

TENANCY REFORM INDUSTRY GROUP (TRIG)

GUIDANCE

TREE PLANTING AND WOODLAND CREATION ON AGRICULTURAL TENANCIES

First Edition

Published 21st December 2022

Published by the Central Association of Agricultural Valuers (CAAV)
Harts Barn Farmhouse, Monmouth Road. Longhope, Gloucestershire GL17 0QD

www.caav.org.uk

No responsibility for loss or damage caused to any person acting or refraining from action as a result of the material included in this publication can be accepted by the CAAV, the authors or the members of TRIG

ISBN 978 1 913664 17 6

© Central Association of Agricultural Valuers (CAAV) December 2022.

Copyright in all or part of this publication rests with the CAAV to which all rights are reserved. No part of this publication may be reproduced or used in any form or by any means including graphic, electronic, or mechanical, including photocopying, recording or web distribution, now known or to be devised, without the written permission of the CAAV or under the terms of a licence.

The CAAV has granted the following organisations – who are represented on TRIG and involved in the preparation of this Guidance - a non-exclusive worldwide licence to publish, print, copy and distribute this Guidance in print and electronic form in the English language:

- Agricultural Law Association (ALA)
- Association of Chief Estates Surveyors and Property Managers in the Public Sector (ACES)
- Country Land and Business Association (CLA)
- Farmers' Union of Wales (FUW)
- National Farmers Union of England and Wales (NFU)
- National Federation of Young Farmers' Clubs (NFYFC)
- Royal Institution of Chartered Surveyors (RICS)
- Tenant Farmers Association (TFA).

A licence has also been granted to the following organisations:

- Department for Environment, Food and Rural Affairs (DEFRA)
- the Welsh Government.

FOREWORD

The members of TRIG, listed at the front of this document, advise DEFRA on agricultural tenancy legislation and associated matters. This includes making recommendations for amendments to the Agricultural Holdings Act 1986 ('AHA 1986') and the Agricultural Tenancies Act 1995 ('ATA 1995'), as well as wider policy issues surrounding the letting of farms and agricultural land and providing guidance to the industry when required

With the rapidly changing demands for land use, TRIG was asked to consider the issues surrounding tree planting and woodland creation on land within agricultural tenancies which would typically need to be tackled in the variety of situations where both landlord and tenant were willing for trees to be planted on the tenanted land. In response, TRIG set up a Working Group to provide Guidance Notes to assist both landowners and tenants when considering tree planting and the implications for both parties. The result is this Guidance paper.

The members of TRIG are representatives of leading industry and professional organisations who are active in the rural tenanted sector and give their time freely and on a voluntary basis. I would particularly like to thank the members of the Working Group for their input to the paper, and also to CAAV which, as one of the TRIG organisations, has made resources available to publish and publicise this guidance.

Julian Sayers DL FRICS FAAV
TRIG Chairman

December 2022

TENANCY REFORM INDUSTRY GROUP (TRIG)

GUIDANCE

TREE PLANTING AND WOODLAND CREATION ON AGRICULTURAL TENANCIES

CONTENTS

FOREWORD	3
Summary	6
1. Background	7
1.1 General	7
1.2 A Third Party Environmental Interest?	8
2. A Framework for an Approach	8
2.1 TRIG’s General Guidance.....	8
2.2 For a Woodland Project.....	8
3. General Issues	9
4. Landlord’s Interests	10
5. Tenant’s Concerns	11
6. Control and Time Scale	11
7. Landlord’s Consent for a Planting Project on a Tenanted Land	12
7.1 General	12
7.2 Where the Tenant has Other Land	13
8. Funding, Compensation and Dilapidations?	13
8.1 General	13
8.2 The Agricultural Holdings Act 1986	14
8.3 The Agricultural Tenancies 1995 (for FBTs)	15
8.4 The Scottish Model	15
9. Does This become a Joint Project?	16
10. Institutions Seeking Planting at Scale in Co-operation with Tenants	17
10.1 General	17
10.2 What Might the Tenant be Asked to do Positively?	17

10.3	Consideration of Carbon	19
10.4	Other Issues	19
11.	Possible Bases for Agreement	20
11.1	General	20
11.2	The Form of the Agreement	20
11.3	No Surprises.....	20
11.4	Planting as Part of Farm Policy.....	20
11.5	Planting to Meet the Requirements of a Farm Produce Purchaser	21
11.6	Agro-Forestry	21
11.7	Planting for Environmental Reasons.....	22
11.8	Carbon	22
12.	Conclusion	23

Note – With TRIG’s responsibilities in England and Wales, this paper is written in the context of the Agricultural Holdings Act 1986 and the Agricultural Tenancies Act 1995 which govern agricultural tenancies in England and Wales. The specific schemes mentioned are those applying in England or Wales. While potentially relevant at a general level, it does not consider the issues here as they might be addressed in Scotland (as by the Tenant Farming Advisory Forum) or Northern Ireland. References to Scottish tenancy legislation and guidance are to give examples, not to provide direct guidance for Scottish circumstances.

