

GUIDANCE NOTE

For use with the Greater London Authority's Standardised Telecommunications Agreements & Leases to be granted to mobile network operators pursuant to the Electronic Communications Code set out in Schedule 3A to the Communications Act 2003

SUPPORTED BY

MAYOR OF LONDON

Introduction

Londoners need to be able to access digital connectivity to take up increasingly digitally delivered services. Mobile data use is growing at more than 30 per cent a year¹ and this is only set to grow further with the advent of 5G services delivering smart city solutions. Agreements need to be reached for this vital infrastructure to be deployed and deliver the services required by London's businesses and residents.

The Mayor has engaged the British Standards Institution to work with a Steering Group made up of representatives of Transport for London, London local authorities, Cabinet Office, landlords, RICS, British Property Federation, network operators and their partnerships to develop consensus-driven impartial documents and accompanying guidance. This project was inspired by the success of the City of London's Standardised Wayleave Toolkit² and the City of London kindly supported the development of these documents.

The installation of mobile services in London frequently suffers from extensive delay due to lengthy negotiations on leases and agreements. The Standardised Mobile Agreements and Leases (the "Draft Documents") published with this Guidance Note are therefore intended to represent a balanced compromise, that was developed with a wide range of stakeholders, to ensure all parties have the information they need to reach agreement more swiftly and therefore reduce costs.

In December 2017 a new Electronic Communications Code (the "Code") was introduced pursuant to the Digital Economy Act 2017. The Draft Documents were developed to reflect the new Code and are thought to be appropriate at the time of publication. However, it is also recognised that, as with any new legislation, there may be uncertainties in relation to interpretation of the Code, and a link to decisions made by the Upper Tribunal (Lands Chamber) has therefore been provided below. The drafting of, and inclusion or omission of terms within, the Draft Documents has been determined in light of a public consultation, and following considerable deliberation and compromise by the Steering Group.

The Draft Documents and this Guidance Note are provided free of charge on the Greater London Authority website and are intended for use by legal representatives of mobile network operators and their site providers, in London and beyond. The use of these documents is voluntary. They can be adapted and are intended to provide a recognised neutral starting point for discussions, promoting common understandings of key issues for discussion. Parties should consult the Ofcom Code of Practice for further guidance, and a link has been provided below.

¹ https://www.ofcom.org.uk/_data/assets/pdf_file/0007/102004/Review-of-latest-developments-in-the-Internet-of-Things.pdf

² <https://www.cityoflondon.gov.uk/business/commercial-property/telecommunications-and-utilities-infrastructure/Pages/wayleaves.aspx>

Important

Parties using this Guidance Note and/or the Draft Documents for any purpose do so on the strict understanding that:-

1. these documents are provided without liability for the Greater London Authority or any other party. It does not constitute any form of advice or recommendation and is not intended to be relied upon by you in making (or refraining from making) any decisions.
2. in no event shall the Greater London Authority or any other party be liable to any other party for any direct, indirect or consequential loss, loss of profit, revenue or goodwill arising from use of this Guidance Note, or any of the Draft Documents. All terms implied by law are excluded.
3. the contents of the Draft Documents and this Guidance Note do not represent any admission by the GLA or any members of the Steering Group in relation to the interpretation and/or operation of the Code, and are not intended to be used for the purposes of interpretation of the Code and/or the Draft Documents in any dispute, Tribunal / Court proceedings, or otherwise.

It is essential that you seek your own legal and valuation advice from professionals with appropriate experience in relation to telecommunications.

Useful links

- Electronic Communications Code, as inserted at Schedule 3A of the Communications Act 2003 by Schedule 1 of the Digital Economy Act 2017:
<http://www.legislation.gov.uk/ukpga/2017/30/schedule/1/enacted>
- Ofcom Code of Practice: https://www.ofcom.org.uk/_data/assets/pdf_file/0025/108790/ECC-Code-of-Practice.pdf
- Register of persons with powers under the Electronic Communications Code:
<https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/policy/electronic-comm-code/register-of-persons-with-powers-under-the-electronic-communications-code>
- Decisions of the Upper Tribunal (Lands Chamber):
<http://landschamber.decisions.tribunals.gov.uk//Aspx/Default.aspx> - (select Category: 26 *Electronic Communications Code / 27 Interim Rights*)
- RICS draft guidance note - Surveyors advising in respect of the Electronic Communications Code (1st edition):
<https://consultations.rics.org/consult.ti/telecoms/viewCompoundDoc?docid=10929972> (note – at the time of publication this is subject to consultation, and RICS are expected to publish a revised note thereafter)
- City of London Standardised Wayleave Toolkit:
<https://www.cityoflondon.gov.uk/business/commercial-property/telecommunications-and-utilities-infrastructure/Pages/wayleaves.aspx>
- Connected London resources: <http://www.london.gov.uk/connectedlondon>

