



RICS professional standards and guidance, UK

# Surveyors advising in respect of the Electronic Communications Code

1st edition, November 2019



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# Contents

<b>Acknowledgments</b> .....	<b>ii</b>
<b>RICS professional standards and guidance</b> .....	<b>1</b>
RICS guidance notes .....	1
<b>1 Introduction</b> .....	<b>3</b>
1.1 Context .....	3
1.2 Purpose .....	3
1.3 Scope .....	3
<b>2 Parties impacted by the Code</b> .....	<b>4</b>
2.1 Site providers .....	4
2.2 Operators .....	4
2.3 Infrastructure providers .....	4
2.4 Additional key stakeholders .....	4
<b>3 Professional behaviour and competence</b> .....	<b>5</b>
3.1 Ofcom code of practice .....	5
<b>4 Categories of electronic communications networks</b> ..	<b>7</b>
4.1 Types of networks .....	7
4.2 Types of infrastructure installations .....	7
<b>5 Planning considerations</b> .....	<b>9</b>
<b>6 Agreement structure</b> .....	<b>10</b>
6.1 Term of the agreement .....	10
6.2 Break options .....	10
6.3 Payment and rent reviews .....	11
6.4 Alterations, upgrades and sharing .....	19
6.5 Assignment .....	19
6.6 Indemnities .....	20
6.7 Access .....	21
6.8 User clause .....	22
6.9 Costs .....	22
6.10 Redevelopment .....	24
6.11 Removal and restoration .....	25
6.12 Dispute resolution .....	25
6.13 Tribunals .....	25
<b>7 References</b> .....	<b>26</b>



# RICS professional standards and guidance

## RICS guidance notes

### Definition and scope

RICS guidance notes set out good practice for RICS members and for firms that are regulated by RICS. An RICS guidance note is a professional and personal standard for the purposes of *RICS Rules of Conduct*.

Guidance notes constitute areas of professional, behavioural competence and/or good practice. RICS recognises that there may be exceptional circumstances in which it is appropriate for a member to depart from these provisions – in such situations RICS may require the member to justify their decisions and actions.

### Application of these provisions in legal or disciplinary proceedings

In regulatory or disciplinary proceedings, RICS will take account of relevant guidance notes in deciding whether a member acted professionally, appropriately and with reasonable competence. It is also likely that during any legal proceedings a judge, adjudicator or equivalent will take RICS guidance notes into account.

RICS recognises that there may be legislative requirements or regional, national or international standards that take precedence over an RICS guidance note.

## Document status defined

The following table shows the categories of RICS professional content and their definitions.

### Publications status

Type of document	Definition
<i>RICS Rules of Conduct for Members and RICS Rules of Conduct for Firms</i>	These Rules set out the standards of professional conduct and practice expected of members and firms registered for regulation by RICS.
International standard	High-level standard developed in collaboration with other relevant bodies.
RICS professional statement (PS)	Mandatory requirements for RICS members and RICS-regulated firms.
RICS guidance note (GN)	A document that provides users with recommendations or an approach for accepted good practice as followed by competent and conscientious practitioners.
RICS code of practice (CoP)	A document developed in collaboration with other professional bodies and stakeholders that will have the status of a professional statement or guidance note.
RICS jurisdiction guide (JG)	This provides relevant local market information associated with an RICS international standard or RICS professional statement. This will include local legislation, associations and professional bodies as well as any other useful information that will help a user understand the local requirements connected with the standard or statement. This is not guidance or best practice material, but rather information to support adoption and implementation of the standard or statement locally.

# 1 Introduction

## 1.1 Context

The electronic communications sector has witnessed dramatic evolution both in terms of the development of new technologies and the demand for services. This has resulted in a profound shift in the way digital electronic communications are deployed, accessed and used. The government acknowledged this by enacting the *Electronic Communications Code* (referred to from hereon as the 'Code') at the end of 2017, as part of the *Digital Economy Act 2017*, to facilitate the delivery and maintenance of high quality digital electronic communications infrastructure and to accommodate future technological development.

The Code regulates the relationship between electronic communications network operators, infrastructure providers and site providers throughout the UK and provides a statutory framework for establishing agreements to place, operate and maintain electronic communications apparatus on land and property. Typically, the Code supports services such as television and radio (both analogue and digital), fixed broadband connections to premises, mobile broadband, voice and text services, cable television and landlines. It provides the legal framework for the roll-out, operation, maintenance and removal of physical electronic communications apparatus and infrastructure to support the provision of these, and any other electronic communications services, across the UK.

## 1.2 Purpose

The aim of this guidance note is to highlight the main factors to consider that may influence or impact the variety of roles a surveyor may be called on to perform within this environment. Given the dynamic nature of the industry, it is not intended to provide an exhaustive body of guidance but to identify the main issues that are likely to arise. This guidance note will also provide a point of reference for surveyors when advising their clients.

The government's objective is to achieve the right balance of interests between site providers, electronic communications providers and, most importantly, the public interest in access to a choice of high-quality electronic communications services, with a competitive and sustainable modern digital communications infrastructure.

## 1.3 Scope

This guidance note is intended to assist surveyors advising clients in relation to electronic communications networks and installations that fall under the scope of the Code, whether or not their client is a Code operator, an infrastructure provider, a site provider or other entity.

Schedule 2 of the Code contains transitional provisions that the practitioner should familiarise themselves with in the context of subsisting agreements entered into before the Code was revised. This guidance note is not intended to address those transitional provisions in detail.



## 2 Parties impacted by the Code

There are several parties that are most likely to be directly affected by the revised Code and involved in negotiations relating to the Code.

### 2.1 Site providers

Site providers are typically acting in the capacity of grantor, landlord or (rarely) vendor. These parties may have a wide variety of legal interests in the land or building, such as a freehold interest, a long leasehold interest, a short leasehold interest, a reversionary leasehold interest or a less permanent right to occupy, such as a tenancy or a licence to occupy. Site providers can have varying levels of experience and expertise in dealing with property matters or electronic communications. Landlords can range from rural farmers and individual building owners to fund managers; and from small businesses to large corporations spanning both public and private sectors.

### 2.2 Operators

Operators usually act in the capacity of grantee, tenant or (rarely) purchaser. These parties may be Code network operators, i.e. parties upon whom The Office of Communications (commonly known as Ofcom) has conferred Code powers on under section 106 of the *Communications Act 2003*, or non-Code network operators, i.e. operators without Code powers. An up-to-date register of persons with powers under the Code can be found on Ofcom's website.

### 2.3 Infrastructure providers

These parties may act as both grantor (landlord), grantee (tenant) and also purchaser/vendor as they may have rights to sites on both a freehold and leasehold basis. These parties may be Code operators under the Code, as they will be providing an 'infrastructure system' as defined in paragraph 7(1) of the Code for use by electronic communication networks. They may also be non-Code network operators providing infrastructure but are not authorised by a direction under section 106 of the *Communications Act 2003*. It is also worth noting that in paragraph 108 'land' does not include electronic communications apparatus. This means that a Code operator cannot assert Code rights against electronic communications apparatus; this was reaffirmed in *Cornerstone Telecommunications Infrastructure Ltd v Keast* [2019] UKUT 116 (LC).

