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birketts
Next Level Law

# Agricultural Brief

Our legal update for farmers, landowners and estate managers

## In this issue



# Welcome

I joined Birketts in January 2015, the same week as the Single Payment Scheme was replaced by the Basic Payment Scheme (BPS), and all that came with it. Since then, the agricultural sector has been peculiarly exposed to more than its fair share of “seismic” events. Elections, Brexit, COVID-19 and war in Ukraine have all brought challenges and opportunities for the sector. 2024 promises plenty more of the same. In England BPS is now a thing of the past, the statutory landscape is scheduled to change and there’s another general election looming, with many anticipating a change of government thereafter.

They say the only certainty in this world is uncertainty and that seems particularly apt in the farming sector today, where resilience and adaptability have never been more important. While we cannot predict who will be in power in twelve months or what that will mean for government policy, we can perhaps anticipate some trends that seem likely to prevail, whichever party takes the helm. The principle of public money for public goods now seems accepted and the consequential changes to the support regime will continue to dent many farming business’ balance sheets – diversification might be a means of making-up the shortfall. The green agenda looks set to stick around and Natural Capital will undoubtedly present opportunities for landowners alongside renewable energy, which will continue to expand in scale and importance. Against this background, both Labour and the Conservative party have indicated a willingness to revisit the rules on Inheritance Tax and/or the reliefs that sit alongside it, which could have very far-reaching consequences for the sector.

**In this issue:**

- **Adam Burden** explains the recent changes to the AHA tenancy regime and those scheduled to come into effect in September 2024.
- **Carol Ramsden** provides some guidance and insight into the eagerly anticipated changes to the statutory regime around public rights of way.
- **Elle Dales** provides an update on the rapidly evolving world of Natural Capital.
- **Jeremy Stanton** considers what diversification looks like in 2024.
- **Edward Bellamy** explains the SFI and how the scheme rules accommodate dispositions of land.

The team at Birketts takes great pleasure from helping clients anticipate and react to the ever-changing environment in which they operate and watching them turn challenges into opportunities. We are always happy to discuss your circumstances, plans and ideas and will do our best to help you to navigate through whatever the next few years have to throw at us all. Bring on 2024!

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# Update on changes to AHA tenancy succession rules

The Agriculture Act 2020 (the 2020 Act) adopted a phased approach to the changes it made to the rules on succession under the Agricultural Holdings Act 1986 (AHA) and some of the more fundamental changes take effect on 1 September 2024.

In every case, before reviewing the succession rules it must be ascertained that the tenancy in question benefits from rights to succeed. Under the AHA, such rights exist where the tenancy:

1. was granted on or before 12 July 1984 (noting that tenancies pre-1 March 1948 may also be dealt with differently)
2. was granted after 12 July 1984 but before 1 September 1995 (provided the tenancy contains express terms that Part IV of the AHA will apply – being the Part of the AHA relating to succession – or a tribunal ordering that it will apply)
3. was granted on or after 1 September 1995 subject to one of the exceptional circumstances set out in sections 4(1)(b)-(d) of the Agricultural Tenancies Act 1995 (which in essence preserve the status of a tenancy granted pre-1 September 1995).

To succeed to an AHA tenancy, the proposed successor must show (amongst other things) that he or she is both “eligible” and “suitable” to do so and a complex array of rules and tests are employed in order to verify this. The 2020 Act has sought to simplify these requirements with the headline changes being:

1. **Minimum retirement age –** historically, a tenant had to be aged 65 or older before an application could be made for succession on retirement. This is no longer the case as the minimum retirement age has been repealed so that an application for succession on retirement can be made when the current tenant is any age.
2. **Commercial unit test** – historically, this test required that an applicant for succession must not be an occupant of another commercial unit of agricultural land. As of 1 September 2024, this requirement is repealed in its entirety and so will no longer prevent potential successors from having an interest in other holdings (whether owned or tenanted). However, it should be noted that other eligibility requirements (particularly the need for the applicant to be a close relative of the tenant and to derive their principal source of livelihood from the AHA holding) will likely be drawn more to the fore, as these must continue to be complied. As discussed in our previous article back in 2020.

