

**TRANSPORT AND WORKS ACT 1992**

**TRANSPORT AND WORKS (INQUIRIES PROCEDURE) RULES 2004**

**LONDON OVERGROUND (BARKING RIVERSIDE EXTENSION) ORDER**

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**STATEMENT OF CASE OF LEGAL & GENERAL PENSIONS LIMITED**

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**1. INTRODUCTION**

- 1.1 This Statement of Case is made by Legal & General Pensions Limited ("**L&G**") in connection with its objection to the proposed London Overground (Barking Riverside Extension) Order ("the **Order**").
- 1.2 L&G's original objection was contained in Montagu Evans' letter to the Secretary of State for Transport dated 12 May 2016. This Statement of Case is submitted in response to the Department for Transport's letter to Montagu Evans dated 12 July 2016 under rule 7(3) of the Transport and Works (Inquiries Procedure) Rules 2004.

**2. SITE LOCATION AND DESCRIPTION**

- 2.1 L&G is the freehold owner of Barking Rail Freight Terminal, Box Lane, Renwick Road, Barking ("the **Property**").
- 2.2 The Property benefits from rail access and a single road access via Box Lane and Renwick Road.
- 2.3 A plan showing the extent of L&G's ownership is attached at Appendix 1.
- 2.4 L&G's ownership covers the whole of the area edged red on the plan at Appendix 1 with the exception of the subsurface land required for the Channel Tunnel Rail Link, which is the long strip edged blue and numbered 2 and 5 which runs in a roughly east/west direction across the Property.
- 2.5 The whole of the Property is leased to DB Cargo (UK) Limited ("**DBC**").
- 2.6 DBC is the UK's largest rail freight company, providing freight, infrastructure and passenger charter trains throughout the UK and freight services to and from mainland Europe via the Channel Tunnel.
- 2.7 The rail freight facility at the Property is operational and connects the UK national rail network to the European rail network via High Speed 1 and the Channel Tunnel.

- 2.8 DBC uses the Property for loading, unloading, storage, preparation and distribution of finished motor vehicles. The current and planned future use of the Property are described further in DBC's submitted Statement of Case.
- 2.9 DBC's lease of the Property continues until 2034, after which time the Property will become vacant and available for re-letting by L&G for its current use or for re-development.
- 2.10 L&G may therefore be able to occupy the Property from as early as 2034. This means that the Order will impact significantly on L&G in the near term.

**3. IMPACT OF CONFIRMING THE ORDER**

- 3.1 The Order confers powers of temporary acquisition in respect of Plot 23. It confers alternative and concurrent powers of temporary and permanent acquisition in respect of Plots 18 and 19.
- 3.2 Together, Plots 18, 19 and 23 comprise the entire western section of the Property. They are identified in the Book of Reference and section plans deposited with the Order application as follows:

<b>Plot</b>	<b>Description</b>	<b>Extent of proposed power</b>
18	1,743 square metres, or thereabouts, of public road and footways (Box Lane) and tunnels carrying railway and works (Channel Tunnel Rail Link)	Compulsory purchase of the lands and rights in lands and the right to use lands temporarily
19	17,953 square metres, or thereabouts, of freightliner terminal and premises (Barking Freightliner Terminal) and tunnels carrying railway and works (Channel Tunnel Rail Link)	Compulsory purchase of the lands and rights in lands and the right to use lands temporarily
23	17,197 square metres, or thereabouts, of freightliner terminal and premises (Barking Freightliner Terminal) and tunnels carrying railway and works (Channel Tunnel Rail Link)	Rights to temporarily use land

- 3.3 Plot 18 comprises Box Lane, the sole vehicular access serving the entirety of L&G's Property. Under Articles 10, 27, 28 and 29 and Part 2 of Schedule 2 of the Order, TfL seeks a number of separate, broadly drafted powers to temporarily stop up and make use of Box Lane. Under Articles 21 and 24, TfL seeks the compulsory acquisition of Box Lane and the imposition of covenants over it and L&G's adjoining land.

