



**REPORT of
DIRECTOR OF SERVICE DELIVERY**

to
**SOUTH EASTERN AREA PLANNING COMMITTEE
28 JUNE 2023**

Application Number	23/00076/FUL
Location	Land North West of Riversleigh, Nipsells Chase, Mayland
Proposal	Change of use from agricultural building to 2 bedroom bungalow (C3 Use) and alterations to fenestration
Applicant	Mr & Mrs Kenny Paton
Agent	None
Target Decision Date	13.04.2023
Case Officer	Devan Hearnah
Parish	MAYLAND
Reason for Referral to the Committee / Council	Member of the Council

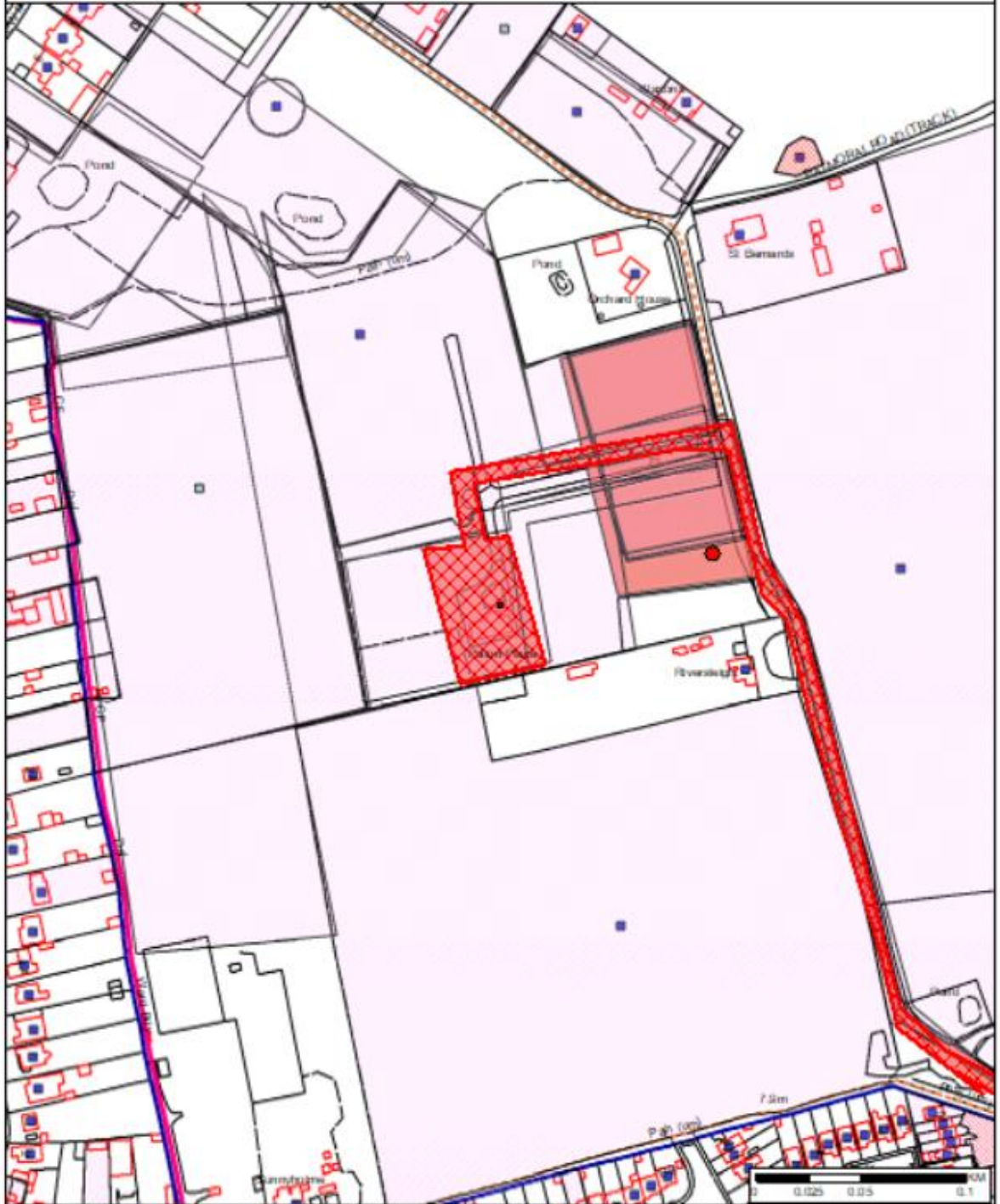
1. **RECOMMENDATION**

REFUSE subject to the reasons set out in section 8.

2. **SITE MAP**

Please see below.

23/00076/FUL
SEAC



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Maldon District Council 100018588 2014



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Scale: 1:2,500

Organisation: Maldon District Council

Department: Department

Comments: Not Set

Date: 25/04/2023

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 on the western side of Nipsells Chase within a rural area outside the defined settlement boundaries of Mayland and is a designated wildlife site. The wider site was an established Orchard until the 1970s, but was cleared in more recent years of almost all trees and is grassed over with the exception of a building that was granted planning permission under application 18/00280/FUL and varied under 20/00574/FUL as an apple storage barn. The site also includes an access track taken from the western side of Nipsells Chase, running east to west and then north to south onto a hardstanding at the front of the building. There are also a number of young trees planted to the southwest of the site.
- 3.1.2 The surrounding area of the application site is largely undeveloped. There are some examples of dwellings to the north and south of the application site and a dwelling has been granted under the terms of application 21/00628/FUL. There is also an extant permission (20/00345/FUL) for a stable building within the northern part of the wider site however, this wider area appears to be used for agricultural purposes. Further to the west of the application site is a woodland.

Proposal

- 3.1.3 Planning permission has been sought for a change of use from an agricultural building to a 2-bedroom bungalow, as well as alterations to the fenestration. The main changes to the building approved under application 20/00574/FUL are:
