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London Luton Airport Expansion

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Volume 8 Additional Submissions (Examination)

**8.182 Applicant's Position Paper on Sections 127 and 138 of
the Planning Act 2008 (Tracked Change Version)**

Infrastructure Planning (Examination Procedure) Rules 2010

Application Document Ref: TR020001/APP/8.182

The Planning Act 2008

The Infrastructure Planning (Examination Procedure) Rules 2010

**London Luton Airport Expansion Development Consent
Order 202x**

**8.182 Applicant's Position Paper on Sections 127 and 138 of
the Planning Act 2008 (Tracked Change Version)**

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Table 1.1: Summary of the Applicants Assessment of s127 and s138 Tests

1 INTRODUCTION

- 1.1.1 This document relates to the proposed expansion of London Luton Airport ('the Proposed Development') and has been submitted by Luton Rising (the Applicant) to the Planning Inspectorate acting on behalf of the Secretary of State for Transport. It relates to an application for a Development Consent Order (DCO) to permit and enable implementation of the Proposed Development made under section 37 of the Planning Act 2008 (as amended) ('the Act') (Ref 1.1).
- 1.1.2 A detailed description of the Proposed Development can be found in **Chapter 1 of the Environmental Statement [APP-029]**.
- ~~1.1.3 This document contains a schedule of statutory undertakers as well as telecommunications operators who retain rights under the Electronic Communications Code as set out in Schedule 3A of the Communications Act 2003 (Ref 1.2). Statutory undertakers (as defined in section 127(8) of the Act), benefit from the provisions of sections 127 and 138 of the Act. Telecommunications operators (who retain rights under the Electronic Communications Code as set out in Schedule 3A of the Communications Act 2003 (Ref 1.2)) only benefit from section 138 of the Act.~~
- ~~1.1.3 This document contains at Table 1.1 a schedule of those statutory undertakers as well as and telecommunications operators in respect of whom the Proposed Development engages sections 127 and 138. who retain rights under the Electronic Communications Code as set out in Schedule 3A of the Communications Act 2003 (Ref 1.2).~~
- 1.1.4 ~~For the avoidance of doubt, Table 1.1 the table does not include address those statutory undertakers or operators where their land is only subject to temporary possession powers contained within the draft DCO. This is because temporary possession does not amount to the compulsory acquisition of land, which is a precursor to engaging sections 127 and 138.~~
- ~~1.1.5 National Highways falls into this category, because the Proposed Development does not seek any compulsory acquisition powers over National Highways' land or interests. Whilst National Highways is not addressed in Table 1.1 National Highways is a Statutory Undertakers where the Applicant is only seeking temporary possession meaning the provisions of s127 and 138 of the Act. However, at noting the request of the Examining Authority under the Rule 17 letter dated 31 January 2024 [PD-023], the Applicant's position on the National Highways interface is that:~~
- ~~a. the Applicant has established the "TRIMMA" process, secured by requirement 30 of the draft DCO, to ensure that mitigation for impacts on the strategic road network is delivered at the appropriate time;~~
 - ~~b. the Applicant has included substantial protective provisions for the benefit of National Highways in Schedule 8 to the draft DCO;~~

c. consequently, National Highways' interests are adequately protected and there will be no detriment to those interests as a result of the Proposed Development.

~~1.1.5 — can confirm that the Proposed Development has no serious detriment to the carrying on of National Highways' undertaking and that the temporary possession the Applicant is seeking is required possession to enable the construction and operation of the Proposed Development. / However, at the request of the Examining Authority under the Rule 17 letter dated 31 January 2004 [TR02001], the Applicant has provided an update to the National Highways Statement of Common Ground [REF] which details the position with regard to National Highways.]~~