- 3.4 The powers sought in respect of Plot 18 will prevent vehicular access from being gained to those parts of the Property which are not proposed to be acquired under the Order. The Order will effectively make the balance of the Property incapable of beneficial use.
- 3.5 Plots 19 and 23 form the main approach to and reception for the rail freight terminal. They serve as a holding area for trucks prior to admission to the main operational area within the Property and for checking departures. They are also the approach and standing area for the car trains and as such, an operational railway yard which is required for the proper operation of the rail freight facility.
- 3.6 Under Articles 21 and 24, TfL seeks the compulsory acquisition of Plot 19 and the imposition of covenants over it and L&G's adjoining land. Under Articles 28 and 29, TfL seeks the power to take temporary possession of Plots 19 and 23, in advance of the exercise of compulsory purchase powers under the Order and for a period of up to 2 years on as little as 14 days' notice, and once in possession to remove buildings and construct such temporary works as TfL considers appropriate. TfL seeks an extension of this period of temporary possession during and after the maintenance period "for so long as may be reasonably necessary".
- 3.7 The powers sought in respect of Plots 19 and 23 will therefore make unusable and take from L&G an area of the Property which is essential for the ongoing viability of current and proposed rail freight operations at the Property.
- 3.8 L&G will argue that the powers sought are excessive, unjustified, draconian and oppressive.
- 3.9 It will argue that the wider impact of approving the Order will be the loss of an operational rail freight facility which is of key importance to UK's national rail network. Approval of the Order will be of national significance in terms of the resulting loss to the national economy.

#### **4. GUIDANCE ON TWA PROCEDURES**

- 4.1 The guidance contained in the Department for Transport's 2006 publication "A Guide to TWA Procedures" is relevant to the Order. It states:
- (A) "Before confirming [compulsory purchase] powers, the Secretary of State will wish to be satisfied that there is a compelling case in the public interest for taking away a person's land or rights in land, and that all the land in question is required for the scheme" (paragraph 1.39 of Part 1).
- (B) "The capability of a scheme to attract the funding necessary to implement it is a relevant factor in the Secretary of State's decision, and it may be especially significant where major new works are proposed ... The Secretary of State, in turn, would wish to be satisfied before making a TWA order that there was a reasonable prospect of the proposed powers being implemented. Consequently, in deciding whether to make a TWA order authorising works, the Secretary of State will wish to have regard to the applicant's prospects of funding the planning and construction of such works, including the payment of any statutory land

compensation ... However the proposed works are to be funded, the applicant should be able to demonstrate that the proposals are capable of being financed in the way proposed. Depending on the size of the project and the nature and extent of the opposition to it, the applicant may need to provide a financial appraisal of the scheme for the purpose of any public inquiry and to be ready to respond to any questions about the project's financial viability" (paragraphs 1.31. to 1.33 of Part 1).

- (C) "The Department is likely to look more critically at provisions which do not follow the model clauses and/or which are not well precedented. Moreover, the Department will expect applicants to explain any differences between the model clauses and the provisions included in a draft order in the "explanatory memorandum"" (paragraph 13 of the Introduction).
- (D) "Relevant advice on the use of compulsory purchase powers can be found in Circular 06/2004 issued by the former Office of the Deputy Prime Minister and entitled "Compulsory Purchase and the Crichel Down Rules" (paragraph 1.39 of Part 1).

## **5. SECRETARY OF STATE'S POLICY ON COMPULSORY PURCHASE**

5.1 The Secretary of State's policy on the making and confirmation of compulsory purchase orders, including those under the Transport and Works Act 1992, is now contained in DCLG's publication "Guidance on Compulsory Purchase process and the Crichel Down Rules" dated October 2015 ("the **2015 Guidance**").

5.2 Paragraph 2 of the 2015 Guidance states:

"The confirming authority will expect the acquiring authority to demonstrate that they have taken reasonable steps to acquire all of the land and rights included in the Order by agreement ... Compulsory purchase is intended as a last resort to secure the assembly of all the land needed for the implementation of projects".

5.3 Paragraphs 12 and 13 of the 2015 Guidance state:

"A compulsory purchase order should only be made where there is a compelling case in the public interest. An acquiring authority should be sure that the purposes for which the compulsory purchase order is made justify interfering with the human rights of those with an interest in the land affected ... a confirming minister will need to understand, and the acquiring authority must be able to demonstrate, that there are sufficiently compelling reasons for the powers to be sought at this time".

5.4 Paragraph 13 goes on to state:

"If an acquiring authority does not have a clear idea of how it intends to use the land which it is proposing to acquire; and cannot show that all the necessary resources are likely to be available to achieve that end within a reasonable time-scale it will be difficult to show conclusively that the compulsory acquisition of the land included in the order is justified in the public interest, at any rate at the time of its making".