- The addition of a window on the south elevation and one on the north elevation to serve en-suites.
 - Re-configuration of the internal layout, including the addition of walls to provide living space which accommodates two en-suite bedrooms, a living room, bathroom, utility and kitchen/diner area.
- 3.1.4 Based on an Enforcement site visit undertaken, the internal works have already taken place.

3.2 Conclusion

Based on the information submitted and available to the Council and having regard to the design, appearance, layout, character and purpose of the application building, it has not been demonstrated that the building, as constructed, constitutes an 'apple storage barn' as authorised by the grant of planning permission 20/00574/FUL. Furthermore, it has not been demonstrated that the use of the building for agricultural purposes was more than di minimis and therefore, the use should be disregarded in accordance with the 'Kwik-Save' case. Consequently, the building is unauthorised development, and the Council cannot reasonably approve an application for a permission for a 'change of use' of a building where the construction of the building is unauthorised.

4. MAIN RELEVANT POLICIES

Members' attention is drawn to the list of background papers attached to the agenda.

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
- 54-58 Planning conditions and obligations
- 84- 85 Supporting a prosperous rural economy
- 92 – 103 Promoting healthy and safe communities
- 104-113 Promoting sustainable transport
- 119-123 Making effective use of land
- 126-136 Achieving well-designed places
- 152 – 169 Meeting the challenge of climate change, flooding and coastal change
- 174-188 Conserving and enhancing the natural environment

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

- S1 Sustainable Development
- S8 Settlement Boundaries and the Countryside
- D1 Design Quality and Built Environment
- D2 Climate Change and Environmental Impact of New Development
- E1 Employment
- E4 Agricultural and Rural Diversification.
- H2 Housing Mix
- H4 Effective Use of Land
- N2 Natural Environment and Biodiversity
- I1 Infrastructure and Services
- T1 Sustainable Transport
- T2 Accessibility

4.3 Relevant Planning Guidance / Documents:

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

5. MAIN CONSIDERATIONS

5.1 Principle of Development

Does the development fall within a change of use?

