

**Agenda Item No:** 7

**Report To:** Cabinet

**Date of Meeting:** 27 October 2022

**Report Title:** Council Housing Broadband Wayleave Agreements

**Report Author:** Tom Jenkins (Economic Development Manager), David Green (Housing Assets Manager)

**Job Title:** Cllr. Neil Bell (Portfolio Holder for Planning and Development

**Portfolio Holder:** (incl Broadband)) and Cllr Andrew Buchanan (Portfolio Holder for Housing)



**Summary:**

Officers are finalising flexible wayleave agreements which would grant access to the council's housing properties for the purposes of installing Fibre to the Premises (FTTP). As Openreach and Netomnia are rolling out FTTP across the Ashford Borough, thousands of the council's residential properties will be in scope for this infrastructure upgrade. To ensure we facilitate and support the wider FTTP rollout, officers are seeking to streamline the wayleave agreement process, reducing the amount of documents and therefore time spent agreeing terms.

The wayleave agreements will be bespoke documents with each company, which reflect key terms and obligations which the council would require to allow access to our housing estate. The agreements cover all housing within ABC's ownership which fall in scope of the current rollout plans within the Ashford Urban Area, with a view to adopting this approach for any future rollout in other parts of the borough. Officers are also proposing recovering inherent costs from providers in line with Government legislation. Ashford has not previously charged for digital infrastructure work, however, due to the volume of properties within scope and the officer hours required, it is proposed that charging a set fee would allow officers to provide an improved service to operators. This would ensure we can support the FTTP rollout to our residential properties leading to a better outcome for our tenants, the providers and officers.

**Key Decision:** YES

**Significantly Affected Wards:** All Wards

**Recommendations:** **The Cabinet is recommended to:-**

- I. Approve the recommendation to adopt a flexible wayleave system for FTTP access to the council's residential properties**

- II. **Delegate authority to the Solicitor to the Council to approve the form of these agreements based on officers' recommendations (whether as deeds or ordinary agreements)**
- III. **Recommend to Full Council to agree the principle of recovering reasonable costs for the council's work on wayleaves and FTTP installation in the council's owned residential properties**
- IV. **Recommend to Full Council to delegate authority to the Assistant Director of Housing to approve the final costs level to be included in these wayleaves prior to them being signed**

**Policy Overview:**

Within the Ashford Borough Council Corporate Plan 2022-2024, the importance of improved digital infrastructure is highlighted in Objective TG2 under Targeted Growth "Enable the improvement of digital infrastructure to support the growing needs of business, voluntary sector and residents". The document explains that fast, reliable digital connectivity across the whole Borough is critical for businesses and residents to trade and access services. Some areas of the Borough are disadvantaged because of poor digital connectivity. A lack of digital connectivity can stifle innovation and business growth as well as create further digital exclusion.

The Ashford Local Plan (Adopted in February 2019) also identifies the importance of great telecommunications infrastructure through the adoption of Policy EMP6 – Promotion of Fibre to the Premises (FTTP).

**Financial Implications:**

Each of these strategic documents prioritise the requirement for improvements to the existing telecommunications infrastructure as well as future proofing where necessary. There are no foreseen financial implications. The main financial implications relate to officer time throughout the agreement process and once works start. Officers are also investigate the option of recovering costs incurred as detailed above, via provisions made in the Electronic Communications Code. The principle allows the above work to take place with no or minimal cost to the Local Authority. More detail is provided in the report.

**Legal Implications:**  
*Text agreed by  
 Principle Solicitor  
 (Property and  
 Projects) on  
 3/10/2022*

The template Wayleaves to be agreed with key providers need to comply with the relevant legislation as set out in Electronic Communications Code contained in Schedule 3A to the Communications Act 2003 as amended by the Digital Economy Act 2017. The legislation gives statutory rights to telecommunications operators to install, maintain and repair electronic communications apparatus over land and carry out works in connection with the installation of the apparatus, subject to agreements with landowners.

The council has statutory powers to enter into the Wayleaves set out in this report under the Digital Economy Act 2017 and the Electronic Communications Code, as well as under the Local Government Act 1972.

The options and implications for signing the Wayleaves (under hand or under seal) are set out in this report.

**Equalities Impact Assessment:** N/A

**Data Protection Impact Assessment:** The agreements relate to the council's properties and land ownership titles only. The council's data protection policies are in place and will be followed throughout the FTTP rollout to ABC's housing estate.

