SECTION 2 – ITEM 6

Application No: 23/P/0194/LDP

Proposal: Proposed lawful development certificate for use as allotments with ancillary parking and the laying of matting (shown on the specification submitted with the application) for access and parking

Site address: Land Off Abbots Leigh Road Abbots Leigh BS8 3QB

Applicant: Allota Futureland Ltd

Target date: 24.03.2023

Extended date: 07.04.2023

Case officer: Charles Cooksley

Parish/Ward: Abbots Leigh/Pill

Ward Councillor: Councillor Jenna Ho Marris

REFERRED BY COUNCILLOR JENNA HO MARRIS

Summary of recommendation

It is recommended that a certificate of proposed lawful development is issued to confirm that the proposal would be lawful. The full recommendation is set out at the end of this report.

The Site

The application site is located within Abbots Leigh to the north of A369, Abbots Leigh Road. It is accessed from Abbots Leigh Road via an unadopted highway which serves as the entrance to the Leigh Woods woodland car park. The site is currently a 7.8 ha open field enclosed by boundary fencing. A public right of way passes through the middle of the site.

The site is adjacent to Leigh Woods and along the southern boundary and outside the site boundary but running parallel along the length of the eastern boundary are trees protected by TPO. Residential dwellings are along the west boundary of the site in Ashgrove Avenue.

The Application

The applicants are applying for a Proposed Certificate of Lawful Use or Development seeking a legal determination that planning permission is not required for the following;

- The use of the site as for allotments
- Ancillary parking for the allotments

- The laying of matting for the access and parking area

Such applications are not conventional applications for planning permission and so the planning considerations normally to be taken into account in the determination do not apply. The application must be decided solely on the application of planning law. If, on an application under this section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect; and in any other case they shall refuse the application. Counsel's advice has therefore been taken on the issues raised and this report includes reference to relevant legislation and caselaw as appropriate.

It is noted that the applicants do not rely upon the works being permitted development under Part 6 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) and have not submitted evidence about this. As such the matter of Permitted Development has not been considered unless it is relevant.

Part 6, Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) relates to permitted development rights for Agricultural and Forestry development.

Consultations

Copies of representations received can be viewed on the council's website. This report contains summaries only. A significant number of comments received relate to the planning merits of the proposal and are not directly related to the legal determination which has to be made. Government guidance provides that views expressed by third parties on the planning merits of the case, or on whether the applicant has any private rights to carry out the operation, use or activity in question, are irrelevant when determining this type of application.

Third Parties:
Objection - 204 letters have been received including opinions from planning consultants and lawyers.
The principal planning points made which are relevant to the determination are as follows:

- Additional infrastructure is required which makes it a material change of use and character of the land.
- Over intensification in the use and change of use of the land for agriculture. Won't be used as allotment, will be used for leisure, commercial use rather than agricultural use
- Change of use from grazing meadow land to cultivation, loss of unspoilt wildflower meadow. The proposed use of the site lies beyond the scope of the decision in Crowborough
- Possible loss of access to public rights of way
- The laying of plastic matting for 80 parking spaces would require large scale "building operations" to scrape clean the surface top soil and level the base and although theoretically removable, will in fact be in place on a permanent basis, thus a permanent structure.

- "The proposed use of the site for allotments falls within the definition of agriculture and provided this is in fact the case, the use of land as allotments, it would be hopeless to argue that the use would not be for agriculture."
- "The fact that the allotments would be different in character from what might be conceived as "conventional allotment" does not take them outside of that category of agricultural use and they are still allotments."
- "The car park is said to be ancillary to the agricultural use. An ancillary use may be relatively extensive provided it is a functionally linked to the primary use. It may be necessary to provide car parking facilities for those who work in agriculture in principle the provision of a car park might be regarded as incidental to the use of land as allotments. However, an ancillary use may grow to the point where it can no longer be said to ancillary but a use in its own right, thereby creating a dual or mixed use. A 80 space car park is not ordinarily associated with the use of land for agriculture. The scale of the use is likely to have an impact of the overall character of the land and on neighbouring land that is more akin to an urban than an agricultural setting. Notwithstanding the functional link between the two land uses, the local planning authority may decide as a matter of planning judgement that the scale of the car park and its effect ought to be regarded as a use in its own right and would require planning permission for the car parking."

