

**PROPOSAL:** Confirm use of first floor accommodation above domestic garage/study/store as separate residential flat and use of land at the rear as a patio is lawful.

**LOCATION:** Jubilee Cottage, 9 Egerton Avenue, Hextable BR8 7LG

**WARD(S):** Hextable

#### **ITEM FOR DECISION**

The applicant is a Member and therefore under the Council's Constitution the application must be determined by the Development Control Committee.

**RECOMMENDATION:** That a Certificate of Lawfulness be GRANTED for use of the first floor accommodation above domestic garage/study/store as separate residential flat and use of land at the rear as a patio because evidence has been submitted which shows that the first floor of the building has been used as a separate residential unit for over 4 years and is immune from planning enforcement action. No other evidence is available or has been submitted to challenge this and therefore on the balance of probability, lawfulness has been demonstrated.

#### **Description of Proposal**

- 1 Confirm use of first floor accommodation above domestic garage/study/store as separate residential flat and use of land at the rear as a patio is lawful.

#### **Description of Site**

- 2 The site comprises a two storey detached dwelling, situated on the southern side of Egerton Avenue, within the urban confines of Hextable. The property is set back from the road, screened by a large Willow tree and features a long driveway, leading to the garage to the rear. The property sits on a very elongated plot, of around 90 metres in depth.
- 3 The garage extends along part of the western boundary with 11 Egerton Avenue and the land at the rear of this. It comprises a garage, study/store and shed/store at ground floor. A metal staircase leads from the ground floor at the south of the building up to the first floor which comprises a lounge, kitchen, bathroom and bedroom. These first floor rooms are served by three dormer windows on the eastern elevation.

#### **Policies**

- 4 Town and Country Planning Act 1990 (as amended)

5 NPPG

### **Relevant Planning History**

- 6 88/01154/HIST - Garage - Granted
- 7 89/0110/HIST - Erection of garage with children's room at first floor level - Granted
- 8 02/02108/FUL - Change of use of first floor of outbuildings as a self contained dwelling in association with existing dwelling - Withdrawn

### **Consultations**

#### *Hextable Parish Council*

- 9 No response received to date (expiry is 3<sup>rd</sup> August 2016)

### **Representations**

- 10 7 letters of representation have been received. 5 letters have been received in support, including one from the applicant with an attached list of neighbours in support of the application. The letters of support state that the building has been let out for several years.
- 11 One letter of objection was received, relating to:
- Multi-tenanted leases
  - Excessive car parking
  - Unsafe exit and entry into Springvale, limited vision
- 12 One letter was received neither indicating support or objection, but raised previous car parking concern and Council Tax query.

### **Chief Planning Officer's Appraisal**

- 13 The main issues for consideration of this planning application are:
- Principle of LDCs
  - Background
  - Summary of evidence
  - Other Issues

### **Principle of LDCs**

- 14 This application is submitted under s191 of the Town and Country Planning Act 1990, seeking to establish the lawful use of the building as a residential dwelling. Section 191 (2) states that:

For the purposes of this Act uses and operations are lawful at any time if—

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(a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and

(b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

- 15 The time limits for taking enforcement action are set out in s171B of the Town and Country Planning Act 1990 and the NPPF Planning Practice Guidance summarises this as follows:

Development becomes immune from enforcement if no action is taken:

- Within four years of substantial completion for a breach of planning control consisting of operational development;
- Within four years for an unauthorised change of use to a single dwellinghouse;
- Within ten years for any other breach of planning control (essentially other changes of use). However, this would also relate to non-compliance with a condition.

- 16 With regard to the degree of information to be submitted in support of such applications, the NPPF Planning Practice Guide explains that:

“In the case of applications for existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant’s version of events less than probable, there is no good reason to refuse the application, provided the applicant’s evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability.”

- 17 The guidance adds that:

“A local planning authority may choose to issue a lawful development certificate for a different description from that applied for, as an alternative to refusing a certificate altogether. It is, however, advisable to seek the applicant’s agreement to any amendment before issuing the certificate. A refusal is not necessarily conclusive that something is not lawful, it may mean that to date insufficient evidence has been presented.”

