

DELEGATED DECISION OFFICER REPORT

AUTHORISATION	INITIALS	DATE
File completed and officer recommendation:	MP	09/09/19
Planning Development Manager authorisation:	AN	10/9/19
Admin checks / despatch completed	AN	12/9/19
Technician Final Checks/ Scanned / LC Notified / UU Emails:	SB	12/09/19

Application: 19/01071/LUEX **Town / Parish:** Ardleigh Parish Council

Applicant: Mrs Carol Weller

Address: Kalm Oak Nursery Hunters Chase Ardleigh

Development: Occupation of the site address in non-compliance with conditions 2 and 3 of planning permission TEN/1959/87.

1. Town / Parish Council

Ardleigh Parish Council No comment.

2. Consultation Responses

N/A

3. Planning History

96/00761/FUL	Erection of garage adjacent to existing dwelling	Approved	11.07.1996
86/01510/FUL	Temp siting of residential caravan for limited period of one year to obtain agricultural viability	Approved	02.12.1986
87/01959/FUL	One det dwelling (related to horticultural nursery)	Approved	09.02.1988
89/01987/FUL	Siting of residential caravan to oversee agricultural holding	Approved	30.03.1990
09/60371/HOUEN Q	Proposed workshop & store		27.02.2009

4. Relevant Policies / Government Guidance

N/A

Status of the Local Plan

The 'development plan' for Tendring is the 2007 'adopted' Local Plan. Paragraph 213 of the NPPF (2019) allows local planning authorities to give due weight to adopted albeit outdated policies according to their degree of consistency with the policies in the NPPF. Paragraph 48 of the NPPF also allows weight to be given to policies in emerging plans according to their stage of preparation, the extent to which there are unresolved objections to relevant policies and the degree of consistency with national policy. As of 16th June 2017, the emerging Local Plan for Tendring is the Tendring District Local Plan 2013-2033 and Beyond Publication Draft.

Section 1 of the Local Plan (which sets out the strategy for growth across North Essex including Tendring, Colchester and Braintree) was examined in January and May 2018 and the Inspector's initial findings were published in June 2018. They raise concerns, very specifically, about the three 'Garden Communities' proposed in north Essex along the A120 designed to deliver longer-term sustainable growth in the latter half of the plan period and beyond 2033. Further work is required to address the Inspector's concerns and the North Essex Authorities are considering how best to proceed.

With more work required to demonstrate the soundness of the Local Plan, its policies cannot yet carry the full weight of adopted policy, however they can carry some weight in the determination of planning applications. The examination of Section 2 of the Local Plan will progress once matters in relation to Section 1 have been resolved. Where emerging policies are particularly relevant to a planning application and can be given some weight in line with the principles set out in paragraph 48 of the NPPF, they will be considered and, where appropriate, referred to in decision notices. In general terms however, more weight will be given to policies in the NPPF and the adopted Local Plan.

5. Officer Appraisal

Site Description

The application site is Kalm Oak Nursery, which is located along the southern section of Hunters Chase, in Ardleigh. The surrounding area is largely rural in character, with large areas of grassed and agricultural land. However, the immediate surrounding area sees sporadic development, including 'The Bungalow' to the east that was recently granted a similar permission to that being proposed, under planning reference 18/01218/LUEX.

Description of Proposal

This application seeks to establish a certificate of lawful use for the removal of conditions 2 and 3 of planning permission TEN/1959/87, dated 9 February 1988. They state:

"The occupation of the dwelling hereby permitted shall be limited to persons wholly or mainly or last employed locally in agriculture as defined in Section 290(1) of the Town And Country Planning Act 1971 or in forestry; or a dependent of such a person residing with him (but including a widow or widower of such a person)." and

"The nursery office and propagation rooms shall only be used for such purposes in conjunction with the use of the site as a nursery and not to form part of the residential accommodation or as a separate unrelated unit whatsoever."

The definition of agriculture and thus agricultural use is now updated by virtue of the Town and Country Planning Act 1990, replacing the 1971 Act. Agriculture would also include horticulture as a form of agriculture.

Assessment

The Planning and Compensation Act 1991 introduced rolling time limits within which local planning authorities can take planning enforcement action against breaches of planning control.