Summary

S1. This paper offers guidance to the issues where both landlord and tenant are willing for the tenant to plant trees on tenanted land, whether in small numbers as trees in a farmed landscape or on a larger, broad acre scale, so that the position of and responsibilities for those trees and ancillary works are properly recorded in the context of the tenancy agreement.

S2. With the long-term nature of such projects and the potential of some to alter the character of the holding, this paper's themes are good clear communication between the parties with reasonable consideration of relevant issues resulting in a properly recorded agreement that covers the necessary points.

S3. With that emphasis on good and open communication between landlord and tenant, an orderly approach for the development of a sound proposal and its proper consideration could see:

- early consultation
- agreeing a timetable
- preparing the details of the tenant's proposals for consideration by the landlord
- the landlord's consideration of the proposal
- the formal written agreement setting the term, for the work to proceed.

S4. That approach rests on the tenant having a soundly justified project, well explained and deliverable. The discussion of that project should create a shared understanding of the tenant's motives and concerns in proposing it and the landlord's motives and concerns in considering with proper regard to the interests of both. Openness and a policy of "no surprises" make a good basis for an enduring agreement.

S5. Both landlord and tenant should be reasonable and proportionate in this, focusing on the issues that are practical for the project and real to each. This paper offers non-exhaustive examples of likely reasonable concerns for a landlord and for a tenant. Others may arise in particular cases but care should be taken to avoid locking in on points that are not relevant.

S6. The tenant can expect the project, potentially seen to change parts of the holding irreversibly, to be tested for its feasibility, its financial requirements and consequences, its recognition of relevant landlord's interests, the management of liabilities and risks, the consents needed, and the treatment of the trees in rent reviews. As with other tenancy agreements, it is important to discuss and agree at the start what is to happen in respect of the project at the end of the tenancy.

S7. Other and more specific models considered here might be relevant where the planting is to be a joint project between the parties or is driven by the landlord wanting the tenant to plant trees.

S8. Given the wide range of potential considerations that arise from the subject matter of this paper, it adopts an inclusive approach in seeking to illustrate when and in what circumstances those potential considerations may arise. It is unlikely that all will be relevant in all circumstances and, given the bespoke nature of some arrangements, it is also unlikely that this paper will include all potential considerations.

S9. The key message is that landlords and tenants who are considering the planting of trees within the contractual and statutory framework of an AHA or ATA agreement should cooperate and be diligent in seeking to identify and discuss openly all the issues that are or are likely to be relevant for them.

1. Background

1.1 General

1.1.1 The premise of this paper is that a landlord and a tenant are both willing for tree planting to be undertaken on tenanted land. On that basis, it reviews the more obvious issues that could be considered in such a situation where the trees affect both the tenant's occupation and the landlord's interest in both the holding as let and the reversion. It does not discuss the issues where a landlord wishes to resume possession for tree planting.

1.1.2 There may then be both more case specific issues and those that turn on the nature of the planting, whether small scale as part of another project such as a slurry store or more extensive. The planting may be for the direct benefit of the tenant or to have trees established ahead of the landlord resuming possession on the end of the tenancy.

1.1.3 It will usually be important to understand the motive for the proposed planting. Motives might include:

- assisting the farming of the holding, whether screening from wind or salt, shading livestock against hot weather, shielding new buildings, a commitment to agro-forestry, river bank buffers for nutrient run-off or meeting the requirements of the supply chain
- to produce timber commercially for use, requiring confidence in the ability to manage it and then fell it at maturity
- to sequester carbon for the farm business
- to sequester carbon under a long term contract to offset another's business emissions
- for biodiversity or other ecological reasons, possibly including a biodiversity net gain agreement
- other reasons of the landlord, such as sporting or amenity.

1.1.4 The planting might often be grant aided or be part of a land management agreement with the government, such as the England Woodland Creation Offer and potential options within the Sustainable Farming Incentive, Countryside Stewardship, Local Nature Recovery or Landscape Recovery in England or the Sustainable Farming Scheme in Wales.

1.2 A Third Party Environmental Interest?

1.2.1 Some projects may be prompted actively by an environmental body marshalling funding and skills, possibly over a wider area involving several holdings.

1.2.2 A conservation covenant, as for a private scheme such as Biodiversity Net Gain, would require the involvement of an environmental body.

2. A Framework for an Approach

2.1 TRIG's General Guidance – The Code of Practice for Projects Requiring Landlord's Consent

2.1.1 Throughout the processes outlined in this paper, the parties may wish to refer to the [Tenancy Reform Industry Group \(TRIG\) Code of Good Practice for Projects, Schemes or Works Requiring Landlord's Consent in Agricultural Tenancies](#) which updated DEFRA's 2004 [Code of Practice for Agri-Environment Schemes and Diversification Projects with Agricultural Tenancies](#).

2.1.2 With the important emphasis on good and open communication between landlord and tenant, that guidance laid out an orderly approach for the development of a sound proposal and its proper consideration:

- early consultation
- agreeing a timetable
- preparing the details of the tenant's proposals for consideration by the landlord
- the landlord's consideration of the proposal
- the formal written agreement setting the terms for the work to proceed.

It then reviewed approaches in the event of agreement not being reached.