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“Neither tenants nor landlords should delay in taking professional advice in the event of a death or proposed retirement”

3. **Suitability test** – the introduction of the Agricultural Holdings (Requests for Landlord's Consent or Variation of Terms and the Suitability Test) Regulations 2021 following the 2020 Act have brought some clarity as to what will be required in respect of suitability of a potential successor. As of 1 September 2024, a successor will need to show that they have the ability to farm 'commercially to high standards of efficient production and care for the environment'. The assessment may also include criteria such as: experience, training and skills in agriculture or business management, health of the potential successor, their financial standing and character, the character and condition of the holding, and also whether a prudent and willing landlord could reasonably be expected to regard the applicant as among the candidates to whom they would be willing to grant the tenancy' if the tenancy was on the open market.

These changes have been designed to significantly simplify the conditions to be met by the tenant and also further show the shift in emphasis within agricultural policy towards the environment.

As mentioned above, these changes will need to be viewed in the round and alongside the requirements for succession which have not been amended or repealed. Eligibility criteria such as the livelihood test will continue to apply and so each potential successor will need to give careful consideration to how their farming business is operated and organised. It is a question of fact and degree as to whether the requirements may or may not be met in each case and so professional advice should always be sought at the earliest opportunity.

From a landlord's perspective, the changes may be less welcome as their position is potentially weakened with regards to recovery of vacant possession on the death of a current tenant. However, the statutory rules are only ever part of the story, and it is always open to a landlord to make a commercial offer to the tenant to replace an AHA tenancy with a fixed term Farm Business Tenancy or similar, which may provide the landlord with peace of mind and an improved Inheritance Tax position.

Finally, it must always be remembered that strict statutory time periods for service of notices under the AHA will continue to apply and so neither tenants nor landlords should delay in taking professional advice in the event of a death or proposed retirement.



# Footpaths – on the move at last!

## Should you need to delve into the world of public rights of way, it's best to recognise the challenge of achieving resolution at a speed faster than glacial.

Be it a claim to record a route over private land, a change to the existing network or a knotty maintenance issue, complex legislation and long-winded procedures often seem designed to ensure that no public rights of way problem will be resolved quickly. This, coupled with limited specialist resource at councils, means that rights of way problems last not just years but sometimes for decades.

Achieving change to the actual legislation is equally difficult. There are strong feelings on both sides of the access debate, with landowner-favourable provisions in the Countryside and Rights of Way Act 2000 (CRoW Act) and Deregulation Act 2015 remaining unimplemented while details are thrashed out. However, 2023 bucked the trend and saw DEFRA grasp the nettle of outstanding public rights of way legislation and begin a programme to bring in changes before the next general election.

### What's new?

#### The presumptions guidance: August 2023

This DEFRA guidance advises councils to attach weight to the impact of public footpaths, bridleways or restricted byways that run near private houses and in gardens, farmyards and commercial and industrial premises. It applies to diversion or extinguishment applications made under the Highways Act 1980 – the most common legislation under which changes are achieved and concludes: "*...it is for the authority to consider the case on all its merits taking into account all the statutory requirements and available guidance. In making its decision as to whether the existing path should be diverted or extinguished, an authority should consider in particular the impact of the existing path on the property owner and/or occupier against the benefit that having the right of way through the land brings to the public...*"

### What does it mean in practice?

Councils deciding applications should consider the adverse impact of the existing route on the landowner or occupier, where it runs within the garden or curtilage of a private dwelling, across a farmyard or within commercial or industrial premises. They should be aware that reducing or eliminating the impact of a route, in terms of privacy, security and safety, are important considerations to which due weight should be given. So, the threat of a formal objection to a diversion or extinguishment order should not be sufficient to deter councils from making orders where there is clear benefit to the landowner or occupier in improving privacy, security and/or safety by the diversion or extinguishment of a route.

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*Carol Ramsden is a landowner representative on DEFRA's public rights of way Stakeholder Working Group. The Group has landowner, Council and user group representatives and is currently working on the detail of pending public rights of way legislation.*

Rights of way problems last not just years but sometimes for decades

### The cut-off

The cut-off is shorthand for the CRoW Act provision which extinguishes unrecorded historic footpaths and bridleways on 1 January 2026, preventing additional routes being added to the definitive map on the basis of pre-1949 documentary evidence of their existence. The extinguishment would bring certainty to landowners, but intense debate over exceptions to the extinguishment has seen the legislation stalled for many years. The legislation finally came into force on 17 November 2023 with DEFRA using an option date of 1 January 2031 for the extinguishment to take effect. Regulations for the exceptions are in hand. Certainty is still some way off, but now repeal of the legislation is required for the cut-off not to happen.

