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## Appeal Decision

Inquiry held on 1 November 2016

Site visit made on 1 November 2016

**by Chris Preston BA(Hons) BPI MRTPI**

**an Inspector appointed by the Secretary of State for Communities and Local Government**

**Decision date: 5 January 2017**

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**Appeal Ref: APP/X1545/C/16/3145308**

**Manor Farm (formerly Roman Farm), Old Heath Road, Southminster, Essex CM0 7BW**

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
  - The appeal is made by Mr M Roman against an enforcement notice issued by Maldon District Council.
  - The enforcement notice, numbered ENF/14/00142/BC, was issued on 29 February 2016.
  - The breach of planning control as alleged in the notice is: The change of use of part of the building shown edged in green on the attached plan from an agricultural barn to a residential building.
  - The requirements of the notice are: (1) Cease the residential use of the land; (2) Remove all internal walls and stairs connected with the residential use of the building; (3) Remove all domestic appliances connected with the residential use of the building; (4) Remove all residential fixtures and fittings, including kitchen cupboards, sink, mattress etc from inside and outside of the building; (5) Remove all residential paraphernalia from the land; and (6) Remove all resulting materials and/or debris from the land.
  - The period for compliance with the requirements is six months after the date the notice takes effect.
  - The appeal is proceeding on the grounds set out in section 174(2) (d), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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### Decision

1. The appeal is allowed and the enforcement notice is quashed.

### Application for costs

2. At the Inquiry applications for costs were made by Mr M Roman against Maldon District Council and by Maldon District Council against Mr M Roman. Those applications are the subject of separate Decisions.

### The Appeal on Ground (d)

3. An appeal on ground (d) is made on the basis that, at the time the enforcement notice was issued, it was too late to take enforcement action against the matters stated in the notice. The time limits within which enforcement action must be taken in respect of breaches of planning control are set out in section 171B of the Town and Country Planning Act 1990 (the Act). Where there has been a breach consisting in the change of use of any building to use as a single dwellinghouse, the relevant period is four years from the date of the breach, as set out in s171B(2).
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4. In this case, the Council disputes that sufficient evidence has been presented to demonstrate, on the balance of probability, that the residential use had continued for a period of four years or more at the time the notice was served. However, it also alleges that there has been positive deception in the planning process, in relation to the content of planning application documents submitted in relation to the site.
5. Section 171BA of the Act provides a mechanism through which a Local Planning Authority can apply to the magistrates court to obtain a Planning Enforcement Order (PEO) in cases where it appears to them that there has been a breach of planning control but that breach has been concealed. If granted, the effect of a PEO is to enable enforcement action to be taken, within a year of the Order being made, irrespective of whether the time limits set out by s171B of the Act have expired. The mechanism was introduced into legislation in response to concerns relating to cases where deception had made breaches of planning control more difficult to detect within the statutory time limits.
6. The allegations regarding deception and concealment did not form part of the Council's case in the lead up to the Inquiry but were introduced on the first morning of the event. The Council had not sought a PEO under Section 171BA of the Act. However, the absence of a PEO does not preclude the possibility that enforcement action can be taken beyond the statutory time limits if the appellant has sought to benefit from deliberate deception in the planning process. That has been established through the cases of *Welwyn Hatfield BC v Secretary of State for Communities and Local Government* [2011] 2 AC 304 and *Jackson v Secretary of State for Communities and Local Government* [2015] EWHC 20 (Admin) & [2015] EWCA Civ 1246.
7. In view of the above, there are essentially two strands to my decision in relation to ground (d). The first relates to the question of whether the appellant can demonstrate, on the balance of probabilities, that the relevant part of the barn had been in use as a dwellinghouse for a continuous period of four years or more at the time the enforcement notice was served. Secondly, if that is the case, I must consider whether there has been positive deception in the planning process and/or concealment of the breach such that the development has not gained immunity from enforcement action, having regard to established case law.