5.5 Paragraph 14 of the 2015 Guidance states:

“In preparing its justification, the acquiring authority should address:

(a) **sources of funding** - the acquiring authority should provide substantive information as to the sources of funding available for both acquiring the land and implementing the scheme for which the land is required. If the scheme is not intended to be independently financially viable, or that the details cannot be finalised until there is certainty that the necessary land will be required, the acquiring authority should provide an indication of how any potential shortfalls are intended to be met. This should include the degree to which other bodies (including the private sector) have agreed to make financial contributions or underwrite the scheme; and the basis on which the contributions or underwriting is to be made

(b) **timing of that funding** - funding should generally be available now or early in the process. Failing that, the confirming minister would expect funding to be available to complete the compulsory acquisition within the statutory period ... following the operative date, and only in exceptional circumstances, would it be reasonable to acquire land with little prospect of the scheme being implemented for a number of years”.

## 6. SECRETARY OF STATE’S POLICY ON RAIL

6.1 The National Policy Statement for National Networks published by the Department for Transport in 2014 (“the **Rail NPS**”) is the Government’s policy on the development of nationally significant infrastructure projects on the national road and rail networks in England.

6.2 Paragraph 1.4 of the Rail NPS acknowledges that the Rail NPS may be a material consideration in decision making on applications made under legislation such as the Transport and Works Act 1992.

6.3 Paragraph 1.7 of the Rail NPS states:

“This NPS sets out the Government’s policy for development of the road and rail networks and strategic rail freight interchanges, taking into account the capacity and connectivity that will be delivered through HS2”.

6.4 It is evident from this that the connectivity of the UK national rail network to the European rail network via HS1 and HS2 is a matter of national importance. Consequently, that any detrimental impact on such connectivity, for example because of a detrimental impact on the rail freight interchange operated from the Property, is a matter of national policy significance.

6.5 Paragraph 2.29 of the Rail NPS states:

“In the context of the Government’s vision for the transport system as a driver of economic growth and social development, the railway must ... provide for the transport of freight across the country, and to and from ports, in order to help meet environmental goals and improve quality of life”.

6.6 Paragraph 2.36 of the Rail NPS confirms that:

“The Government has therefore concluded that at a strategic level there is a compelling need for development of the national rail network to meet the need set out in paragraphs 2.28 and 2.29”.

- 6.7 Paragraph 2.47 of the Rail NPS emphasises the need to treat rail freight interchanges in a sensitive manner when assessing development impacts, particularly for interchanges which are sited in urban locations:

“The siting of many existing rail freight interchanges in traditional urban locations means that there is no opportunity to expand, that they lack warehousing and they are not conveniently located for the modern logistics and supply chain industry”.

- 6.8 Paragraph 2.54 of the Rail NPS is the Government's policy for addressing the need for more and bigger rail freight interchanges:

“The Government therefore believes it is important to facilitate the development of the intermodal rail freight industry. The transfer of freight from road to rail has an important part to play in a low carbon economy and in helping to address climate change”.

- 6.9 And in paragraphs 2.56 to 2.58 of the Rail NPS:

“The Government has concluded that there is a compelling need for an expanded network of SRFIs ... [whereas] ... in London and the South East, away from the deep sea ports, most intermodal RFI and rail-connected warehousing is on a small scale and/or poorly located in relation to the main urban areas ... [meaning that] ... there is a particular challenge in expanding rail freight interchanges serving London and the South East”.

- 6.10 L&G will therefore argue that Government policy on railways requires the Order's impact on current and future operations at the Property and on the development potential of the Property to be balanced very carefully. L&G will argue that the Order should not be confirmed as drawn as the Order is inconsistent with the Rail NPS.

## **7. PARTICULARS OF CASE**

- 7.1 L&G acknowledges that the extension of the current rail network to facilitate the redevelopment of Barking Riverside will be beneficial for the wider area. However, it is concerned that the impact of the Order on the Property has not been fully considered by TfL and that the powers sought are excessive in any event.

### **No compelling case in the public interest**

- 7.2 The Secretary of State's current and longstanding policy requires a compelling case in the public interest to be demonstrated before compulsory purchase powers are granted. L&G will argue that a compelling case has not been demonstrated because:

- (A) TfL has failed to demonstrate that the Order and its impact on the current and future rail freight operations carried out at the Property are consistent with the Government's national policy on rail.

