

# AGRICULTURE AND RURAL ESTATES

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# Foreword

As we start a new year, the Agriculture & Rural Estates Team have been reflecting on our successes and continued growth in the team and so I wanted to share some of our highlights of 2023. We had a hugely enjoyable show season and managed to show off our new team gilets at Devon County, Royal Cornwall, Mid Devon, Okehampton and culminating with our very own doggy photobooth at Honiton Show. Despite some challenging weather, we really enjoyed meeting up with our clients and contacts, both old and new. This year we also teamed up with Taste of the West as a sponsor for their awards, to celebrate the best of South West food producers and it is always a pleasure to see how the majority of these are from the agricultural sector. Our team has continued to grow and progress and we are delighted that James Hudson (Projects & Construction) and Alex McNie (Property) have successfully qualified as solicitors – in both the farming sector, and our team, the next generation is coming and that makes for an innovative and bright future.



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# Diversification options under Agricultural Permitted Development Rights

**Given the current economic climate, many landowners and farmers are looking to diversify their income stream. With their property assets historically tied to agriculture usage, it might be of interest to learn that there are planning law provisions that will open up the opportunity for change and diversification. In this article we explore the permitted development rights within The Town and Country Planning Order 2015.**

The Town and Country Planning Order 2015 (GDPO) provides permitted development rights to change the use of a building and any land within its curtilage from a use as an agricultural building to a flexible use falling within one of the following use classes: Class B8 (Storage and Distribution), Class C1 (hotels) or Class E (commercial, business or service). This form of development is known as Class R Development and is becoming increasingly popular for many farming businesses.

## Taking the first step

Before you can rely on Class R it is important to check that permitted development rights have not been removed pursuant to an existing planning condition or planning obligation, or other planning designation such as an article 4 direction (which operates to restrict certain permitted development rights). You should then consider the specific limitations of Class R. One of the key limitation of Class R is that the building must have been:

- in agricultural use as part of an established agricultural unit since 3 July 2012; or
- in the case of a building which was in use before this date but not in use on that date, when it was last in use it should have been agricultural use as part of an established agricultural unit; or
- in the case of a building brought into use after 3 July 2012 been in agricultural use for as part of an established agricultural unit for a period of 10 years before the date of development under Class R begins.

It is for the applicant to demonstrate that on the relevant date (as noted above) the building was used solely for agricultural use as part of the established agricultural unit.

## How do we define agriculture?

Agriculture is defined within Section 336 of the Town and Country Planning Act 1990 (as amended) as follows: includes 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.

The GDPO provides further guidance and provides that for the purposes of Part 3 and 'Agricultural Building' means a building (excluding a dwellinghouse) used for agriculture (see above) which is also used for the purposes of a trade or business and 'agricultural use' refers to such uses.

## What are the limits?

A recent appeal decision has provided some useful guidance the limits of Class R as Cornwall Council refused a prior approval application for the change of use from an agricultural building to a guest house for three reasons (noted below) and the decision was upheld by the inspector on appeal. We have set out the specific reasons for the initial refusal below alongside the inspector's conclusions which should serve as key considerations for future applications:

1. the existing state of the building would require significant works to enable habitation for guests that go beyond the remit of change of use – on appeal the inspector noted that the application had not been accompanied by a supporting structural report. Whilst Class R does not require an agricultural building to be structurally capable of the conversion (because it provides for the change of use only and not operational development) the inspector in this case no doubt gave weight to the fact that no information was submitted regarding whether the existing structure would be strong enough for the proposed use as opposed to requiring a complete rebuild. The initial officer report also gave weight to the fact that the existing building is 'open fronted' which is often presents itself as a cause for concern;
2. the building was not present on aerial photography held by the Council– the inspector noted that it was unclear whether the building had been rebuilt due to storm damage post 2016. This serves to highlight the importance of collecting accurate evidence ahead of any application given that the burden of proof is squarely on the applicant; and

3. the existing building was not deemed to be used for an agricultural trade or business – during the inspectors site visit it was observed that the land holding was used to grow fruit and plants and consisted of meadow land and wooded areas with the building subject to the development proposals being used to store lawn mowers, plant pots and buckets as well as a variety of smaller items but there was little evidence of any activity or link to demonstrate that the building was solely used for an agricultural use as there was little evidence of a business. The appellants did not produce any records such as business accounts to support their claim of agricultural trade use. This shows the importance of keeping good records so that it can be presented in evidence if challenged.