*Evidence Relating to the Use of Part of the Barn as a Dwellinghouse*

8. There is no dispute that the western end of the barn was in use as a dwellinghouse at the time the enforcement notice was served. The dispute relates to when that change of use took place and whether the use has continued, without any significant break in occupation, since the breach occurred.
9. The appellant and Mr Brooks, his friend and local builder, provided compelling evidence under oath as to the time frame within which works took place to convert the western end of the barn into residential accommodation. Whilst it can often be difficult for witnesses to recall when development took place precisely, particularly if that development occurred a number of years ago, the particular circumstances of this case are such that there is good reason why the events were recalled so lucidly by Mr Roman and Mr Brooks.

10. Prior to converting the barn Mr Roman was in the process of building up the poultry farming business at the site and was living in a static caravan on site for which a temporary planning permission had been granted. The barn had been constructed and was in use in relation with the business, for the storage of eggs and equipment. Mr Roman lived in the caravan with his partner, Ms Wendy Morgan who was a local school-teacher but also assisted Mr Roman in the running of the farm, particularly with book keeping and other organisational matters. Ms Morgan collapsed and died suddenly at the farm on 24 June 2007.
11. The death of Ms Morgan prompted the conversion of the barn. Mr Brooks went to live with Mr Roman in the caravan for two weeks following the death of Ms Morgan to provide emotional support. It was during that time that the pair discussed the conversion of the barn. Mr Brooks explained that Mr Roman found it extremely difficult to continue living in the caravan due to the emotional association of the accommodation with Ms Morgan. Mr Roman and Mr Brooks explained that the works to convert the barn were undertaken within the following two months. Those works included fitting central heating, a bathroom, additional works to fit out the property with electricity (above that which already existed), creation of internal walls, the provision of kitchen units and the general upgrading and fitting out to residential standards. A pair of French doors were also added to provide access from the living accommodation into the barn.
12. Mr Roman stated that he moved into the building by the end of August 2007. Further works were undertaken following that point, including the addition of a staircase to the second floor, and the provision of flooring on that floor, something which Mr Roman recalls finishing on New Year's Eve 2007. Two windows to serve the lounge at first floor level were also added and a window frame was inserted in the west elevation at first floor level but the outside wall remained bricked up and no glazing was added. The description of the conversion works tallies with the layout of the property that I was able to witness on site.
13. Nothing has been presented that would lead me to doubt the evidence provided by Mr Roman, Mr Brooks or Mr Forde regarding the sequence of events described above. Recollection of the events for all three witnesses was, understandably, an emotional matter and I found the evidence compelling. It appears to me that the magnitude of the events that preceded the conversion were of such importance that the dates and timeframes would be easily recalled by those closely involved. Consequently, on the balance of probabilities, I conclude that the western end of the barn had been provided with all the facilities needed to day to day living and had been occupied for residential purposes by the end of August 2007.
14. Further to that point, Mr Roman stated that he continued to live in the property and attempted to carry on with the poultry business but found this difficult in the absence of his partner and due to the financial recession. Planning permission was granted for a permanent farm workers' dwelling in October 2010. However, Mr Roman had borrowed money from unregulated lenders and got into difficulty in re-paying the money. He described being burgled in October 2011, an incident during which he was restrained and assaulted. According to Mr Roman, that incident cause him to consider his position and he subsequently left the country in August 2012, giving power of attorney in

respect of the property to Mr Forde. By that point, Mr Roman suggests that he had lived in the property continuously for a period of roughly five years. That evidence is corroborated by the evidence of Mr Forde and Mr Brooks who were familiar with the appellant and the property throughout that time. Both describe making visits to see Mr Roman at the property throughout the period and Mr Brooks described making visits on a weekly basis.

