

Code of good practice for agri-environment schemes and diversification projects within agricultural tenancies



Tenancy Reform Industry Group

Agricultural Law Association
Association of Chief Estates Surveyors and Property Managers in Local Government
The Central Association of Agricultural Valuers
Country Land and Business Association
Farmers Union of Wales
Local Government Association
National Farmers Union
National Federation of Young Farmers Clubs
Royal Institution of Chartered Surveyors
Tenant Farmers Association

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Summary

The following Code sets out the framework within which landlords and tenants should be able to agree the appropriate terms following which agri-environment schemes and diversification projects can be pursued by the party concerned.

In summary, the Code leads the parties through 5 steps which propose:

1. Early consultation between the parties once a project starts to be planned.
2. Agreeing a timetable during which the landlord and tenant will seek to agree terms.
3. Preparation of detailed proposals with a guide as to information which might be relevant depending on the nature and scale of the project.
4. Issues to be addressed in considering the proposals and the need for a written response.
5. Preparation of a formal written agreement between the parties.

The Code includes details of an adjudication scheme to consider cases where landlords and tenants are unable to reach agreement. It also incorporates an Annex setting out the grounds upon which it might be reasonable for a landlord to withhold consent and vice versa for a tenant within a second similar section.

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The Code of Good Practice (“the Code”) is designed to provide guidance for landlords and tenants to assist the parties in agreeing terms for a variation(s) to an existing agricultural tenancy under the provisions of either the Agricultural Holdings Act 1986 or the Agricultural Tenancies Act 1995 for one or more of the reasons set out below to aid all aspects of diversification:

- Amending user clauses.
- Varying clauses relating to subletting parts of the holding.
- Permitting the erection or alteration of a building(s) for diversification projects.
- Allowing entry into agri-environment, conservation and woodland schemes.
- Permitting diversification associated with agricultural activities.
- Permitting diversification into non-agricultural activities.

The steps detailed below are based on a tenant wishing to submit a proposal to a landlord for consideration but the reverse scenario may apply in certain situations. In addition the same procedure could be adopted by a tenant who has failed to seek consent in advance as required under the terms of a tenancy agreement.

The extent of the submission to the landlord whilst providing all the information required to enable a decision to be taken should be proportionate to the proposal(s) concerned.

Step 1 – Early consultation

- The tenant should approach the landlord at the earliest opportunity regarding the diversification proposal(s) either orally or in writing, using the usual channels of communication. This may be a direct approach or via the landlord's agent. If the initial approach is oral the proposal(s) should be confirmed in writing.
- The parties and or their agents should meet as soon as possible to discuss the proposal(s) particularly where this involves major projects.
- During this process the broad terms of the proposal(s) should be explained together with the potential implications and benefits for the landlord and the tenant.
- The landlord and tenant should agree what needs to be provided to support the tenant's request for consent.
- The landlord and tenant should seek to agree how matters relating to the costs of preparing and considering the detailed proposal(s) are to be dealt with. Each party may bear their own costs but if the landlord needs to seek professional assistance which ultimately does not yield any significant financial benefit the tenant may be required to contribute towards the landlord's additional costs providing these are reasonable and necessary for considering and responding to the application depending on the scale of the scheme.
- Once agreed, the issue of costs should be confirmed in writing between the parties.

Step 2 – Agreeing a timetable

- The parties should agree a realistic timescale for the preparation and a measured consideration of the proposal(s) with sensible deadlines.
- The time frame needs to take account of any deadlines such as applications for agri-environment schemes, grant funding or obtaining planning and other consents from third parties.
- The agreed time frame should be confirmed in writing between the parties.

Step 3 – Preparing details of the tenant’s proposal(s) for consideration by the landlord

- The tenant should prepare a sound business case for the landlord to consider the extent and nature of which will vary depending upon the proposal(s) concerned. For example in a situation of varying a user clause it may be that a set of gross margins are adequate to support a change in the cropping permitted by the existing tenancy agreement. On the other hand a major non agricultural diversification project will usually require a full financial appraisal similar to that which might be submitted to a financial institution.

