RE: IX WIRELESS LIMITED

A D V I C E

Background

1. IX is a Code Operator within the meaning of the Electronic Communications Code ("the Code").

2. IX's network (within the meaning of Paragraph 6 of the Code) comprises a combination of fixed wireless and full fibre technologies that are capable of delivering gigabyte capable connections. Whilst its network is in its relative infancy, IX has roll-out plans to expand its network, initially with a focus on the North West and, thereafter, countrywide. Initial roll-out phases also focus on urban areas.

3. In terms of telecommunications network infrastructure, IX is looking to install its electronic communications apparatus on building rooftops, on lattice masts (up to 25 m in height), metal poles of up to 15 m in height and wooden telegraph poles with a height of approximately 8 m. The network is created by connecting sites either wirelessly (using apparatus that transmits and receives radio signals) or with physical fibre. Connections from the network to the user's premises are made either wirelessly or by overhead physical fibre.

4. IX is an approved supplier under BDUK's "gigabyte voucher scheme".

5. IX considers that once its network coverage is expanded in accordance with its plans. It will offer a highly competitive alternative to the Openreach fibre network.

6. Digital inclusion is at the forefront of IX's new network and it has committed to making up to 25% of its network capacity available for approved Digital Inclusion programmes and initiatives.

Planning

7. As a Code Operator, IX has the benefit of Schedule 2, Part 16 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) ("the GPDO").

8. The type of typical developments in respect of which IX seeks my advice are as follows:

- Type A - A development consisting of the erection of a plastic, metal or timber vertical pole of up to 15 m overall height to carry fibre cable above ground level. Type A developments have two main variants:

  (i) Type A(1) - consisting of a wooden telegraph pole that is 8 m in overall height to carry a fibre cable above ground level;

  (ii) Type A(2) - consisting of a plastic, metal or timber vertical pole that is between 8 m and 15 m in overall height to carry fibre cable above ground level together with a street cabinet in close proximity to the pole for housing electronic communications apparatus required as part of the network (note that the fixing height of the fibre cable will vary depending on topography).

9. I am asked to advise in respect of two matters:

- Whether a Type A(2) development is a "mast" within the meaning of the GPDO? and

- Whether Type A(2) development on unprotected land is ground based apparatus within Class A for which prior approval is not required?

The Law

10. Schedule 2, Part 16 of the GPDO (as amended) provides, inter alia:

- "**Permitted Development**

  A. Development by or on behalf of an electronic communications code operator for the purpose of the operator's electronic communications network in, on, over or under land controlled by that operator or in accordance with the electronic communications code, consisting of –

  (a) the installation, alteration or replacement of any electronic communications apparatus."

- In the case of a mast, development is not permitted under A(a)(i) ibid if it would exceed 25 m above ground level (excluding any antennae) (subject to A(1)(c)(ii), ie masts on Article 2(3) (protected) land or a highway).

- A4 ibid defines "a mast" as "a radio mast or radio tower" and "electronic communications apparatus" and "electronic communications code" as having the same meaning as in the Communications Act 2003.

- A5 provides that where Class A permits the installation, alteration or replacement of electronic communications apparatus then various ancillary works are also permitted.

11. Section 151 and Section 106(1) of the Communications Act, read together, provide that "electronic communications apparatus" has the meaning set out in the Telecommunications Code in Schedule 2 to the Telecommunications Act 1984. Paragraph 1 of Schedule 2 to the Telecommunications Act 1984 provides:

> "(1) In this code, except in so far as the context otherwise requires –
>
> …

> ‘electronic communications apparatus’ means –
>
> (a) any apparatus (within the meaning of the Communications Act 2003) which is designed or adapted for use in connection with the provision of an electronic communications network;
>
> (b) any apparatus (within the meaning of that Act) that is designed or adapted for a use which consists of or includes the sending or receiving of communications or other signals that are transmitted by means of an electronic communications network;
>
> (c) any line;
>
> (d) any conduit, structure, pole or other thing in, on, by or from which any electronic communications apparatus is or may be installed, supported, carried or suspended
>
> and references to the installation of electronic communications apparatus are to be construed accordingly.”

Paragraph 1 of Schedule 2 explains the meaning of some of the terms included within this definition:

> “‘*line*’ means any wire, cable, tube, pipe or similar thing (including its casing or coating) which is designed or adapted for use in connection with the provision of any electronic communications network or electronic communications service;
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> ‘*conduit*’ includes a tunnel, subway, tube or pipe;
>
> ‘*structure*’ does not include a building.”

12. In the case of *R (on the application of Nigel Mawby and Lewisham Council)* [2013] EWHC 264 the meaning of “mast” for the purposes of Part 16 ibid was considered. Lang J note that it was well-established that the GPDO was to be construed in a broad common sense manner (see Paragraph 23 ibid). She went on to note:

> “28. The Claimant referred me to dictionary definitions of the word ‘mast’. The Shorter Oxford English Dictionary gives the following meanings:
>
> ‘1. A long pole or spar, often one of a number, set up more or less vertically on the keel of a sailing vessel to support its sails …

2. A pole; a tall pole or other slender structure set upright for any purpose; especially (a) a flagpole; (b) a post or lattice-work upright supporting a radio or television aerial …' (emphasis added).

