Rebuttal Evidence given by Zoe Lelah Wangler, Managing Director, the Ecological Land Co-operative Ltd.

Public Local Inquiry pursuant to Section 78 of the Town and Country Planning Act 1990

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1 Evidence on Viability Presented By Acorus

1.1 Mr. Berryman has argued that in order for temporary consent to be granted for agricultural workers' dwellings the three proposed businesses must be financially sustainable and viable. This, he states, means the generation of the minimum agricultural wage. He has calculated return to unpaid labour using the projected income and expenses for Year 3 and the MAFF Methodology for Financial Calculation (LU1893) including a calculation for 'notional rent'. Mr. Berryman's approach is incorrect for the following reasons:

Requirement to Generate the Minimum Agricultural Wage

1.2 At paragraph 2.9 Mr. Berryman states that:

> "As long ago as 1973 planning guidance said that 'It is, for example, clear that a farm (now any rural business) which could not provide an income at least equal to the minimum agricultural wage (currently £14,114.88 from 1st October 2012, see Acorus 3) would not be viable, and an income above that level may be necessary for viability in view of the investment requirements of a farm business…. This concept of viability has been carried forward through successive editions of planning advice".

1.3 That a minimum agricultural wage is required is factually incorrect. Both PPS7 and PPG7 required that applications for *permanent* dwellings show that their farm business had been profitable in *one* of the last three years. Neither policy statements mentioned the need to generate the minimum agricultural wage to pay the farmer.

1.4 Furthermore, the requirement that one of the last three years was profitable was the test for applications for *permanent* dwellings. For applications for *temporary* dwellings the guidance in both PPS7 and PPG7 stated that applicants needed only to show "clear evidence that the proposed enterprise has been planned on a sound financial basis". Emerging local plan policy DM/10 does not require applicants for temporary permission to show profitability by Year 3, nor to evidence that they can generate the minimum agricultural wage, but to show "sound financial planning".

1.5 Turning to the High Court case of Petter and Harris v Secretary of State for the Environment, Transport and The Regions and Another (1999)(Appendix

ZW/18), here Lord Justice Sedley is clear that sound financial planning does not imply the need to show a profit, nor evidence that the business would generate the minimum agricultural wage. Rather, it must be shown that the farm business is likely to continue to operate over the duration of the intended period of the planning permission:

> "Here, an unexpected but genuine application by somebody living by subsistence farming did not require a rigid application of criteria designed for commercial agriculture but a practical adaption of those criteria to secure the underlying purposes of the policy. Profitability was no guide to its genuineness and a poor guide to its probable continuation. The true question should have been whether the unit was sustainable in the hands of the first applicant and in that sense viable and likely to continue so, which would have probably been answered affirmatively had it been addressed by the inspector".

1.6 This ruling was reflected in PPS7 which stated:

> "In applying this [financial] test authorities should take a realistic approach to the level of profitability, taking account of the nature of the enterprise concerned. Some enterprises which aim to operate broadly on a subsistence basis, but which nonetheless provide wider benefits (e.g. in managing attractive landscapes or wildlife habitats), can be sustained on relatively low financial returns."

1.7 The 1973 guidance referred to by Mr. Berryman reflects the requirement for a large commercial farm to pay the additional worker(s) it wishes to house. It has little relevance to our prospective smallholders. This is echoed by Lord Justice Sedley (Petter and Harris v SoSETR) who found "if it is an employee who is to live on the land, no employer is likely to keep him or her there if the land is not yielding a profit. If it is the applicant himself, again viability is likely to mean the production of an economic surplus for him of some kind" (page 2, paragraph 4). There are other High Court cases in which similar conclusions have been reached, including Jarmain v Secretary of State for the Environment, Transport and the Regions (2001) (Appendix CA/07):

> "If the figure were based on actual gross profit, and the profits had been calculated on the basis of the ability of the farm to support the applicant, as opposed to the cost of a notional employed labourer,

again the result would have been yet more favourable to the applicant. Such a result would have accorded much more closely with the actual as opposed to the theoretical situation which prevailed on the holding" (paragraph 51).

Year Three as the Benchmark

1.8 At paragraph 2.9, Mr. Berryman writes that "viability is normally expected to be achieved by year 3". As set out above, PPS7 required applications for *permanent* dwellings to show *profitability* in *one of the last three years,* the policy then stated that applications for temporary dwellings would *normally* be for three years. Emerging local plan policy DM/10 makes no reference to the need to show viability by any given year, nor makes a recommendation as to the length of a temporary consent.

1.9 The Council has agreed, in the Statement of Common Ground, that if the appeals were allowed, the temporary consent could be for five years.

1.10 Mr. Berryman has therefore incorrectly assessed the businesses at Year 3. If the appeals were allowed and the businesses were successful a permanent permission would be sought at Year 5, not Year 3. If PPS7 had not been repealed, any applications for permanent permission would have been assessed on the *three last years*, which would be Years 3, 4, and 5. Emerging local plan policy DM/10 does not include a financial test for applications for permanent permission.

1.11 The ELC set out in great detail in both our application documentation (final appendix to each of the individual Design & Access Statements) and our pre-application discussion documentation why an entirely new ecological farm business requires five rather than three years to establish itself.

Use of MAFF Methodology for Financial Calculation (LU1893) and Notional Rent

1.12 No authority continues to use the financial test provided by MAFF and known as "LU/1893". DEFRA has stated that LU/1893 became obsolete by the 1997 version of PPG7.

1.13 More importantly, in the case of Jarmain v Secretary of State for the Environment, Transport and the Regions (2001), Lord Justice Gibbs found in

relation to LU1893 that the Inspector fell "into significant error" by accepting "as part of the actual expense figures those costs which were purely notional, such as rent which was never in fact incurred" (paragraph 51). Lord Justice Gibbs also commented that "It will be apparent that this test [LU/1893] is not to be taken as conclusive of future viability. It is rather a tool which may be used to assess the genuineness and sustainability of an applicant's intentions. That is apparent from the document itself" (Appendix CA/07).

1.14 (Of note: the costs of the temporary dwellings are not £100,000 as used by Mr. Berryman in his application of LU1893. As set out in evidence, self-build low impact dwellings have been found to cost between £4,000 and £14,000. The prospective tenants for Plot C had included the projected cost of their dwelling in the cash-flow forecast (£7,300)).

Planned on a Sound Financial Basis

1.15 Returning to policy on viability. There is currently no financial test in the local development plan. Emerging plan policy DM/10 seeks that applications for temporary consent show sound financial planning. In the definition of sustainable development, the NPPF defines the economic pillar of sustainable development as development that seeks a strong, responsive and competitive economy and which supports innovation. How the applications accords with the objectives of this element of the NPPF is set out in paragraph 4.63 of my proof of evidence.

1.16 Mr. Berryman has not stated that he found fault in the business planning other than "If the tenants are purchasing the leasehold, this should be clearly stated and shown in the budget calculations" (paragraph 6.3).

1.17 Two of the three applications clearly accounted for the leasehold in the application documentation:

- PINS ref: **2181807** (Plot C). The cost of the leasehold purchase is accounted for in the section 7 of the business plan. The first line item under Expenditure is 'Land' (£65,000).
- PINS ref: **2181808** (Plot A). On page 1 of the document 'Cash Flow Forecast Years 1 to 5', again the first line item under Expenditure is 'Land' (£65,000).

1.18 Our application process required prospective tenants to demonstrate that they had the necessary funds, in either savings or loans, to cover the costs of: purchasing the lease; their business infrastructure / development; and their temporary dwelling. We also needed to see evidence that they would be able to cover their living costs for an initial period while they established their businesses. The prospective applicants for all three plots demonstrated this to us.

1.19 The business plans incorporate a number of strands (agroforestry, bees, point-of-lay hens, covered crops, field crops, etc.) and in order to satisfy ourselves that the business were indeed planned on a sound financial basis we went to individuals with various different expertise and experience to appraise the projected yields, costs, prices, markets and so forth:

- Martin Crawford, the Director of the Agroforestry Research Trust assessed the agroforestry elements of the business plans. He produced a written assessment for each which can be found as an appendix to the individual Design & Access Statements. He found both the projected cropping figures (quantities) and likely income from the agroforestry areas to be accurate.
- Local market gardener Amanda Goddard, Spring Grove Organic Farm, who has run a successful commercial smallholding in Milverton since 2003 wrote "I visited the Greenham Reach site recently and have also been able to read the applicants' business plans. I see no reason why they should not be successful on this site" (submitted with document 'Response to Holcombe Rogus Parish Council – Appendix A').
- Agronomist and crop consultant Richard Harding found no problems with the business plans, commenting that "the success of the project is likely to rest with the drive and determination of the individuals concerned and their ability to read and supply the local market with what it requires given the current competition" (submitted with document 'Response to Holcombe Rogus Parish Council – Appendix A').
- Chartered Accountant Sandra Aldworth is a Director of the ELC and has seen no cause for concern.
- Finally, our agricultural appraiser and organic horticulturalist Rebecca Laughton reported in her appraisals that she found the businesses to be

planned on a sound financial basis (submitted in individual agricultural appraisals).

