

2020 2 14 ODFAA Briefing as a result of legal advice from Freeths Solicitors and National Allotment Society (NAS) in January 2020

Association committee comments to be returned to ODAFAA by **March 3rd**

ODFAA is now at a point where we have taken detailed advice from both a solicitor and the Legal & Operations Manager at the National Allotment Society. This briefing aims to summarise the main points of that advice and to put forward a proposed position for the next round of discussions and negotiation with OCC.

The main legal guidance from Freeths helped us understand the key differences between holding a Licence and Lease, and the implications of each one for the future operation and security of the Oxford City allotments.

It also clarified the process and most likely costs of registering each Lease, should we hold those; and provided initial information on alternative forms of Association beyond the current status of Unincorporated, with the attendant need for 'trustees' and the personal liability they incur. Key points to note: -

- A Licence is a personal right, a simple permission to occupy land creating no rights or interest in the land and offers no real security. OCC might argue that this can be modified to some extent by what is actually written into the Licence, but this does not alter the fundamental character and shortcomings of this type of agreement. A Licence does not need to be registered. We know that the Land Registry consider the present agreement to be a licence.
- A Lease is a grant of exclusive possession for a stated period of time and confers the right to the uninterrupted use of the land, even to the exclusion of others, subject to agreed reciprocal 'rules' and duties. A lease is binding on the landlord's successors – so would apply to any new owner of the allotment land if it was sold. It is the more secure option of the two.
- Any Lease over 7 years duration must be registered. The cost to each Association would be £40 (less if done on-line) at first registration and, if remaining Unincorporated, the same again each time there is a change in the 'trustee' signatories. A simple site plan must also be submitted once, likely cost £3.
- Remaining Unincorporated would mean at least two 'trustees'/signatories would be required from each Association. These individuals would hold personal liability for the stipulated operation of the Lease as the property/site is vested in them on behalf of the Association. OCC propose to limit this liability to some degree by holding the Associations liable for gross and other material breaches of any agreement, currently stated as being to the extent of 'all the Association's realisable assets' – effectively bankrupting the Association.
- To greatly reduce the problems of individual liability, the many options of Incorporation have been examined. In this case the Association assumes a legal personality of its own, can undertake a Lease directly and its 'committee'/officers would have limited liability. Freeths suggested straightforward small company form, either 36 of them or one umbrella company that Associations hold shares in. Any form of Incorporation would involve some small additional cost to set up and annual reporting/accounting would be required. Associations that are members of NAS can be sponsored by NAS.

The meeting with Liz Bunting at NAS provided helpful additional guidance and reinforcement of some of Freeths' main advice. Key points from NAS were: -

- NAS couldn't think of anywhere in the country where a council uses a license; they are all leases. Liz understood that many 'just want to garden' but unfortunately it is a litigious environment and Associations have to make sure that they are protected in the future as much as possible. What associations need and what OCC are prepared to offer needs to be negotiated
- In terms of documentation, she recommended either a lease for the land and a separate Service Level Agreement setting out responsibilities on both sides; or a lease that includes those responsibilities - plus separate Rules in either case plus a members' agreement. Both these NAS models are in regular use and in either case, the landowner or prime lessee (i.e. OCC), is responsible for due diligence and for making sure allotments are properly constituted. A NAS model Service Level Agreement (SLA) will be available by the end of Feb.
- There are examples where Federations have taken on leases and passed them on to Associations, but this brings in another layer and Federations then need to be in a position to take on this role for many years. ODFAA / ALM explored this option previously and decided against it. It is better to do it the way that we are currently structured in Oxford, i.e. with leases directly from OCC to Associations.
- The role of ODFAA should go into the SLA, and OCC's responsibility for making sure there are proper constitutional arrangements in place at each Association. Liz mentioned that there should also be a clause setting out the leaseholder's responsibility for reporting any encroachment to OCC. It is then the OCC's responsibility to do something about it.
- Liz supported inclusion in any new agreement of OCC's responsibility for enforcing Notices to Quit. In law, the landlord has ultimate responsibility for the plot holders' conduct and where this is to the detriment of the land and the quiet enjoyment by others it should support Associations in taking action. It is poor due diligence that OCC do not currently insist in any agreement that associations should have a proper up-to-date constitution and rules etc. We know that they have not checked this information for the duration of the previous agreement.
- Liz confirmed that OCC has a legal duty to manage the asbestos on any site: it has to be inspected and it is their legal duty to identify it, notify members, manage it – i.e. seal, or remove it if in bad condition. She said each lease should document where it is. The lease or lease and Service Level agreement should specify the buildings maintenance contract for council owned buildings on each site.
- Liz asked if Oxford sites were registered as an Asset of Community Value (linking with neighbourhood plans, which provides a level of protection). They are not. Liz recommended that we do this.
- Liz asked if Landlord's indemnity was included in our insurance. She set out the sort of situation it would cover – e.g. a spillage or nuisance caused by a member on site where an affected neighbour might claim against the landowner. We need to check it.
- Liz said that when taking on new leases, she always recommends taking photographs before you sign anything so that you can prove at the end of the term the site condition when you took it on. (Not for sharing, just for association use).