Support - 96 letters have been received. The principal planning points made do not raise issues relevant to the legal determination of the need for planning permission.

Abbots Leigh Parish Council: Objects to the application for the following reasons;

- The evidence submitted does not sufficiently demonstrate that the proposed large scale allotment will not result in a significant difference in the character of activities on the site (and therefore change of use) from the existing open grassland.
- The evidence submitted is not precise enough about the nature of the activities proposed at the allotments - any communal areas, picnic areas or bike locks (which are publicly advertised as being available) as well as the 80 car parking spaces proposed, do not fall under the Section 336 definition of agriculture.
- The laying of matting represents an act of development resulting in a change of use
- Avenue and Home Farm Road. These proposals should be subject to a full planning application.

Principal Legal Issues

Issue 1: The proposed use of the land as allotments

The current use of land is agricultural, and the applicants seek confirmation that the proposed allotments fall within the definition of agricultural and therefore does not amount to a change of use of the site.

Section 336(1) of the Town & Country Planning Act 1990 (TCPA) defines agriculture as including:
"…horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land), the use of land as grazing land, meadow

land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes, and agricultural shall be construed accordingly."

The definition is broad, and planning case law confirms it encompasses the use of agricultural land for the purpose of allotments (*Crowborough Parish Council v Secretary of State for the Environment [1981*]);

Section 55 (2)(e) of the Act provides that the following is not to be taken to involve the development of land:

(e) the use of any land for the purposes of agriculture or forestry (including afforestation) and the use for any of those purposes of any building occupied together with land so used;"

Since the use of land for agricultural or forestry purposes does not constitute development, it is unnecessary to ask whether there would be a material change of use from one type of agricultural use change to other agricultural uses. For that reason, the use of the site for the purposes of allotments is considered lawful.

It is noted that objectors have suggested that the proposed use is not just for allotments, but may also include communal areas, a picnic area and bicycle locking facilities. The application must however be determined on the basis of the proposal and supporting information submitted by the applicant. The applicants have clarified that such uses are not included within the application and they do not seek a determination on the lawfulness of such uses. If it transpires that such other matters do occur at the site then the judgement will made at that time as to whether they constitute development for which planning permission is required. The applicant runs the risk of future enforcement action or revocation of the certificate if it fails to describe the proposed use of the site accurately and instead commences a different use. It should be noted however that case law (*Pittman v Secretary of State for the Environment*) has also confirmed that the fact that work on an allotment might be undertaken as a hobby or recreation did not take the activity outside of the definition of “agriculture” set out in the Act.

A number of comments have been raised on the grounds that the scale of the proposed use and the number of proposed plots (approximately 700) goes beyond a reasonable allotment operation and would amount to an intensification of the use and therefore amount to a material change of use of the land. Legal advice has been taken on the question of intensification. Although there may be a material change in use where an existing use has become intensified, there has been no court decision where intensification alone has been held to amount to a material change of use. (*Hertfordshire CC v Secretary of State for Communities and Local Government [2012]*). A change in use can only be material by bringing about a definable change in the character of the use of the land. A mere intensification of a use does not in itself constitute a material change (for example additional tables at a restaurant or increasing the number of caravans on a caravan site). The proposed use as allotments remains within the definition of agriculture and so long as the use remains an agricultural use, the intensification of this use would not result in a material change of use. This has also been considered in caselaw in the Crowborough case where factors such as greater intensity of use that would be involved with the working of individual plots by tenants, was specifically rejected.

Issue 2: The proposed access to the site and the proposed ancillary allotment parking

The proposed use as allotments includes space allocated for vehicle parking along the eastern boundary. The applicants have written within the design and access statement **"***An area for car parking and to allow drop-off and pick-up of people and equipment/supplies is proposed and this is to be laid out a minimum of 10m from the access point and runs in a north-south direction along the eastern boundary of the site.***"** The proposed site plan outlines that the parking area has 80 parking spaces. The issue to consider is whether the parking is "ancillary" to the use as allotments (ie: part and parcel of the allotment use) or a primary use in its own right.

