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Dear Ian

Planning Act 2008, section 127

I am writing to confirm the arrangements which the Secretary of State for Energy and Climate Change wishes to put in place in respect of the discharge of his functions under section 127 of the Planning Act 2008, as amended by the Localism Act 2011. 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 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development consent before the completion of the examination of the application, and the representation has not been withdrawn, and*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, *mutatis mutandis*, for cases where an applicant seeks to acquire compulsorily by way of a DCO rights over statutory undertakers’ land. In such cases certificates are issued under section 127(5).

Section 127 does not expressly allocate the functions ascribed in it to “the Secretary of State” 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 the holder of a licence under the Electricity Act 1989 or to a gas transporter within the meaning of the Gas Act 1995,¹ responsibility for issuing any certificates under section 127 falls to the Secretary of State for Energy and Climate Change. In a case where the DCO in 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 an energy project, the Secretary of State for Energy and Climate Change 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 he 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 Energy and Climate Change, in his function as decision-maker under section 127, needs to be properly informed about any matters which may be relevant to his decision as to whether or not to issue such a certificate. He considers that for these purposes it would be desirable for him to have received a report about matters likely to be relevant

¹ References to statutory undertakers in section 127 include the holders of licences under the Electricity Act 1989 and public gas transporters within the meaning of the Gas Act 1995. See section 127(8) and Electricity Act 1989, section 112(1) and Schedule 16, paragraph 2(2)(g) (in respect of Electricity Act licence holders) and Gas Act 1995, section 16(1) and Schedule 4, paragraph 2(1)(xxxi) (in respect of gas transporters).

to his 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 the Department of Energy and Climate Change or the Office of the Gas and Electricity Markets, hold a hearing, or visit or inspect the land.

The Secretary of State for Energy and Climate Change 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 development consent order provision for the compulsory acquisition of:
 - (i) land acquired by the holder of a licence under the Electricity Act 1989 or a public gas transporter within the meaning of the Gas Act 1995, (each “a relevant statutory undertaker”) for the purposes of their undertaking; or
 - (ii) rights over relevant statutory undertakers’ land; and
- (b) it appears to the Secretary of State for Energy and Climate Change 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 Energy and Climate Change wishes the procedures set out below to be followed in respect of the functions conferred on him by section 127 in respect of any order made further to such a proposal (“section 127 functions”).

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:

- (c) a member of the Panel which is to examine the application for development consent to which the proposed development consent order relates (“the relevant application”); or
- (d) 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:

- (e) 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;
- (f) a summary of any representations made in respect of the Secretary of State for Energy and Climate Change's section 127 functions;
- (g) any other matters which the section 127 examiner considers relevant to the exercise of those functions;
- (h) a reasoned recommendation to the Secretary of State for Energy and Climate Change as to whether he should issue a certificate under section 127(2) or (5) in respect of the relevant statutory undertakers' land or rights over that land; and
- (i) 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).

The Department will forward any correspondence relating to the Secretary of State's section 127 functions which it receives before receiving the section 127 examiner's report to Planning Inspectorate.

Yours sincerely

Giles Scott
Head of National Infrastructure Consents