Form and structure of mineral option and lease
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RICS guidance note
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Acknowledgements
Foreword

This guidance note is aimed at professionals in the field of negotiations for rights to minerals and also touches on leases of void space. It is generally biased towards those working for the landowner, however, it can also inform the tenant and its professional advisers.

The guidance note serves to remind us of what the basic building blocks of a mineral lease comprise. It also reminds us that there is no such thing as a standard mineral lease. Hence each case should be considered on its individual merits.

It will be noted by the experienced practitioner that no case law is referred to. Individual cases inform individual situations. Experience and practising in the field should provide the wisdom and knowledge which builds on these building blocks.

This guidance note may be considered as but one source of information in the negotiation of rights. Others including statute, codes of practice and the like will add to the practitioner’s armoury. In serving to remind us where we should all be starting from, it provides us with a clear and compelling direction.

Gordon Wood, FRICS
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July 2007
Statutory and other references

Railway Clauses Consolidation Act 1845
Mines (Working Facilities and Support) Act 1923
Landlord and Tenant Act 1954
Mines and Quarries Act 1954
Health and Safety at Work etc. Act 1974
Environmental Protection Act 1990
Town and Country Planning Act 1990
Environment Act 1995
Quarries Regulations 1999
Regulatory Reform (Business Tenancies) (England and Wales) Order 2003
RICS guidance notes

This is a guidance note. It provides advice to RICS members on aspects of their practice. Where procedures are recommended for specific professional tasks, these are intended to embody ‘best practice’, i.e. procedures which in the opinion of RICS meet a high standard of professional competence.

Members are not required to follow the advice and recommendations contained in the note. They should, however, note the following points.

When an allegation of professional negligence is made against a surveyor, the court is likely to take account of the contents of any relevant guidance notes published by RICS in deciding whether or not the surveyor had acted with reasonable competence.

In the opinion of RICS, a member conforming to the practices recommended in this note should have at least a partial defence to an allegation of negligence by virtue of having followed those practices. However, members have the responsibility of deciding when it is inappropriate to follow the guidance.

On the other hand, it does not follow that members will be adjudged negligent if they have not followed the practices recommended in this note. It is for each surveyor to decide on the appropriate procedure to follow in any professional task. However, where members depart from the practice recommended in this note, they should do so only for a good reason. In the event of litigation, the court may require them to explain why they decided not to adopt the recommended practice. Also, if you have not followed this guidance, and your actions are called into question in a RICS disciplinary case, you will be asked to justify the steps you did take and this may be taken into account.

In addition, guidance notes are relevant to professional competence in that each surveyor should be up-to-date and should have informed him- or herself of guidance notes within a reasonable time of their promulgation.
1 Introduction

1.1 General introduction to mineral leases

1.1.1 Most mineral leases in the United Kingdom today are granted in relation to construction aggregates (sand and gravel, limestone, granite, gritstone, monumental stone, etc.) although there are still opencast coal operations for which leases of the surface or working rights agreements can be negotiated. However, as documents relating to the working of coal are to a large extent determined by the requirements of the Coal Authority, it is advisable to refer to their model forms of agreement.

1.1.2 In addition, the Crown has ownership of certain ‘mines royal’ such as gold and silver, and there are certain statutory provisions which relate to the working of other minerals such as petroleum, which are deemed to be state owned. The leases which are granted for the working of these are atypical of leases of aggregate and similar minerals and are therefore not dealt with in this guidance note. Many of the provisions and considerations will nevertheless be similar (e.g. restoration, payment of royalties, etc.).

1.1.3 A lease is not necessarily the best form or structure for a landowner or operator. Tax considerations will often dictate whether a lease or capital purchase of land and/or minerals alone will be the best route, so it is recommended that a client is always advised to take specialist taxation advice.

1.1.4 Leases do however give considerable cashflow advantages to operators and control and certainty of income to the landlord, and are therefore the most common method of granting exploitation rights.

1.2 Leases v licences

1.2.1 A lease is an interest in land, and as such carries certain implied legal rights (such as exclusive occupation) and obligations (such as the landlord’s obligation to give quiet enjoyment) which do not apply to other forms of occupational arrangements.

1.2.2 A licence (e.g. for working rights) is a purely contractual arrangement, giving no rights or imposing no obligations other than as specifically otherwise contained in the document of grant.

1.2.3 There may be good reasons why a licence for mineral workings is preferred to a mineral lease (e.g. because the landlord is the owner of the surface but not the minerals, and does not wish to grant exclusive occupation or imply any other surface rights – e.g. for the erection of ‘value-added plant’ such as concrete plants – which the tenant may argue are implied in the grant of a lease). A surface owner cannot of course grant a ‘mineral lease’ as such, but can grant a lease for access and surface rights, or a working rights agreement or licence.
1.2.4 Since the introduction of Stamp Duty Land Tax (SDLT), it has been necessary for tenants to give a ‘reasonable estimate’ of the consideration payable under mineral leases, which can produce considerably greater liability to SDLT than under the old stamp duty regime.

