Business Clinic

This week we take an in-depth look at diversification and the legal, management and tax questions it raises

THRINGS SOLICITORS

Legal issues that can arise with alternative enterprises

There is no one-size-fits-all when it comes to diversification – much will turn on location, financial resources, the availability of grants, planning restrictions and the skills of those involved.

Projects can vary enormously, from relatively small forays into direct farmgate sales through to capital-intensive projects such as the conversion of buildings into holiday lets, large farm shops and other retail outlets.

One could look to have others to take on some of the financial risk and take a return in the form of rent (such as with some renewable projects) or even container storage, where the marketing and management can be left to others.

Different considerations and approaches may be required depending upon whether you are an owner-occupier or a tenant.

If the latter, consider whether there may be scope to collaborate either financially or otherwise with the landlord.

More fundamentally, is the landlord's consent required to diversify and how can that be secured?

Preparation is key if diversification is going to work for a business: it is rarely "easy money".

The amount of time such projects require to get them off the ground and to sustain them afterwards is often underestimated and both could have an impact on the core farming business.

Car boot sales and markets are one of the temporary changes of use allowed on farmland for a limited number of days under GDPO rules

Here, we look at some important planning and contractual issues in a diversification context, as well as how tenants can maximise the chances of obtaining landlord's consent.

Be clear on contract essentials to provide a safeguard when things go wrong

Mary Chant
Commercial partner
Thrings

It is not uncommon for contracts in the food and farming sector to be concluded with a handshake rather than with official documentation.

In the event of a dispute, the lack of writing means a lack of evidence about what has been agreed.

So when it comes to buying goods and services for diversification projects, there are certain essentials which should be considered, agreed and documented.

These include:

- Who are you contracting with? If you aren't clear, you won't know who to claim against if it all goes wrong.
- What exactly are you buying? Make sure the goods or services are accurately described. Do they need a technical specification or a functional specification which sets out what they must do? Do they have to meet certain standards?
- How much are you going to pay? The price may be clear at the outset, but if it has to be calculated during the life of the contract, you need to agree the basis of that calculation and bear in mind the calculation must be capable of interpretation by an "outsider". References to "market value" are unlikely to be specific enough.
- When do you have to pay? You may be required to pay the entire sum at the start of the contract but if payment is due in instalments, be clear whether they fall at calendar intervals or whether they depend on the achievement of certain milestones. Alternatively, payment may be linked to the date of, or the receipt of, an invoice.
- How long is the contract to last? Is it just a one-off delivery of goods or services or is the arrangement to last for longer? If so, is it for a fixed period (for example, one year) or is it open-ended with the contract carrying on until either you or the supplier gives notice to bring it to an end? If the latter, how much notice has to be given? Bear in mind that if there are very few suppliers of the goods or services in question, you may not want the supplier to be able to end the contract before you can get a replacement supplier in place.
- Keep arrangements as simple as possible. The more complex they are, the harder they are to document and higher the risk of a dispute.

PHOTOGRAPHY: INGRAM IMAGE

Test the water with temporary GPDO options

Alex Madden
Head of planning
Thrings

Farm diversification projects, by their very nature, will invariably involve a change in the use of the land that had previously been in agricultural use.

Such a change may be on a temporary or permanent basis, and this will dictate whether there is a need for express planning permission from the local planning authority.

The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (GPDO) is a powerful tool in offering temporary change of use rights as an alternative to going down the express planning permission route which will require the submission of an application and will be subject to a statutory procedure.

The temporary use of the land under the GPDO for a farm diversification project may be a useful way to test the water on such a proposal in order to gauge local reaction and to identify any issues (planning or otherwise) that may need addressing if a permanent change of use of the land is contemplated.

In particular, the proposal may be affected by other regulatory regimes such as health and safety, environmental health and licensing, all of which will require consideration.

Under the GPDO, the temporary use of land for up to 28 days in any calendar year is permitted, along with the provision on the land of any moveable structure for the purpose of the permitted use.

