Birketts

WELCOME TO THE WINTER 2019/2020 EDITION OF

Agricultural Brief

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Welcome to the winter 2019/2020 edition of Agricultural Brief, our newsletter for farmers, landowners and others involved in agriculture.

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Please subscribe electronically at www.birketts.co.uk/register in order to receive details of our podcasts, agricultural articles and invites to any forthcoming agricultural seminars and events.

Whilst we are looking to maintain the paper copy of *Agricultural Brief* as an annual publication, we will also be collating an electronic edition each year so its vital that you 'opt in'.

This introduction is written as the Conservative Party celebrate winning the 12 December 2019 General Election, returning the largest majority they have enjoyed since 1987. This should allow the Government to progress its manifesto commitments, including in respect of agriculture.

Accordingly, we can expect a shift away from the CAP to a new system based on "public money for public goods" with a seven year transition period and a promise that current EU spending levels in agriculture (£3.2bn per year) will be maintained for the next five years, albeit with direct payments being phased out and money transferred into a new Environmental Land Management System.

Manifesto commitments also include an increase to the annual quota under the Seasonal Agricultural Workers Scheme from 2,500 to 10,000 per year along with a points based system for skilled migrant workers. We will watch with interest over the coming months to see how these manifesto promises translate into action.

Meanwhile, in this edition of *Agricultural Brief* we can be sure of the useful content provided by the Birketts' contributors. Deborah Sharples writes on the importance of record keeping for farmers and Julie Gowland writes with advice on managing health and safety risks on farms. Edward Long discusses the steps needed beyond mere "prior approval" for undertaking permitted development and Tom Sharpe writes on changes relating to written statements for workers and employees as of April 2020. For businesses taking on seasonal workers Tom and Julie's articles will be of particular relevance and these are topics on which we will expand with a breakfast seminar in 2020.

Finally, Will Foley writes with a reminder of the best practice of advance preparation for sale as we move towards, hopefully, a period of increased political stability for the spring market for land sales.

If you have any questions relating to points arising from this edition of *Agricultural Brief* or legal matters generally, please do contact a member of the Agriculture and Estates Team who will be delighted to assist.

Record keeping is a healthy exercise for farmers

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When working to protect the interests of farmers and landowners, we often find that one of the most significant factors influencing the outcome is the quality of their record keeping.

In many circumstances we have to look back quite a long way into the past to try to establish in detail what happened. This exercise is so much easier where there are good, well-ordered records.

It is of course not only important to keep records, but to be able to find them again. In some cases we will be looking back over 20 years, so a good archive system (or memory) is essential!

What records will be needed is hard to anticipate, but there are some rules of thumb. The golden rule, to my mind, is to keep a record of all complaints and encounters with the public and all official visits to the farm. It is useful to make a note of where and when the encounter took place, with whom, and about what was said. At the time, these matters may seem trivial, but 20 years later they can take on a whole new significance to you or your successors. A simple farm diary is a useful tool.

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Public rights of way and town and village greens

An example of where records can be valuable 20 years on is in relation to claims for public rights of way. The public is able to claim a right of way if it has used a route ‘as a right’ for 20 years or more without challenge or interruption. A landowner who can produce records of having stopped and challenged people on the route over a 20 year period, or of having erected notices challenging the right of access, will be in a much stronger position than one who cannot. The same is true of potential claims for town and village greens. In all cases, a note made at the time of the incident is more valuable than a recollection years or even months later. They are accepted as being far more likely to be accurate.

In the case of both the right of way and town and village green claim the landowner can best protect his or her interests by following a statutory procedure to deposit a declaration and statement with the Local Authority. This will ‘stop the clock’ on any claims, but as always, record keeping is vital because the statement must be renewed every 20 years.

Planning and enforcement

It is not uncommon for uses to take place on rural properties without compliance with planning law. Common examples are houses with an agricultural occupancy condition attached being used by someone not employed in agriculture, or properties granted permission as holiday lets being used as permanent dwellings. Alternatively, an agricultural barn may be used for a non-agricultural business.