1.2.5 Licences may also be chargeable to SDLT as a ‘profit a prendre’ depending on their true nature.

1.3 Security of tenure

1.3.1 The Landlord and Tenant Act 1954 (LTA 1954) does not apply to ‘leases for mining purposes’.

1.3.2 Leases for surface working or quarrying are included in that term, as well as underground leases for ‘mining’.

1.3.3 It has been held that a lease for peat working is not a ‘lease for mining purposes’ and therefore has the protection of LTA 1954, but the logic for this is questionable, as the working of peat is no different to the extraction of other minerals.

1.3.4 It is worth remembering, however, that a ‘lease for mining purposes’ may cease to be so once the relevant minerals are worked out, and the land is used for, for example, the processing of minerals imported from elsewhere, or for landfill, both of which would be protected under LTA 1954.

1.3.5 There may therefore be a case for excluding LTA 1954 by the new procedure under the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 in mineral leases where the lease may continue in connection with other business uses after mineral extraction has ceased (other than purely for restoration and agricultural aftercare).

1.4 Options and other conditional agreements

1.4.1 Because of the considerable sums that an operator will have to invest in investigating the reserve and obtaining planning permission for a new mineral extraction site, it is usual for the grant of a mineral lease to be prefaced by an agreement, conditional upon the grant of an acceptable planning permission.

1.4.2 The most common forms of conditional agreement are:
   - Option agreement (under which the operator has the right, but not the obligation, to call for the grant of a mineral lease if it is successful in obtaining an acceptable planning permission); and
   - Conditional contract (under which there is an enforceable contract to grant and take a mineral lease, subject only to the obtaining of an acceptable planning permission).

1.4.3 An option gives an operator the opportunity to withdraw from the arrangement if it does not find the terms of a planning permission acceptable, or for any other reason does not wish to exercise its option, while a conditional contract binds both parties into the mineral lease once a planning permission is granted which complies with the requirements of the contract.
1.4.4 The choice of vehicle depends largely upon the requirements of the parties and particularly the landlord, who may have tax reasons, for example, to prefer one over the other.

1.5 Ownership of minerals

1.5.1 The first matter which it is advisable for a surveyor to establish (with the assistance of an appropriately experienced solicitor) is whether or not the landlord owns the minerals sought.

1.5.2 Many conveyances contain reservations of ‘mines and minerals’ either with or without working rights, some of which may be restricted to underground means only.

1.5.3 In deciding whether a particular substance is a ‘mineral’ it has been held that one must consider whether the substance was considered as a mineral ‘in the vernacular of the mining world, the commercial world and landowners’ in the locality, and at the time of the grant or reservation.

1.5.4 Factors which will have an impact upon the interpretation would include whether surface and underground working rights were included; whether there were other sites in the locality where the relevant substance was being worked; and whether the substance was ‘exceptional in use, value or character’.

1.5.5 The question of ownership is of course central to the grant of a mineral lease, as the remedy for wrongful working is an injunction and damages would be an account of profits, and not just a market royalty.

1.5.6 It is a basic point when a mineral surveyor commences negotiations on behalf of a client that ownership of the minerals is first established.

1.6 Other forms of working rights agreements

1.6.1 Occasionally, the parties agree to enter into an alternative arrangement, such as a licence to extract and process minerals, or (where the minerals are vested in a third party) a licence to enter onto the surface, and access, process and export the minerals.

1.6.2 The parties may also agree that there should be an outright purchase of the surface (thus allowing the landlord to ‘roll over’ any capital gain into other qualifying land) or the minerals only. In either case, there will be a need to grant limited rights of access for mineral working.

1.7 Waste disposal and recycling

1.7.1 Whilst this guidance note is not primarily concerned with waste management matters, it is appropriate that some mention is made of such rights here, given the valuable potential of landfill, and more recently, recycling.

1.7.2 There is still doubt over the ownership of any void space left by mineral working, especially surface working, and one has to consider whether the rights to import and deposit (or recycle) extraneous waste should be granted or reserved.
1.7.3 The commercial terms for waste disposal may or may not be capable of being established at the outset of the negotiations, but there is a need for some discussion of the possibility of waste disposal and recycling (and indeed other forms of after-use, such as leisure or hard development) in order to properly advise the client, whether landowner or operator.

1.7.4 Consideration of whether or not to include rights to voidspace and for recycling within proposed mineral rights depends upon several factors including planning policy, engineering and environmental criteria, and not least the attitude of the client to landfill. Given the confusion which can surround ownership of voidspace the paramount consideration is that the agreement to be negotiated makes it crystal clear who owns what (including landfill gas), how it is to be dealt with and by whom.

1.8 Taxation

1.8.1 Taxation of mineral receipts is a specialist matter and it is worthwhile advising landowners and operators to take separate accountancy or legal advice.