In order for a use to be ancillary, it must be carried on in the same planning unit as the primary use (i.e. without physical separation) and it must be functionally linked to the primary use: (*Main v Secretary of State for the Environment (1998*) and (*Westminster Council v British Waterways Board [1985]*). A use is not ancillary simply because it is small in scale, rather the necessary functional relationship with the primary use must exist: Further, it is established through case law that the ancillary link may be lost where the ancillary use grows to the point where it can no longer be said to be ancillary, but to have become a separate use in its own right (*Trio Thames Ltd v Secretary of State for the Environment [1984]*)

To establish whether a use is materially different it is important to consider what is the "planning unit". Based on case law, for the purposes of this issue, the planning unit is the entire site as it is a single unit of occupation with a single main purpose, namely the allotment use, without subdivision *(Burdle v Secretary of State for the Environment [1972]*) On this basis, the parking use would occur within the same planning unit as the allotment use, without physical separation. Further, it would be functionally related to the allotment use because it would be used by the allotment users accessing the site. This is not an unexpected part of an allotment use. The purpose of an allotment is to provide outdoor growing space, often to people who do not have a garden or sufficient space at home. It is to be expected that people will travel to the allotment, very often by car, and the provision of parking is thus ancillary to the allotment, having regard to ordinary and reasonable practice.

Some objectors and the legal comments made on behalf of the Parish have alleged that the parking use may not be ancillary to the allotment use because of the scale of the proposed car parking area. Nevertheless, it is concluded that the scale of the parking use is not so great as to mean that it is not ancillary, applying the *Trio Thames* case. The reason for this is that although 80 parking spaces is a significant number, this must be put in the context of the site, which measures some 7.8 hectares. Further, this must be set against the likely capacity of around 700 allotments. In this context, it is concluded that 80 parking spaces is not of such a large scale that the parking use cannot be ancillary to the use of allotments.

A means of access to the site is being created, by the removal of a section of existing wire fence. The site will access onto an unadopted private access road which serves the Leigh Woods Forestry Commission car park. Having regard to the site plan enclosed with the Application, this appears to be very small in extent and thus could be regarded as *de minimis*. The removal of the fence does not amount to development and does not require permission to complete its removal and on the basis that the proposed access onto an

unadopted highway does not amount to development for the purposes of s. 336(1) and as detailed in s.55 TCPA 1990.

The other aspect of the proposed access to the site and the proposed ancillary allotment parking which therefore must be considered is whether or not they constitute operational development and if they do, whether they are permitted development ("PD") by virtue of the provisions of the Town and Country Planning (General Permitted Development) Order 2015 (often referred to as the "GPDO").

As explained above, in this case the removal of the fence for the access is not development and the car park is considered to be ancillary and whether it is permitted development is considered below in issue 3.

Issue 3: Is the proposed matting for the access and parking area operational development?

To facilitate the parking area the application involves the laying of "Grass Grid" matting, which the applicants have said on the basis of how it is installed and its interaction with the land, that it does not constitute "operational development". The matting is comprised of hollow sections which when placed on the land will allow grass growth through. It has been stated that the matting does not require any excavation and no other ground preparation or levelling will be carried out. The laying of the proposed matting does not require significant time or labour to install and can be carried out by someone without expertise in building or engineering operations. The works are intended to be carried out by the Roots team and will take 1-2 days for the access point with the parking area being completed alongside the other works to establish the site, as and when it is required. The matting will be clipped together and laid upon the ground, and will not be fixed to the ground, nor will it be pressed or pushed into the ground, with only natural compaction from vehicles driving over it.

Section 55 of the Act defines what is "development" and therefore what may require planning permission.

This states:
"….., "development," means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land".

There are therefore two limbs to the definition - the carrying out of building, engineering, mining or other operations (often referred to collectively as "operational development") and secondly, the making of a material change of use.