Being able to claim a certificate of lawfulness or to defend an enforcement notice will depend on being able to prove continuous use for a period, in some cases, of up to ten years. It is possible to give evidence in a statement, but that evidence inevitably carries more weight where there is a strong and continuous trail of 'real' evidence in the form of written records and correspondence.

If undertaking physical works without planning permission, such as conversion of a barn or erection of an extension, it is valuable to keep receipts for materials and labour and a record of when the use started.

This short article has concentrated on long term records, some of which may have acquired almost historical significance by the time they are needed, but there is also a place for really detailed day to day records. When things go wrong they can be your first and main line of defence. Where livestock and muck spreading are concerned, records of what was done and when and what your neighbours did and when, along with a record of the weather, is often priceless if an abatement notice is served.

Summary

In the hurly-burly of daily life, when there is too much work to be done and too little time to do it, record keeping can seem to be nothing but a nuisance. It is, however, a hugely valuable exercise and a few minutes spent today making a diary note or completing a checklist could pay real financial and business dividends in the future.

Prior approval: no panacea

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The increase in available permitted development rights for the development of former agricultural buildings has led to us seeing a sharp increase in the number of properties being sold with the benefit of prior approval for such development.

Unfortunately, that increase has also led to us becoming involved in cases where overreliance has been placed on the value of prior approval in circumstances where other factors mean that the development for which prior approval was obtained does not meet the other conditions of the relevant permitted development right, and as such cannot proceed.

Understandably, such cases can cause a significant amount of frustration for both buyers and sellers, particularly in cases where a substantial uplift in value has been obtained on the basis of the development potential.

To understand the shortcomings in relying solely on the existence prior approval, it is first necessary to understand what this is.

What is prior approval?

Prior approval is a pre-condition of development under a number of the available permitted development rights. The majority of larger agricultural conversions require the grant of prior approval in respect of certain aspects of the development. These vary depending on the use class being relied on, but generally address matters such as contamination, transport and highways impacts and flooding.

Most importantly, a prior approval is not a planning permission. As was recently confirmed in the case of Wokingham the benefit of planning permission for a development pursuant to permitted development rights extends only to works that are in compliance with both the requirements of that right, and the details provided as part of the prior approval application.

The risks

The two areas we see lead to the majority of problems are, in the case of all agricultural conversions, the actual use of the building prior to the conversion, and in the case of conversions to residential dwellings pursuant to Class Q, the ability of the building(s) in question to be converted, as opposed to being rebuilt. We explore each of these in further detail overleaf.

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All agricultural conversions

Classes Q, R and S require that, on the requisite date, a building was used solely for agricultural purposes as part of an established agricultural unit to benefit from the permitted development rights available. The use of a building at a particular time is a question of fact, and not one that is established (or otherwise) by the existence of a prior approval.

We have become aware of cases where, following the grant of prior approval, questions have been raised as to the actual use of the building to be converted at the relevant date. If it can be demonstrated that the building had been put to another use at that time, or the agricultural use of the building had been abandoned, the benefit of the permitted development right is lost. Such occurrences are particularly problematic where a property has been purchased solely for the purposes of development or where development work has already begun.

Conversions to residential use

The second issue, in relation to the ability of buildings to be converted to residential use under Class Q as opposed to being rebuilt, is one we are seeing with increasing frequency. This may, in part, be due to the reduction in availability of suitable buildings, with the best examples having already been converted. Unfortunately, without proper investigations having taken place, it has been known for these structural shortcomings to only come to light with the building collapsing part-way through the conversion works. The letter of the law in these cases is particularly severe, as without a building, there is nothing left to convert. With many agricultural buildings being in the open countryside or other locations where planning permission wouldn't ordinarily be granted, this can spell the end of any development potential at the site.

"Robust due diligence needs to be undertaken to ensure that all of the conditions of the prior approval rights are properly fulfilled...