- (B) TfL has failed to demonstrate, as a result of its lack of design detail, that the powers sought are required and/or justified. L&G will argue that the land and rights sought are excessive. This is evident from a comparison of Planning Direction Drawing Sheet No. 4 against the areas of Plots 18, 19 and 23 – the Plot areas are far greater in size than the narrow corridor of land and rights actually required for TfL's proposed elevated viaduct. The lack of any proper justification is also evident from the omissions contained in TfL's supporting Environmental Statement, which omissions include the failure by TfL to record or adequately record the environmental impacts of the project on the Property. Whilst, for example, the Environmental Statement records the numbers of additional passenger movements, it makes no mention of the indirect effect of such movements on the transportation of rail freight. L&G will argue that the powers sought are both disproportionate and oppressive and that their exercise will effectively sterilise both the current and any alternative use of the Property. L&G will argue that the land required for the proposed viaduct should be limited to that which is needed to accommodate the piers supporting the proposed viaduct and that the project should not be authorised until the key design parameters are fixed for TfL's proposed works and, to the extent that this is impossible, until a reasonable and realistic range of parameters and dimensions has been identified and it has been demonstrated that all reasonable steps have been taken in preparing the detailed design of the viaduct to limit the impact of the viaduct on L&G's and DBC's use and enjoyment of the Property.
- (C) TfL has failed to demonstrate that the requisite resources are available to it to ensure delivery of the Order scheme (see further, immediately below).
- (D) TfL has failed to take all reasonable steps to acquire all of the land and rights included in the Order by agreement.

#### **Funding and delivery of project not proven**

- 7.3 The Secretary of State's current and longstanding policy is to require an acquiring authority to provide "substantive information" at an early stage of the compulsory purchase process as to the sources of funding available for both acquiring the land and implementing the scheme for which the land is required.
- 7.4 L&G will argue that the two page Funding Statement contains insufficient detail in this respect. It will argue that TfL has failed to demonstrate that the funding is and will be available to ensure delivery of the Order scheme.

#### **Order provisions excessive**

- 7.5 L&G will argue that the Order provisions are excessive and unjustified and that they should be modified if the Order is to be confirmed.
- 7.6 In particular, L&G will seek the modification of the following provisions:

- (A) Article 10 and Part 2 of Schedule 2 of the Order confer broad powers to temporarily stop up, divert and/or alter Box Lane and parts of Renwick Road and in addition, power to use the stopped up roads as temporary works sites. TfL seeks the ability to exercise these powers “without limitation”. It seeks to exercise these powers without having to secure the agreement of or even consult with L&G or any other person who might be affected by the closures. This is both excessive and oppressive. It is a departure from the powers contained in the Model Clauses which TfL makes no attempt to justify. In its Explanatory Memorandum, TfL requests these additional powers on the bare statement that it was able to secure such powers for two entirely separate and unrelated railway orders.
- (B) Article 27 of the Order confers additional powers in relation to streets within the Order limits. TfL seek the power to use Box Lane “for the purposes of the authorised works ... or any other purpose ancillary to its undertaking” without being required to acquire Box Lane or any right or easement in it. TfL makes no attempt to justify this power, which is both excessive and oppressive.
- (C) Article 18 of the Order confers broad powers of entry for the purpose of surveying and investigatory works. TfL seeks the power to make trial holes and leave apparatus “in such positions as TfL thinks fit”. TfL seeks the ability to exercise these powers with the minimum of prior notice and without having to secure the agreement of or even consult with L&G or any other person who might be affected by the investigatory work notwithstanding the fact that the powers have the potential to impact on L&G’s and DBC’s ability to access and use the Property. This is both excessive and oppressive.
- (D) Article 21 of the Order confers powers on TfL to acquire the whole of the western part of the Property, land which is essential for the current and future use and enjoyment of those parts of the Property which are not acquired. L&G will argue that the powers sought are excessive and unjustified (see further, paragraph 7.2(B) above).
- (E) Article 24 of the Order confers additional powers in respect of the land permanently acquired under Article 21. TfL seeks the ability to impose restrictive covenants over land beneath and/or adjacent to the new railway if this is “required for the purpose of protecting the authorised railway where it is running on the viaduct”. This is a departure from the powers contained in the Model Clauses which TfL justifies in its Explanatory Memorandum as necessary “to minimise the amount of land which it might otherwise be necessary to acquire outright”. L&G will argue that this justification only makes sense if the extent of land for which permanent acquisition is sought under Article 21, in the case of L&G, Plots 18 and 19, is very significantly reduced (for example, to bring it closer in extent to the narrow corridor of land shown on Planning Direction Drawing Sheet No. 4) or preferably if the powers sought in relation to Plots 18 and 19 are, instead of being powers of permanent acquisition, modified to be powers to acquire new rights only under Article 26 of the Order.

