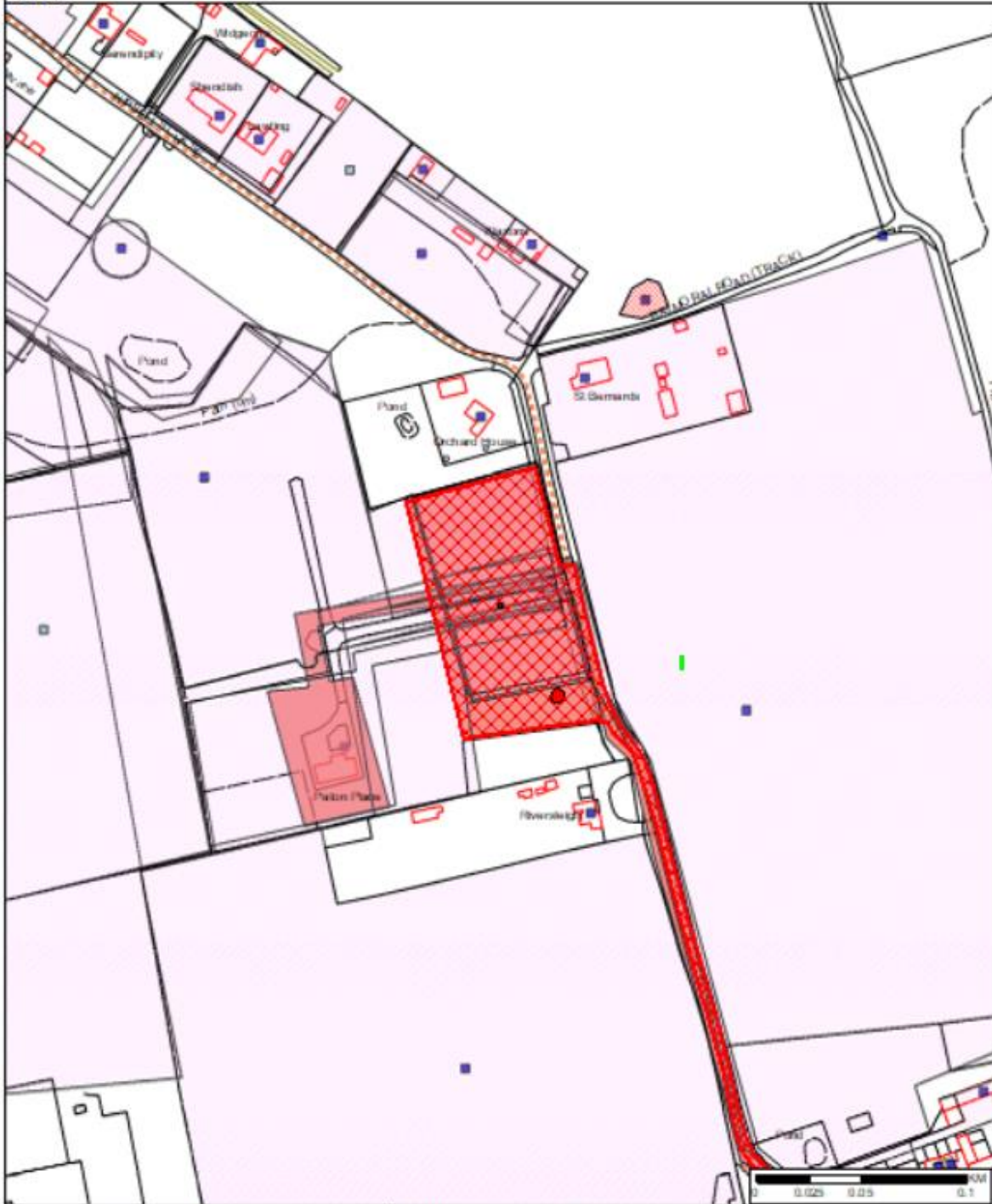
1. RECOMMENDATION


REFUSE for the reasons as detailed in Section 8 of this report.

2. SITE MAP

Please see below.

23/00266/VAR
SEAC



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	Organisation:	Maldon District Council
	Department:	Department
	Comments:	Not Set
	Date:	24/04/2023
	MSA Number:	100018588

3. SUMMARY

3.1 Proposal / brief overview, including any relevant background information

Application site

- 3.1.1 The application site is located to the west of Nipsells Chase to the north of the settlement boundary of Mayland and is a designated wildlife site. The site is currently vacant with the exception of an access track along the northern edge of the site. Access is taken from the west of Nipsells Chase, which adjoins the access track and leads to a wider field where planning permission has been granted for a barn, stable and ménage. The barn has been erected to the southeast of the application site. The majority of the wider site is a largely open area of grassed land with a number of young trees. The edges of the site feature denser and more mature trees and hedgerow soft landscaping. To the north of the site is the residential property of Orchard House and to the south is the residential property of Riversleigh.