### 2.4 Additional key stakeholders

Additional key stakeholders include the end consumers of services, central and local government, the general public, the communications regulator (Ofcom), members of professional bodies and other industry and trade bodies operating in the electronic communications sector.

## 3 Professional behaviour and competence

The electronic communications sector is complex and dynamic, and it is important that prior to accepting instructions, surveyors should consider whether they have sufficient knowledge and understanding of all matters relating to the instruction to be able to carry out their duties to the required standard. The nature of this sector means that it is likely to impact surveyors from a wide variety of disciplines and those practicing in a multitude of environments.

In terms of professional behaviour and conduct, all RICS members are bound by the RICS *Rules of Conduct* and must comply with the RICS professional statement, *Conflicts of interest*.<sup>1</sup> This includes compliance with the International Ethics Standards<sup>2</sup> and the five ethical standards defined in the RICS Global Professional and Ethical Standards.<sup>3</sup>

The importance of professional engagement by RICS members representing parties on all sides, in matters relating to the new Code, is emphasised. Where a valid claim for a Code agreement has been made, any reluctance of parties to engage in dialogue or negotiation can result in frustration and a deterioration in working relationships. RICS members should not allow conflicts of interest to override their professional or business judgment and obligations, but act with integrity at all times.

It is an RICS requirement that all RICS-regulated firms operate a complaints handling procedure (CHP) and should be prepared to provide a copy of the procedure when requested. All members are expected to provide a proper standard of service pursuant to rule 5 of the RICS *Rules of Conduct for Members*.<sup>4</sup> If a complaint is received about work being carried out under a contract with an RICS-regulated firm, the firm's CHP should be followed. In the case of a member working through a non-regulated firm, the member should still consider their obligations under rule 5 of the *Rules of Conduct for Members* when addressing that complaint.

### 3.1 Ofcom code of practice

The government has recognised the importance of all parties involved in Code-related matters behaving in a way that fosters good relationships, in order to facilitate the deployment of communications infrastructure. Within the new Code, it imposed upon Ofcom a duty to produce a code of practice<sup>5</sup> that underpins the importance of positive and productive engagement between all parties. This code of practice provides a reference framework for landowners, operators and infrastructure providers to establish, develop and maintain effective working relationships across a range of issues, roles and responsibilities. Its status was emphasised by the deputy president of the Upper Tribunal (Lands Chamber) in *Cornerstone Telecommunications Infrastructure Ltd v The University of London* [2018] UKUT 356 (LC), but the Ofcom protocol is important in all cases – particularly where a site owner is not professionally represented. Anyone advising in respect of Code matters, whether RICS members or not, is expected to comply with the Code with potential consequences where this expectation is breached.

This code of practice provides guidance in the service of notices where the opposing party is deemed to be acting in a dilatory or unreasonable manner. Professionals who encourage clients to delay or act unreasonably will be acting in contravention to the standards of conduct expected by RICS. Save where the client has a genuine reason for resisting the imposition of a Code agreement it should be the aim of RICS members to facilitate reaching a consensual agreement without recourse to the issuance of proceedings under the Code wherever possible.

As stated above, it is important to note that the code of practice along with the RICS behaviours outlined in the RICS professional statement *Surveyors advising in respect of compulsory purchase and statutory compensation, UK* (which has relevance to any compensation assessment forming part of a Code claim) applies to RICS members.<sup>6</sup>

The code of practice also extends to all others acting on Code matters: agents and contractors acting on behalf of landowners, operators and infrastructure providers. It covers all Code matters including negotiations for new agreements and site activities such as installations, upgrades and site inspections. There is an absolute expectation that parties will treat each other professionally and with respect. Furthermore, irrespective of the complexity of the activity or assignment, parties are expected to respond promptly to correspondence and aim to complete the process as swiftly as possible.

This position is also supported by recent case law. In *Cornerstone Telecommunications Infrastructure Ltd v The University of London* [2018] the deputy president of the Upper Tribunal (Lands Chamber) drew attention to written communications described as ‘imperative and threatening’, and criticised the conduct of parties who refused to engage in negotiations. In another instance, an agreement was effectively imposed on the claimant’s terms on the basis that the respondent had decided not to comply with the tribunal’s directions. The tribunal has clearly indicated that it will view failure to engage and act, especially when directed to do so, with displeasure.

Most importantly, the code of practice emphasises that Code-related matters should proceed on a voluntary basis and avoid recourse to the courts. In the event of a court hearing, the extent to which a party has complied with the behavioural expectations set out in the code of practice may be a factor influencing the eventual outcome of an award on costs.

## 4 Categories of electronic communications networks

There are several different networks and infrastructure types that are deployed according to the environment in which the service is either being delivered or received.

### 4.1 Types of networks

The list below sets out the broad categories of networks, but it should be noted that many operators use a mix of these – and in some cases all – to deliver their services.

#### 4.1.1 Fixed-line

Fixed-lines are typically made of copper, co-axial or fibre optic wires and cables that may be run either underground or overground via poles, forming arterial routes between one area and another and connecting the service provider directly with the consumer. Such services include telephony, broadband (wire and fibre) and cable (fibre) television services.

#### 4.1.2 Wireless

Wireless services are delivered by analogue or digital signals transmitted and received through the 'air' by static or mobile devices. Examples include television and radio broadcast, mobile telephony and data and radar.

#### 4.1.3 Satellite

Satellite networks use signals transmitted and received by the combined use of earth-orbiting satellites and ground-based infrastructure. These can range from small receiving satellite dishes on the side of buildings to large earth-station infrastructure delivering telecommunication services worldwide.

### 4.2 Types of infrastructure installations

Installation types vary depending on the service being delivered and the environment in which it is operating. The most commonly identified categories are listed below.

#### 4.2.1 Greenfield

The greenfield category is most commonly associated with mobile networks in rural areas where, for example, a tower or mast has been specifically constructed for this purpose to which equipment is attached. These specifically-constructed structures tend to be located in areas where the availability of suitable buildings or structures is limited or where the service requires specific attributes only provided by purpose-built infrastructure, such as certain terrestrial broadcast installations.

However, greenfield installations can also be located in urban and suburban areas, particularly along transport infrastructure routes.

### **4.2.2 Rooftop**

The rooftop category is typically used in urban environments but can also extend into rural areas where service providers use existing structures such as grain silos and water towers. Equipment is either attached to the building structure directly or mounted on infrastructure, which is itself attached to the building.

### **4.2.3 Street-based**

Street-based refers to installations that may be positioned at ‘street level’ either on land, buildings or street furniture such as outdoor cabinets, telegraph poles and lamp posts.

### **4.2.4 Subterranean**

This category typically relates to wires and cables and associated access chambers, that are buried underground.

