



# **Application for Certificates in Respect of Compulsory Acquisition of Open space and Rights over Open space pursuant to Section 131(4A) and Sections 132 (3) and (4A) - Planning Act 2008**

## Supplementary Supporting Information

**Thames  
Tideway Tunnel**



Creating a cleaner, healthier River Thames

# Thames Tideway Tunnel

## Application for Certificates in Respect of Compulsory Acquisition of Open Space and Rights over Open Space pursuant to Section 131(4A) and Sections 132 (3) and (4A) – Planning Act 2008 Supplementary Supporting Information

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## 1 Introduction

### 1.1 Submitted application

- 1.1.1 An application for certificates by the Secretary of State pursuant to Section 131 (4A) and Section 132 (3) and/or (4A) of the Planning Act 2008 (as amended) was made on 7 November 2013.

### 1.2 Supplementary information

- 1.2.1 In response to that application, Thames Water Utilities Limited (TWUL) wishes to expand on certain matters raised in the application. This supplementary information is presented to assist the Secretary of State in reaching his decision. It does not seek to raise new or revised material.
- 1.2.2 In particular, additional information is provided to address the following points:
- a. In paragraph 6.3.8, TWUL states that certain types of land and land uses have been omitted. At Section 2 below, this supplementary statement seeks to provide the reasoning for the process the applicant has undertaken in omitting these areas of land and use from further consideration.
  - b. In Section 3 below, further information is provided in relation to the other methodologies that were considered for the calculation of prohibitive cost, and why these were not selected in favour of the approach finally settled upon.
- 1.2.3 Furthermore, to provide clarity, Section 4 below provides additional information on the suitability judgement, specifically in relation to planning constraints for each site (which are the subject of detailed assessments in the Supporting Statement). This sets out the national, regional and local planning policies which are key to the overall judgement of suitability of many of the sites and the other factors involved in that judgment.

## 2 Discounted unsuitable uses

### 2.1 Background

- 2.1.1 In paragraph 6.3.8 of the Supporting Statement submitted with TWUL's application, the land uses which were not considered as part of the search for suitable alternative land sites are described. Paragraph 6.3.8 states:
- “Land in the catchment area that is currently or could in future be used for essential infrastructure of community value has been omitted from the exercise as it is not suitable. This includes the following:*
- a. Transport – roads or railways, including stations*
  - b. Health – hospitals, health centres, doctors' surgeries, dental surgeries*
  - c. Education – schools, nurseries, colleges*
  - d. Religious – places of worship*
  - e. Civic – land or buildings used for council services.”*
- 2.1.2 Section 6 of the Supporting Statement describes the exercise undertaken by TWUL to search for suitable alternative land to be given in exchange for order land.
- 2.1.3 This section explains the rationale for exempting those use types identified in paragraph 6.3.8.

### 2.2 The rationale

- 2.2.1 In identifying what land might be suitable as exchange land, each type of land use, including those set out in paragraph 6.3.8, was considered to be potentially suitable for the provision of alternative land.
- 2.2.2 TWUL then identified any land use that was considered unsuitable to be given in exchange for order land.
- 2.2.3 In considering unsuitability, TWUL identified key strategic land uses which were not surplus to requirements (and, therefore, were not available on the open market) and which would have to be acquired compulsorily.
- 2.2.4 Within that stage of the assessment, TWUL identified those land uses for which the prospect of obtaining planning permission for the change of use to open space land was considered negligible. Since it would be highly improbable that a compulsory purchase order for such land would be confirmed, the land was not considered to be suitable alternative land. This exercise led to TWUL concluding that those land uses set out in paragraph 6.3.8 were unsuitable to be exchange land.
- 2.2.5 It was also considered that the acquisition of the land set out in paragraph 6.3.8 and its change to open space would have a harmful impact on the communities which live near that land. This point is elaborated on below.