1.8.2 Each landowner will have different circumstances, priorities and requirements, and there can be no ‘rule of thumb’ other than perhaps to say that while a capital sum may be taxed at preferential rates to income (at current rates) the amount realised for a capital purchase of minerals is likely to be considerably less than under a royalty arrangement over a number of years.

1.8.3 We recommend that taxation considerations are foremost in any advice given to landowners, particularly, and it is advisable that no terms are finally agreed unless and until specialist tax advice has been obtained and it has confirmed that the proposed terms and structure are in the client's best interests.

1.9 Compulsory rights

1.9.1 It is not commonly known that there is a procedure by which private rights to work minerals, or for ancillary rights, can be compulsorily acquired, despite the land or mineral owner’s wishes, for the private gain of the operator.

1.9.2 The Mines (Working Facilities and Support) Acts 1966–74 give an operator the right to apply to the Secretary of State for Trade and Industry for compulsory rights to work minerals or for ancillary rights (such as the right to carry minerals across the objector’s land) in certain circumstances, for example, where the owners of the minerals:

- cannot be found, or are too numerous; or
- refuse to grant the rights, or demand unreasonable terms,

and it is expedient in the national interest that such rights be granted.

1.9.3 In the case of minerals such as coal or petroleum, the requirement of ‘national interest’ is relatively easy to satisfy, but in other minerals (e.g. roadstone or other construction aggregates) the burden of proof is likely to be considerably greater.
1.10 Specialist advice and other sources

1.10.1 The RICS Minerals and Waste Management Faculty contains members experienced in the field, many of whom were trained as 'Chartered Mineral Surveyors' and who have specialised for many years in minerals and waste matters.

1.10.2 Members who do not have specialist expertise are advised to consider carefully whether such specialists be invited to be part of the team advising the client, in order to ensure that the client does indeed receive 'best advice'.

1.10.3 In addition, it is recommended that solicitors and accountants with appropriate experience are engaged in order to ensure that matters of drafting and tax planning are fully covered.
2 The role of the surveyor

2.1 Principles

2.1.1 There is no such thing as a standard lease for minerals and/or waste. Each agreement must be negotiated on the merits of the site and the circumstances. It is the function of the surveyor when negotiating an agreement to draw the parties together, finding consensus and common ground which, through compromise, offers something to each party.

2.2 Assessing the resource

2.2.1 Prior to detailed negotiations commencing it is appropriate to have an understanding of:
- the geology of the deposit;
- planning policy;
- markets; and
- costs and values.

2.3 Geology

2.3.1 We recommend that the surveyor takes steps to be satisfied of the quality and quantity of the mineral reserve.

2.3.2 This normally means using data produced by intrusive field investigation initially undertaken either independently of, or by using, commercial interests.

2.3.3 Information derived from such an investigation will more fully inform the parties.

2.3.4 Once an option is entered into provision can be made for supplementary site investigation.

2.4 Planning policy

2.4.1 It is advisable to research the status of the prospect within current and evolving planning policy.

2.4.2 Clearly some prospects such as those in National Parks will have limited planning potential.

2.4.3 The term of the options must reflect sensible timescales to deal with the planning opportunity but conversely not tie up land for long periods without the prospect of a planning consent.

2.4.4 It is advisable to make provision in the option for the promotion of prospects within strategic and site-specific evolving mineral plan policies.
2.5  Markets

2.5.1  It is vital that the surveyor understands the market for the material which is the subject of the negotiation.

2.5.2  Typically most but not all aggregates are low profit materials which travel short distances to market.

2.5.3  Other minerals such as china clay, silica sand or coal may travel long distances to market.

2.5.4  Knowing where the material can be sold, and for how much, is a building block of the negotiation.

2.6  Costs and values

2.6.1  During the negotiation the surveyor is normally, but not exclusively so, expected to agree a commercial arrangement for rents and royalties.

2.6.2  The royalty that can be agreed for a mineral is essentially that part of the operator’s gross margin that the operator is prepared to give up to the landowner in return for the access rights needed.

2.6.3  Gross margin is a function of costs and value – i.e. what it can be sold for.

2.6.4  Knowing as much as possible about site establishment and production costs together with selling costs will allow the surveyor to make a reasoned assessment of the margin and then by negotiation the royalty.

2.6.5  There is no such thing as a standard royalty and care must be taken by the surveyor when approaching the negotiation.