- 18 To ensure that decisions are clear, precision in the terms of any certificate is vital. It is important to note that:

- a certificate for existing use 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. But where it is within a “use class”, a certificate must also specify the relevant “class”. In all cases, the description needs to be more than simply a title or label, if future problems interpreting it are to be avoided. The certificate needs to therefore spell out the characteristics of the matter so as to define it unambiguously and with precision. This is particularly

important for uses which do not fall within any “use class” (i.e. “*sui generis*” use); and

- where a certificate is granted for one use on a “planning unit” which is in mixed or composite use, that situation may need to be carefully reflected in the certificate. Failure to do so may result in a loss of control over any subsequent intensification of the certificated use.

#### *4 or 10 years*

- 19 The condition on the original application for the garage under 89/0110/HIST contained a condition which restricted the use of the garage as incidental to the enjoyment of the dwellinghouse. Breaches of condition are immune from enforcement action after 10 years, whereas the use as a single dwellinghouse is immune from enforcement action after 4 years. It therefore has to be established which period of time this application should be assessed against.
- 20 The decision of the Court of Appeal in *Arun DC v. FSS* (2006) concluded that the only exception occurs where a breach of condition (to which the 10-year rule would normally apply) results in the creation of a separate dwelling. This is therefore only example of a breach of condition being subject to the 4-year rule (*Arun DC v. FSS* 2006).
- 21 Due to this case law the proposal will be considered under the 4-year rule.

#### **Background**

- 22 The building on the site which is the subject of this LDC application was granted permission in June 1989 for a garage/store/shed at ground floor and a children’s play room at first floor.
- 23 The conditions on the approval stated that the building should be kept available for use as a garage at all times and that the use of the building should be incidental to the enjoyment of the dwellinghouse and should not be used for any other purpose.
- 24 The building under this permission was divided into three sections at ground floor, yet was open plan at first floor, according to the approved plans.
- 25 In 2002 an application was received for the change of use of the first floor as a self contained dwelling. This application was subsequently withdrawn and no further action was taken.
- 26 The site visit to the property revealed that the ground floor elements of the building remain unchanged, however the first floor has been split into a living room area, kitchen area, bathroom and bedroom. The external appearance of the building does not appear to have changed.
- 27 The applicant claims that the first floor has been used as an independent unit since 2008 as a first floor flat.

#### *Summary of evidence*

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| Evidence Source                                   | Evidence  |
|---|---|
| Affidavit: T H Searles                            | Statement - additional accommodation originally for children. Subsequently let out on Short Hold Tenancy Agreement. Three tenants since 2008. Have use of the first floor, terrace to the rear and driveway. For the last 4 years the garage and patio has been used as a separate residential dwellinghouse. |
| Aerial Photographs                                | Indicate garage in current position 2003, 2007 & 2015.  |
| Tenancy Agreement - Mr Robinson                   | Commencement date 18 <sup>th</sup> March 2008   |
| Ashton Burkinshaw letter re. tenancy              | Tenancy commenced 18 <sup>th</sup> March 2008   |
| Ashton Burkinshaw invoice                         | Payment paid 17 <sup>th</sup> March 2008  |
| Ashton Burkinshaw Prescribed Information document | Signed by Mr Robinson, no date  |
| Letter from Mr Robinson                           | Confirming 3 months notice of tenancy - 18 <sup>th</sup> March 2012   |
| Tenancy Agreement - Mr Baron                      | Commencement date 21 <sup>st</sup> June 2012  |
| Mann Lettings letter re. deposit                  | Dated 15 <sup>th</sup> June 2012 confirming tenancy period of 12 months and rent amount   |
| Copy of bank transactions                         | Bank transactions from Mr Baron, indicating monthly rent payments from 1 August 2012 to 1 <sup>st</sup> May 2013  |
| Mann Lettings letter re. Mr Baron's tenancy       | Initial 12 month fixed tenancy which reverted to a periodic tenancy under the Housing Act. States that they understand that Mr Baron was in situ until approximately 1 week prior to Mrs Pierzchniak moving in  |
| Tenancy Agreement - Mrs Pierzchniak               | Commencement date 30 <sup>th</sup> November 2013  |
| Copy of bank transactions                         | Bank transactions from Mrs Pierzchniak, indicating monthly rent payments from 3 August 2015 to 1 July 2016  |
| 2002 application                                  | Officer notes suggest that the building has been in use for at least 2 years  |