### **a. Transport – roads or railways, including stations**

- 2.2.6 TWUL considered that the prospect of obtaining planning permission for the change of use of roads or railways for the provision of open space land was negligible. The prospect of a compulsory purchase order being confirmed in these circumstances was, similarly, considered negligible.
- 2.2.7 In addition, it was considered that the acquisition and removal of roads or railways for the provision of open space would have a disproportionately harmful impact on the communities served by these key elements of infrastructure. For instance, the disruption to the road and rail network and the negative impact that such disruption could have on road and rail users, journey times, and the delivery of goods and supplies was considered to outweigh the benefits arising from providing the proposed replacement open space.
- 2.2.8 The communities served by the railway station would be severely inconvenienced and, owing to the fact that the location of a railway station is determined by the road and rail networks which service it, the acquisition of a railway station would cause additional problems for the proper functioning of those networks. It was considered that there was no reasonable prospect of a compulsory purchase order being confirmed in respect of such transport facilities in order to turn them into open space.
- 2.2.9 TWUL also considered that the value communities would place on roads and railways (including railway stations) would be greater than the value they would place on the open space provided in their place.

### **b. Health – hospitals, health centres, doctors’ surgeries, dental surgeries**

- 2.2.10 TWUL considered that the prospect of obtaining planning permission for the change of use of health facilities (for instance, hospitals, health centres, doctors’ surgeries, dental surgeries) for the provision of open space land was negligible. The prospect of a compulsory purchase order being confirmed in these circumstances was, similarly, considered negligible.
- 2.2.11 In addition, the acquisition and demolition, for instance, of a hospital would have a detrimental impact on the communities it serves, requiring patients to travel further to access its services and so causing knock-on effects (for instance, increased waiting times) at neighbouring hospitals.
- 2.2.12 It was considered that similar arguments could be made in respect of health centres, doctors’ surgeries and dental surgeries. It was considered that there was no reasonable prospect of a compulsory purchase order being confirmed in respect of such health facilities in order to turn them into open space.
- 2.2.13 TWUL also considered that the value communities would place on health facilities would be greater than the value they would place on the open space that would be provided in their place.

### **c. Education – schools, nurseries, colleges**

- 2.2.14 TWUL considered that the prospect of obtaining planning permission for the change of use of education facilities (for instance, schools, nurseries and colleges) for the provision of open space land was negligible. The prospect of a compulsory purchase order being confirmed in these circumstances was, similarly, considered negligible.
- 2.2.15 Education facilities are much-needed community resources, of which closure could compromise the relationship between pupils and their communities, lead to a reduction in staff numbers, and require pupils to travel further to get to school, nursery or college. For school pupils, this could have a detrimental impact on their participation in extra-curricular activities and reduce parental participation in school life. It was considered that there was no reasonable prospect of a compulsory purchase order being confirmed in respect of such educational facilities in order to turn them into open space.
- 2.2.16 TWUL also considered that the value communities would place on education facilities would be greater than the value they would place on the open space that would be provided in their place.

### **d. Religious – places of worship**

- 2.2.17 TWUL considered that the prospect of obtaining planning permission for the change of use of places of worship for the provision of open space land was negligible. The prospect of a compulsory purchase order being confirmed in these circumstances was, similarly, considered negligible.
- 2.2.18 Particular sensitivity was paid to places of worship, owing to the detrimental impact that closure could have on the spiritual lives on the communities they serve. Any places of worship that were also listed buildings would provide additional challenges, where structures would have to be demolished. It was considered that there was no reasonable prospect of a compulsory purchase order being confirmed in respect of such places of worship in order to turn them into open space.
- 2.2.19 TWUL also considered that the value that communities who use places of worship would place on them would be greater than the value they would place on the open space that would be provided in their place.

### **e. Civic – land or buildings used for council services**

- 2.2.20 TWUL considered that the prospect of obtaining planning permission for the change of use of civic buildings for the provision of open space land was negligible. The prospect of a compulsory purchase order being confirmed in these circumstances was considered similarly negligible.
- 2.2.21 TWUL considered that land or buildings used for council services best served their communities when located near their communities. Such facilities are often essential to the proper functioning of local services and relied upon by large sections of the community. It was considered that there was no reasonable prospect of a compulsory purchase order being confirmed in respect of such civic facilities in order to turn them into open space.

