TOWN AND COUNTRY PLANNING ACT 1990
APPEAL BY ECOLOGICAL LAND COOPERATIVE

Site at NGR 307117 120011
(Greenham Reach)

APP/Y1138/A/12/2181807/NWF
APP/Y1138/A/12/2181808/NWF
APP/Y1138/A/12/2181821/NWF
Inquiry opened 29.1.2013

APPELLANT'S CLOSING SUBMISSIONS

Essential need

1. Evidence for the Council in relation to essential need was given by Mr Berryman who had conducted one or two previous assessments of permaculture type proposals out of many hundred and possibly over a thousand agricultural appraisals, suggesting that his degree of specialisation into the circumstances of the present type of application may be as low as 0.1% - 0.5%. By contrast Ms Laughton has an MSc from Wye College University of London and extensive expertise in relation to the needs of this type of intensive horticulture operation.

2. Mr Berryman's evaluation of the farming operation treated the decision to apply labour intensive methods as a personal preference rather than a need of the business operation, contrary to the logic of the *Fivepenny Farm* decision at para 22.

3. The overall evidence set out in extensive detail by Rebecca Laughton and, in many respects amplified by Mr Berryman's colleague in relation to another horticulture proposal, was attacked on numerous fronts, but, it is submitted, these challenges failed to make much headway.

4. In general the strategy of the Council was to try suggest: that the only real reason to be on site would be for emergencies and that there would not be many of these; that the small-scale of the proposed businesses means there is no essential need; and that automation can replace human attention on site.

5. Throughout, these challenges failed to give realistic attention to the scarce resources of time and money available to the smallholdings, and the inability of those running them to sustain the inevitable losses that would be entailed, survive the unreasonable working day away from home and afford the technological alternatives proposed.

6. In relation to the argument about emergencies:

   In general this is not the core justification for essential need – it is possible for anyone to grow vegetables and sell them and thus to give the appearance of running a horticultural business, but many such businesses are supplemented in the long term by grant aid or supplemental income. RL stated she knew of no examples of small-scale horticulturalists who do not live on site and are 100% reliant on their business for their livelihood. For viability, it is vital that they are able to maximise efficiency and attend immediately to even small crises so as to prevent unnecessary losses. Such efficiency relies on being able to integrate work on the smallholding with home life without the need of time consuming travel, and is relevant to every day, not only to emergencies.

   It was for this reason that Ms Laughton explained that she regarded financial and functional matters as intertwined namely because without the benefit of being able to maximise functions through residence on site, financial viability of the business would be jeopardised. This approach contrasted with that of Mr Berryman the previous day. The latter, when cross examined, had been asked whether he would agree that a business finely balanced between success and failure, and where on site residence would result in additional expenses as a result of losses to 'pests, weather, and an inability to optimise systems in countless small ways' as expressed by Mr Smaje, could fairly be said to be a

business for whom such residence was ‘essential’. In striking contrast to most commonsense uses and understandings of the word essential, he claimed that residence in such a situation could not be said to be essential.

Specific emergencies:

- Chicks – if the brooder gets either too hot or too cold then the chicks are in danger of smothering and a whole batch of chicks can be lost. That emergency can only be prevented by regular checking in the middle of the night.

- Loss of seedlings – Seedlings in polytunnels will have a wood burner that must be stoked regularly in winter so that the temperature never drops below 18 degrees C. That emergency can only be prevented by regular checking in the day and especially at night.

- Geese – Adrian Berryman appeared to accept that there was a need for temporary accommodation in the month or two before Christmas to prevent theft of geese worth £2,000.

- Risk to hens at dusk – Anyone living off-site will need to go home at some point. They can’t spend every waking hour out on-site, and for any period where they are not present, especially in the evening, there will be a risk of fox attacks on chickens, even if they are surrounded by electric fencing.

- Wind – Plot A and B’s polytunnels are not protected to the southwest as this area is due to be an agroforestry plantation, which will take 15-20 years to grow to be an adequate windbreak. Consequently, plotholders will need to be on-site in case of emergency decisions being required about cutting the plastic in the case of high winds, and to ensure that all doors and windows of the polytunnels are not blown open.

7. In relation to the argument about scale:

Proportionality - The financial cost of a single emergency event such as loss of chickens or ducks to a fox would have a proportionately greater impact on

such small businesses. For example, a fox might take 30 of 50 chickens, but would not take 3,000 of a flock of 5,000.

