

# Wayleaves



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## What is a wayleave?

If there's a way you can **leave** these alone, then great: they can be a pain. If not, read on, as, in the increasingly technologically-driven world, wayleaves are becoming more common, and more complex (unlike in the Good Old Days ©).

In its simplest sense, a wayleave is a licence that doesn't bind future owners of the property. In most cases a wayleave is granted to a utility company, giving them rights to install and retain apparatus (e.g. power cables, overhead lines, internet cabling etc.) on someone else's land. Utility companies pay for the privilege of doing so. Wayleaves generally only give contractual rights (i.e. unlike an easement) and so aren't treated as 'dispositions' of land and are personal between the contracting parties. Most can be terminated by giving notice – normally quite a long notice period of around six – 12 months – but can last for many years.

Often, it is a tenant of a building that requests the wayleave (e.g. so that they can get broadband in their premises and the cabling runs across the landlord's property and into their own space) but generally the freeholder will want to need to be a party to the wayleave. Tenants may be a party to the wayleave if the apparatus runs across its premises - mortgagees too depending on the facts (and so on and so on). Whilst "true wayleaves" don't give the utility company an interest in land, the freeholder should beware: depending on the facts and intentions of the parties, they could be an easement, or even a lease. Read on...

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## Does this mean they don't 'run with the land'?

Yes. But, as in all cases, there is a but... Often the parties treat the wayleave as binding: it suits them to keep it in place because the landowner often either benefits from the supply, or gets payments from them (or both!). The wayleave often benefits the tenants too; happy tenants make for an easier life.

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## So what are they?

A wayleave can be treated as an easement – which is the grant of an interest in land and can be protected by registration at Land Registry. Other easements include rights of way, rights of support or rights to run services over

it (sound familiar?). There are a number of characteristics required for a wayleave to actually become an easement. These were set out in a case called *Re: Ellenborough Park*. For a right to become an easement it must have all of the following characteristics:

1. There must be both dominant and servient land;
2. The right must 'accommodate' the dominant land – this needs to be for the benefit of the land not just a personal advantage for the owner;
3. The dominant and servient land must be owned by different persons (common-ownership extinguishes an easement);
4. The right must be capable of forming the subject matter of a grant – they should be either granted expressly or impliedly or by prescription.

A wayleave with all of these characteristics then, can be an easement and so can be registered at Land Registry. One helpful guide which points towards an easement and away from a wayleave (though not conclusively unfortunately) is that often an easement will only have a single, one-off payment connected to it to get permanent rights. A wayleave is typically for a fixed period and will probably incur a 'rent'.

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## What about leases?

A lease also creates an interest in land, but in order for a wayleave to become a lease, it needs to have the characteristics of a lease (obviously). A lease needs to grant exclusive possession of land for a fixed term (which must be less than the term held by the landlord) and generally, though not always, reserves a rent. When the lease is granted, the tenant becomes the owner of that land for the term and on the terms of the lease. For a true wayleave, this is not the case – that's just a licence.

Ultimately, what a wayleave is depends on the intention of the parties and the circumstances. In certain cases, there can be "necessary wayleaves" granted to statutory undertakers which bind any person who is at any time the owner or occupier of the land, without needing to be registered at the Land Registry. Necessary (sometimes known as Statutory) wayleaves do not need the landowner's agreement to be put in place. Normally they do get negotiated, but not always;

if no agreement is reached, the provider can often go ahead and install the equipment under the Code Power Operating Licence.

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### **How does this all fit in with the Telecoms Code?**

The Government is proposing to change the valuation of the rental payment to a system based on compulsory purchase principles (as is the case for many other utilities), meaning that the value of the land will be assessed based on its value to the landowner, not on its value to the network operator as under the current Code. DCMS reckons that this would result in a reduction of wayleave costs for network operators of around 40% (not to be sneezed at) and should prevent “ransom rents”. The consultation paper also recommends granting an automatic right for operators to upgrade and share apparatus, without prior agreement or payment to landowners, where there is minimal adverse visual impact, thus allowing operators to quickly update their networks when new technology becomes available. This in turn benefits TechCo which has just taken up space on the 30th floor of The Shard (well done TechCo) as it is bound to need high capacity servers and extensive cabling to cater for its techie needs.

Don't forget however that whenever the Telecoms Code comes into play, the security of tenure-esque provisions contained in it will come into play so it can be very difficult to get providers off the land once they're on it. The proposal is to delete Schedule 2 of the Telecommunications Act 1984 (the current Telecoms Code) and replace it with an entirely new Schedule 3A and critics are concerned that operators will be granted statutory (i.e. not contractual) rights: to assign agreements or share rights without requiring consent; to upgrade apparatus without consent; and to access the subject property for maintenance and repair of the apparatus sited there. Questions abound concerning health and safety and security, particularly where buildings are multi-tenanted or have public access (such as shopping centres or hospitals).

An important and welcome change to the current regime is that Telecoms agreements will be excluded from the security of tenure provisions of the Landlord and Tenant Act 1954 so there should no longer be a conflict between the two regimes. This doesn't mean that operators have no protection however; it's just dealt with under the Code instead of, confusingly, under both as previously.

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### **A market-standard anywhere?**

Good question: yes. In the City of London. For non-mobile infrastructure agreements. Basically this new standard wayleave agreement is to be used for providing superfast broadband in the City, and to do so in a much quicker way. The City of London Corporation has been consulting with all manner of parties to produce a balanced and convenient template that should be adopted to speed up the process. Tenants and occupiers should feel the benefit of this in particular as they can sometimes be left waiting for months with no, or no adequate, internet connection in their new premises and the new 'plug and play' vision is welcome, particularly in light of the continued push to maintain London as a leading Technology hub and to encourage new investment through start-ups that need instant internet access in order to make their business succeed.

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### **How long will it take for me to get a wayleave in place?**

Well... this depends on how well organised everyone is (and how co-operative) and depends on the circumstances (how many adjoining land owners will be involved, are there any tenants' needs to consider etc.) but around three months is roughly average for the legal side to be put in place. The standard-form wayleave for the City should see these delays shrink, though it is still very early days. So you should really think ahead and consider your needs for the future at the earliest stage – difficult if you're a tech start-up that doesn't have a clue whether you're the next Google or the next Bungle.

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### **If you only remember 5 things, remember these 5 things**

1. Licence, easement or lease – you need to look into this further and consider all the circumstances, intentions of the parties and the drafting;
2. You should think as far ahead as possible to make sure your requirements are met and any expansion in your business doesn't cause connectivity issues;
3. The Telecoms Code will often come into play (with all its fun intricacies);

4. They're getting longer and more complicated; but...
5. There is a proposal for standard-form wayleaves to be put in place and other streamlining proposals such as value being switched from operator to landowner, so they may become cheaper and quicker to be put into place.

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### Vaguely relevant fact

The Milky Way is moving through space at a velocity of 343 miles per second and will collide with Andromeda Galaxy in about 5 billion years' time. Puts the negotiation of a wayleave into perspective...

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### ...little bits of law

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