2.1.3 *While drafted for Scottish agricultural tenancies, regard might also be had to the Tenant Farming Commissioner's [Guide to the Use of Tenanted Agricultural Holdings for Non-Agricultural Purposes \(Diversification\)](#).*

2.2 For a Woodland Project

2.2.1 Even with willing parties, much depends on the quality of the way in which they work together in developing the project and settle the necessary arrangements between them, including as they bear on the tenant's business and the landlord's property. These arrangements should be tested for how well they might handle problems that arise. As with granting a tenancy, a critical issue is to agree on the approach to the issues to be dealt on the end of the tenancy; that will help influence the sound design of the project from the start. Openness and a policy of "no surprises" makes a good basis for an enduring agreement.

2.2.2 These steps outline how parties can approach this, considering, developing and agreeing terms for a tenant to take a tree planting or woodland project forward (indeed, applicable to other equivalent projects):

- early and open discussion and consultation between the parties once a project starts to be planned, including defining and clarifying objectives and the issues that need to be discussed for the project to proceed sensibly
- agreeing a framework with a sequencing of and timetable for the discussion and agreement of terms
- the development of the proposal in detail, securely founded on the information and analysis needed for the nature and scale of the project (Note – for English schemes above 5 hectares, the Woodland Creation Planning grant may assist.)
- understanding the timetable and sequencing for implementing the scheme, as plants may need to be ordered, grants applied for and optimal planting times met
- address the issues that have been raised in this, seeking mutually beneficial and practical answers and then recording the answers in written heads of terms
- prepare the formal written agreement or memorandum between the parties which will then be the legal basis on which money and effort is to be committed and the project will unfold.

2.2.3 Factors in this process can include:

- the appropriateness of the proposal for the land in question and its long term consequences
- the parties' roles and funding of the establishment and maintenance of the project
- considering the place and demands of any grant scheme or other third party funding that might be relevant with any longer term obligations
- what happens at the end of the tenancy
- the approach to rent and other landlord/tenant matters
- consideration of how liabilities would be allocated and handled
- the taxation implications for each party.

3. General Issues

3.1 Farmers and owners face the question of how to maximise value, whether income or capital, from agriculture and land use. That can be more challenging for landlord and tenant with woodland offering perhaps testing more sharply how both might benefit in this time of change.

3.2 For woodland issues, the background is that:

- almost all tree planting is a long term project, typically longer than the life of many tenancies, though fruit trees, Christmas trees, short rotation coppice and biomass are on shorter rotations but with an impact on later uses
- under current law, woodland is effectively a permanent land use (though on occasion a substitute area might be agreed for replanting after felling and future possible policy changes might recognise certain types of planting as more reversible)
- woodland has long been typically excluded from tenancies by estate landlords
- trees are customarily reserved to the landlord by the tenancy agreement

- tenants, taking land in order to farm it within their business, have not generally been interested in forestry with its initial cash commitment and long period then until income could be expected to be receivable
- the separate tax regime excluding both costs and income from Income Tax (Income Tax (Trading and Other Income) Act 2005, s.768) and Corporation Tax for commercial woodland (which generally suits foresters) magnifies both the initial cost and the later income in comparison to those of a farm enterprise
- where woodland is sold by its occupier managing it for commercial gains, the value of trees is excluded from Capital Gains Tax (see Taxation of Chargeable Gains Act 1992, s.250)
- woodland management is commonly done by specialist contractors and is rarely a farmer's particular skill
- thought needs to be given to how the woodland would be managed; many farm woods are too small for commercial contract management though specialist, local or small contractors might be available or the farmer might have the skills
- each party has its own interests which it will want to protect or advance.

3.3 While commercial timber production, if that is what is in mind, perhaps usually better considered on its own merits supplying future markets for low carbon materials, the parties might see potential in the value of carbon. Even if not envisaging selling carbon to others, registration under the Woodland Carbon Guarantee Scheme might assist presenting the business or farmland as low carbon or be supportive promotion of other income streams.

4. Landlord's Interests

Agricultural landlords, in their variety from large traditional estates to small farm ownerships and village charities, might have concerns including:

- the effect of the woodland on the landlord's current interests in the holding, including its interaction with other management concerns (sometimes sporting) and reserved access across the holding
- the effect on the land that will come back to the landowner in terms of utility, visual effect, farming use, other objectives, its value (woodland values being below good farmland values) and its ability to generate income
- the importance of being part of the decision on woodland, both in principle and in detail as to location and type of planting
- woodland is taken as an irreversible change in land use so that should it be felled it has to be replaced, limiting the landowner's future options including development and sitting alongside broader fears about designation of land
- woodland is excluded from Agricultural Property Relief from Inheritance Tax unless its occupation is ancillary to that of agricultural land and pasture and so a change from agriculture to woodland can impose a tax cost on the landlord
- commercial woodland can benefit from Business Property Relief where, subject to the other tests for this relief, it is the active business of the taxpayer, having it on let land would weigh against that

- whether the tenant can be expected to undertake the project effectively
- rental consequences, whether fearing that the planting woodland might, in practice, reduce or sterilise the income potential of the land or suspecting that the landlord's land would be used to unlock a new income stream that should be properly reflected in the rent
- understanding the potential position at the end of the tenancy for compensation or dilapidations.

