

The Telecommunications Code - a timely reminder

Throughout the South West it is now a common sight to see a mobile phone mast tucked away in the corner of a field or on top of a building, but with the 3G networks being developed the number of masts required to maintain the networks has increased. Frequently, mobile phone companies offer good rents for relatively small spaces, and people with space to spare may well be tempted by the good returns.

These sites are let under a variety of agreements, ranging from formal business leases to simple licences and agreements. Original licences and leases for older transmitter sites may now be falling due for renewal, and this is where the potential sting in the tail of the Telecommunications Code may become apparent.

It is not widely known that, in addition to the normal protection given to business tenants, mobile phone operators have the protection of paragraphs 20 and 21 of the Telecommunications Code (the "Code"). The Code gives a mobile phone operator additional rights to keep their equipment, including transmitter and any power supply, on the site even if their lease or licence has been terminated. This protection is in addition to any statutory security of tenure given to the operators as business tenants. The Code prevents the removal of the apparatus or equipment even if the right of operator, as tenant or licensee, has come to an end, either due to the expiry of the lease or licence or by the operation of a break notice by the landowner.

If a lease or licence comes to an end, and the parties cannot agree terms for a new lease or licence, it is not possible for a landowner to simply seek the removal of the equipment by serving notice on the operator. If the landowner does serve notice in ignorance of the Code, the operator is entitled (and, in practice, is likely) to serve a counter notice within 28 days to object to having to remove its equipment. The landowner then has to get a Court order to recover possession and the removal of the equipment. It sounds simple enough but the Court will not order the removal of the equipment under paragraph 21 if:



- the landowner can be sufficiently compensated in money; and
- the removal of the equipment will substantially interfere with the services provided by the operator.

In deciding these issues, the Court has to have regard to the principle that no person should be unreasonably denied access to a public telecoms system. Given the importance of mobile phone networks and the fact that good sites are increasingly hard to come by for operators, it is far from certain that the Court will make the order sought. In that case the operator will be entitled to stay.

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In the case of carefully prepared agreements where the landowner has negotiated break clauses to allow them to bring the lease or licence to an end early to allow for redevelopment, the Code still applies, irrespective of the break provisions. If the landowner wants to redevelop under paragraph 20 they will again have to serve notice and, again, the operator can object. If they object the Court will only make an order for the removal of the apparatus if:

- it is necessary to ensure the development; and
- the removal of the apparatus will not substantially interfere with the services provided by the operator.

Remember that this protection is given in addition to the protection given to the operator as tenant or licensee. It applies even if the operator's tenancy or licence is not protected by the Landlord and Tenant Act 1954. If the Court will not order the removal of the equipment, the operator will be entitled to carry on using the equipment and the site. The compensation payable in that case will be an amount equivalent to the diminution in

value of the land (which could be quite small in the case of a corner of a field where the rest of the field can be used as before).

The equipment or apparatus that is protected is not only the mast but also the electricity supply to operate the mast. To confer this protection on an operator, you do not need to have a formal lease or agreement. The agreement has to be in writing but it could simply be a letter setting out the agreement between the operator and the landowner, signed by both parties.

In reality many people who have entered into agreements with operators did so without knowing about the Code. It is only when they seek to recover possession that they become aware of it - when it is too late!

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Occupiers' Liability

The facts of the 2003 House of Lords' case of *Tomlinson v Congleton Borough Council* are a tragic reminder of the responsibilities that landowners owe their visitors, be they invited guests or otherwise.

On a hot May bank holiday in 1995 John Tomlinson ignored notices prohibiting swimming. He dived into a pond in a park owned by Congleton Borough Council and broke his neck. He is now a tetraplegic and unable to walk.

The Court of Appeal held the Council liable on the ground that it knew that the notices were largely ignored by visitors to the park. However, the House of Lords criticised the decision in the Court of Appeal and all five of the Law Lords found that the Council was not liable to Tomlinson.

While the Occupiers' Liability Act 1957 deals with lawful visitors, the Occupiers' Liability Act 1984 provides that landowners owe a duty of care to persons other than visitors, albeit a lesser duty than is owed to invited visitors. Although Tomlinson was a lawful visitor to the park, once he dived into the pond he became a trespasser. The Council cited a famous quip of Scrutton LJ in the 1927 case of *The Calgarth* "When you invite a person into your house to use the staircase, you do not invite him to slide down the bannisters".

