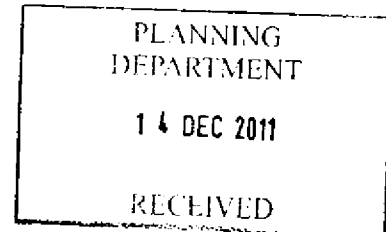


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Date 13 December 2011  
Our Reference SS/Brookmans Park  
Your Reference



Dear Madam

**SUBMISSION OF APPLICATION FOR CERTIFICATE OF LAWFULNESS OF PROPOSED USE  
ELECTRONIC COMMUNICATIONS INSTALLATION, BROOKMANS PARK, GREAT NORTH ROAD, HATFIELD, HERTFORDSHIRE AL9 6NE**

We have submitted an application via the Planning Portal for a Certificate of Lawfulness of Proposed Use in respect of the above site. The application is made under Section 192 of the Town and Country Planning Act 1990, as amended. A cheque of £167.50 in respect of the requisite application fee is submitted with a hard copy of this letter. With this application you should receive, via the Planning Portal, the following:

- 1) An O.S. Site Location Plan scale 1:2500 reference 140237\_ML\_00 - 010
- 2) Photographs of equipment racks within an equipment building
- 3) Photographs of a typical interior of a modern data centre
- 4) Document TIA – 942 Data Center Standards Overview.
- 5) The Ofcom register of persons with powers under the Electronic Communications Code
- 6) Section 32 of the Communications Act 2003 that defines electronic communications networks and services.
- 7) A Legal Opinion from Martin Kingston QC and Pinsent Masons
- 8) A Certificate of Lawfulness dated 18 November 2010, issued by the Vale of Glamorgan Council.
- 9) A Certificate of Lawfulness dated 19 November 2010, issued by North Somerset Council.

Arqiva, Wireless House, Warwick Technology Park, Heathcote Lane, Warwick, CV34 6DD  
Tel 01926 416000 Fax 01926 416600 [www.arqiva.com](http://www.arqiva.com)

In accordance with the advice set out in paragraphs 8.25 onwards of Circular 10/97 – *Enforcing Planning Control*, we set out below the information necessary for you to issue the Certificate requested.

### **Arqiva Ltd**

You will see from the Ofcom register of persons with powers under the Electronic Communications Code that our three principal operational companies, Arqiva Ltd, Arqiva Communications Ltd and Arqiva Services Ltd, are included.

In terms of our business, Arqiva owns and operates the terrestrial radio and television broadcast networks across the UK and we are also a radio site management company. We accordingly own or manage several thousand sites that are used for a range of electronic communications purposes.

The terrestrial radio and television broadcast networks were amongst the first electronic communications networks developed across the UK. As technology has evolved our sites have become host to each successive form of network and installation. Hence, the major electronic communications sites originally developed for the terrestrial radio and television networks are shared with installations for earth satellite stations, the mobile phone operators, Airwave and the emergency services, utility networks and for networks operated by central and local government departments and agencies such as the RNLI and the Maritime and Coastguard Agency. Associated with our broadcast activities and the requirements of our customers, there is a significant demand for data centre accommodation and hosting for this type of network is developing as one of the next generation services provided at our sites.

The continued use and sharing by other networks, which takes place on our sites is a longstanding policy requirement set out in PPG8 – Telecommunications and echoed, for example, in saved Policy R21 in the Welwyn Hatfield District Plan 2005.

Whilst in many cases additional operational development, such as buildings, radio masts or other plant and machinery has required planning permission, sharing on our broadcast sites by new and additional electronic communications operators, code or otherwise, has always been regarded as falling within the same use.

### **The Application Site and its Lawful Use**

The application site is shown on the location plan submitted. The site was originally developed for electronic communications network purposes prior to 1 July 1948 and is operated by us for terrestrial radio broadcasting purposes. The development of the site therefore predates the modern town planning system. Since then various planning permissions have been granted for additional apparatus for our predecessor companies and for other electronic communications operators and the site now also hosts an earth satellite station and a radio tower supporting a number of mobile operators and Airwave.