Size – Even if some emergencies could be said to be proportional (e.g. perhaps frost killing all of the seedlings of a particular crop), that is not to say that they would not undermine the viability of the business. Any business, large or small, would find it essential to guard against such emergencies.
It's not the single emergencies, but rather the accumulation of losses from numerous emergencies, small or large, arising from not living on-site, that would threaten the viability of the business.

8. In relation to the argument about automation : automated systems are never 100% reliable and do not seek to rectify their own failings, whereas humans can identify problems and find creative solutions.

   Financial costs of automation – The costs of automating all the systems suggested by Mr. Berryman and my learned colleague would be wildly out of proportion to the projected income of the businesses – the wood pellet stove alone would cost in the region of £23,000, more than three times the cost of the dwelling on Plot C, and very likely a larger stove would in fact be necessary. Other automated systems suggested by the Council included an auto-turning egg incubator and a mobile phone based alarm system – both of these would significantly add to the set up costs of the business. This would involve the smallholders taking out loans and being subject to interest repayments, which can be avoided by low-tech, labour-intensive systems.

   Environmental costs of automation – Alternatives to the automated systems proposed result in fewer CO2 emissions. For example, according to DECC figures, gas powered brooder heaters for the chicks would produce 13 times more CO2 than log-powered heaters per KW of heat. Even wood pellets produce twice as much CO2 as logs due to energy used in processing and transport. The solution of heating polytunnels using a biodiesel-powered generator would not meet the sustainability criteria set out for the site, due to the environmental and social impacts associated with biofuel production.

9. In relation to long hours:

Agricultural workers will inevitably have to work long hours, and in the proposed businesses shift workers will not be employed, leaving the plotholder(s) to carry out all of the tasks. It is reasonable for even a smallholder to have some degree of home and family life. It has been agreed by both parties that the tasks involved in running these smallholdings will stretch over an extremely long working day, lasting from 5 or 6am (picking salad) to 10pm or midnight (collecting slugs) for six months of the year. It will only be possible for them to carry out this job by integrating home life with work life so that they are on site to deal with emergencies even when they are 'off duty'. Furthermore, during the winter night-time tasks such as stoking woodstoves will require the plotholders to be on site even during the dark hours when they would not usually be working. This will be routine.

Financial viability

10. The Appellant takes issue with the Council's application of a financial viability test for reasons set out below. Nevertheless, the Appellant also contends that the matters suggested by Counsel for the Council in relation to financial viability were based on a number of misunderstandings about what should properly be included in the relevant accounts. In particular there seemed to be some confusion over which items of expenditure should properly be included in a profit and loss account. Specifically the Appellant submits:

a) To calculate a business profit the income for a *particular period* needs to be matched with the expenditure that relates to the generation of that income. The final assessment of profitability would have looked at profit and loss for a given year, <u>not</u> an aggregated profit and loss account over several years – so that losses would not be carried forward as was suggested by Counsel for the Council.

b) Items of *capital expenditure* last for more than one accounting period and are reflected on the business balance sheet, as they have a continuing value from year to year. Land, for example, is unlikely to fall in value and will remain as a business asset for the life of the business, whereas a piece of machinery may last for 5 years and needs to be depreciated over its useful life. In this case neither a house nor land would be featured in the profit and loss account because they would not depreciate.

c) The method of financing a business is different for each business proposition, it may be from loans raised, from personal savings or from a combination. This finance would be reflected on the Balance Sheet that would be drawn up at the time of any application for permanent permission. The only item to be reflected in the Profit and Loss would be the recurring annual interest charged by an outside lender, such as a bank. This was included in the profit and loss account for plot C but was not relevant to the other two applications.

d) The introduction of personal savings by the proprietor is a matter of choice and there is no cost to the business, there is only a personal loss of the potential interest earned to the proprietor. The case of *Jarmaine* (Appendix CA/07 para 51) makes clear there is no need to include any notional rent.

e) A superficial error in the presentation of figures for plot C was made, in that personal expenditure was deducted prior to profit in years 3 onwards. As a result the bottom line business profit should be stated as higher than it was.

f) It is often the case in the early years of setting up a business that further investment or subsidy needs to be made to farmers to meet their own living costs. In the case of Plots B and C, part time work is undertaken in the early years by one of the proprietors, whereas Plot A will be financed from savings. On the old Annex A test, provided a subsistence income had been reached within one of the last three years, the project could properly be regarded as viable.

