

SECTION 2 – ITEM 8

Application No: 23/P/1828/LDP

Proposal: Certificate of lawful development for the proposed use of the land as allotments.

Site address: Land off Abbots Leigh Road, Abbots Leigh

Applicant: Allota Futureland Ltd

Target date: 17.10.2023

Extended date:

Case officer: Charles Cooksley

Parish/Ward: Abbots Leigh/Pill

Ward Councillors: Councillor Jenna Ho Marris

REFERRED BY COUNCILLOR JENNA HO MARRIS

Summary of recommendation

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

Background

The applications follow a previous application for a Certificate of Lawfulness of Proposed Use or Development, ref: 23/P/0194/LDP which sought a legal determination on the use of the site as an allotment, along with an ancillary parking area; and the laying of the matting for the parking and access areas of the site.

The certificate was refused for the following reason:

“Due to its degree of permanency and the change it causes to the nature of the ground and extending over an extensive area the car parking surface constitutes an “other operation” for which planning permission is required”.

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 5.4 ha open field enclosed by boundary fencing. A public right of way passes across the northern boundary of the site. Further fencing has recently been erected around the site perimeter as permitted development.

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 Certificate of Lawfulness Proposed Use or Development seeking a legal determination that ‘the proposed land use (as specified in the application submission) does not constitute development requiring planning permission’. The proposed use is “use of this land for allotments”

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 is made under section 192 of the Town and Country Planning Act 1990 (as amended) and must be decided solely on the application of planning law. This requires that if, on an application under the relevant section of the Act, the local planning authority is provided with information satisfying it that the use described in the application would be lawful if instituted or begun at the time of the application, it shall issue a certificate to that effect; and in any other case it shall refuse the application. Counsel’s advice was taken on the previous application and this report incorporates that advice, together with advice from the Council solicitor, and includes reference to relevant legislation and caselaw as appropriate. The burden of proof lies with the applicant who must describe the proposal with sufficient clarity and precision to enable the local planning authority to understand what is involved.

The legislation provides for the determination of the lawfulness of any proposed use (or operations) under section 191(2) of the principal Act.

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

(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.’

There is no enforcement notice requirements applicable to this proposal under (b). The applicant therefore considers there is no conflict with (a) in that enforcement action may not be taken in respect of the proposal because it is not development for the purposes of section 55 of the Act; accordingly no planning permission is required pursuant to section 57 of the Act; and thus the carrying out of the proposal could not amount to a breach of planning control for the purposes of section 171A(1) of the Act that would be amenable to enforcement action. These matters are dealt with below under Principal Planning Issues.

Further information has been sought from the applicant since the application was submitted and where provided this is reflected in this report and the conclusions reached.

The previous application included the creation of an access, ancillary parking on the site and the laying of matting for the parking and access. The current application does not include those aspects and the applicants have been clear that they only intend to establish that the use of the land for allotments is lawful and therefore this is the only proposed use specified in this application. They state that no other operational development is included or implied in the application. The applicant has further stated in response to requests for further information that “it is very clearly possible for the land to be used as allotments, via the cultivation of plots for the growing of fruit and vegetables, without any operational development (enabling works) taking place. This is the proper basis on which the Council should approach the assessment and determination of this application, and one which has support via various legal and appeal case precedents”.

Whilst not outlined in the application as initially submitted, following a request for further clarification the applicants have provided information regarding access to the site. A new gate and boundary treatment is to be created in the south east corner of the site for pedestrians and to facilitate maintenance operations and deliveries. These works are potentially either not development in that they don't involve any operational works or could be lawful by virtue of the Town and Country Planning (General Permitted Development) Part 2 Class A which provides the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure is permitted development subject to certain limitations.. The applicant advises that additional access to the site can be achieved through the existing gates which serve the Public Right of Way as well as other routes available to access the land crossing other nearby land to the north and west, over which the applicant advises it has rights of access. None of these accesses form part of the application.

The previous application outlined that the site would have approximately 700 plots but no indication of how many plots would be available for this site. The area of the site has reduced from approximately 7.8 ha to 5.4 ha in this application but no plan has been provided to outline how the site would be laid out. The applicants have advised that the site would be used for allotment plots of various sizes with space between for movement around the site. For the previous application the applicant stated the land would be divided into plots of various sizes where a standard plot would be 36 sqm, but may range in size from 12 to 72 sqm.