The lawful use of the site is therefore for electronic communications network purposes. Such use does not fall within any of the categories defined with the Town and Country Planning (Use Classes) Order 1987, as amended (Use Classes Order) and so is *sui generis*.

## **The Proposed Use**

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The proposed use of part or all of the existing equipment buildings for a data centre that will be connected near continuously to a live electronic communications network for the purpose of storing, processing, updating and transmitting and receiving data by electronic means.

For the reasons set out below, we consider this is also a *sui generis* use for electronic communications network purposes and moreover one that falls within the same category as the lawful use of the site.

## **No Material Change of Use**

In explaining why we consider a proposed data centre at our site in Brookmans Park will not result in a material change of use, we examine a number of key aspects under sub headings below.

### **i) The Regulatory Framework**

Although the Use Classes Order does not include an electronic communications category, it is nonetheless capable of definition through the regulatory framework, including town planning legislation.

Section 32 of the Communications Act 2003, defines electronic communications networks, which include networks for software and stored data. This definition therefore includes both broadcast networks and data centres. This definition is linked to planning legislation, because it is under Section 106 and 107 of the Communications Act that powers exist to apply the Electronic Communications Code. The Electronic Communications Code therefore only applies to operators who fall within the Section 32 definition. From the Register you will see this covers a wide range of different operators, including, for example, Internet Service Providers who make extensive use of data centres.

Part 24 of Schedule 2 of the Town and Country (General Permitted Development) Order 1995, as amended (GPDO) grants rights to Electronic Communications Code Operators. Significantly these rights do not make any distinction between the different types of networks and services that exist. Town planning legislation therefore takes this *sui generis* use and applies it broadly across all forms of electronic communications networks.

This approach is replicated in national planning policy and your attention is drawn to endnote 2 to PPG8 – *Telecommunications*. PPG8 predates the changes introduced by the Communications Act and so still uses the old terminology of "telecommunications" which has now been changed to electronic communications (this being one of the amendments made to the Part 24 rights). However, the point that remains valid is the way in which national policy applies universally to all forms of (now) electronic communications. In any event, Paragraph 30 of the Supporting Guidance does make specific reference to networks, both public and private, for data purposes.

### **ii) Network Requirements**

A defining operational requirement of an electronic communications network is its liveness. So for example, the radio and television broadcast networks operate continuously as do the mobile

networks and those used by the emergency services. In similar fashion networks used by Internet Service Providers are also continuously live. Thus, connectivity is a key network requirement for our radio broadcast site at Brookmans Park and likewise for a data centre.

The first data centres were developed in the United States and their Telecommunications Industry Association produced the attached document TIA – 942 – Data Center Standards Overview. This has been adopted as the industry standard in the UK. This summarises the physical cabling and connectivity requirements and explains the four different tiers of reliability that have been categorised. You will note from the emboldened titles the percentage availability, i.e. *the continuousness of network connection*, which is the defining characteristic in recognition of its importance. Similar tiers exist for sites that comprise the radio and television broadcast networks.

### **iii) Operational Requirements**

To maintain near continuous availability radio broadcast sites like the one at Brookmans Park have dual and high powered electricity supplies, as well as standby generators, with associated fuel stores. That is also a key operational requirement with a data centre as well as other electronic communications networks.

In addition, there are also other operational requirements in common, including for example, fire suppression and security systems, and the need to be located on sites that are generally free of external risks, such as hazardous neighbouring uses.

### **iv) Physical and Other Characteristics**

There are a number of physical and other characteristics that are similar between different electronic communications networks, and our radio broadcast network and data centres in particular, for example:

- Electronic communications equipment is set out in racks within buildings in temperature controlled rooms, with internal and external cooling equipment.
- The electronic communications equipment is constantly monitored by a combination of on and off site monitoring.
- There is processing of data signals and information that is continuously transmitted and received.
- There are requirements for storage, both physical (e.g. equipment spares) and electronic (i.e. data).
- Sites have low manning levels and therefore limited parking and circulation requirements.
- Once installed, deliveries and large vehicle movements tend to be low in frequency.
- Ancillary office and welfare facilities for permanent and visiting staff and other personnel.