2.6.6  It is also the case that individual tax circumstances and preferences will differ.

2.6.7  Landowners will need tax advice as to the most appropriate way the income or capital should be received.

2.7  Management of mineral and waste agreements

- Both options and leases need to be managed.
- This is a function of the surveyor.
- Legal agreements consigned to drawers at the back of a desk no longer afford comfort.
- Positive management of the terms of the agreement from the beginning to the end is critical and if done properly should form the basis of a good working relationship between the parties.
- A lease without effective management has the potential to serve no one.
3 Option agreements

3.1 Term

3.1.1 For an option to be legally enforceable it must be for a term certain, and come into effect within 21 years.

3.1.2 The usual position is that the option will need to take into account periods required for:

- securing the inclusion of the property in the relevant planning strategy documents (Spatial Strategy, LDF, etc.);
- a full drilling programme, including sampling and interpretation;
- a full environmental assessment and preparation of the necessary Environmental Statement for submission with the planning application;
- preparation of a planning application;
- pre- and post-submission negotiations with the mineral planning authority;
- a realistic timescale for consideration of the application (possibly as much as 12 months or more);
- the possibility of an appeal;
- the possibility of court proceedings following the grant of permission or an appeal.

3.1.3 In light of the above, it is not unusual for options to be granted for three to five years (an 'Initial Option Period') with a further extension possible if, at the end of the Initial Option Period, there is no final decision on planning, for example, the mineral planning authority has not issued a decision, or an appeal has been submitted but not progressed to its conclusion.

3.1.4 In any event, unless there is a particular reason for not doing so, a 'longstop date' ought to be inserted so that a landowner is not burdening his land with the option for an indeterminate time.

3.2 Prospecting area

3.2.1 This will need to cover the maximum area over which it is likely that exploration activities may need to be carried out, and in respect of which planning permission is sought.

3.2.2 It would not be unusual for the prospecting area to exceed the area in respect of which planning permission is likely to be granted, as investigations for flora and fauna may need to extend over a considerable area (e.g. for great crested newts) and off-site drainage may also be an issue.

3.2.3 The landowner will need to consider if any areas of the property will be rendered difficult, or impossible, to farm economically once possession has been taken for mineral working.
3.2.4 The operator may wish to have the ability to exercise the option in respect of parts only of the option area, as and when planning permission is granted for those parts. This should be acceptable to the landowner, subject to proper consideration of minimum and maximum areas, and the matters mentioned in 3.2.1 and 3.2.3 above, and whether for taxation reasons, successive tranches should only be taken in successive tax years.

3.3 Option fee

3.3.1 There is no 'standard' option fee.

3.3.2 Option fees can vary from a few hundred pounds for a speculative programme of investigation perhaps on a limited scale, with no possibility of an immediate application for planning consent, to six-figure sums where the deposit is of strategic importance, with a virtual certainty of planning permission being granted.

3.3.3 Option fees can also be made to be payable periodically, and may be index-linked (e.g. to the Retail Prices Index) or increase according to length of time (e.g. £3,000 per annum in the Initial Option Period, and £5,000 per annum thereafter).

3.3.4 The matter is, however, entirely open to negotiation.

3.3.5 It must also be remembered that VAT may be chargeable on the Option Fee if the landowner has opted to charge VAT on the property.

3.4 Rights granted

3.4.1 These will need to be sufficiently wide to include all operations in connection with the preparation of a planning permission as mentioned above, including drilling, trial pitting, removal of samples for testing, installation and retention of monitoring equipment (e.g. piezometers), flora, fauna and landscaping surveys, etc.

3.4.2 If any particular plant and equipment is needed for the above, it may be prudent to provide specifically for rights to bring those onto the property along specified routes.

3.4.3 From the landowner’s point of view, it will be necessary to build in protection by restricting access to certain times, and along specified routes. Removal of minerals for sampling will need to extend to such amount as may be reasonable for production testing through a processing plant or brick manufacturing facility, for example.

3.5 Planning obligations

3.5.1 The operator is advised to prepare the planning application in consultation with the landowner and his agent, who must have the rights to:
  ● obtain such information as they may reasonably require from the operator;
  ● participate in any discussions with the mineral planning authority where they impact on the amount of mineral likely to be permitted to be extracted or on the proposed restoration aftercare or possible after-uses;
receive a copy of, and to have sufficient time to comment on, the application and all supporting statements plans, etc.; and

- agree the content of the application with the operator before submission.

3.5.2 It is recommended that the planning application covers the maximum area and maximum amount of minerals which can reasonably be applied for.

3.5.3 The application may be in the sole name of the operator, or joint names of the landowner and operator. A consideration in deciding this will be whether the landowner wishes to be able to pursue an appeal if the application is refused and the operator wishes to walk away from the option, in which case an application in joint names may be preferable.

3.5.4 We advise that the operator, as a minimum, be obliged to prepare and submit a planning application within a specified time (which may include an extension period to allow for protracted negotiations with the mineral planning authority) and to diligently pursue the application.

3.5.5 Ideally, the operator should be required to submit and pursue an appeal against refusal, but most operators are unwilling to accept such an obligation, as they see their role as investing as much time, effort and money as they deem fit, and a decision to appeal will involve a very considerable additional expense and commitment which it may not, in the circumstances of the reasons for refusal, be justified.