The duty imposed by the 1984 Act is against any risk of injury "by reason of any danger due to the state of the premises or things done or omitted to be done on them". Lord Hoffmann remarked that: "Mr Tomlinson was a person of full capacity who voluntarily, and without any pressure or inducement, engaged in an activity which had inherent risk. The risk was that he might not execute his dive properly and so sustain injury. Likewise, a person who goes mountaineering incurs the risk that he might stumble or misjudge where to put his weight. In neither case can the risk be attributed to the state of the premises. Otherwise any premises can be said to be dangerous to someone who chooses to use them for some dangerous activity. In the present case, Mr Tomlinson knew the lake well and even if he had not,

the judge's finding was that it contained no dangers which one would not have expected. So the only risk arose out of what he chose to do and not out of the state of the premises... It follows that in my opinion, there was no risk to Mr Tomlinson due to the state of the premises or anything done or omitted upon the premises. That means that there was no risk of a kind which gave rise to a duty under the 1957 or 1984 Acts."

Lord Hoffmann then went on to consider the conditions which had to be satisfied for liability to arise under the 1984 Act and they can be summarised as follows:

The occupier must be aware of the danger or have reasonable grounds to believe it exists.

The occupier must have knowledge or foresight of the presence of the trespasser.

It must be reasonable to expect the occupier to offer the trespasser some protection against the risk.

The first two conditions were satisfied in that the Council knew that there was a possibility that someone might injure themselves in the shallows of the pond and that swimmers came to the pond. However it is the third condition which is of particular interest.

If the third condition is not fulfilled there is no duty owed to a trespasser under the 1984 Act. Lord Hoffmann stated "even if the risk had been attributable to the state of the premises rather than the acts of Mr Tomlinson, the question of what amounts to "such care as in all the circumstances of the case is reasonable" depends on assessing... not only the likelihood that someone may be injured and the seriousness of the injury which may occur, but also the social value of the activity which gives rise to the risk and the cost of preventive measures. These factors have to be balanced against each other."

One element in the balancing exercise is the cost of the preventative measures. In his Lordship's view two other considerations were of more significance. The first was the social value of the activities which would have to be prohibited in order to reduce or eliminate the risk from swimming. On the facts, this would mean destroying the beaches of the pond on which people sunbathed and children played. The second consideration was whether the Council should be entitled to allow people of full capacity to decide for themselves whether to take the risk. Lord Hoffmann again said, "I think it will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land. If

people want to climb mountains, go hang gliding or swim or dive in ponds or lakes, that is their own affair. Of course the landowner may for his own reasons wish to prohibit such activities... So this appeal gives your Lordships the opportunity to say clearly that local authorities and other occupiers of land are ordinarily under no duty to incur... social and financial costs to protect a minority (or even a majority) against obvious dangers."

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Radical Changes to the Planning System under way

The Planning and Compulsory Purchase Act 2004 (the "Act") has been described as the most important change to the planning system in the last 30 years, particularly as it seeks to make the system clearer, faster and more certain. One of the most fundamental aspects of the Act which has already started to have an effect on the planning system, is the replacement of the current system of Local Plans with a new scheme of Local Development Frameworks.

So what are Local Development Frameworks?

The Local Development Framework is intended to be a "portfolio" of documents which, taken as a whole, sets out the local planning authority's policies relating to the development and use of land in their area. It replaces the existing local or unitary development plan and any linked supplementary guidance.

The Government set a deadline of 28th March 2005 for relevant councils to prepare a Local Development Scheme. This is effectively a programme setting out the documents which will make up the Local Development Framework, with their intended consultation and adoption dates. Most councils have now published their scheme on their website, and this can provide the public with a helpful timetable to the work in progress.

What will these portfolios contain?

The Local Development Framework will contain a variety of Development Plan Documents, such as Proposal Maps and Site-Specific Allocations of Land, and Supplementary Planning Documents which expand upon policies set out in the Development Plan Documents or provide additional detail on their implementation.

One further document which the new Act obliges all councils to include in its Local Development Framework portfolio is the Statement of Community Involvement. This is intended to set out the authority's strategy for public involvement in the preparation of development plans and consultation on major planning applications. Interestingly, the statutory nature of this requirement means that an authority which fails to observe the terms of its own Statement of Community Involvement is potentially open to legal challenge. Development Plan Documents may have to be withdrawn if they are shown not to be compliant with the Statement of Community Involvement.

No more Local Plan Inquiries...

The new Act requires local planning authorities to submit every Development Plan Document to the Secretary of State for independent examination. This takes the form of a modified examination in public, conducted by an independent person ("the Examiner"). This is intended to make the process less formal and more user-friendly, mirroring the Planning Inspectorate's guidance on Planning Inquiries and Hearings. The right to make representations supporting, or objecting to, the document under consideration remains, but does not necessarily carry the same right to cross-examine other participants that it did under the Local Plan Inquiry process.

