Written Evidence Submission: Strutt & Parker on behalf of various clients
Dated: 31st October 2016

Introduction

Strutt & Parker have been involved in the Telecommunications Industry since the initial roll out of sites in the 1980's, always acting solely on behalf of land and building owners. Due to the large number of transactions we are involved in, we have been able to publish a regular Telecommunications Survey depicting trends and movements in the market. Our latest Telecommunications Survey was published in September 2016 and is based on over 6,000 transactions. Our clients range from Site Providers of small greenfield installations in remote rural locations through to commercial rooftops in the centre of London. This gives us an enviable stance of having the ability to liaise with the widest array of building and land owners who support current networks. We have serious misgivings about the fundamental reasons for the proposed changes to the Code and about the likelihood of achieving the Government's aims.

Evidence

1. From our discussions it is apparent that Code Operators have complained that Site Providers behave badly and have held Operators to ransom routinely. Our many years of experience in this market gives us absolute certainty that where a Site Provider is ever in breach of any lease terms, they are very quickly re-dressed by the Operators. Breaches of lease or poor behaviour is much more commonly incurred from the Operators and we would be prepared to cite a number of cases where Operators, including infrastructure providers such as Arqiva, have forced a Site Provider to litigate following breaches of lease and the withholding of monies or information.

2. We see no evidence of Site Providers holding Operators to ransom (despite requests made to Department of Culture Media and Sport (DCMS)) and the Operators have sufficient protection already under the Landlord and Tenant Act 1954 as well as the current Code. The existing market is well established and works effectively. Remote rural sites generally achieve lower rents than city centre sites. The proposed changes to the Code are not necessary in this regard and will damage an otherwise functioning market.

3. We would request that DCMS present evidence that supports allegations by Operators that Site Providers are the cause of their problems. Contrary to such allegations, it is abundantly clear to us that new sites are not rolled out in rural areas simply due to a lack of appetite by the Code Operators who do not wish to spend in excess of £100,000 plus maintenance, management, insurance, electricity costs etc. to build a site providing coverage to a handful of houses and a minor road due to a lack of profitability..

4. The DCMS impact assessment document refers to the high costs of accessing sites. So far as we know, charges only exist where Operators charge other Operators for access to their sites. Clients of ours otherwise would only ever charge for access if there is an emergency call out at unsociable hours in a location that requires supervision or a key being provided. We would welcome the production of any evidence of these 'high costs'. We have also seen statements submitted claiming that access to sites is delayed by Site Providers. This is not the case – the majority of sites can be accessed at any time of day or night and in any event, the Operators have insisted on 24/7 access for emergencies which includes break downs. Such delays are more likely caused by the Operator's poor internal administration.

5. The Mobile Infrastructure Project might be regarded as a failure given that around only 10% of the expected sites have actually been delivered. But our experience in that project suggests that there had been a failure on many sites by the Operator to even make reasonable endeavours to discuss terms. On other sites, where terms had been agreed, the Operator simply failed to progress the matter through legals or aborted the process if the March 31st deadline could not seemingly be met – much to the dismay of many potential Site Providers and beneficiaries. Again, we would have serious concerns about the MIP Project being used a reason for (or evidence of the need for) Code Reform along the proposed lines.

6. It is of real concern to us that DCMS appear only to have canvassed the views of the Operators who have a vested interest in making allegations about Site Providers behaving poorly, particularly given the agreement struck by Sajid Javid in December 2014 on behalf of the government to invest in their networks. Again, we would request that DCMS obtain information from Code Operators as to how many sites they have identified to attempt to rollout within the period since their agreement with the government and to then identify precisely how many of those sites have not been built as a result of ransom requests or poor behaviour by Site Providers.

Access Arrangements

7. We appreciate that access to telecommunications equipment can be for different reasons such as planned works for maintenance and upgrade purposes as well as 'emergency' requests where access is provided generally on a 24/7 basis. Many of our clients have a duty, responsibility and obligation under the primary use of the building or land that access may be required over. They are obliged to ensure that Operators do not seek to bypass these provisions. Where buildings belong to bodies such as NHS Trusts, Schools, Housing Authorities and Blue Light Authorities, there should not be under any obligation to allow unfettered access to sites.

8. Serious concerns are raised over the eligibility of those attending site as well as any credentials which should be deemed as necessary such as a Disclosure & Barring Service (DBS) checks. The works required should also not affect those who are using the building or land under the primary purpose.

9. Facilitating access is often a time consuming exercise which requires review of the proposed works in conjunction with the Agreement and any Risk Assessment and Method Statements, time is factored in to the consideration of the site which allows for these provisions. However the time element incurred in ensuring the requests are valid should potentially be viewed as a separate entity from the consideration (if consideration is to be amended)

Site Sharing

10. Site Providers must have full jurisdiction over who is permitted to install equipment on their land or property. To bypass this provision and allow a third party to install equipment on a Site Provider's land or property, just because an agreement has been entered in to between two willing parties, is not only reckless but also a gross violation of the Site Provider's rights.