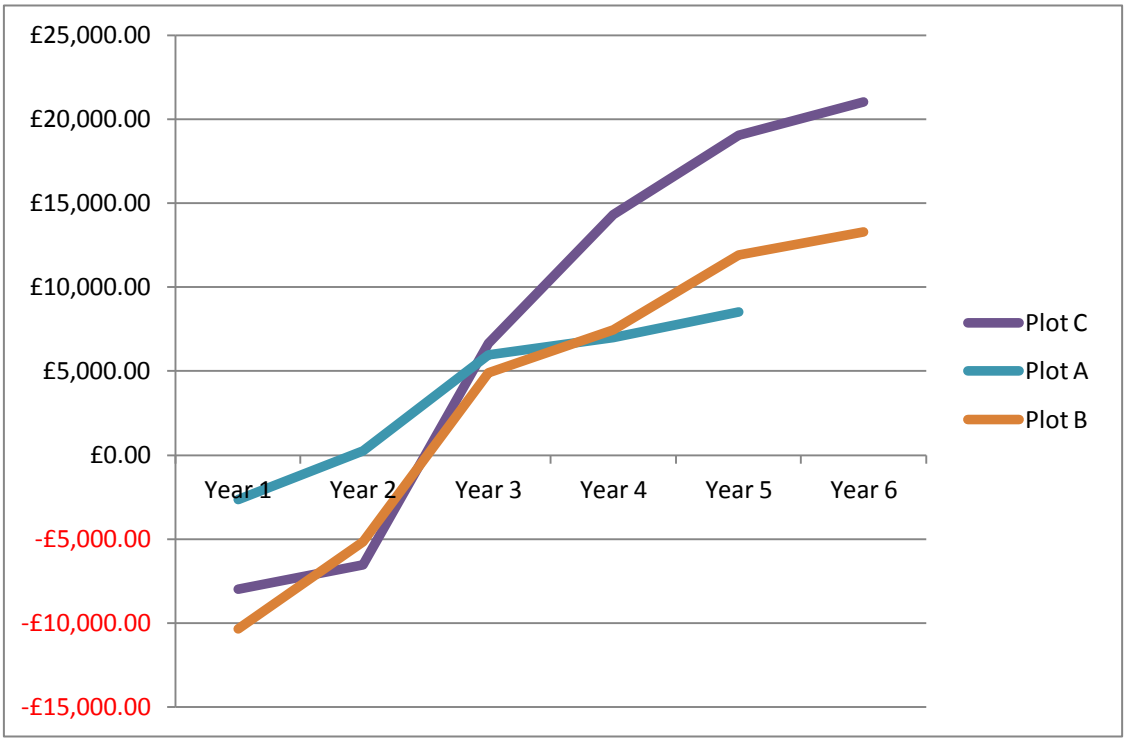
1.20 Witness Roger Hitchings, senior consultant at Elm Farm Organic Research Centre, has stated in evidence that after examining the figures within each of the business plans, "I can confirm that they are consistent both with the Organic Farm Management Handbook (to which I was a major contributor) and figures from a range of similar enterprises with which I have been involved".

Financial Sustainability

1.21 I respectfully suggest that the question for this inquiry is perhaps whether the businesses and families can be sustained on the projected net incomes.

1.22 As shown in Graph 1, projected net profits increase over the five year period and would be expected to continue rising should the Scheme continue beyond that time, not least because the fruit trees that are an essential component of agroforestry take several years to establish and reach full productivity.

Graph 1: Projected Net Profit Years 1-6 (Plots B&C) and Years 1-5 (Plot A)



1.23 It is relevant to note, as did the Inspector in deciding on Lammas' application for 9 low impact smallholdings (Appendix CA/03), the cost savings available in low impact living compared to conventional living. As set out in evidence, these would include energy costs, increasing amounts of home-production of much of the food, and the lack of requirement for water and sewerage costs.

1.24 Income support for a couple is currently at a level of around £6,000 per year. If unemployed families in towns are able to survive on such an income, it stands to reason that many smallholders obtaining benefits from their land (as above) can provide for themselves on a good deal less (and the projected incomes are greater not less).

2 Evidence That Planning Appeal for 'Plot B' is not Justified Presented By Acorus

2.1 It was stated in the Grounds of Appeal for appeal ref: 2181821 (Plot B) that following the Council's decision to refuse permission, the prospective tenants for Plot B, Ms. Long and Mr. Stanton let the ELC know that they were unlikely to take up the smallholding should the appeal prove to be successful. Ms. Long gave her approval however for her business plan to be used by a subsequent smallholder on Plot B. The ELC have a long list of prospective smallholders and would have no problem finding a suitably experienced grower to take on Ms. Long and Mr. Stanton's proposed business.

2.2 Mr. Berryman has stated in paragraph 5.1 (and again in paragraph 6.2) that his assessment of the business plans are "based on the assumption that these people are the prospective tenants, if this changes and new tenants and proposals come forward, they will need a new evaluation".

2.3 I do not agree that planning policy demands that a new evaluation would be needed if Ms. Long and Mr. Stanton do not take up the smallholding.

2.4 It is normal practice for farmers and farm estate managers to recruit farm workers for a new farm enterprise only after the necessary consents have been obtained.

2.5 The ELC is similar to a farm estate manager in the following respects:

a. The ELC recruited / recruit the prospective tenants via an open recruitment process and have the right – via the leasehold agreement, Management Plan etc – to remove the tenant if they are not deriving their livelihood from the site (at least 1 FTE) through ecological agriculture;

b. The ELC's recruitment process involves the assessment of the proposed businesses and reference checks for the shortlisted applicants; and

c. The ELC remains involved, via the annual monitoring, in managing the site. This includes providing support to the tenants and facilitating further support from other civil society organisations.

2.6 The replacement tenant would be recruited on the basis that they developed the proposed business.

2.7 If the ELC are unable to find new tenants who are ready to take the proposed business forward then a new planning application for Plot B would have to be made based on the replacement tenant's business plan.

2.8 Finally, it is perhaps worth explaining why we did not seek a replacement tenant for Plot B ahead of the appeal. We had sought to avoid involving prospective tenants in the planning applications from the outset. By involving prospective tenants before a consent has been secured we are effectively asking individuals and families to put their lives on hold for an unknown period while we work our way through the planning process with an unknown outcome. We recruited prospective tenants in May and June in 2011 and the Council refused our applications a year later. Should the appeals be allowed, our tenants would have waited almost two years to start their farm businesses.

3 Evidence that Policy Requires Existing Functional Need and/or an Existing Rural Business, Presented by Rowan Edwards Town Planning Consultants

3.1 Mr. Rowan at paragraphs 3.6 and 3.7 states that the essential "need has not yet, as far as the Members are concerned, been proven … It is a view I agree with". At 4.22 Mr. Rowan argues in reference to emerging local plan policy DM/10 that 'first of all the business has to be "existing"'.

3.2 Regarding the first point, adopted local plan policy COR18 does not specify whether or not essential need has to be proven. Emerging local plan policy DM/10 states that "Where a rural business is not established a temporary dwelling may be permitted…" (my emphasis). Clearly, under this policy, an established rural business is not a necessary condition to successfully seeking temporary permission for a dwelling. Yet it is hard to see what further evidence we could provide to make essential need "proven" without actually establishing rural businesses.

3.3 The case R. (on the application of Vale of White Horse DC) v Secretary of State for Communities and Local Government has been attached as Appendix 1 to this rebuttal. Here Robin Purchas Q. C. found that "a need will often necessarily be for accommodation to be put in place so as to secure the particular project. A construction that recognises needs as existing for an intended enterprise in this sense would well serve the overall purpose. However, I can see no purpose achieved by denying a need that has arisen to make provision for an intended enterprise. It would seem to constrain agricultural enterprise on a somewhat arbitrary basis".

3.4 On the need for there to be an existing rural business: Again, adopted local plan policy COR18 is silent on this matter. Policy DM/10 refers to the need for a rural business to be existing only for applications for *permanent* dwellings. The policy is clear that this does not apply to applications for temporary permission. As above, it states "Where a rural business is not established a temporary dwelling may be permitted" (my emphasis).

3.5 Looking back to previous guidance:

- **PPG7**: referring again to Petter and Harris v SoSETR, the Lord Justices found that "That annex assumes that a planning authority may

be faced with an application in respect of a new dwelling supporting a new farming activity" (my emphasis).