5. Tenant's Concerns

5.1 While there might be many motives for a tenant planting at a very small scale, a tenant farmer might most typically only do tree planting on any larger area of a holding for which rent is being paid to realise an economic benefit. That benefit would usually recognise both the need for continuing income and the significant initial outlay in planting and related costs. If that use of the land gives or supports a financial margin that is relevant to both the tenant's income and the rent.

5.2 Where the planting is prompted by conditions for farm produce sales or by the supply chain, the tenant might wish to consider the relationship between the long term commitment of land to trees and the prospective life of the contract for produce or with the supplier. While some sectors such as dairy can see medium term contracts, hedgerow and boundary planting might in many cases better preserve the farming and income potential of the holding than planting up useful land, committing it for a longer term than the produce contract.

5.3 With that observation, the tenant, presumed here to be persuaded of the case for the tree planting project, might usually be interested in:

- its costs and how they are handled
- its management
- its relationship with the rent and its treatment at rent review
- its treatment on the end of the tenancy
- whether there are to be any further commitments beyond the tenant's business as by an agreement with the state or other party
- any liabilities that the tenant might assume either by planting the trees or under any agreement (as might be to repay grants or continue to guarantee carbon after the end of the tenancy)
- issues for insurance.

6. Control and Time Scale

6.1 With the need to assume a time scale for the trees to reach an age for felling (usually between 40 and 100 years), issues here include:

- the control of the land required by the tenant – grant schemes would pay the person with control
- the duration of that control given the life of the trees – a Sitka spruce crop might have 40 year life, true carbon sequestration requires some 100 years
- the tenant cannot usually guarantee such long term control - while there are a few long fixed term Farm Business Tenancies (FBTs), 1986 Act tenancies are generally from year to year with the tenant able to leave on under 2 years notice but given longer term security by the Act which typically falls away on the tenant’s death
- will the landlord assume any continuing obligations in respect of the trees or any associated matters were the tenancy to end? Or would a new tenant be expected to continue the agreement on terms?

6.2 As almost all tenancies will end within the timescale for trees to reach felling age, the parties should consider how the trees and any associated matters are to be handled on the end of tenancy. The issues for trees are likely to be the same as for other fixed equipment that the tenant might establish on the holding. It is important that the question of the rules for treating this at the end of the tenancy are resolved when the project is agreed and not left for later and so possible misunderstanding and disagreement.

7. Landlord’s Consent for a Planting Project on a Tenanted Land

7.1 General

The issues here include:

- whether consent is needed – generally needed under current tenancies
- which terms of the present tenancy are relevant
- is that consent not to be unreasonably refused? - what might constitute reasonable refusal
 - o where planting is part of a larger project as for screening buildings, etc
 - o where considering the evidence that is reasonably needed to meet a requirement for a produce contract
 - o where an option like agro-forestry (where that needs further consent) would dictate the future farming operation of the land, including the scale of machinery, as by a successor, a future occupier or the landlord
- reasonable issues for a consent?
 - o location?
 - o scale (including whether the planting is disproportionate to the holding)?
 - o design?
 - o species?
 - o interaction with other uses?
 - o interaction with existing fixed equipment (such as landlord’s underdrainage) and easements
 - o landlord’s current reservations including access across the holding
- reasonable terms for a consent:

- where timber is in mind
- where trees are to serve other purposes
- over carbon and other matters
- over fencing and protection
- over management
- necessary beating up to replace failed trees and restocking/replanting
- biosecurity and disease issues
- what happens after destruction by storm or fire?
- insurance generally and liability for fallen timber
- issues of rent
- condition at the end of the tenancy
- financial provisions at the end of the tenancy
- protection of the continuity of any income stream after the end of the tenancy
- landlord's assumption of continuing responsibility after the tenancy.

7.2 Where the Tenant has Other Land

7.2.1 It is not uncommon for a tenancy to be part of a larger farming business with other land owned or rented. Just as a tenant's project for buildings on a holding to serve a larger area can raise concerns (with their compensation liabilities), so might a concern about planting that is at a scale perceived to be disproportionate to a specific holding.

7.2.2 Particular issues might arise here in connection with the current proposals for the Sustainable Farming Scheme in Wales which would normally require a claimant of the universal payment have 10 per cent of land under tree cover.

8. Funding, Compensation and Dilapidations?

8.1 General

Where the tenant is to plant an area of trees, the parties might then consider:

- how the cost is to be funded between the parties, with whatever support comes from a grant scheme or another party
- who will be party to any funding agreement, whether a grant or private finance
- who will deal with maintenance? – beating up, fencing, vermin control, timely thinning, etc
- an agreed woodland management plan with mechanisms for its revision and enforcement
- the rent review basis
 - the woodland, if established by the tenant, could be disregarded as a tenant's improvement at rent review, or
 - the woodland, with its economics/payments could be part of the rent assessment

The choice might depend on the circumstances with options being:

- the trees are required as part of the tenant's operational business (as for a supply contract) – pointing to the tenant's improvement model

- seeing that this is more like grant farming, given the time horizon of the tenancy compared to the economic life of the trees – which might perhaps not have a significant end value.
- financial recognition at the end of the tenancy
 - what is being passed on, such as
 - the trees with timber value?
 - the right to the remaining payments?
 - continuing obligations under any funding agreement for the trees?
 - is there anything to be compensated
 - in the trees?
 - in the fencing etc?

