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The Planning Inspectorate
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*FTAO Mr R Nash (Case Officer)*

Your Ref.: APP/W1850/W/16/3148136
Our Ref.: APA/HAYGRO/16/1453

20 June 2016

Dear Sirs

**TOWN & COUNTRY PLANNING ACT 1990 (AS AMENDED): APPEAL BY HAYGROVE LIMITED: TRUMPET FIELDS, ADJ. TO THE A438, TRUMPET, LEDBURY, HEREFORDSHIRE, HR8 2RA.**

We refer to your letter of 6 June 2016, sending copies of the LPA's Statement and Third Party Representations ('TPRs').

This letter and the enclosures constitute the Appellant's substantive response to those documents.

The enclosures herewith comprise:

- A Table of Comparison of Visual Effects, prepared by Carly Tinkler CMLI, the Appellant's Landscape Architect (Annex 1);
- A spreadsheet setting out a rebuttal of the Third Party Representations. (Annex 2);
- Annexes 3, 4 and 5 as identified in this letter below.

The content and purpose of these documents is amplified below.

So far as the LPA's Statement is concerned, the Appellant makes the following comments.

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i) The proposed minor amendment to the Appeal Proposal (Appellant's SoE Para. 3.4.11):

Our records show that the Plan (TFP-008) referred to at 3.4.11 of the Appellant's Statement was sent to the LPA. However, we acknowledge the LPA's claim that this Plan was not in fact received and this Plan (together with an explanatory note explaining its purpose, intended to assist the LPA and the Inspector) has now been enclosed with this correspondence and is also appended to the enclosed Table of Comparison of Visual Effects cited above.

The Appellant concurs that it is for the Inspector to consider whether the Appeal can be determined on the basis of the proposed amendment. In the Appellant's submission the amendment does not fall foul of the judgement in Bernard Wheatcroft Limited v. The Secretary of State for the Environment (or related cases). Thus, the test in 'Wheatcroft' is whether the substance of the application had been altered and so changed that granting it would deprive those who should have been consulted on the changed development the opportunity of such consultation and whether the effect of the amended planning permission would be to allow development that was in substance not that for which permission had been applied. That is clearly not the case in this instance. The increase in the landscaped area on the A438 frontage, whilst significant in its visual impact, clearly involves a minor reduction in the area proposed to be tunnelled, through the staggered foreshortening of a number of contiguous polytunnel rows on the northern edge of the Appeal Site. Such a change is de minimis and could equally well have occurred in the context of the discharge of a planning condition relating to landscaping and or in an amendment to an approved landscaping scheme. Finally, it is not unusual for those utilising this growing technology, such as the Appellant, to make small ad hoc reductions in the precise extent of approved polytunnels on a day-to-day basis for practical and operational reasons.

ii) The Appellant's fallback position: use of cloches as an alternative to polytunnels:

Before we respond to the comments about cloches in the LPA's Statement, it should be understood that cloches are much inferior to polytunnels as a growing technology for soft fruit and are used only as a necessary expedient when polytunnels cannot be used, therefore. Amongst other things they need to be removed when attending to the crop, which cannot be done when it is raining because rain damages the ripening fruit. This heavily constrains cultivation, is time consuming, involves higher labour costs and results in increased crop damage and loss compared to polytunnels. In particular, the fruit cannot be picked in the rain. Furthermore, the crops require more treatment due to a poorer, more humid close environment which causes botrytis rots, resulting in reduced quality and shelf-life of the fruit.

Notwithstanding the commentary in the preceding paragraph, the Appellant regards the LPA's speculation as to the planning status of cloches to be wholly fantastical, unsound and unsubstantiated as a matter of law and is inconsistent with its own policy to date.

Thus, the definitive determination on this issue was the judgement of Mr Justice Sullivan in the High Court of Justice in Regina (on the Application of Hall Hunter Partnership) v. The Secretary of State for the Environment (2006). This was an appeal under Section 289 of the Act against decisions by an Inspector appointed by the defendant dismissing two appeals by the Claimant under Section 174 of the Act relating to a polytunnel development at Tuesley Farm Godalming, Surrey. The Court found the Inspector's conclusions, as set out in his Decision Letter dated 15 December 2005, to be sound in all respects and quashed the Appeal.