The time limits are:

- o four years for building, engineering, mining or other operations in, on, over or under land, without planning permission. This development becomes immune from enforcement action four years after the operations are substantially completed
- o four years for the change of use of a building, or part of a building, to use as a single dwelling house. Enforcement action can no longer be taken once the unauthorised use has continued for four years without any enforcement action being taken
- o 10 years for all other development. The 10 year period runs from the date the breach of planning control was committed

Once these time limits have passed, the development becomes lawful, in terms of planning.

Subsection (1) of section 191 provides for an application to determine whether a specified existing use, operation, or failure to comply with a planning condition or limitation, which has already been carried out on land, is lawful for planning purposes.

Applications for Lawful Development Certificates should include the following information:

o whether the application relates to:

o a use

o a building operation

o a condition not complied with

o the date that the use started

o any use class the applicant considers to be applicable

o the reasons the applicant thinks he is entitled to a Lawful Development Certificate

o any other relevant information

o a plan identifying the land

o a certificate as to the applicant's interest (ownership, tenancy etc) in the land and any interest of any other person

Question 7 of the application form confirms that the application relates to a use, and confirms that the use began in 1993.

Question 4 of the application form confirms that the application relates to an existing C3 use.

Question 6 of the application form confirms that the grounds for the Lawful Development Certificate are that the use began more than 10 years before the date of the application.

A Land Registry plan, title number EX480713, identifies the land to which the application relates.

Question 10 of the application form confirms that the applicant's interest in the land is as the owner.

It is up to the person applying for a Lawful Development Certificate for an existing use to show the proper evidence. This could include:

o proof that any use has been carried on continuously for a period of 10 years

The following evidence has been submitted in support of the LDC:-

A statutory declaration of Carol Anne Weller of Kalm Oak Nursery, who has confirmed that herself and her late husband Eric George Weller purchased the property in 1993. While it was their intention to continue the horticultural nursery use, Mr Weller was at that time employed by Anglian Water as a civil engineer on a full time basis. Mr Weller's salary was needed to pay for the upkeep costs of the family and house, and he had no involvement in the running of the nursery. Mrs Weller ran the nursery and sold trees and shrubs. However, the nursery did not become profitable and was close within the following five years; no agricultural or horticultural use has taken place at the property since 2000.

The statutory declaration further explains that the propagating room, which had been used by the previous owners for growing a particular breed of shrub, was never grown from the date of purchase in 1993. Instead this room has been used as a dining room, bedroom or a study/library. The nursery office was used as such between 1993 and 2000, but since the closure of the business in 2000 it has been used as a dining room and bedroom.

An additional statutory declaration has been provided by Dave Blacker, who has confirmed that the contents of Mrs Weller's declaration are accurate. This declaration also confirms that Mr Blacker instructed his company to convert the loft space above the old propagation room into a bedroom in approximately 1996. To the best of Mr Blacker's knowledge the converted loft space has been used as a bedroom ever since, the propagation room has been used as a dining room, bedroom or

study/library since the purchase of the property, and the nursery office has been used as a dining room or bedroom since the closure of the nursery business.

Additional information has been supplied by the applicant which shows numerous letters/payslips between 1992 and 2009 from Anglian water confirming Mr Weller's employment, as well as a number of photographs of the rooms in residential use. While most of the photographs are not dated, one is dated 17 December 2003. Further, upon meeting the applicant's son at the time of the site visit, it is clear he has clearly aged since some of the photographs provided were taken, while other undated photographs include the applicant's late husband, who passed away in 2010.

Condition 2

Within former Government Circular 11/95 in a footnote to paragraph 102 it states that 'last working' covers the case either of a person who is temporarily unemployed or of a person who from old age or illness is no longer able to work.

Case law also discusses whether a couple occupying a dwelling subject to an agricultural occupancy condition, where one partner works in a non-agricultural occupation and the other in agriculture, may be looked at as being dependent on each other.

Under planning reference APP/X/95/GO310/002333 (Land at Beenham Stocks Vineyard, Beenham Hill, Reading, dated 21 May 1996) the appellant claimed to have occupied the dwelling for more than 10 years without compliance, with the husband being employed within the film industry. However, it was held that the wife in this case worked a considerable number of hours on the holding, thereby contributing to the overall income of the household, from which the husband may be assumed to have derived some benefit, so that to some degree he could be regarded as being, at least in part, dependent on his wife's income, notwithstanding that his own was significantly greater. The occupation of the dwelling was therefore not considered to be in breach of the condition and the appeal was dismissed.

