Allotments and their protection

Katie Scuoler examines the vital role that allotments play in creating communities of the future

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'The government's Garden Communities Programme aims to take Ebenezer Howard's original idea of the garden city, which sought to combine the best of town and country living, and renew this for the 21st century.'

The housing shortage and housing affordability, particularly in the South East of England, is a near-constant media headline. Building on its manifesto pledge, in its Autumn 2017 Budget, the government announced its ambition to deliver 300,000 new homes a year by the mid-2020s. The government has made clear that (*Garden Communities Prospectus* (August 2018)):

> ... it's not just about getting the numbers up. We don't have to make a false choice between quality and quantity. We can – and must – have both, and well-planned, well-designed, locally-led garden communities have an important part to play in meeting our housing needs.

As such, garden communities – ie holistically planned and self-sustaining new settlements – are high up the government's political agenda. The government's Garden Communities Programme aims to take Ebenezer Howard's original idea of the garden city, which sought to combine the best of town and country living, and renew this for the 21st century. Howard's design of garden communities was based on a concentric model, with radiating uses from a central core, with the settlement boundaries edged by allotments and circled by a wider belt of agricultural land which would provide both food for the residents and access to the countryside. Howard's vision also included shared vegetable gardens and generous private gardens to enable fruit and vegetable growing ('Food and garden cities in principle and practice', Susan Parham, July 2016). While he did not expect the new settlements to be self-sufficient, he saw the synergies between the proximity of the producer and consumer – combining the health benefits to the residents of fresh fruit and vegetables, with a certainty of market for producers.

However, the role of food production – both in terms of land use and wellbeing – has largely been overlooked in the modern articulation of garden communities. While many people may have the aspiration to grow their own produce, a survey by the National Allotment Society in 2013 found that in England there is an average of 52 people waiting for every existing 100 plots. The most heavily oversubscribed waiting lists simply close to new entrants. Ironically given the latent demand for allotments, large schemes often involve development on existing allotment land, even if that space is to be re-provided as part of the new development.

Against the background of Howard's vision, this article considers the legislative protections which have been afforded to allotments.

Allotments: then and now

While allotments have a long, and tumultuous, history dating back over a thousand years, the modern concept of allotments has its roots in the nineteenth century (The National Allotment Society). The Enclosures Acts of the 1800s facilitated the enclosure – essentially, the fencing off – of common land by wealthy landowners, thereby removing the rights of rural labourers to use that land for grazing and food production. By the end of the nineteenth century the impact on the welfare of the rural poor through enclosure and rapid industrialisation resulted in calls for land reform and the giving over of land to the rural poor for food production.

In 1908 the Small Holdings and Allotments Act 1908 was enacted

which, for the first time, imposed a duty on borough, urban district and parish councils to provide and let a sufficient number of allotments to meet, what they saw as, the demand in that administrative area (s23). Supporting that obligation, authorities had a broad power to acquire land for allotments by agreement or compulsorily (s25) and improve, and adapt, land which had been acquired for use as allotments (s26). 111 years later, those provisions still remain in force.

Section 23 of the 1908 Act is slightly fettered in two regards. First, where the population of the relevant area is less than 10,000 the duty is limited to the provision of 'allotment gardens' not exceeding 'forty poles' (approx 1,000sq m), (s9(a) Allotments Act 1950 (1950 Act)). In areas with a population of 10,000 or higher, the obligation extends to the provision of allotment gardens not exceeding one-eighth of an acre (s9(b) 1950 Act). Second, there is a loosening of that duty in respect of the inner London boroughs which have a discretion whether to provide allotments (s55(4) London Government Act 1963).

Section 23 of the 1908 Act requires that where six or more residents in an administrative area write to the relevant council advising it to take proceedings under the 1908 Act to provide allotments, the council must take such representation into consideration. However, even when it is determined that there is a demand for allotments in the area, there are no minimum standards and, crucially, no time limits in which to provide them.