- 5.1.1 Planning permission has previously been granted for the construction of an apple storage barn at the site (20/00574/FUL). It is acknowledged that the exterior of the building has been constructed largely in accordance with the previously approved plans, albeit there are now additional windows being proposed as part of this application. However, in order to address whether or not the application represents a change of use, the Council must determine, as a matter of fact and degree, whether the building as erected constitutes an 'apple storage barn' as allowed under the original permission. To determine this the Council needs to determine if the building is authorised. In considering this, regard should be had to the design, appearance, layout, character and purpose of the building as well as its use. If the Council concludes that a dwellinghouse has in fact been constructed, even where it is visually

compliant with the plans, then it cannot be concluded that the previous permission for an 'apple storage barn' is extant.

- 5.1.2 The Council has sought independent legal advice on the above matter, which has been factored into the assessment below.
- 5.1.3 There are three relevant cases to consider in respect of this matter:
- Sage v Secretary of State for the Environment, Transport and the Regions [2003] 1 WLR 983.
 - Welwyn Hatfield BC v SSCLG [2011] 2 AC 304
 - Kwik-Save Discount Group Ltd v Secretary of State for Wales (1981) 42 P&CR 166.
- 5.1.4 In the 'Sage' case an enforcement notice was issued for the erection of a dwellinghouse. The Appellant appealed on the grounds that the building was an agricultural building that did not require planning permission and that it was substantially complete four years prior to the notice. The appeal was dismissed on the basis that the building was not agricultural but a dwellinghouse given its layout and appearance. In reaching this conclusion the Inspector considered how the building was constructed with domestic and not agricultural features. The materials, the fenestration and the inclusion of cavity block walls were indicative of a residential building rather than agricultural. Emphasis was placed on the need to assess a structure based on its physical and design features, noting that *'Keeping a pig in the sitting-room or hens in the kitchen does not turn a dwelling house into an agricultural building even if the humans move out... The starting point for considering the permitted use of a new structure is the character of the building for which permission has been given... (section 75(3)): 'the permission shall be construed as including permission to use the building for the purpose for which it is designed.'*
- 5.1.5 In conclusion it was found that given the layout and appearance the building was not agricultural and was not designed as such.
- 5.1.6 This is relevant to this application because the building has a clearly residential appearance and has been constructed to a standard that could provide comfortable living accommodation rather than reflecting what would be considered as an agricultural use. Whilst the external appearance of the building and the materials used in its construction have not been substantially altered from the approved scheme, the building has been built to a residential standard and has a residential appearance. The Applicant has acknowledged within the planning statement that the insulation, electrics, and foul water mains have already been implemented to a residential standard. The Applicant has tried to justify the level of insulation stating that heating, the hot water boiler and bathroom were needed to keep the fruit at the correct temperature and washing. However, the building features a number of waste and water pipes within multiple rooms, that would go over and above what would reasonably be considered necessary for an apple storage barn. Likewise, whilst it is acknowledged that the apples would need to be kept at an even temperature, the Royal Horticultural Society suggest that temperatures should be between 2.8 degrees Celsius and 7 degrees Celsius. Full residential type insulation is unlikely to be necessary to maintain these temperatures and therefore, the building, given its layout and appearance, is not agricultural.
- 5.1.7 The 'Welwyn' case relates to a permission to construct a hay barn which was restricted by a condition to ensure that it was only used for the storage of agricultural products. A similar condition applies to the barn permission (20/00574/FUL). Condition 3 of that permission states that the building shall only be used for the

purposes related to or ancillary to agricultural operations occurring at the application site. The completed building in the Welwyn case had the external appearance of a hay barn but was fitted out internally as a dwelling. A certificate of lawfulness after the relevant four-year period was refused on the basis that the building was not a dwellinghouse. The Secretary of State allowed the appeal but found that the building had always been intended to be used as a dwellinghouse, with the Applicant deliberately deceiving the Local Planning Authority (LPA). The matter went to the Supreme Court who held that the construction of the building had been begun and completed as a dwelling and not as the barn originally permitted. Therefore, it was found that there had been no change of use from the permitted barn to the residential use.

