

Code reform: better the devil you know?

Proposed new Electronic Communications Code will make life worse for property owners

The government is having another go at reforming the Electronic Communications Code, having failed to do so in the Infrastructure Bill. The new code, part of the proposed Digital Economy Bill, will be a great disappointment to the property industry – unless the government starts listening to the concerns of property owners.

The current code is widely regarded as “one of the least coherent and thought-through pieces of legislation on the statute book” (Lewison LJ in *The Bridgewater Canal Co Ltd v GEO Networks Ltd* [2010] EWHC 548 (Ch); [2010] PLSCS 91).

A digital economy lies at the heart of the UK’s competitiveness on the world stage, and is something we all wish to embrace more than ever in light of Brexit. After a lengthy consultation undertaken by the Law Commission and the Department for Culture, Media & Sport (“DCMS”), we hoped that a new code would make it attractive for all parties to roll out telecoms infrastructure to meet the government’s ambitious targets.

In our view, this draft code will do quite the opposite. The new code will give property owners minimal value, while allowing telecoms operators free rein to share occupation, and change the equipment on sites without having to pay for the privilege.

The government is pressing ahead with

ON TELECOMS

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will be based on an amount the operators wish to spend. This will decimate rental values and income streams for property owners, which is estimated to save the mobile network operators £40m-£50m annually.

In 2015, the government’s last attempt to eradicate poor coverage in rural areas was abandoned after only 16 mast sites were built, at a cost of £150m to the taxpayer.

Assignment and site-sharing

Network operators will be freely permitted to assign and share occupation with other third party operators. This will be for a nil consideration, and given that many of these parties will be code operators, there will be no requirement to obtain the property owner’s consent. As a result, property owners will not have clear visibility on who is occupying. This only

their assignees and third party code operator sharers will have “carte blanche” rights to access the property owner’s land day or night.

This presents a multitude of security issues/threats, not least for local authority and government buildings, schools, prisons, hospitals, airports, national railway and other transport networks, particularly as those attending on behalf of the network operators are rarely direct employees, and are usually four or five tiers removed.

Dispute resolution

The changes proposed will pit the property industry against the telecoms sector and, as a proposed counter-measure, increased compulsory purchase powers look likely to be conferred on code network operators. The government has elected in the first instance for disputes to be referred to the County Court, which is already overwhelmed.

Trouble ahead

The government’s attempts to improve rural broadband will handicap the more vital and valuable urban networks, prompting property owners to reject proposals for new sites, and rid themselves of existing ones, wherever possible.

The change in approach to “no scheme” value will sound the death knell for site

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the new code (the second reading of the bill took place on 13 September). In the absence of any substantive changes sought by the property industry, it is evident that this new code will fail to address the fundamental problems of the current code.

In response to representations made by the property industry, DCMS is of the opinion that the market will find its own level. These are just a few fundamental reasons why it won’t:

Valuation

The current telecoms market allows operators and property owners to negotiate a rent for sites between “willing parties”. The new code will do away with the market rate definition for sites, and instead impose a “no scheme” valuation on both parties.

In effect, telecoms sites will be treated like any other utility and the price for sites

adds to the complexities surrounding telecom sites.

Termination

Future telecoms agreements are to be expressly carved out of the Landlord and Tenant Act 1954 (“the 1954 Act”), although the code will adopt a similar test of the landlord’s intention to redevelop. For redevelopment, the property owner will now have to give a much longer period of notice – the minimum period being 18 months, rather than the six months under the 1954 Act.

This will frustrate developers, investors and housebuilders and will potentially put the 50,000 mast sites that exist across the UK on a direct collision course with the government’s own housing policies.

Site access

Under these new proposals, operators,

acquisition on both sides of the professional divide. And in doing so, the asset class within which telecoms sites fall will be regarded as liabilities with no further explanation.

If the government wants to get this right – and time is ticking – then it must heed the property sector’s concerns before this bill gets any further.

It is quite possible that the new bill will become legislation as early as April 2017. Our advice to property owners and network operators is to conclude all outstanding leases/licences beforehand, as the landscape thereafter could be profoundly different.

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