Allotments are recognised in para 91 of the National Planning Policy Framework (NPPF) as having a role in supporting healthy lifestyles. Similarly, the government's 'Allotment disposal guidance: Safeguards and alternatives' (January 2014) (the guidance) recognises allotments as valuable community spaces that provide people with the opportunity to enjoy regular physical exercise; meet new people in their neighbourhood; and benefit from a healthier diet, regardless of income.

The process of establishing new allotments is relatively straightforward. The only land use requirement is that the land must have planning permission for agricultural use. The term 'agricultural' is broadly defined in the Town and Country Planning Act 1990 and includes horticulture and fruit growing. Modern allotments can be either publicly or privately owned. Where land is owned by the local authority it can either be appropriated and held by them as allotments (termed 'statutory allotments') or held, ultimately, for some other purpose and let as allotments in the meantime (commonly known as 'temporary allotments') but as explained below, different protections apply to each. Local authority landlords are entitled to charge rent at a rate at which 'a tenant may reasonably be expected to pay' (s10 Allotments Act 1950). Local authority owned allotments are managed either through direct local authority management or devolved management, which may take the form of an association or limited company (with the National Allotment Society having template documents for ease).

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Yet despite the relative ease of establishing them, the National Allotment Society in 2013 found that there are a total of 78,827 on waiting lists for allotments in England, equating to an average of 52 people waiting for every existing 100 plots. Clearly despite the statutory duty to do so, insufficient allotments are being provided to meet the demand.

Protections for existing allotments

The strongest form of protection for existing allotments comes from the Allotment Act 1925. Section 8 stipulates that where a local authority has purchased or appropriated land for use as allotments it must not sell, appropriate, use or dispose of the land for any purpose other than use for allotments without the consent of the Secretary of State for the Environment (termed a 'disposal application' in this article).

Only statutory allotments benefit from the section 8 protections. Where land has been acquired or is held by the council for some other purpose but is used on a temporary basis for allotments or is privately owned, it does not benefit from the section 8 statutory protections.

Those allotments benefiting from the 1925 Act protections are:

- 'allotment gardens': these are allotments not exceeding 'forty poles' (approx 1,000sq m), wholly or mainly for the production of vegetable or fruit crops for personal consumption (s22 Allotment Act 1922); and
- any parcel of land not more than five acres which is cultivated or intended to be cultivated as a garden or farm, or a combination of the two.

Section 8 restricts the giving of consent to a disposal unless the Secretary of State is satisfied that:

(1) adequate provision will be made for those allotment holders who are being displaced;

(2) such reprovision is unnecessary; and

(3) such reprovision is not reasonably practicable.

The guidance refers to these as the mandatory statutory criteria and makes clear that the statutory criteria for the disposal of allotments must be met in all cases. However, the discretion afforded by s8 is very broad. The guidance adds to the statutory criteria by setting additional policy criteria to be applied to any application for disposal that the Secretary of State receives. Together, the statutory and policy criteria set the framework for the determination of disposal applications.

Statutory criteria

Statutory criterion 1: *Adequate provision will be made for displaced plot-holders*

The guidance explains that adequate alternative provision should ideally be within three-quarters of a mile of the existing allotment site and be easily accessible. Where that is not the case, an explanation will be required. The guidance sets out matters which the Secretary of State will consider when seeking to establish whether the council has met this criterion; these include the size and distance of new/alternative provision relative to the existing plots and evidence that land has been secured to accommodate the displaced plot-holders.

It is not, however, always necessary that the land for the alternative provision already be purchased or cultivated as allotments. It is open to the Secretary of State to grant consent under s8 subject to conditions which may include the securing of the re-provision land. Evidence that such land will be secured may include an in-principle lease or sale agreement.

Statutory criterion 2: *Such re-provision is not necessary*

Re-provision may not be necessary where, for example, there are no existing plot-holders on that site, and there is no one waiting for a plot on that site.