### "The Right to Apply"

Another provision of the CRoW Act, much needed in areas of the country where councils refuse to accept any applications for public path diversion or extinguishment orders or have long waiting lists meaning years of delay. DEFRA has committed to bringing in the right to apply in 2024, along with full cost recovery by councils. Applicants will be entitled to a determination within four months of submission, although will have to do much pre-application work and can expect significant costs.

### Other changes

There is a raft of smaller, but important, changes that DEFRA has committed to introducing as soon as it can, including:

- revision to the tests for claimed routes
- agreement between landowners and councils to divert claimed routes
- council power to dismiss 'irrelevant' objections to orders
- removal of the need for expensive press advertisements
- power to authorise gates on restricted byways to control livestock.

## New at Birketts

We have been delighted to welcome Camilla Rhodes to our national public access team. Camilla is a qualified chartered surveyor with a background in private practice and 20 years' experience at a local highway authority. She brings expertise in highway and public rights of way law and will add depth to our ability to react to the new legislation. Camilla looks forward to assisting clients all over the country with the challenges that come from public access over their land.



# The Natural Capital rollercoaster ride: always forward, never straight

Anyone with an interest in the Natural Capital marketplace will probably feel as though they've been on a bit of a rollercoaster in recent months.

The landscape continues to shift (no pun intended), creating much uncertainty for all involved, to the extent that writing an article about where things stand feels like a precarious thing to do at the moment. Nevertheless, we look briefly at where we are now and what you can do to prepare for the future. Strap yourselves in, the ride will continue for some time yet...

A suite of draft regulations which define what, how, when, where and by whom Biodiversity Net Gain (BNG) is to be delivered, together with a template biodiversity gain plan and accompanying guidance was produced by the Government at the end of November 2023. Broadly speaking, it is full steam ahead for the delivery of a 10% BNG compared to the pre-development biodiversity of the site becoming mandatory from 12 February 2024 for all but small schemes (which will have a later commencement date of 2 April 2024) and Nationally Significant Infrastructure Projects (for which the intended launch date is currently from November 2025). From this date forward, developers will have to demonstrate how they will meet this requirement within a biodiversity gain plan, which must be approved by the relevant planning authority before development can begin.

The new "biodiversity gain hierarchy" introduces a sliding scale of priority starting with avoiding detriment to existing biodiversity, mitigating biodiversity losses through the design of the development, enhancing and then creating biodiversity on-site, looking to off-site registered biodiversity gain to fulfil the BNG condition and, as a last resort, committing to buying statutory biodiversity credits. As ever, the devil is in the detail of the new regulations and there are exceptions and modifications for some types of development and indeed certain irreplaceable habitats which would be affected.

Meanwhile, landowners still have little clarity on whether entering into long-term schemes is going to be financially prudent from both a tax and an income perspective. The Government's 'Taxation of environmental land management and ecosystem service markets' consultation closed in June 2023 and we are expecting further guidance to be published by DEFRA in Spring this year, so keep an eye on news channels and social media for updates. Time will tell as to whether creating new habitats and generating BNG units will be more lucrative than food production or other forms of diversification as unit pricing, driven by supply and demand, inevitably settles over time.

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Nutrient neutrality schemes looked set to be de-railed towards the end of summer 2023 when the Government proposed to 'unblock' the development process in nutrient neutrality catchment areas by removing the obligation on developers to consider the impact on nutrient levels of urban wastewater from proposed schemes. However, following a robust outcry from a multitude of different channels including many non-governmental organisations, the House of Lords intervened and voted to reject this bid to dilute the relevant provisions of the (the Levelling Up Regeneration Bill). Nutrient neutrality is therefore very much still a requirement in the relevant catchment areas. We have been involved in documenting a range of creative ways to assist developers in meeting their obligations, so it is worthwhile for landowners to consider whether or not it may be possible to capitalise on this opportunity.

As for the world of carbon, businesses appear to be looking inwardly at this stage at how they can reduce their own carbon footprint before considering how they can provide offsetting opportunities for other entities. As lawyers, we envisage our input for the next couple of years involving documenting land-based schemes and advising on the terms of commercial contracts between companies who are aiming for net zero and those providing solutions for them to achieve it.