15. I accept that little evidence in the way of utility bills, council tax records, electoral registry records or other documentary evidence has been provided that would support the claims made by the appellant with regard to his occupation of the property. The described period of Mr Roman's occupancy is book ended by traumatic events; the death of his partner at the outset and the burglary and financial concerns relating to the problems associated with loans from unregulated lenders towards the end. From the compelling way he, Mr Brooks and Mr Forde described those events under oath I have no reason to doubt that the evidence provided was an accurate reflection of what occurred.
16. None of the Council officers who gave evidence at the Inquiry had visited the property during the period when Mr Roman states that he was in residence. It is not clear if anyone from the Council went inside the western end of the barn during that period; photographs from 2008 and 2010 are largely confined to the external elevations of the building with some internal shots within the 'non-residential' section of the barn. The Council's case officer note relating to the visit in October 2010 states that the barn had a residential appearance but considered that it was in use for the storage of eggs and processing machinery at the time. The case officer in question did not appear for the Council and it is not clear whether he entered the western end of the barn before reaching that conclusion. The absence of any photographs from within that section would suggest that he did not and the comments relating to egg storage and processing appear to relate to what can be seen on the internal photographs that were taken within the eastern end of the barn.
17. On one of those photographs the French doors that were purportedly installed by Mr Roman and Mr Brooks to give access from the house to the barn can clearly be seen. Mr Mouratidis was initially under the impression that the French doors shown within the photograph were in the western gable elevation of the barn and did not appreciate that the doors were, in fact, internal doors within the building. However, the photograph sheds little light on whether the space beyond was in residential use at that point in time and the Council have produced no evidence from within that part of the building that would lead me to doubt the appellant's version of events.
18. No windows are present at first floor level on the 2008 or 2010 photographs although rooflights had been installed. Windows had been inserted by the time of the Council's subsequent visit in 2014. Mr Roman suggested that windows had been placed in the southern elevation at first floor level in 2007 but had subsequently been blocked up nine months later at the request of Mr Nesbit, the Council's enforcement officer, and re-instated in 2011. No correspondence has been presented to support that assertion. However, the absence of first floor windows does not, of itself, indicate that the property was not in residential use. Mr Roman suggests that he was content to utilise borrowed light from ground floor windows and the rooflights and to rely on artificial light on the first floor. Whilst that situation was unconventional and may not have suited most people it seems to me that, at that point in time, the residential

use of the barn was not seen as a permanent solution by Mr Roman. He was still seeking to build up the poultry business and secured planning permission for a farm workers' dwelling in 2010. He may well have been content with the relatively basic and unconventional standard of accommodation in that context.

19. Consequently, the photographs provided by the Council and the officer note relating to the site visit in 2010 do not lead me to alter my conclusions on the likelihood that Mr Roman lived in the western end of the barn from 2007 up until August 2012. There is no evidence that he lived elsewhere after he moved in in August 2007. The static caravan remained on site but I can see no logical reason why Mr Roman would have moved back into the caravan, given the relative warmth and comfort of the facilities in the converted barn, and the emotional memories associated with the caravan. I consider it likely that the caravan was used to store documents and papers associated with the business, as described by Mr Roman. His financial state would be likely to have precluded renting or buying any other property.
20. The Council have referred to the content of supporting documents in relation to two planning applications that were submitted in 2010, as evidence of inconsistency in the appellant's case. The first relates to an application to renew the temporary planning permission for the mobile home, submitted in February 2010<sup>1</sup> (the February 2010 application); the second to an application for the construction of a farm workers dwelling, submitted in July 2010<sup>2</sup> (the July 2010 application). The covering letter submitted with the February 2010 application made no reference to the fact that Mr Roman was living within the barn at that point in time. Nor did it state that he was living within the mobile home but noted that 'it is clear that the applicant still needs to be within sight and sound of the flock for large parts of the day and night for their welfare and to attend to routine bird husbandry matters'.
21. Following discussions with the Council the February 2010 application was withdrawn and the July 2010 application was submitted and subsequently approved. Paragraph 2.12 of the Design and Access Statement (DAS) that accompanied that application stated that 'there are no other buildings on site capable of conversion' and, at paragraph 4.1 the document notes, with reference to the location of the proposed dwelling, that 'this will enable the dwelling to be constructed whilst the mobile home is still occupied by the applicant'. The barn is consistently referred to as an 'agricultural barn' and there is no reference in the DAS to the fact that the western end was occupied for residential purposes.
22. Thus, there was no indication in the documents supporting the applications that Mr Roman was living in the western end of the barn. The particular sentences referred to in the DAS suggested otherwise. Taken at face value, the content of those two paragraphs contradicts the evidence given by Mr Roman, Mr Brooks and Mr Forde under oath that Mr Roman was living in the western end of the barn in 2010. Mr Roman accepted as much at the Inquiry but indicated that he didn't read the precise detail of the application documents but left those matters in the hands of Mr Forde. Whilst giving evidence under oath he suggested that the content of the documents was incorrect because he was living in the barn at the time.