Intent: lack of pre-existing physical work on the site

11. The unusual feature of the role of the ELC in mediating between the proposed tenant farmers and the planning system has been noted already in this case. It has undertaken the extensive consultation, negotiation, preparation and development needed to present a detailed and finely tuned prospective application. We have heard from Ms Wangler that her future approach is likely to involve working even more cooperatively with Councils to ensure that developments go ahead with the support of the local authority. The benefits to all sides including to the planning system itself of the ELC carrying out the role it has carved for itself would be rendered completely impossible by an

approach that ruled that such 'off site' evidence of intent could carry no weight – as indeed emerging policy DM10 appears to suggest. In my submission the matters set out in of Ms Wangler's proof at pages 22-23 obviously constitute adequate proof of intent to render unnecessary any speculative outlay by the intended tenants prior to approval of the project.

Missing plot B Farmer

12. For the same reason, the unique and unusual role of the Ecological Land Cooperative is a good reason for this Inquiry to be confident that the problem of the missing farmers for plot B will be capable of remedy by the Appellant. We have heard about the meticulous and careful way in which tenants were originally selected for this project, further set out at page 8 of the rebuttal proof. We have heard about the proposals for repeating this process. In every respect, it is like a carefully planned job application process which makes the analogy to a farm estate recruitment process to be highly pertinent. Given the attention to detail and high standards of the work carried out to date by the Appellant, the Inquiry can have every reason to be confident that either a replacement will be found who is willing to run the business plan as currently approved, or that a fresh application will be submitted on the basis of a new business plan.

Relation of Financial Viability to Essential Need

13. Despite the fact that the financial viability test in Annex A has been abolished the local authority asserted that it had been 'integrated into' essential need alongside functional need in para 55 NPPF. Some support for this approach was found by the Council in the Bird's Wood decision at AC/1. The inspector in this case found that,

> "Annex A remains an appropriate way to assess essential need as it is well established and well understood".

With all respect to the Inspector in that case, the Appellant submits that arguing for an inertia of approach on the basis that this is 'understood' by the relevant professionals is not a good reason in the context of a determination by government to open up planning on the grounds that:

> "in part, people have been put off getting involved because planning policy itself has become so elaborate and forbidding – the preserve of specialists, rather than people in communities" (NPPF, Ministerial Forward)

Without wanting to be facetious, the logic of arguing for a test simply because it is understood by those who would use it is analogous to the logic of the drunkard who gropes around under the streetlamp looking for a key which he dropped in the bushes, but who explains that he is looking under the light because that is where he can see properly.

14. More specifically, in *Bird*, the Inspector found, "no reasons were given for assessing the appeal development against one test but not the other." (para 9). By contrast very good reasons have been presented in relation to this case as to why there is no need to assess this development against any test for financial viability. These reasons rely on the reasoning of Buxton LJ, who explained in *Petter and Harris v Secretary of State*:

> the reason why financial viability and the long-term prospects of the farming operation are taken into account is in order to seek to ensure that the residential development that is going to be permitted on the basis of the agricultural activity will indeed remain as a residential development linked to an agricultural activity; that is to say, as indeed paragraph I5(c) of PPG 7 puts it, the agricultural activity concerned has a clear prospect of remaining financially sound and profitable. The simple words of the policy and of the policy document must therefore be interpreted with that overall intention in mind (p9 at ZW/18).

The reason that policy prior to the NPPF included assessment of financial viability, in other words, was not as an end in itself, but solely a means to avoid the risk of a development granted for one purpose becoming abused for another. In this case there is no risk of such abuse in the present case for other reasons wholly unrelated to financial viability, namely that as a result of the management agreement and s 106 agreement it will be impossible for tenants without a valid functioning business to continue to remain resident on site.

15. The approach in *Petter & Harris* logically subordinates the question of viability to the question of need, (because if the business ceases to exist there can be no thing which needs the dwelling, which will be left washed up on its own as it were, without any purpose other than a purely residential one).

16. By contrast the local authority conceived the 'integration' of functional and financial in a purely additive way: that the appellant must jump through two separate distinct hoops: [functional need] + [financial viability]. In so far as the local authority appear to regard the financial test as an end in itself (rather than a means to securing appropriate development) they step outside the proper arena of planning, and into that of economic micromanagement or regulation.