- (F) Articles 28 and 29 of the Order confer powers enabling TfL to take temporary possession during the construction and maintenance periods of any land which it would otherwise be authorised to acquire permanently, in L&G's case Plots 18 and 19. TfL seeks powers to remove buildings and to construct temporary works and buildings on any such land. It seeks to exercise these powers on giving the minimum of prior notice and to remain in occupation of the land for up to 2 years. This is a departure from the powers contained in the Model Clauses which TfL justifies in its Explanatory Memorandum by reference to its ability to secure such powers for two entirely separate and unrelated railway orders and its wish for "greater flexibility eg in the event that following detailed design of the works it is decided that only temporary occupation rather than permanent acquisition of some land is required". L&G will argue that TfL should not be granted what it appears to concede are excessive powers on the basis that it has failed to carry out the appropriate level of design work, especially where the flexibility which TfL's desires is at the expense of affected landowners such as L&G, whose interests are thereby harmed more than they need to be and more than can properly be justified.
- (G) Schedule 3 of the Order modifies the statutory Compensation Code contained in the Compulsory Purchase Act 1965 and the Land Compensation Act 1973. TfL seeks to modify and restrict the usual rights to compensation for persons suffering injurious affection and severance from a compulsory acquisition. TfL makes no attempt to justify this modification. L&G will object to the wording of Schedule 3 on the basis that the changes sought are unnecessary, unjustified and oppressive.

#### **Environmental Statement inadequate**

- 7.7 The Environmental Statement supporting the Order application fails to include a description of the likely significant environmental impacts of the BRE project in relation to the Property, contrary to Directive 2011/92/EU (as amended) and The Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006 ("the **EIA Regulations**").
- 7.8 Whilst, for example, the Environmental Statement records the numbers of additional passenger movements, it makes no mention of the indirect effect of such movements on rail freight operations.
- 7.9 L&G will argue that, on the basis of this and other omissions, the Order cannot be confirmed since to do so will be in breach of the EIA Regulations.

#### **Planning conditions inadequate**

- 7.10 The Request for a Planning Direction under Section 90(2A) of the Town and Country Planning Act 1990 proposes only 7 planning conditions and these are all limited to the construction period for the works.

- 7.11 L&G will argue that planning conditions should be imposed which require the detailed design of the viaduct crossing the Property to be agreed in consultation with L&G and DBC before any powers under the Order are exercised. The detailed design should include the exact route of the new railway, the design, construction methodology and size/spacing/orientation of the piers which support the proposed viaduct and the minimum height above ground of the underside of the viaduct structure.
- 7.12 L&G will argue that planning conditions should be imposed which regulate the activities which may be carried out by TfL on land which it proposed to use as construction compounds and welfare facilities under Order powers.
- 7.13 L&G will argue that the planning conditions should be imposed which address the operational period of the new railway as well as the construction period. It will argue that additional detailed conditions should be imposed which, for example, require the railway operator to mitigate environmental impacts such as noise, vibration, dust and light spill arising from the construction and use of the railway (including from the construction compounds).
- 7.14 L&G will argue that a planning obligation is also required to address TfL's proposed shared use of Box Lane and to ensure that pedestrian and vehicular access to the Property is maintained at all times during the construction and operational phases.

### **Human Rights**

- 7.15 The powers sought in the Order are widely drawn. L&G has argued in this Statement that they are overly wide, unjustified and oppressive in their effect.
- 7.16 The confirmation of the Order as drafted will constitute a serious and disproportionate interference with L&G's rights and those of DBC under the Human Rights Act 1998 and under Article 1 of the First Protocol to the European Convention on Human Rights.
- 7.17 No adequate public interest or legal justification has been provided by TfL in connection with this breach of L&G's human rights.