Any building to be converted to residential use under Class R must not exceed a cumulative total of 500sqm of floorspace. In the event that the building offers between 150sqm – 500sqm a prior approval application is required which means that the LPA are entitled to consider matters such as transport, noise, contamination and flood risk and so it is important that any such impacts have been considered ahead of submission of an application. If the building is under 150sqm a simpler notification process is followed (which means that the LPA do not have regard to the aforementioned additional considerations).

The government has recently pledged to reform permitted development rights in this area and we have included a link below to our previous article which summaries the proposed changes: <https://www.trowers.com/insights/2023/august/farm-diversification-reform-to-permitted-development-rights>

Our specialist planning team are able to advise on all aspects of planning law and policy including the availability of permitted development rights and the preparation of planning applications.



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# Succession Planning Series: Farm business management

**At the heart of the family farm is the farming business itself. Adequate succession planning for this operation can be all too easily overlooked when absorbed in the day-to-day demands of running the farm, but the importance and challenges of ensuring the smooth transition of the business to the next generation should not be underestimated.**

In this second instalment of our Succession Planning Series, Associates Victoria Borrow (Private Wealth), Jonathan Holloway (Corporate) and Holly Bryan (Private Wealth Disputes) break down the key aspects to consider and why.

## Business structures

Farming businesses tend to be either a partnership arrangement or a private limited company; the former being far more common.

The partnership may be informal, with no prescribed agreement in place, or there may be a farming partnership agreement in place (**FPA**) to document the terms upon which the partners agree to carry on business together and their respective share of the profits.

The limited company structure is less common, potentially due to the formalities of incorporating and the ongoing public filing obligations. In a family setting this may feel overly complicated and burdensome. However, for larger farms it can be an attractive option to consider, particularly if the family want to segregate areas of diversification.

For the purposes of this article, we shall focus mainly on the partnership structure and also assume any farm tenancy is a post 1995 farm business tenancy.

## Who owns what

The business is not the same as the assets. Therefore, an essential starting point is to establish how the assets central to the business are held and consolidate everyone's understanding. Often this is not a straightforward exercise, due to changes and exchanges between those involved in the business over the years.

It may be that the assets used by the farming business are held by the partners in their personal capacity or it may be the assets are held by the partners on behalf of the partnership. From an estate planning perspective, understanding how the assets are held, the potential tax consequences and how they can be passed on is central to being able to formulate an effective strategy for succession.

## Inheritance Tax Business Property Relief

In an ideal world succession arises as a result of planned retirement, but it is not uncommon in farming for the death of the head of the family to be the first time succession is considered and whilst post-death variations can be used to minimise negative outcomes it very much depends on the circumstances and may not be possible. Worst case scenario, if assets must be sold to pay Inheritance Tax (**IHT**) and the farm divided between the various successors, it could mean the end of the business.

The most important IHT relief available in farming is Agricultural Property Relief (**APR**). However, where this isn't available in respect of the full value of the land and property, or in relation to the other assets of the farming business, a claim for IHT Business Property Relief (**BPR**) may be available.

The rate of BPR will be 100% or 50% depending on the type of asset and who owns it. If the land, buildings, plant or machinery is owned by the deceased directly and used wholly or mainly for the purpose of the business carried on by the partnership the rate of BPR will be 50%. Whereas, if the land, buildings, plant or machinery is owned by the partnership then the rate of BPR on the deceased's interest will be 100%.

Evidently, by simply reorganising the ownership of the assets used by the business significant IHT savings could be made, which in turn could mean the survival of a business that may have otherwise failed.

With diversification increasingly playing a part in modern farming, it is also a worthwhile exercise to consider whether any arm of the business needs to be hived-off to prevent the investment activities (such as rental properties) from diluting the trading status of the operation, which could impact the availability of BPR.

## Key documents

Where the assets are owned directly by the partners as opposed to being owned by the partnership, the devolution of those assets upon death can also create difficulties if they do not pass to the surviving partners.