- **PPS7**: "It will also be important to establish that the needs of the intended enterprise require one or more of the people engaged in it to live nearby" (my emphasis) and "If a new dwelling is essential to support a new farming activity, whether on a newly-created agricultural unit or an established one" (my emphasis).

3.6 The Planning Inspectorate's Case Law and Practice Guide 7: Agricultural, Forestry and Other Occupational Dwellings in the Countryside advises that "If a new dwelling is needed to support a new farming activity, whether on a new or existing farm unit, it should normally be provided by a caravan or other temporary accommodation for the first 3 years" (my emphasis).

Appendix 1: The case R. (on the application of Vale of White Horse DC) v Secretary of State for Communities and Local Government

CO/848/2009

Neutral Citation Number: [2009] EWHC 1847 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 10th July 2009

B e f o r e:

ROBIN PURCHAS QC
(SITTING AS A DEPUTY HIGH COURT JUDGE)
Between:
THE QUEEN ON THE APPLICATION OF VALE OF WHITE HORSE DISTRICT COUNCIL

Claimant

v

(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2) H WALKER AND SON

Defendants

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(Official Shorthand Writers to the Court)

Ms Sarah Hannett (hearing) and Mr Jack Anderson (judgment) (instructed by Vale of White Horse District Council) appeared on behalf of the **Claimant**
Mr David Blundell (hearing) and Mr Jonathan Wills (judgment) (instructed by the Treasury Solicitor) appeared on behalf of the **First Defendant**
Ms Jenny Wigley (hearing) and Ms Suella Fernandes (judgment) (instructed by Horsey Lightly Fynn) appeared on behalf of the **Second Defendant**

J U D G M E N T
(Draft for approval)

1. THE DEPUTY: In this application the claimant planning authority applies to quash the decision of an Inspector on behalf of the first defendant allowing the appeal of the second defendant from the refusal by the claimant of planning permission for the erection of two agricultural workers dwellings at New Manor Farm, Charney Bassett.

2. Ms Sarah Hannett, who appears for the claimant, relies on three grounds: (1) that the Inspector misapplied the functional test under PPS7; (2) that the Inspector misunderstood the effect of the unilateral undertaking; and (3) that the Inspector misapplied the financial test under PPS7. Ms Hannett did not pursue in this court her further ground that the Inspector erred in law in failing to apply the policy on temporary planning permissions under PPS7.

Background

3. The second defendant runs a successful farming enterprise from Manor Farm, Garford, and elsewhere. In particular, he has a goat dairy unit of some 850 goats which he wished to expand by an additional 2,000 goats. He acquired land at New Manor Farm for this purpose so that the goat herd was partly kept at Willowbrook Farm and partly at New Manor Farm. On 4th January 2005, planning permission was granted for a new agricultural building and an extension to house the expanded goat herd.

4. He required additional on site workers accommodation to the single dwelling that he had at that time and accordingly applied for two additional workers dwellings, the subject of the present proceedings. Permission was refused on 10th April 2008. He appealed and there was a hearing on 25th November 2008. The appeal was allowed by letter dated 18th December 2008.

PPS7

5. The issues in this case involve PPS7, which sets out the first defendant's policies for sustainable development in rural areas. It is convenient to set out the relevant part of that policy guidance at this point.

6. At paragraph 1(iv), the key principles are set out including:

> "New building development in the open countryside away from existing settlements, or outside areas allocated for development in development plans, should be strictly controlled; the Government's overall aim is to protect the countryside for the sake of its intrinsic character and beauty, the diversity of its landscapes, heritage and wildlife the wealth of its natural resources and so it may be enjoyed by all."

At paragraph 9, the guidance continues that local planning authorities should:

> "strictly control new house building (including single dwellings) in the countryside away from established settlements or from areas allocated for housing in development plans.

> 10. Isolated new houses in the countryside will require special justification for planning permission to be granted. Where the special justification for an isolated new house relates to the essential need for a worker to live permanently at or near their place of work in the countryside, planning authorities should follow the advice in Annex A to this PPS."

7. Turning then to Annex A, it has a general introduction dealing with agricultural, forestry and other occupational dwellings, then specific advice on permanent agricultural dwellings is given in paragraphs 3 to 11. Temporary agricultural dwellings is dealt with in paragraphs 12 and 13, forestry dwellings in paragraph 14 and other occupational dwellings in paragraph 15.

8. In the introduction at paragraph 1, reference is made to earlier policy guidance for special justification and continues:

> "One of the few circumstances in which isolated residential development may be justified is when accommodation is required to enable agricultural, forestry and certain other full-time workers to live at, or in the immediate vicinity of, their place of work. It will often be as convenient and more sustainable for such workers to live in nearby towns or villages, or suitable existing dwellings, so avoiding new and potentially intrusive development in the countryside. However, there will be some cases where the nature and demands of the work concerned make it essential for one or more people engaged in the enterprise to live at, or very close to, the site of their work. Whether this is essential in any particular case will depend on the needs of the enterprise concerned and not on the personal preferences or circumstances of any of the individuals involved.
>
> 2. It is essential that all applications for planning permission for new occupational dwellings in the countryside are scrutinised thoroughly with the aim of detecting attempts to abuse (e.g. through speculative proposals) the concession that the planning system makes for such dwellings. In particular, it will be important to establish whether the stated intentions to engage in farming, forestry or any other rural-based enterprise, are genuine, are reasonably likely to materialise and are capable of being sustained for a reasonable period of time. It will also be important to establish that the needs of the intended enterprise require one or more of the people engaged in it to live nearby."

9. Turning then to the advice on permanent agricultural dwellings, at paragraph 3:

> "3. New permanent dwellings should only be allowed to support existing agricultural activities on well-established agricultural units, providing:
>
> (i) there is a clearly established *existing* functional need (see paragraph 4 below);

(ii) the need relates to a full-time worker...

(iii) the unit and the agricultural activity concerned have been established for at least three years, have been profitable for at least one of them are currently financially sound, and have a clear prospect of remaining so (see paragraph 8 below);

(iv) the functional need could not be fulfilled by another existing dwelling on the unit, or any other existing accommodation in the area which is suitable and available for occupation by the workers concerned; and

(v) other planning requirements...

4. A *functional test* is necessary to establish whether it is essential for the proper functioning of the enterprise for one or more workers to be readily available at most times..."

10. The advice then goes on to consider other aspects of the functional test and a requirement for the number of workers and continues at paragraph 8:

"8. New permanent accommodation cannot be justified on agricultural grounds unless the farming enterprise is economically viable. A *financial test* is necessary for this purpose, and to provide evidence of the size of dwelling which the unit can sustain. In applying this test (see paragraph 3(iii) above) authorities should take a realistic approach to the level of profitability taking account of the nature of the enterprise concerned. Some enterprises which aim to operate broadly on a subsistence basis, but which nonetheless provide wider benefits (e.g. in managing attractive landscapes or wildlife habitats) can be sustained on relatively low financial returns.

9. Agricultural dwellings should be of a size commensurate with the established functional requirement. Dwellings that are unusually large in relation to the agricultural needs of the unit, or unusually expensive to construct in relation to the income it can sustain in the long-term, should not be permitted. It is the requirements of the enterprise rather than those of the owner or occupier, that are relevant in determining the size of dwelling that is appropriate to a particular holding."

11. It then goes on to consider conditions and siting. At paragraph 12, it turns to temporary agricultural dwellings, providing:

"If a new dwelling is essential to support a new farming activity, whether on a newly-created agricultural unit or an established one, it should normally, for the first three years, be provided by a caravan, a wooden structure which can be easily dismantled, or other temporary accommodation. It should satisfy the following criteria:

(i) clear evidence of a firm intention and ability to develop the enterprise concerned (significant investment in new farm buildings is often a good indication of intentions);

(ii) functional need (see paragraph 4 of this Annex);

(iii) clear evidence that the proposed enterprise has been planned on a sound financial basis;

(iv) the functional need could not be fulfilled by another existing dwelling on the unit ...; and

(v) other normal planning requirements..."

At paragraph 14 forestry dwellings are dealt with, applying the same criteria that apply to agricultural dwellings, and, similarly for other occupational dwellings at paragraph 15, other rural based enterprises are required to be subject to the same criteria and principles.

The decision letter

12. At paragraph 3 of the decision letter, the Inspector referred to the planning obligation in these terms:

> "The obligation is not to dispose of the proposed dwellings separately from the farm and vice versa and that neither of the dwellings shall be occupied until either the extension to the existing agricultural building or the new agricultural building, permitted under planning permission reference CHA/11240/1, has been constructed and made ready for use."