**Risk Assessment (Risk Appetite Statement):** The main key risks currently identified are:

- a. Lower levels of access will impact residents' employment opportunities where employers are increasingly likely to require them to work from home, particularly following the pandemic.
- b. Lower access impacts resident's levels of social inclusion and isolation from services, and have the potential to increase inequality.
- c. The Council's, residents and businesses digital transformation plans will be impacted by the levels of broadband and mobile access throughout the Borough.

**Sustainability Implications:** Improved digital connectivity can support the council's Green Pioneer ambitions to achieve net-zero by 2030. Faster and more stable internet connections ensure that residents can access services and work remotely leading to probable reductions in CO2 emissions.

**Other Material Implications:** N/A

**Exempt from Publication:** NO

**Background Papers:** N/A

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## **Introduction and Background**

1. Officers from teams across the council have been working collaboratively on improvements to the digital infrastructure of the borough. One major workstream has been the creation of a flexible wayleave agreement which would grant access to the council's properties for the purposes of installing Fibre to the Premises (FTTP). As Openreach and Netomnia are rolling out FTTP across the Ashford Borough, thousands of our residential properties will be in scope for this infrastructure upgrade.
2. Through the Connectivity Portal by DCMS, the Government promote key interventions that local authorities can make to support the improvements of digital infrastructure. These include mapping public sector assets, encouraging the use of public sector land and assets and reaching access agreements with operators.
3. With the wider rollout of FTTP currently taking place in Ashford, the council has an opportunity to future-proof our residential properties and ensure our tenants have access to the best possible digital infrastructure. Faster and more secure broadband can improve residents' levels of social inclusion, reduce isolation from services and thus inequality.
4. Both the advice from Government and the feedback received directly by officers from Internet Service Providers clarifies that agreeing a flexible wayleave document, allowing access to the council's housing assets in particular, is important for the wider rollout. This is further supported by Kent County Council officers who are working with councils to draft a toolkit which can be used when agreeing such wayleave documents.
5. To that end officers are finalising wayleave documents with Netomnia and Openreach which seeks to allow access to the council's residential premises that fall under the scope of this rollout. Within the documents, mechanisms are in place to ensure the council retains full control and has oversight of the works at each property.

## **Ashford Borough Council Wayleave Overview**

6. The normal procedure for operators to access the council's properties would be to agree a wayleave for each individual property, at the point at which access was required. Each document needs to be reviewed individually before being agreed, signed and access to that property granted. Officers are proposing to streamline this process to increase efficiency and ensure the FTTP rollout to our housing stock can progress rapidly whilst still retaining oversight and control of key aspects of this work. The council will be able to allow access to its housing estate, by telecoms operators, under one agreement rather than thousands of individual ones.
7. Ashford Borough Council's approach to wayleave agreements would be to enable access to our housing stock by agreeing terms as quickly and easily as possible for both parties. To that end, we understand that many operators already have template agreements which they would seek to submit to any council in the UK. Officers in Legal and Housing can review different

templates that are received but have drafted key terms and obligations which would be required for inclusion. These terms and obligations ensure the operators meet the council's requirements with regards to legal and asset management matters.

8. The wayleave agreement documents cover many standard items but include: the rights and obligations of the operator, the council's obligations, matters relating to upgrades or moving the operator's equipment, termination and disputes, indemnity and costs. In addition the wayleaves will have a schedule of the properties which are covered by the agreement with an operator. This schedule will be updated as the operator progresses their rollout and more properties come into scope.

## **Costs**

9. In addition, Ashford Borough Council must comply with the new Electronic Communications Code (ECC) which, under the Digital Economy Act 2017, replaces previous legislation and requires public authorities to work with the telecommunications industry. The council is obliged by this legislation to work with the telecommunications industry in the deployment of telecommunication infrastructure, equipment and services. The ECC also acknowledges that this work requires resource and implicit costs. Therefore the council has the right to recover most associated costs from the providers. Ashford Borough Council is seeking to enable and support FTTP rollouts and so will identify a realistic level of costs which will be sought to be covered, without compromising the prospect of FTTP being installed. This will also form part of the wayleave agreements that the council would enter into.
10. The resource and cost implications relate to officer time. Officers in Housing and Legal are required to review, assess and negotiate the wayleave agreement, assess service packs (showing the proposed installation), initial and ongoing inspections of works at the properties and Building Control fees. These are costs that the council can reasonably recover as part of the wayleave process under the ECC.
11. In relation to costs, it is recommended that, in order to ensure access to our housing stock as quickly as possible in the Ashford Urban Area, the council continue to investigate a reasonable level of costs to be requested from the operators. This final cost figure would then be included in all flexible wayleaves moving forward and would apply to all operators equally.

