

Ms K Hurst
Department for Culture, Media and Sport
100 Parliament Street
London SW1A 2BQ

21st June 2016

Dear Ms Hurst

Electronic Communications Code

I write on behalf of the Compulsory Purchase Association (CPA).

The CPA is a members' organisation promoting best practice skills for those engaged in compulsory purchase and compensation assessment. Our members include barristers, lawyers, planners, surveyors, valuers, accountants and land referencers. The Association is regularly consulted by the Department of Communities and Local Government, and its advice has been taken into account in the preparation of recent legislative reform of various aspects of compulsory purchase and compensation. The Association was consulted by your Department following the publication by the Law Commission of its Report on the Communications Code.

The CPA is surprised that your Department has not so far engaged with our Association in connection with the preparation of the forthcoming Bill on the Communications Code, especially as, we understand, some of the intended provisions, relating to the definition of the consideration payable for the grant of Code Rights, are likely to move closer to the "no scheme" basis that

applies to the compulsory acquisition of land and interests in land. I set out below a number of points that the Minister may wish to take into account in the preparation of the Bill which, we understand, is shortly to be introduced in the House of Commons. The Association does not adopt any particular view on policy, but is concerned to ensure that legislation in this field is workable. Thus, recent amendments to section 237 of the Town and Country Planning Act 1990, and to the Land Compensation Act 1961, have been largely brought about in the form now enacted as the result of DCLG accepting the Association's advice about the workability of the legislation.

Pending the publication of the intended Bill, and the scrutiny of its provisions by the Association, we offer the comments below on the proposals, as we understand them at this stage. We use, as a basis for our comments, the Electronic Communications Code, as it appeared with amendments, introduced and withdrawn from the Infrastructure Bill in January 2015.

1. **The Code Rights**: Paragraph 3(c) and (f) contain quite wide powers to carry out any works on the land, in respect of which apparatus is to be installed or kept, and to interfere with or obstruct a means of access to or from such land. We do not understand the Code, in its reference to a "code right" as meaning anything other than the extent of the rights in paragraph 3, and in particular as including, where appropriate, (c) and (f). We do understand that, where appropriate, the Court may make an order conferring a code right on an operator, with limitations. This would not appear to leave any discretion to the Court as to limitations on the exercise of the code rights identified in sub-paragraphs (c) and (f) and perhaps an illustration will show the practical difficulties. If one assumes there is an intention to place apparatus on the roof of a multi-let building containing, say, residential, commercial and perhaps retail units, many of which are accessed through secured areas, with the need for security passes, codes or otherwise, we fail to see how the grant of a code right consisting of (c) and/or (f) can sensibly be exercised. Inevitably, access to complex buildings have to be the subject of security arrangements.

2. Whilst we accept that under Code paragraph 22(2) the imposed agreement shall contain such terms as the Court thinks appropriate, and Code paragraph 22(5) requires a Court to ensure that the least possible loss and

damage is caused by the exercise of the code right, we do not think that this necessarily provides adequate protection to all occupiers and the owners of all interests in a multi-let, or indeed any large building, unless the conferment to the two Code rights mentioned above can be done with limitation or conditions where appropriate.

3. **Power of Court to impose agreement:** We have two principal concerns here. First, whether the “Court” is the County Court or the Upper Tribunal (Lands Chamber), making an application to such a Court, and securing both a hearing and a decision, within a reasonable time, especially in the case of applications for interim or temporary code rights, is somewhat problematical in terms of the expeditious provision of apparatus in many cases. We note that the use of an arbitration is suggested in other places in the Code for other purposes, and we wonder whether the use of either an arbitrator or the planning inspectorate might not provide a more expeditious, as well as being an informed and knowledgeable, alternative forum.

4. In relation to the test to be applied by the Court, Code paragraph 20(5) provides that the Court may not make an order under paragraph 19 if it thinks that the relevant person intends to redevelop all or part of the land to which the code right would relate, or any neighbouring land, and could not reasonably do so if the order were made. In this connection a “relevant person” is a person required by an operator to confer a code right, and that person would normally be an occupier, and not necessarily a freeholder or other owner of reversionary or intermediate interests in a building or other land. Thus, it may be, that the freeholder or other reversionary owner is in the process of recovering possession against tenants with a view to developing the building or land, and yet that person would not be a person whose development intentions should be taken into account by the Court under Code paragraph 20(5). We believe that this point should be reconsidered because of the practical consequences which will arise to the prejudice of both the code operator and the freeholder or other reversionary owner.

5. **The measure of the consideration:** We understand that this is to be altered to a “no scheme” value basis. We reserve the right to make further comments when the details of this are known as the Association has

considerable experience in some of the difficulties of the application of statutory scheme disregard rules under the Land Compensation Act 1961.

6. **Rights to the payment of compensation**: We note that, in addition to the payment of a consideration, there will be an entitlement to compensation for any loss or damage that has been sustained or will be sustained by a relevant person. We make the following points. First, it will be extremely difficult on the date when the Court makes an order under paragraph 19 to then foresee the extent of the exercise of code rights into the future, and the effect of that exercise in terms of entry and works to “keep” apparatus. A “once and for all” determination of compensation will not be satisfactory in those cases where, perhaps some years later, extensive exercise of code rights in respect of existing apparatus is invoked, perhaps to considerable cost and loss to the relevant person at a time. Whilst we understand the need to avoid continuous recourses to claims for compensation, some consideration should be given to the problem we have identified.

7. Second, we note that in cases where the parties cannot agree, the amount of compensation is to be determined by arbitration. We accept that this is a sensible method but note that the Court, perhaps the Upper Tribunal, will determine the measure of the consideration, but a different and additional forum will be used to assess the compensation. We accept that the Upper Tribunal (Lands Chamber) can accept a reference to arbitration by consent, but it does seem to us that the Code should adopt a single forum for both the measure of consideration and the assessment of compensation.

8. **Interim and temporary Code Rights**: There is no indication of what is meant by “interim”, or of any maximum period for which an interim order can be required. We suggest that such a material period ought to be inserted in the Code for clarity. The same point applies to temporary orders.

9. **Part 11 – Overhead Apparatus**: As we understand this part, there will be power to fly lines over land owned or occupied by a person other than a person whose land is the land upon which the apparatus connected to such a line is installed. We believe that this Part should make provision for compensation, as the flying of a line over land or buildings may damage their

value, and could impede development. Second, provisions should be made by which such lines can be removed in cases of intended development.

Yours sincerely

Barry Denyer-Green

(National Committee Member, Compulsory Purchase Association)

