

Application No: 13/2277N

Location: TOP END FARM, BARTHOMLEY ROAD, BARTHOMLEY, CHESHIRE, CW2 5NT

Proposal: Lawful Development Certificate For Use Of The Land And Building For The Storage, Blending And Adaptation Of Fertilisers For Sale

Applicant: Mr Mark Able

Expiry Date: 26-Aug-2013

**SUMMARY RECOMMENDATION:**

For Members to comment on the application

**MAIN ISSUES:**

Whether the use has operated continuously for a period in excess of 10 years and whether that use is ancillary to the main functions of the farm.

**REASON FOR REFERRAL**

The application was called in to Committee by Cllr David Marren on the following grounds:

*“Residents are concerned that there are serious highway concerns associated with this application. They cite that the lorries used are too big and the frequency too frequent and as such they present a danger to pedestrians and other vehicles using the lane; that the vehicles are eroding verges and also causing property damage to neighbouring residences.*

*Additionally residents are concerned that there was no communication of this application and that they only found out yesterday which means that they cannot properly furnish evidence against the application through lack of time. In the interests of transparency and the safeguarding of the Council's reputation I request that this application is called-in and heard by the Southern Planning Committee please.”*

**It should be noted that the application is put before Committee to inform them of the current situation and not for a decision to be made by members. This is because it is a matter of establishing the legal position and not about the planning merits of the use at the site.**

**DESCRIPTION AND SITE CONTEXT**

The application site forms part of a farm complex located within the Green Belt as defined by the Local Plan Proposals Map. The site comprises a mixture of traditional brick and more

modern portal framed buildings. The site is accessed via a track from Barthomley Road which also has the route of a Public Right of Way along its length. To the north of the farm complex is a railway line.

## **DETAILS OF PROPOSAL**

This application is for a Certificate of Existing Lawful Use and seeks confirmation from the Local Planning Authority of the lawful use of the farm for the storage, blending and adaptation of fertilisers for sale. The main consideration is whether the use on site has been carried out continuously for a period of 10 years and whether that use is ancillary to the function of the farm.

## **RELEVANT HISTORY**

**12/1073N** – Retention of extensions to agricultural buildings. Refused 2012

**11/2209N** – Certificate of lawfulness for the use of the farm for the storage, blending and adaptation of fertilisers for sale on 31<sup>st</sup> January 2013

**10/4960N** – Retrospective planning application withdrawn for a Change of Use from Agricultural Use (Beef Farming) to a Concrete Panel Business on 23<sup>rd</sup> December 2010.

**P07/1104** – Planning permission approved for Agricultural Building for Storage and use as Workshop, open topped Crop Storage on 16<sup>th</sup> November 2007.

**P06/0450** – Consent approved for Erection of Agricultural Silage Building Relocated from Limes Farm on 2<sup>nd</sup> June 2006.

**P95/0052** – The Local Planning Authority did not object to the erection of an agricultural building subject to a landscaping scheme in 2005.

**P94/0981** – The Local Planning Authority objected to the erection of an agricultural building in 2004.

## **CONSULTATIONS (External to Planning)**

None

## **VIEWS OF TOWN/PARISH COUNCIL**

None received at the time of report writing.

## **OTHER REPRESENTATIONS**

At the time of report writing, 12 people have commented on this matter. The objectors put forward the following opinions:

- The original LDC faced strong opposition from neighbours, who over the years, had been complaining about the impact, which the unlawful activity had on them. These complaints were largely ignored.

- The LDC was granted on the basis that the scale of the fertiliser business was small, split between 2 sites, and was restricted to one building at TEF.
- The applicant is now arguing significant growth in the fertiliser business, which is intensification, and not covered by the current LDC. If this is so, a new planning unit is created, thereby demanding a full planning application to be submitted, and not an amendment to the current LDC.
- The applicant is attempting to amend the current LDC and is trying to obtain planning the easy way, thereby avoiding through consideration and submissions by all relevant parties.
- Essentially, the applicant is seeking to appeal the decision made on 13<sup>th</sup> January 2012. It is submitted that 21 months later, he is too late and is out of time. In any event, the applicant failed to state in the last LDC application that fertiliser was his primary source of business and use of land at TEF. This assertion by the applicant is paradoxically contradicted by the 7 other planning matters associated with TEF, which have been before the planners since 2006.
- If this application is to proceed, the current, and any subsequent information submitted by the applicant cannot remain confidential, as it is the main evidence in support of the applicant's case. It has to be subject to proper scrutiny by the objectors. For it to remain confidential would be in law a breach of natural justice.