At paragraph 5 he set out his main issues, including:

> "• whether there is an established need for the proposed dwellings and whether it is essential that they be located on the appeal site..."

He referred to policy, including PPS7, in paragraph 6. In paragraphs 7 or 8 he described the farm holding and then turned to deal with the functional test at paragraphs 9 through to 14. At paragraph 9 he said:

> "9. The facility at Willowbrook Farm is operating at capacity and, in order to meet increasing demand, and at the same time reduce reliance on other producers, the appellant has obtained planning permission ... for an extension to an existing agricultural building and erection of a new agricultural building at New Manor Farm. The new buildings, together with conversion of the existing milking parlour, will enable the business to rear on female kids born on the holding which will then be brought into milk production.
>
> 10. Once the new buildings were constructed it would be expected that

> the herd size would be increased quickly to maximise return on investment. The proposed expansion would allow New Manor Farm to accommodate 2000 head in milk together with the rearing of replacement does. The operation at Willowbrook Farm would continue.
>
> 11. The care of expectant doe goats, does with kids, kids on milk machines and being weaned and any sick animals requires 24 hour supervision by specialist staff. The Council's agricultural consultant confirms that it would be necessary to have staff on hand to attend to the welfare of goats but expresses the view that, based on a doubling of the herd on site, that 2 residential workers would be sufficient with a third beneficial but not essential."

The Inspector then continued at paragraph 13:

> "13. The appellant has estimated that with 2850 milking goats there would be, on average, 630 animals under close supervision at any time and that one skilled person would be generally able to look after around 200 high supervision animals at a time. These figures are not challenged by the Council. I therefore consider that it is reasonable to expect that there would be a requirement for 3 on site skilled staff."

He then concluded at paragraph 14:

> "I therefore conclude that the requirement for a second residential member of staff would arise as soon as the build-up of the herd commenced and the third early in the expansion of the herd size. I consider, therefore, that the functional requirement for 2 additional specialist staff would arise very soon after the construction of the additional stock facilities."

He then turned to the financial test in paragraphs 15 to 17. At paragraph 15:

> "15. The appellant's goat dairy business has been operating since 1987, with New Manor Farm having been purchased in 2000. The business supplies a diverse customer base and to meet all customer requirements milk is bought in from suppliers in the UK and abroad. The proposed expansion of the business would reduce the need to rely on external sources and accommodate an increase in demand, recognized by the Council as running at 15-20% per annum.
>
> 16. Although the farm accounts do not separate out the dairy goat enterprise, the appellant has provided figures to demonstrate that the livestock element provides for the major part of gross margins, with goats forming 95% of the livestock. Gross and net financial profit has shown a steady increase over the period 2005 to 2007. The appellant's accountant confirms the financial viability of the business and supports the expansion of the business.

> 17. The appellant has also produced figures based on standard industry data to estimate the current management and investment income (M&II) for the goat enterprise at £121,207.50 and predict the M&II for the expanded herd at £565,607.50, taking account of increased overheads.
>
> 18. On the basis of the above I conclude that the goat enterprise is well established and is financially viable, and would remain so when expanded. I also consider that the increased income would sustain dwellings of the size proposed."

13. He dealt with temporary permission policy in paragraphs 19 to 21. He set out the policy dealing with new farming activity in paragraphs 19 and 20, then concluding at paragraph 21:

> "21. I consider that the appellant has demonstrated that the expansion of the existing goat enterprise would be functionally and financially viable and that it is not necessary, in this instance, to utilize temporary accommodation for the additional specialist staff."

He then dealt with size of the accommodation and alternatives, before concluding at paragraph 24:

> "24. I therefore consider that a functional need for the two additional dwellings at New Manor Farm will exist provided the expansion of the herd proceeds. The extension of the stock housing will not be implemented without the expansion programme being implemented. The occupation of the dwellings could be tied by condition, to persons engaged in agriculture at the business operation New Manor Farm. A condition could also be imposed such that the dwellings could not be occupied until the stock housing was ready for use. I consider therefore, that the dwellings would not be constructed ahead of a clear functional need.
>
> 25. I therefore conclude that, with satisfactory safeguards in place to ensure that the dwellings would not be occupied should the expansion not proceed, the financial and functional tests of PPS7 would be met..."

He therefore concluded that the appeal would be allowed. He dealt with conditions, paragraph 29, saying:

> "29. Whilst the unilateral planning obligation will ensure that they would not be constructed prior to the expansion of the enterprise, I consider that a condition limiting the occupation of the dwellings to persons employed in agriculture at New Manor Farm is necessary to ensure that the dwellings are used for the purposes that justify their construction."

He allowed the appeal, subject to an agricultural occupancy condition.

14. I should also refer to the unilateral undertaking which was made on 5th December 2008. That contained a covenant in clause 5.1.1 and paragraph 2 of the First Schedule as follows:

> "Neither of the Dwellings shall be occupied until one of the Agricultural Buildings has been constructed in accordance with the Agricultural Buildings Permission (and made ready for use)."

In the definitions in the unilateral obligations the Dwellings are the agricultural dwellings, the subject of the present application, and the Agricultural Buildings were those that had been earlier permitted.

Approach to construction of planning policy

15. In this case, as in others, following the Court of Appeal decision in R (on the application of Raissi) v Secretary of State for the Home Department [2007] EWHC 243 Admin, an issue has arisen as to the correct approach of the court to the construction of planning policies. The established line of authority in planning cases commences with the Court of Appeal decision in R v Derbyshire County Council, ex parte Woods [1997] JPL 958, where Brooke LJ said at page 967:

> "If there is a dispute about the meaning of the words included in a policy document which a planning authority is bound to take into account, it is of course for the court to determine as a matter of law what the words are capable of meaning. If the decision-maker attaches a meaning to the words they are not properly capable of bearing, then it will have made an error of law, and it will have failed properly to understand the policy (see *Horsham DC v Secretary of State for the Environment* [1992] 1 PLR 81, *per* Nolan LJ at 88. If there is room for dispute about the breadth of the meaning the words may properly bear, then there may in particular cases be material considerations of law which will deprive a word of one of its possible shades of meaning in that case as a matter of law."

Brooke LJ then went on to refer to the judgment of Auld J, as he then was, in Northavon District Council v Secretary of State for the Environment [1993] JPL 761. The approach in Woods was applied by Buxton LJ in Petter and Harris v Secretary of State for the Environment, Transport and the Regions [1999] 79 P&CR at 214 at page 222 and 223, but in that case Sedley LJ considered that Woods was not in point.

16. In First Secretary of State v Sainsbury Supermarket Limited [2005] EWCA Civ 520, Sedley LJ said at paragraph 16:

> "Thirdly, the interpretation of policy is not a matter for the Secretary of State. What a policy means is what it says. Except in the occasional case where a policy has been ambiguously or unclearly expressed (see *R v Derbyshire CC, ex p. Woods* [1997] JPL 958), so that its maker has to amplify rather than interpret it, ministers are not entitled to thwart legitimate expectations by putting a strained or unconventional meaning

> on it. But what ministers do have both the power and the obligation to do - and Miss Lieven readily acknowledged that this is her real point - is to apply their policy from case to case, keeping in balance the countervailing principles (a) that a policy is not a rule but a guide and (b) that like cases ought to be treated alike."

17. In R (on the application of Heath and Hampstead Society) v Camden London Borough Council [2008] 2 P&CR 13, Carnwath LJ referred to the decisions in Woods and Northavon at paragraphs 14 and 15 and continued at paragraph 16:

> "There is perhaps a slight difference of emphasis between the two statements, in that Brooke LJ places more weight on the role of the court in determining the 'breadth of meaning' of the words. This may reflect the fact that Auld J was concerned with a decision of the Secretary of State interpreting his own policy. In that context it is understandable that, short of perversity, the court will respect his interpretation of his own words. By contrast, where, as in *Derbyshire* and in the present case, the decision is that of a local authority applying national policy, the importance of consistency of interpretation as between different authorities becomes a significant, additional factor."

However, I note in the consideration that followed, that the court felt free to impose its own interpretation of "replacement" and not "materially larger" for the purposes of PPG2 over that of the planning authority: see paragraph 37.

18. The Camden case was decided after the Raissi case, to which I refer below. It was followed by the Court of Appeal decision in South Cambridgeshire District Council v Secretary of State for Communities and Local Government [2008] EWCA Civ 1010, where Scott Baker LJ said at paragraph 15(ii):

> "Interpretation of policy is the matter for the decision maker. Where the interpretation is one that the policy is reasonably capable of bearing there is no basis for intervention by the court. *R v Derbyshire County Council ex parte Woods* [1997] JPL 958."

There is no indication in either the Camden or the South Cambridgeshire cases that Raissi was cited and it was not considered expressly in the judgments.