Examples: financial appraisals, budgets, gross margins, cash flows, comparables, supporting evidence, details of relevant skills, qualifications and training.

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- The tenant should provide the appropriate proof that the project can be funded assuming terms are agreed between the parties from either his own resources, via a financial institution and/or potential grant funding with or without seeking a contribution from the landlord. In the case of grant funding the proposed application should be consistent with the eligibility rules.

Examples: assets, reserves, retained profits, landlord's contribution, joint funding, applications, loans and grants taking into account the terms thereof.

- The tenant should make reference to the extent to which the terms of the tenancy may require varying and the impact, if any, that this might have on the landlord's rights and reservations. In addition the option to reverse any change to the terms might be considered if the scheme or project concerned is no longer being pursued.

Examples: user clauses, sub and alternative lettings, repair and other liabilities.

- The tenant should provide full details of the consents to be sought from third parties before implementation of the proposal(s) if approved by the landlord.

Examples: planning permission, Building Regulations, Fire Regulations, environmental consents, public health approval.

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- The tenant should detail any assignments, sublettings or joint ventures, which may form part of his proposal(s) including the housing of non-agricultural employees. It should be noted that certain proposals may result in part of a holding being taken out of an existing tenancy and let under a non-agricultural business tenancy governed by the Landlord and Tenant Act 1954 or a farm business tenancy under the Agricultural Tenancies Act 1995.

Examples: Assured Shorthold Tenancies, licences, leases, limited liability partnerships.

- The tenant should consider proposals for the recording of any permanent works as Tenant's Improvements or Tenant's Fixtures including compensation on termination where appropriate.

Consider: provisions of AHA 1986 or ATA 1995 as appropriate.

- The tenant may need to consider proposals for any variations to the passing rent following agreement to the diversification and any future reviews with the Landlord.

Consider: provisions of AHA 1986 or ATA 1995, stepped rent, turnover rent, rent holiday as appropriate.

Step 4 – Landlord's consideration of the tenant's proposal(s)

- The landlord should give careful consideration to the proposal(s) including all those matters set out in the tenant's submission as part of Step 3.
- The landlord should request in writing any further information required if the tenant has not properly addressed the matters set out within Step 3 providing this is reasonable and relevant to the

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proposal(s). For example, the landlord should not automatically request a full set of the tenant's accounts if other information provides sufficient financial detail or this is inappropriate in view of the nature and scale of the planned diversification.

- After the landlord has given full consideration to the proposal the landlord or the landlord's agent should prepare a written response to the tenant's proposal(s), confirming approval, giving approval subject to specified conditions or refusing consent stating all the reasons.

Annex 1 sets out the grounds whereby a landlord may withhold consent for a tenant's diversification project or seek to impose conditions and vice versa within Annex 2.

Step 5 – Formal Written Agreement

- Once the parties are agreed the terms should be confirmed in writing in an appropriate form which should be prepared by a suitably qualified professional adviser.
- The documents should cover all the matters bearing on the tenancy.
- Where appropriate the agreement should include a waiver of the landlord's powers under Case B of the Agricultural Holdings Act 1986 together with any other rights which may detract from or negate the landlord's grant of the consent.

What if a landlord and tenant are unable to reach agreement on a proposal?

Defra is to set up an Adjudication Scheme to consider cases where landlords and tenants fail to reach agreement on a proposal for a diversification project or participation in an agri-environment scheme.

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Where the landlord and tenant have failed to agree on a proposal, it would be open to either party to refer the issue for adjudication. The Adjudicator would have powers similar to an Ombudsman. The first step in the adjudication would be for either the landlord or tenant to submit an outline proposal on a standard document to the Adjudicator, which should be copied to the other party. This would set out the reasons why the Adjudicator should consider the matter.

Assuming the Adjudicator decided that he/she was able to accept the case, the Adjudicator would ask the parties to submit their arguments within a specified timescale, copied to each other. Each party would have the opportunity to comment on the other's arguments. In addition, the Adjudicator would be able to carry out a site visit as well as seek technical or legal advice. Finally the Adjudicator, having taken everything into account, would make a decision in favour of or against the proposal. The decision would be made available to both parties. If either party failed to provide information to the Adjudicator, he/she would base the decision on the information available.