General guidance

In general:-

1. There are four draft documents, two each for greenfield and rooftop sites. In each case the parties have the option of using a document taking the form of either (a) a lease; or (b) an agreement (the relevant drafts are otherwise in substantially the same form). Parties may prefer the familiarity of using a document describing itself as a lease, and any contract which grants exclusive possession of a demised area may well comprise a lease anyway, regardless of how it describes itself. Alternatively, the parties may prefer to use documents describing themselves as agreements, given that the Code does not require the use of leases (although their use is not prevented).
2. For convenience, this Guidance Note refers to "site providers" rather than landlords, "operators" rather than tenants, and "agreements" rather than leases. However, for the purpose of this note those terms may be used interchangeably, and the adoption of those particular terms should not be taken as a recommendation to use one form of document over any other.
3. You should check that the party contracting as (a) "operator" is in fact an operator with the benefit of Code powers (using the relevant link above); and (b) "site provider" is in fact an occupier within the meaning of Part 2 of the Code (taking legal advice).
4. The draft agreements contain a number of provisions in square brackets, which may require negotiation / need to be determined on a case-by-case basis. In many instances the choice to be made is readily-apparent. However, more detailed guidance on the use of the agreements is set out below.

Guidance on draft documents

Provision	Relating to	Guidance
Access Contact definition / para. 4.2 / para. 10.6	Access Contact	<p>The parties may agree (where appropriate) that it is unnecessary for access notices to be formally served in hard copy. The parties may wish to provide an email address for the Site Provider's Access Contact, to facilitate access for operators and ensure that access notices are seen promptly by the Site Provider. If so, it is important to ensure that necessary changes are made to the access provisions at paragraph 4.2 and notice provisions at paragraph 10.6.</p>
Access Arrangements definition / para. 4.2	Access Arrangements	<p>It is envisaged that the arrangements for accessing a particular site must necessarily be determined on a site-by-site basis, and would therefore either be set out in the definition of Access Arrangements or contained in a separate document (if sufficiently detailed, to be annexed to the agreement). Clearly the requirements are likely to be different for greenfield and rooftop sites. It is for the parties to consider issues such as:-</p> <ul style="list-style-type: none"> • the provision of any access codes / keys by the site provider to the operator; • any health & safety requirements / security procedures; • any limitations on the time of access (e.g. for residential buildings); • whether supervised access would be necessary (e.g. for sensitive / secure buildings), and who should pay for any associated costs; • whether the operator should notify the site provider if the access involves any substantial works e.g. requiring a crane; • the circumstances in which the operator may be required to provide a Risk Assessment and Method Statement; • whether any particular gates (e.g. marked X on the Plan) must be kept locked at all times when not in use; • whether all vehicles must pass through a wheel wash (e.g. marked Y on the Plan) prior to accessing the Communications Site / entering the Site Provider's Property; and • where necessary, any periods for which access should be suspended (e.g. in the exercise of sporting rights). <p>It is important to ensure that any site specific access arrangements are not inconsistent with the operator's access rights at paragraph 4.2 (and if necessary consider amending those accordingly).</p>
Compensation definition	Compensation	<p>Note that the payment of a sum in lieu of compensation pursuant to the agreement may preclude a further compensation payment should the site provider consider that they have suffered any additional loss. You should seek valuation advice from a surveyor experienced in telecommunications.</p>
Electricity Administration Fee definition / para. 3.2.2(b)		<p>If the site's electricity supply is provided via the site provider's supply, which is administered and re-charged by / on behalf of the site provider, then the parties may consider whether it would be appropriate for the operator to pay a sum in lieu of that administrative burden.</p>

