

PLANNING AND REGULATORY COMMITTEE

UPDATE SHEET

16 August 2023

Section 2

Item 6 – 23/P/0194/LDP Land Off, Abbots Leigh Road, Abbots Leigh, BS8 3QB

Additional Third Party comments

Additional representations have been received from or on behalf of the local residents as follows.

Biodiversity Net Gain (BNG)

At the last Committee meeting under public speaking the applicant indicated that the proposal would deliver a 15% Biodiversity Net Gain (BNG) at the site once their facility is in operation. Section 194 of the Town and Country Planning Act 1990 (as amended) provides that it is an offence if an applicant for a Certificate of this type makes a statement which is false or misleading. If the applicant is unable to produce evidence of a properly procured ecologist's baseline assessment of the biodiversity of the site in its current state there will be nothing against which the claimed net gain is going to be measured. This is now a recognised process through which BNG is now being delivered across England. The Committee should establish whether such a baseline assessment has been procured and in so doing, identify whether the statement has been employed to mislead or deceive. The baseline report should be a properly prepared ecologist's report. If the Committee cannot satisfy itself on this point, it is another reason to turn down the application.

Officer comment

No formal record is made of public speakers' statements either for or against an application or the weight attributed to them. It is correct however that the Act contains provisions which make it an offence to a) knowingly or recklessly make a statement which is false or misleading in a material particular; (b) with intent to deceive, use any document which is false or misleading in a material particular; or (c) with intent to deceive, withhold any material information. Biodiversity net gain (BNG) is intended to be a means to contribute to the recovery of nature while developing land. It is making sure the habitat for wildlife is in a better state than it was before development. Not all the legislative provisions to require BNG are in place but in any event reference to providing BNG is not relevant to this application which is solely to determine the lawfulness of the proposed use as described in the application.

Comments on officers' report

A letter from a solicitor on behalf of local residents (the full text of which has is on the council's website) states that the officer report to the July committee (and the subsequent update report to the this committee) is not a legally sound basis upon which members can take a decision because it: (a) fails to explain that members are entitled to exercise their own judgment in applying the facts arising from the Application to the legal principles; and (b) contains legal errors in its consideration of whether the laying of "Grass Grid" matting is capable of constituting operational development and (c) the

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application fails to comply with the requirements of Article 39 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 in that it does not clearly identify the precise areas within which operations and uses are to take place. The specific points made are summarised as follows:

- There is legal ambiguity in the scope of the application which must be addressed before the application can be lawfully determined. Members are entitled to find that on the facts of the application, in particular the extensive parking areas shown on the submitted plan, that the overall use is not "agricultural". Members are entitled to take the view that the parking is so extensive that it is not ancillary, and that instead what is shown on the plans is a mixed or dual use that amounts to a material change of use. In this respect the *Crowborough* case which has been referred to did not include any parking element.
- Whether a change of use is material is a matter of planning judgement and a question of fact and degree based on the decision maker's appraisal of the character of the use. The application envisages a very large allotment site with extensive parking and the partitioning of multiple parcels and would have significant impacts on the character of the use and give rise to significant external impacts, for example by way of visual clutter and vehicle movements. These factors all weigh in favour of the conclusion that the proposed change of use from the current use as an open field would be material.
- The proposed parking surface comprises an extensive, engineered, structural solution that would facilitate a permanent car park and access route for at least 80 vehicles. This manufactured structural base will be installed and retained permanently. It will require ground preparation and personnel with construction skills. The applicant's assertions to the contrary are implausible. In any event the method of installation is legally irrelevant, and members are entitled to conclude that the installation of the Grasscrete has a sufficient degree of size, permanence and physical attachment to constitute operational development.
- The officer's conclusion that the Grasscrete is not a building operation is an exercise of planning judgement, which is subjective. A different decision maker is entitled to legitimately take a different view. Members can have regard to the extensive area over which the Grasscrete will be installed and the permanency and functional role the Grasscrete performs.
- The officer report places significant weight on whether the operations would be "normally undertaken by a person carrying on business as a builder". The officer's reliance on this is misplaced because the definition of "building operations" in Section 55(1A) is non-exhaustive – it "includes" the matters listed in that Section but does not exclude other "building operations".
- The officer consideration of whether the operations proposed amount to an "engineering operation" is entirely inadequate. In the *Fayrewood Fish Farms* case the Court held that there was no requirement "that an engineer must actually be engaged on the project, simply that it was the kind of operation on which an engineer could be employed, or which would be within his purview". Clearly an engineer could be involved in works to create a permanent load bearing structure in order to construct a car park, and it is irrelevant that such an engineer is not intended to be engaged for this project. Secondly, the formation or laying out of a means of access to highways is simply one kind of engineering operations, it is not exhaustive. The officer is therefore wrong to conclude that because the Grasscrete is not a means of access to highways it cannot be an engineering operation.