The effect of this judgement was to establish that polytunnels, such as those the subject of the instant Appeal, constituted a 'building' requiring planning permission. It is relevant to the claim made in the LPA's Statement that the Tuesley Farm Inspector specifically listed some "portable" items which are ***not*** 'buildings' and therefore do not generally require planning permission when brought on to agricultural land. These include 'low tunnels', 'French tunnels', covers for cherries, pig arks, chicken houses, ***cloches***, huts for agricultural uses, hop poles and polythene sheeting and nets and fleeces for covering plants at ground level. He concluded that such structures did not amount to development as defined in Section 55 of The Act and were not subject to planning control therefore.

It should be noted that the writer of this rebuttal was the Planning Consultant for the Hall Hunter Partnership and a professional witness for its planning appeal in the Tuesley Farm case and can therefore speak with direct knowledge and experience of the case and the issues considered in those proceedings.

Next, we draw attention to the attached (Annex 3) report of the Council's Solicitor to the March 2007 meeting of the Herefordshire Council Cabinet. It will be seen that this is an extensive and thorough report dealing with the consequences of the judgement of Mr Justice Sullivan on the aforementioned appeal, which effectively determined the Council's subsequent policy with respect to farm-scale polytunnels. It will be noted that in its commentary, conclusions and recommendations the Report makes no reference to agricultural structures *other* than polytunnels, including cloches, and thus makes no attempt to assert that such structures should be subject to regulation in future. It is reasonable to conclude that had the Solicitor to the Council considered that cloches (or other agricultural structures) should be conflated with polytunnels in terms of their planning status, then he would have said so.

Subsequently there has been significant use of polythene cloches by farmers in Herefordshire, primarily for cultivating asparagus, but also for soft fruit. The Appellant is not aware of any attempt by the Council to assert that they amount to development requiring planning permission and to bring such structures within the ambit of planning control. (It will be evident that the Appellant is currently using cloches on the Appeal Site as an interim operational measure pending the determination of this Appeal, without any suggestion by the LPA that this amounts to a breach of planning control).

Furthermore, in the case of a proposal for farm-scale polytunnels at Pennoxstone Court, Kings Caple, Herefordshire, the issue of whether the use of polythene cloches constituted an alternative crop covering for soft fruit that did not amount to development requiring planning permission, and thus a credible fall-back option, was specifically considered, in the first instance (at the planning application stage) by the same LPA - Herefordshire Council – as in *this* Appeal and subsequently by the Planning Inspector who heard an appeal against the refusal of planning permission by the Council. It was agreed by both parties and accepted by the Inspector that cloches were not subject to planning regulation and it was accordingly agreed that the Appellant would enter into a S106 Unilateral Obligation (NB: specifically ***not*** a planning condition) prohibiting the use of cloches in those fields where polytunnels were not to be erected. The Inspector's Decision Letter is attached (Annex 4) and attention is drawn specifically to Paragraphs 78 and 79 thereof.

In the submission of the Appellant, therefore, the legal and procedural position with respect to cloches and thus with regard to the fallback position in this case is crystal clear.

In contrast to the evidence set out above, the LPA has offered no objective substantiation for its assertions which amount therefore to nothing more than uninformed speculation, which we strongly suspect is intended to muddy the waters in this case. It is noteworthy that no attempt was made to run this argument in the Delegated Decision Report, or, in the Decision Notice.

In the circumstances, should the LPA seek to perpetuate this line of argument, then the Appellant will insist that the issue be made the subject of full legal submissions by the parties and, if necessary for such submissions to be examined and tested before the Inspector. The Appellant will also seek an award of costs against the LPA for unreasonable behaviour.

iii) Economic issues.

It is clear that the parties agree that the economic impact of the Appellant's business with and without the Appeal development is a consideration. The difference between them lies in the *weight* to be afforded to this consideration in striking the planning balance.

Thus, the Appellant contends that LPA manifestly failed to afford sufficient weight to the economic benefits of the proposed development in arriving at its decision, especially in the context of the limited harm to the character and appearance of the countryside.