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<sup>1</sup> LPA reference 10/00105/FUL

<sup>2</sup> LPA reference FUL/MAL/10/00702

23. Mr Forde insisted that the applications should be looked at in the context of why and when they were made. In particular, he stated that the application to renew the planning permission for the mobile home was only made following a prompt from the Council's enforcement officer who noted that the previous permission has expired. Further, that application was withdrawn on the advice of the planning officer who suggested that an application for a permanent dwelling was made. In Mr Forde's eyes that indicated that the Council was not unduly concerned about any continued unauthorised residential use at the site because they were happy for the application to be withdrawn without any alternative planning permission being in place. In other words, at that point in time the residential use of the barn or the caravan or the caravan would have been unauthorised and he didn't consider it was a matter of particular significance. Rather, Mr Forde suggested that he concentrated on the primary objective of securing permission for a permanent workers' dwelling. At that stage, Mr Roman's occupation of the barn was considered as a temporary solution, pending approval and construction of a permanent dwelling.
24. Whilst I acknowledge the content of the planning documents from 2010, I must weigh that against the evidence given by Mr Roman, Mr Brooks and Mr Forde as to the occupation of the barn at that time. It seems likely, to my mind, that the planning documents did not accurately reflect the current living arrangements of Mr Roman at the time and, taking account of the compelling accounts of Mr Roman and Mr Brooks, who visited the property regularly over that period, I remain satisfied, on the balance of probability, that Mr Roman was living in the barn in 2010, notwithstanding the content of the planning documents.
25. In view of the above, I conclude, on the balance of probabilities, that Mr Roman had lived in the building for more than four years by the time he left the country in 2012. Following 2012, the property has been managed by Mr Forde who claims to have let it out to a number of what he describes as 'low value' tenants at a 'sub-market rent' of £300 per calendar month. According to Mr Forde, the reason for the low value of the rent was due to the basic standard of accommodation and the fact that the intention was to sell the farm once he had resolved issues relating to the title deeds through the courts i.e. by removing the charge that had been placed on the property by the unregulated lender. That process took somewhat longer than the 6 months that he had anticipated and the matter was heard in Court in June 2015.
26. Little evidence of who lived at the property from August 2012 onwards has been provided by the appellant. The Council Tax register notes that Mr Alan David Noakes and Miss Pauline Tabone were resident from 26 June 2015 and there is no dispute that the property has been occupied from that point onwards. The Council visited the site on the first and tenth of July 2014 and the photographs provided show shoes outside the entrance door and photographs through the window into the kitchen show foodstuffs and cleaning products. It would appear to have been occupied at that point in time. I also note reference to the local newspaper report of the suicide of a tenant at the property in December 2014.
27. Furthermore, Mr Forde has provided details of regular money transfers via Western Union of amounts ranging from £200 to £500 over the period from November 2012 to January 2016. The evidence is presented in tabulated form and the table does not depict where the money was transferred from and to.

Mr Forde suggests that the transfers were money sent from him to Mr Roman in respect of rent collected from the property. Whilst the evidence is not entirely transparent I have no reason to doubt Mr Forde's version of events.

28. When viewed in totality, the evidence presented indicates that the property continued to be let for residential purposes on a relatively informal basis since 2012. No evidence of any intervening use has been provided and any agricultural use would appear to have ceased when Mr Roman left the country. Consequently, it seems probable that Mr Roman lived in the western end of the barn for more than four years between summer 2007 and August 2012 and that the residential use has continued since that date without any intervening use or periods of prolonged vacancy.