### **Draft legal agreement**

- 7.18 TfL has provided L&G with the first draft of a legal agreement which aims to regulate the exercise by TfL of its Order powers in respect of Plots 18, 19 and 23.
- 7.19 The draft agreement recognises, in principle, that the whole of Plots 18 and 19 are not required by TfL for permanent acquisition and that Box Lane does not need to be closed.
- 7.20 The draft agreement is not in a satisfactory form since, in addition to the above, it seeks to preserve in favour of TfL many of the excessively wide powers to which L&G objects and which are referred to in this Statement.
- 7.21 L&G is willing and able to reach a voluntary agreement with TfL to enable the Order scheme to go ahead without delay through an agreed mechanism.

7.22 In light of the above, L&G will request that Plots 18, 19 and 23 are excluded entirely from the Order or, at the very least, that the powers sought under the Order are significantly reduced and that limitations are imposed upon those that remain to minimise interference with L&G's rights.

## **8. SUMMARY**

8.1 TfL has failed to demonstrate a compelling case in the public interest for the compulsory acquisition of land and rights in Plots 18, 19 and 23 for the purposes of the Order.

8.2 The Order provisions are excessive, unjustified and oppressive in their effect.

8.3 TfL has failed to date to engage in meaningful discussions with L&G over the acquisition by agreement of land and/or rights in the Property.

8.4 Confirmation of the Order at this stage will be premature.

8.5 Plots 18, 19 and 23 should be excluded entirely from the Order or, at the very least, the powers sought under the Order should be significantly reduced and limitations imposed upon those that remain to minimise the interference with L&G's rights and to address the objections raised in this Statement.

8.6 L&G's proofs of evidence to the public inquiry will expand upon the matters referred to in this Statement by reference to the documents mentioned in it, the London Plan and the documents made available by TfL under the Inquiries Procedure Rules.

**Slaughter and May  
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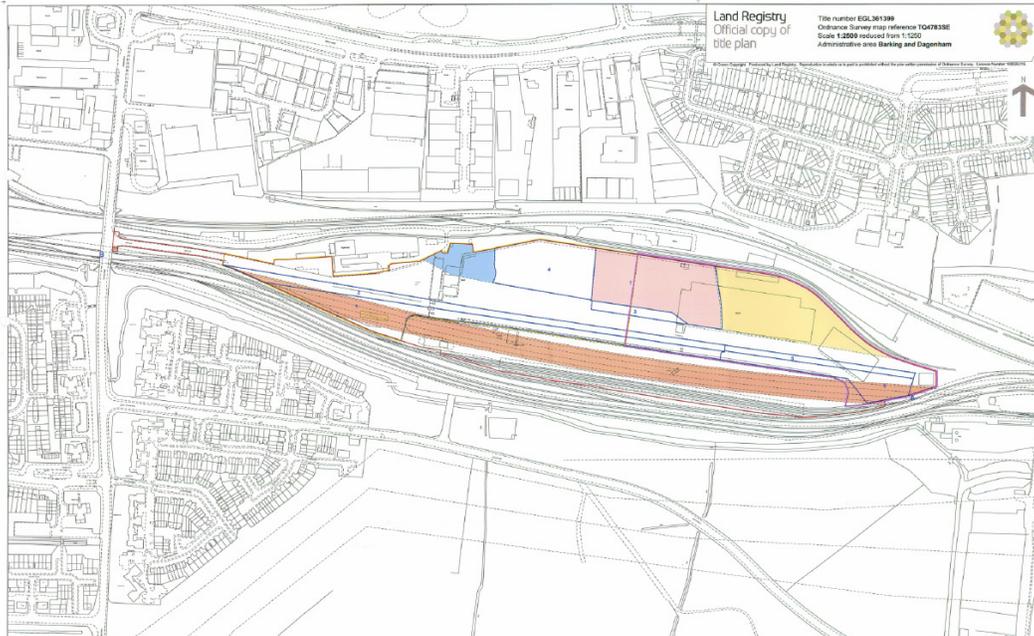
**12 August 2016**

**Tel: 020 7600 1200  
Ref: JEE/RLXK**

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# Appendix 1

(Plan showing extent of Property)



This official copy issued on 3 November 2014 shows the state of this title plan on 29 July 2014 at 09:26:09. It is admissible in evidence to the same extent as the original (s.87 Land Registration Act 2002).  
This title plan shows the general position, not the exact line, of the boundaries. It may be subject to distortions in scale. Measurements scaled from this plan may not match measurements between the same points on the ground.  
This title is dealt with by Land Registry, Croydon Office.