The attached photographs show the great physical similarity between radio equipment used for broadcast and data centre purposes.

Thus, in terms of use there are no distinguishing characteristics between the existing and proposed use of the whole or part of the existing buildings. As a consequence, there will be no materially different impacts that might require different treatment for town planning purposes. In other words, the radio broadcasting use and the proposed data centre use can be considered as falling within the same category of *sui generis* use, for electronic communications network purposes.

As well as the similarities in operation, there are obvious differences in terms of operational development, with radio broadcasting also requiring associated radio masts. However, town planning clearly treats use and operational development separately, so for example, factories in the same general industrial use may have very different requirements for building shape and external plant and machinery. Likewise the operational development required and the planning issues associated with a retail kiosk, a unit shop and a supermarket may be very different, but still within the same use class.

The physical differences between a radio broadcast site and a data centre do not therefore require them to be placed into different categories for the purposes of use.

#### **Further Supporting Evidence**

##### **i) Legal Opinion**

The lawful use of our electronic communications installation at Brookmans Park is for electronic communications network purposes. As such, the site can be used for the existing radio broadcast and mobile communications purposes as well as for the proposed use as a data centre without requiring planning permission for a material change of use. In support of this view, we refer you to the attached Legal Opinion that has been provided by Martin Kingston QC and Pinsent Masons.

##### **ii) The Digital Britain Report**

In further support of our application, we draw your attention to the Digital Britain Report, which can be viewed on the following link:

<http://www.official-documents.gov.uk/document/cm76/7650/7650.pdf>.

Page 84 of the report (90 on the tab), is the Chapter that deals with the radio and television broadcast networks. Within this Chapter you will see at paragraph 140 that modern data centres are included. You will note from the description in the box that a key element of a data centre is that it is "always on", i.e. part of a live network and hence its consideration by Government in the same light as our broadcast networks. This report was sponsored by the Departments of Culture Media and Sport; and Business, Innovations and Skills, the DCMS being the Government department responsible for electronic communications. You will see also that the actions identified in this chapter fell to OFCOM, the electronic communications regulator. Clearly if a modern data centre were considered by Government to fall within Class B1 or B8, the actions would be for another Government department or agency.

Our approach to the law is therefore wholly consistent with the way in which the Government treats modern data centres in the Digital Britain report, the most recent and authoritative report dealing with this subject matter, i.e. a modern data centre should be treated as an electronic communications use that falls within the same category as a broadcast network site like Brookmans Park and is not ordinarily a Class B1 or B8 use.

### iii) Precedent

As at Brookmans Park, we are exploring the possibility of using surplus space for data centre purposes on other sites and so we have made similar applications elsewhere at Clevedon in North Somerset and Wenvoe in the Vale of Glamorgan. Both planning authorities issued Certificates and these are attached in support of this application.

### Summary and Conclusion

In summary, the weight of the evidence and legal opinion supports our view that a modern data centre falls within the same *sui generis* electronic communications use as our broadcast network sites like Brookmans Park. We still wish however to obtain a Certificate to provide certainty. This is regarded necessary in the light of alternative views that data centres fall within either Class B1 or B8, something that is addressed in the Legal Opinion.

In conclusion, we consider we have provided you with sufficient information to justify the Certificate of Lawfulness of Proposed Use applied for and request that you issue a Certificate as follows, or similar:

"The proposed use as a data centre does not require planning permission because:

The existing lawful use of the site is for electronic communications, which is *sui generis* as it does not fall within any defined class specified in an order under Section 55 (2) (f) of the Town and Country Planning Act 1990, namely the Town and Country Planning (Use Classes) Order 1987. From the information submitted the proposed use as a data centre is also an electronic communication use in the same *sui generis* category and so no material change of use will occur."

We hope you have all the necessary information to assist your determination. However, if you do have any queries or would find a meeting helpful, please do not hesitate to contact our Saleem Shamash on 07973 430768 or [saleem.shamash@arqiva.com](mailto:saleem.shamash@arqiva.com).

Yours faithfully

  
ARQIVA LTD