Failure to make a Will results in intestacy and under intestacy there is a strict framework as to how the assets of the deceased are divided-up, which may differ wildly from intentions. For any farmer it is essential to have a Will in place to make sure your assets pass in accordance with your wishes and aims for the business.

Trust arrangements can be used within the Will to provide flexibility or asset protection, as desired, and help ensure IHT mitigation.

Alongside the Will it is highly advisable to have a carefully drafted FPA, as discussed in more detail below. There needs to be close correlation between the contents of the Will, the aims of the succession plan and the terms of the FPA.

## The risks of failing to properly succession plan

Unfortunately, failure to put in place a plan (and the necessary documents) to ensure the smooth succession of a farming business can result in a dispute arising. More often than not, a dispute will arise either as a result of the succession of the farming business not being in line with expectations and discussions, or improper tax planning results in a significant IHT liability, resulting in the Farm being sold to meet it.

There are broadly two key claims we see arising, unfortunately very regularly, in relation to farming businesses following the passing of the business owner/founder:

- **Proprietary Estoppel:** a proprietary estoppel claim is a claim seeking to enforce a promise, which a person has relied on to their detriment, and has then been reneged upon (intentionally or unintentionally). A common example of this sees a person working on their parents' farm for many years for little/no pay, but on the assurance that the farm and farming business would pass to them one day. Unfortunately, their parent fails to put in place the proper succession planning structures and as a result, the farming business passes to the wrong person, or is to be divided between multiple siblings. It is open to the person who was made and relied on the promises to seek an order from the Court enforcing them, or compensating them for their detriment suffered as a consequence of the deceased reneging on their promise.
- **Inheritance Act:** a claim under the Inheritance (Provision for Family and Dependents) Act 1975 (known as the 'Inheritance Act' or '1975 Act') is a claim against an estate for reasonable financial provision, by a person who does not feel they have been sufficiently provided for (either under a Will or the rules of Intestacy). A common example of this is a farmer making provision for his farming business (which includes the farmhouse) to pass to his eldest son on death. The farmer then dies and son inherits, but the farmer's wife is left with little or no provision from the estate, as the majority of it was 'wrapped up' in the farming business. A successful Inheritance Act claim will result in the Court ordering an alternative distribution of an estate to meet the needs of the claimant.

Both of the above claims (as well as the many others we see arising), are incredibly expensive to take to trial, but are not uncommon. Sadly the level of costs incurred and improper tax planning can also result in the farm being sold to meet the liabilities of the estate. Both of



these outcomes can be avoided by having professionally prepared documents to ensure your wishes for the succession of your farming business come into fruition.

### How we work with your Trusted Advisors

We regularly work alongside a family's trusted advisers, for example their long-standing accountant, to put in place effective business structures and avoid disputes such as those referred to above from arising. It is important that a person (or family's) advisers are all on the same page when it comes to succession planning and effective collaboration from a legal advisory and accountancy/financial advisory perspective is the best way to ensure your business transitions to the next generation seamlessly.

### Some of the key points we have input on are:

- Discussing and reviewing your business structure: it is common for farming businesses to operate as a partnership, under a FPA (which has no legal separation between a partners' personal and business assets, but likewise has no public filing obligations such as having to file accounts at Companies House) on the basis that the farm does not have any outward-facing business element / no outside public interaction.
- If however, the business is doing something that interacts with the public where people could incur harm to their person and look to seek compensation, then potential liabilities to 3rd parties coming onto your premises / using your services increase significantly (as those 3rd parties could sue any of the partners if something goes wrong). Essentially all a partner's personal assets (not just the business assets) could be at risk as there is no separation between the partners, personally and the business.
- The accounting and tax provisions of the FPA.

### When should a new FPA be prepared, and what are the benefits?

Should a partnership model be considered the most appropriate to proceed, there are key benefits to a new FPA being prepared:

- Certainty of terms: a new FPA should clarify how the partnership operates. Should certain operational decisions be made with the consent of a certain partner / number or percentage of partners? Are assets of the partnership to remain the separate property of individual partners? It is important to set out the partners' decisions about the ownership and use of the more valuable assets / items.