Further, planning appeal reference APP/C/96/P2114/643380 (Land at Meadows, Colwell Road, Freshwater, Isle of Wight, dated 11 July 1997) involved the husband not being employed in agriculture and the wife's last economic activity being in agriculture despite not receiving an independent wage. The Inspector in this application concluded that although the husband was strictly not the wife's dependant the condition could not be construed as excluding a married couple. Therefore the condition was considered not to have been breached and the appeal was dismissed.

It is therefore concluded that Mrs Weller's last employment role was working at the horticultural nursery up until 2000. No evidence has been provided to demonstrate that Mrs Weller had further employment after this time, with the statutory declaration confirming that Mr and Mrs Weller went travelling. Further, case law states that despite the main income during 1993 and 2000 arising from Mr Weller's non-agricultural salary, Mrs Weller worked approximately 70 hours per week and thereby contributed to the overall income of the household. Given this it is considered that the use of the site has not been in breach of Condition 2 of TEN/1959/87.

Condition 3

Although the applicant at one time worked in agriculture on the application site, the statutory declaration has confirmed that the propagation room has been used for residential purposes since 1993, while the nursery office has not been in use since 2000. Photographs submitted further demonstrate that the rooms have been used for residential purposes since 2003 until present day upon undertaking a site visit. Following 2001 both Mr and Mrs Weller had retired and went travelling.

Section 191 of the Town and Country Planning Act 1990 is the relevant section when dealing with issues of Certificates of Lawful Use or Development. Section 191 (1) (a) states that the use will be lawful if no enforcement action or Breach of Condition Notice could be served and, that the use or development does not constitute a contravention of any of the requirements of any Enforcement

Notice then extant. In this case there is no record of an Enforcement Notice in respect of this property.

The Council does not have any compelling evidence of its own to refute these statements and therefore on the balance of probabilities the case for a Certificate of Existing Lawful Use is made.

Circular 10/97 'Enforcing Planning Control - legislative provisions and procedural requirements' states that if a certificate is for a use of land - unless the use falls within one of the "use classes" specified in the Use Classes Order (UCO) current at the time, or the certificate is granted on the basis that a specific grant of planning permission confers, lawfulness on the use it is important for it to state the limits of the use at a particular date. These details will not be legally equivalent to a planning condition or limitation. They will be a point of reference, specifying what was lawful at a particular date, against which any subsequent change may be assessed. If the use subsequently intensifies, or changes in some way to the point where a "material" change of use takes place, the LPA may then take enforcement action against that subsequent breach of planning control (which a less precise certificate might well preclude). A LDC must therefore be precisely drafted in all respects.

By virtue of section 191(5)(b), a LDC must include a description of the use, operations or other matter for which it is granted regardless of whether the matters fall within a "use class" of the UCO. But where within a "use class", a LDC must also specify the relevant "class". In all cases the description must be more than simply a title or label, if future interpretational problems are to be avoided. The LDC should therefore state the characteristics of the matter so as to define it unambiguously.

The evidence submitted with the application is sufficiently clear and unambiguous to demonstrate that, on the balance of probabilities, the nursery offices and propagation room at Kalm Oak Nursery have been used as residential use for a period of 10 years, that this use has not been supervened by another material change of use and nor has it been abandoned.

6. Recommendation

Split decision

7. Conditions/Reason for Refusal

1 Lawful Use granted:

The evidence submitted with the application is sufficiently clear and unambiguous to demonstrate that, on the balance of probabilities, the nursery offices and propagation room at Kalm Oak Nursery have been used as residential use for a period of 10 years, that this use has not been supervened by another material change of use and nor has it been abandoned. This therefore demonstrates a clear and continuous breach of Condition 3 of TEN/1959/87.

2 Lawful Use refused:

Reason for Refusal

The applicant has failed to provide sufficient and precise evidence to demonstrate that the occupation of the application site has not been limited to persons wholly or mainly or last employed locally in agriculture or in forestry. The onus is on the applicant to provide the necessary factual information in order to substantiate the application. In this case the evidence submitted demonstrates that Mrs Weller was last employed at Kalm Barn Nursery until 2000, with no evidence of any later employment provided, and therefore does not demonstrate that Condition 2 of TEN/1959/87 has been breached.

8. Informatives

N/A