#### *Positive Deception and Concealment*

29. The *Welwyn* judgement held that the public policy principle – that no-one should be allowed to profit from his own wrong – could be applied for planning purposes, notwithstanding the statutory scheme laid down by the Act. In other words, it was possible to take enforcement action in cases where the time limits imposed by s171B of the Act had been exceeded, if there had been positive and deliberate deception. Lord Manse JSC, giving leading judgement in *Welwyn* identified four features that took that case outside the scope of s171B(2) of the Act; there was positive deception in matters integral to the planning process; the deception was directly intended to undermine the planning process; the deception did undermine the planning process and; the wrong doer profited directly from the deception.
30. Mr Justice Holgate in the High Court judgement in relation to *Jackson* reiterated those four criteria but noted that not all cases would need to meet all four points for the 'Welwyn principle' to apply. He cited the case of *Fidler*<sup>3</sup> where no false statements had been made in the planning process because no planning applications had been made. The deception in that case was related to deliberate concealment.
31. Having read the respective judgements it is clear that the principles established in *Welwyn* should not be applied lightly. Lord Brown in *Welwyn* noted the following:
- 'Inevitably the breaches of planning control statutorily said to become immune from enforcement under section 171B involve a spectrum of wrongdoing. These range from cases at one end where the developer is simply unaware of the need for development permission to, at the other extreme, those intent on unpermitted development who plot a whole course of deception designed to circumvent planning control and escape enforcement'* (paragraph 73).
32. Lord Justice Richards giving lead judgement in the Court of Appeal in relation to *Jackson* made direct reference to the comments of Lord Brown and noted that *'the Welwyn principle applies to only particularly serious cases'* (paragraph 45).
33. The Council's case in relation to positive deception relates primarily to the content of documents submitted in relation to planning applications for development at the site. Mr Mouratidis and Mr Leigh also referred to the outward appearance of the building, with particular regard to the first floor

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<sup>3</sup> *Fidler v Secretary of State for Communities and Local Government* [2010] EWHC 143 (Admin)

windows which had been blocked up in 2008 and 2010, as depicted in photographs supplied by the Council.

34. However, there is no evidence that the windows were blocked up in a deliberate attempt to conceal the residential use. Even without those windows, the western end of the barn had a dwelling like appearance as a result of the domestic style windows and doors, including the French doors linking the living accommodation to the barn, and the domestic style rooflights. That was acknowledged in the Council officer's site visit notes relating to the visit on 06 October 2010, as set out above. The site remained open to inspection and the residential use would have been apparent to anyone looking through the windows. In that sense, it appears to me that there was no attempt to deliberately conceal the activity on site in a way that is comparable to *Welwyn*, where a dwelling had been constructed from the outset with the outward appearance of a barn, or the well-publicised case of *Fidler* where the dwelling was concealed with straw bales.
35. Moreover, it seems to me that Mr Roman's decision to convert the western end of the barn was driven by the strong emotional response to the loss of his partner rather than as a pre-planned act of development. It seems likely that Mr Roman would have understood that planning permission was required to convert the barn but I can appreciate that compliance with planning regulations may not have been at the forefront of his mind in the weeks following the tragic death of his partner, when the work was undertaken. In other words, the conversion appears to have been driven by a spur of the moment reaction as opposed to a deliberate attempt to deceive the planning system. Up to that point, the barn was used for agricultural purposes and it was still Mr Roman's intention to carry on with the agricultural business. Therefore, I find a clear distinction between the actions of Mr Roman and those of Mr Beesley in *Welwyn*, or Mr Fidler, both of whom were guilty of deliberate concealment and deception from the outset.
36. The bulk of the Council's case relating to deception relates to the content of the planning documents submitted in relation to the February 2010 application and the July 2010 application. As noted above, the content of the DAS, at paragraphs 2.12 and 4.1 in particular, gave the impression that Mr Roman was still living in the mobile home at that point in time. Mr Roman accepted as much at the Inquiry but indicated that the information was incorrect and that he didn't read the detail of application documents but left those matters in the hands of Mr Forde. Mr Roman described himself as a 'hands on' man and not someone who took an acute interest in paperwork and I have no reason to doubt that he left planning matters in the hands of Mr Forde and his company. Whilst Mr Roman may ultimately be considered responsible for applications submitted in his name, I am satisfied that the content of the supporting documents did not come about as part of a deliberate attempt on his part to mislead.
37. Moreover, I am satisfied that the applications submitted in 2010 were made as part of a genuine attempt to secure planning permission for a permanent agricultural workers' dwelling in relation to the farming business at the site. There is no dispute that Mr Roman was still engaged in agriculture at that time or that he was attempting to build up his business. At the time the applications were submitted no planning permission was in place for any form of residential accommodation at the site.