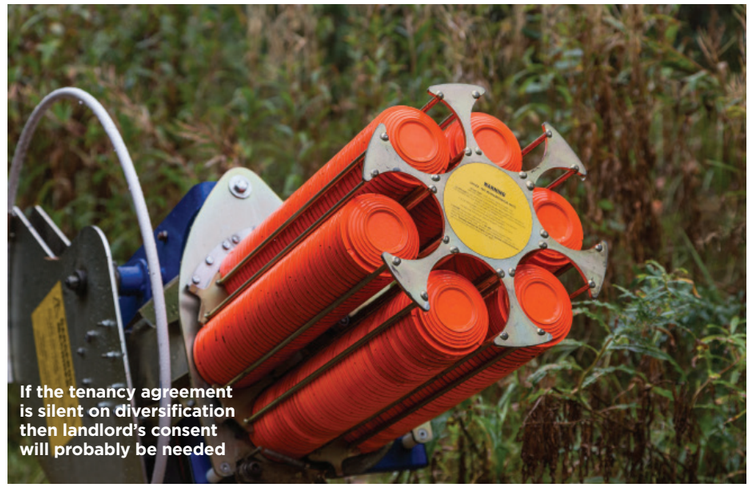
Limitations

However, there are some limitations prescribed in the GPDO – most notably the temporary use of land for holding a market and motor car and motorcycle racing (including trials of speed and practising for these activities) – which are limited to 14 days in any calendar year.

The GPDO also prohibits the temporary use of land for certain activities such as film-making, a caravan site and the display of an advertisement.

Moreover, if the land lies within a Site of Special Scientific Interest, the temporary use of land for motor car and motorcycle racing, clay pigeon shooting and war games is not permitted.

The risk is where prohibited activities are undertaken, or the number of permitted days is exceeded, there is, on its face, a breach of planning control which may then be subject to enforcement action.



If the tenancy agreement is silent on diversification then landlord's consent will probably be needed

Considerations before diversifying under a farm tenancy

Duncan Sigournay
Head of agriculture
Thrings

Diversifying when occupying land and buildings under an agricultural tenancy brings with it its own set of challenges.

The starting point is to look at the tenancy agreement itself. What was agreed at the outset and are there any provisions enabling non-agriculture use? If not, one would have to look at seeking the landlord's consent to such activities.

I always recommend tenants try and look at the project from the landlord's perspective; it is all too easy to get wrapped up in the excitement of the project and lose sight of the fact the landlord does not have to give consent. There is no absolute right to diversify, however impressive the project looks or feels to the tenant.

Landlord's refusal can be for any number of reasons: the project may conflict with the landlord's own financial interests or projects; it risks changing the status of the tenancy; it has been poorly researched; it is not viable; or even because of a fundamental lack of trust between the parties.

The key for a tenant is to consult early with the landlord before moving on to a detailed, well-thought out, thoroughly researched and fully costed proposal. Tenants must also recognise that the landlord will nearly always want to see a financial return for giving consent.

In 2004, following a recommendation from the cross-industry Tenancy Reform Industry Group (TRIG), Defra published guidance for tenants and landlords called the code of good practice for agri-environment schemes and diversification projects within agricultural tenancies.

The code sets out in detail things for tenants to consider when seeking landlord's consent. Although the associated non-binding adjudication service never took off, the overall guidance remains as relevant today as it did then.

In addition, those occupying tenancies governed by the Agricultural Holdings Act 1986 with succession rights also have to be mindful that any diversification projects could adversely affect a potential succession applicant's prospects.

Generally, income generated on the holding from non-agricultural activities can count against a succession applicant. Although since 19 October 2006 such work can now be counted as "agricultural work", it must have been approved in writing by the landlord after that date.

If the tenancy does have succession rights, professional advice should be sought at an early stage.

DO YOU HAVE A QUESTION FOR FW'S EXPERTS?

Outline the issue in no more than 350 words. Please give as much information as possible.

Send your enquiry to Business Clinic, *Farmers Weekly*, RBI, Quadrant House, The Quadrant, Sutton, Surrey SM2 5AS and include a telephone number.

You can also email your question to fwbusinessclinic@rbi.co.uk

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