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- The officer report fails entirely to consider whether the Grasscrete could constitute "other operations" within Section 55(1) of the Town and Country Planning Act 1990. "Other operation" within Section 55(1) of the Town and Country Planning Act 1990 is its own distinct category of operational development and does not require such operations to be ones normally undertaken by a builder. The officer report should be corrected to address the issue of "other operations" with S55(1). Case law has established that the term "other operations" is to be interpreted widely, and as such there is significant scope for members to conclude that the operations proposed comprise "other operations".

The letter invites members to refuse the application on the following basis:

- The application contains insufficient information. The Act provides that any application must be accompanied by sufficient evidence/information for a LPA to decide the application and without the same a refusal may be justified. Further, Article 39 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 provides that where an application specifies two or more uses, operations or other matters, the plan which accompanies the application must indicate to which part of the land each such use relates. Such a plan has not been provided as it is unclear where the allotment use is proposed. The applicant has failed to provide the appropriate level of detail necessary to give the Council certainty as to the precise nature of the proposals.
- The dual allotment and car park use amounts to a material change of use requiring planning permission. When properly understood it is clear that the proposal would involve uses that are not agricultural or ancillary to agricultural uses. Instead, the proposal includes use as an 80-space car park which cannot be said to be ancillary to the agricultural use proposed. Members are entitled to exercise judgment in coming to this view.
- The Grasscrete is very clearly operational development. The officer report contains basic legal errors when it considers whether the installation of the Grasscrete constitutes operational development. Once the legal tests are properly understood and the facts of the application are applied to the legal principles, it is clear on any sensible appraisal that the Grasscrete involves building operations, engineering operations or other similar operations, that requires the grant of planning permission. It is highly surprising that the officer report concludes otherwise, and such an approach would set a dangerous precedent for other cases, as well as exposing the Council to a material risk of judicial review.

Officer comment

The national Planning Practice Guidance (PPG) makes clear that without sufficient or precise information, a local planning authority may be justified in refusing a certificate. This does not preclude another application being submitted later on, if more information can be produced. In the case of applications for proposed development, an applicant needs to describe the proposal with sufficient clarity and precision to enable a local planning authority to understand exactly what is involved.

Legal advice on the application has been taken from both the council solicitor and from external counsel. The officers' report is based on that advice. Where appropriate, further information has been sought from the applicant and that information has been taken into account in reaching the recommendation. This includes further information submitted about possible future activities on the

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site as requested by the Committee at its July meeting. A plan showing the general arrangement of the site, including the car parking, was submitted with the application.

The conclusions on whether the proposals constitute a material change of use are set out in the committee reports. The letter fails to set out the correct approach to determine a material change of use. Factors that have to be considered are: 1. what is the primary use of the land? 2. what is the scope of that use? 3. what is the extent of any lawful ancillary uses? 4. what is the planning unit to which the primary use is attached? Also what is the status in law of the use and whether the change is a new use that is a material change of the planning unit. This consideration also has to take into account whether the use, even if a change, is excluded by the legislation. In this case agricultural use is a specific exclusion from the definition of development requiring planning permission. There are other factors that would be considered but are not relevant to this application.

The issue of operational development is also addressed. The method by which the car park surfacing would be provided was expressly raised with the applicant prior to the July committee. The applicant's response was that:

"...the hollow grid sections will be clipped together and placed directly onto the ground. Whilst the manufactures recommendations for the use of this product are noted – they are not being followed here, for this installation. No sub-base or any of the other features referenced in the (manufacturer's) document will be used. The applicant has tested this approach (using the product other than in accordance with the manufactures standard recommendations) to ensure that it will be fit for purpose, for the intended use."

Whether this amounts to "other operations" is a matter of planning judgement. The proposed surfacing is of a very low profile, with limited visual impact and minimal impact on the physical characteristics of the site. On the other hand, the surfacing will cover an extensive area that is not de minimis, even in the context of the site as a whole. It is intended to be permanent and, over time, will change the quality of the ground by providing stability, and extending in a uniform, connected, arrangement. These matters have all been considered and the officers' conclusion is that the proposed surfacing does not constitute an "other operation", given the matting is simply placed on the ground, without attachment, insertion or compression and would only cover approximately 3,000sqm of a 78,000 sqm site.

If it was concluded that the surfacing amounted to operational development it would be necessary to consider whether it nevertheless constitutes "permitted development" (PD) under the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO). The GPDO grants planning permission automatically for specific defined operational development. Given the conclusions reached, it has not been necessary to consider this in detail to date.

The PPG explains that a LPA 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.

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Comment in support

A comment in support of the application has been submitted. It commends the applicants' allotments for their contribution to the local communities of Bath & NE Somerset (B&NES). The allotments at Tuckers Meadow have developed over the last 16 months from a plain farm field to an attractive growing space, which enhances the landscape, provokes positive conversations about growing food and encourages and enables people to start growing produce for themselves. The customers' cars are driven carefully and politely. Passers by enjoy the view of the colourful flowers and the scenes of bountiful produce. The site is an asset to the city. Customers have been encouraged to share any surplus produce for two community food projects, within 2 miles of the allotments.