One additional point was put forward alleging wrongdoing by the applicant which the Council will not publish in this report.

Many other planning related points were put forward by objectors; however this application is to establish a point of law, not to argue the impacts of the development.

## **OFFICER APPRAISAL**

### **Legislative Background**

The applicant is entitled under S.191 of the Town and Country Planning Act 1990 to seek a Certificate of Lawful Existing Use or Development (CLEUD) by the submission of Statutory Declarations and any other evidence relevant to the case to seek confirmation of the lawful use of the land in question. The evidence should establish both the factual position of the use of the land for a period of 10 years or more and prove the lawfulness of the use in planning terms. The issuing of a certificate would create immunity from enforcement action in relation to the use established.

It is important to distinguish between the determination of a CLEUD and other planning-related applications. Unlike the latter, which may be open to subjective opinion, the determination of a CLEUD application must be based upon factual evidence, submitted under oath and relevant Planning Law. The onus of proof is held to be with the applicant in the submission of sufficient evidence. However, paragraph 8.15 of Annex 8 of Circular 10/97: Enforcing Planning Control states that:-

*"the burden of proof is on the appellant, the Courts have held that the relevant test of the evidence on such matters is the 'balance of probability'. As this test will accordingly be applied by the Secretary of State in any appeal against their decision, a Local Planning Authority*

*should not refuse a certificate because the applicant has failed to discharge the stricter, criminal burden of proof, namely 'beyond reasonable doubt'."*

The Circular goes on to state that the applicant's evidence does not require independent corroboration in order to be accepted. Provided that the Local Planning Authority has no evidence of its own or from others to contradict "or otherwise make the applicant's version of events less than probable" and, provided that the applicant's evidence is sufficiently precise and unambiguous, the certificate should be granted on the balance of probability.

The Circular also importantly confirms that:-

*"The Local Planning Authority should proceed on the basis that neither the identity of the applicant (except to the extent that he or she may not be able personally to confirm the accuracy of any claim being made about the history of a parcel of land), nor the planning merits of the operation, use or activity, are relevant to the consideration of the purely legal issues which are involved in determining an application".*

### **Examination of Evidence**

In July 2011 an application for a Certificate of Existing Lawful Use was submitted to the Local Planning Authority for the use of the farm for the storage, blending and adaptation of fertilisers for sale. A large amount of evidence, including sworn affidavits were submitted with this application and the conclusion reached was that the fertiliser business had operated from part of the site for a period in excess of 10 years and that a positive certificate should be issued. The certificate was issued on 31<sup>st</sup> January 2013.

The certificate that was issued gave the following reason.

*"From the information available to the Local Planning Authority it appears that, on the balance of probability, the storage, blending and adaptation of fertilisers for sale has been carried out at the farm for a period in excess of ten years, at a level which is ancillary to the primary agricultural use of the site."*

The applicants have submitted this application as they consider that there is a flaw in the certificate (11/2209N) as they contend that the use is not ancillary to the use of the farm for agriculture.

The evidence submitted with the previous application and the additional evidence submitted with this application include financial details from the applicant's accountant. These give details of the income from the agricultural business and the fertiliser business. These show that the fertiliser business is not dependant on the agricultural business; in fact the income from the fertilizer business is far in excess of that of the farming enterprise.

The previous certificate established that the fertiliser business had been carried out for a period of in excess of ten years. Therefore the key issue for this application is whether the use is ancillary to the agricultural side of the business operated from Top End Farm. If this was the case, the fertiliser business would not be able to operate independently of the agricultural business.

It has been clearly demonstrated by the financial evidence submitted by the applicant, that the fertiliser business is the primary income generator at the site and could operate independently of the agricultural use. The use can therefore not be considered to be ancillary.

## **CONCLUSIONS AND REASON(S) FOR THE DECISION**

On application number 11/2209N, it was considered that, on the balance of probabilities, on the basis of the sworn statutory declarations and other evidence that a positive Certificate should be issued for the use of the site for the storage, blending and adaptation of fertilisers for sale, as the use had been undertaken for a period of over 10 years and was therefore beyond enforcement proceedings. The information submitted with this application has, on the balance of probability, demonstrated that this use is not ancillary to the agricultural business operated at the site and as such this word should not be included in the certificate.

On the basis of the evidence submitted, it is Officers view that a positive certificate should be issued.

As stated above, this report is placed before committee for information and comment only.

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