1.1.6 This Schedule Table 1.1 of this document should be read in conjunction with the following documents:

- a. **Special Category Land Plans [AS-021]**
- b. **Land Plans [AS-011]**
- c. **Statement of Reasons [AS-071]**
- d. **Book of Reference [TR020001/APP/3.02]**
- e. **Status of Negotiations [TR020001/APP/8.34]**
- f. Applicant's comments on responses to Written Questions by Interested Parties: **[REP2-035], [REP3-059], [REP5-052]**
- g. Applicant's Response to Written Questions: **[REP2-035]**
- h. Applicant's Response to Written Representations Made by other Statutory Organisation and Additional Submissions **[REP2-039]**
- i. Applicant's comments on responses to Written Questions by – Broad and General, Cross-Topic Questions **[REP4-052], [REP7-049]**
- j. Applicant's Response to Written Questions – Compulsory Acquisition and Temporary Possession of Land and Rights **[REP4-056], [REP7-051]**
- k. Applicable Statements of Common Ground where referenced in the Status of Objection column.

2 SECTION 127 OF THE PLANNING ACT 2008

2.1.1 This document considers the extent to which the compulsory acquisition powers the Applicant seeks to obtain under the DCO impacts land where a statutory undertaker has been identified as having an interest as identified by the **Book of Reference [TR020001/APP/3.02]** (Statutory Undertaker Plots).

2.1.2 The Applicant has applied the tests within section 127 of the Act (as amended) (section 127) to assess whether Proposed Development amounts to 'no serious detriment' to Statutory Undertaker Plots.

- 2.1.3 Section 127(3) of the Act provides that a DCO may only authorise compulsory acquisition of statutory undertaker land where a representation has been made by the statutory undertaker objecting to the acquisition if the Secretary of State is satisfied that:
- a. the land can be purchased and not replaced without serious detriment to the carrying on of the undertaking (section 127(3)(a)); or
 - b. if purchased, the land can be replaced by other land belonging to, or available for acquisition by, the undertaker without serious detriment to the carrying on of the undertaking (section 127(3)(b)).
- 2.1.4 Section 127(6) of the Act provides that a DCO may only authorise the compulsory acquisition of rights over Statutory Undertaker land where a representation has been made by the Statutory Undertaker objecting to the acquisition if the Secretary of State is satisfied that:
- a. the rights can be acquired without any serious detriment to the carrying on of the undertaking (section 127(6)(a)); or
 - b. any consequential detriment to the carrying on of the undertaking can be made good by the undertaker by using of other land belonging to or available for acquisition by the undertaker (section 127(6)(a)).
- 2.1.5 The Statutory Undertaker Plots required for the Proposed Development are detailed at Table 1.1, against which conclusions are made as to whether the Applicant can purchase the land or acquire the interests without serious detriment to the carrying on of the undertaking of the Statutory Undertaker.
- 2.1.6 The Applicant's conclusions regarding 'no serious detriment' has been determined through an analysis of the impact the Proposed Development would have on Statutory Undertaker apparatus and land interests being acquired.

3 SECTION 138 OF THE PLANNING ACT 2008

- 3.1.1 Section 138(4) of the Act provides that a DCO may only authorise compulsory acquisition of statutory undertaker land and a "relevant right" or "relevant apparatus" where the Secretary of State is satisfied that the extinguishment or removal is necessary for the purpose of carrying out the development.
- 3.1.2 "Relevant right" means a right of way, or a right of laying down, erecting, continuing or maintaining apparatus on, under or over the land, which—
- (a) is vested in or belongs to statutory undertakers for the purpose of the carrying on of their undertaking; or
 - (b) is conferred by or in accordance with the electronic communications code on the operator of an electronic communications code network.
- 3.1.3 "Relevant apparatus" means—
- (a) apparatus vested in or belonging to statutory undertakers for the purpose of the carrying on of their undertaking, or

(b) electronic communications apparatus kept installed for the purposes of an electronic communications code network.

3.1.4 The Applicant's conclusions that the extinguishment of the relevant rights, or the removal of the relevant apparatus is required to enable the construction and operation of the Proposed Development has been determined through an analysis of the impact the Proposed Development would have on Statutory Undertaker and operator apparatus.