Alongside dealing with BNG, nutrient neutrality and carbon matters, we are also helping clients with Landscape Recovery projects and have been advising on title, planning and environmental issues which need to be considered and dealt with to deliver these schemes. Each proposal is different in nature and requires input from a variety of advisers from funders, solicitors and agents through to ecologists, planning consultants and local authorities.

Looking ahead, we suspect that the next general election may cause a bit of a bump in the road in terms of certainty for those looking to involve themselves with the opportunities that the Natural Capital market presents. However, even for those who are hesitant to commit to anything long term just yet, there is plenty to do to stand oneself in good stead for the future and the point at which we gain further clarity on some of the fundamentals.

Landowners would be wise to speak to an ecologist and a land agent about what and where might be appropriate for a Natural Capital project on their property and to arrange for their baseline survey to be carried out if this has not already been done. Accountants should also be consulted regarding how a change in the use of such an area could affect their tax and financial affairs and how this should be managed to minimise any losses of reliefs and exemptions. Advice should also be sought from a solicitor as to any title issues which may need to be dealt with (such as a lack of access rights, bank restrictions and occupational tenancy matters, to name a few key ones) and also before signing any agreements which are offered up. We have seen some very innovative drafting in circulation, not all of which is very landowner-friendly, so please consult your solicitor before signing anything.



# Diversification, or simply joining up the dots?

## Do you have older and costly underused farm buildings, land available for new buildings, or less of your land in agricultural production?

Increasing numbers of agricultural businesses are in this position but are still very much farming operations with food production as their number one business objective. Many other businesses are aiming to reduce their carbon footprint, but are not really sure how to achieve reduction targets.

### Sustainable food production opportunities

It can be hard sometimes as a landowner to join it all together. In isolation, the different ingredients to the cocktail might be labelled 'diversification', whether into controlled environment agriculture (CEA), renewable energy, and/or Natural Capital. However, combined they make for a logical sustainable food production opportunity, utilising your land-based resources, your land's Natural Capital, your buildings (both old and purpose built) and renewable energy generation opportunities, by applying your existing management and business experience towards sustainable food production.

Every farm will have older buildings that are under-utilised and often not suitable for larger modern farm machinery or storage but are costly in terms of repair and maintenance.

Farms may also have space and land available for putting up new buildings. CEA producers are using both of these options to house their operations, with larger producers often using bespoke newly built buildings and smaller ones often re-purposing smaller buildings (or a combination of both).

CEA requires significant amounts of energy. Landowners are very well placed to commit land for renewable energy uses, whether solar, wind, anaerobic digestion (AD) or ground source heat pumps, backed up by battery storage facilities to provide energy security and consistency alongside control over pricing and energy overheads. The energy source is therefore 100% green, clean energy. There is no need for a grid connection as the energy supply can be off grid, however surplus energy could be sold direct to other users as a private supply or, with a grid connection, sold into the grid.

Foods produced through a CEA operation can be sold locally at the farm gate, through a farm shop, or to local food retailers, hotels and restaurants looking for local produce. This would often fit alongside sustainable animal production as part of a branded farm food supply. The end result: local, sustainably produced food, consumed locally, that is also helping farming businesses meet their carbon reduction targets.

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**The legal perspective**

One of the first questions to ask is who would operate the CEA unit. Would this be the landowner/farmer themselves, or more likely, a CEA franchise or third-party tenant, even where the landowner remained an active participant or investor. There would, however, need to be some risk firebreak between the CEA operation and the main farming business. The operator would occupy under a lease, with the landowner being protected by a rent deposit arrangement.

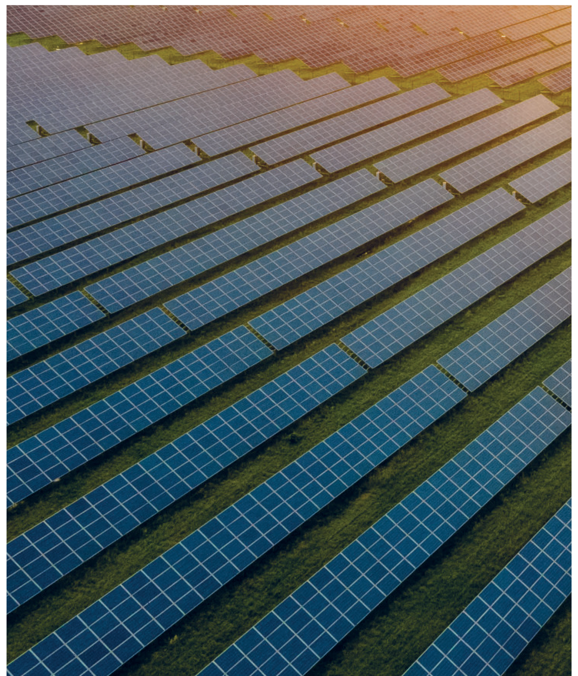
The renewable energy generation, whether solar, wind, AD or ground source heat, dependant on scale and viability, would again be structured as a third-party operator paying rent to the landowner, under a lease, selling green energy direct to the CEA facility by way of a power purchase agreement. Or it could be the landowner installing and operating the energy generation facility themselves. Any surplus energy could be sold direct to users (via private cabling) such as local houses, factories or retail units, again via power purchase agreements.