Operator's Break Date / Operator's Break Notice definitions / para. 9.1.3 / para. 9.1.4	Operator's break	It is a matter of negotiation between the parties whether the operator should have a break right, and if so when this can be exercised and the period of notice the operator is required to give. The same applies to any right for the operator to determine the agreement if it loses its contract to provide a service to its customers.
Site Provider's Break Date / Site Provider's Break Notice definitions / Para. 9.2.2	Site Provider's break	Similarly, it is a matter of negotiation between the parties whether the site provider should have a break right, and if so when this can be exercised. The proposed notice period has been chosen to run concurrently with the 18 months' notice required pursuant to paragraph 31(3)(a) of the Code, on the basis that there is little point in agreeing a shorter notice period for any contractual site provider's break clause.
Site Provider's Property definition	Site Provider's Property	You should consider carefully the extent of this definition and how it is used in the agreement. For example, it may not be appropriate for this to be the entirety of the land in the site provider's ownership. It may also be that more than one definition for different parts of the site provider's land would be appropriate (e.g. with different parcels of land subject to access / cable rights, interference obligations, site provider's repairing obligations, and in particular lift & shift rights).
Access Route definition / para. 4.2.1	Access Route	The parties should agree an appropriate route, bearing in mind the access rights at paragraph 4.2.1, particularly paragraph 4.2.1(c).
Para. 1.5(e) / para. 5.1.3	Site Provider's costs – requests for consent	Paragraph 1.5(e) should be deleted if Option B at paragraph 5.1.3 is not being used (which would require the site provider's consent for certain upgrades i.e. those which the operator does not already automatically have the right to carry out pursuant to paragraph 17 of the Code).
Para. 1.5(j)	Site Provider's costs – lift & shift	See note on paragraph 10.1.4 below
Para. 2.3	Insurance / service charges	It was considered whether provisions should be included allowing the site provider to recover from the operator a proportion of any insurance & service charges. However, these were deliberately omitted on the basis that the parties could / should determine at the outset the extent to which such sums should be factored into any compensation payment.
Para. 3.3.2	Additional Cable rights	The rights at paragraph 3.3.2 are not explicitly set out at paragraph 3 of the Code. Whilst these rights <u>may</u> nonetheless be imposed upon a site provider by the Tribunal, they are deliberately separated from the rights at paragraph 3.3.1 for that reason. You should take advice on any impact this provision may have upon valuation.

Para. 3.4.1	Wayleaves	Wayleaves granted to third parties are often essential for the operation of a site, and it is recognised that a delay often arises at this stage. It is for the parties to consider a target period within which site providers should complete any such wayleaves, and it is considered that this paragraph contains sufficient protection for a site provider e.g. if the terms being proposed are unreasonable / the obligation is merely to use reasonable endeavours.
Para. 5.1.2	Installation of Equipment	<p>It is intended that the agreement shall refer to drawings and a specification detailing the Equipment to be installed at the outset. The extent to which operators have the right to upgrade that Equipment is a matter of negotiation (but ultimately subject to the Code – see below). However, this paragraph provides clarity, ensures that a site provider does not unknowingly grant a right for the installation of unlimited Equipment, and in particular provides a "benchmark" for the purpose of assessing whether the conditions at paragraph 17(2) and (3) of the Code are met.</p> <p>However, parties should consider any potential impact upon valuation of operators' rights to install Equipment being limited to just that detailed in drawings and a specification, rather than unlimited rights.</p> <p>This provision may require amendment for renewals (i.e. where existing Equipment is to remain in place).</p>
Para. 5.1.3	Upgrade rights	<p>Paragraph 17 of the Code confers an automatic statutory right on an operator who has obtained an agreement conferring Code rights to upgrade that Equipment without needing the consent of the Site Provider or having to pay in order to do so, providing that the conditions at paragraph 17(2) and (3) of the Code are met. This is reflected by Option A.</p> <p>However, the parties may agree to further enhance this position, and so paragraph 5.1.3 provides options – namely:</p> <ul style="list-style-type: none"> • Option B: for the operator to upgrade the Equipment (in addition to the automatic paragraph 17 rights) where the conditions are not met, subject to consent (not to be unreasonably withheld or delayed); or • Option C: an unfettered right for the operator to upgrade the Equipment, which is not qualified by paragraph 17 of the Code. <p>You should take legal advice on this provision, and also on any potential impact upon valuation.</p>
Para. 5.1.3	Notice of upgrade	<p>The parties may agree the inclusion of a requirement for the operator to give notice of certain types of upgrade, such as: <i>"If an upgrade results in any changes to externally visible Equipment, then the Operator shall provide the Site Provider with written notice containing reasonable details of any such upgrade within [28] days of completion of the upgrade."</i></p> <p>Note that making a requirement for notice a pre-condition for upgrades would be void under the Code.</p>