Proposal

- 3.1.2 The application seeks a variation to condition 2 of application 21/01240/VAR and also the removal of condition 13, which was approved by the Council on 08 April 2022 following the resolution to grant planning permission by the South Eastern Area Planning Committee. For completeness the previous Committee report is provided as **APPENDIX 1** to this report. Conditions 2 and 13 state:

'2 CONDITION

The development hereby permitted shall be carried out in accordance with the following approved plans and documents: 1056/03 Rev B, 1056/04A, 1056/05, 1056/06A, 1056/07A, Arboricultural Method Statement 27 September 2021.

REASON

To ensure that the development is carried out in accordance with the details as approved.'

'13 CONDITION

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 dormer window or other form of addition or opening shall be constructed in the roof of the building hereby permitted 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, S8, D1 and H4 of the Maldon District Local Development Plan and the guidance contained within the National Planning Policy Framework.'

- 3.1.3 Specifically, the proposal seeks to vary the plans listed in condition 2 and remove condition 13 in order to add first floor accommodation to the previously approved dwelling. The main changes would involve the following:
- Alteration to materials to include brickwork to a height of 1m.
 - Addition of two dormer windows on the front roof slope

- Alteration to the style and size of ground floor windows and style of the doors on the front elevation.
- Change to the design of fascias
- Balustrade added to the covered porch area at the front of the dwelling.
- Addition of two dormer windows and two roof lights on the northern elevation as well as alterations to the window style and design.
- Addition of two dormer windows and four rooflights on the southern elevation as well as alterations to the window style and design.
- Removal of chimney on the rear elevation. Alterations to fenestration design and sizes as well as two additional ground floor windows.
- Addition of one dormer window, two roof lights, a balcony and two Juliet balconies to the first floor on the rear elevation.
- Internal alterations would include the addition of a cake studio, pantry and kitchenette at ground floor in place of the master bedroom and bedroom 2.
- The first floor would include four bedrooms, a living space, three en-suites, a kitchen, a laundry/storage room and a balcony. The number of bedrooms would therefore increase from two to four. This is considered in the paragraph below.

3.1.4 The floor plans only show three bedrooms, although one of the double bedrooms has been labelled as 'bedroom 4'. Furthermore, the room labelled as 'Laundry/Storage Room' could easily accommodate a bedroom, with it being just slightly smaller than 'Bedroom 4'. As the 'Laundry/Storage Room' could easily accommodate a bedroom it is reasonable to expect that this room could be used as a bedroom by future occupiers. Therefore, the proposed changes are considered to create a four-bedroom dwelling and it is on this dwelling size that the application should be assessed.

3.1.5 The application which has been applied to be varied was in fact a variation of an original permission (21/00628/FUL). As part of that application, it was deemed that the development was not a live work unit in planning terms because it only contained a study which was not an unusual situation in any residential dwelling. Therefore, the addition of the workspace at ground floor will need to be fully justified in order for the development to be granted. However, firstly it must be considered whether the application falls within the remit of a S73 application which will be assessed below.

3.1.6 It is noted that the proposed Site Plan (1056/07) does not show the siting of the proposed dormer windows and that the location plan 1056/06 shows an additional outbuilding on the western edge of the land within the Applicants' ownership. However, this is not considered to prejudice the application as the dormers are clearly shown on the elevation plans and the other building does not form part of this application.

3.2 Conclusion

3.2.1 The amendments to the application would involve the addition of a first floor of accommodation, which would be in direct conflict with the original description of works which set out that the development is to be of single storey. Therefore, the proposal does not relate to the same development. Consequently, and in accordance with *Finney v Welsh Ministers & Ors (Rev 1)* [2019] EWCA Civ 1868 (case law confirming that a Section 73 application cannot be used where the amendment involves a change in the description of the development) the Council cannot legally grant permission under a S73 application. To do so would result in the decision being ultra vires.

