

GUIDANCE NOTE FOR CITY OF LONDON LAW SOCIETY LAND LAW COMMITTEE SUBSTATION LEASE

INTRODUCTION

The negotiation and agreement of substation leases and associated documents can sometimes be a time-consuming process. Inspired by the efficiencies effected by the City of London's industry standard Digital Fixed Line Infrastructure Wayleave Agreement for the installation of electronic communication apparatus, the Land Law Committee of the City of London Law Society ("Committee") considered that similar efficiencies could be achieved with substation leases.

An industry group was convened under the Committee's auspices representing property owners, developers, funds, distribution network operators (DNOs) and independent distribution network operators (IDNOs). The remit was to produce standard substation leases for different situations and associated documentation, which will help to streamline the process of agreeing substation leases and reduce delays before the property is connected to the network. This will be facilitated by the documents being of a balanced nature between property owner and DNO/IDNO.

The industry group has published its first substation lease for an outdoor freestanding site with accompanying easements. This can be found on the City of London Law Society website at <http://www.citysolicitors.org.uk/clls/committees/land-law/>. The group is keen to gauge the reaction of the property industry and DNOs/IDNOs to this lease and if the document is favourably received and regarded as beneficial to transactions, the group will produce other substation leases for different situations, for example, where the substation forms part of the landlord's building.

The group also plans to publish a streamlined process for proving title which may include a form of certificate of title and short form enquiries, which it is considered may facilitate the deduction of title for substation leases.

The draft lease(s) and associated documents and guidance are provided without liability for the City of London Law Society or any other party. They do not constitute any form of advice or recommendation and are not intended to be relied on by the user in making (or refraining from making) any decision. The user should seek their own legal and valuation advice. In no event shall the City of London Law Society or any other party be liable to any party for any direct, indirect or consequential loss, loss of profit, revenue or goodwill arising from use of the draft lease(s) and associated documents and guidance. All terms implied by law are excluded.

Please let us have your feedback on the published lease and this guidance and your thoughts on the project generally, by emailing the City of London Law Society at mail@citysolicitors.org.uk.

CONTEXT TO SUBSTATION LEASE

The DNO is a company licensed by OFGEM to distribute electricity for a specific part of Great Britain pursuant to Clause 6(1) (c) of the Electricity Act 1989. The DNO owns and operates the electrical distribution network infrastructure within its area, distributing electricity from the transmission grid (but not supplying it) to the public's properties. There are 14 licensed areas held by 6 company groups. The following DNO companies are represented on the Committee's industry group, UK Power Networks, Western Power Distribution and SSE.

There are also IDNOs. They own and operate electricity distribution networks which are mainly network extensions connected to a DNO's distribution network, serving for example particular properties or developments.

The property owner or a developer will request an electricity connection to the DNO/IDNO's network for the benefit of the owner's property. As a condition of the connection agreement between the DNO/IDNO and the owner, the owner has agreed to transfer or lease the relevant land to the

DNO/IDNO and/or grant easements over certain areas for access, ventilation and the installation, maintenance and repair of the DNO/IDNO's network. The working group has to date produced a standard substation lease for freestanding sites.

When the DNO/IDNO provides the draft deed, it will also provide enquiries and a plan showing the location of the substation site and the easements required, coloured as denoted in the legend to the plan. Some DNO/IDNOs may require the owner/developer to provide electronic versions of architects' plans showing the substation location and dimensions, access and all cable routes. UK Power Networks for example require the plans/drawings to be in AutoCad.dwg file format version 2014 or earlier.

It is the policy of DNO/IDNOs not to energise the electricity supply until the lease or other deed is completed, so as to secure ownership and control of the DNO/IDNO's assets and equipment in a satisfactory form.

DNOs and IDNOs will typically have the following requirements in relation to the provision of title information.

TITLE INFORMATION

The DNOs/IDNOs have differing practices on whether they require the owner to provide official copy entries for the registered title to the relevant land for the substation site and/or easements, but most require the provision of copies of all documents referred to on the register. At least one DNO requires the owner's solicitors to provide a certificate of title in a prescribed form.

The DNOs/IDNOs will require vehicular and pedestrian access to the substation site and/or easement land direct from a public highway. If access (or cable easements crossing land) is dependent on private rights of way, the DNO/IDNO requires deduction of the relevant deed of grant, which needs to show that the owner is able to sub-grant such rights for the benefit of the DNO/IDNO.

If the owner's property is charged, where necessary the lenders under each charge must be provided with a copy of the agreed form of deed without delay to enable the lender to issue its discharge of part (form DS3) and/or written consent to the deed.

The owner is usually expected by the DNO/IDNO to make application at its own cost and without delay for any consents/ releases required from, where relevant:

- any landlord/superior landlord pursuant to the terms of the relevant lease to the owner or any superior lease;
- any restrictive covenant which may prevent the DNO/IDNO from using the site or easement land for its undertaking;
- any beneficiary of a restriction on the title affecting the site and/or easement land in Land Registry form RX4 (unless the restriction can be certified and will not carry through to the substation site and/or easement land);
- any beneficiary of a unilateral notice affecting the site and/or easement land in Land Registry form UN2.