- In discussion about alternatives to being Unincorporated we understand that there are about 450 allotment co-ops around the country and the leases are signed by the co-op, a form of limited company. The NAS itself is a co-op. Liz said there were new Financial Conduct Authority (FCA) model rules for incorporation, the registration forms are relatively simple and if associations adopt the rules as they are, NAS will sponsor any of their member organisations through the process. It then takes FCA 15 working days to process, and there is no annual fee now. Annually, Associations have to submit accounts, which should be inspected not audited, and the 'AR30' - a fairly straightforward form checking that you are operating as you have committed to operate. Co-op form brings limited liability, making it easier to attract committee members in the future, and the problem of re-registration with trustees changing is removed.
- The new lease could in fact be with a mix of un-incorporated and incorporated (i.e. co-op type) associations – this would purely be a drafting issue. Also, it would be possible for smaller associations to group together to reduce the admin load. We recognise that over the duration of the past agreement but one grouping of associations has survived. She said that some associations in an existing lease have changed to become a co-op part way through lease. In her experience, having talked to councils, they tend to be more in favour of incorporated arrangements.

As a result of this external information and guidance ODFAA is offering its revised rationale and making the following recommendation to Associations. **We will pursue this approach in further negotiations with OCC subject to any additional proposals or comments from Members that gather majority support.** [The ALM agreed a date of March 3rd for your association committee replies.](#)

Oxford City Council has been, and continues to be, supportive of the principle and practice of allotment gardening, and the current provision of land area for the purpose is as good as anywhere in England. However, pressure on the low levels of existing land for housing and commercial development will only increase and current 'statutory' designation of allotment land is not of itself a water-tight guarantee. It is not only sensible that we should seek all available measures of protection for our own use of this great resource, but incumbent on all of us to do the same in the interests of others in the future. Allotments in Oxford have had devolved management for some time, probably longer than anywhere else, which annually and cumulatively has saved OCC a great deal of money. While the current arrangements have been at best adequate, we have recognised for many years that there is room for improvement in a number of areas on the part of Associations and OCC and, by implication, ODFAA will have to accept evolving responsibilities as part of any changes for the better.

The renegotiation of the primary agreement gives us an opportunity to embed such improvements in the governance, operation and management of all allotments in Oxford. It is inevitable that the administrative and financial changes proposed will have varying degrees of impact across Associations, by size and current robustness, but the greatest improvements and security do require these to be taken on board. **ODFAA will seek to mitigate some of this by offering support, guidance and access to training, and has identified certain options that may reduce this, albeit at lesser degrees of security for individuals.**

ODFAA recommends that: -

Primary Agreement & Related Documents

- OCC provide, and all Associations accept, a full Lease for 21 years with, among other key elements, break clauses and rent reviews at each interval of seven years. Such Lease will include all rights, duties and responsibilities of both Lessee (Tenant) and Lessor (Landlord) or where this is not the case, a separate Service Level Agreement covering such rights, duties and responsibilities not included in the Lease document.
- In addition, revised Allotment Rules, agreed by ODFAA and OCC, will be produced and must be incorporated as a minimum in any Association Rules. Any additional site-specific Rules should be wholly necessary and will be subject to review by the ALM.
- Association and ODFAA Constitutions will be reviewed and amended/replaced as required, to ensure both uniformity and compliance with the requirements for the legal entity adopted (Incorporated or Unincorporated) and the Lease/SLA/Rules accepted.
- Individual 'plot holder' agreements will likewise be reviewed and amended as necessary.

Registration & Incorporation

- A Lease will have to be registered and a simple site plan attached. ODFAA will argue that the latter should be provided by OCC and cost of registration is reduced by completing on-line. ODFAA is applying for grant money to cover the initial cost of registration for all sites.
- **It is a judgement call for each Association whether to incorporate or not** - ODFAA recommends that you do, as the issues of individual 'trustee' liability for holding the Lease is removed as well as the costs of re-registering if 'trustees' change. Evidence and available support from NAS suggests incorporation as a Co-operative is the most widely used. (Additional information can be provided).