Relevance of the positive features of the scheme set out at paragraph 4.2 of the statement of case

17. The Appellant contends that the positive features of the scheme set out inter alia in paras 4.2 of the statement of case are capable of being taken into account and given weight by the Inspector within four different analytical approaches:

    a) Pursuant to the Appellant's argument in its opening submissions, in consequence of the relevant policies being absent, silent and/or out of date, it will be necessary to conduct a balancing exercise, and to assess whether the adverse impacts of the scheme, would significantly and demonstrably outweigh the **benefits**.

        i) In relation to the existing policy – the relevant date on which a matter should be determined is the date on which the decision will be taken not today's date, unless the reason for deciding to delay the decision was in order to deliberately change the circumstances under which such a decision was made. "It is common ground that it would be unjudicial for a court (as in R v Boteler (1864) 4B & S 959, 122 ER 718) to refuse to apply the substantive law on the grounds that the court regarded that law as unfair or wrong". See *R v Walsall Justices, ex parte W* (a minor) [1990] 1 QB 253.

        ii) In relation to the *emerging policy* being incapable filling an absence

or silence, support for this argument was lent by the decision of *Whitemoor Lane* from 3 January this year which gives policy DM/10 little weight (para 5). In defence of DM/10 being consistent with the NPPF, Counsel for the Council sought to argue that since any development plan is always subject to material considerations, the failure to build the open ended nature of special circumstances in para 55 into the development plan was not a matter of importance since material considerations can always be given weight. While this is true - as is demonstrated by the Council's approach to material considerations in the present case – once a matter is expelled outwith the development plan it is harder to accord it the same weight than when it is within it.

iii) Insofar as delivery of the scheme for practical reasons hinges upon the Appellant's tenants being permitted to reside on site, residence is essential to the proposed work at the site. Accordingly the positive benefits might validly be analysed as relevant factors to be addressed ***within*** **a concept of 'essential need'** widened beyond the functional (and/or the functional supplemented with the financial). This appears to have been the sense conferred by the Council's planning officer on the new essential need test.

iv) The positive features of the scheme might validly be analysed as **a 'special circumstance'** which – particularly having regard to the purpose behind para 55 prescribed in the first clause of the first sentence of that paragraph – *to promote sustainable development* – should be given proper weight and significance by the Inspector.

v) The positive features of the scheme are might validly be treated as a **material consideration**, indicating the acceptability of development that is otherwise than in accordance with the development plan. The courts have always taken a very wide interpretation as to what should be taken into consideration in determining an application. In *Stringer v Minister of Housing and Local Government [1971] JPL 114,* Cooke J said *"any consideration which related to the use and development of land was capable of being a planning consideration"*. Since the case of *R v Westminster City Council ex. P. Monahan* [1989] JPL 107 it has been clear that benefits flowing from a proposed development may properly be

regarded as material considerations. In that particular scheme the benefits were to be financial ones that would enable one part of the site (the Royal Opera House) to be developed as a consequence of a commercial development that would otherwise not have been granted on its own. Counsel for the Council's re-examination invited from Mr Rowan the suggestion that he was not aware of 'environmental or social problems affecting the site,' and it may be that a line of argument from the Council would suggest that there is a lack of a direct connection between the site and the benefits flowing from the development and/or problems addressed by the development, and that this lack of connection prevents the matters in 4.2 being regarded as material considerations. However:

i. this applies a narrow and outmoded spatial criteria which fails to recognise the transboundary nature of the challenges of sustainable development – eg climate change, loss of smallholdings or, lack of rural economic growth will affect this site and its environs, but not simplistically or immediately.
ii. Such a geographical restriction runs against the spirit of the enabling, facilitative and positive emphasis within the Framework.

Council's approach to the Positive Benefits of the Scheme

18. A surprising feature of the Council's case was that **NONE** of the positive benefits of the scheme appeared to be capable of being weighed as part of any balancing act. Although Mr Rowan asserted in cross examination that he gave these positive features some weight, (despite the fact that in his proof no weight at all appeared to be conferred on the positive features of the scheme), it was apparent that no real weighing exercise was or could take place since in his view it was clear that whatever the benefits, none of these would be a reason for delivering the scheme unless it **ALSO** met the 'essential need test.'

19. It never appears to have crossed his mind that these positive benefits of the work being carried through the scheme, and the fact that this work would not take place without the local authority enabling the scheme through provision of permission for a dwelling could themselves be regarded as making it, "essential for a rural worker to live permanently at or near their place of work." This was the approach of his Council's planning officer.

20. When asked about this Mr Rowan commented: "That might be one way to look at it, but I think it's the wrong way. I'm not here to comment on that, I'm here to defend the Council's decision". When asked by the Inspector to explain why he disagreed with the officer's approach he explained that: "It is the site that demands or requires the house, not the individual. It is the farm that determines whether a house goes there".

21. This switch from considering the essential needs of the enterprise to considering the essential needs of the site revealed the extent to which the Council's approach to its obligations was modelled on a gatekeeping / restriction / preservation / conservation approach which placing the *land* at the centre of focus rather than an enabling / facilitative / or positive approach towards sustainable *development*, contrary to the spirit and intention of the Framework.