4. MAIN RELEVANT POLICIES

4.1 National Planning Policy Framework 2021 including paragraphs:

- 7 Sustainable development
- 8 Three objectives of sustainable development
- 10-12 Presumption in favour of sustainable development
- 38 Decision-making
- 47-50 Determining applications
- 55-58 Planning conditions and obligations
- 60-80 Delivering a sufficient supply of homes
- 104-113 Promoting sustainable transport
- 119-123 Making effective use of land
- 126-136 Achieving well-designed places
- 174-188 Conserving and enhancing the natural environment

4.2 Maldon District Local Development Plan 2014 – 2029 approved by the Secretary of State:

- Policy S1 Sustainable Development
- Policy S8 Settlement Boundaries and the Countryside
- Policy D1 Design Quality and Built Environment
- Policy D2 Climate Change and the Environmental Impact of New Development
- Policy H2 Housing Mix
- Policy H4 Effective Use of Land
- Policy E1 Employment
- Policy S7 Prosperous Rural Communities
- Policy N2 Natural Environment and Biodiversity
- Policy T1 Sustainable Transport
- Policy T2 Accessibility
- Policy I1 Infrastructure and Services

4.3 Relevant Planning Guidance / Documents:

- Maldon District Vehicle Parking Standards
- Maldon District Design Guide (MDDG) (2017)
- National Planning Policy Framework (NPPF)
- National Planning Policy Guidance (NPPG)

5. MAIN CONSIDERATIONS

5.1 Principle of Development

5.1.1 Section 38(6) of the Planning and Compulsory Purchase Act 2004, Section 70(2) of the 1990 Act and paragraph 47 of the NPPF require that planning applications are determined in accordance with the Development Plan unless material considerations indicate otherwise. In this case the development plan comprises of the approved Local Development Plan (LDP).

5.1.2 Planning permission for residential development at the site was granted under the terms of application 21/00628/FUL. It would appear that as a result of the amendment to Condition 2 and removal of Condition 13 this proposal seeks to add

an additional floor of accommodation, as well as an employment element to the building and increase the bedroom numbers proposed, as well as the changes to the external appearance set out above. Therefore, the material considerations when determining this application for the variation of Condition 2 and removal of Condition 13 is whether an additional floor can be added, the employment use would be acceptable at the site, the external and internal (bedroom numbers) changes are acceptable and whether the existing conditions are legally sound and if there is any other justification submitted to warrant their removal/variation.

- 5.1.3 Firstly, it must first be determined whether the proposal falls within the parameters of a Section 73 application.

Does the proposal fall within the parameters of a Section 73 application?

- 5.1.4 Lord Justice Lewison in a recent court judgment in the Court of Appeal between John Leslie Finney and Welsh Ministers, Carmarthenshire County Council and 'Section 73 application stated that "On receipt of such an application section 73 (2) says that the planning authority must "consider only the question of conditions". It must not, therefore, consider the description of the development to which the conditions are attached. The natural inference from that imperative is that the planning authority cannot use section 73 to change the description of the development. It is notable, however, that if the planning authority considers that the conditions should not be altered, it may not grant permission with an altered description but subject to the same conditions. On the contrary it is required by section 73 (2) (b) to refuse the application. That requirement emphasises the underlying philosophy of section 73 (2) that it is only the conditions that matter."
- 5.1.5 The above judgement has been further endorsed recently in the case of *Armstrong v Secretary of State for Levelling-Up, Housing and Communities & Anor* [2023] EWHC 142 where the High Court stated that '*section 73 is clearly intended to be a provision which enables a developer to make a section 73 application to remove or vary a condition, provided of course that the application does not conflict with the operative part of the planning permission*'
- 5.1.6 On the basis of the above judgements, it is clear that permission for a Section 73 application shall only be granted for the same development and any variation shall only relate to the conditions imposed to the original permission.
- 5.1.7 The description of development relating to application 21/01240/VAR was as follows:

'Variation on condition 2 and removal of condition 8 on approved planning application 21/00628/FUL (Proposed construction of a single storey self build live/work dwelling).'
- 5.1.8 The description of development above clearly outlines that the development would be of single storey. Therefore, the proposed amendments would be in conflict with this condition by adding an additional storey of accommodation. Consequently, although the variation would only relate to conditions imposed to the original permission, the proposal does not relate to the same development. As such, the Local Planning Authority (LPA) are not in a position to be able to legally grant the proposed changes under a S73 application as they do not have the power to alter the description of a development.
- 5.1.9 Given that the application cannot be granted on the basis of the application that has been submitted, it is not necessary for an additional assessment considering the suitability of the proposed changes to the site to be outlined within this report.

