

THE HEREFORDSHIRE CODE OF PRACTICE FOR THE TEMPORARY AGRICULTURAL USE OF POLYTUNNELS

PROGRAMME AREA RESPONSIBILITY: ENVIRONMENT

CABINET

14TH OCTOBER, 2004

Wards Affected

County-wide

Purpose

To consider the future of the voluntary Code of Practice to control the siting of polytunnels in Herefordshire.

Key Decision

This is a key decision because it is significant in terms of its effect on the communities or working in an area comprising one or more wards. It was included in the Forward Plan.

Recommendations

THAT Cabinet accepts the findings and recommendations of the Environment Scrutiny Committee review and agrees to adopt the revised Code of Practice set out at Appendix 1 with the addition of:

- (a) no return to the land which has been covered within two years.
- (b) the Code of Practice to be reviewed every two years or earlier if the legal position dictates.

Reasons

To agree to adopt a revised Code of Practice for the control of use of Poly tunnels within the County.

Background

1. The widespread use of polytunnels by soft fruit growers across the county in recent years prompted the Council to introduce a Code of Practice to regulate those structures which could not be regulated by statutory planning control. The early use of polytunnels clearly fell within agricultural permitted development rights or was obviously temporary in nature. Nevertheless the Code of Practice did not permit such structures where planning permission was required.
2. As this horticultural practice has developed the arguments for and against the need for planning permission have intensified. Until the matter is finally determined by government planning policy or a definitive court ruling, the Council has been advised that its proposal for adopting a Code of Practice represents an acceptable use of its

legal powers.

3. The Code of Practice is intended to introduce benefits to the residential neighbours of growers using polytunnels while offering to the growers an opportunity to participate in a regime of controls designed to protect both their own and wider community interests supporting this successful agricultural initiative.
4. A complaint was made to the Local Government Ombudsman about the Council's policy in relation to this matter and its alleged failure to take appropriate planning enforcement action. The Ombudsman is aware of the Council's review of the matter and has asked to be kept informed of its outcome.

Considerations

Scrutiny Review June 2004

5. On 6 February 2003, Cabinet agreed to adopt a Voluntary Code of Practice to Control the use of Poly tunnels. The policy provided for the operation of the Voluntary Code to be reviewed after 12 months. It was agreed that the Environment Scrutiny Committee be asked to undertake the review.
6. The Member Working Group, established to carry out the Review of the Voluntary Code of Practice, reported on 23 June 2004. The Report, which clearly sets out the process of investigation, the extent of public involvement and consideration of environmental and other effects, concluded with recommendations to amend the Code. Copies of the Review have been circulated to Cabinet Members.

Further Representation and ODPM Advice

7. Since 23 June 2004, the Council has received further representation on the scrutiny committee proposals and consulted the Deputy Prime Minister and First Secretary of State who is responsible for governing policy in relation to these matters.
8. The Office of the Deputy Prime Minister responded on 21 July 2004. This letter advised the proposed revisions to national planning policy PPG7 (now published as PPS7) would not contain advice on how policy would be delivered and that a consultation exercise on the General Permitted Development Order (GPDO) would be the subject of a public consultation exercise later this year.

Revisions to the Code

9. The Environment Scrutiny Committee have, in taking account of representations, recommended a number of changes to the existing code. For ease of comparison the Appendix has been marked up to clearly show the changes proposed. These include:
 - In paragraph 1 revision to the title of the code. Removal of the words "Spanish type" with the word "temporary" added and other minor wording changes.
 - Paragraph 2 places responsibility upon the grower to notify the relevant Parish Council(s), where more than one Parish Council is involved.
 - Within paragraph 3 the main change is to increase the distance of a polytunnel from a dwelling from 30m to 50m.

- Landscape mitigation measures are requested for sites adjacent to an AONB and encouragement is given to more modern plastic materials which cumulatively would have the effect of lessening the visual impact of polytunnels in and adjacent to an AONB.
 - For the first time a 2 year period is specified for the siting of polytunnels in a particular location. Members will note this is one point growers are unhappy about and who have suggested a longer period is necessary.
 - Lastly, in terms of the guidance note, the growers are requested to store unused polythene away from public view with all wastes removed and recycled.
10. Changes have been made to the Polytunnel Checklist to reflect the legal advice and the changes in the notes for guidance. The particular word 'voluntary' is removed from the opening statement. Additional information is requested in some of the boxes and written confirmation is requested that land has been cleared of polytunnels in accordance with the growers details. Finally, an additional box is added with respect to confidentiality.
11. The 'Notice to Herefordshire Council' has been altered only in that a grower confirms the relevant Parish Council(s) have been notified.

Legal Implication

12. Counsel, Mr Timothy Jones, has been asked to advise the Council on the current policy as set out in the Code of Practice. He concludes:

"By far the most relevant authority is Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions (No.2). The other authorities mentioned above are also relevant. It should be noted that Cardiff Rating Authority v Guest Keen Baldwin's Iron & Steel Co Ltd is not a binding authority in planning law. While appeal decisions will often be helpful in seeing how independent expert decision-makers, namely inspectors, have approached the issue, they are not authorities and should not be treated as such.

In itself the Council's current policy is acceptable provided it is recognised that as its first paragraph states, it does not apply where planning permission is required and that in practice it does not constitute the test for determining whether planning permission is required.

The checklist is clearly useful, but in my opinion could be improved by the addition of the following questions: (a) the maximum height of the polytunnels; and (b) whether and if so what services (e.g. water and electricity) are to be supplied to the tunnels. I have no suggested alterations to the policy. It might be of practical use to establish prima facie (but not absolute) thresholds, which would point to planning permission being required. If this is done, I would advise giving the greatest weight to size and duration of presence, while not falling into the trap of giving no weight to physical attachment and mobility."

13. Counsel's advice has been taken into account in drafting the Code recommended at Appendix 1. Separately the Council has reviewed all instances of polytunnel development that has been brought to its attention to decide in each case whether it is development that requires planning permission and if so what action should be taken.

Alternative Options

Alternative Option 1

As set out in the recommendation above, but the siting shall be restricted to 3 years with no return to the same land within 3 years.

Alternative Option 2

As set out in the recommendation above, but the period of no return to be the same on the growing period.

It is assumed in both these options, consistent with the code, that the polythene cover would not be in place for longer than 6 months in any year.

The first and second options arise from concerns expressed by growers and from some representations. The growers have made it clear they wish to use a site for longer than two years but also would prefer not to have any restriction on returning to the same field for further strawberry growing. The view from objectors is that the amount of time a particular field is used should be restricted with the return period being as long as possible.

Risk Management

In view of the legal uncertainty there will remain a risk of challenge. At this stage the Council is advised that the Code of Practice is lawful and represents a reasonable exercise of the Council's relevant powers and duties.

Consultees

Environment Scrutiny Committee

Mr M Don
Mr P Huyton
Mr E Kelly
Mrs S Kelly
Mr H Morgan
Mrs V Morgan
Mrs V O'Neil
Mrs D Penfold
Mr C Wooldridge
Mr A Davison
Mr E Drummond
Mr G Moor
Mr D Price
Mr A Snell
Mr S Stubbins
Mrs B Heavens
Mr Nash

Background Papers

Review of Voluntary Code of Practice to Control the Siting of Polytunnels in Herefordshire –
23 June 2004
Environment Scrutiny Committee Report – 23 June 2004