### **4.2.5 In-building**

The in-building category includes installations that are designed to deliver a range of services inside a building envelope, such as an office building or a shopping centre.

## 5 Planning considerations

The scope of this guidance note does not extend to a detailed explanation of potential planning issues associated with electronic communications development or the relevant planning legislation and case law. However, there are key considerations for surveyors that provide a backdrop to other Code-related activities and negotiations.

At a national level, the importance of high-quality electronic communications infrastructure to future economic and social welfare is reiterated in government digital strategy and planning frameworks, at both UK and devolved levels.

However, there should be an awareness of the obligation on local planning authorities to balance the need for supporting infrastructure development with the objective of achieving sympathetic design, appropriate to the local environment and circumstances. The ability of local planning authorities to exercise development control is restricted by the grant of planning consent through statutory instruments for much of operators' required infrastructure. The rights of operators to claim this consent varies between UK countries under their General Permitted Development Orders.

- **England:** *Town and Country Planning (General Permitted Development) (England) Order 2015*, as amended.
- **Wales:** *Town and Country Planning (General Permitted Development) Order 1995*, significantly amended by the *Town and Country Planning (General Permitted Development) (Amendment) (Wales) (No. 2) Order 2014* and additional secondary legislation in 2018.
- **Scotland:** *Town and Country Planning (General Permitted Development) (Scotland) Order 1992*, significantly amended by the *Town and Country Planning (General Permitted Development) (Scotland) Amendment Order 2017*.
- **Northern Ireland:** *The Planning (General Permitted Development) Order (Northern Ireland) 2015*.

Each government has provided a detailed, and often complicated, list of restrictions, where operators can deploy their apparatus on a lightly controlled system or where the subjective judgment of the planning authority retains full development control.

Invariably, though, it is the deployment of structures and substantial above-ground infrastructure that is most likely to require greatest sensitivity to planning considerations and their interplay with Code negotiations. Other forms of development, such as additional antennas on existing structures, outdoor cabinets and supporting fixed-line networks, may also fall within the remit of planning deliberations and should not be overlooked.

Changes are being made to these statutory instruments on a regular basis, following the development of new apparatus for new networks. Familiarity with the most up-to-date legislation is required before trying to interpret the actions needed to meet the statutory requirements.

## 6 Agreement structure

The Code is based on the principle of consensual agreement between the parties, rather than compulsion or imposition, and when there is recourse to the tribunal it is to determine the agreement that should be reached. It is the intent that most negotiations should conclude in a voluntary agreement reflecting the freedom of parties to agree to whatever terms they wish. Clearly, though, the process will be conducted against the backdrop of the Code and the likely terms of an agreement that could be imposed by the tribunal were the matter to be referred for determination in the event that consensual agreement cannot be reached.

This section provides guidance on the key areas that are likely to be the subject of negotiation in developing a new agreement, or in relation to an existing agreement. Surveyors will be aware that the rights granted or restricted may have a negative or positive effect on the value of the overall agreement.

It should also be remembered that the rights sought and granted may extend to, or affect, areas other than the area where the electronic communications apparatus is physically located. An example of this would be the provision of power or communications connectivity to the apparatus on a greenfield mast site via cable or line located under or over land outside of the mast compound. Additionally, where mast sightlines need to be maintained, this may impose restrictions that could limit development elsewhere.

As an overall concept, a key Code principle encompassed within paragraph 12(1) is that a Code right is exercisable only in accordance with the terms subject to which it is conferred. Therefore, it is incumbent on the parties and their advisors to ensure that the needs of both sides are clearly addressed and incorporated into any agreement.

### 6.1 Term of the agreement

The surveyor should ensure that the duration of the rights to be granted or acquired are understood by the party being advised and that due thought has been given to any proposed future development, use, expansion or other activities. There is usually an expectation on the operator's part of a long-term commitment and careful deliberation by all parties should be made at the outset as to whether this is feasible in the circumstances. If the surveyor (reflecting on the landowner's future development requirements) believes that a shorter term needs to be agreed with the operator, then the rationale for this needs to be clearly articulated.

### 6.2 Break options

It is recommended that detailed thought should always be given to the need for a break clause. Break options should be reviewed in light of key factors, such as the level of investment in the site by the acquiring party (which is likely to be significant) and any potential redevelopment requirements of the site owner.

Break clauses are also discussed in section 6.10 of this guidance note as they are particularly pertinent when redevelopment is an option.

## 6.3 Payment and rent reviews

The new Code makes separate provisions for both consideration and compensation (as did the previous Code) and these are found in paragraphs 24 and 25 and in Part 14. Consideration is discussed in section 6.3.1 and compensation in 6.3.3 of this guidance note.

Historically, negotiations for new agreements usually focused on a single, all-encompassing payment in the form of an annual rent. Under the new regime, case law suggests that where appropriate this practice is likely to continue (see *EE Ltd and Hutchison 3G UK Ltd v The Mayor and Burgesses of the London Borough of Islington* [2019] UKUT 0053 (LC) where the tribunal considered that the service charge (potentially a compensation item) should be wrapped up in a single annual occupation payment (consideration)). However, and where warranted, a site provider can make later claims for compensation.

The balance of consideration and compensation elements is likely to vary on a case-by-case basis according to the specifics of the subject site under negotiation. Therefore, surveyors need to be clear on how they apportion the different components that make up the overall payment to avoid the risk of double counting.

### 6.3.1 Consideration

By way of background, the government's view in its ministerial statement from May 2016 is that:

‘site providers should continue to receive fair payment (consideration) for the use of their land and that this should be in addition to simple compensation for any damage or loss of value to the land’.<sup>7</sup>

The government also proposed that the revised Code should:

‘limit the value of consideration by changing the basis of valuation to a ‘no scheme’ rule that reflects the underlying value of the land’.

However, the phrases ‘fair payment’ and ‘underlying value of the land’ are not found in either the Code or any judgment made to date under the Code (save by way of citation of the Department for Digital, Culture, Media & Sport (DCMS) publication in May 2016).<sup>7</sup> Further clarification was offered by the government in a debate on the 22 February 2017 (Hansard column 359) when Lord Ashton confirmed:

‘The government are clear that landowners should be paid appropriately for allowing code operators to use their land. That is why the revised Code requires a price to be paid for that use, rather than creating a system where the landowner solely receives compensation.’

Furthermore, as a matter of principle, payment should not include a share of any economic value created by demand for electronic communications services (*Cornerstone Telecommunications Infrastructure Ltd v The University of London* [2018]; *EE Ltd and Hutchison 3G UK Ltd v The Mayor and Burgesses of the London Borough of Islington* [2018] UKUT 0361 (LC)).



In *Cornerstone Telecommunications Infrastructure Ltd v The University of London* [2018] the deputy chamber president stated that:

‘As enacted, however, the Code does not provide for the economic value of the Code rights to be shared in a way originally intended; site owners are to be compensated only for the value of the rooftop or field margin in a ‘no scheme’ or ‘no network’ world, a value which is expected to be nominal.’