3.5.6 It may, however, be self-defeating if an appeal against non-determination is filed at a time when it is likely that an application is to be recommended for approval subject only to the resolution of a few outstanding, and relatively minor, points. An ill-timed appeal may result in an unnecessarily hostile reception from the planning authority, which may make the appeal more difficult than is necessary.

3.5.7 The landowner should be obliged to enter into any necessary s. 106 or similar agreements necessary to secure the grant of permission, subject to an appropriate indemnity from the operator in respect of costs, and a right to object to any matters which may have an adverse impact on the property’s possible after-use, unless those impacts are an obvious and necessary consequence of the approved planning application.

3.6 Other operator’s covenants

Examples of other covenants (which is not an exhaustive list) include:

- to enter on the land only in accordance with the approved terms of entry made between the parties;
- to comply with all obligations imposed under the Planning Acts;
- to agree beforehand the site of all intended boreholes, trial pits, etc.;
- to site all boreholes, pits and excavations as near to field boundaries and roads as possible;
- to keep all boreholes and trial pits fenced off, clearly marked and, if necessary, covered or capped, and as soon as practically possible and before the expiry of the Option Period fill them in and restore the ground to its former condition;
• to repair immediately any damage to fences, walls, gates, drains, pipes, ditches or waterways caused by the operator’s activities;
• to pay full compensation for all losses or damage (e.g. to an agricultural tenant) caused by the operator’s activities;
• to maintain and keep accurate records of the prospecting and to provide a copy of the full report to the grantor free of charge, subject to agreement on confidentiality;
• to indemnify the landowner against all actions and claims made against him by a third party in connection with the operator’s activities on the property;
• not to assign, underlet, charge or otherwise share or part with the benefit of the Option Agreement. If the operator does wish to have the right to assign, it should be subject to the landowner’s prior written approval to an assignee of sufficient financial technical and managerial resources to comply with the terms of the Option Agreement and proposed mineral lease;
• to comply with all statutory requirements relating to the operator’s works.

3.7 Exercise of option

3.7.1 The operator ought not be permitted to exercise the option without the benefit of planning permission.

3.7.2 The operator may wish to delay exercise of the option until all consents necessary for the full implementation of the planning permission have been obtained, for example, including s. 106 and s. 278 agreements, footpath or road diversion orders, PPC consents, etc. Whilst this is understandable, it may mean a significant delay of months or even years, and the landowner’s agent might consider whether there is to be, for example, some periodic payment to the landowner as soon as planning permission has been granted.

3.7.3 The Option Agreement will have to provide for the following matters to be dealt with at the time of the completion of the mineral lease:
   (a) whether the agreed commencing rents and royalties are to be index-linked from the date of the sums being agreed;
   (b) the indication in the Option Notice of the amount of land which the operator wishes on completion to have access to and possession of (the two may not be the same);
   (c) the giving of vacant possession by the landowner of the areas referred to in (b) above, which may involve the landowner reaching agreement with any agricultural or other tenant for the giving up of possession.

3.8 Costs

3.8.1 It is usual for operators to agree to pay the landowner’s professional costs in connection with the negotiation and completion of the Option Agreement.

3.8.2 However, disagreements can arise on the amount of those costs, which can often exceed £10,000–20,000, even in a relatively uncomplicated transaction.
3.8.3 One solution would be for a cap to be applied to the amount of costs which the operator is to carry, with the ability to recoup any excess from royalties if the transaction completes. Whilst this does not entirely remove the risk from the operator, it has been used successfully in order to break the deadlock.

3.8.4 Where the landowner can recover VAT, the operator is obliged to pay only the VAT exclusive amount.

3.9 Termination

3.9.1 Standard termination clauses, for example, on the liquidation of the operator, are to be included.

3.9.2 The operator may wish to terminate early if it is of the opinion that planning permission will not be granted. Whether to accept this is a difficult decision for the landowner, as he will wish to maximise his chances of obtaining planning permission, and it will depend on the circumstances and individual negotiations in each case.
4 Mineral leases

4.1 Term

4.1.1 The term will have been negotiated at the time of agreement of the terms generally, but must be long enough to permit the commencement and completion of mineral extraction and restoration, perhaps with a short contingency for delays.

4.1.2 Aftercare can be dealt with outside the term (see section 4.12 below).

4.1.3 Security of tenure should be considered. Leases ‘for mining purposes’ are excluded from the security of tenure provisions in the Landlord and Tenant Act 1954, but where there are, for example, provisions for retention of plant and equipment on the property after working of the property is completed (e.g. to service other mineral deposits in the area), or for infilling with waste, that the operator may acquire protection and therefore contracting out may be prudent (see the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003).

4.2 Demised minerals

4.2.1 The particular minerals being worked should be the only minerals included in the lease. Consideration may however have to be given to situations where other minerals have to be disturbed or worked through to reach the main mineral sought – are those other minerals also to be leased, and if so on what terms?