- 2.2.22 TWUL also considered that the value communities would place on land or buildings used for council services would be greater than the value they would place on the open space that would be provided in their place.

## 3 Rationale for approach to prohibitive cost

### 3.1 No guidance on prohibitive cost

- 3.1.1 S131(4A) of the legislation invites the applicant to make a determination as to whether any land to be found would be suitable to provide as exchange land, and if suitable whether it would be available. On the basis that land can be found to be suitable and available the applicant is required to make a judgement as to whether that land would then only be available at a prohibitive cost.
- 3.1.2 There is no definition provided in the legislation to assist with the judgment required to determine whether that cost would or would not be prohibitive.
- 3.1.3 We have found no guidance issued by DCLG to assist with the interpretation of this provision in the legislation.
- 3.1.4 We have been unable to identify any case law precedent to assist in defining the meaning of 'prohibitive cost'.

### 3.2 Range of approaches considered

- 3.2.1 In broad terms we considered four alternative approaches to the one we adopted, being:
- a. Existing Use Value
  - b. Certificates of Appropriate Alternative Use
  - c. Property Budget
  - d. The 'Disproportionate to Project Costs' approach

#### Existing use value

- 3.2.2 In any valuation approach it would be accepted practice to first consider 'existing use value'. On account of the management costs associated with public open space its value is normally recorded at a nominal amount. Evidence we found put this nominal value in the range of £10,000 to £25,000 per hectare. At this level the land sits quite easily at the very bottom end of the range of land values to be found in London and, on the basis of it not being acceptable to use existing open space land as exchange land, the purchase of any other land would appear prohibitive against public open space land values. The applicant has already confirmed to the Planning Inspectorate that in determining 'prohibitive cost' the existing use value of public open space included in the draft DCO for compulsory acquisition would not be relied upon.

#### **Certificates of Appropriate Alternative Use**

- 3.2.3 During exchanges with the Examining Authority in the context of the application for development consent for the Thames Tideway Tunnel<sup>1</sup>, the applicant has explained why making an application for a certificate of appropriate alternative development<sup>2</sup> ('CAAD') on an area of open space to be acquired does not provide an appropriate basis for determining 'prohibitive cost' of exchange land. We have explained that both existing and any emerging planning policy would protect areas of open space from the prospect of 'other' development, such that any application for a CAAD would result in a 'nil' certificate; that is, a certificate that planning permission would not be granted for any other use. Our conclusion therefore is that this approach would offer no assistance to the task of defining 'prohibitive cost' of exchange land.

#### **Property budget**

- 3.2.4 As part of the Land Acquisition Strategy for the project the value of all sites has been estimated and potential compensation costs assessed. This provides a property cost budget for the whole project. We considered whether the budget figures could be used as a comparator to establish whether the cost of exchange land would or would not be prohibitive. It was immediately evident that as it is the applicant who set the budgets the process becomes entirely circular. Because budgets can be set high or low depending on the assumptions adopted, the test would not be objective, and therefore could not form the basis of a robust assessment.

#### **The 'Disproportionate to project costs' approach**

- 3.2.5 Another option given some consideration was to interpret "prohibitive" to mean "disproportionate to project costs" and thus to use the overall capital cost of the project as a comparator. We formed a view that this was an unsafe means of determining prohibitive cost for a number of reasons as follows:
- a. For large projects the cost of providing replacement open space land will always be a small proportion of the overall cost of the project. That does not mean, however, that the cost of providing the alternative open space land is not prohibitive. An objective test must be undertaken. A developer should not have to pay more for replacement open space simply because the project it is promoting is large, and it should not have to pay more for replacement open space than the promoter of a smaller project which, by comparison, has a low cost base.
  - b. In the case of the Thames Tideway Tunnel, the estimated capital cost of the project is over £4bn. The net cost of property acquisition as a proportion of this is estimated at 4%. The relationship between capital cost and property acquisition varies significantly from project to project

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<sup>1</sup> See responses to Q4.19 – Q4.23 First Written Questions (4 November 2013)

<sup>2</sup> S17 of the Land Compensation Act 1961

and does not provide an objective test. Compared with £4bn the cost of providing exchange land will always appear to be small.