Statutory criterion 3: *Such provision is not reasonably practicable*

The guidance notes that it is for the council to explain why it thinks that adequate alternative provision is not reasonably practicable as each council's situation will differ according to their local circumstances. It notes that the cost of acquiring replacement will generally fail to satisfy the test that re-provision is not reasonably practicable. Section 32 of the 1908 Act requires that proceeds from the sale of allotment land be applied to:

- the acquisition of new allotment land;
- the adaptation or improvement of existing allotment land; or
- the discharge of debts and liabilities in connection with land acquired by the council for allotments.

As a result, while land receipts do not necessarily have to be expended on the provision of replacement allotment space, the purposes to which they must be put renders an argument on financial viability grounds unlikely to succeed. The guidance definitively states that:

> ... where it is not possible to finance alternative land for displaced allotment holders, disposal will not be an option.

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Similarly, where land supply issues render it not reasonably practicable to make alternative provision, the guidance notes that councils will be expected not to displace existing allotment-holders.

Policy criteria

In addition to the three mandatory criteria the guidance sets out four policy criteria which will be 'applied thoroughly to all applications received'.

Policy criterion 1: *The allotment in question is not necessary and is surplus to requirement*

The guidance explains that this criterion assumes that the allotments in question are either not being used or have low occupation. Even where a large site has only a few occupants, the council must still show, in line with the statutory criteria, that adequate alternative provision will be made for any displaced plot-holders, unless this is unnecessary or not reasonably practicable. As part of this the Secretary of State will consider factors including the number of people on the waiting list for that site.

Policy criterion 2: *The number of people on the waiting list has been effectively taken into account*

The guidance explains that this criterion takes into account waiting lists across the whole of the council's area and seeks to understand where there are apparent inconsistencies between the number on waiting lists across the borough and planned allotment disposal. As part of this the Secretary of State will consider whether the council has sought to match demand with supply (ie has it asked those on the waiting list whether they would want a plot on the existing site and if not, the reasons why).

Policy criterion 3: *The council has actively promoted and publicised the availability of sites and has consulted the National Allotment Society*

The guidance explains that this criterion is directed at addressing latent demand from those that might be interested in taking up an allotment plot, as well as active demand from those already on waiting lists. When considering whether the first part of the criterion has been satisfied, the Secretary of State will have regard to the range of activities that the council has undertaken to actively promote and publicise the availability of sites. For example, the extent of information available on the council's website, any leaflets/posters that have been distributed and the general provision and placing of information. The guidance advocates engagement with the National Allotment Society be undertaken at a formative stage where disposal is being considered as an option, and prior to obtaining councillor's agreement to any disposal application. Consultation with the National Allotment Society is informative but not determinative for the purposes of the Secretary of State's decision.

Policy criterion 4: *The implications of disposal for other relevant policies, in particular local plan policies, have been taken into account*

This criterion looks to assess any contradictions between the council's

intention to dispose of allotment land and any other council policies, including in neighbourhood plans, which are inconsistent with that disposal.

The exceptional circumstances test

If a council is unable to comply with all policy criteria, the Secretary of State may still grant disposal if there is evidence of 'exceptional circumstances' which would justify that disposal. The guidance does not purport to define or explain what is meant by 'exceptional circumstances' other than to acknowledge that decisions will be made on a case-by-case basis, with the onus on the applicant to provide evidence of the exceptional circumstances that could justify disposal of the allotments.

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The case of *R (Moore) v Secretary of State for Communities and Local Government* [2016] added some clarity to the meaning of 'exceptional circumstances' in the context of allotments. The case concerned the decision by Watford Borough Council to appropriate 2.63ha of allotment land at Farm Terrace, Watford for use as part of a mixed-use redevelopment scheme which included residential and commercial elements and improvements to Watford General Hospital (the Watford Health Campus Scheme). The Secretary of State's approval to the appropriation under s8 of the 1925 Act had been sought, and granted.

Farm Terrace allotments consisted of 128 plots, but there were only 24 tenants cultivating 31 plots, that number having dwindled over the previous years in light of the council's decision to appropriate the land (and two earlier legal challenges).