The actual payment, if any, may depend on the quality of the woodland management up to that date
 - if the trees are there with consent, dilapidations might not apply for issues from change of land use
 - but if the trees or fencing have not been maintained to the required standard that could be a ground for claim (there might be some difference here between the expectations of any scheme and those of the landlord/marketplace).

8.2 The Agricultural Holdings Act 1986

8.2.1 Schedule 7 of the 1986 Act provides a statutory basis for end of tenancy compensation to be paid by the landlord to the outgoing tenant for items that are made with the consent of the landlord or the Tribunal, including:

- planting trees otherwise than as an orchard and bushes other than fruit bushes (Item 28) while orchards (Item 5) also qualify but require landlord's consent without recourse to the Tribunal
- making or removal of permanent fences (Item 17)
- making or improvement of roads or bridges (Item 15).

8.2.2 As short-term improvements not needing consent, Schedule 8 covers the application to land in England of manure, fertiliser, soil improvers and digestate (in England as Item 4A and Wales as Item 4B).

8.2.3 Where the trees might be thought to offer value to a successor occupier, there might usually be little reason to plant them as tenant's fixtures but rather seek landlord's consent so that they could be compensated as tenant's improvements. The 1986 Act tenant does now have the opportunity under the new s.19A to challenge a restriction on consent or a restrictive term of an agreement where it impedes access to a DEFRA support scheme – but for no other financial opportunity.

8.2.4 However, it might be that trees planted for arable agro-forestry might be considered as tenant's fixtures unless the landlord is also positively committed to that farming system with the trees as planted.

8.3 The Agricultural Tenancies 1995 (for FBTs)

8.3.1 The principles-based approach of the Act provides for compensation for tenant's improvements which are defined at s.15 as

- “(a) any physical improvement which is made on the holding by the tenant by his own effort or wholly or partly at his own expense, or
- (b) any intangible advantage which—
 - (i) is obtained for the holding by the tenant by his own effort or wholly or partly at his own expense, and
 - (ii) becomes attached to the holding,”

The default valuation basis is the value added to the holding as a let holding by the improvement. If they do not add value to the holding as a holding, there would be no compensation due. Trees would ordinarily qualify as a physical improvement. However, it seems likely to depend on circumstances whether the benefit of sequestered carbon could be an intangible advantage. That latter point is better covered by agreement between the parties.

8.3.2 Where the trees might be thought to offer value to a successor, there might usually be little reason to plant them as tenant's fixtures but rather seek landlord's consent so that they could be compensated as tenant's improvements.

8.3.3 However, to give this part of the discussion more content these principles can be illustrated by the tenant who, with landlord's consent, both:

- plants an area of trees under the England Woodlands Creation Offer with its substantial support for establishment and early maintenance
- secures a contract under the Woodland Carbon Guarantee Scheme.

8.3.4 With the landlord's consent to plant them, the trees would usually be a physical improvement under s.15 of the 1995 Act with compensation, by default, payable at the value they add to the holding as a holding. There might or might not be reason for there to be a value, according to the circumstances. However, the effect of the Act's s.20(3) is that any value might be largely negated by the proportion of the cost met by the EWCO support.

8.3.5 With the landlord's consent to enter the Woodland Carbon Guarantee Scheme, that contract with its 35 year life could be an intangible advantage under s.15 of the 1995 Act with compensation, by default, payable at the value it adds to the holding as a holding. While the early payments might be low, if all goes well with the trees then payments might begin to mount after, say, 20 years. As that might be after the end of the tenancy, the landlord would be taking to this income stream together with such potential as there may be to opt into any private payments that might pay more. That is likely to have an identifiable value – by planting trees years ahead of the landlord's resumption, the tenant could, in effect, have “carbon banked” for the landlord (in the style of “habitat banking” for biodiversity gain). An example of an agreement for a Woodland Carbon Guarantee contract can be seen on Gov.uk.

8.4 The Scottish Model

8.4.1 The Agricultural Holdings (Scotland) Act 2003 provides that where an Agricultural Holdings (Scotland) Act 1991 Act tenant has planted trees on the holding since 2003 and they

are for future cropping, then s.45A of the 1991 Act allows a claim can be made between the parties based on:

- the “worth” of the trees to a willing purchaser for future cropping
- any loss of rent by the landlord by retaining the trees until cropping, together with the cost or returning the land to agricultural use afterwards.

If the former exceeds the latter, the tenant can claim the excess; if the reverse, then the landlord has a claim.

8.4.2 It is not understood that there has been any experience of this provision in use, partly because the nature of tree planting may mean that insufficient time may have passed and partly because it may anyway only rarely arise. There may be valuation issues in the unusual use of the word “worth” and the specific need to consider the trees only.