How to help protect your position

Taking into account the above, it is clear that both buyers and sellers of property with the purported benefit of permitted development rights for the conversion of agricultural property need to do more than obtain or rely on the existence of the grant of a prior approval application. Robust due diligence needs to be undertaken to ensure that all of the conditions of the prior approval rights are properly fulfilled to avoid something coming to light that either frustrates a sale, or, arguably worse, leads to the Local Planning Authority stopping a conversion in its tracks, with all of the potential financial, and other, consequences that might have.

If you have any further questions on this article or any of the issues highlighted are of relevance, please contact Ed Long or a member of the Planning Team.

Managing health and safety: top ten tips

In the last ten years, almost one person a week has been killed as a direct result of agricultural work. Many more have been seriously injured or made ill by their work.

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These statistics and HSE's Business Plan for 2019/2020 put a particular focus on inspection programmes and targets for the agriculture sector and highlight the need for effective health and safety management.

Why worry about health and safety?

Health and safety is a fundamental requirement of any sustainable farming business and should be regarded as an essential part of farm business management. Good farmers and employers recognise the benefits of reducing incidents among their workers and are aware of the financial and reputational reasons to achieve good standards of health and safety.

Under the Health and Safety at Work etc. Act 1974 employers have a duty to ensure, so far as is reasonably practicable, that their employees work within a safe environment. If employers breach their legal duties, not only will their reputation and that of their business be damaged, but they could find themselves being investigated by the Health and Safety Executive and prosecuted.

Under the Health and Safety at Work etc. Act 1974 employers have a duty to ensure, so far as is reasonably practicable, that their employees work within a safe environment.

It is therefore very important that you know your duties and your risks and that you manage those risks effectively to show that you have taken all reasonable steps to ensure the safety of your employees and others.

Common issues

Contrary to popular belief, having a mountain of paperwork will seldom solve the issues. Good health and safety is about having practical solutions to real risks. You must have robust risk assessments and safe systems of work in place, particularly as farmers and farm workers work with potentially dangerous machinery, vehicles, chemicals, livestock, at height or near pits and silos. These risks can also extend to family members working on the farm and children living on site.

Although it is important to have adequate policies and procedures in place, it is equally important to provide sufficient training to new employees as well as existing ones.

Businesses using temporary or seasonal workers must provide the same level of health and safety protection for them as they do for employees.

Businesses using temporary or seasonal workers must provide the same level of health and safety protection for them as they do for employees. Training and the provision of information is key. The Management of Health and Safety at Work Regulations 1999 states safety training is particularly important when people start work and The Provision and Use of Work Equipment Regulations 1998 (PUWER98) specifies the need for training for people who use work equipment.

Many employers believe that induction training is sufficient long term when in fact updated training should be provided regularly throughout employment; this can be delivered from a variety of sources including tool box talks, the issuing of safety bulletins, local health and safety groups and the HSE website amongst others.

Problems can arise when the policies and procedures are not implemented correctly; this can often be the case when companies conduct work out of their ordinary remit without appropriately adjusting or implementing new policies and procedures. Unwise risk-taking is an underlying problem in the agriculture industry and those working on their own are especially vulnerable.

In summary, 'say what you do, do what you say and have the paperwork to prove it'!

Top ten tips

Below are our top 10 tips for effective health and safety management:

1. take health and safety seriously
2. know your health and safety obligations and how to manage them
3. monitor health and safety and the risks regularly with effective risk assessments
4. review what is happening (both on paper and in reality)
5. enforce your policies and procedures
6. lead from the top down
7. have clear lines of responsibility and supervision
8. ensure you have appropriate training in place
9. do not be complacent
10. walk the walk and talk the talk.

In summary, 'say what you do, do what you say and have the paperwork to prove it'!

The content of this article is for general information only. If you require further health and safety and agriculture information, please contact Julie Gowland of the Regulatory and Corporate Defence team at Birketts. Our team consists of Consultants (including former HSE Inspectors) who can offer practical and realistic expert advice and assistance as well as specialist solicitors and barristers.