Insurance – Buildings and Indemnity

- Subject to further clarification on administrative and payment process, we propose continuing the existing relationship with Zurich.
- OCC will accept responsibility for, and will insure, all buildings/structures erected and paid for by the council that remain in use on sites – responsibility (including any insurance) for the contents of such buildings/structures will be the responsibility of Associations.
- Further clarity is required, but we will recommend Landlord's indemnity insurance is provided if it is not already.

Council owned buildings and Asbestos

- Surveys of buildings and toilets by OCC will be completed ASAP and condition reports provided to Associations. Maintenance, future inspection and reporting arrangements will be agreed with OCC.

Allotment Budget

- The present budget derives primarily from association rents and external payments for other use of allotment land. The new allocation of this budget remains to be finalised through negotiation.
- The current position is that the so-called reactive maintenance section of the allotment budget (£12,700 at present) will in future be allocated to management of certain **trees** within the site

boundaries, based on a 3-year inspection regime. This and the respective responsibilities for **ditches** will be need to clarified in the Lease or Service Level agreement.

- ODFAA will expect that the present OCC commitment to: ring fence the allotment budget; be transparent in reporting to ALM meetings; annually account for work identifying association sites; and spend annually or release back to associations will continue.
- The balance of the current Allotment budget (c. £7k - £8k), which presently includes payment to ODFAA for the insurance premium and grants, is subject to further discussion and negotiation.

February 7th Phil Baker and Wendy Skinner Smith

Other issues – Alert re- Asset register and Maintenance costs.

A question about what to do if a fence or gate was damaged was raised at the January ALM, which suggested that some associations have not yet complied their asset registers and explored their potential maintenance responsibilities over the duration of the next agreement.

You will recall that in 2018 ODFAA recommended that associations began work on this. Allotment Associations cash holding is crucial to their ability to maintain the site and survive cash crises and fund improvements.

A shortage of cash is the biggest single threat to the success of self-management, particularly in small sites. In every society the first call is on money needed to operate the site. This is usually the annual running costs and might include paying for: rent, water (if piped), minor repairs, mowing, internal tree work.

The association may also need to hold deposit money for members. Another call on cash is for longer term maintenance and renewal over the term of the agreement, – a sinking fund for large items like machinery, for e.g. the fence, gates, association owned site building, water piping/water harvesting structures.

Other authorities where they have explored this (Barnet Federation) suggests that larger societies of more than 200 members need financial reserves of c. £30,000, 100 members = £15,000, 50-100 members = £10,000, under 50 members = £5,000.

One Oxford allotment association has now completed this process and informs us that they have carried out an exercise to identify everything the Association owns, with estimates of the cost of future maintenance or replacement of all our assets.

Details of their Assets and Maintenance Planning show that they have derived a sum that they need to 'save up' each year (this 'saving up' is properly called a '**sinking fund**'). The committee has decided that they need to build up a sinking fund as soon as possible by increasing membership fees by 80% to build their sinking and emergency fund to cover the 21-year period.

- A) If the Sinking Fund aimed to cover the depreciation of their assets from next year on, it would start at 0 and grow by £6,100 each year.
- B) If the Sinking Fund aimed to cover the depreciation of their assets up to next year and from then on, it would need to start at around £18,300, and grow by £6,100 each year.

They have some reserves which will be allocated to the sinking fund and a separate key deposit fund but they have calculated that per pole fees now need to go up from £3.75 to £6.75. Although that sounds like a lot, it is from a relatively low national base. Here are some examples.

| size | present | increase | proposed total |
|-------------------|---------|----------|----------------|
| 5 pole half plot | £18.75 | £15.00 | £33.75 |
| 10 pole full plot | £37.50 | £30.00 | £67.50 |

The Association will continue its existing policy of helping out in cases of financial hardship and will consider tapering new fees over 2 years depending on AGM

advice.

ODFAA did a summary of some other authority plot fees in 2015 and it has updated these. See below.

| City | 2015 10 poles | 2019 10 poles | |
|----------------------|---------------|---------------|--|
| Bath & NE Somerset C | £85 | £92 | plus water share |
| Brighton & Hove CC | £75 | £80 | |
| Bristol CC | £75 | £85 | + £15 application fee/£10 waiting list fee |
| Swindon BC | £49.50 | £46 - £80 | |
| York City C | £60 | £90 | |
| Birmingham | £65 | £93 | |
| Richmond on Thames | £142 | £184 | |
| Oxford | £27 | £33 | |

Most are a mixture of local authority managed and devolved sites

The average nationally appears to be £70 but data is no longer easy to find given the management of allotments between associations and local authorities is changing fast! You will see that during the last 4 years almost all associations have increased their fees, even when starting at a much higher base.