In its Statement the Authority apparently seeks to further resile even from the limited weight it afforded to economic benefits in the Officer's Delegation Decision Report. Thus it seeks to construct a case based on what it asserts are the limited additional benefits (to the Appellant's Business and to the local economy) of the Appeal Proposal compared to the existing enterprise. This construction is wholly at odds with the evidence and amounts to misdirection. This includes attempting to put a wholly different construction on the Appellant's evidence.

For the avoidance of doubt, Paragraph 3.5.5 of the Appellant's Statement, in using the word "marginal", was certainly ***not*** intended to suggest, nor was it an 'acceptance', that the commercial and economic benefit of the proposed development are *limited*. Taken in the proper context of the paragraph and the Appellant's evidence overall this should have been apparent to even the most prejudiced reader, seeking to put the most unfavourable gloss possible on the evidence. Marginal in this context was therefore intended to mean *additional* and the rest of the paragraph and the economic evidence submitted by the Appellant at the application stage demonstrate that this additional benefit is very significant indeed.

In the final paragraph on the third page of the LPA's Statement an outrageous and thoroughly improper and misleading attempt is made to dilute the genuine economic and commercial significance the Appeal Proposal, by cobbling together some purportedly factual information and some vague ill-informed speculation about the Company. This argument appears to focus on the total amount of land already cultivated by the Appellant and ignores the crucial fact that the Appellant's case is based fundamentally on a *qualitative* rather purely quantitative need.

By way of categoric rebuttal of this questionable assertion, the ***facts*** are this:

The Company is the sole supplier of British organic berries to leading UK retailers Tesco, Sainsbury's and Waitrose. They also exclusively supply premium organic box schemes run by Riverford Organics and Able & Cole.

The combined market share of UK organic berries sold by these customers is estimated at greater than 90%, as referenced in 3.5.5 of the Appellant's Written Statement of Evidence. The full tunnelled area of the Appeal Site would be 14 ha. This would represent 40% of the Company's total organic berry growing area, at the moment. The Company is most likely to plant only strawberries in the additional area provided on the Appeal Site and this would represent at least 80% of the business' organic strawberry growing area. The Appeal Process is, therefore, of immediate ***strategic*** significance to the supply of UK organic berries and especially organic strawberries in the UK market.

UK organic berries have seen a resurgence in recent years, in line with organic market growth which is growing at 4.9% (Source: Soil Association 2016 Organic Market Report).
The UK berry industry is also experiencing exceptional growth of 18% over the last 52 weeks, with further accelerated growth of 21% over the last 4 weeks (Source: Kantar data, May 2016).

Rabobank estimate that the berry market will grow at least 7% a year over the next 5 years, and have reported that "*the organic berry market is a rapidly growing niche*" with organic berries achieving 34% growth (Source: Rabobank calculations based on Euromonitor, FAOSTAT, Eurostat, 2016). Berries are now the fastest growing sector within the UK fruit market.

So far in the 2016 season, the Company has experienced this combined positive impact. It has sold 60% more organic strawberries than to the same time last year, and this is forecast to continue. The land which is the subject of the Appeal has contributed significantly to the availability of organic strawberries over this period, and will continue to do so, albeit with reliance on significantly less operationally effective cloches, if planning permission for polytunnels is withheld in this case. On the back of this, leading UK retailers are looking to commit to long-term plans with the Company to ensure that the future growth in organic berries can be fulfilled. Having secure long-term plans to fulfil this demand is therefore essential.

The organic berry enterprise represents one quarter of the Company's budgeted farming profit for 2016. This demonstrates the importance of organic farming to the overall operation.

It is also worth noting that the Appeal Site is very rare in its overall suitability. Land which is organic, with water, without soil disease, near distribution and cooling capacity, able to be tunnelled, is very hard to find. Indeed growing soft fruit organically is itself very risky and challenging. At least three other major and otherwise successful UK berry growers have tried and withdrawn from organics due to these site and cultivational difficulties.

The Appeal Proposal is fundamental to the future supply of organic strawberries to the UK. If the Appeal is not allowed the viability of organic UK berries will be under severe question. The only viable alternative source being *imported* organic berries, which would clearly not be a sustainable option

In support of the above rebuttal evidence we attach two letters, respectively from the Soil Association and from Riverford Organic Farmers (Annex 5).

iv) Landscape and visual impact issues.