It was common ground between the parties that all statutory criteria had been satisfied, but that Policy Criterion 1 (that the allotments were not necessary and surplus to requirement) was not met. In his decision the Secretary of State set out the benefits of the proposals, including the benefits of the Watford Health Campus Scheme for the residents of Watford. He noted the increased viability of the scheme once the allotments were incorporated within it; and the public benefits of housing, and possibly a new school, on the allotment site. He concluded that those benefits constituted 'exceptional circumstances' which justified the grant of consent,

notwithstanding Policy Criterion 1 had not been met. The claimant argued that the Secretary of State had misunderstood the guidance, and in doing so had applied an insufficiently high threshold to the circumstances required to qualify as 'exceptional'.

In interpreting the term 'exceptional circumstances' in the context of s8 and the guidance, Lang J referred to the words of Lord Bingham CJ in *R v Kelly (Edward)* [2000], where he remarked:

> We must construe 'exceptional' as an ordinary, familiar English adjective and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly or routinely, or normally encountered.

Lang J rejected the claimant's argument that the words 'exceptional circumstances' indicated a 'strong presumption against the grant of consent', and refused to quash the section 8 decision, noting that:

- where the four policy criteria are not met, the Secretary of State has a discretion to grant consent in exceptional circumstances – that is not the same as there being a presumption which must be rebutted;
- the Secretary of State can rely on the cumulative weight of individual factors in supporting a finding of 'exceptional circumstances' (ie it is not necessary for each factor to be an exceptional circumstance when considered in isolation);
- viability was a benefit capable of being taken into account in determining exceptional circumstances (as per the first instance decision in this case, *R (Moore) v Secretary of State for Communities and Local Government* [2014]); and
- where there is uncertainty in respect of an aspect of the proposal, it is a matter for the decision-maker, in the exercise of their discretion whether to grant consent.

This decision highlighted that the guidance imposes more safeguards than those included in s8. Those safeguards are intended to be achieved by the requirement that the four policy criteria ought generally to be met before consent will be granted, however, the case confirmed that the discretion afforded to the Secretary of State – and the weight given to different factors – is very broad.

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Conclusion

Statutory allotments are afforded robust protection by s8 of the 1925 Act, but as the case of *R (Moore)* highlights, such allotments are not immutable. So, what other protections are there?

Nearly 100 allotments have been listed as assets of community value (National Allotment Society). While a listing does not provide a right of first refusal for a community group, or any obligation on the owner to sell to them, it does afford a veneer of protection to temporary allotments in the event of a sale. The timing of ACV listings is key, however. An asset can only be listed if, among other things, the local authority considers that (s88(2)(b) Localism Act 2011):

> ... it is realistic to think that there can continue to be non-ancillary use of the building or other land which will further (whether or not in the same way) the social wellbeing or social interests of the local community...

In *New Barrow Ltd v Ribble Valley Borough Council* [2017] the tribunal held it was not realistic to think that the use of the listed land as allotments would continue, given notice to vacate had been served on the plot-holders and the land was subject to a licence to occupy in connection with a consent for development on adjacent land.

Wellness magazines and sustainability champions regularly implore us to eat seasonably, and to eat locally grown produce and to do so by shopping locally. While the integration of food production and urban living was a key principle of the original garden city movement, it tends be overlooked in its modern reinterpretations. This is perhaps reflective of a wider overlooking of the statutory duties to provide an adequate number of allotments to meet the demand.

It is easy to flippantly dismiss the oversubscribed, and in many cases closed, waiting lists for allotments as a desire to live The Good Life. However, as identified in the opening words of the guidance, allotments:

> ... are valuable community spaces that provide people with the opportunity to enjoy regular physical exercise; meet new people in their neighbourhood; and benefit from a healthier diet, regardless of income.

That is something which should be promoted, encouraged and woven into the new settlements of the 21st century. ■

New Barrow Ltd v Ribble Valley Borough Council
[2017] UKFTT 2016/0014 (GRC)
R v Kelly (Edward)
[2000] QB 198
R (Moore & ors) v Secretary of State for Communities and Local Government
[2014] EWHC 3592 (Admin)
R (Moore) v Secretary of State for Communities and Local Government
[2016] EWHC 2736 (Admin)