9. Does This become a Joint Project?

9.1 If an area planted is of significance, might there be reasons for it to be pursued as a joint project between landlord and tenant, structured more as a joint venture? That model might see less turn on which party is in occupation at any particular point but then perhaps raise a different set of questions when occupation changes, depending on whether the joint venture continues or ceases at that point.

9.2 That might arise in situations such as where:

- biodiversity gain is part of the picture with its 30 years or longer conservation covenant or planning obligation. With a conservation covenant open to tenants with tenancies granted for more than seven years and some of that fixed term remaining (Environment Act 2021, s.117(4)), only a limited number of FBT tenants would have the legal freedom to enter such agreements – as 1986 Act tenants, formally tenants from year to year, could not. However, it is the tenant who starts with the necessary occupation of the land, subject to any power that the landlord has to take back land from the tenancy.
- planting is supported by a grant scheme that accepts landlord and tenant as joint parties but with only one to do the works and receive the payments. In such a case, the landlord might then become that party when the tenancy ends.
- a Landscape Recovery agreement involving tenants and woodland.

9.3 The parties might consider whether such a joint project was better conducted on a new separate agreement with the land taken out of the agricultural tenancy. That agreement might be a tenancy specifically for this purpose or another form of contract between the parties.

10. Institutions Seeking Planting at Scale in Co-operation with Tenants

10.1 General

10.1.1 This approach would see a significant area of land within a commonly larger tenancy put to forestry ahead of that tenancy ending. This would be a part of a larger programme to establish either or both of a commercial forestry operation and a carbon sequestration operation to meet the requirements of the owner while accommodating the tenant. This relies on the landowner and tenant agreeing on the objectives and specifications of the project.

10.1.2 The owner is likely to have a specification for the tree planting and what is required for it to achieve its objectives and would want to ensure those were delivered on the ground. Scale of operation might see the owner retaining contractors across the wider operation. In the final analysis, the harvest might often be a key interest of the owner unless the carbon is of a scale that substantially matches a proportion of the owner's remaining emissions.

10.1.3 The tenant has possession of the land. While that is unlikely to be for long enough to see the timber harvested, a long-term tenancy could see several audits of carbon stored with potential payments. The tenant is on-site in a way that an institutional owner, its forestry managers and contractors would not be. The tenant is being asked to give up the farming use of land in his business which means not only losing the production from that land but the contribution its margin gives to support the overhead costs (such as labour, machinery and finance) of the farm.

10.1.4 In some circumstances, this could be seen as phase towards farming retirement, often more a matter of scale than of cessation.

10.2 What Might the Tenant be Asked to do Positively?

10.2.1 Is the tenant to pay the costs of establishment? The present England Woodlands Creation Offer appears very largely to meet the typical costs of establishment and pay for 10 years maintenance. It will be a matter of practicality whether that is just offsetting costs or makes a genuine contribution to income that at least makes good for the commitment of the land to this use.

10.2.2 How is the tenant's establishment and early management to be regulated by the owner? Who would have responsibility for management thereafter, with beating up, vermin control, fencing maintenance, brashing, thinning and so on? Why would the owner not prefer to use specialist skilled forestry contractors?

10.2.3 Another initial issue would be where the tenant has existing investment in the land that could be compensated as a tenant's improvement, such as an underdrainage system, possibly with implications for land remaining in farming.

10.2.4 With that background, the reconciliation of interests appears to be financial at heart with core issues for the tenant including:

- **how is this to yield a sufficient income to be attractive?** Where the land in mind currently yields an income (particularly if this is after Basic Payment), the tenant might normally want to be confident that this would be matched.
- how is that income to be business income – a tax matter?
- is the carbon to be available to the farm business (not for sale but as part of the assessment of its footprint)?
- how are risks shared?
- what happens at the end of the tenancy regarding claims for compensation or dilapidations and transfer of any contracts?

These questions need considering here in the context of a substantial tree planting venture, not one that is simply ancillary to a largely unaltered farming business.

10.2.5 Much of this may turn on taking a clear view of the relative values of timber production and carbon. The combination of timescales and current values do not suggest that payments for carbon could provide sufficient income on their own – leave aside the issues over carbon “ownership”. Over the next couple of decades, carbon values are thought likely to rise as they are required to drive more expensive carbon out of the economy. More coherent markets, including any access that might be given to the UK Emissions Trading Scheme, could raise these values further. However, these carbon values could be undermined by COP26’s exploration of more regular international trading and then, more fundamentally, were net zero to be achieved when there might be few emissions to be offset. That time scale might appear remote to a tenant susceptible to this approach and payment at five year audit intervals might not be felt to be a regular income. Additional payment or underwriting could be needed. That may point to looking at other potential markets (such as biodiversity net gain or nutrient neutrality) that could, subject to their scale, be better able to provide funding.

10.2.6 Reference may be made by the Scottish Tenant Farming Commissioner to the general comments at this preliminary stage in carbon trading in *An Interim Guide to Securing Tradeable Carbon Credits in an Agricultural Holdings Situation*.

10.2.7 The Woodland Carbon Guarantee Scheme model sees assessment and payment at 5 or 10 year intervals, a different pattern from farming income. What would be the approach where the tenancy ends (as after death) mid-cycle?