22. This is despite the fact that – as Mr Rowan conceded - the entire purpose of the restriction introduced in the third sentence of paragraph 55 was subordinate to, and in order to achieve the objective of, the first clause of that paragraph: ie. to achieve sustainable development.

23. Having first rejected the possibility that the benefits of the scheme could be regarded as internal to the essential need test, Mr Rowan then, when asked by the Inspector, also rejected the possibility that special circumstances – in relation to the scheme – could mean anything at all other than essential need, though he accepted that the obvious effect of 'such as' was to make the list a non-exhaustive one.

24. Mr Rowan further sought to justify his approach by suggesting that any scheme would be likely to be able to justify itself as meeting the three pillars of sustainable development. This argument was flawed on two fronts:

    a. As has been evidenced in detail by the Appellant, the ambition and scope of this scheme with regard to sustainable development is obviously entirely unusual and exceptional. Most of the experts giving evidence on behalf of the scheme including climate scientists, specialists on organic agriculture, agro-ecologists and others have spent their lives attempting to study and practice sustainable

development. If this scheme cannot reliably be evaluated as amounting to sustainable development within the meaning of paragraph 55 of the NPPF, then it is hard to imagine any scheme that could so safely be regarded.

b. Most schemes have pros and cons – for instance a superstore may improve services but threaten a town centre; or a housing development may bring jobs but cause a loss of green space etc. Often this reflects the fact that there are conflicts between one or other of the dimensions of sustainable development. Yet significantly and unusually in this case no negative features of the development were advanced by the Council that might constitute reasons against it.

25. Counsel for the Appellant in cross-examination and also in his opening submission has sought to suggest that positive features of the scheme can be divided into two categories – either:

a) merely relevant matters of planning policy which should be applied in the ordinary course by all applicants for planning permission, or else;

b) in so far as they are not matters of planning policy (for instance the purposes in the Climate Change Act or the Smallholdings Act) - simply background information of little relevance or weight.

26. In relation to the first of these suggestions – this is just that – a suggestion. The policy is a new one and it is up to you Madam to determine how it is interpreted. In any case:

a) the suggestion is incoherent – for instance if we proved essential need within the terms of the emerging policy DM10, we'd still be considered to be a "special circumstance" within the NPPF. There is no logical reason to assume that because something is mirrored in planning policy it stops being a "special circumstance".

b) In ignoring the difference between substantial delivery of a wide range of policies and bare compliance with them, this approach assumes that the only point at which a policy becomes relevant to a proposal is when it is in

conflict with it. This is again symptomatic of a notion of the function of planning from which the NPPF is trying to move away – namely that it is about merely about control, regulation and restriction rather than enabling and facilitation.

27. In relation to the non-planning policies and purposes on which this scheme delivers, the weight to be given to these benefits is ultimately a matter for you madam, although I would suggest that the unusual feature of this scheme that would justify the benefits of this application being regarded as a special circumstance and/or a material consideration is to be found in the combination of the wide range of proposed benefits; the stark absence of adverse impacts and the carefully thought-through set of safeguards.

28. A further argument raised by Counsel for the Council has laid weight on the fact that the Government chose not to expressly mention low impact development as an example of special circumstances, alongside, as Mr Wadsley put it, buildings in the countryside by a 'new Vanburgh'. We have heard about the slowness of the planning system in responding to some of the environmental and social challenges which we confront as a country. Policy is made from bottom up as well as from top down, and it would be entirely open to you to decide that the benefits of this proposal in facilitating access to farming for those on a low income and in tackling a range of other social, environmental and economic problems, is every bit as valuable as a grand design for a rich person of high aesthetic standards.

29. You will not have failed to notice the overwhelming wave of sympathy and goodwill that this application has attracted from a wide range of interested parties who have put their energies and expertise at the disposal of this project – and come to speak on its behalf. It is surely striking that not one of those who have opposed this project have yet turned up to speak against it. I would urge you to decide in favour of this application. Further, I would invite you to expressly decide that, whether or not you consider this application to meet any financial viability or functional need tests, to go on *in any event* to decide that, having full regard to the benefits of this proposal, this application is justified on the basis of special circumstances and/or material considerations. As Mr Smaje who attended on the first day of this hearing has pointed out, if the benefits of this application are not capable of being considered a special circumstance it is very hard to conceive of any smallholding application that

will ever be capable of satisfying this criteria. Without some loosening of the restrictions here, farming is likely to remain an activity capable of being pursued only by the very rich or by those born into farming families.

30. For all the reasons that have been set out earlier in full, I therefore urge you to grant this appeal.

Philip McLeish
Garden Court North
31 January 2013