4 CONCLUSION

4.1.1 In line with paragraphs 2 and 3 and Table 1.1 of this paper, the Applicant considers that any effects resulting from the Proposed Development on Statutory Undertaker Plots (which includes apparatus) is protected under the DCO, including the Protective Provisions contained in Schedule 8 to the DCO, and / or agreements with the affected Statutory Undertakers or operators.

Table 4.1: Summary of the Applicants Assessment of s127 and s138 Tests

Statutory Undertaker	Nature of Undertaking	Land Requirement ¹	Status of Objection	Accordance with tests in s127(3)(a) or (b)	Accordance with tests in s127(6)(a) or (b)	Accordance with test in s138(4)	Agreement Type
Affinity Water Limited	Water and sewerage undertaker as per the Water Industry Act 1991.	(Category 2) CA, CAR	<p>Existing objection to the Order.</p> <p>Discussions are ongoing regarding a separate side agreement between the Applicant and Affinity, to provide further protection for Affinity. The latest draft of this agreement is under discussion between Affinity's legal representatives and the Applicant's solicitors.</p> <p>The Applicant is confident that agreement on all matters will be concluded prior to 8 February 2024 (end of examination).</p>	<p>The Applicant is satisfied that the tests in s127(3)(a) or (b) are met.</p> <p>The tests in s127(3)(a) and/or (b) can be met by according with Articles 36 (Statutory Undertakers) and 37 (Apparatus and rights of statutory undertakers in stopped-up streets) and the Protective Provisions as contained within Schedule 8 Part 1 of the draft DCO submitted at Deadline 9 [TR020001/APP/2.01] or in accordance with agreements made between the Applicant and Affinity.</p> <p>Furthermore, the test in s127(3)(b) se can be met as the application contains provisions for land to be acquired via the compulsory acquisition powers contained within the DCO for the benefit of any Affinity new and relocated assets, and contains provisions that would enable Affinity to carry out its statutory duties with regard to its other existing apparatus or interests that are within the Order Limits.</p> <p>The Applicant is satisfied that the tests in s127(6)(a) or (b) are met.</p>	<p>The tests in s127(6)(a) and/or (b) can be met by according with Articles 36 (Statutory Undertakers) and 37 (Apparatus and rights of statutory undertakers in stopped-up streets) and the Protective Provisions as contained within Schedule 8 Part 1 of the draft DCO submitted at Deadline 9 [TR020001/APP/2.01] or in accordance with agreements made between the Applicant and Affinity.</p> <p>Furthermore, the test in s127(6)(b) can be met as the application contains provisions for rights to be acquired via the compulsory acquisition powers contained within DCO for the benefit of any Affinity new and relocated assets, and contains provisions that would enable Affinity to carry out its statutory duties with regard to its other existing apparatus or interests that are within the Order Limits.</p>	<p>The Applicant is satisfied that the test in s138(4) is met as the extinguishment of the relevant rights, or the removal of the relevant apparatus is required to enable the construction and operation of the development and other development authorised by the grant of the DCO application within the region of Affinity Water's apparatus and interests.</p>	<p>Protective Provisions, Schedule 8, Part 1 of the draft DCO submitted at Deadline 9 [TR020001/APP/2.01] contains Protective Provisions for the Protection of Electricity, Gas, Water and Sewerage Undertakers.</p> <p>Articles 36 (Statutory Undertakers) and 37 (Apparatus and rights of statutory undertakers in stopped-up streets) of the draft DCO submitted at Deadline 9 [TR020001/APP/2.01].</p> <p>Requirements (the main requirements being requirements 12, 13 and 17) for the protection of water resources</p> <p>Separate agreement (confidential) between the Applicant and Affinity, which is nearing conclusion.</p>

¹ CA (Compulsory acquisition), CAR (Compulsory acquisition of rights over land and temporary possession), CAS (Compulsory acquisition of subsoil), CASTPS (Compulsory acquisition of subsoil and temporary possession of land at the surface).