The decision of the Adjudicator will be in the form of a recommendation and would not be binding on either party. Defra will, however, monitor the results of the Adjudication Scheme as a measure of the success of the Code of Good Practice in encouraging tenant farmers to participate in diversification projects and agri-environment schemes.

The scheme is expected to be in operation as from 2005. Further information about the adjudication scheme will be available from Farm Focus Division of Defra, Area 2D Ergon House, Horseferry Road, London, SW1P 2AL. Tel: 0207-238-6811.

Landlord's grounds for withholding consent for a tenant's diversification proposal(s)

The landlord may be justified in withholding consent where one or more of the following grounds can be demonstrated:

1. Where the project, in the reasonable opinion of the landlord, would substantially interfere with the quiet enjoyment of retained rights over the land.

This covers diversification that for example may impact on highly valued sporting rights or where a proposal involves visitor attractions on relevant land.

2. Where the proposal, in the reasonable opinion of the landlord, is not considered viable.

This ground encompasses for example cases where:

- the landlord reasonably believes (taking into account the information provided by the tenant in the business plan and supporting documentation) that the proposals would not provide an adequate return to justify investment by the parties or either of them; or
- the tenant has not demonstrated adequate resources to promote, deliver, and manage the project; or
- proposed changes to the holding (or part thereof) would in practice be beyond the obvious means of the tenant to reinstate.

Viable in this context not only relates to financial viability but also to matters concerning whether the tenant has the appropriate competence or skills to carry out the proposal effectively.

3. Where the implementation of the proposal would be detrimental to the sound management of the estate of which the land consists or forms part or other land belonging to the landlord.

To include situations where the granting of the landlord's consent would result in the landlord being guilty of a breach of a covenant for quiet enjoyment in relation to another tenant(s) or occupier(s).

This might be where the tenant's proposal directly affects the business or investment of the landlord or one (or more) of his other tenants.

Similarly the landlord could rely upon this ground to refuse consent where the implementation of the proposal would be detrimental to the landlord's own business interests. Clearly in such a case other grounds may also be relevant such as Ground 4 below.

4. The proposal would cause the landlord to suffer undue hardship.

The issue of loss of tax reliefs by the landlord in the event that the diversification proposal was implemented would fall within this category.

5. Where the implementation of such a proposal would result in the holding ceasing to be agricultural in nature.

The Code only applies to agricultural tenancies and therefore it would be inappropriate for it to be used to such an extent that it would result in the entire holding no longer being agricultural in nature. A series of consents may however be given but the landlord may subsequently refuse consent for a virtually identical proposal on the grounds that the project is a 'step too far'.

The over-riding test for this ground is whether the granting of the consent results in the tenancy falling outside the provisions of the agricultural tenancy legislation governing the agreement i.e. either the ATA 1995 or the AHA 1986.

6. Where the tenant is in material breach of the existing tenancy agreement and the matter has been brought to the attention of the tenant prior to the submission of a proposal for diversification.

The landlord has the right to object to a diversification proposal where the tenant is already failing to honour the terms of the tenancy agreement and this materially affects the landlord's interest.

However the landlord can only rely on this ground, in the context of the Code, where the breach has been notified to the tenant in writing ahead of an application under this Code.

7. Where the tenant has failed to adhere to the Code.

This particularly applies to supplying appropriate information under the Code to the landlord in connection with the application for consent.

8. Where an application is not materially different to a previously unsuccessful application.

Once an application for consent has been made, there will be a restriction upon a further application to the Adjudicator within two years based upon a proposal substantially the same as the 'failed' one – save where the subsequent application incorporates all the amendments proposed by the Adjudicator on a previous occasion.

Tenant's grounds for objecting to a landlord's proposal(s)

The tenant may be justified in objecting to a landlord's suggestion for a change of use or diversification where one or more of the following grounds are demonstrated.