## **Forms of Agreement**

12. The wayleave agreements will need to be agreed by Ashford Borough Council and the operator, however these could be signed as deeds or as simple agreements. Members are asked to consider these options and the proposed approach detailed below.
13. Generally in law, deeds differ from agreements in that, a deed is enforceable whether or not 'consideration' (i.e. money or value in some other form) is given for the obligations undertaken by the parties to it. By contrast, an ordinary contractual promise or agreement made for no consideration, is not enforceable.

14. Secondly, the limitation period for action to enforce an obligation arising under a deed is 12 years, double the period for action for breach of an agreement which is 6 years.
15. In relation to the wayleaves, the preferred option is that they be signed as a deed due to the large number of council properties involved and the obligations imposed on the operators in relation to council land affected by the wayleaves. Delegated authority could be given to the Assistant Director of Housing and the Director of Health and Wellbeing to agree the form and sign these wayleaves.

## **Proposal**

16. It is proposed that Ashford Borough Council adopts a system of flexible wayleaves to allow access to the housing under its ownership for the purposes of installing FTTP.
17. This proposal would set the council's preferred option to agree wayleaves in the form of deeds with operators. It would allow delegated authority to negotiate the wayleaves and approve or refuse these.
18. The proposal would also mean the council charges a set fee to cover the inherent reasonable costs associated with installing FTTP in our residential properties. This would allow officers to provide a quick and efficient service which providers would be positive about.
19. The proposal would allow delegated authority to evaluate the exact reasonable costs and set a standard fee for all providers seeking to install FTTP in the council's residential properties. This would allow the process to be better for both parties thus enabling a quicker rollout of FTTP locally.

## **Equalities Impact Assessment**

20. A fundamental priority in improving affordable reliable broadband and mobile access for residents within the Borough, is to reduce social exclusion and rural isolation. The aspiration to level up access across the Borough will look to reduce the current inequalities in access, highlighted by the Covid-19 pandemic.

## **Other Options Considered**

21. Officers have considered other options including not seeking a flexible wayleave approach. This would entail thousands of individual wayleave agreements being received over the coming years, leading to thousands of hours required by officers in the Housing and Legal teams to review these and agree them. The option to recover costs could also be impacted.
22. An alternative option has been considered to create the council's own template for wayleave agreements for FTTP in our housing properties. As detailed above, this could lead to further negotiation time with providers and could stall the rollout of FTTP to our properties. The option to recover costs would not be impacted.

## **Reasons for Supporting Option Recommended**

23. Agreeing flexible wayleaves for providers' access creates efficiencies in the council's processes. It would save officer time by reducing the number of documents that would need to be scrutinised and agreed.
24. This approach to wayleave agreements for the council's housing stock would support the wider FTTP rollout whilst not compromising on our requirements and obligations. The option to recover costs also ensures the council is not financially impacted by this work and can support providers to deliver FTTP more efficiently.

## **Next Steps in Process**

25. Members are asked to decide on the proposed approach for entering into these agreements.
26. If Members agree, officers will progress negotiations on the terms of wayleaves with operators, in particular identify the appropriate level for costs to be recovered and follow the approved procedure for signing these documents.

## **Conclusion**

27. Digital infrastructure improvements are important within the Government's agenda of Levelling Up the UK. Particularly infrastructure upgrades will help address social inclusion and reduce digital exclusion. Improved digital connectivity could also lead to reduced carbon emissions from fewer travel journeys. Overall this would enable the future-proofing of the Ashford Borough.
28. All parties including Government and operators agree that access to council housing will support the delivery of FTTP nationally. At a regional level KCC are keen to ensure councils can enter these types of agreement to support FTTP rollouts locally. A flexible approach to wayleaves for the purposes of FTTP rollouts is crucial to this being delivered.
29. Agreement from Members on how these wayleaves should be agreed will allow officers to finalise work on these agreements and ensure the council's properties are connected to FTTP as soon as possible.

## **Portfolio Holder's Views**

30. "One of the objectives in our Corporate Plan 2022-2024 is to enable the improvement of digital infrastructure to support the growing needs of business, voluntary sector and residents. We are looking forward to seeing fast, reliable digital connectivity available across the whole borough so no one is disadvantaged in accessing online services or doing business."  
Cllr Neil Bell, Portfolio Holder for Planning and Development

31. “It is important that the council seizes the opportunity to future-proof our residential properties and ensure we are championing digital inclusion among our tenants. Simplifying this wayleave process and ensuring faster broadband for our social housing is key to ensure the council is being efficient and to reducing isolation among our residents.”  
Cllr Andrew Buchanan, Portfolio Holder for Housing

## **Contact and Email**

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