29. Although I have previously thought that the natural meaning of the word 'mast' is a post or pole used for support, like a ship's mast, I note that the Oxford English Dictionary expands the meaning in the telecommunications context to include a 'lattice-work upright supporting a radio or television aerial.' From the evidence which I saw, a lattice-work upright of this type looks more like a tower than a post or pole. However, it seems that the generally understood meaning of the word 'mast' in this context is a pole or a tower. That accords with the definition in the GPDO. The IPI also confirmed that, in the industry, the term 'mast' is used to refer to both masts and towers."

In the judgment Lang J robustly rejected arguments that sought to limit the broad GPDO definition of mast in the following terms:

"42. In my view, there is no basis for assuming that the GPDO was drafted and made on the basis that the terms 'mast' would be defined in accordance with the definitions in the Glossary to the Code of Best Practice. The Code of Best Practice is not a statutory code and it is not cross-referenced in the GPDO. The Code of Best Practice does not even purport to give guidance on the legal definition of 'mast' in the GPDO. By way of illustration, it defines a 'mast' as a ground-based structure, whereas the term is used in paragraph A.2 to refer to both ground-based and building-based structures. The DCMS consultation paper acknowledged the value of the Code as a source of advice on communication and consultation between operators, local authorities and local communities, not on the correct interpretation of the GPDO.

43. Turning now to the Secretary of State's representations, in my judgment, it is permissible to take into account the Secretary of State's views on the correct interpretation of the GPDO, but they are by no means conclusive. It is for the court to decide upon the meaning of the legislation. Whatever may be the intention of the promoting minister of department, it is not always given effect in the wording of the instrument that is enacted (see *R (Risk Management Partners Ltd) v. London Borough of Brent* [2010] PTSR 349, at [227]).

44. The Secretary of State did not support the Defendant and IPI's narrow interpretation of the term 'mast'. The Secretary

of State submitted that the definition of 'mast' in the GPDO was 'not defined more specifically to ensure that it covers structures that fulfil the function of supporting antennae to transmit and receive radio waves.'

45. The Secretary of State went on to say:

> 'The industry led Code of Best Practice on Mobile Network Development in England (the Code) contains a general definition of a "mast" (see footnote at page 10 of the Code) as "… a freestanding structure that supports antennas at a height where they can transmit and receive radio waves." The Glossary of Terms at Appendix F of the Code includes descriptions of structures typically used to support antennas, such as (Ground-based) Masts, Stub Masts and Pole Mounts. … The broad definition of "mast" in the GPDO is intended to capture all such support structures, whether building-based or ground-based.
>
> The Claimant asks for a declaration that the definition of "masts" should be read as "a ground or building based, self-supporting structure to which antennae are attached, but which does not contribute to the function of the antennae." As explained above, we would not wish to limit the intended application of the GPDO to masts of a particular scale or design but the term mast, as used in the GPDO, is intended to encompass "a structure that supports antennas at a height were they can transmit and receive radio waves.'

46. In my judgment, it is clear that the Screening Opinion's interpretation of the term 'mast' in the GPDO is a broad one, which would include the support poles in this case. I cannot accept the Defendant's submission that, by including the reference to height in the final sentence quoted above, he intended to exclude stub masts or pole mounts installed on the top of buildings, because the height is largely provided by the building. That would contradict the broad and inclusive interpretation of 'mast' which the Secretary of State gives earlier in his representation.

…

53. In the GPDO, the term 'mast' is defined as 'a radio mast or tower'. This definition should be broadly interpreted. On this Building, each central support pole is a radio mast within the meaning of the definition of 'mast' in paragraph A.4 of Part 16 of the GPDO as it supports antennae which transmit and receive radio waves."

Analysis

13. While the Type A(1) and Type A(2) structures are electronic communications apparatus within the meaning of the 2003 Act ibid which definition is cast wide enough to embrace "any" apparatus used in connection with the provision of electronic communications, they are not "masts". "Mast", as I have explained above, has a wide meaning but it is ultimately anchored by the need for whatever structure is defined as a "mast" to carry equipment that enables it to receive and transmit radio waves. Even the Claimant in the Mawby case accepted the need for a mast to be able to send and receive radio waves. Types A(1) and A(2) do not have that facility, therefore they are not properly described as "masts". The prior approval provisions only apply to Part 16 A2(3) development (see A3(4) ibid). A2(3) development is defined as follows:

> "(3) Subject to sub-paragraph (5), Class A development-
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> (a) on article 2(3) land, excluding development specified in sub-paragraph (4);
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> (b) on land which is, or is within, a site of special scientific interest; or
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> (c) on unprotected land where that development consists of –
>
> (i) the installation of a mast;
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> (ii) the alteration or replacement of a mast which, when completed –
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> (aa) is taller than the mast which existed prior to such alteration or replacement; and
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> (bb) exceeds a height of 20 metres above ground level;
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> (iii) the construction, installation, alteration or replacement of –
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> (aa) a public call box; or
>
> (bb) radio equipment housing, where the volume of any single development exceeds 2.5 cubic metres,
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> is permitted subject, except in case of emergency (in which case only paragraph A.3(12) applies), to the conditions set out in paragraph A.3 (prior approval).

(4) Development is specified for the purposes of sub-paragraph (3)(a), if it consists of –

(a) the installation, alteration or replacement of a small cell system on a building which is not a dwellinghouse or within the curtilage of a dwellinghouse; or

(b) development which is within the limitations specified in paragraph A.1(1)(d)(i)bb), A.1(2)(f), A.1(5) or A.1(6)."

Clearly the installation of what are essentially telegraph poles under Types A(1) and A(2) do not fall within A.2(3) ibid which is concerned with masts.

I so advise.

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16th May 2019

RE:

IX WIRELESS LIMITED

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