- 5.1.8 The relevance of the abovementioned case to this proposal is that from the exterior of the building the development had largely been built in accordance with the plans and therefore, would appear as the development as approved. However, it is clear from the internal layout, the level of facilities and the finish of the interior including features such as a fully equipped kitchen, laminate style flooring, skirting boards and window ledges, that the building was not intended to function as an agricultural building internally. There is also a sofa, coffee table, rugs and doormats inside the building which is more akin to a residential use rather than agricultural. There is a small amount of agricultural and equestrian equipment, being stored in the building but this was being stored on cardboard boxes in what appeared as an attempt to protect the flooring, something which is not common practice in a barn. Likewise, site visit photographs also show that residential items were likely being stored as labels on storage boxes contain labels such as 'boys toys', 'Lego' 'Make-up' and 'cricket'.
- 5.1.9 It is claimed that the kitchen was bought on sale for £150. The Applicant has advised that there is a receipt that could be submitted, albeit this just lists the sale as 'sale item'. Therefore, this could be for any of the individual items and doesn't demonstrate it is for the kitchen as a whole. Regardless of the cost, the fully equipped residential kitchen is over and above what would reasonably be required for an agricultural use and would no doubt take up much needed space within an agricultural unit. On the basis of this evidence, the building as constructed is considered a dwellinghouse.
- 5.1.10 The above is further supported by Building Control records which show a photograph demonstrating that the double doors to the kitchen diner and the wall separating the living room and diner were in place at the construction stage. This point also goes back to the 'Sage' case of the building not being designed for an agricultural purpose. Therefore, the building has not been constructed in accordance with the grant of planning permission, despite the external appearance and therefore, there is no extant permission at the site.
- 5.1.11 The Judge in the 'Welwyn' case went on to say that *'Even assuming that it could be shown that the development of a hay barn was 'begun' with section 56(2), this cannot assist on the essential question whether the building as constructed and completed was a barn, so that the only breach was in its use as a dwellinghouse contrary to its stated purpose... Even if the planning permission were to be treated as having been initiated or begun, it was not implemented in any further or substantial respect; so the building constructed was not a building which could be regarded as having any permitted use.'* The Supreme Court therefore held that there was no change of use and that there was a public policy reason to disapply the time limit in cases of deliberate concealment.
- 5.1.12 In relation to this application, it would appear that the permission for the barn had not been implemented any further than the construction of the exterior walls or in any

substantial respect. Therefore, the building has no permitted use and as such a change of use cannot be applied.

5.1.13 The last case is 'Kwik-Save' related to a permission for the erection of a petrol station, car wash, car showroom and tyre fitting bay. The 20,000 ft floorspace showroom was erected and five cars brought to the showroom for sale, with advertising in two newspapers. The showroom operated for one month before the operation ceased. It was then used as a retail discount store. An appeal against an enforcement notice alleging a change of use from use as vacant land for the purpose of a retail discount store, relied on the permitted development order, which at that time enabled a change of use of premises from 'use as a shop for the sale of motor vehicles' to use as a shop for any purpose.

5.1.14 The appeal was dismissed, with the Inspector holding that the use '*amounted to no more than a token use of the appeal premises as a shop for the sale of motor vehicles, so minimal as to be of no planning significance*'. *In a court challenge the Claimant accepted that the use was 'a device in order to bring themselves within the terms of the order'. The Divisional Court found that 'the very fact that a device was resorted to by the Appellants makes me suspect the use to which it is said and the land was put. The Inspector and the Secretary of State found that it was de minimis on the facts. I would not disagree with that, and in my judgement if a use is a de minimis use it is not a use within the Order.'*

5.1.15 The Court of Appeal agreed and set out three questions of mixed law and fact:

- 1) Was there in fact a use for the sale of motor vehicles?
- 2) If there was, was it minimal?
- 3) If minimal, should it be disregarded?