The Act also defines "building" which "includes any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building". Although the proposed matting would be permanent, nevertheless, given its dimensions, and pre-formed nature, it could not be described as either a structure or an erection, given its essentially flat form, flush on top of the ground and it is unlikely to be of sufficient size to amount to a "building" as defined in the Act. The other factors – in particular the absence of attachment to (or compression into) the ground and the relatively short length for installation for an area of this size are consistent with this assessment.

The Act defines “engineering operations” in s.336(1) as: “engineering operations” includes the formation or laying out of means of access to highways”. In *Fayrewood Fish Farms Ltd v Secretary of State for the Environment [1984]* the court took the view that an engineering operation could be an operation which would generally be supervised by an engineer (including traffic engineers as well as civil engineers) but that it was unnecessary that it should actually have been so supervised.

From the information received from the applicant, it unlikely that the installation of the proposed matting would be supervised by an engineer, particularly given the absence of any apparent technical engineering challenge with the site; and the simple nature of the installation without excavation, ground preparation or the laying of a subsurface.

Accordingly, the only basis on which the proposed matting might be an engineering operation is if it is means of access to a highway for the purposes of s. 336(1) of the Act. This has also been considered above. It is apparent that whilst a means of access to the site is being created through the removal of a section of existing wire fence and then the laying of the matting, the access is not to a public “highway” as defined in the relevant legislation and therefore this provision is not triggered.

The Act defines “building operations” in s. 55(1A) For the purposes of this Act “building operations” includes— (a) demolition of buildings; (b) rebuilding; (c) structural alterations of or additions to buildings; and (d) other operations normally undertaken by a person carrying on business as a builder. There is no evidence that the laying of the proposed matting would need to be carried out by a builder.

Considering s. 55(1A) of the Act, the only remaining possibly relevant category is paragraph (d) – ‘*other operations normally undertaken by a person carrying on business as a builder’*. The Proposed Matting is not built or otherwise constructed – the panels are connected to each other using the pre-formed ‘*flat plug-lap joint’* and then laid on the ground. No technical knowledge is required or any basis for employing a specialist contractor.

The proposed matting is of a very low profile, with limited visual impact and minimal impact on the physical characteristics of the site – the levels will not change and, whilst the ground will be more stable, its other qualities are essentially unchanged. Balancing these consideration the proposed matting will cover a wide area, it is permanent until removed. However on balance it is unlikely to be an ‘other operation’, given the matting is simply placed on the ground, without attachment or excavation.

Since the matting is considered to be an “an other operation” here are no permitted development rights relevant to the proposed matting.

On the basis of the above information and assessment it is concluded that the matting does not amount to operational development with particular reference to the criteria for “other operations” and would be lawful for the purposes of this application.

Conclusion

In summary, taking into account all the considerations above and the details provided in the application and by the applicants, also taking into account the relevant comments received from other parties the use of the site for allotments is a use within the definition of '*agriculture'*, applying *Crowborough;* the use of the site for allotments will fall within s. 55(2)(e) TCPA and thus will not amount to development; planning permission is not required for the use as allotments and applying s. 191(2) TCPA 1990, the use of the site for allotments is lawful.

Also as the proposed use is not development requiring planning permission and the proposed matting is not development requiring planning permission both the proposed use and the proposed matting are lawful for the purposes of s. 191(2)(a) TCPA 1990

RECOMMENDATION: That a Certificate of Lawful development be APPROVED for the following reason:

1. The proposed use of the site as allotments with ancillary parking, is a use within the definition of '*agriculture'* and the use of the site for allotments falls within section 55(2)(e) and thus will not amount to development and the proposed matting and creation of an access does not fall under the definition of operational development, does not constitute a building, engineering or other operational development by virtue of section 55 of the Town and Country Planning Act 1990 as amended. For these reasons, it is concluded that if the proposed operation had commenced on the application date, it would have been lawful for planning purposes. Also the proposed use does not breach an existing condition or limitation imposed on a grant of planning permission which has been acted upon and which would constrain the development now proposed and there are no extant enforcement notices relating to this land that would be contravened by the proposal.