10.2.8 For Income Tax, farming is statutorily defined as a trade on its own – the occupation of land for the purposes of husbandry. Forestry has a radically different tax status which is generally appreciated by commercial foresters. Despite the potential for a broad reading of that tax definition of farming, it would not naturally seem to be farming income. If so, that might ease the issue of sporadic income by giving access to the five year averaging available to farmers.

10.2.9 What is the tenant to be paid for? **For what is the tenant still to pay rent?**

10.3 Consideration of Carbon

10.3.1 Where the landowner's motive is to meet its carbon targets, the farmer is anyway likely to be under increasing pressure to show a smaller carbon footprint, perhaps in many cases in response to supply chain pressure. This hard task would generally be harder without the carbon in these trees being available to the tenant. These interests need clear-sighted reconciliation for an agreement to go forward. At any one point during the tenancy, who would have the benefit of the carbon?

- the owner with its net zero objectives?
- the tenant under pressure to mitigate farming carbon?
- a third party buying credits, putting money into the system?

Equally, where there are receipts in respect of the carbon, whether income or capital, who should have those?

10.3.2 One model might be for the tenant to have the benefit of the carbon during the tenancy but it is then transferred to the landowner on the end of the tenancy. That creates uncertain timing for the owner but shields the tenant. If viewed over time and a large enough estate, it could all balance out but some tenancies will not end before 2050, a few not till much later. If used to realise a payment from a third party, then neither owner nor tenant has the use of that carbon, currently likely to be more important within their businesses than sold away.

10.3.3 As the 2021 Californian fires in offset forests show (or, indeed, the UK's Storm Arwen and its successors of winter 2021/22), there is a need to consider the risk of objectives not being achieved. Here in the United Kingdom the risks are at present perhaps more of disease, storm or stress than fire but need to be considered over the century required for true carbon sequestration. The owner's larger landholding is better able to buffer the activity at scale but the recognition of risk and its allocation is to be considered alongside reward.

10.4 Other Issues

10.4.1 Other operational risks need to be considered – who is liable if a tree falls on a car? Once identified, the risks can then be considered, managed and, as relevant, insured against – though grown trees require regular inspection where they might be a risk.

10.4.2 At the end of the tenancy, the same issues arise as discussed more generally above and will need to be covered in the agreement between owner and tenant:

- what is to be transferred from tenant to landlord? Is that when the benefit of carbon moves?
- is there anything for which the tenant should be compensated?
- is there anything for which the tenant might be dilapidated?

10.4.3 As this is explored further with its practical and statutory contexts, it may be tested whether such larger scale planting, if done within a tenancy, is better done by:

- amendment of existing tenancy agreements
- a fresh agreement, probably outside agricultural legislation, between the parties for the land concerned.

11. Possible Bases for Agreement

11.1 General

11.1.1 Inevitably, the approach to the terms of an agreement depends on the underlying purpose, economic or otherwise. It is usually important:

- to define clearly what is intended
- to allocate responsibilities between the parties for both any works and their management
- to establish how the woodland is to be viewed at rent review
- to establish at the beginning what the approach is to be on the end of the tenancy.

11.1.2 While tree planting is not as novel as some of the other issues coming forward, the sense that it might now be of greater value and at greater scale is seeing some parties take uninformed precautionary positions that might prove counter-productive. In particular, a focus on carbon payments may substantially overstate their value at farm level and open parties to risks that are not understood.

11.2 The Form of the Agreement

The approach to this may depend on the scale of the planting envisaged and the extent that it changes the holding and activity on it. More minor changes might be handled more readily by an agreed memorandum than to be kept with the tenancy agreement. More significant changes could be recorded by such options as:

- revising the tenancy agreement
- replacing the tenancy agreement with a new one drafted for the changed circumstances
- an accompanying agreement or memorandum for the tree planting and associated provisions which may still be aided by explicit amendment of the use and other clauses in the tenancy agreement to remove any argument that the tenant is in breach of them.

11.3 No Surprises

It appears to be a starting point for a pragmatic relationship that the parties agree that neither is to surprise the other by a unilateral action during the tenancy that binds the holding, such as a conservation covenant or the alienation of carbon. That is particularly important ahead of the rules for these schemes or options being established and proper markets developing and being understood but may well be a sensible starting point in any case.

11.4 Planting as Part of Farm Policy

11.4.1 While noting that this may be closely allied to planting to meet the ends of a produce purchaser and to planting for environmental reasons, this might typically be small scale so as to support rather than detract from the farming. Aside from orchards and other directly productive planting, this might see:

- the shielding of a new farm building to meet a planning condition
- the shielding of a slurry store for ammonia control

- the hedgerow trees, whether for pleasure, carbon, future shading of livestock or otherwise.

11.4.2 Simple recognition and definition of what is being done may be all that is needed as situations such as these fit with the overall farm business for which the tenancy is held.

11.4.3 With the economy-wide drive towards net zero, such consideration of trees as part of farming policy might now include a block of woodland required under a supply contract with a purchaser of produce.