11. We are aware that infrastructure sharing is commonplace throughout the UK and that many leases contain provisions that permit sharing of either the equipment or the infrastructure. However, Site Providers should not be forced to allow sharing of infrastructure with a third

party with whom they may have had previous agreements which did not conclude amicably or which were terminated following poor behaviour by the Operator.

12. Our reading of the Draft Code is that infrastructure providers cannot have the new Code enforced against them. Infrastructure providers would therefore still be able to substantially profit from the subletting of space on sites and Operators will see no benefit at all – nor will the general public.

13. There are no obligations in the Draft Code to prevent Operators creating a profit rent situation by charging full site share rates to other Operators as they currently do. The only party who will lose out in such cases will be the Site Provider. Again, little if any benefit will be seen by the public.

14. The Mobile Operators Association should already have made DCMS aware that a duopoly has effectively been created in the market place for network sites. Cornerstone Telecommunications Infrastructure Limited (CTIL) have been very successful in assigning leases to enable the joint use by O2 and Vodafone. Similarly EE and 3 have been converging their networks for many years now. Given the success of the networks being rolled out under the current code, we see no reason at all to now freely allow site sharing.

15. In the event of an assignment or a site share, the Draft Code does not demonstrate what controls will be available to a Site Provider to ensure strength of covenant and to ensure that contractual terms are complied with.

16. Irrespective of how DCMS conclude the assignment and site sharing issues, in our view it is of absolute paramount importance that such rights continue to be paid for in what is a perfectly well established market. We would therefore urge the striking out of paragraphs 23 (3)(b) and paragraph 23 (4)(b).

17. Our experience in the market place would suggest to us that the imposition of multiple Operators on a Site Provider's property with no additional revenues (but where the original Operator tenant will generate a profit rent) will likely prevent Site Providers from allowing an Operator onto the land in the first place. Far from facilitating rollout, the new Code will more likely hamper it.

18. The Draft Code contains no definition of site sharing. This must be addressed.

19. In relation to paragraph 17, Operators will not be required to inform the Site Provider as to who is sharing the site. Paragraph 37 creates issues in this regard because Operators will be allowed a 3 month period to inform their Site Provider as to who is actually in occupation. This will be at a critical time when the Site Provider could be seeking vacant possession in order to redevelop a site or carry out urgent repairs, particularly when added to a wholly unnecessary 18 month notice period.

Valuation

20. We would welcome an explanation from DCMS as to why there is a suggestion of the "no scheme" basis for valuation when this goes markedly against the considered recommendation of the Law Commission.

21. We have requested evidence from DCMS as to situations where Site Providers have held Operators to ransom. We do not believe this to be at all common, but in any event, we welcome an anti-ransom mechanism, but not in a "no scheme" world.

22. Existing Site Providers have forged relationships with Operators over many years with a rental value being paid for the rights enjoyed. The intention to save the industry £1 billion over 20 years will do nothing other than remove the financial incentive to retain the equipment on a Site Provider's land, particularly when Operator's rights are to be increased.

Termination

23. We have grave concerns over the termination process. The Draft Code does not address how a Site Provider of a rooftop site seeks removal of apparatus in order to carry out important or urgent roof repairs.

24. The Operators should not require an 18 month period in order to find an alternative site. With any sense of urgency, this process should be 12 months at most, but the 18 month period will, of course, ordinarily follow a notice period of 12 months where a Site Provider is seeking to terminate a contractual agreement. Added to this is a 3 month period whereby the Operator can delay informing a Site Provider as to who is on the site. The overall effect of this is that a 12 month break clause following a 3 month period, followed then by an 18 month period plus 28 days for an Operator to decide whether or not to vacate, leaves just short of a 3 year period during which the Operators should be able to find a new site. We would in any event have concern that Operators will take little action to find an alternative site for a large part of this period and even after the 18 month period has expired, a Site Provider may well find that they will have to take court action in order to remove the Operator. These issues are unlikely to enhance the likelihood of a Site Provider wanting to grant a lease to an Operator for a new site in the first place. As a compromise, perhaps the Operator should have a maximum of 18 months' notice, be it under a contractual arrangement or upon expiry of a lease or combination of the two. I.e. a Site Provider may serve 12 months' notice to terminate a contractual arrangement, in which case the Operator would then have 6 months statutory protection under the Code.

25. In our opinion, Paragraph 36 (6) should go further so as to require removal of apparatus, not simply to allow a Site Provider to make a request for the removal to take place. This seems to be an example of where the Code is unreasonably drafted in the Operators' favour.