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The above list of evidence indicates that the first floor of the building has been lived in by a tenant since 18<sup>th</sup> March 2008. It is not entirely clear whether this has been continuous from the information submitted. There seems to be slight discrepancy within the applicant's statement where it is

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stated that Mr Baron was in residence from June 2012 to November 2014. However, the bank transactions submitted and Mann Lettings evidence indicates that the end date was in 2013, not 2014 and Mrs Pierzchniak's tenancy agreement started in November 2013.

- 30 There is also discrepancy between the information from the 2002 application which was withdrawn. The officer report suggests that the building has been in use as additional accommodation for the last 2 years. However, it is important to note that it is not known if this use was independent or incidental to the enjoyment of the dwellinghouse. For this reason it is felt that this provides little weight.
- 31 Notwithstanding these discrepancies, it is clear from the evidence above that the first floor of the building has been occupied as a residential unit since 2008 through the tenancy agreements, bank statements and other documents, which provide significant weight. While this use may not have been entirely continuous, the gaps between the occupancy of the flat do not appear to be longer than one month according to the evidence above.
- 32 The question is therefore whether this interruption is enough to defeat any claim of immunity from enforcement proceedings. This is a matter of fact and degree as to whether a short period such as a month is considered continued use. When taking an example of the sale of a residential property, the duration that the property is sold to when the new owners move in can take a month or more and while there is a gap in occupation, the house still remains in residential use. Taking this example, it is considered that the break of a month is not a material interruption to the use of the first floor of the building under this application in this instance due to its short period.
- 33 It is also noted that the application makes reference to the use of the patio area around the rear of the building. The original application for the garage does not appear from the plans to include a patio area. The patio area is however included on the plans submitted under this application and the statement from the applicant indicates that this area has been used by the tenants as an area in association with the first floor flat. The site visit indicated that this area has a distinctive boundary as it is slightly raised from the rest of the garden and only visible when walking towards the end of the garage building. It is sited immediately to the rear of the building and provides the base for the staircase leading to the first floor. It appears very worn and is clear that it has been in situ for some time. It is therefore considered that the patio has a close relationship with the first floor of the building and without any further evidence to the contrary, has been used in connection with the first floor flat.

## **Other Issues**

### *Concealment*

- 34 There are provisions for dealing with concealed breaches of planning control even when the 4-year time period has passed, under Enforcement regulations. The expediency of taking action has been considered. However, it is not felt that these provisions apply in this instance as SDC has no

evidence to suggest that there has been a positive form of deliberate deception here to actively hide the nature of the occupancy which would warrant the refusal of the application on the basis of concealment.

## **Conclusion**

- 35 While some of the evidence provided has been somewhat ambiguous in regards to the dates that the first floor of the building has been rented out, there is sufficient evidence in relation to the tenancy agreements, bank statements and letters from the Lettings Agencies to support the contention that the first floor of the garage building to the rear of 9 Egerton Avenue and the patio associated with this has been used as a separate residential flat for more than 4 years.
- 36 The first floor flat and patio are therefore immune from enforcement action and has become the established use.

## **Recommendation**

- 37 Grant.

