

Ian Gambles
Director of National Infrastructure
National Infrastructure Directorate
The Planning Inspectorate
Temple Quay House
Bristol
BS1 6PN

Martin Woods
Head of TWA Orders Unit
General Counsel's Office
Department for Transport
Zone 1/18
Great Minster House
33 Horseferry Road
London
SW1P 4DR
Direct Line: 020 7944 2488

E-mail: martin.woods@dft.gov.uk

Web Site: www.dft.gov.uk

Our Ref: TWA 2/1/45

8 May 2012

Dear Mr Gambles,

CERTIFICATES UNDER SECTION 127 OF THE PLANNING ACT 2008

I am writing to confirm the arrangements which the Secretary of State for Transport wishes to put in place in respect of the discharge of her functions under section 127 of the Planning Act 2008, as amended by the Localism Act 2011 ("section 127 functions"). In this letter, references to "the Act" refer to the Planning Act as amended and references to "section 127" refer to section 127 of the Act.

Section 127 makes provision for cases where an applicant for development consent under the Act seeks the inclusion in an order granting development consent ("DCO") of provision for the compulsory acquisition of land, or a right over land, which has been acquired by statutory undertakers (as defined in section 127(8)) for the purpose of their undertaking and the following conditions, set out in section 127(1)(b) and (c), are met:

- "(b) a representation has been made about an application for an order granting development consent before the completion of the examination of the application, and the representation has not been withdrawn, and*
- (c) as a result of the representation the Secretary of State is satisfied that—*
 - (i) the land is used for the purposes of carrying on the statutory undertakers' undertaking, or*
 - (ii) an interest in the land is held for those purposes."*

In these circumstances, the Act provides that a DCO including provision for compulsory acquisition of statutory undertakers' land can be made only to the extent that the Secretary of State is satisfied of the matters set out in section 127(3) and issues a certificate under section 127(2) to that effect. Those matters are:

"that the nature and situation of the land are such that—

- (a) *it can be purchased and not replaced without serious detriment to the carrying on of the [statutory undertakers'] undertaking, or*
- (b) *if purchased it can be replaced by other land belonging to, or available for acquisition by, the undertakers without serious detriment to the carrying on of the undertaking."*

Subsections (4) to (6) of section 127 make similar provision for cases where an applicant seeks to acquire compulsorily by way of a DCO rights over statutory undertakers' land. In such cases the DCO can only include such provisions where the Secretary of State is satisfied of the matters set out in section 127(6) and issues a certificate to that effect under section 127(5). Those matters are:

"that the nature and situation of the land are such that—

- (a) *the right can be purchased without serious detriment to the carrying on of the [statutory undertakers'] undertaking, or*
- (b) *any detriment to the carrying on of the undertaking, in consequence of the acquisition of the right, can be made good by the undertakers by the use of other land belonging to or available for acquisition by them."*

Section 127 does not expressly allocate the functions set out in it to any particular Secretary of State. However, the intention is that they should be discharged by whichever Secretary of State (or potentially, Secretaries of State, where more than one kind of statutory undertakers' land is concerned) is (or are) responsible for the field of activity in which the statutory undertakers' undertaking is carried on. Depending on the type and field of the project for which development consent is being sought, the same Secretary of State (or one of them) may also be responsible for determining the application for a development consent.

In any case where the statutory undertakers' land concerned belongs to:

- (a) a person authorised by any enactment to construct, work, or carry on a railway, light railway, tramway, road transport, water transport, dock, harbour, pier or lighthouse undertaking; or
- (b) the Civil Aviation Authority or a person who holds a licence under Chapter 1 of Part 1 of the Transport Act 2000; or
- (c) an undertaker in the transport field which is deemed to be a statutory undertaker for the purposes of the Acquisition of Land Act 1981 by virtue of another enactment,¹

(each "a relevant statutory undertaker") responsibility for issuing any certificates under section 127 falls to the Secretary of State for Transport. In a case where the DCO in

¹ See section 127(8) of the Planning Act 2008 and section 8 of the Acquisition of Land Act 1981.

which it is sought to include provision for the compulsory acquisition of that land or rights over it would grant development consent in respect of a transport project, the Secretary of State for Transport will also determine the application for development consent under section 104 or section 105 of the Act.

The question of whether or not to issue a certificate is separate from (albeit related to) the question of whether there is a compelling case in the public interest for the compulsory acquisition of land or rights over the land concerned (see section 122 of the Act) and/or from those matters to which the relevant Secretary of State must have regard under section 104 or 105 of the Act, and any other matters which she thinks are both relevant and important when making a decision as to whether or not to grant development consent.

Before issuing any certificate under section 127(2) or (5), the Secretary of State for Transport, in her function as decision-maker under section 127, needs to be properly informed about any matters which may be relevant to her decision as to whether or not to issue such a certificate. She considers that for these purposes it would be desirable for her to have received a report about matters likely to be relevant to her decision under section 127 from a suitably qualified person. Before preparing such a report, that person may need to discuss representations made in respect of section 127 matters with the parties involved, make inquiries of technical experts in relevant bodies such as the Office of Rail Regulation, hold a hearing, or visit or inspect the land.

The Secretary of State for Transport considers that the persons best suited to preparing such reports are persons appointed by the Planning Inspectorate.

Accordingly, in all cases where:

- (a) a proposal has been made to include in a DCO provision for the compulsory acquisition of:
 - (i) land acquired by a relevant statutory undertaker for the purposes of their undertaking; or
 - (ii) rights over a relevant statutory undertaker's land; and
- (b) it appears to the the Secretary of State for Transport that the conditions set out in section 127(1)(b) and (c) are, or may be, met in respect of that land,

the Secretary of State for Transport wishes the procedures set out below to be followed in respect of the section 127 functions in respect of that proposal.

A suitably qualified person ("the section 127 examiner") should be appointed to make a report to the Secretary of State about matters relevant to the exercise of the section 127 functions in that case.

The Secretary of State has no objection to the appointment of a section 127 examiner who is:

- (a) a member of the Panel which is to examine the application for development consent to which the proposed DCO relates ("the relevant application"); or
- (b) where no Panel is appointed, the person appointed under section 79 of the Act in respect of the relevant application.

Notification of receipt of the request for a certificate under section 127 should be published on the Planning Inspectorate website.

The section 127 examiner's report should be delivered to the Department no later than the date on which the Panel (under section 74(2)(b)) or the appointed person (under section 83(1)(b)) report on the relevant application to the Secretary of State who is to determine the application.

The section 127 examiner's report should set out:

- (a) a summary of any representations made in respect of the Secretary of State for Transport's section 127 functions;
- (b) in cases where it has been suggested that the conditions in section 127(1)(b) or (c) are not, or may not be, satisfied, the examiner's view as to whether the disputed condition is satisfied ;
- (c) any other matters which the section 127 examiner considers relevant to the exercise of those functions;
- (d) a reasoned recommendation to the Secretary of State for Transport as to whether she should issue a certificate under section 127(2) or (5) in respect of the relevant statutory undertaker's land or rights over that land; and
- (e) where the recommendation is that a certificate should be issued, a draft of the certificate and of the notice required to be published under section 127(7)(a)

Yours sincerely,



Martin Woods
Head of TWA Orders Unit