- c. Prohibitive cost would be related to the value of the project not the value of the land. It could therefore result in a different level of prohibitive cost being applied to the same land by different projects. Such an approach would be capricious. The cost of providing the replacement open space should relate to the value of the land and not the value of the project
- d. The cost of exchange land would likely end up being totally disproportionate to the benefit in providing replacement land in any given circumstance; this would be irrational.
- e. TWUL remains a regulated company. It is regulated by OFWAT and must deliver value for money. Owing to this, it would not be appropriate for TWUL to pay disproportionate sums of money for replacement open space in comparison with what other developers, particularly public sector or regulated developers, would expect to pay.
- f. Ultimately the reliance on a test based on whether a replacement land cost is disproportionate against overall project costs establishes, in our view, a dangerous precedent for any infrastructure scheme of national importance where the public, either directly or indirectly, will be bearing the cost and, indeed, even if they are not.

### **3.3 Rationale for approach applied**

- 3.3.1 We have sought to identify an objective test that could be applicable for any form of infrastructure development which is seeking to acquire replacement open space.
- 3.3.2 First, we looked at the character of the development and concluded that it was closest to industrial development by reference to both RICS guidance and planning use classes. Secondly, we looked broadly at what a private sector developer would be prepared to pay for replacement open space in order to carry out a similar form of development.
- 3.3.3 In comparing the value of the open space land for industrial development and the likely cost to acquire exchange land sites, we have found cost to be grossly disproportionate and therefore prohibitive.

## 4 Suitability tests applied to sites

### 4.1 Introduction

4.1.1 The assessment of the land that could be suitable to be provided in exchange for the order land was evaluated through a considered process, which is documented in the Supporting Statement submitted with the application.

### 4.2 Application of tests under both sections 131 (4A) (c)(i) and 132 (4A) (c)(i)

4.2.1 The relevant subsection in the Act (as amended) states:

*“(c) either –*

*(i) there is no suitable land available to be given in exchange for the order land, or*

*(ii) any suitable land available to be given in exchange is available only at prohibitive cost ...”*

4.2.2 We applied the (c)(i) test to each plot of potential exchange land and determined in each case that the land was not suitable and/or available. While that could have been the end of our assessment under (4A)(c), we in fact then went on to consider the ‘prohibitive cost’ test under (c)(ii). We did this in case the Secretary of State disagrees with our assessment under (c)(i) (ie, ‘suitable’ and ‘available’) in relation to any plot of exchange land and wished to be informed about our assessment for that plot under (c)(ii) (ie, ‘prohibitive cost’). TWUL has not applied these as an either/or test, but simply provided the information and assessment under (c)(ii) in case the Secretary of State is not satisfied with any part of the assessment under (c)(i).

### 4.3 Suitability

4.3.1 The term ‘suitable’ is not defined in the Act. In the absence of clear guidance, TWUL has considered sites to be ‘suitable’, in the first instance, if they are both within the defined catchment areas (see Table 6.1 of the Supporting Statement), are of a comparable size to the open space to be included in the order land and are not in an excluded use (see Section 2 above). The rationale for this is that the exchange land would need to be both accessible for users of the existing open space (ie, as convenient as the existing open space land), and that it should be a similar size, so as to fulfil a similar space requirement.

4.3.2 The sites considered to be suitable on these two key points are set out in the schedule at Appendix A of the Supporting Statement.

4.3.3 Further detailed assessments of the suitability of sites were then undertaken which are presented in the Supporting Statement. In making judgements about the suitability of alternative sites, there were a number

of issues that were considered. In particular, judgements about the suitability of the site were based on key planning requirements that, in many cases, represented constraints that in practice could not be overcome.

4.3.4 Examples of planning policy constraints are provided below.

### Loss of residential

4.3.5 There were a number of examples where the proposed alternative sites would result in loss of residential accommodation. This was considered both where existing residential accommodation would be lost and where the acquisition of the site would preclude any approved development for residential from taking place.