19. In these circumstances, there is a clear and consistent line of authority in the Court of Appeal as to the correct approach to planning policies; that is that it is for the court in the first place to construe what a planning policy means, including the breadth and scope of its terms. Subject to that, its interpretation and application to a particular situation and context is for the decision-maker. A planning policy is contextual and should be applied contextually. That is a matter for the decision maker, not the courts, subject to review on normal administrative law principles.

20. Ms Hannett, however, submits that the effect of Raissi is to overrule those authorities and that I should follow Raissi. Raissi was a case concerning the application of

ministerial policy for *ex gratia* compensation for those detained for offences for which they were acquitted or with which they were not charged in the particular case to a person detained for extradition which did not take place. Hooper LJ said at paragraph 106:

> "The issues arising in this court are first whether, as a matter of interpretation, the ex gratia scheme is capable of applying to detention in the context of extradition proceedings or is limited to detention following wrongful conviction or charges under domestic law. If, as the Divisional Court held, it does not apply to extradition proceedings, that is an end to the matter. If it does, the second issue is whether there is evidence of serious default on the part of the Metropolitan Police and/or the CPS which the Home Secretary ought to consider. Ouseley J was of the view that this point was unarguable. We have given permission for the point to be reopened. The third issue is whether (if the application fails under the serious default provision) the circumstances of this case are so exceptional that the Home Secretary ought to reconsider the application under the second paragraph of the scheme."

21. He then considers certain authorities in that field and comes to the planning cases at paragraph 119, having referred to the textbook by Michael Fordham, the *Judicial Review Handbook*. He continues:

> "119. As Mr Fordham shows, in planning cases, some cited by Auld LJ, the courts have in the past tended to ask only whether the meaning attributed to the words of the policy was a reasonable one. There are similar statements in immigration cases, although the modern appellate system in which the tribunal reconsiders the appeals afresh is likely to mean that the proper interpretation of policy will be decided by the tribunal."
>
> 120. Even in planning cases the courts are not unanimous..."

He then goes on to refer to the passage in the judgment of Sedley LJ in the Sainsbury case. He continued at paragraph 122:

> "We have some difficulty with the reasonable meaning approach. One presumes that, if the minister has applied a meaning to some part of the policy, then the minister, without announcing any change in the policy, could not in a later case adopt another meaning, arguing that both meanings are reasonable and it is up to him or her to choose which meaning to use in any particular case. If that is right, then the reasonable meaning approach would only benefit the minister when interpreting the meaning of a particular part of the policy for the first time.
>
> 123. We have reached the conclusion that *McFarland* does not prevent this court from deciding what the policy means. To that extent we disagree with the Divisional Court. We shall use the *Webb* test, whilst

accepting that it could be worded in a more modern way."

22. The Webb test is from the judgment of Lawton LJ in R v Criminal Injuries Compensation Board ex parte Webb [1987] QB 74 at 78:

> "This entails the court deciding what would be a reasonable and literate man's understanding of the circumstances in which he could under the scheme be paid compensation..."

23. For my part, I do not see anything in the judgment in Raissi which purports to overrule the general approach to planning policies in planning cases to which I have referred above and in my judgment the proper approach should remain as set out in Woods. However, for the reasons I explain below, in the present case I do not believe that anything turns on which test is in fact applied.

Submissions

24. Ms Hannett submits on the first ground in respect of the functional test that it is clear from the Inspector's conclusions that any need for the dwellings would arise with the expansion of the herd. She refers to paragraph 14 of the decision letter. Therefore, she submits, it is an inescapable inference that there was no existing functional need at the date of the decision. The functional test is specific at paragraph 3(i) that there must be a clearly established existing functional need; indeed the policy emphasises "existing". Paragraph 4 in elaborating on that requirement uses terms couched in the present tense. However, it is clear that this Inspector treated existing as including a future contingent need. That was a misapplication and misunderstanding of the policy and should be rejected on both the Raissi and the Woods approach. It was wrong and in any event unreasonable.

25. As to the unilateral undertaking, she submits that paragraph 25 of the decision letter makes clear that the Inspector's conclusion that the functional and financial tests were satisfied was contingent on the expansion going ahead. At paragraph 29 he relied on the section 106 obligation to provide that safeguard. However, the obligation only prevented occupation until one of the buildings had been constructed and was made ready for use. That provided no guarantee whatever that the expansion as a whole would have proceeded. The building could be constructed and not used or put to some other agricultural use not supporting the functional test purpose. At paragraph 24, she submits, the Inspector postulated a condition to preclude occupation before the stock housing was ready for use but he never imposed a condition to that effect. The agricultural occupancy condition was unspecific to the particular purpose on which the functional test was supported and so either the Inspector misunderstood the effect of the obligation or he acted perversely in relying on it. On either basis the decision was flawed.

26. As to the financial test, Ms Hannett submits that the requirement in PPS7 for the financial test was focused on the particular unit and activity concerned which should be limited to the particular unit at New Manor Farm. In paragraph 8 of the Annex, the reference to the unit and to the enterprise concerned should also be interpreted in that

sense. The critical question was whether the goat enterprise would be financially viable. Here there were no accounts or figures for the goat enterprise, let alone for the expanded enterprise which itself was in the future. The current figures were only estimated and the future estimates left out the capital costs. In these circumstances, either the Inspector had no proper or relevant financial evidence for his conclusion that the financial test was met or that conclusion was perverse.

27. Mr David Blundell, who appears for the first defendant, submits as follows. As to the functional test, the correct understanding of existing functional need is need which is arising at the present time. The Inspector was fully entitled to conclude that there was an existing need in the light of the evidence before him, including (1) the present need for the business to expand; (2) the existence of planning permission for the buildings required for that purpose; (3) the evidence accepted by the Inspector, that that was the intention of the second defendant so as to implement the provision and proceed with the expansion; and (4) that he could only do that with suitable on site worker accommodation.

28. He submits that the objective of the test is to avoid abuse through speculative proposals. That is plainly not this case, as found by the Inspector. It would also be inconsistent with other policies in PPS7 to support economic activity and growth while protecting the countryside and rural areas if the more narrow or constrained approach was taken. The claimant's interpretation is one that fails to respect its context or purpose. There was, he submits, no error in the Inspector's approach.

29. As to the unilateral undertaking, he draws attention to paragraph 3 of the decision letter, where the Inspector set out the relevant provisions of the obligation. Therefore, he submits, he clearly had its provisions in mind.

30. The Inspector concluded on the evidence that the dwellings would not be constructed before the enterprise was expanded. He had evidence to support that conclusion, including as to the existing need for expansion, the intention to proceed with it, the fact that the project was financially attractive and would lead to increased margins and the fact that the dwellings would not be occupied until one of the buildings was constructed and ready for use, itself a financial commitment. That was also consistent with the timing of the requirement for additional staff on site as set out in paragraph 14 of the decision letter.

31. There was, he submits, no flaw in his reliance on the section 106 obligation as part of this analysis in leading to his overall conclusion that was supported on the evidence as a whole or in not imposing a specific condition preventing occupation of the agricultural dwellings before both agricultural buildings were constructed. It was a matter of planning judgment for the Inspector.

32. As to the financial test, the Inspector was entitled to rely on the evidence that the majority of the business earnings arose from livestock, of which the goat enterprise comprised some 95 per cent. Coupled with the overall farm accounts, there was ample evidence for the conclusion of the Inspector that the financial test was met, reinforced by the accountant's verification and support. Mr Blundell also refers to the decision in

Petter and Harris, to which I have referred earlier, as supporting a flexible or purposive approach to applying the financial test under previous but similar advice in Annex 1 of what was then PPG7. Thus he submits that Inspector's approach and his conclusions are not to be criticised.

Consideration

The functional test

33. Taking the approach which I set out earlier in this judgment, I start by considering the scope of the relevant policies in PPS7 as properly understood. In doing so, I accept that any construction of the policy should be contextual and have regard to its purpose. In that respect, the purpose of the guidance in Annex A of PPS7 is to safeguard the countryside from isolated new homes, whilst allowing for accommodation where it is essential to support agriculture and other rural based enterprises. This is reflected in the overall introduction to the annex in paragraphs 1 and 2 which I have set out earlier where in particular it draws attention to the needs of the enterprise and the importance of safeguarding against abuse.