Para. 5.1.4	Additional Equipment rights	The rights at paragraph 5.1.4 are not explicitly set out at paragraph 3 of the Code. Whilst these rights <u>may</u> nonetheless be imposed upon a site provider by the Tribunal, they are deliberately separated from the rights at paragraphs 5.1.1 and 5.1.3 for that reason. You should take advice on any impact this provision may have upon valuation.
Para. 6.3.1	Site Provider's repairing obligations	You should take advice on any potential impact that the site provider's repairing obligation may have upon valuation.
Para. 7.5	Indemnity	<p>It is recognised that indemnity clauses are often hotly-contested and so, whilst paragraph 7.5 sets out a proposal, this may in fact be negotiated between the parties on a case-by-case basis. The points shown in square brackets may need to be discussed in more detail, although this is not necessarily exhaustive.</p> <p>A wider indemnity (in relation to damages etc. arising from any cause associated with the Rights / Communications Site / Equipment) was considered, but was not considered appropriate. This was primarily on the basis that compensation (for loss or damage as a result of exercising the Code rights) would be assessed at the outset of the agreement. However, in any event this does not preclude an operator's liability (albeit in damages) for any breaches of their obligations contained in the agreement.</p>
Para. 7.7	Non-interference by Site Provider	<p>You should take advice on the possibility of the non-interference clause having an impact upon any potential redevelopment, and therefore valuation.</p> <p>Some operators may require a more comprehensive provision, with a right to serve notice upon a site provider requiring the resolution of interference / the ability to determine the agreement.</p>
Para. 8.1	Alienation	Some operators may require more flexible alienation rights (e.g. the ability to charge / wider sharing rights for infrastructure providers). This would be a matter of negotiation between the parties.
Para. 8.2.2	Sharing	<p>Operators have an automatic sharing right at paragraph 17 of the Code (which is subject to the conditions at paragraph 17(2) and (3) of the Code). This provision acknowledges the Operator's right to share use of the Equipment "<i>in accordance with the Code</i>".</p> <p>You should take advice on any potential impact these sharing rights may have upon valuation.</p>
Para. 8.2.2	Notice of sharing	<p>The parties may agree the inclusion of a requirement for the operator to give notice of certain types of sharing arrangement, such as: "<i>If a sharing arrangement provides a right to physical access for any Other Operator, their employees, agents or contractors, then the Operator shall provide the Site Provider with written notice containing reasonable details of any such sharing of the use of the Equipment within [28] days of entering into the sharing arrangement.</i>"</p> <p>Note that making a requirement for notice a pre-condition for sharing would be void under the Code.</p>
Para. 10.1	Lift & shift right	The relevance of a lift & shift right for greenfield sites was discussed, but it was decided that this should be included in the draft agreement, with it being up to the parties whether the provision should be deleted on a case-by-case basis.

Para. 10.1.1	Lift & shift notice period	It is up to the parties to agree an appropriate period of notice for lift & shift.
Para. 10.1.4	Lift & shift cost threshold	It may be appropriate to consider the situations in which it would be reasonable for the site provider to bear any costs associated with lift & shift, rather than the operator doing so by default. The draft assumes that this would be the case where the site provider intends to redevelop, or if the site provider exercises the right in excess of an agreed number of occasions. That threshold [X] is to be agreed between the parties, taking into account the length of the Term, but also bearing in mind that this may continue thereafter pursuant to the Code.
Para. 10.6	Notices	Consider the interaction between this provision, the Access Arrangements (e.g. if it is agreed that the Access Contact may be contacted by email), and paragraph 4.2.

Contributors to the documents

The Mobile Agreement template documents and guidance have been produced with technical expertise provided by Nicholas Vuckovic and Gowling WLG (UK) LLP, working as part of a Steering Group comprised of representatives of the following organisations:-

- Airwave
- British Property Federation
- Brookfield Properties
- Cabinet Office
- Camden Council
- Central London Forward
- City of London
- City of London Law Society Land Law Committee
- Cornerstone
- Eversheds Sutherlands
- Foot Anstey
- Greater London Authority
- Lawrence Heller
- Local Government Association
- London Councils
- MBNL
- RICS
- Telefonica
- Three
- Vodafone
- Westminster County Council
- West London Alliance