26. The current Code carries provisions whereby an Operator cannot claim protection under the Code if they have terminated their contractual arrangement in the first place. The new Code must prevent Operators from terminating leases only with a view to renegotiating better terms. That would appear to us to be substantially interfering and undermining an established market where willing lessors and willing lessees have reached agreement on terms which both sides are happy with.

27. We note with particular concern paragraph 26 (c) whereby a tenant could apparently seek to rely on the Code where the Site Provider has a break option, but where the Site Provider has not even exercised that break option. Again, such action could be taken deliberately with a sole view of renegotiating terms.

Regulation

28. We would like to understand the role of OFCOM in protecting Site Providers and in particular the removal of telecommunications equipment from sites where Site Providers are no longer willing to facilitate telecommunications equipment.

29. The definition of land currently excludes apparatus. Our interpretation of this is that the Code cannot therefore be enforced against an infrastructure provider or a tower owner.

30. Further definition is required with regards to the intended effects of Paragraph 28 relating to security of tenure and the Landlord and Tenant Act 1954

31. Schedule 3, paragraph 1 (5) imposes a new section into the 1954 Act. As we understand it, this already exists – it came into being in 2015 in relation to Home Business Tenancy Agreements.
32. We have serious concerns over the Operator's ability to modify terms. Paragraph 26 (1)(c), 29 (1)(b) and 32 (3)(b) should all be deleted as they enable the Operators to use a Site Providers break to try to secure better terms.

33. We are keen to understand how a Site Provider may be able to recover costs when an Operator makes a request for additional rights. To date, Operators have heavily resisted payment of Site Provider's costs and yet an overriding principle of compulsory purchase legislation is that a Site Provider should not be left out of pocket as a result of the acquiring authority's proposals or approaches. We believe that the Code needs a clear provision that, in all matters, a Site Provider's reasonable costs will be met by an Operator upon request. We would accept that where a Site Provider has acted unreasonably then an Operator may be entitled to refuse payment. Many single site owning Site Provider's may otherwise simply feel compelled to agree to requests, no matter how unreasonable and no matter how much it impacts upon their premises and business. Operators could forcibly press for such additional rights and threaten to exercise their "deep pockets" by pursuing the matter through a costly tribunal. We envisage this to be an area where the Code could be routinely abused by Operators and we consider the Draft Code to be utterly inadequate in this regard.

Summary

34. We fully appreciate that many parts of the UK suffer from poor or no network coverage. This is more apparent in remote areas where the Operators are not inclined to proceed with the acquisition, planning and design stage due to the profitability of the site. We have correspondence from Operators confirming profitability rather than network coverage is a driver for site locations. Just recently we received confirmation of a likely withdrawal by an Operator on a site where terms were agreed, solely because the electricity connection might be prohibitively expensive.

35. We were able to secure a single site under Arqiva led Mobile Infrastructure Project initiative (which has been built and is operational). However we were also acting as agents on behalf of Site Provider's on a number of further sites, all of which failed to be progressed. The key reasons for the failure of these projects were not down to negotiations but related more to planning, cost of infrastructure and cost of acquiring a power source to site.

36. The vast majority of our clients have existing agreements with Operators which were negotiated in arm's length transactions and concluded consensually without the

requirement for any intervention. In an industry which is well established with over 60,000 telecommunications sites across the country negotiated amicably between willing parties, the move to an enforced position seems unreasonable and unnecessary. We have serious concerns that Site Providers are being blamed for the deficiency in mobile coverage. Enforcing draconian Code power is unlikely to incentivise a would-be Site Provider to entertain Operators and nor will it incentivise Operators to roll out more sites.

37. Indeed, some of our clients have specified that they would consider removal of telecommunications equipment from their buildings and land in order to not to be encumbered by the proposed amendments. Whilst the aspirational aim of reform is to create a connected environment with the reduction of not-spots, our discussions suggest that the opposite may be realised with sites being lost or withdrawn and potentially with no replacement sites lined up to maintain coverage.

38. Although it has been specified that consensual agreements will still be sought, should Operators not reach an agreement to their liking, the opportunity to invoke Code rights remains. This therefore creates a default negotiating position which is heavily weighted in favour of the Operator.

39. We are concerned that the Draft Code is extremely unpalatable for many "would be" Site Providers, but an ability for the parties to simply contract out of key aspects would resolve the situation substantially. We do not consider that the complete removal of freedom of contract between the parties is of any benefit to the industry as a whole and we fear that this will damage Operators' ability to acquire new sites. Alternatively, a removal of the "no scheme" valuation methodology would enable an established market to continue operating.

40. The government is otherwise proposing to make amendments to benefit the shareholders of multi billion pound companies, to the detriment of those individuals or bodies who provide the infrastructure, without incentivising or forcing Operators to build more sites and to improve network coverage. Sadly, the Proposals are being pushed forward for entirely the wrong reasons.