Binding recommendations

One very significant change from the old system is that the Examiner will essentially determine the Development Plan Document, rather than simply make recommendations to the authority. The authority may only adopt the document with modifications if the Examiner has recommended those modifications, and cannot override any recommendations made by him. An authority not minded to accept the Examiner's recommendations has only one choice, which is not to adopt the plan.

Be alert!

Over the next three years, local planning authorities will gradually be replacing their existing Local Plans with a number of Development Plan Documents which meet the requirements of the new system. Each will be subject to public consultation and an independent examination, but the examination of each document will not necessarily take place at the same time, and the order of production will no doubt vary between councils. Interested parties would be well advised to keep an eye upon their Council's Local Development Scheme, to ensure they don't miss the opportunity to comment on any documents which potentially affects their interests!

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Do you feel lucky?

You need more space but you like your house and don't want to move from the area, so what do you do?

The solution is obvious. Add an extension - what could be simpler! In actual fact the addition of an extension is in most cases far from simple. If you try to rush things or cut corners you are likely to experience difficulties which may cause you stress and could cost you a lot of money.

You probably know that planning permission is required for most extensions, and you have probably heard of building regulations. If your home is a listed building you are also going to need to obtain listed building consent. But you know this and you are sure you have obtained all the necessary consents and approvals – right?

When you bought your home your lawyer should have given you a report on the title. He or she may have mentioned that your home is subject to restrictive covenants against adding new buildings or extensions without the consent of the owner of the adjoining property. These might have been imposed many years ago. If you have forgotten about these covenants, or choose to ignore them, you could be in for a nasty shock. In the case of *Mortimer v Bailey*, which was decided by the Court of Appeal at the end of October last year, that was exactly what happened.

The claimants and defendants started off good friends. When the defendants wanted to add an extension to their house they very sensibly showed their friends the architects' drawings. The claimants did not like what they saw. They thought it was horrendous and would adversely affect their main room and the extension would "close them in". They pointed all this out in a letter which, as the judge put it, was notable for its conciliatory tone and constructive suggestions.

From then on things went quickly downhill. In spite of the claimants' objections the building works were started, leaving the claimants no choice but to go and see their lawyers. They checked the deeds and found that the defendants' property was subject to a restrictive covenant which benefited the claimants' property. This showed that no additions or alterations were permitted to the defendants' property without the prior approval of the claimants - such approval not to be unreasonably withheld. The claimants' lawyers wrote to the defendants threatening legal proceedings if the works were not stopped. The defendants refused and by the time the case reached court the extension was finished.

The court then had to decide whether to order the demolition of the extension, or order a payment to the claimants for the defendants' breach of covenant. The court decided that in this case financial compensation would not be sufficient, and that the only just and proper approach was to restore the situation to the status quo, and ordered that the extension be demolished. The judge said: "They took an enormous and costly

gamble. They have lost and must return the building to its former state." The Court of Appeal agreed and ordered costs against the defendants.

Many properties are not subject to any restrictive covenants, and where they exist, they may have been poorly drafted and may not be enforceable. But if you do not check your deeds or obtain the correct legal advice where necessary, you will, like the defendants in this case, be gambling with your home. You may of course be lucky. So if you do decide to rush ahead and add that extension, the question you need to ask yourself is "do you feel lucky?"

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Inheritance Tax^(IHT)

A warning for Westcountry property owners

New research by HBOS shows that the Westcountry has six of the top seven rural constituencies for house price growth.

The attractiveness of the Westcountry as a place to live, and the growth in second homes ownership for buyers outside the region has contributed to this.

Despite the levelling off of the housing market in the past 18 months, many Westcountry home owners will now be stung with IHT if proper planning is not in place.

For every £100,000 over the current tax threshold of £275,000, beneficiaries will have to pay £40,000

To ensure that the tax threshold of the first spouse to die is fully utilised, married couples should have Wills which include Discretionary Trusts. The optimum tax efficient Will would allow the Trustees to give the surviving spouse a life interest in the matrimonial home, and any residual cash and investments, which could be terminated by the Trustees as a tax planning measure when the surviving spouse's financial needs reduce. A confidential Letter of Wishes to the Trustees will guide them in the management of the Trust.

It is also important for couples to own their share in any property as "Tenants in Common" rather than "Joint Tenants".

On current tax rates, £110,000 IHT will be saved on the second death, but it may be possible to save a much greater sum than that with proper tax planning structures and regular reviews.

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Planning for Letting

Use as a dwellinghouse is in Class C3 of the Planning Use Classes Order. For these planning purposes dwellinghouses include flats or maisonettes in use either as family accommodation or for no more than six people who live together as a single household. There is no need to obtain express planning permission to change from one of these two uses to the other, and the situation is unaffected by other changes to the Use Classes Order which came into force earlier this year. Those 2005 alterations to permitted development rights impact particularly on clubs, pubs and other eating and drinking establishments.