Reinforcing this further in *EE Ltd and Hutchison 3G UK Ltd v The Mayor and Burgesses of the London Borough of Islington* [2018] he stated that:

‘The whole premise of the Code is that there is a need, in the public interest, to impose agreements on unwilling parties in return for consideration which Parliament has deemed to be adequate notwithstanding that it is [or] may be significantly lower than would result from an unrestricted commercial negotiation.’

For ease, this disregard is referred to as the ‘no network’ assumption, a term firstly adopted by the tribunal in *EE Ltd and Hutchison 3G Limited v The Mayor and Burgesses of the London Borough of Islington* [2019], partly to distinguish it from the larger ‘no scheme’ principle for compulsory purchase derived from the *Pointe Gourde* principle, and other decisions and statutes.

For RICS members, the starting point is the application of the latest edition of *RICS Valuation – Global Standards 2017* (Red Book Global Standards) that incorporates the International Valuation Standards.<sup>8</sup> All RICS members who provide a written valuation are required to comply with both the professional and the valuation technical and performance standards. In other words, Red Book Global Standards is the starting point for all RICS members whatever type of valuation activity they are engaged in, and there are no exemptions (see PS 1 section 1, paragraph 1.1 and section 5 paragraph 5.1). It is, however, explicitly recognised that statutory requirements (see PS 1 section 4 paragraphs 4.1 and 4.2), such as the use of the particular basis of value specified in the Code, must be followed – this does not involve a departure from the Red Book (see PS 1 section 6 paragraph 6.3).

The provisions of Red Book Global Standards PS 1 and PS 2 are always mandatory where a written valuation is provided. Nevertheless, given the diversity of activity undertaken by RICS members, there is a differentiation between particular types of assignment, where it is recognised that the mandatory application of the Red Book VPS 1–5 may be unsuitable or inappropriate. These exceptions regarding VPS 1–5 are set out in detail in Red Book Global Standards PS 1 paragraph 5. Even though not mandatory in such circumstances, the adoption of VPS 1–5 is nevertheless encouraged where not precluded by the specific requirement or context. If in doubt, it is safer to regard VPS 1–5 as mandatory.

For clarity, therefore, the use of the statutory basis of market value as specified in the Code (which differs from the basis of market value set out in VPS 4) does not by itself constitute a departure from Red Book Global Standards (see PS 1.6).

Even where the mandatory application of VPS 1–5 may be unsuitable or inappropriate for the valuation assignment (see PS 1.5) RICS members are required to comply with PS 1 and PS 2 in all cases where a written valuation is provided.

In many instances, valuers will be providing valuation advice expressly in preparation for, or during the course of, negotiations or litigation, including where the valuer is acting as advocate, which is an exception under PS 1.5.

Market value under the Code differs from market value as defined in VPS 4 section 4 of Red Book Global Standards to the extent that the law requires certain prescribed (special) assumptions to be made including that the right that the transaction relates to does not relate to the provision or use of an electronic communications network. Compliance with the Code's basis of value does not itself constitute a departure from Red Book Global Standards though the requirement to adopt the Code's basis of value must be made clear in the terms of engagement and report for a valuation.

Market value is defined by paragraph 24(2) of the Code as:

'the amount that, at the date the market value is assessed, a willing buyer would pay a willing seller for the agreement:

- (a)** in a transaction at arm's length
- (b)** on the basis that the buyer and seller were acting prudently and with full knowledge of the transaction and
- (c)** on the basis that the transaction was subject to the other provisions of the agreement imposed by the order under paragraph 20.'

This assessment is subject to the following specific provisions of paragraph 24(3):

'The market value must be assessed on these assumptions:

- (a)** the right that the transaction relates to does not relate to the provision or use of an electronic communications network
- (b)** paragraphs 16 and 17 (assignment, and upgrading and sharing) do not apply to the right or any apparatus to which it could apply
- (c)** the right in all other respects corresponds to the code right and
- (d)** there is more than one site which the buyer could use for the purpose for which the buyer seeks the right.'

It is important for surveyors to understand that the assessment of consideration under paragraph 24 is not an assessment under a compulsory purchase regime. The legislation provides for a separate assessment of consideration and compensation. Payment under one or both headings may be applicable depending on the circumstances of each case. The key point is that the asset to be valued is the relevant person's 'agreement to confer or be bound by the Code right (as the case may be)', noting that the definition explicitly refers to the willingness of both parties.

Payments for Code agreements can either comprise a recurring payment or a capital sum. The appropriate agreement terms will normally reflect current practice in the market the property is situated in and matters such as the duration of the agreement, the frequency of rent reviews (if any) and the responsibilities of the parties for maintenance and outgoings will all affect the market rent. The statutory definition under the new Code imports specific assumptions that restrict some of the terms that may be agreed.

Valuers should take care to set out clearly the principal agreement terms that are assumed as these will bear on the opinion as to the market value of consideration whether it is assessing a recurring payment or a single payment.

For surveyors negotiating agreements under the new Code, a challenge will be the initial dearth of evidence of agreements transacted on this new basis (*EE Ltd and Hutchison 3G Limited v The Mayor and Burgesses of the London Borough of Islington* [2019] and *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd* [2019] UKUT 107 (LC)).

Yet, underlying this is the point that all valuations are professional opinions on a stated basis of value, coupled with any appropriate assumptions or special assumptions. A valuation is not a fact. Like all opinions, the degree of subjectivity involved will inevitably vary from case to case, as will the degree of certainty. Most valuations will be subject to a degree of variation (that is, a difference in professional opinion), a principle well recognised by the courts in a variety of jurisdictions.

Ensuring user understanding and confidence in valuations requires clarity and transparency. The general requirement for valuation reports is to refer to the approach or approaches adopted, the key inputs used and the principal reasons for the conclusion reached. This enables the user to understand the valuation figure in context. How much explanation and detail are necessary concerning the supporting evidence, the valuation approach and the particular market context is a matter of judgment and depends on the specifics of the case.

The statutory definition of consideration in paragraph 24 under the new Code has fundamentally changed from the old Code resulting (in the short term) in a reduced level, or even absence, of empirical data on which to base a judgment. In such situations demands placed on valuers can be unusually testing. Although valuers should still be able to make a judgment, it is important that the context of the judgment is clearly expressed.

As with other markets, the issue of transparency plays an important role in smoothing the process of negotiating new agreements in what is an embryonic market. The imposition of confidentiality clauses and agreements, unless there is an overriding commercial or legal requirement, would act against the efficacy of this embryonic market, as they constrict the availability of comparable evidence. This is a matter of concern to many stakeholders, including the DCMS.