Statutory Undertaker	Nature of Undertaking	Land Requirement ¹	Status of Objection	Accordance with tests in s127(3)(a) or (b)	Accordance with tests in s127(6)(a) or (b)	Accordance with test in s138(4)	Agreement Type
	"road transport"		with regard to the form of Protective Provisions provided in the Order, specifically the inclusion of land access, commuted lump sums and the funding of National Highways' costs. The Applicant is confident that agreement on all matters will be concluded prior to 8 February 2024 (end of examination).	The Applicant is satisfied that the tests in s127(3)(a) or (b) are met. The tests in s127(3)(a) and/or (b) can be met by according with Articles 36 (Statutory Undertakers) and 37 (Apparatus and rights of statutory undertakers in stopped-up streets) and the Protective Provisions as contained at Schedule 8 Part 1 and Part 6 of the draft DCO submitted at Deadline 10 [TR020001/APP/2.01] or in accordance with agreement made between the Applicant and National HighwFurthermore, the test in s127(3)(b) can be met as the application contains provisions for land to be acquired via the compulsory acquisition powers contained within the DCO for the benefit of National Highways' new and relocated assets, and contains provisions that would enable National Highways to carry out its statutory duties with regard to its other existing apparatus or interests that are within the Order Limits.	The Applicant is satisfied that the tests in s127(6)(a) or (b) are met. The tests in s127(6)(a) and/or (b) can be met by according with Articles 36 (Statutory Undertakers) and 37 (Apparatus and rights of statutory undertakers in stopped-up streets) and the Protective Provisions as contained at Schedule 8 Part 1 and Part 6 of the draft DCO submitted at Deadline 10 [TR020001/APP/2.01] or in accordance with agreements made between the Applicant and Cadent Gas. Furthermore, the test in s127(6)(b) can be met as the application contains provisions for rights to be acquired via the compulsory acquisition powers contained within the draft DCO Order for the benefit of National Highways' new and relocated assets, and contains provisions that would enable National Highways to carry out its statutory duties with regard to its other existing apparatus or interests that are within the Order Limits.	and operation of the development and other development authorised by the grant of the DCO application within the region of National Highways' apparatus and interests.	the Proposed Development to National Highways' apparatus. Articles 36 (Statutory Undertakers) and 37 (Apparatus and rights of statutory undertakers in stopped-up streets) of the draft DCO submitted at Deadline 9 [TR020001/APP/2.01]. Separate agreement (confidential) between the Applicant and National Highways.
Network Rail Infrastructure Limited (Network Rail)	Railway licence holder as per the Railways Act 1993	(Category 1 and 2) CA, CAR,	The Applicant has provided Network Rail with a detailed schedule outlining, for each plot in which Network Rail have an interest, the location	The tests in s127(3)(a) is met on the basis that the proposed acquisition does not detrimentally affect Network Rail operational land, and by reason of the Protective Provisions as	The tests in s127(6)(a) can be met for the same reasons as set out in relation to s127(3)(a).	The Applicant is satisfied that the test in s138(4) is met as the extinguishment of any relevant rights is required to enable the construction and operation of the development	The Applicant has included Protective Provisions based on Network Rail's preferred form, but with amendments proportionate to the impact of the Proposed Development to Network

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			<p>of that plot, the nature of their interest, the extent of works permitted in that plot and the nature of the land powers sought by the Applicant to deliver those works.</p> <p>The Applicant discussed each plot with Network Rail. The Applicant noted that that the proposed acquisition does not affect Network Rail's operational land. Where permanent acquisition is required over Network Rail Land, Network Rail has entered into discussions with the Applicant to voluntarily sell this land, relating to a multi-storey car park, to the Applicant. The other principal form of acquisition relates to a right of access for car park users through an existing footway under the railway.</p> <p>The Applicant has agreed to include protective provisions for Network Rail. These are taken from Network Rail's standard protective provisions but with amendments made to provide protection proportionate to the minimal impact of the Proposed</p>	<p>contained at Schedule 8 Part 8 of the draft DCO submitted at Deadline 9 [TR020001/APP/2.01].</p> <p>This means that the land can be purchased and not replaced without serious detriment to the carrying on of the undertaking and so section 127(3)(b) is not engaged.</p>		<p>authorised by the grant of the DCO application.</p>	<p>Rail's land, interests and apparatus at Schedule 8, Part 8 of the draft DCO submitted at Deadline 9 [TR020001/APP/2.01].</p>