If any tenant of the owner has rights over the substation site and/or easement land, they must consent to the deed.

If any part of the easement land lies outside the owner's title, it will be necessary to join the third-party landowners to the deed in order to give the necessary rights. The approach of DNOs/IDNOs is that it is usually the owner's responsibility to secure at its own cost the consent of any third parties and establish the identity of the third party's solicitor.

Where the owner's property is affected by a planning agreement (including those under Section 52 of the Town & Country Planning Act 1971, Section 38 and 278 of the Highways Act 1980, Section 33 of the Local Government (Miscellaneous Provisions) Act 1982, Section 106 of the Town & Country Planning Act 1990, Section 104 of the Water Industry Act 1991, Part 2 of the Planning Act 2008 or any provision in legislation of a similar nature) ("**Planning Agreement**"), which has conditions that have fallen due but have not been observed or performed and there is no exclusion for utility undertakers, the DNO/IDNO may expect the owner to procure:

- a variation or release of such Planning Agreement to exclude the relevant part of the property;
- or in exceptional cases, a comfort letter from the relevant authority confirming that the terms of such Planning Agreement will not be enforced against the DNO/IDNO or its successors.

It is important for owners to factor in any such need for consents/releases, since without them, there will be a delay in completing the relevant documentation and the energisation of supply.

THE LEASE

The Lease is a balanced draft and is in a standard industry form for the proposed transaction and should not be amended other than to make the Lease specific to or relevant to the site.

The Lease is intended for a freestanding substation structure that is not attached to or part of any building of the landlord. If the substation is attached to or forms part of the landlord's building, the Lease will need to be amended. The authors of this Lease standard intend in due course to launch an equivalent of the Lease for a substation that is attached to or forms part of the landlord's building, as well as other varieties.

The Lease does not contain a forfeiture clause. The practical reason for this is that the distribution of electricity is intrinsic to the use and operation of the relevant property and forfeiting the lease is simply likely to lead to the DNO/IDNO turning off the electricity. Breach of the DNO/IDNO's obligations will give rise to a possible damages claim and the property owner may have recourse to OFGEM.

The Lease is intended to fall within sections 24-28 of the Landlord and Tenant Act 1954 (security of tenure).

Since the Lease will be registered at HM Land Registry, there are the relevant Prescribed Clauses at the front.

The area let to the Tenant is described as the "Premises" (clause 1.11).

The Landlord lets with full title guarantee which in most circumstances is suitable for the commonly encountered long lease of this type (clause 2).

The Tenant's covenants include a Tenant's indemnity (clause 3.13) and clause 4 governs conduct of the Landlord's claim under the Tenant's indemnity.

The Landlord's covenants include a Landlord's indemnity (clause 5.8) and clause 6 governs conduct of the Tenant's claim under the Landlord's indemnity.

Clause 7 is a redevelopment/lift and shift provision.

The conditions in clause 8 include an optional Tenant's right to a renewal lease for a further term of 60 years (clause 8.5). This right as well as the length of the renewal lease is subject to agreement between the parties, but the length of the renewal lease must not exceed 60 years from the termination of the first lease, otherwise it will be void, falling foul of paragraph 7(2) of Schedule 15 to the Law of Property Act 1922. The terms of the renewal lease must exclude the option to renew, otherwise this will operate as an agreement for a demise for a term of 2,000 years (paragraph 7(1) of Schedule 15 as aforesaid). An alternative to the option to renew is to grant a longer initial term.

Clause 8.6 gives the Tenant a right to break the Lease if it no longer requires the premises for an electrical transformer substation.

Clause 8.7 excludes the operation of the Contracts (Rights of Third Parties) Act 1999, and there is an exclusion of the operation of section 62 of the Law of Property Act 1925 and other rights in clause 8.8.

There is a simple Dispute Resolution provision in clause 9 by which nominated senior representatives of the parties try to resolve the dispute in the first instance. If that fails, the other normal remedies are available to the parties and the Lease does not seek to impose any particular type of dispute resolution such as expert, arbitrator or mediation.

The Schedule contains a description of the Premises and the Easements granted to the Tenant. The Easements are stated in clause 2 to be for the benefit of the Premises and the Tenant's or a Group Company's Undertaking (as defined in the Lease).

Simple execution wording for a company is included and it will need to be altered, for example, for a limited liability partnership, overseas entity or if the company is executing by a director in the presence of a witness.

The Lease has a number of footnotes commenting on other specific points of drafting.

As mentioned earlier, please let us have your feedback on the published Lease and this guidance and your thoughts on the project generally, by emailing the City of London Law Society at mail@citysolicitors.org.uk.