38. In that context, it appears to me that the strategy of Mr Roman was to secure a permanent agricultural workers' dwelling on the site and the applications were submitted towards achieving that aim, rather than as a deliberate attempt to deceive the Council with regard to the unauthorised use of the barn.
39. The Council was satisfied that the business was viable at the time the application was assessed and that it could support a permanent dwelling. It is difficult to gauge whether that decision would have been different had the Council been aware that he was living in the barn at the time the application was made. Whilst it would have been apparent that the barn was 'capable of conversion' Mr Roman's stated intention at that stage was to increase the size of the flock and it is reasonable to assume that the barn would have been required and utilised for its originally intended purpose, had the farm expanded as anticipated and the permanent dwelling been constructed. Consequently, it is not clear that Mr Roman profited as a result of the misleading content of the planning documents, given the overall strategy for the farm. Planning permission may well have been secured in any event.
40. In my view this is not a case where Mr Roman gained planning permission for a form of development that he had no intention of implementing in order to deceive the planning authority as to his occupation of the barn. He was fully engaged in the farming enterprise and sought permission for a permanent dwelling that he fully intended to build and occupy. In that context, I consider that the applications were not directly intended to undermine the planning process but were based on the estimated needs of the farm moving forward.
41. Consequently, I do not agree that this case sits on all fours with the cases of *Welwyn* and *Jackson*, as suggested by Miss Foster in closing submissions for the Council. The conversion was not concealed through any action on site or in terms of the outward appearance of the building and the initial conversion took place as an emotional response to the tragic death of Mr Roman's partner. The initial conversion works were not undertaken as part of a deliberate plan to deceive.
42. Whilst the documents associated with subsequent planning applications did not present the full circumstances and were misleading in some respects I do not consider that those applications were made in a deliberate attempt to deceive the Council in relation to the occupancy of the barn. Rather, they were made as part of an on-going long term strategy for the farm and were based on the genuine intentions of Mr Roman to make a success of that business.
43. Therefore, having regard to the information before me, and applying the principles established through relevant judgements, I am of the view that the circumstances of the case are such that the *Welwyn* principle should not apply. In other words, the actions of the appellant were not such that the case should be considered to fall outside the scope of s171B(2) of the Act.

#### *Overall Conclusions on Ground (d)*

44. For the reasons set out I found the evidence given by Mr Roman and Mr Brooks to be compelling as to the timeframe when the conversion to residential use took place and the length of subsequent occupation. On the balance of probabilities I conclude that Mr Roman lived in the western end of the barn for a period of more than four years before he left the country and consider it likely that the residential use has continued without significant breaks in

occupation or any intervening use since that time. In my view, the circumstances of the case are such that the *Welwyn* principle should not be applied. Therefore, the use of the western end of the barn for residential purposes is immune from enforcement action by virtue of the terms of s171B(2) of the Act. The appeal on ground (d) succeeds and I shall quash the notice accordingly.

**The appeal on Grounds (f) and (g)**

45. Given that the notice will be quashed as a result of my decision in relation to ground (d) it is unnecessary for me to consider the appeal on grounds (f) and (g).

*Chris Preston*

INSPECTOR

## **APPEARANCES**

### **FOR THE APPELLANT:**

Mr David Whipps

He called

Mr M Roman

Appellant

Mr Peter Brooks

Mr Russell Forde B Eng  
(Hons) Dip TP MRTPI

Principal Director, Smart Planning Ltd

### **FOR THE LOCAL PLANNING AUTHORITY:**

Ms Anjoli Foster

Of Counsel

She called

Mr Spyridon Mouratidis

Planning Officer

Mr Matthew Leigh

Planning Group Manager

BA(Hons) MA MRTPI

## **Documents Submitted at the Inquiry**

- 1) Forwarding letter, dated 15 February 2010, submitted with planning application for the renewal of temporary permission for siting a mobile home (Smart Planning Limited)
- 2) Letter, dated 27 October 2006, relating to the initial application for a mobile home (Smart Planning Limited)
- 3) Design and Access Statement submitted in relation to a planning application for the erection of a farm workers' dwelling
- 4) Council officer site visit notes and assessment in relation to the application for a farm workers' dwelling (FUL/MAL/10/00702).