4.3.6 The loss of residential accommodation in London (and nationally) is a key planning issue, supported by planning policy at the national, regional and local levels.

4.3.7 The NPPF sets out a core planning principle at paragraph 17, which identifies the planning system as a vehicle to *“proactively drive and support sustainable economic development to deliver the homes ... that the country needs”*. It also describes how local authorities should adopt a series of measures to boost the supply of housing in their respective areas (para. 47), and also *“identify and bring back into residential use empty housing and buildings in line with local housing and empty homes strategies and, where appropriate, acquire properties under compulsory purchase powers”* (para. 51).

4.3.8 The *London Plan* recognises the acute shortage of housing in the capital and, as a consequence, it has clear restrictive housing policies, as set out in Policy 3A.15 ‘Loss of housing and affordable housing’ which states that *“DPD policies should prevent the loss of housing, including affordable housing, without its planned replacement at existing or higher densities”*.

4.3.9 At the local level, London borough policies are required to be in accordance with the *London Plan*. In relation to the protection of residential accommodation, this is translated to many local plan policies, such as RBKC’s Core Strategy, Policy CH 3 ‘Protection of Residential Uses’, and LB Lewisham’s Core Strategy 1 (Point 2), which advises that *“Development should result in no net loss of housing”*.

**Table 4.1 Example residential sites**

Site ref.	Site name	Existing/proposed use	Suitability/planning issues
<b>BARE004</b>	3-8 Queens Drive and Chester Close	18 x houses and 2 x flats	Loss of residential
<b>KNGGP031</b>	55-122 Buckhold road	Terraced houses, semi-detached houses and flats	Loss of residential
<b>FALPS026</b>	23-27 Plough	5 x residential units	Loss of residential

Site ref.	Site name	Existing/proposed use	Suitability/planning issues
	Road	(vacant)	
<b>DEPCS005</b>	Berthon Street	Residential estate	Loss of residential

### Loss of retail

- 4.3.10 In addition, in a number of instances, potential exchange land was identified which was in retail use. On identified core shopping frontages (primary and secondary frontages), such uses are often given a high level of protection by planning policies. For example, paragraph 23 of the NPPF encourages the definition of clear primary and secondary shopping frontages, and promotes competitive town centres.
- 4.3.11 In the *London Plan*, Policy 3D.3, 'Maintaining and improving retail facilities', states that boroughs should "*work with retailers and others to prevent the loss of retail facilities*".
- 4.3.12 At a local level, most planning authorities have clear policies to protect retail floor space on their identified primary and secondary shopping frontages. For example, LB Wandsworth's *Development Management Plan Document*, Policy DMTS3, states that core frontages should be retained for retail and other complementary uses.

**Table 4.2 Example retail sites**

Site ref.	Site name	Existing/proposed use	Suitability/planning issues
<b>BARE005</b>	Putney Exchange Shopping Centre	Retail units on primary shopping frontage	Loss of retail on primary shopping frontage
<b>CHEEF002</b>	Units 70-75 Duke of York Square	Retail units	Loss of retail in a major shopping area (RBKC)
<b>DEPCS007</b>	1-51 Deptford High Street, Deptford	Retail with residential over	Loss of retail on core shopping frontage

- 4.3.13 What is clear is that for planning policy reasons, these sites would not be suitable. Were these sites to be included within compulsory acquisition powers as replacement land, where the tests under Section 122 of the Planning Act would be applied, the need to retain these sites, in the public interest, for their current use would outweigh the needs of the scheme for replacement land.

## 5 Conclusion

- 5.1.1 In Section 1, we set out that we would address points related to how we went about discounting land uses comprising essential community infrastructure, the alternative approaches we considered to establish our assessment of what constituted ‘prohibitive cost’, and further information on how the assessment of ‘suitability’ was considered in relation to planning and other factors involved in that judgement. The preceding sections 2, 3 and 4 address these matters and are provided to assist the Secretary of State in his consideration of our application for Certificates under s.131 and s.132.

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### **Thames Water Utilities Limited**

Clearwater Court, Vastern Road, Reading RG1 8DB

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100-RG-PNC-DCLGX-000001