If there is a grid connection, surplus energy units could alternatively be sold into the grid as green energy.

An important further consideration is whether the land is owned, freehold or tenanted. If the farm and buildings are tenanted there will almost certainly need to be a commercial discussion with the landlord with regards to both the CEA use, repurposing buildings, building new buildings, and installing renewable energy facilities. Owners, Agricultural Holdings Act tenants and Farm Business Tenancy tenants will require specific legal (and tax) advice. Lease terms will need to be of sufficient length to enable the tenant to offset the capital cost and provide a funder with sufficient income cover over the lease term to repay loans.

It's possible that a CEA provides a solution enabling existing buildings to be repurposed whilst staying within a food production use, whilst at the same time providing a further potential source of income (either as rent or, with direct involvement, business income), alongside reducing a farming business' carbon footprint. A CEA has real potential to solve these problems but it is not without risk and not for the faint hearted and certainly should not be pursued without legal advice.

Food for thought!





# Risks of change of management control for SFI agreements

With the Basic Payment Scheme (BPS) ending at the end of last year in England and delinked payments continuing to taper off in value until their last year in 2027, it is important to consider how to replace this income stream.

The Sustainable Farming Incentive (SFI) has been introduced as part of Environmental Land Management Schemes (ELMS) in order to provide funding to make-up some of this shortfall and we are now starting to see these agreements on land being sold, gifted or leased.

Change in management control for an SFI agreement will happen when there is a sale, lease or other transfer (such as a gift or inheritance) of the land subject to the SFI agreement or any part of it. If this happens you are obliged to let the Rural Payments Agency (RPA) know and they have absolute discretion as to whether to allow a transfer of the SFI agreement to the person who now has management control. However, they say that they will not usually allow this to happen.

In summary the RPA has several options, and they could:

1. reduce the grant (temporarily or permanently)
2. require the grant to be paid back (in whole or part)
3. vary the SFI agreement, for example by changing the land or the actions required
4. terminate the SFI agreement
5. accept a transfer of the SFI agreement to the new person with management control.

It is important to note here that you may already have incurred costs in complying with the SFI agreement which you would not be able to recover, even if the grant has to be paid back.

Time will tell as to the preferred actions of the RPA in each case, but having regard to the potential outcomes above, if you are planning to sell, lease or gift your land in the near future it is worth taking advice and carefully considering whether to enter into an SFI agreement.

**Additional considerations for tenants**

Tenants do not have to seek consent from their landlord before entering into an SFI agreement as far as the RPA is concerned. However, it should be noted that if their tenancy ends during the term of the SFI agreement, then the tenant will be in the same position as above. Albeit, if the tenancy is terminated unexpectedly, then it may be classed as a "good reason" for a breach, although this does not necessarily preclude the above options being taken. Other "good reasons" for a breach include: death, serious illness, insolvency, supply chain issues, natural events or criminal damage.

It's also worth noting that while the RPA may not require a tenant to obtain the landlord's consent, depending on the terms of the tenancy, not getting landlord's consent could put a tenant in breach of their tenancy and lead to enforcement action. Accordingly, a detailed review of the terms of your tenancy should be undertaken before entering into any SFI agreement.

Please note that this article is based on the 23 June 2023 terms and conditions. The pilot SFI terms kept any transfer at the RPA's absolute discretion and included a complete ban on transfers during the last three months of the SFI agreement. However, they did not suggest that a transfer was an unlikely occurrence, as the current terms suggest. To complicate matters further, there were also slightly different terms in 2022 and it is therefore important to check each SFI agreement individually to see which provisions apply in each case.

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