In response to a request to provide an indicative plan showing the proposed arrangement of the allotments and plots, the applicant's agent has stated that “...the proposed use (as allotments) is a typical and well understood one, on the basis of plots of land which are given over to the cultivation of various fruits and vegetables, by individuals or small groups. These plots would be laid out regularly with space between for general circulation. Areas at the margins of the site would be given over to wildflower planting or other habitat creation”. The applicant does not consider that a plan of the proposed allotment layout is necessary in order to determine the application which is before the Council.

In response to queries from the Council, the applicant has responded that the application as submitted is very clear in respect of the land to which it relates, i.e. the land shown on the submitted site location plan as edged with a red line. The anticipated points of access into the land have been identified following a request from the Council although the applicant states that this is not directly a matter on which the land use covered by the certificate application turns. The applicant's agent states that the applicant has an interest

in other nearby land by way of a lease. He advises that the applicant has rights to use other land to provide access into the land comprised in this application, as also previously identified. The applicant does not consider that any further information is necessary in order to determine the application which is before the Council.

Relevant Planning History

Year: 2023

Reference: 23/P/0194/LDP

Proposal: Use as an allotment in agricultural use with ancillary parking; and The laying of the matting (shown on the specification submitted with the application) for access and parking

Decision: Refused

Year: 2023

Reference: 23/P/0192/LDP

Proposal: Certificate of Lawful Development for the placement of 2 no. Shipping Containers

Decision: Withdrawn

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 not relevant when determining this type of application.

Third Parties:

Objection - 165 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:

- Change of use from grazing meadow land to cultivation, loss of unspoilt wildflower meadow. The scale of the proposed allotment operation would exceed the typical operation of an agricultural activity and go beyond the scope of the decision in Crowborough
- 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.
- The application is not sufficiently supported with the necessary information or precise enough to determine the lawfulness of the proposal. For example, there is nothing explaining the number of plots, how they will be laid out, what will be grown, whether there will be any ancillary uses (for example parking).
- The proposed use as allotments is not possible without enabling works amounting to operational development. Therefore instituting the use would be unlawful. A certificate cannot be granted for a use that would, if instituted, result in

unlawfulness. The proposed use and the enabling operational development are indivisible in this particular case on the facts.

Officer comment

Further information and clarification was sought from the applicant as described above. The applicant has confirmed the application is simply for the use of the land as allotments and no other works or proposals are included.

Support - 22 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

Recommend refusal for the following reasons:

- Insufficient information on how the site will be developed, including how many plots will be provided, on-site parking and advertised activities.
- The proposed business operation does not fall under the definition of an allotment.
- The proposed development should be subject to a full planning application so that all the implications can be fully considered.
- Unacceptable access and highway arrangements
- Works required to create the allotments will amount to operational development.

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Principal Planning 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 agriculture 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]*). In that case, the court concluded that what is done on allotments could quite easily said to be horticulture and included within the definition of 'agriculture' in the Act.

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, such a use does not require planning permission. In this case it is unnecessary to ask whether there would be a material change of use from one type of agricultural use to another agricultural use. 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 be 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 or if the information provided is false in a material particular or if any material information is withheld. It should be noted however that case law (*Pittman v Secretary of State for the Environment*) has also confirmed, following *Crowborough*, 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 plots 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 the *Crowborough* case where factors such as greater intensity of use that would be involved with the working of individual plots by tenants, the consequent changes in the appearance of the land and the greatly increased numbers of people visiting the land was specifically rejected.

While not expressly part of the application comments have been raised about potential activities that might take place on the site which would not fall within agricultural uses, such as talks and workshops (linked to growing at the site and wildlife at the site and surrounding area) community picnics, outdoor yoga and festivals.

It is not necessarily agreed that community picnics, outdoor yoga and festivals would be ancillary activities to the use of the land as allotments. However, planning permission is not required for the use of any land for any purpose for not more than 28 days in total in any calendar year (taking into account there are other qualifications to this 28 day allowance that do not apply in this instance). Therefore, the use of the site to host activities such as community picnics, outdoor yoga and a festival, provided the number of days of these activities does not exceed 28 days in a calendar year, would be permitted development not requiring a planning application and therefore be a lawful use of the site.

It should be further noted that the Committee's refusal of the previous application 23/P/0194/LDP was only on the basis that it considered elements of the proposal amounted to "operational" development. The proposed use as allotments was not in itself part of the reason for refusal.

Conclusion

In summary, taking into account all the considerations above, the details provided in the application and by the applicants, together with 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 section 55(2)(e) of the 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.

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

1. The proposed use of the site as allotments 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 does not require planning permission. For these reasons, it is concluded that if the proposed use 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.

The planning application can be viewed at [23/P/1828/LDP](#)