Statutory Undertaker	Nature of Undertaking	Land Requirement ¹	Status of Objection	Accordance with tests in s127(3)(a) or (b)	Accordance with tests in s127(6)(a) or (b)	Accordance with test in s138(4)	Agreement Type
			<p>Development to Network Rail's land and apparatus. They still provide prior approval for Network Rail in respect of any works which may affect railway property.</p> <p>Network Rail have maintained that their standard protective provisions cannot be amended on the face of the DCO, and that a framework agreement should be entered into. As at Deadline 9, Network Rail has not provided the Applicant with Network Rail's proposed framework agreement.</p> <p>The Applicant does not consider such an agreement to be necessary in light of the protective provisions on the face of the draft DCO, and the minor nature of any effects on Network Rail land and apparatus.</p>				
Thames Water Utilities Limited	Sewerage undertaker (for areas within the Order Limits) as per the Water Industry Act 1991	(Category 1 and 2) CA, CAR	<p>Existing objection to the Order</p> <p>A separate side agreement has been negotiated between the Applicant and TWUL, to provide further protection for</p>	<p>The Applicant is satisfied that the tests in s127(3)(a) or (b) are met.</p> <p>The tests in s127(3)(a) and/or (b) can be met by according with Articles 36 (Statutory Undertakers) and 37 (Apparatus and rights of</p>	<p>The Applicant is satisfied that the tests in s127(6)(a) or (b) are met.</p> <p>The tests in s127(6)(a) and/or (b) can be met by according with Articles 36 (Statutory Undertakers) and 37 (Apparatus and rights of</p>	<p>The Applicant is satisfied that the test in s138(4) is met as the extinguishment of the relevant rights, or the removal of the relevant apparatus is required to enable the construction and operation of the development and other</p>	<p>Protective Provisions, Schedule 8, Part 1 of the draft DCO submitted at Deadline 9 [TR020001/APP/2.01] contains Protective Provisions for the Protection of Electricity,</p>