1. Where the activity would prejudice the tenant's rights.

Depending on the nature of the activity involved it may result in either a deliberate or inadvertent, fundamental change to the tenancy agreement, including a change that means it becomes governed by a different statutory code. Deliberate changes would include the migration to a lease under the Landlord and Tenant Act 1954 and other business tenancy legislation, changing from a 1986 Agricultural Holdings Act tenancy to an FBT and the imposition of residential tenancies on dwellings. However, it might also include other changes, which may reduce the tenant's rights including loss of succession, changes in repairing obligations and further landlord's reserved rights. If these form part of a landlord's proposal, then the tenant should be allowed to object.

Whilst not necessarily forming a requirement of the landlord, there will be circumstances where a proposal might inadvertently alter the tenant's rights in some or all of the ways noted above. Tenants should be able to object where they reasonably believe their rights would be prejudiced.

2. Where the activity would lessen the tenant's ability to earn income from the holding.

Tenants should not be under an obligation to accept a landlord's suggested change of use if it would result in the tenant's ability to earn income from the holding being reduced. This would also include

proposals where the tenant is unable to finance start-up costs including any period of reduced income whilst the new enterprise is being established.

3. Where the activity is contrary to an established plan for the existing or future viable use of the holding.

Tenants have rights and responsibilities and may have developed an existing plan for the management of the holding within the bounds of the tenancy agreement. Tenants should be able to object to any suggestion from the landlord which is contrary to those plans.

4. Where the activity would lessen the tenant's quiet enjoyment of the holding.

An implied covenant of all tenancy agreements is that the tenant is allowed the quiet enjoyment of the holding. Tenants should be able to object to a landlord's proposal where it is clear to the tenant that the tenant's quiet enjoyment of the holding would be jeopardised.

5. Where the activity requires skills, capital or other factors not available to the tenant.

Tenants should be able to object to the landlord's proposals where they would be required to employ particular skills or capital which they do not have available and which would only be obtained at an unreasonable cost to the tenant. For example, a tenant should not be required to accept a landlord's proposal for a farm to be used as an educational facility if the tenant does not have or cannot reasonably access the necessary manpower, communication skills or finance to upgrade facilities that would be necessary.

6. Where the activity would cause the tenant to suffer undue hardship.

Whilst this will be measured mainly in financial terms, there may be other factors in terms of the impact upon the tenant's family which should be taken into account.

7. Where the activity in the reasonable opinion of the tenant is not considered viable.

It would be to the landlord's advantage to test his proposal against the experience and skills of the tenant. In this respect, the tenant could object if he believes that the landlord's proposal would not provide an adequate return to justify investment by either party. The tenant may also have knowledge of the holding to suggest possible areas of conflict between the landlord's proposal and what the holding has available.

8. Where the implementation of a proposal from the landlord would result in the holding ceasing to be agricultural in nature.

The Code is only intended to apply to agricultural tenancies and therefore it would be inappropriate for the Code to be used to such an extent that the holding would no longer be agricultural in nature.

9. Where the landlord is in material breach of the existing tenancy agreement and the matter has been brought to the attention of the landlord by the tenant prior to the submission of a proposal for diversification.

The tenant has the right to object to the landlord's proposal where the landlord is already failing to honour the provisions of the tenancy agreement (e.g. repairs, quiet enjoyment and provision of fixed equipment) and this materially affects the tenant's interest.

However, the tenant can only rely on this ground where the breach has been notified to the landlord in writing.

10. Where the landlord has failed to comply with the Code.

This will relate particularly to the amount and nature of information provided by the landlord through the Code of Good Practice process.

11. Where a proposal is not materially different to a previously unsuccessful proposal.

Landlords should be unable to propose changes which have already been subject to analysis under the Code of Good Practice if those proposals are largely unchanged from their original versions.

The following organisations have been involved in the preparation of and have signed up to the Code of Good Practice:

Agricultural Law Association

Association of Chief Estates Surveyors and Property Managers in Local Government

Central Association of Agricultural Valuers

Country Land and Business Association

Farmers Union of Wales

Local Government Association

National Farmers Union

National Federation of Young Farmers Clubs

Royal Institution of Chartered Surveyors

Tenant Farmers Association

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