- Continuity of partnership: unless expressly excluded by the terms of the FPA, death or retirement of a partner terminates a partnership under existing partnership law. A FPA can avoid (and future proof) this scenario and we would review this position to ensure a FPA aligns with the partners' succession planning. Perhaps you need to add your children as new partner(s) and we can consider whether a variation to your existing agreement or preparing a new FPA is more appropriate.
- More tailored provisions for the commercial practices of the partnership: the FPA should reflect existing (or put in place new) practices in areas such as the partnership's financial arrangements (for example how income profits and losses and drawings are to be dealt with) and decision making (including the frequency of partnership meetings and how many of the partners need to be present for a valid meeting). Agreements which have been in place for some time should also be reviewed in case revision in these areas is required.



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# Decarbonising heat and power: the role of Geothermal Energy

**To meet the UK's commitment of Net Zero greenhouse gas emissions by 2050, virtually all heat supply needs to be decarbonised. That means taking steps to transition away from fossil fuels to low carbon heat sources.**

The future of heating is likely to be a mix of efficient, low carbon technologies – covering heat pumps, heat networks, and a potential role for hydrogen. But with an increasing reliance on electricity for low carbon heat and the need to secure reliable, clean energy sources – should we be looking to geothermal energy?

## What is Geothermal Energy?

Geothermal energy refers to heat stored within the Earth's crust which can be converted into heat and electricity. It is a natural source of heat that is low carbon and renewable. There are a range of ways of harnessing geothermal energy – and the most appropriate extraction technology is often determined by geography.

Shallow geothermal systems typically extract heat at a lower temperature and combined with ground source heat pumps, that heat can be adjusted to provide a usable heat source for residential or commercial purposes.

Deep geothermal systems typically produce heat with higher temperatures that can be used directly as heat sources or for electricity generation. These systems usually require boreholes and geothermal reservoirs miles beneath the Earth's surface to extract heat at required temperatures. Most of Iceland's heat demand is served by geothermal energy – and that is due primarily to its active tectonic geology.

There are also various examples in the UK of mine water energy systems which utilise thermal energy in abandoned mines – which benefit from consistent temperatures year-round.

## Geothermal Energy in South West England

Running beneath the peninsula of South West England from the Isles of Scilly to Dartmoor (where it emerges so spectacularly) is a geological structure known as the Cornubian Batholith. Comprised of granite, an igneous crystalline aggregate of quartz, feldspar and mica, often used in construction, this structure plays a key role in the future of Cornwall's low carbon energy supply.

One high profile project that is harnessing the benefits of the unique geology of the region is the United Downs Deep Geothermal Plant near Redruth. This project is the first geothermal power plant in the UK and will

produce heat and power from heat extracted from the Cornubian Batholith. The project has been underway since 2009, and will inject and extract heated water from deep underground to create vapour to power turbines and electricity generators, and produce a direct source of heat. The plant is due to supply heat and power to Langarth Garden Village (located outside Truro) via a new pioneering heat network from next year.

Given the size and capacity of the plant, there are likely to be various other opportunities for heat and power offtakes. We understand that it is proposed that farmers will also be able to access and use this network as a cost effective and efficient heat source. Possible uses include greenhouse heating, pasteurisation, and timber treatment, among others.

Geothermal heat and power potentially provide an opportunity for low carbon heat and power sources to new developments in the area, and for a range of domestic, commercial, or industrial purposes. Any heat offtake or power purchase arrangement needs careful consideration before it is entered into - particularly on the key terms of supply (including supply commitments, pricing and length of term). An understanding of the key commercial drivers and regulatory complexities are vital to ensuring that any such arrangement meets individual requirements.

## Future of Geothermal Energy in the UK

When asked to consider geothermal power, most of us automatically think of Iceland or other regions with similarly elevated tectonic volatility. However, the UK has been cautiously investigating it since the 1970s, although we have fallen behind our European counterparts in realising its potential. For example, Paris utilises geothermal heating networks to supply a quarter of a million homes since first tapping into heated aquifers (underground layers of water-bearing rock) in the late 1960s.

In 2022, the House of Commons Environmental Audit Committee launched a review examining the potential role of geothermal technologies as part of the UK's commitment to achieve Net Zero. The committee raised concerns that Government policy had not integrated it as part of its Net Zero strategy and called on the Government to provide longer term support for geothermal heat. The Government's response highlighted that extracting lower temperature geothermal heat for use in heat networks was likely to represent the most 'widespread opportunity' for geothermal energy to decarbonise the energy system within the UK. That follows the Government's Heat and Buildings Strategy (published in 2021) which positions heat pumps and heat networks as the UK's primary routes to decarbonising heat.