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			<p>TWUL, but not yet formally completed. The Applicant is confident that agreement on all matters will be concluded prior to 8 February 2024 (end of examination).</p>	<p>statutory undertakers in stopped-up streets) and the Protective Provisions as contained within Schedule 8 Part 1 of the draft DCO submitted at Deadline 9 [TR020001/APP/2.01] or in accordance with agreements made between the Applicant and TWUL.</p> <p>Furthermore, the test in s127(3)(b) can be met as the application contains provisions for land to be acquired via the compulsory acquisition powers contained within the DCO for the benefit of any TWUL new and relocated assets, and contains provisions that would enable TWUL to carry out its statutory duties with regard to its other existing apparatus or interests that are within the Order Limits.</p>	<p>statutory undertakers in stopped-up streets) and the Protective Provisions as contained within Schedule 8 Part 1 of the draft DCO submitted at Deadline 9 [TR020001/APP/2.01] or in accordance with agreements made between the Applicant and TWUL.</p> <p>Furthermore, the test in s127(6)(b) can be met as the application contains provisions for rights to be acquired via the compulsory acquisition powers contained within the DCO Order for the benefit of any TWUL new and relocated assets, and contains provisions that would enable TWUL to carry out its statutory duties with regard to its other existing apparatus or interests that are within the Order Limits.</p>	<p>development authorised by the grant of the DCO application within the region of Thames Water Utilities Limited's apparatus and interests.</p>	<p>Gas, Water and Sewerage Undertakers.</p> <p>Articles 36 (Statutory Undertakers) and 37 (Apparatus and rights of statutory undertakers in stopped-up streets) of the draft DCO submitted at Deadline 9 [TR020001/APP/2.01].</p> <p>Requirements (the main requirements being requirements 12, 13 and 17) for the protection of water resources. Separate agreement (confidential) between the Applicant and TWUL, which is agreed in substance.</p>
UK Power Networks (UKPN)		(Category 2) CA, CAR	<p>Discussions have concluded on a separate side agreement between the Applicant and UKPN, to provide further protection for UKPN. The terms are agreed and UKPN has executed its counterpart. The Applicant is confident that the agreement on all matters will be concluded prior to 8 February 2024 (end of examination).</p>	<p>The Applicant is satisfied that the tests in s127(3)(a) or (b) are met. The tests in s127(3)(a) and/or (b) can be met by according with Articles 36 (Statutory Undertakers) and 37 (Apparatus and rights of statutory undertakers in stopped-up streets) and the Protective Provisions as contained at Schedule 8 Part 1 of the draft DCO submitted at Deadline 9 [TR020001/APP/2.01] or in accordance with agreement made between the Applicant and UKPN.</p>	<p>The Applicant is satisfied that the tests in s127(6)(a) or (b) are met. The tests in s127(6)(a) and/or (b) can be met by according with Articles 36 (Statutory Undertakers) and 37 (Apparatus and rights of statutory undertakers in stopped-up streets) and the Protective Provisions as contained at Schedule 8 Part 1 of the draft DCO submitted at Deadline 9 [TR020001/APP/2.01] or in accordance with agreements made between the Applicant and UKPN.</p>	<p>The Applicant is satisfied that the test in s138(4) is met as the extinguishment of the relevant rights, or the removal of the relevant apparatus is required to enable the construction and operation of the development and other development authorised by the grant of the DCO application within the region of UKPN's apparatus and interests.</p>	<p>Protective Provisions, Schedule 8, Part 1 of the draft DCO submitted at Deadline 9 [TR020001/APP/2.01] contains Protective Provisions for the Protection of Electricity, Gas, Water and Sewerage Undertakers, which are agreed.</p> <p>Articles 36 (Statutory Undertakers) and 37 (Apparatus and rights of statutory undertakers in stopped-up streets) of the DCO submitted at Deadline 9 [TR020001/APP/2.01].</p>

Statutory Undertaker	Nature of Undertaking	Land Requirement ¹	Status of Objection	Accordance with tests in s127(3)(a) or (b)	Accordance with tests in s127(6)(a) or (b)	Accordance with test in s138(4)	Agreement Type
				Furthermore, the test in s127(3)(b) can be met as the application contains provisions for land to be acquired via the compulsory acquisition powers contained within the DCO for the benefit of UKPN's new and relocated assets, and contains provisions that would enable UKPN to carry out its statutory duties with regard to its other existing apparatus or interests that are within the Order Limits.	Furthermore, the test in s127(6)(b) can be met as the application contains provisions for rights to be acquired via the compulsory acquisition powers contained within the draft DCO for the benefit of UKPN's new and relocated assets, and contains provisions that would enable UKPN to carry out its statutory duties with regard to its other existing apparatus or interests that are within the Order Limits.		Separate agreement (confidential) between the Applicant and UKPN, which is agreed in substance.
Virgin Media Limited	Operator of an electronic communication code network as per the Communications Act 2003	(Category 2) CA, CAR	No objection made.	No objection made, the test within s127(3) does not apply.	No objection made, the test within s127(6) does not apply.	The Applicant is satisfied that the test in s138(4) is met as any extinguishment of existing rights, or any removal of the relevant apparatus is required to enable the construction and operation of the development authorised by the grant of the DCO application.	No objection made.
Vodafone Limited	Operator of an electronic communication code network as per the Communications Act 2003	(Category 2) CA, CAR	No objection made.	No objection made, the test within s127(3) does not apply.	No objection made, the test within s127(6) does not apply.	The Applicant is satisfied that the test in s138(4) is met as any extinguishment of the relevant rights, or any removal of the relevant apparatus is required to enable the construction and operation of the development authorised by the grant of the DCO application.	No objection made.

REFERENCES

Ref 1.1 Planning Act 2008, c.29

Ref 1.2 Communications Act 2003, c 21