6. ANY RELEVANT SITE HISTORY

- **17/00736/FUL** - Proposed construction of a new detached single storey dwelling – Withdrawn
- **17/01043/AGR** - Prior notification for permeable hardstanding, with edging stones. – Refused 12.10.2017
- **17/01060/DD** - T1 - Elm - Fell. T2 - Wild Pear - Fell. T3 - Wild Pear - Fell. Can works proceed under 5-day D&D **5 Day Notice** - Approved 16.10.2017
- **18/00816/HRN** - Hedgerow removal notice for clearance either side of entrance. Area 1 (Southern side) - 2.5m. Area 2 (Northern side) - 3m. – Allow
- **21/00102/FUL** - Construction of a single storey dwelling – withdrawn
- **21/00102/FUL** - Construction of a single storey dwelling. Withdrawn
- **21/00628/FUL** - Proposed construction of a single storey self-build live/work dwelling. Approved 15.10.2021
- **21/01240/VAR** - Variation on condition 2 and removal of condition 8 on approved planning application 21/00628/FUL (Proposed construction of a single storey self build live/work dwelling). Discharged 08.04.2022
- **22/05055/DET** - Compliance with conditions notification 21/01240/VAR (Variation on condition 2 and removal of condition 8 on approved planning application 21/00628/FUL (Proposed construction of a single storey self build live/work dwelling)) Condition 3 - Materials, Condition 4 - Landscaping, Condition 5- Boundary Treatment, Condition 6 - Cycle Parking, Condition 7 - Parking Spaces, Condition 8 - Surface Water Drainage, Condition 9 - Foul Drainage, Condition 15 - Biodiversity Strategy, Condition 16 – Part Discharged/ Part Refused 25.08.2022
- **23/05015/DET** - (Proposed construction of a single storey self build live/work dwelling) Condition 3 - Materials, Condition 4 - Hard and soft Landscaping, Condition 5- Boundary Treatment, Condition 6 -Cycle Parking, Condition 7 - Parking spaces, Condition 9 - Surface water drainage, Condition 15- Biodiversity Enhancement and Mitigation. Condition 16- Biodiversity Enhancement Strategy for Protected and Priority species. Conditions Discharged.

Applications within the wider site:

- **18/00280/FUL** - Construction of an apple storage barn – Approved 23.05.2018
- **18/00839/FUL** - Change of use of land to equestrian and erection of building to be used for storage of agricultural machinery and stabling of six horses – Approved 20.06.2019
- **20/00345/FUL** - Variation of condition 2 and 8 on approved planning permission 18/00839/FUL (Change of use of land to equestrian and erection of building to be used for storage of agricultural machinery and stabling of six horses) – Approved 10.07.2020
- **20/00733/FUL** - An equestrian arena to ride in the wet winter months. The arena is to be made of an equestrian sand mix. Approved 12.11.2020
- **23/00076/FUL** - Change of use from agricultural building to 2-bedroom bungalow (C3 Use) and alterations to fenestration. Pending Consideration

7. CONSULTATIONS AND REPRESENTATIONS RECEIVED

7.1 Representations received from Parish / Town Councils

Name of Parish / Town Council	Comment	Officer Response
Mayland Parish Council	No response received at the time of writing this report.	Noted

7.2 Statutory Consultees and Other Organisations

Name of Statutory Consultee / Other Organisation	Comment	Officer Response
Local Highways Authority	No response received at the time of writing this report	Noted - given that the access has not changed since the original application and the increase in traffic as a result of the employment element is unlikely to have an impact on the local highway network, no response is considered necessary.

7.3 Internal Consultees

Name of Internal Consultee	Comment	Officer Response
Environmental Health	No objection subject to the inclusion of foul and surface water drainage conditions	Noted if the application were to be approved these conditions would be included and updated where necessary to reflect changes since the previous grant of planning permission on the original application.

7.4 Representations received from Interested Parties

7.4.1 **One** letter of representation has been received for this report. The reasons are summarised below:

Objecting Comment	Officer Response
<ul style="list-style-type: none">- A new application is required as the dwelling is no longer single storey.- Impacts on the character and appearance of the area.	<ul style="list-style-type: none">- Addressed at section 5.1- Noted. However, it is not relevant to address this matter at this stage because Officers view is that the application cannot be

<ul style="list-style-type: none"> - Potential for other rooms in the building to be used as additional bedrooms. - Lack of information in respect of the 'cake studio' which is substantially larger than the previous home office. - If permission is granted a condition should be imposed to prevent any future sub-division of the property. 	<p>determined on the basis it does not fall within S73 of the TCPA.</p> <ul style="list-style-type: none"> - Addressed at section 5.1 - Noted. However, it is not relevant to address this matter at this stage because Officers view is that the application cannot be determined on the basis it does not fall within S73 of the TCPA. - Noted. However, it is not relevant to address this matter at this stage because Officers view is that the application cannot be determined on the basis it does not fall within S73 of the TCPA.
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8. REASON FOR REFUSAL.

1. The amendments to the application would involve the addition of an additional floor of accommodation. These changes would not be in accordance with the original description of works and therefore, the proposal does not relate to the same development. Consequently, and in accordance with *Finney v Welsh Ministers & Ors (Rev 1) [2019] EWCA Civ 1868* the Council cannot legally grant permission under a S73 application.