34. It is convenient at this point to deal with the meaning of the expression "enterprise" which is used at a number of points in the annex. Mr Blundell submitted that it should be seen as referring to the overall farming business. Ms Hannett submitted it should be seen as the particular project or scheme for which the dwellings were said to be essential. In my judgment, for the purpose of the Annex, "enterprise" is used to refer to the particular project which is said to underpin the requirement. That is supported by the references in paragraphs 1 and 2, to which I have referred. First, paragraph 1 refers to people engaged in the enterprise. Paragraph 2 goes on to refer to the need of "the intended enterprise". That seems to me to fit more naturally with an interpretation that it was the particular project or scheme rather than the whole farm business or undertaking. That also seems to me to be clear from subsequent references, including in paragraph 4, "essential for the proper functioning of the enterprise"; paragraph 8, "taking account of the nature of the enterprise concerned", which contemplates subsistent based projects for landscape or ecological purposes; and paragraph 12(i), "clear evidence of a firm intention and ability to develop the enterprise concerned"; and (iii) "clear evidence that the proposed enterprise has been planned on a sound financial basis". It is also consistent with the advice on other occupational dwellings in paragraph 15, which I have set out earlier. It seems to me very difficult to treat the use of "enterprise" in these passages as referring to the whole of the farm business or undertaking. Thus I support the approach that Ms Hannett submitted was correct.

35. Returning to Annex A, the advice on agricultural dwellings then follows, at paragraph 3 to 11 dealing with permanent dwellings and paragraphs 12 and 13 dealing with temporary dwellings. By paragraph 3, new permanent dwellings should only be allowed to support existing agricultural activities on well established units subject to the specified conditions. By paragraph 12, if the accommodation is essential to support a new farming activity, whether or not the unit is established or new, should normally be temporary for the first three years, again subject to the specified conditions.

36. Again, there was a difference of view between the parties as to the meaning of "agricultural activity" and "agricultural unit" in the Annex. Mr Blundell submitted that the agricultural activity meant the activity of the whole farm to which the agricultural unit also referred. He submits that this was supported by a purposive construction. Ms Hannett submitted that the farming activity was the particular activity relevant to the claim for need for accommodation and the unit was necessarily limited to the locational unit where the accommodation was said to be required.

37. In my judgment, it is clear that the "agricultural unit" is the relevant economic farming unit for the farm in question. This may be the whole farm or may be an identified part and may comprise a number of locationally discrete operations that are operated as one agricultural economic unit. I see no warranty for restricting the unit to the particular location where the dwelling is said to be required.

38. The "agricultural activity" is an identified activity on the unit. That may be, for example, a form of livestock rearing or arable or dairy. I do not accept that it is necessarily the whole unit. Very often an agricultural unit will be used, as here, for a number of agricultural activities. Thus it is that the agricultural unit and the agricultural activity are treated individually under paragraph 3 and in paragraph 3(iii) as well as in paragraph 12. Similarly, the use of a unit in paragraph 3(iv), 8 and 9 seems to me entirely consistent with the approach I have set out above. I find it very difficult to reconcile the meaning for which Mr Blundell contends with the wording, for example, of paragraph 12, which plainly distinguishes the farming activity from the agricultural unit. I should add that what in a particular case is the enterprise, the relevant agricultural activity or the relevant agricultural unit, will be a question of fact and degree for the decision-maker.

39. Coming then to the functional test, in the first place, by reason of the introductory passage to paragraph 3, the accommodation must be to support an existing agricultural activity and be on a well established agricultural unit. The functional test is explained in paragraph 4 as "whether it is essential for the proper functioning of the enterprise for one or more workers to be readily available at most times". Thus it presupposes an enterprise involving an existing agricultural activity, the functioning of which makes it essential to have workers available at most times.

40. Returning to paragraph 3(i), the functional need must be clearly established, which is a matter of evidence. It must also be existing, which is where the issue arises in the present case. In particular, whether for a need to exist, the particular enterprise that gives rise to the requirement must be in place.

41. The following considerations seemed to me relevant in resolving this question. (1) First, at paragraph 3(i) it is the need which must be existing. It is not to be a future need but it is not the enterprise that necessarily has to be in place. If I propose to expand an existing farming activity and need accommodation for that purpose, I necessarily have to put in place the necessary consents and to secure the provision in advance. Thus the need for that to be done arises in advance of the expansion being completed but it is still a functional need as being essential for the proper functioning of the enterprise for the purposes of paragraph 4 of the Annex.

42. (2) A distinction arises under the Annex between permanent and temporary dwellings. For permanent dwellings, the relevant agricultural activity must exist. Therefore it would not meet the requirement if, for example, there was no current goat herd. That would be a new farming activity which would have to be addressed under the temporary dwelling policy in paragraphs 12 and 13. However, it may be appropriate to support an existing farming activity by expanding it. That would constitute an enterprise and the question would be, for the functional test under paragraph 4, whether the proper functioning of that expansion or enterprise required the attendance of a worker most of the time. Plainly the expansion of existing farming activities is well within the expectation of normal farming economics and planning. If existing need is construed so as to include the requirements of the enterprise, including the steps that have to be taken to provide the accommodation for the additional worker or workers, then the policies seem to cover the situation. If not, then, as Ms Hannett accepted, expansion cannot take place of an existing activity in accordance with the policy other than as an exception to paragraph 3 or with temporary accommodation, although it would not be a new activity for the purpose of paragraph 12. That would be surprising, given that the purpose of the provision is to provide support for existing farming activities.

43. (3) Moreover, that approach is reinforced by the last sentence of paragraph 2 of the Annex, where it states:

> "It will also be important to establish that the needs of the intended enterprise require one or more of the people engaged in it to live nearby."

It is clearly referring to the needs of a future or intended enterprise requiring residence nearby. It seems to me consistent with an approach that recognises a present need for an intended enterprise which is planned but not yet implemented.

44. (4) I do not consider that this leaves the emphasised qualification "existing" without force or meaning. Plainly to exist in this sense there would have to be a current or immediate enterprise that gives rise to the requirement; something in a medium or long term plan would not generally give rise to an existing need. But as here, where there is an enterprise already in hand and intended to proceed forthwith, that could be properly regarded as giving rise to an existing need, albeit in advance of full implementation of the enterprise itself; whether or not the need is existing in this sense would be for the decision-maker to determine on the evidence.

45. (5) Taking a purposive construction, it seems to me that the purpose to which I have referred earlier, to ensure the countryside is protected but concession is made for the essential needs of agriculture and other rural based enterprises, which other policies support, would be met by enabling the needs to be recognised when they arise. A need will often necessarily be for accommodation to be put in place so as to secure the particular project. A construction that recognises needs as existing for an intended enterprise in this sense would well serve the overall purpose. However, I can see no purpose achieved by denying a need that has arisen to make provision for an intended enterprise. It would seem to constrain agricultural enterprise on a somewhat arbitrary basis. Moreover, it would sit ill with the policy for temporary accommodation which is

tied to whether the activity, not the enterprise, is new. In this sense, in my judgment, a construction that allows for present needs of an intended project to be met seems to reflect the good sense of the overall policy framework. The narrow construction would seem to me to lack principle or logic.

46. Thus I conclude that an existing need can include circumstances which establish a need for accommodation to be in place as part of a proposed expansion of an existing farming activity or other enterprise.

47. Turning then to the decision in this case, the Inspector considered the needs of the enterprise in paragraph 13, concluding that there would be a requirement for an additional two on site skilled staff. At paragraph 14, he considered the timing of that requirement, concluding that it would arise very soon after the construction of the additional stock facilities. At paragraph 24, he concluded that there was a functional need for the two dwellings which would exist provided the expansion of the herd proceeded. He went on to conclude that with safeguards the dwellings would not be constructed ahead of a clear functional need. At paragraph 25 he concluded that, as there were satisfactory safeguards in place to ensure that the dwellings would not be occupied should the expansion not proceed, the functional test in PPS7 would be met. Finally, at paragraph 29 he concluded that the unilateral planning obligation would ensure that the dwellings would not be constructed before the expansion of the enterprise.

48. In effect, this Inspector was satisfied that there was a functional need for the enterprise which existed in the sense that on the evidence it was planned and in part permitted. He was also satisfied that in the circumstances the new buildings would only be allowed to support an existing agricultural activity, in circumstances where there was a clearly established existing functional need in that on the evidence the dwellings would not be constructed before that expansion took place. Thus the functional test in PPS7 was met. In my judgment, he was entitled to reach that conclusion on the evidence before him. It was not perverse.

49. I should add that my conclusions would be the same if I had followed the Webb approach of the reasonable and literate man's understanding in Raissi, which in the circumstances of this case in my judgment makes no difference to my overall conclusion.