### 6.3.2 Possible approaches to valuation

As a starting point it is relevant to bear in mind that the 'market' within this industry differs from, for example, the commercial property market, in one key aspect. Namely that, apart from infrastructure site providers whose business is dedicated to the provision of hosting third-party apparatus or situations where the landowner would benefit from the availability of electronic communications infrastructure, some landowners, whether in an urban or rural context, are likely to prefer not to have third parties of any sort on their property. Therefore, there may be merit in acknowledging the need for awareness that some parties may regard the presence of the apparatus and the rights that go with it as an imposition. Nevertheless, the statutory definition of market value under the Code requires the assumption of a willing seller. This is an important contextual consideration that should shape how negotiations proceed and the terms on which agreements are sought by the operator.

The introduction into the Code valuation criteria of the willing buyer and of a specific transaction on a particular date and terms gives a conventional shape to the exercise to be undertaken. It requires the assumption of a transaction, whether or not one would happen in reality. The transaction is assumed to take place in the open market with all the features present in that market. The making of assumptions, often contrary to the true facts, is a familiar technique in valuations of all sorts. In the case of the Code, the matters that must be assumed, (including the 'no-network' assumption) are absolutely critical to the outcome.

It will be a question of fact in each case what alternative use may be made of the site on the terms imposed, having regard to the no-network assumption. It is potentially likely that an agreement includes a covenant by the operator not to use the site other than for the permitted use of providing a network or infrastructure system. In such a case, despite the narrowness of the permitted use, and following the logic applied in *EE Ltd and Hutchison 3G UK Ltd v The Mayor and Burgesses of the London Borough of Islington* [2018], it is appropriate to have regard to rental values for other uses, even though the only permitted use imposed under the agreement is relating to electronic communications use.

In this case, concerning a rooftop site, there was an implicit acknowledgment that the no-network assumption permitted some notional relaxation of contractual terms that would otherwise limit the permitted use to statutory Code purposes only. Given this position, both parties approached the issue of valuation on the assumption that the rooftop site could be used for open storage.

When considering potential alternative uses, there is a need to assess the strength of the market for that potential alternative use or commodity. Where the commodity is one that, in reality, nobody would bid for, the requirement to assume that a transaction will take place does not oblige the valuer to assume additionally that the market in which that transaction occurs is a competitive one. The valuation hypothesis is a tool for ascertaining the value of the commodity in the market as it exists, subject only to the assumption, which may be contrary to reality, that there is at least one willing buyer in that market. It is therefore essential to consider the true state of the market and to recognise that the notional willing buyer embodies the actual level of demand for the commodity that is assumed to be on offer.

Additionally, the fact that there may be only one bidder in the market does not mean that the price agreed will necessarily be a nominal one. The willing buyer is not able to use the absence of demand to drive the price down to a level at which the seller would not be willing to transact. Both are willing to deal at the market price. Nevertheless, if the characteristics of the premises mean that, in reality, nobody would pay anything for them, the correct conclusion may be that their market value is nominal. It would be wrong to approach the assessment of consideration either on the basis that the absence of competition would necessarily result in only a nominal value, or on the basis that the assumption of a willing buyer would necessarily result in a figure that is more than nominal. The value of the land to the willing buyer will depend in every case on its characteristics and potential uses, and not simply on the number of potential bidders in the market.

While most of the initial cases relating to the new Code have concerned rooftop sites in an urban setting, the logic and approach applied in these cases may be equally relevant to new Code agreements in a rural context. Indeed, there are potentially

many more examples of third-party agreements for uses or commodities that are not related to electronic communications apparatus or infrastructure. In *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd* [2019] the tribunal suggested that transactions in respect of similar rights granted for non-telecommunications purposes would have the advantage of not requiring adjustment to reflect the no-network assumption and might prove useful. These might include activities such as works or site compounds and parking compounds. However, any alternate use value of the subject land will depend on whether there is a realistic prospect of forthcoming planning permission for that use along with interest from those types of user.

Regarding the suitability of a comparable, RICS members are reminded that the land used by many electronic communications installations is relatively small, therefore an appropriate analysis and devaluation methodology is critical (a straight-line pro-rata approach may be inappropriate – *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd* [2019]).

Under the new Code regime, valuers should be extremely careful in approaching the assessment of consideration and compensation. There is likely to be a shift towards explicitly identifying the factors that fall under both these headings to avoid double counting and to ensure all claim headings are properly considered. The case of *EE Ltd and Hutchison 3G UK Ltd v The Mayor and Burgesses of the London Borough of Islington* [2018] clarified the position that compensation for diminution in value of the land under paragraph 84(2)(b) and consideration are sums payable for different things.

Consideration is a one-off or periodic payment representing the value of the right to use the land for the term, on the terms that have been agreed or imposed. It is, as the Code states, the price for the grantor's agreement to be bound by the Code rights (albeit a price determined on assumptions that disregard the purpose that gives the right most of its value). Compensation, on the other hand, is recompense for loss or damage suffered by the site provider as a consequence of the agreement reached or imposed; it is the monetary equivalent of the loss or damage sustained (see section 6.3.3).

To conclude, it is acknowledged that in practice, the valuation assumptions required to be made when assessing the amount of consideration payable prevent the site provider from realising the true value of its land. In reality, the site provider is prevented from realising that portion of the value of its land that is attributable to its suitability for use in connection with the provision of an electronic communications network. However, that does not give rise to a loss for which compensation is payable, under paragraph 84 of the Code. For the purpose of the Code, including for the purpose of determining whether a compensatable loss has been sustained, consideration determined in accordance with paragraph 24 must be taken to be the market value of the rights conferred. RICS members are referred to *EE Ltd and Hutchison 3G Limited v The Mayor and Burgesses of the London Borough of Islington* [2019] where the tribunal sets out a detailed review of the heads of claim in respect of compensation and provides useful guidance as to which of those heads it considered to fall within the remit of 'compensation' under the new Code and those that do not.

### 6.3.3 Compensation

The Code includes principles founded on the long-established compulsory purchase regime in paragraph 25. In *EE Ltd and Hutchison 3G Limited v The Mayor and Burgesses of the London Borough of Islington* [2019], it was agreed that it would be appropriate to borrow the three general conditions set out in *Director of Buildings and Lands v Shun Fung Ironworks Ltd and Cross-Appeal Co (Hong Kong)* [1995] UKPC 7, to support a claim for fair and adequate compensation, as follows:

- there must be a causal connection between acquisition and loss
- the loss must not be too remote and
- the claimant is expected to behave reasonably to mitigate the loss and avoid incurring unreasonable expenses.

However, it should be noted that the application of these principles is specific to Code-related activity and any assessment of compensation should therefore be conducted with specific regard to the Code. Nevertheless, the disregard of electronic communications use found within paragraph 24 relating to the assessment of consideration does not apply in relation to the assessment of compensation.

As an example, the practical impact of matters potentially to be disregarded for consideration valuation purposes may give rise to a separate claim for compensation for loss or damage. The surveyor should, therefore, be alert to the prospect that separate claims for compensation may feature more prominently under the new Code, yet guard against potential double counting. These matters may be dealt with under consideration or indeed in the agreement covenants (see *EE Ltd and Hutchison 3G Limited v The Mayor and Burgesses of the London Borough of Islington* [2019] where it is made clear in paragraphs 136–138 that if the operator agrees to an obligation to make good any damage they cause in the tenant covenant's section of the agreement, then it is unlikely that any compensation will be payable).