New right to a written statement of terms for all workers and employees from day one

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Following the recommendations of the Taylor Review of modern working practices in 2017 (the Taylor Review), the Government published its Good Work Plan which introduces various changes aimed at enhancing the rights currently enjoyed by employees and to extend these improved entitlements to workers.

The emergence of a variety of new working patterns has led to increased scrutiny of employment status and a glut of case law on the subject (e.g. several cases involving Uber raising the question of whether its deliver drivers are genuinely self-employed or workers). This derives from the fact that employment law provides an array of protections to employees that do not apply to other members of the workforce.

In simple terms an 'employee' is someone who works under a contract of employment, in the classic 'master and servant' relationship. It is a contract of service, where the employer is obliged to provide work and the employee is obliged to perform it. As an employee you are protected against unfair dismissal, discrimination and benefit from rights and entitlements under the Working Time Regulations, to name but a few statutory rights.

At the other end of the spectrum is someone who is genuinely self-employed, where there is no right to receive work, or to perform it if offered. Someone who is self-employed has the benefit of autonomy, but very little protection under employment law.

Somewhere in the middle is a 'worker.' This person has less autonomy than their self-employed colleague, but more than an employee. They are typically engaged under a contract of some sort, under which they have agreed to personally perform certain services in a prescribed manner. A worker does not have protection against unfair dismissal, but they cannot be discriminated against and they are entitled to things like paid holiday and the national minimum wage.

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Currently, under section 1 Employment Rights Act 1996, only employees who have been continuously employed for more than one month, must be provided with a written statement of certain terms of their employment (known as a "section 1 statement" or "written particulars of employment") by their employer within two months of employment commencing. Certain information must be provided to the employee in a single document

...information must be provided to the employee in a single document including the names of the employer and employee, the employment start date and the date of any period of continuous employment, hours of work and pay and the interval of payment, holiday entitlement and holiday pay.

including the names of the employer and employee, the employment start date and the date of any period of continuous employment, hours of work and pay and the interval of payment, holiday entitlement and holiday pay. At present, employers are afforded some flexibility as the remaining section 1 information can be provided at different times within the generous two-month timeframe.

From 6 April 2020, all new employees and workers will have the right to a statement of written particulars from their first day of employment and there will no longer be an exception to this entitlement for jobs lasting less than a month. Additional information will have to be included as part of the extended right such as details of any probationary period, the anticipated length of the job, provisions regarding certain types of paid leave (including maternity and paternity leave) and specific days and time of work (this list is non-exhaustive). More information must be included in a single document with a few limited exceptions including provisions concerning pensions, collective agreements and training requirements which may be provided separately or in instalments.

Under the current requirements the following particulars may be included in a supplementary statement – notice periods for termination by either party, terms relating to absence due to incapacity and sick pay, terms pertaining to the length of temporary or fixed-term work and any terms related to work outside the UK a period exceeding one month. However, once the new rules come into force, these will have to be provided in the principal statement.

The compensation available for failing to provide the required statement of particulars (currently up to four weeks' gross pay) will not be increased under the updated requirements. Likewise, claims of this type will retain their limited scope as 'piggyback' claims only, meaning that workers and employees will only be able to pursue this type of claim alongside another substantive claim rather than as a standalone claim.

Given the new obligation to provide particulars on 'day one', employers should begin preparation of the revised statement of particulars during the recruitment stage, well in advance of the individual's start date, to ensure compliance with the new timing requirement. Employers should also review their existing contract templates and check that these provide for every element of the new requirements.

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Employers will also need to give careful consideration as to who might qualify as a worker. Unless the employer is entirely satisfied that the individual in question is in business on their own account or that they are a customer of the individual, it is advisable to treat the individual as a 'worker' and provide them with a statement.

It will be important for employers to distinguish between those who are employees and those who are workers to ensure that only individuals who are genuinely employees will benefit from specific employee protections (such as protection against unfair dismissal). Care should therefore be taken to issue contracts of employment only to employees and to use a separate template when issuing particulars for workers.