Unilateral obligation

50. It is plain from paragraph 3 of the decision letter that the Inspector had the terms of the unilateral obligation in mind as he there sets them out. His conclusions in paragraphs 25 and 29 make clear that he was satisfied that on the evidence before him, with the unilateral obligation in place, the dwellings would not be constructed ahead of the functional need arising from the expansion of the herd. That evidence included that the existing farm business was operating at capacity, that permission had been obtained for the farm buildings to be constructed for the expansion and that the expansion would be viable and would significantly increase the profit margins as well as other advantages in reducing reliance on external sources of supply. He had evidence as to the firm

intention to proceed. The section 106 obligation precluded occupation of the dwellings until at least one of the required buildings had been constructed and was ready for use. Thus it required a positive step to commit to the enterprise. On that basis, he was in my judgment entitled to conclude that the cottages would not be constructed in the absence of the expansion proceeding and equally that if the cottages were constructed the expansion would be taking place, giving rise to the requirement. I do not consider that this conclusion reflected a misunderstanding of the section 106 obligation or was otherwise perverse.

Financial test

51. At paragraph 16, the Inspector makes clear that the farm accounts dealt with the whole farming enterprise, but that he had been provided with figures to demonstrate that the major part of the gross margins was from livestock, of which the goat enterprise comprised some 95 per cent. He refers to the accountant's confirmation of viability, including his support for expansion. He also referred to the figures for the goat enterprise as existing and as expanding. There is nothing to suggest that he failed to appreciate that the capital costs were not included in the latter. There was ample evidence in my judgment for the Inspector's conclusion at paragraph 18, that the goat enterprise was well established and financially viable and would remain so when expanded. His approach would fully accord with that commended in paragraph 8 of Annex A, taking a realistic approach to profitability. In my judgment, the criticisms made in this respect are not made out and this ground accordingly also fails. In the circumstances, the claim fails and the application will be dismissed.

52. MR WILLS: My Lord, I am most grateful.

53. THE DEPUTY: May I just find out who is who. Are you Mr Wills?

54. MR WILLS: It is, my Lord.

55. THE DEPUTY: Forgive me. Yes, Mr Anderson, is that right?

56. MR ANDERSON: Thank you, my Lord. The claimant does seek permission to --

57. THE DEPUTY: Well, let us just first deal with the judgment and costs and then we will come to permission later.

58. MR ANDERSON: In principle, the claimant accepts that it is liable to pay the Secretary of State's costs of this matter but there are a number of comments that they wish to make and the overall figure that the claimant thinks should be allowed is £6,000.

59. THE DEPUTY: Right, let me just take it in order. First, plainly application to be dismissed and the claim for costs is by the first defendant.

60. MR WILLS: Indeed so, my Lord. My Lord, might I just check whether you have the latest statement of costs?

61. THE DEPUTY: Well, that is what I want to just check.

62. MR WILLS: It is a trifling amendment, I handed it up immediately prior to the judgment.

63. THE DEPUTY: Yes, amended statement of costs.

64. MR WILLS: The total on the second page of that amended is £7,850.

65. THE DEPUTY: Right. Well, that is fine. Any other application for costs? No.

66. Yes, Mr Anderson, can I come back to you then. I cut you off in mid flow. Shall we deal with the costs? Principle, nothing to say.

67. MS FERNANDES: My Lord, may I just interrupt. There is an application for costs on the part of the second defendant.

68. THE DEPUTY: Right. I would like to deal with the principle of costs first, before we get on, so would you like to make your application?

69. MS FERNANDES: Indeed.

70. THE DEPUTY: And it Ms Fernandes?

71. MS FERNANDES: It is, my Lord.

72. In the first place, I would ask that the application for costs be dealt with by written submissions and not today. Of course, you are aware of the guidance in the Bolton Metropolitan District Council case, which says that in principle the second defendant should not be awarded costs but there are particular features of national importance and interpretation of this policy and a particular significance of this case to the second defendant and his farming enterprise that do, we say, indicate that the second defendant's costs should be awarded.

73. We would like to make those submissions in writing and to be submitted in the next seven days for your consideration. That is my first application.

74. THE DEPUTY: Well, I am just considering it for a moment. I appreciate you were not in the case and I made clear I was not requiring attendance on this occasion by Ms Wigley, I think, who was appearing at the hearing.

75. MS FERNANDES: Indeed.

76. THE DEPUTY: Well, I will hear from -- my problem really is this, that I need to look at costs in the round on this, if you are making that application. You are not in a position to deal with that at this point?

77. MS FERNANDES: My Lord, I am. I have been instructed.

78. THE DEPUTY: I think there is a strong advantage in dealing with it now, so to speak, and particularly, as I think conventionally, this matter having taken place in less than a day's court time, I would anticipate that I ought to be able to assess costs so the matter is finished and completed. I am strongly of the view that we should proceed with your application now. All right.

79. MS FERNANDES: I am grateful. Well, there are just some cases. I would just summarise the Bolton guidance --

80. THE DEPUTY: Do you have a copy of it? I am obviously familiar with it. I think I was in it.

81. MR WILLS: My Lord, I do not have a copy.

82. THE DEPUTY: I will rely on the White Book then, because I think probably -- is it in the White Book?

83. MS FERNANDES: Yes.

84. THE DEPUTY: Is there a White Book in court?

85. MR WILLS: I think it was part of the bundle, the original bundle actually on the part of the second defendant.

86. THE DEPUTY: Right. Then I will -- if it is in there. You are absolutely right, it is in there. Thank you. Yes.

87. MS FERNANDES: It should be -- if you look at the skeleton argument on behalf of the second defendant.

88. THE DEPUTY: Well, I have it.

89. MS FERNANDES: Well, I will just summarise the points from that case. It is that the developer is entitled to their costs only if they can show that there was likely to be a separate issue on which he was entitled to be heard and that means an issue not covered by counsel for the Secretary of State.

90. THE DEPUTY: Well, my only problem at the moment is I seem to have the Court of Appeal judgment. I do not seem to have a House of Lords judgment, because I think the guidance conventionally referred to is in the House of Lords.

91. MS FERNANDES: Yes, my Lord, it is.

92. THE DEPUTY: Can we just proceed on the basis -- are you familiar with the principle?

93. MS FERNANDES: Yes, indeed, the principle that if there is an issue not covered by counsel for the Secretary of State or there is an interest which the developer has which

requires separate representation, in those circumstances, the developer is entitled to his costs.

94. THE DEPUTY: Well, may be.

95. MS FERNANDES: Well, may be, subject to your discretion, since the case has a number of special features and in that particular case, my Lord, you will realise that there were difficult issues raised in relation to the principle of public policy and also the size and the nature and the complexity of a particular development, which was of significance to the developer, and it was on that basis that a departure from the general principle was justified.

96. By analogy, I say this case is applicable -- that those principles of departing from that general principle should be applied. Firstly, the outcome of this case is extremely important to the second defendant, who has an urgent need to expand his goat enterprise in order to meet his contractual commitments. He has those commitments with several large supermarkets and this is not a case of the developer speculating financially on the possibility of planning permission, he has secured planning permission, and instead it is a farming business which has -- at which a crucial planning permission had been put at risk by these proceedings, so it was highly contingent on concrete steps which have already been put in place and taken forward. It therefore was necessary for the second defendant's business to ensure that this case was defended properly and that all the points were covered sufficiently so as to protect his prior planning permissions in place and that the new planning permission was secured in order to further his enterprise objectives.

97. Secondly, the second defendant, I say, needed to be represented and prepare for the hearing, because the second defendant simply did not know how the case would be put and defended, in particular terms, until the Friday before the hearing, and although there was a defence -- a claim lodged in time, it has to be noted that the particular points of the claim were not put forward until Monday 29th June in the claimant's skeleton argument, nearly two weeks after it was due, that being 17th June as a result --

98. THE DEPUTY: That was the claimant's? Whose skeleton was that?

99. MS FERNANDES: That was the claimant's skeleton.

100. THE DEPUTY: And when was it put forward again? You say the Friday before the hearing.

101. MS FERNANDES: It was filed on 29th June, which is two weeks before -- two weeks after it was due and only the Friday before the hearing. As a result, the Secretary of State's skeleton was not lodged until the Friday before the hearing.

102. THE DEPUTY: Right. Let me just get these dates straight then. So the Secretary of State's skeleton last Friday. I think this was heard on the Wednesday, is that right?

103. MS FERNANDES: Yes.

104. THE DEPUTY: And when was the claimant's skeleton filed?

105. MS FERNANDES: 29th June.

106. THE DEPUTY: Right. Thank you. Yes.

107. MS FERNANDES: By which -- and so the Secretary of State's skeleton was not lodged until the Friday before the hearing, by which point the second defendants had prepared their case in the skeleton, which was only lodged and then served on the Monday morning of 6th July. So that time lapse, my Lord, we say did make it difficult to know exactly the case put against the second defendant and the fact that there was some negotiation between the claimants and the defendant was failing to put their skeleton in on time is of no relevance. My learned friend will refer you to the fact that there was some agreement but it does not change the fact that particular points and the precise arguments to be raised at the hearing were not clarified until a later date.