Guidance may also be drawn from decisions of the tribunal that have established some practical principles relating to compensation, the main provisions of which are found in paragraphs 84 and 85 of the Code. Within these paragraphs are matters for which compensation may be payable depending on the circumstances. Paragraph 84 (Compensation where agreement imposed or apparatus removed) lists matters such as expenses (including reasonable legal and valuation expenses), diminution in the value of the land, and costs of reinstatement, while paragraph 85 relates to injurious affection to neighbouring land etc.

In *EE Ltd and Hutchison 3G UK Ltd v The Mayor and Burgesses of the London Borough of Islington* [2018] the tribunal offered the provisional view that the list of matters in paragraph 84 is not intended to be exhaustive and suggested that other types of loss or damage may be the subject of compensation. It also recognised in *Cornerstone Telecommunications Infrastructure Ltd v The University of London* [2018] that issues such as noise, disturbance and inconvenience may feature as a claim and that 'where the site provider obtains a significant financial return from hosting an operator's apparatus no doubt problems of this sort are easier to shrug off; where there is no meaningful return to the site provider they may become more difficult to endure'. However, the tribunal has also made the point that there are likely to be some cases where there is no need for compensation because no loss or damage will be sustained as a result of the Code rights imposed.

On specific matters, in *EE Ltd and Hutchison 3G UK Ltd v The Mayor and Burgesses of the London Borough of Islington* [2018] the tribunal has clarified that recoverable expenses and fees are those incurred in seeking to agree terms for a Code agreement. They do not include costs incurred in resisting the imposition of the agreement in principle, or in attempting to compromise the reference itself as these are a matter for the tribunal as costs of the reference.

The tribunal did not disagree with the respondent's claim to compensation for the temporary use of its land at ground level for a working compound and the site of a crane to enable installation of the operator's apparatus. On the other hand, it pointed out that the operator's agreement of the rooftop site would provide exclusive possession and permit the operator unsupervised access and to come and go in the same way as a leaseholder of one of the flats. Therefore, costs incurred by the landlord in shadowing the operator's compliance with their own obligations, to the extent they exceed the management function already taken into account in the assessment of consideration, did not constitute loss and damage recoverable under paragraph 25.

While this case concerned a rooftop, these are nonetheless matters that, to a greater or lesser extent, are potentially applicable to other scenarios such as a greenfield installation in a rural context.

This case also reinforced the need for the surveyor to avoid double counting. For example, the tribunal rejected the inclusion of wear and tear to the common parts as a result of the claimants' presence, the use of fire safety precautions, and a contribution to the cost of future general roof repairs as separately itemised compensation matters. This was because, in determining consideration, the tribunal had already taken wear and tear to the common parts into account (in lieu of a service charge contribution). In addition, the operator would be contractually liable for making good any damage they cause.

Finally, there is nothing to restrict the time when an order for compensation may be made. The tribunal confirmed that such a position is the obvious intent of paragraph 25(2)(b), which allows an order to be made 'at any time afterwards', i.e. at any time after the imposition of an agreement under paragraph 20.

### 6.3.4 Fixed-line versus mobile networks

Although the Code applies to all forms of electronic communications networks, surveyors should consider the extent to which the differences between fixed-line and mobile infrastructure may impact the assessment of consideration and compensation. Under the previous Code different valuation approaches and agreement structures were applied to each and this might continue under the new Code. This reflects the position that in most cases, fixed-line apparatus, especially when underground, is likely to pose less risk of ongoing inconvenience or disturbance to the landowner than infrastructure based above ground. Nevertheless, there are practical issues to consider even with underground apparatus that the surveyor should consider. These may include:

- the land is cultivated for agriculture and so there are concerns that cables are buried at an appropriate depth and accurately marked on plans
- land drainage systems are in place that may be damaged by the proposed works and
- the proposed line of route affects tree roots, either in commercial timber plantations, orchards, historic parkland or amenity planting.

### 6.3.5 Dealing with initial uncertainty

The embryonic nature of the market under the new Code is likely to result in an initial degree of uncertainty for the surveyor. Therefore, it is important that when advising clients on consideration and compensation, surveyors ensure every step of the process includes clear and full explanations of all assumptions made. In this way, clients will be able to fully appreciate the prevailing challenging conditions and negotiations can proceed with the appropriate level of confidence.

### 6.3.6 Rent reviews

The extent to which a new agreement will provide for rent reviews will be a matter of agreement between the parties. The Code states that an agreement imposed by a tribunal may contain provisions for the payment of regular sums or a single lump sum – or some other basis.

Any number of factors can influence the outcome, such as the parties' preferences, the development of the market, the size of the payment and administrative and management considerations. Typically, under the previous Code, agreement structures would provide for regular payment reviews, linked to a market rent or some other basis, such as indexation. In the case of fixed-line wayleave agreements, however, small annual sums might be converted to a single lump sum for similar reasons of administrative ease. It is a matter for RICS members to consider and advise as to the best approach in the specific circumstances.

## 6.4 Alterations, upgrades and sharing

The extent to which the parties can agree to alterations, upgrades and sharing of apparatus should be considered and guided by paragraph 17 of the Code, which sets out an impact and burden 'test' in paragraphs 17(1) and 17(2). Practitioners should familiarise themselves with this guidance as there is a level of subjectivity that is likely to vary from site to site, particularly as this is an untested area (other than within the planning arena). Should the matter be the subject of a formal dispute, the parties will be required to justify their respective positions.

As a matter of good practice, sufficient records of the apparatus should be collated at the outset. A schedule of condition with written and photographic records and as-built drawings of the subject site agreed between the parties may be appropriate to ensure a clear understanding and record of what has been installed both above and below ground.

Access to the installation for the purposes of infrastructure removal and site restoration should also be considered.

Surveyors should note that, as set out above, paragraph 17 should be disregarded in determining consideration, but not compensation, under the Code. Should parties agree to expand 'rights' voluntarily then, to the extent that the expanded rights go beyond the rights set out in the Code, those additional rights would not be captured by this disregard.

## 6.5 Assignment

Assignment should be set against the background of industry consolidation at one end and dynamic technological evolution at the other, facilitated by the release and



re-use of spectrum continually leading to new entities and entrants (network operators). The revised Code recognises this dynamic environment and provides the rights and limitations to be applied to the assignment of Code agreements between Code operators in paragraph 16.

The reference to 'operator' (singular) is to be understood as also including assignments to operators jointly. This is the effect of section 6 of the *Interpretation Act 1978*, but also because in such a case the joint vesting of code rights will mean that the operators will effectively be treated as one.

Paragraph 16 does not restrict the opportunity to enter into a guarantee agreement subject to the terms agreed by the parties.

Surveyors should note that as set out earlier, paragraph 16 should be disregarded in determining consideration. Should parties agree to expand 'rights' voluntarily then they will not be captured by this disregard to the extent that the expanded right go beyond the right to assign set out in the Code.