## **Background Papers**

Site and Block plans

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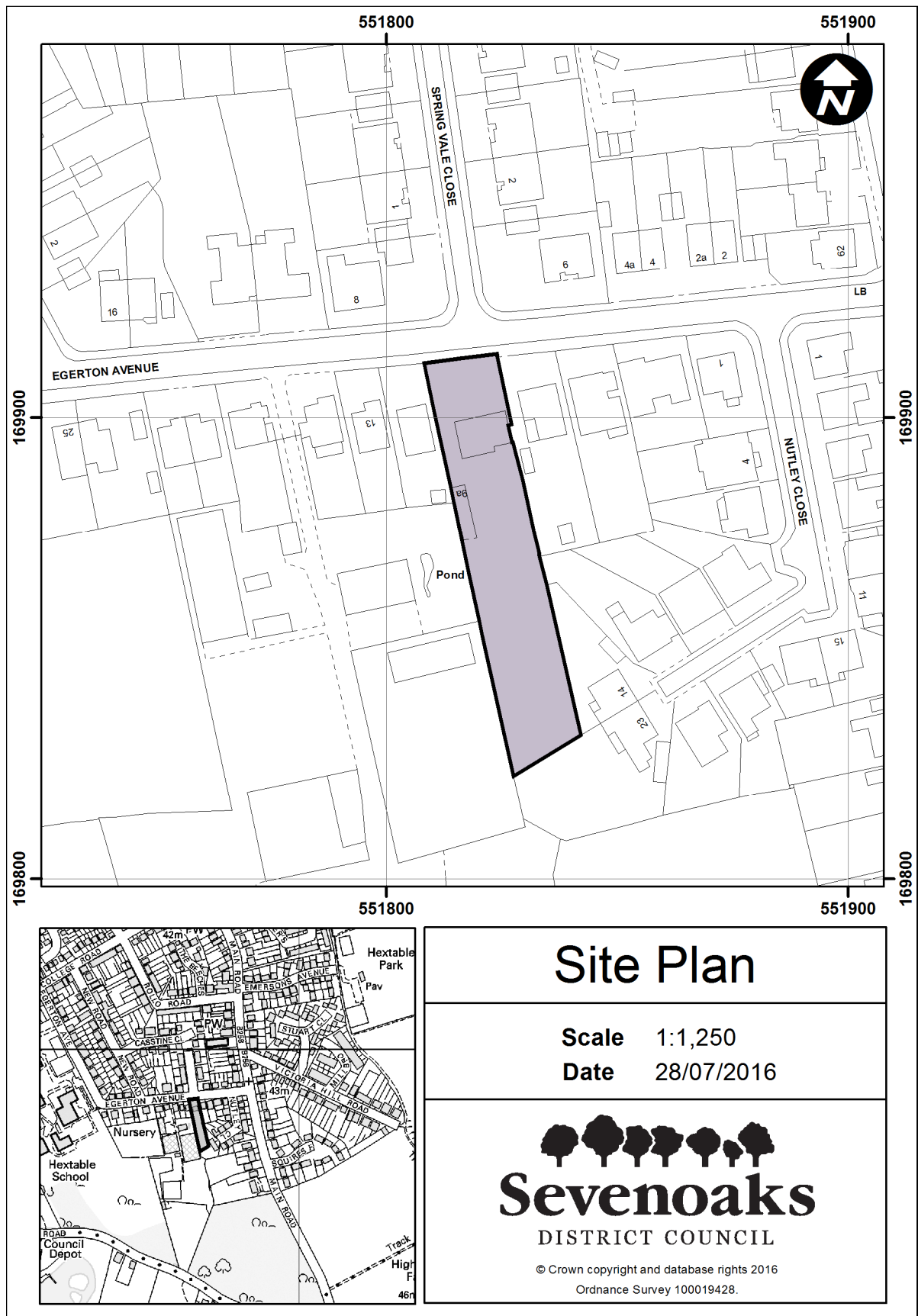
**Richard Morris**  
**Chief Planning Officer**

Link to application details:

<https://pa.sevenoaks.gov.uk/online-applications/applicationDetails.do?activeTab=summary&keyVal=O9YCK3BKI1K00>

Link to associated documents:

<https://pa.sevenoaks.gov.uk/online-applications/applicationDetails.do?activeTab=documents&keyVal=O9YCK3BKI1K00>



# BLOCK PLAN