4.2.2 Where it is possible that other minerals may be encountered in the working (e.g. clay workings overlain by sand/gravel) it is useful to state clearly whether the operator may work the other minerals and sell or remove them, and if so upon what terms as to payment, etc.

4.3 Demised land

4.3.1 The essentials of a ‘lease’ need to be borne in mind – a lease of ‘land’ will carry with it rights which may not have been intended, for example, to erect plant for purposes unconnected with the working of the particular operation, and therefore the user clause will also need to be carefully drafted.

4.3.2 Subject to the above, the demised land (if so expressed) or the property in respect of which the demised rights are to be exercisable, needs to be sufficiently extensive to allow the operator to fully implement the planning permission, whilst leaving the landowner with sufficient land to carry on his other activities (if appropriate).

4.3.3 It may be that other land may be made available to the operator, for example for tree planting or installation of monitoring boreholes, but that should be at an appropriate payment and subject to other reasonable terms.
4.4 Rights granted

4.4.1 The following list (which is not exhaustive) includes the majority of the rights usually required for the full and proper working of the minerals:

- to enter onto and let down or destroy the surface (subject to giving of notice as mentioned below);
- to search for the minerals by surface operations only and process and carry them away or (subject to payment if appropriate) dispose of them by removal off-site;
- to make excavations, construct and use settling lagoons, buildings plant machinery, conveyors or other works as may be reasonably necessary or convenient;
- all necessary rights for working and making merchantable the minerals (excluding the rights to include plant for ‘value added’ products such as ready-mixed concrete, asphalt, concrete blocks, bricks and the like unless any of these rights have been specifically negotiated);
- to deposit back on the property waste minerals arising from the working of the demised minerals;
- to store separately any minerals or other material not included in the demise, and required by the landowner to be so stored (subject nevertheless to the restrictions imposed by the relevant planning permission);
- if appropriate, a right to carry onto or across the property other minerals or materials for processing, subject to a separate wayleave payment (unless of course the demised minerals are not capable of being worked and sold on their own without being blended) all in a manner to be agreed with the landlord.

4.5 Exceptions and reservations

4.5.1 The following list (which is not exhaustive) includes examples of exceptions from the demise and rights usually reserved to the landlord:

- all minerals apart from the demised minerals;
- the rights of waste disposal on the land (but these should not be exercisable by the landlord without appropriate agreement with the operator, possibly with the operator having a right of pre-emption over them);
- all growing timber (possibly with the obligation on the operator to remove and deliver it to the landlord);
- all sporting rights, but subject to appropriate restrictions on their exercise, for example, within 200 m of a working or plant site area;
- all treasure trove, archaeological remains and the like;
- the right to continue farming those areas not required for mineral working landscaping or other operations of the tenant and to reoccupy areas restored during the mandatory aftercare period (see 4.12 below);
- appropriate rights of support for adjoining or neighbouring property;
- appropriate rights of way for agricultural and/or sporting purposes or for the purposes of exercising the exceptions and reservations;

It is advisable that all the above be made subject to the person exercising those rights causing as little damage or inconvenience as possible and making good any damage or inconvenience so caused.
4.6 Certain rent

4.6.1 This guarantees a level of income for the landlord and encourages the operator to work at least the amount required annually for covering the certain rent.

4.6.2 It is usually set at a level which the operator feels it will be able to achieve with relative ease if its expectations are fulfilled, and may be increased over time to allow for the initial year(s) when the operation is being set up.

4.6.3 Typical levels are between 25–35 per cent of anticipated annual full production, but may be more or less, depending on individual cases.

4.6.4 The certain rent may be expressed:

- as a monetary sum; or
- as the sum which is produced by multiplying the royalty applicable to the particular year of the term in question by a stated tonnage.

4.6.5 From a landlord’s point of view, it may be prudent to include a right for the landlord to terminate the lease if in, say, any two or more succeeding years of the term the operator does not extract enough mineral to cover the certain rent. This will encourage the operator to keep the unit in as full production as is possible. It is of course always open to the parties to negotiate to waive that right in the event of a fall in market demand.

4.6.6 Payment of the certain rent should not be less frequent than annually in advance.

4.6.7 It may be appropriate to include a provision that if in any year of the term the total royalties payable in respect of the demised minerals extracted do not exceed the certain rent, the full certain rent will still be payable but the shortfall (usually expressed in tonnes) may be carried forward against amounts extracted in excess of the certain rent in future years, so that the shortfall (‘shortworkings’) are recouped. This is a matter for negotiation in all cases and we recommend professional advice is sought.

4.6.8 Under no circumstances, however, should there be a right to recoup workings in any year over the amount required to cover the certain rent against short workings in succeeding years.

4.7 Royalties

4.7.1 The royalty payable for the demised mineral is often referred to simply as the ‘royalty’ or ‘the mineral royalty’.

4.7.2 The royalty is usually calculated on the tonnage of minerals worked and sold from the property, or otherwise removed from it.