As noted above Carly Tinkler, the Appellant's Landscape Architect, having now seen the LPA's substantive case, noting in particular that the Authority continues to rely on the landscape and visual analysis, such as it is, that is contained in the Officer's Delegated Decision Report, has prepared a 'Table of Comparison of Visual Effects' (Annex 1). This highlights the differences between the principal parties, specifically in relation to the impact of the proposed development on identified viewpoints.

This rebuttal document is intended to assist the Inspector by contrasting the opposing interpretations of the views on a receptor-by-receptor basis and also to aid him/her in undertaking the Appeal Site Visit.

The Appellant remains of the view that the fundamentally differing approaches of the parties would best be aired and tested before the Inspector, but in the absence of that opportunity, the Table of Comparison will go some way to compensating for that deficiency.

v) Third party representations.

Finally and again as noted above, the Appellant has prepared an itemised spreadsheet rebutting third party objections which is self-explanatory (Annex 2)

vi) Planning Conditions (LPA's Annex 9)

So far as the LPA's comment relating to the alleged breach of planning control is concerned, the Appellant has made it clear that the polytunnels erected for the time being on the Appeal Site will be removed at the end of the 2016 growing Season. This is a temporary expedient, relating to part of the Appeal Site only, and is not intended to amount to the implementation of the development for which planning permission is sought, nor can it be reasonably construed as such implementation. There is no problem with the wording of planning conditions precedent therefore.

We propose the following planning conditions:

1. The development hereby permitted shall be begun before the expiration of five years from the date of this permission.
2. Before a start is made to the erection of any of the polytunnels or to the construction of the reservoir and pond hereby permitted and coincident with the bringing into use of the proposed new vehicular access/egress referred to in Condition 3, the existing vehicular access/egress from/to the Appeal Site and the A438 shall be permanently closed in accordance with the details set on Transport Planning Associates Drawing No. SK03.
3. Before a start is made to the erection of any of the polytunnels hereby or to the construction of the reservoir and pond permitted the proposed new vehicular access/egress from/to the Appeal Site and the A438 as shown on Transport Planning Associates Drawing No. SKO2 including the visibility splays, shall be constructed and brought into use. Thereafter, the accesses shall be maintained such that the visibility splays remain clear and unobstructed above a height of 60 centimetres from the existing ground level at the centreline of the access.

4. The landscaping and ecological enhancement measures set out in Figure 7: Landscaping Proposals and as specified in the Landscape and Ecology Management Plan dated February 2015 shall be carried out in the first planting season after the commencement of development.
5. Any trees or plants that, within a period of five years after planting, are removed, die or become, in the opinion of the Local Planning Authority, seriously damaged or defective, shall be replaced as soon as is reasonably practicable with others of species, size and number as originally approved, unless the Local Planning Authority gives its written consent to any variation.
6. Before the development hereby permitted is commenced details of the design of the proposed pond and raised reservoir, including the earthworks (comprising the grading, shape, profile and height of the works relative to existing ground levels) and the materials to be used and the impact on existing vegetation, undertaken by an appropriate engineer, shall be submitted to and approved in writing by the local planning authority. These details shall include a construction method statement and a risk assessment.
7. The proposed pond and raised reservoir shall be constructed and brought into use before any of the polytunnels hereby permitted are covered in polythene.
8. None of the polytunnels hereby permitted shall exceed a height of 5 metres above the existing ground level.

The LPA's proposed condition 6, requiring removal of polythene coverage of polytunnels during a specified period (15 November to 31 December), is ***not*** acceptable to the Appellant. For reasons of essential operational flexibility, avoidance of water-borne disease and cost, the Appellant requires the facility to keep the polytunnels covered during this period. The Appeal Proposal has been assessed on the basis of year-round coverage, which has no material effect on the landscape and visual impact of the proposed polytunnels. The LPA provides no objective evidence in support of this proposed planning condition.

We look forward to an early notification of the appointed Inspector and to the fixing of the Appeal Site Inspection date.

Yours faithfully,

[redacted]

**Antony P Aspbury**
Director

Encs.