With Government ambitions to grow the heat network sector with the aim that 20% of the country's heat will be supplied by heat networks from 2050, there is opportunity to utilise geothermal heat sources on a commercial basis. Regulation of heat networks is due to be introduced over the next few years which is likely to provide greater confidence in the market – but potential implications of regulation (especially for those carrying out regulated activities) need careful consideration.

Overall, there is a role for geothermal energy in the decarbonisation of heat and in the move away from fossil fuel power sources – but location restrictions, cost, and potential environmental impact are likely to remain key barriers to large-scale deployment.

Trowers & Hamblins property, land and energy teams have a wealth of experience in managing the complex transition to alternative land uses and development of renewal energy. Please get in touch if you'd like to know more about how we can advise you.



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# 2024? The outlook's bright say South West business leaders

**I do find January to be a funny month, business-wise. Whilst there is a sense of new beginnings and looking forward, there is often also some trepidation as to what the New Year will bring. For many sectors December is the key month for their business profitability, with January a time for assessing how their company has performed and seeing how that impacts on development plans.**

December profits often cushion the quieter first quarter market conditions. The Food and Beverage sector is a prime example of this, with a busy December period essential to see firms through Q1, when trade is traditionally significantly quieter. Many retailers too are in the same boat, with independent retailers and High Street brands alike relying on December takings to cushion lower takings. Some of our largest retailers take as much as 80-90% of their profits in December, carrying losses for many other months of the year.

And despite what might well have been a tough Christmas for some, given how 2023 was a year of persistent high inflation and low consumer confidence, we're seeing positive noises from South West businesses in the latest raft of regional business surveys. Always interesting to read, the latest findings from Lloyds Bank have revealed that 76% of the firms they recently interviewed across our region expect to see more profitability in the coming year, a result that mirrors our own findings at the South West Tourism and Leisure Forum late last year. My colleague Ian Brown hosted the event alongside colleagues at Savills and a poll of attendees there found 94% were optimistic for their businesses in 2024.

Lloyds also found that over a third of respondents wanting to develop their business and 32% looking to invest in training this year. As I've mentioned before, investing in business is a sure sign of confidence, as is training.

All of these encouraging results are great to see and are particularly interesting given the macro-economic and socio-political environment in which South West firms are operating. For our exporters there seems little let up in the ongoing development of post-Brexit regulatory change. It was always going to be complicated, but it's a significant challenge as those selling to foreign markets try to adapt to new trading requirements and, or, look for new markets to focus on. Brexit itself seems like forever ago now, but the impact is still keenly felt. Conflicts pile on the pressure, unnerving markets as they do, and political change is potentially in the offing with a UK General Election apparently looming, and the US gearing up for significant votes this year.

Closer to home however, the Business West's latest Quarterly Survey has highlighted that 71% of firms that they spoke to feel that finding the best talent for their businesses to be a key issue for the year ahead. They reported difficulties in finding suitable staff to fill skilled roles across manual and technical roles, as well as professional and managerial positions. 22% of respondents are in an expansive mood and reported an increase in their hiring of new people. So will 2024 see more of a 'war for talent' across our region? Quite possibly, it seems. On the positive side, we're blessed with some of the country's finest Universities, and we remain one of the UK's go-to destinations for young people who are looking for a good quality of life and exciting career prospects, so we're in a good place to meet the challenge.

So it looks like we've got a busy year ahead but I believe that our South West business community is definitely on the front foot for making the most of it. This was certainly a clear message coming out our "Future of food & drink in the South West – fostering economic growth and sustainability" event last autumn, which we hosted jointly with Taste of the West and Bishop Fleming Chartered Accountants. There seems to be some let up in market conditions, with international trade slowly moving back into positive territory and inflationary pressures easing, which is encouraging, but I think we're all highly conscious of the broader economic outlook remaining challenging.

As we ease into 2024 do keep your eyes peeled for news and events here at Trowers that will help you navigate any choppy waters ahead. As ever we have a packed agenda of events, commentary and analysis that you won't want to miss.



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