4.7.3 There is a natural reluctance on the part of Grantees to pay for minerals which, although extracted, remain to be disposed of off-site, for example, because it is too fine, or otherwise below specification.

4.7.4 Whilst it is impossible to generalise on the figures which should be payable, the more strategically important a deposit is and closer it is to the markets for which it is destined, the higher the royalty will be.
4.7.5 Sand and gravel can command widely differing royalties according to locality, markets and quality. It should also be noted that an increasing number of transactions are now conducted on the basis of royalties payable by reference to percentage of ex-pit selling price, which can also vary widely.

4.7.6 Certain types of mineral will command different royalties if they are of particular importance – e.g. industrial sands and other industrial minerals will usually commend higher royalties than similar minerals destined for non-industrial uses.

4.7.7 In order to protect landlords against inflation and ensure a fair share of the value realised by the demised minerals, it may be preferable, from the landlord's point of view to express the royalty figure as a percentage of the ex-pit sale price, subject to a minimum figure expressed in £/tonne.

4.7.6 The appropriate percentage will vary from site to site, depending on the costs of production and preparation for sale, local market conditions and the level of the certain rent or other costs incurred by the operator.

4.7.7 It may also be provided that any aggregates levy is to be borne by the operator, and not the landlord.

4.8 Other rents and royalties

4.8.1 Surface rent

4.8.1.1 Surface rent may be appropriate where areas will be rendered unavailable to the landlord, but mineral will not be worked from them, for example, areas used for soil storage, landscaping, haul, roads, etc. For ease of calculation, it may be payable in respect of any land which has been unavailable to the landlord for any part of a year of the term (perhaps with a de minimis of at least one month).

4.8.1.2 The rate at which surface rent is payable will depend upon the loss to the landlord, but may not reflect full loss of profits, but a reasonable rental value achievable in the locality.

4.8.1.3 Payment of surface rent is usually in advance for pre-determined areas taken but may be in arrears, as it may not be possible to calculate it in advance. Payments may be quarterly, half-yearly or annually, but with an annual reconciliation to deal with fluctuations through the relevant year of the term.

4.8.2 Plant site rent

4.8.2.1 Occasionally it may be appropriate for the operator to pay a separate rent for the site of its processing plant, for example, where it is to be used for processing minerals other than those worked from the property as well as the demised minerals.

4.8.2.2 The amount of such a rent is impossible to define, and is a matter for negotiation, possibly by reference to rents for some industrial applications in the locality, but it is usually a fixed sum.

4.8.2.3 Payment of plant site rent is usually in advance quarterly, half-yearly or annually.
Wayleave royalty

Where a right is given for minerals from adjacent or neighbouring workings to be brought onto or through the property, a wayleave rent ought to be negotiated.

The amount of a wayleave royalty is usually a fraction of the royalty figure, lying between 10 and 20 per cent (though it can be higher in genuine ransom situations).

Payment of wayleave rent is usually quarterly, half-yearly or annually in arrears as it may not be possible to calculate it in advance.

Review of rents and royalties

Reviews of certain rent and wayleave royalty are usually linked to reviews of mineral royalties, and so are often self-reviewing.

The usual bases of review of mineral and surface are either to an open market figure or by reference to an agreed index.

Generally, review clauses provide that rents and royalties do not go down at any review, but there may be a case for providing that the mineral royalty may go up or down, but not in excess of a particular percentage, or below say the commencing royalty figure.

Reviews to open market rate generally occur not less frequently than three-yearly. More frequent intervals are certainly acceptable, but tend to create a never-ending process of review negotiations which will be time-consuming, expensive and may create an unnecessary strain on the relationship between the parties.

As industrial indices (e.g. for sand and gravel) are sometimes viewed as being unrepresentative of the situation in the locality, reviews are now often based upon the Retail Prices Index, or the percentage change in the ex-pit price of the demised minerals. The preferred choice is a matter for negotiation and specialist advice, but reviews by reference to a published index will be easier to apply more frequently (e.g. annually).

If a relatively frequent index-linked review is selected, it may be appropriate to refer the rent to an open market review at less frequent intervals in addition as a check over the term of a long lease.

Planning and other statutory obligations

The operator is advised to comply at its own cost with all planning and other statutory requirements, including those in any s. 106 agreement (which, it should be remembered, binds the land even after the operator has left), and to preserve the mineral planning consent.

New planning applications are not to be permitted without the landlord’s specific prior approval, and it may be prudent to provide that approval may be withheld if the application is likely to result in a restriction on the amount of mineral which may be worked.
4.11 Environmental risks

4.11.1 These are of course now of increasing concern, and it may be prudent for a landlord to consider requiring regular environmental surveys or audits and an indemnity against any liabilities which may arise.

4.11.2 Most, if not all, of the major mineral operators, however, now have environmental policies and procedures which are likely to provide a significant level of reassurance to landlords.

4.12 Restoration and aftercare

4.12.1 Restoration and aftercare conditions will be imposed by the planning permission and possibly also (especially where they are long term) by a s. 106 agreement.