Dwellinghouse permitted development rights are often relied upon by landlords for student houses and also by the operators of small scale care in the community accommodation. When a prospective purchaser is considering buying an ordinary house to use for either of these purposes, then usually there will be no need to consider further whether or not planning permission will be needed. The question “is there a material change of use?” can be ignored, because the change is pre-emptively and conclusively permitted development. Landlords therefore tend to prefer premises for no more than six residents.

A useful recent planning appeal decision has illustrated the legal position that even if there are more than six individuals in the household, this still may not amount to a material change of use from use as a dwellinghouse, and may not therefore need planning permission. Under the Use Classes Order, provided the six are living together as a single household and not independently, the position is automatic. What this recent decision confirms is that if there are more than six residents the need for planning permission is not inevitable.

The Inspector recognised and applied the principle that the Use Classes Order provisions do not settle whether any changes outside classes need planning permission. He decided that the occupation of a house in Southampton by eight students was not producing a level of activity so different from occupation by six people that it amounted legally to a material change of use. Therefore it was not development and did not require planning permission. The Planning Authority could not take enforcement action to prevent the continued use.

Planning rights do not override any restrictive covenants a neighbour may be able to enforce governing the use of a property. Special rules apply in London, particularly for short term lettings, and specific restrictions can sometimes apply through express planning permission conditions or the local withdrawal of permitted development rights. Generally, however, this appeal decision is a helpful reminder, particularly for buy to let investors, that planning permission is not automatically required for a seven or more student household.

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Making “Affordable Housing” affordable...

“Affordable Housing” is a familiar term within the planning system. Adopted Local Plans often make provision for developers to contribute towards such housing in order to obtain planning permission for residential developments over a certain size. However, in practice Affordable Housing has not always lived up to its name! For example, the Government’s current planning policy definition of Affordable Housing includes “low cost market housing”, which can still be out of the financial reach of many.

In order to help increase the provision of housing that is truly affordable, the Government is in the process of finalising a review of planning policy guidance on the topic. Earlier this year the Government published a consultation paper “Planning for Mixed Communities” and its 5 year plan “Sustainable Communities: Homes for All”. Together these two papers will have a significant effect on how local planning authorities and developers approach the provision of Affordable Housing.

Amongst the proposals within the pending new guidance, planning authorities will be encouraged to define Affordable Housing with reference to the specific housing needs in their local areas. In particular, local authorities will be given greater freedom to specify what housing is affordable by reference to local income levels and house prices or rents for particular types of households. This is a significant move away from the current national guidance that advises that local authorities should not specify the tenure of housing.

The importance of having a rigorous and up to date housing needs assessment is also stressed in the “Planning for Mixed Communities”. Such an assessment should provide the backbone for the establishment of Affordable Housing policies within emerging Local Development Documents (LDDs). Local authorities are advised to define Affordable Housing in their LDDs. The definition should include the proportions of social rented and

intermediate housing to be provided with reference to the total amount of housing to be developed on a site. LDDs will probably also include details on the type and the size of housing to be provided. In other words, LDDs will potentially be far more prescriptive than existing local planning policies as to what amounts to Affordable Housing.

It is also anticipated that the minimum site thresholds for Affordable Housing will be removed. Therefore local authorities will, in line with national policy guidance, potentially be able to insist on some form of contribution towards such housing in the case of small-scale residential developments. These contributions may take the form of financial contributions towards Affordable Housing provision off site. Even the proposed introduction of a general threshold for affordable housing of 15 dwellings or 0.5 hectare, is a significant move from the current guidance which sets a site threshold of 25 dwellings or 1 hectare.

Whilst the changes should strengthen local authorities’ ability to secure Affordable Housing which meets the needs of their communities, authorities should also take into account other factors such as the implications of competing land uses. Planning authorities need to be realistic about the costs of delivering Affordable Housing. After all, if the cost of delivering such housing makes a residential scheme unviable, the current concerns about defining “Affordable Housing” will be somewhat immaterial. Consequently, local authorities and developers will be well advised to work together to secure the delivery of truly affordable housing.

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Seminar Listings

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Have you ever been to one of our seminars? If not - why don't you give it a try?

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- Exeter 13th September
- Plymouth 15th September
- Taunton 20th September
- Truro 22nd September

Employment Club 2005 dates

- Exeter 11th October
- Plymouth 13th October
- Bridgwater 18th October
- Truro 20th October
- Taunton 25th October

Commercial Property 2005 dates

- Taunton 8th November
- Exeter 10th November
- Plymouth 15th November
- Truro 17th November

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