Although the right to receive the enhanced statement of particulars will only apply to new employees and workers whose start date is on or after 6 April 2020, existing employees (whose employment commenced on or after 30 November 1993 but before 6 April 2020) are entitled to request updated particulars if they wish and employers will be obliged to comply within one month of the request.

If existing workers do not currently have written particulars in place, it is prudent to issue them with these in line with the new requirements to avoid future disputes.

What to do when you're expecting (to sell)

When you are looking to sell a property, a title review before it is placed on the market or a sale is agreed can save you time and money.

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The New Year (and in this case, a new decade!) is usually seen as a time of opportunity. You may be looking to sell land and/or property to help raise the necessary funds to help you realise this opportunity and there is nothing quite as frustrating as something going wrong or delaying the sale once terms have been agreed.

There are many issues (some common and some not so) that can be spotted and dealt with before a property is placed on the market. The advantage of this is that often the solution to these problems is far simpler when a buyer isn't involved and the solution can then be implemented before a buyer is found. Some recent examples are below.

1. We acted for a client who was about to sell their farm. On a review of the HM Land Registry title, it was noted that various small areas appeared to be unregistered and that the boundaries of the titles didn't quite match up with the position on the ground. We were able to correct this before the property came to market which avoided the complexity (and additional expense) of dealing with both registered and unregistered land and the seller was also able to pay a reduced HM Land Registry on their first registration application.

2. We acted for a client where, upon review, it was noted that a right of way that was believed to exist over a field, in fact, did not. We were able to ensure that the requirement to grant this right of way was included within the sales particulars and thus any potential buyers were aware of the requirement to grant the right of way when they made their offers. The alternative would have been approaching the buyer once the sale had been agreed to ask for the right to be granted and this may well have resulted in a price reduction.

3. A new client approached us for some advice as they were about to place a number of farm buildings (10+) on the market. The buildings were all subject to unwritten tenancy agreements and we were able to reduce these all to writing and have them signed by the tenants before a sale was agreed. There was a concern that the tenants may be difficult or refuse to sign if thought a sale had been agreed as we would be in a weaker position but this was successfully circumvented. This also had the added bonus of being able to present the written leases to prospective buyers which was undoubtedly a more attractive proposition than a property being subject to unclear occupation arrangements.

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It is worth noting that being asked to consider a property in this manner before it is sold does not necessarily lead to an increase in costs – in fact, it can lead to your legal fees overall being cheaper.

4. A further example of the value of preparation from the other side of the fence is shown from a recent purchase transaction. Upon investigation, we noted that the boundary of the property shown on the sale plan and the boundary of the property owned by the seller in accordance with the title deeds were different. Although the discrepancy was subtle, this may have prevented access to one building and we asked the seller to rectify this. Time and expense were incurred by all parties in the month after this discovery as a solution was sought. This is something that could have been avoided if the seller had considered the boundaries before the property was placed on the market.

The above are just a few examples of where problems have been (or could have been) found and solutions implemented on an early review of title prior to marketing. It is worth noting that being asked to consider a property in this manner before it is sold does not necessarily lead to an increase in costs – in fact, it can lead to your legal fees overall being cheaper as finding a solution in circumstances that do not involve pressure from a buyer is often simpler to implement than if a solution is required later in a transaction.

Key contacts

Birketts are very good in this area. They have a good presence in the region and the lawyers are all very knowledgeable.

Chambers UK [2019]

Birketts' Agriculture and Estates Team of over 50 advisors are recognised as Tier 1 by the Chambers UK directory and the Legal 500 and operate from our Cambridge, Chelmsford, Ipswich and Norwich offices allowing us to service our UK and overseas clients with ease.

The team encompasses ecclesiastical law, public access issues, aggregates extraction and management, renewable energy projects, structuring family successions and taxation, as well as mainstream agricultural and property law advice linked to sales, purchases, tenancies, options and development.

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