The Judge found the answer to all three questions to be 'yes' and found that the question of whether the use was material would be unhelpful and misleading. Based on this judgement it is for the decision maker to determine the answers to the three questions set out above.

5.1.16 In respect of the use of the building for apple storage purposes, it is necessary to apply the three-stage test in 'Kwik-Save'. The Case indicates that it is permissible for a decision-maker to ask whether an alleged use of land or a building is a 'device' in order to achieve an 'advantage' in the planning system. In this case that 'advantage' would be to enable an application for a change of use of an existing building in circumstances where the proposed use is unlikely to have attracted planning permission in the first place.

1. As a matter of fact, was there an apple storage use

5.1.17 Building Control records show that the barn was still under construction in November 2020. Therefore, the first harvest in which the barn could reasonably have been put into use is 2021. The Applicant acknowledges in an email dated 9 February 2023 that the harvest occurs between August and October and that as of February 2023 no apples or other fruit was being stored in the building, suggesting that the barn is not in use for storing apples for a large part of the year. The applicant also refers to a fruit fly issue in 2021 where they decided to split the internal storage room, but soon realised the rooms were too small for purpose, again suggesting the use was for a limited time only. On a recent Enforcement visit (18 February 2023) small items of agricultural and equestrian equipment were being stored in the building, with cardboard being used to protect the flooring. The Applicant has also provided a video of himself mulching apples outside the building, with a machine that can be seen to

be stored within the building. Comments have also been made in relation to the sale of apples and Cider as well as the purchase of new apple trees, although only evidence of the tree purchase has been provided and not any sales of the apples or cider.

5.1.18 Whilst the apple mulching that occurred outside the building offers little by way of what occurs inside the building and that it would appear the building was designed as a dwelling from the outset, given the presence of the agricultural equipment inside the building it can be accepted that there has been an apple storage or associated use that has occurred within the building. However, it would need to be determined if that use was minimal.

2. If so, was it minimal

5.1.19 As discussed above, the evidence submitted with the application would suggest that the storage of fruit was minimal due to the length of time apples were being stored and due to it quickly being realised that the rooms were '*far too small*' for the processing activities. Likewise, the amount of agricultural related equipment inside the building is minimal and is stored in a manner that does not suggest a regular agricultural use i.e., protection of the flooring. Also, the limited time of two harvests that the building could have been put into use is also somewhat minimal. On this basis the answer is yes, the use was minimal.

3. If so, should it be disregarded?

5.1.20 Given that the use of the building was minimal, and it was clear from the offset that the building had been designed as a residential building for the reasons outlined above, then the use should be disregarded. It would appear from the evidence and submission that the use of the building has been used as a device in order to achieve an advantage in the planning system. For these reasons the building is unauthorised because it has been found to be a dwelling house rather than an 'apple storage barn' and there has been no agricultural use when considering the tests set out in 'Kwik-Save'. Therefore, it is not reasonably open to the Council to grant planning permission for a change of use.

Conclusion

5.1.21 The above assessment against the relevant Case Law concludes that any alleged use of the building for apple storage purposes was minimal. Furthermore, the building as constructed was not an 'apple storage barn'. Therefore, on the basis of the Case Law the Council cannot reasonably approve an application for a permission for a 'change of use' of a building where the construction of the building itself is unauthorised and where there has been no agricultural use prior to a residential use. To do so would set an undesirable precedent and raise issues for consideration e.g. the weight which the Council applies to the evidence should any comparable case come before the Council for determination; the weight to which the Council applies to cited case law as 'material considerations'; the legal rule of consistency in planning (administrative) decision making.