11.5 Planting to Meet the Requirements of a Farm Produce Purchaser

11.5.1 Taking the example where the best way to meet the requirements of a produce purchaser is to plant an area of woodland, that then becomes an integral part of the business operation, not a separate issue for assessment of rent as it underpins the overall income. While the requirements of a purchaser of produce might rarely be specific as to particular works on the holding, they might:

- require compliance with planning conditions and expected standards
- increasingly include audited progress on greenhouse gas emissions reduction.

Those would be the conditions for a commercial contract that underpins the rent for the holding.

11.5.2 The immediate choice of business option lies with the tenant but, unless the landlord has very different objectives for the holding, it might ordinarily be better to facilitate what is sensibly needed, defining it and considering appropriate terms for what might usually be tenant's work. Ultimately, this planting would simply be part of the holding as whole, unless the trees were also to be managed for their timber potential.

11.5.3 The landlord might have to consider that refusing consent for it could weaken the basis for the rent while agreeing where and how the woodland is created might serve other longer term objectives.

11.5.4 The relevant issues are then more appropriately about such matters as location, species, design and management.

11.5.5 At end of the tenancy, the trees are capable of being an improvement with a compensation value, subject to the condition of the trees and the scale of any grant received for establishing them. Any agreement over the carbon that the landlord has approved and the tenant passes on could be a compensatable intangible advantage.

11.6 Agro-Forestry

11.6.1 With this approach reconfiguring fields and potentially defining or limiting the scale of machinery that might be used, this particularly needs discussion between landlord and tenant. The risk for the tenant in pursuing such a policy is that, if that preference is not widely shared, there could be a future claim for dilapidations should the market of future tenants not see that as attractive.

11.6.2 That is a point about the possible interest and attitudes of successors to the tenant, subsequent occupiers and users of the land.

11.6.3 In this context the lines of trees would be part of the operational infrastructure of the holding, its fixed equipment and so:

- with their particular role be more likely to be established by the tenant to suit the tenant way of working than by the landlord
- as tenant's works, whether with consent or not, would be disregarded at rent review
- if there with landlord's consent (if fixed equipment, they would not be a routine improvement), they would be capable of giving rise to an end of tenancy compensation claim for whatever value they may at that time add to the holding, subject for an FBT to any abatement under s.20(3) for the proportion of the cost that was funded by any grant.

11.6.4 The landlord's consent might contain provisions for the proper management of the trees or even, where possible, for their removal at the end of the tenancy as an impediment to future uses.

11.7 Planting for Environmental Reasons

11.7.1 The tenant might be attracted by the increasing array of possible rewards for environmental planting, as say for buffers along water courses, also potentially protecting the holding from environmental challenge over soil run-off.

11.7.2 In essence, this could either be:

- akin to tenant's planting for farm policy or for supply chain reasons
- delivered to suit the landlord's objectives.

It could be that this arises under an agreement for a development, on or off-farm, to achieve nutrient neutrality or biodiversity net gain as much as to secure funding under an official scheme, from a water company or any other private agreement.

11.7.3 The potential benefits would lie in areas other than timber and perhaps only marginally in carbon.

11.7.4 However, if considering any significant area that intruded on the production potential of the holding, the likelihood is that trees established by the tenant would be disregarded at a rent review leaving the tenant with a cost to be carried by the hopes of reward from the trees.

11.7.5 The end of tenancy situation would generally be as with the other options reviewed.

11.8 Carbon

11.8.1 On what is known at present, the parties should recognise that:

- the value of carbon is at present low at farm scale, less than the value of potential timber and has to take account of the need to provide against failure whether by buffer or other policy
- it will take time before there is even modest absorption of carbon as growing trees achieve size

- that process will continue over many decades
- even well planted and managed trees are at risk from disease, storm, animals, fire and other challenges
- in most cases, value may only accrue significantly after the expiry of the tenancy

11.8.2 Those points may give perspective as to whether a deal should be done and, if so, how one should be approached.

11.8.3 Questions then include:

- who is assuming what commitments?
 - o to spend what on initial establishment of the trees and protection
 - o liability for their management, protection and replacement
- how and on what terms is that commitment handed on or retained at the end of the tenancy?

11.8.4 If the tenant simply enters into a purely personal agreement, that tenant might find there is a continuing personal exposure to liabilities to continue offset the third party's emissions as well as potential payments after the end of the tenancy when having no control over the trees. The greatest opportunity for value may lie in what is handed on to the landlord on the end of the tenancy. Equally, where there is a Woodland Carbon Guarantee Scheme or equivalent agreement, a landlord might see advantage in being able, on the end of a tenancy, to take to trees that are already well established and so ready to absorb more carbon than they would as transplants.

12. Conclusion

The theme of this guidance is the importance of communication between landlord and tenant, supported by good advice, with realistic appraisal of what is proposed, clarity as to motives and relevant interests, shared understanding of what genuinely matters to each, a soundly tested project with costing and financial forecasts properly recorded with appropriate consents and agreement as to its delivery, the management of liabilities and risks and, finally, what happens on the end of the tenancy. Even mutually willing parties can misunderstand each other, create confusion and unwanted surprises, undermining a potentially sound project and prejudicing relationships. This note is intended to assist parties to avoid that.

--0---0---0--