## 6.6 Indemnities

Indemnity clauses provide a fast-track way for the site provider to be compensated for any losses and liabilities that they incur as a result of the actions or omissions of the operator. Indemnity clauses avoid the lengthy and uncertain route of bringing an action against the operator via the courts. The standard types of indemnities seen in Code agreements usually cover three areas.

- Losses or liabilities suffered by the site provider arising from a breach by the operator in the terms of the Code agreement.
- Protection of the site provider against any losses and liabilities suffered due to the operator being negligent.
- Protection of the site provider against any third-party claims that are triggered by something the operator has or has not done. Operators are unlikely to agree to an indemnity that 'bites' where they have done nothing wrong (known as 'no-fault' liabilities).

There are no specific references in the Code to indemnities or the form they should take, so proportionality and reasonableness should be the guiding principles for the surveyor when negotiating the terms of the indemnity.

RICS members will be familiar with the common law principles around causation, remoteness of loss, the requirement to mitigate loss and the ability to join in others for contributory negligence, which are likely to be introduced into the clause by the operator. This would be to ensure their contractual indemnity is no more extensive than their liability would be at common law. Positive actions or conditions for the site provider to notify the operator of any claims and to consult the operator before settling any proceedings may assist in addressing the concerns of the operator.

The operator might also seek an indemnity from the site provider in some cases, and the principles referred to earlier would apply equally in these circumstances.

It is not unusual for an indemnity being provided by one party to another to be capped at a particular sum, on the basis that the indemnifying party will not be able to obtain insurance to back up the indemnity for an unlimited sum. The level of such a cap is a

matter for negotiation between the parties, taking into account the perceived risks, the parties' financial capacity and status and the availability or otherwise of insurance and location of the site of the electronic communications apparatus.

It should be noted that it is not possible to limit or cap liability for matters involving death or personal injury caused by negligence or for fraud or misrepresentation, so any cap on liability will need to explicitly exclude these.

## 6.7 Access

Access should be considered holistically, to include the whole life cycle of an operational communications site in terms of establishment, maintenance (physical and operational), upgrading and eventually removal or decommission. It is important that these phases are considered at the start of the process. This is because major activities are likely to be infrequent, one-off and require more intensive use (and possibly the presence of large plant), whereas maintenance is likely to be a more regular event, but of limited or potentially negligible impact. Surveyors should also note that using large plant may involve agreements with third-party adjacent occupiers, or the use of adjacent land owned by the site provider.

It is recommended that a site meeting takes place at the earliest opportunity between the parties to agree the 'normal' access route and to consider any alternative routes for potential one-off activities or a set-down area (which is becoming more commonplace). Additional thought should be given to the following:

- installation type, such as greenfield or rooftop
- environment in which the installation is located (remote rural, within or on an operational site such as a water tower, city centre office or residential building)
- surrounding land uses
- proximity to any risks and
- requirement, if any, for specific security measures.

Most electronic communication installations will be carrying emergency services traffic and/or providing critical broadcast or other services that may well be the subject of high availability requirements with contractual penalties attached to them. It is also the case that continuity of the site provider's businesses and activities needs to be maintained; therefore, access arrangements that meet the needs of both parties is key and reinforces the requirement for openness and transparency.

As part of the agreement it is suggested that a clear process is developed for access to each site that not only considers the potential frequency of visits but also how access is to be made (e.g. car, four-wheel drive vehicles, foot, supervision need, etc.). Other site-specific matters such as security, working practices, health and safety implications, the needs of secure or sensitive locations (from nursery schools and hospitals to police stations and scientific or data facilities), interactions with livestock, biosecurity and the identity of visitors should also be addressed. If notification is required, ensure the method and timings are clarified – this can often be dealt with more effectively by way of an addendum to the agreement with provisions updated when necessary by way of agreement between the parties.

The emphasis here is one of practicability and to ensure that the legitimate requirements and needs of the parties are addressed as they relate to site-specific matters. Members'

attention is drawn to *EE Ltd and Hutchison 3G Limited v The Mayor and Burgesses of the London Borough of Islington* [2019] paragraph 141 where it was stated ‘... Responsibility for the safety of the site will therefore fall to the claimants, not to the respondent. They will be entitled to unsupervised access, and to come and go in the same way as a leaseholder of one of the flats. Costs incurred by the respondent in shadowing the claimants’ compliance with their own obligations, to the extent that they exceed the management function already taken into account in the assessment of consideration, are not a loss and damage recoverable under paragraph 25.’

See also Ofcom’s Code of Practice, discussed in section 3.1.

## 6.8 User clause

The technology sector is dynamic and ever-evolving and many services available today were not even contemplated five years ago. Government policy aims to support network operators in the delivery of their services and should therefore be a consideration when negotiating the permitted use under the agreement and the imposition, if any, of restrictions.

RICS members also need to be aware that any attempt to word the permitted use clause in the agreement, in a way that prevents the operator from exercising their right to upgrade (and referred to in paragraph 17 of the Code), is likely to be rendered void by paragraph 17(5) of the Code.

It should be noted that while the use for electronic communication purposes must be disregarded for the purposes of valuing consideration under paragraph 24 (but not compensation), if concerns around user exist it would be sensible for the actual use rights permitted to be clearly set out in the agreement.

Historically, many agreements, particularly wayleave agreements for fixed-line networks, did not include a user clause on the basis that there were not many other uses to which the sites for electronic communications apparatus could be used.

There may be circumstances where ‘interference’ may occur from the deployment of some technologies for existing systems on site. The surveyor should establish whether any such sensitivities exist and ensure that all parties have the required information available to them to make informed decisions.

This term should also be considered in conjunction with paragraph 24(3)(a) that deals with the basis of valuation for rights under the Code.

## 6.9 Costs

It is mandatory for RICS members to confirm the basis of their fees, disbursements and scope of instructions clearly to their client in writing. Should there be any uncertainty as to length of time required or potential complexity involved with the instruction, this should be clearly set out for the client.

Additionally, the obligation to ensure that any fees or disbursements are reasonable lies with the RICS member. Best practice is for the fee quotation for the work being undertaken to be clearly set out in a letter of engagement (LOE) to the client, together with the scope of the instructions and a note of any assumptions that have been taken into account in formulating the fee quotation. The client should be invited to confirm the

fee quotation by signing and returning a copy of the LOE to the RICS member, to be kept on file.

The *Cost of Leases Act 1958* states that, notwithstanding any custom to the contrary, there is no obligation on either party to an agreement to pay the whole or any part of any other parties' solicitor's costs of the lease. It should also be noted that the term 'lease' can be interpreted to apply to any tenancy or subtenancy.

Parties are, of course, free to agree on what basis they 'treat' with one another, which may involve an agreement in respect of costs and fees incurred, for example, surveyors' fees, legal fees and third-party costs (such as mortgagees and their advisors) and disbursements.