4.12.2 The landlord may wish to be given the first right to farm (e.g. with grazing sheep) any restored areas, and during the aftercare period at no cost to himself, with the operator paying for all annual treatment, etc.

4.12.3 It is often now the case that aftercare is dealt with by the grant of a separate aftercare licence in respect of the relevant restored area(s) so that those areas are then taken out of the mineral lease and governed by the terms of that licence.

4.12.4 The standard of restoration and aftercare are likely to take into account the requirements of the landlord as well as those of the mineral planning authority, as it is the landlord who will remain the owner of the property into the future.

4.12.5 Restoration bonds are becoming more common as a means of a guarantee to landlords that restoration and aftercare will be carried out, irrespective of whether the operator is still in existence. Where these are used, they should be subject to review not less frequently than three- or five-yearly.

4.13 Alienation

4.13.1 It is advisable to impose the usual restrictions on alienation.

4.13.2 It is a good idea to bear in mind that while a right to share occupation with an associated company may be granted, a right to assign to a group company ought to be treated in the same way as an assignment to an unrelated third party, as the assignee group company may be a shell company, whose shares may then be sold out of the group, thereby completely frustrating the intention of the restriction.

4.13.3 It is also becoming increasingly common now for the major operators to be controlled by foreign companies, and it can prove valuable to provide adequate protection for the landlord if the operator to whom the lease is granted becomes a foreign company.

4.14 Other tenant’s covenants

4.14.1 Examples of other covenants (which is not an exhaustive list) include:

- payment of interest on late payments of rents and royalties;
to work the minerals in the best approved practice without committing unnecessary waste. The landlord may also require them to be worked ‘continuously’. This is an important obligation, as it will oblige the operator to work the demised minerals without interruption throughout the term, even in preference to its own minerals on an adjoining site. A breach of a continuing working provision is a ground for forfeiture of the lease;

- restrictions on erecting or using plant for the production of value added products (e.g. ready-mixed cement, asphalt, concrete products, bricks);
- to use the property strictly for the exercise of the rights granted only;
- the holding of an annual project meeting to discuss the past and ongoing operations;
- to install a weighbridge on the property, or to nominate a weighbridge where the minerals are to be weighed, to maintain it in accordance with the manufacturer’s instructions and as required by law (i.e. accurately) and to allow the landlord to test it;
- to ensure that all minerals removed from site are taken over the nominated weighbridge;
- to prepare plans, sections and working drawings as appropriate throughout the term at intervals of at least 12 months and provide paper and electronic versions to the landowner free of charge;
- to give a reasonable length notice of entry before taking occupation of any land for the purpose of mineral working. It is prudent to provide for a six-month notice, with a parallel provision that shorter notice may be given, subject to the payment of compensation for the value of growing crops. Where the land is tenanted, it is advisable for the landlord to ensure that the tenancy agreement provides for short notice to terminate for mineral working and agreement is made with the minerals operator that the operator will be responsible for paying any compensation to the agricultural tenant.

4.15 Landlord’s obligations

4.15.1 These can include:
- quiet enjoyment;
- service of appropriate notices on tenants and statutory undertakers;
- confidentiality.

4.16 Disputes resolution

4.16.1 It is recommended that an appropriate disputes resolution clause be included, providing for disputes to be referred to expert determination or, if more appropriate, formal arbitration.

4.17 Termination

4.17.1 It is advisable that provisions similar to those included under the Option Agreement be included.
5 Precedents

5.1 The authors have considered whether some precedent forms should be included in this guidance note, but have concluded that this would be undesirable due to the legalistic nature of such documents.

5.2 Where precedents need to be considered, or provided to non-specialist advisers, these can be obtained from the appropriate legal precedent works available for such purposes.

5.3 The *Encyclopaedia of Forms and Precedents*, published by Butterworths/Lexisnexis is the premier source of drafting precedents for the legal profession, and reference may be had to the ‘Mines Quarries and Landfill’ title in that work for a brief commentary on the law relating to mining and precedents which can be adapted for use in particular circumstances. However, it must be emphasised that this is a legal work intended for use primarily by lawyers, and surveyors must therefore be wary of using it without appropriate guidance from suitably experienced lawyers.
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There is no such thing as a standard lease for minerals and/or waste. Each agreement must be negotiated on the merits of the site and the circumstances. This guidance note aims to provide a reminder of the basic building blocks of a mineral lease and explains what needs to be considered in each case.

This guidance note is aimed at professionals in the field of negotiations for rights to minerals and also touches on leases of void space. It is generally biased towards those working for the landowner, however, it can also inform the tenant and its professional advisers.

The RICS guidance note Form and structure of mineral option and lease:

• provides clear explanations of mineral leases and option agreements
• outlines the role of the surveyor in this complex area
• offers practical advice and suggestions
• puts forward suggestions for good practice.