5.1.22 Given that the application cannot be reasonably granted on the basis of the application that has been submitted, it is not necessary for an additional assessment considering the suitability of a change of use at the site to be outlined within this report.

6. ANY RELEVANT SITE HISTORY

- **FUL/MAL/17/00736**– Proposed construction of a new detached single storey dwelling. Application withdrawn.
- **AGR/MAL/17/01043** – Prior notification for permeable hardstanding, with edging stones. application refused 12.10.2017.
- **DD/MAL/17/01060** – 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
- **18/00280/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 20.06.20219
- **20/00463/WTPO** - G1 Prunus Spinosa - Remove strip 1m wide by approx. 3.5m long. Approved 01.07.2020
- **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
- **20/05040/DET** - Compliance with conditions notification 18/00280/FUL (Construction of an apple storage barn) Condition 3 – Materials. Discharged 23.07.2020
- **20/00574/FUL** - Variation of condition 2 on approved planning permission 18/00280/FUL (Construction of an apple storage barn). Approved 05.08.2020
- **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
- **20/05055/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 - External Lighting. – Part discharged part refused 25.08.2022
- **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) Approved 06.04.2022
- **23/00266/VAR** - 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)). 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	Object – <ul style="list-style-type: none"> • Outside the settlement boundary • Design is out of 	<ul style="list-style-type: none"> • It is not relevant to address this matter at this stage because the application cannot

Name of Parish / Town Council	Comment	Officer Response
	keeping with the surrounding area <ul style="list-style-type: none"> • Impact on neighbouring amenity • The Orchard is no longer at the site 	be determined on the basis it is not a change of use as applied for. <ul style="list-style-type: none"> • The design was previously found acceptable as part of the previous permission. • The loss of agricultural activity would be addressed as part of a relevant application.

7.2 Statutory Consultees and Other Organisations

Name of Statutory Consultee / Other Organisation	Comment	Officer Response
Natural England	A Habitats Regulation Assessment should be undertaken in respect of the Essex Coast RAMS	<ul style="list-style-type: none"> - If the application were to be approved a S106 agreement securing the contribution would be required.
Essex Wildlife Trust	No response received at the time of writing this report	Noted, as a non-statutory consultee EWT's comments are not essential to the determination of the application.

7.3 Internal Consultees

Name of Internal Consultee	Comment	Officer Response
Environmental Health	No objection	Noted
Arboricultural Consultant		
Ecology	No objection subject to securing: <ul style="list-style-type: none"> - A financial contribution towards Essex Coast RAMS - Biodiversity mitigation and enhancement measures. 	Noted. If the application were to be approved these matters could be secured by a condition.

7.4 Representations received from Interested Parties

7.4.1 1 letter of objection has been received. The reasons are summarised in the table below:

Objecting Comment	Officer Response
<ul style="list-style-type: none">- Contrary to Policy E4- The site is not suitable for further residential accomodation contrary to Policies H7 and S8- Introduction of residential paraphernalia would be inappropriate at this site- Unsuitable access including for pedestrians- This is not an infill site contrary to Policy H4- The building could be repurposed for other uses such as the stable being which has not yet been built on the site.- There are no special circumstances to approve the application.	<ul style="list-style-type: none">- These points are noted. However, it is not relevant to address these matters at this stage because the application cannot be determined on the basis it is not a change of use as applied for.

8 REASON FOR REFUSAL

1 Based on the information submitted and available to the Council, and having regard to the design, appearance, layout, character and purpose of the application building, it has not been demonstrated that the building as constructed constitutes an 'apple storage barn' as authorised by the grant of planning permission 20/00574/FUL. Furthermore, it has not been demonstrated that the use of the building for agricultural purposes was more than di minimis and therefore, the use should be disregarded. Consequently, the building is unauthorised development, and the Council cannot, having regard to relevant Case Law, approve an application for a permission for a 'change of use' of a building where the construction of the building is unauthorised.