However, the following matters should be considered.

- The time and, therefore, the cost of a transaction will usually be directly driven by the complexity, number of parties involved and the specific environment in which it is being conducted.
- Despite the infancy of the revised Code legislation it is up to the RICS member to ensure they are sufficiently cognisant of the new Code rules, and possess the relevant specialist skills and knowledge (see section 3, Professional behaviour and competence). It is inappropriate for the client or any other party to bear any fees or costs to fund the surveyor's education in these matters.
- It is recommended that RICS members provide a transparent and clear basis of any fees or costs that are either to be met in full, or to which a contribution is to be made by the other party to the transaction.
- Any assumptions made on the basis of uncertainty of the environment (such as the infancy of legislation) should be clearly set out at the outset. Should circumstances change there will then be a reference point to assist with identifying where any variation from the original assumptions have occurred. It may also be practical and constructive to consider agreeing a phased approach whereby costs and fees are set out and agreed to deliver specific outputs as the transaction progresses.
- In any event RICS members are reminded that they should ensure their clients understand that they will ultimately be responsible for the payment of fees, and are clear regarding the costs of any matters that may not normally be borne by the other party. This is important should the matter be covered by an imposed agreement under the Code.

The position in respect of costs in connection with a tribunal reference was made clear in *EE Ltd and Hutchison 3G UK Ltd v The Mayor and Burgesses of the London Borough of Islington* [2018] paragraph 122:

'There is no dispute about the site provider's entitlement to reasonable legal and valuation expenses in connection with agreeing the Code agreement. ... As previously mentioned, recoverable fees are those incurred in seeking to agree terms for a Code agreement and do not include costs incurred in resisting the imposition of the agreement in principle, or in attempting to compromise the reference itself (all of which are a matter for the tribunal as costs of the reference).'

While this related to costs on a matter referred to the tribunal and parties are free to agree on how the matter is dealt with via consensual agreements, it might be a 'signpost' to RICS members as to how advisors' efforts should be channelled when they

are being funded by others (also covered in section 6.3.3). More recently, the case of *Cornerstone Telecommunications Infrastructure Ltd v Central Saint Giles General Partner Limited & Clarion Housing Association Limited* [2019] UKUT 183 (LC) discussed the issue of costs at length, in particular considering the proportionality of costs incurred by the parties in relation to the matter in hand.

## 6.10 Redevelopment

The new Code will remove any potential future ‘conflict’ with the *Landlord and Tenant Act 1954* or the equivalent *Business Tenancies (Northern Ireland) Order 1996*; jurisdiction is now with the tribunal to end, continue or change agreements for redevelopment purposes. Paragraph 31(4)(c) of the Code sets out the basis to bring an agreement to an end.

It is expected that all parties enter into discussions and negotiations with mutual transparency and openness. Given the significant investment typically associated with the deployment and installation of network infrastructure, caution should be exercised in terms of negotiating an agreement where there is any tangible prospect or intent to redevelop the subject area in the future or there is an evident likelihood or prospect. Such an outcome could adversely impact all parties unless the agreement is entered into with full transparency. In such circumstances it may well be prudent to pursue an alternative location.

Communication between the parties is essential to ensure there is a clear understanding of intent so that all parties can make clear, informed business decisions. The potential incorporation of electronic communications within a proposed redevelopment may benefit all parties but, if not, the earlier the parties engage the more likely it is that there will be a better outcome for all sides. While matters of notice and counternotice are prescribed under the Code, a good working relationship should always be the surveyors’ goal.

Where there is an intention to redevelop, it is recommended that the landowner is as transparent as possible regarding the extent to which their redevelopment plans are impacted by the presence of the electronic communications apparatus.

If a break clause is to be included, thought should be given as to whether it is ‘triggered’ following a specified event such as the receipt of planning consent to redevelop the site, or a commercial decision is made to provide flexibility to either one or both parties. Break clauses may be subject to specified conditions involving the successful discharging of obligations by one or both parties. These should be reviewed to ensure their practicability and ability to be validated.

Where the future plans for the potential site are uncertain, surveyors should consider including a term within the agreement for temporary or permanent re-siting of the installation under a ‘lift and shift’ provision. The impact on the parties of such a clause should help to determine where the benefits and liabilities lie in negotiating the overall agreement. This is addressed in paragraphs 23(8)(a) and (b) of the Code, which specifically states that a court (if imposing an agreement) must decide if a break or lift and shift should be incorporated into the agreement.

## 6.11 Removal and restoration

Building on the rights and obligations under the old Code, the new Code provides additional clarity in terms of the rights of third parties to require removal.

The surveyor should consider the issues regarding future removal and restoration (reinstatement) from the outset as it is an inevitable part of the site life cycle.

A schedule of condition with written and photographic records and as-built drawings of the subject site agreed between the parties may be appropriate to ensure a clear understanding and record of what has been installed both over- and underground. Access to the installation for the purposes of infrastructure removal and site restoration should also be considered.

A pragmatic approach combined with clear and transparent communication between the parties at the outset may identify that some parts of the installation could in fact remain in situ. Examples can include underground cables no longer in service where more damage would be caused by their removal, and access tracks that are now commonly used by the grantor. If no agreement is reached, the equipment will have to be removed and the site satisfactorily reinstated.

## 6.12 Dispute resolution

The Code makes provision for specific matters, following prescribed paths (including the service of notices) to be referred to the tribunal for determination. Surveyors should also consider in terms of proportionality, time and cost whether other alternative dispute resolution mechanisms should be adopted or incorporated within the agreed terms. The practitioner should be aware of the benefits and limitations of each route when advising their clients.

## 6.13 Tribunals

Many disputes or differences between operators and site providers are referable for resolution by a tribunal. These include whether an agreement for Code rights should be imposed and, if so, on what terms.

- **England and Wales:** these matters presently go to the Upper Tribunal (Land Chamber) and then to the Court of Appeal.
- **Scotland:** matters go to the Lands Tribunal for Scotland and then to the Court of Session.
- **Northern Ireland:** matters still go to the County Court but may in time be transferred to the Northern Ireland Lands Tribunal.

It should be noted that there are still only a relatively limited number of tribunal decisions on the Code, some of which are progressing to appeal. There will be more decisions to come in respect of a number of matters that will hopefully assist and guide all parties in the application and understanding of the Code.

## 7 References

- 1 *Conflicts of interest* (1st edition), RICS professional statement.
- 2 *International ethics standards* (2016), International Ethics Standards Coalition.
- 3 *Global professional and ethical standards* (2017), RICS.
- 4 *Rules of Conduct for Members* (2013), RICS.
- 5 *Electronic communications code* (2017), Ofcom Code of practice.
- 6 *Surveyors advising in respect of compulsory purchase and statutory compensation* (1st edition), RICS professional statement.
- 7 *A new electronic communications code* (2016). London: Department for Culture, Media & Sport.
- 8 *RICS Valuation – Global Standards* (Red Book Global Standards) (2017), RICS professional statement.



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