108. Thirdly, the second defendant has a separate interest from the Secretary of State, namely the section 106 agreement and the argument about discretion on that point, and that does set the second defendant's position apart from the Secretary of State and indeed his interest in defending this matter. Lastly, the claimant did raise a new point in the claim form. That is paragraph 13(iv) --

109. THE DEPUTY: Just give me a moment.

110. MS FERNANDES: Skeleton, paragraph 13(iv).

111. THE DEPUTY: Sorry, 13 or 30?

112. MS FERNANDES: Sorry, in the claim form at paragraph 13(iv).

113. THE DEPUTY: The claim form, sorry.

114. MS FERNANDES: And the skeleton --

115. THE DEPUTY: Let us deal with the claim form. Where do you say in the claim form?

116. MS FERNANDES: Paragraph 13.

117. THE DEPUTY: 13(iv). And then the skeleton at paragraph 30?

118. MS FERNANDES: Yes, relating to the lack of information about capital expenditure before the Inspector.

119. THE DEPUTY: You were saying that the G&II did not include capital costs, I think.

120. MS FERNANDES: Yes. So the second defendant also felt it necessary to appear to be able to deal specifically with any points relating to this, which in a way are personal to the second defendant and points which the Secretary of State could not really provide or submit arguments on and it was thought necessary to ensure that the court did not get

the impression that this issue had been specifically raised before and ignored by the Inspector. Instead, it is an issue raised for the first time in these proceedings.

121. Really, in summary, as it happened, the second defendant's imput on this was not ultimately necessary as the issue was not pursued by the claimant at the hearing but it is clear that the second defendant did not know that until we got here to court.

122. Looking at those particular points of that case, against the context of the Bolton guidance, I do say that, because of the features of this case, and also the extensive guidance that you have given in terms of interpretation of this policy, which has significant implications for the farming community, the second defendant was required to attend and does seek his costs.

123. THE DEPUTY: Thank you very much. Mr Anderson, I need not trouble you.

124. Ms Fernandes asks for a second set of costs in this case on behalf of the second defendant, who is the applicant farmer. Ms Wigley appeared at the hearing and in the event her submissions were simply to support the submissions made by Mr Blundell.

125. Taking the principles in Bolton, Ms Fernandes helpfully and concisely relies on four points to establish a need for either an issue or an interest separately to be represented on the second defendant's part. First, that this is not a speculative proposal, it is very important to her client to ensure that the case was defended properly. Secondly, the timing of the skeletons being provided: for whatever reason, as far as the second defendant was concerned, the skeleton for the claimant was only filed on 29th June, when it was due on 17th June, which gave little time to understand how the case would be put and also led to the first defendant's skeleton only becoming available the Friday before the hearing on the following Wednesday. Thirdly, she relies on the particular interest in the section 106 obligation, a point which her client was directly involved, were it to come to a question of discretion or otherwise, and fourthly, what she says is a new point, at paragraph 13(iv) of the claim, relating to the absence of capital costs as part of the gross margin and management figures, to which the Inspector referred.

126. In my judgment, none of those matters amount to a sufficient reason for requiring separate representation of the second defendant within the Bolton principle. I am not satisfied there was either a separate issue or a separate interest that required separate representation. In those circumstances, the application for a second set of costs is refused.

127. I am grateful. Can we then come to assessment of the amended schedule and I think now I am back to you, Mr Anderson, am I not?

128. MR ANDERSON: My Lord, yes, thank you. Just going through it and highlighting a couple of points, the claimant submits that some of the time allocations here are over generous, in particular the attendance on counsel at (a). The claimant suggests one hour should be disallowed, taking that to 1.7 hours.

129. THE DEPUTY: So this is (a), 2.7 hours, you say what?

130. MR ANDERSON: 1.7 hours.

131. THE DEPUTY: So one hour off that. Are you deducting 1.7 or are you saying it should be deducted by one hour?

132. MR ANDERSON: Deducted by one hour, so it would be 1.7.

133. In relation to attendance on others, that 1.5 hours be deducted from 3.5 hours at (a) to give two hours and, in relation to work done on the documents, I think this is particularly because the bundles and that were prepared by the claimant, that the total permitted for work done on the documents be ten hours.

134. THE DEPUTY: Documents. Rather than what?

135. MR ANDERSON: Rather than the 16.7 hours that is presently claimed.

136. THE DEPUTY: So that should be ten.

137. MR ANDERSON: In relation to the attendance on the hearing, I do not think we have in fact included anything for --

138. THE DEPUTY: Do I have a claimant's schedule of costs?

139. MR ANDERSON: My Lord, there should be a claimant's schedule of costs. If you do not, I can --

140. THE DEPUTY: Can you pass it up?

141. MR ANDERSON: I can pass a copy up.

142. THE DEPUTY: Thank you very much. Is there a figure for attendance on counsel here, on your schedule?

143. MR ANDERSON: My Lord, there is not a figure for today's hearing. There should be a --

144. THE DEPUTY: No, I am saying attendance on counsel. I am looking for the equivalent -- there is attendances on party, on opponents, on others.

145. MR ANDERSON: My Lord, my instructing solicitor tells me that must be under attendance on others. There is not a specific --

146. THE DEPUTY: Yes. Is there anything else?

147. MR ANDERSON: My Lord, I think that was the -- other than to say in respect of the costs allowed for attendance at the hearing, whilst obviously my learned friend's costs would be allowed, as the case went short on Wednesday, there should not be any further costs in respect of attendance today.

148. THE DEPUTY: Well, it was necessary to have someone attend on judgment.

149. MR ANDERSON: Obviously, my Lord, yes.

150. THE DEPUTY: Thank you. Mr Wills?

151. MR WILLS: My Lord, I am grateful. My Lord, my global submission is that the grand total figure is not so grand and of course it is a significant sum less than that claimed by the claimant in the event of them being successful. In relation to the specific points made by my learned friend, firstly the figure claimed for attendance on counsel, in my submission the first defendant should not be penalised for particularising that, rather than including it in a perhaps more obfuscatory way in the larger figure, which also includes other attendances. I am instructed that any time that was necessary on that was necessitated by the fact that counsel, my learned friend Mr Blundell, not only was involved in the hearing but also gave advice first and so a certain amount of liaison was necessitated by that process.

152. The second point regarding further attendance, attendance on others, I am instructed that the second defendant entered matters at a fairly late stage. That in itself necessitated a little extra time over and above what would have ordinarily been necessitated.

153. The third point raised by my learned friend with regard to work done on documents, it is submitted that that figure is a reasonable figure and there is no necessity to lower that to an arbitrary round number and, finally, with regard to the hearing going short, I understand that it went short by around an hour and today's proceedings have taken sufficiently long to eclipse that amount. So no reduction should be made for that reason either, my Lord.

154. THE DEPUTY: And attendance on others is on the second defendant, is it?

155. MR WILLS: My Lord, primarily on the second defendant, as I understand it, yes.

156. THE DEPUTY: Thank you. You have no further submissions?

157. MR ANDERSON: My Lord, no.

158. THE DEPUTY: Thank you.

159. I propose to reduce the attendance figure on others to two hours, rather than 3.5, so that is £320 rather than £560, but otherwise I am satisfied with the overall figure of £7,850. Is there a VAT consequence of that reduction? I can just deduct it, can I?

160. MR WILLS: I am instructed there is no VAT consequence, my Lord. Good thinking though.

161. THE DEPUTY: Well, then that means taking off, I think, 240, which I make 7,610. Does that sound right?

162. MR WILLS: Yes, my Lord.

163. THE DEPUTY: Any other applications?

164. MR ANDERSON: My Lord, the claimant does seek permission to appeal against the decision, in particular as regards the interpretation placed on PPS7.

165. THE DEPUTY: Yes.

166. MR ANDERSON: My Lord, I do not, as it were, have any fresh arguments to make other than those -- I need not trouble you at this stage. As Ms Fernandes indeed submitted, it does raise issues of general importance as to the interpretation of that policy, both as to the functional test and as to the financial test. In relation also to the point about the understanding of the unilateral undertaking, my Lord, that also raises an issue in terms of the Inspector's last conclusions that a particular individual would go ahead with the expansion that was the basis for the functional and for the financial test being satisfied, that, I think, was expressly required by the planning obligation itself and, as to whether or not that is sufficient, that is also, I submit, an issue of public importance. On those grounds.

167. THE DEPUTY: I do not propose to grant permission. I am not satisfied there are any realistic prospects of success and the public importance of the issue is not such as to warrant granting permission, given the absence of that realistic prospect. Unless there are any other applications, in those circumstances I will dismiss the application. I will order the claimant to pay the first defendant's costs, which I assess in the sum of 7,610. I refuse permission to appeal.

168. I hope that covers all of the necessary. Thank you very much.