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Hearing Transcript

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Date:	12 May 2026

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Compulsory Acquisition Hearing - 12_5_26 14_00

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SUMMARY KEYWORDS

Prologis, compulsory acquisition, SEGRO, public interest, Section 1223, Section 1222, DCO scheme, environmental assessment, socio-economic benefits, non-delivery scenario, commercial viability, planning permission, development consent, inquisitorial examination, alternative mechanisms.

SPEAKERS

Speaker 15, Speaker 16, Speaker 17, Speaker 4, Speaker 3, Speaker 12, Speaker 5, Speaker 1, Speaker 14, Speaker 10, Speaker 7, Speaker 9, Speaker 11, Speaker 20, Speaker 13, Speaker 8, Speaker 19, Speaker 2, Speaker 18, Speaker 6

00:00

Good afternoon. Can I just confirm whether you can hear me and my live stream is working. So with that, now we move on to the presentations Tom Hartford, Prologis, and for example, 16 minutes. If you if you're still going at 15 minutes, 30 seconds, I will tell you if that's alright. Just saying, you know, you come again if you haven't practised this already. So just just before I start, because I'll be speaking on. Both be speaking to refer to the two parties together as the APS, just as a short one. That's that's fine. Any other effective parties here, I'm sure we'll understand for this

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particular, this particular exercise. Thank you sir. On behalf of the Prologis, these submissions made on behalf of both of the APS. And after a brief introduction, I'll start with approach, a preliminary point on section 35 alternatives, and then delivering benefits. And then Mr. Westman Smith will then follow to deal with comparisons in the later compulsory acquisition world public interest, Parliament acquisitions, the APS case is that SEGRO has not demonstrated that there is a compelling case in the public interest for any of its land to be taken compulsorily. And the condition in Section 1223, is therefore not satisfied. Furthermore, in respect of those parts of the AV, slam proposed effectively to be set aside in future highway works that are not triggered by the DCO scheme, the condition in Section 1222, is not satisfied. The case is set out extensively in the AV is relevant reps, written reps, deadline two and deadline three, submissions which must be understood in full in a limited time available today, it's only possible to find a very brief overview of the main themes. First of all, approach, Prologis submissions on direct approach to the application to the section 1223, test set out in section four of his comments on deadline bond submissions. Parliament's choice of the word compelling is deliberate and importance into legislation, the approach set by the case law, which is qualitatively different from material, material higher than a bare balance of advantage public interest must decisively demand the compulsory position, and if there is any reasonable doubt on the matter, the balance must be resolved. Citizen. The reason set out in that document, SEGRO has mischaracterized the test seeks to set the bar too low. That error must inevitably mean it has misled itself when deciding whether it will be justified to seek powers and compulsory acquisition, and that encouraging the panel and the Secretary of State to follow suit, it's both failing to engage properly with the true test, inviting the decision making to end the law. Then the preliminary point of section 35 is so you will have seen this in our written representations in section three, Mark comments on deadline one, submissions in section two, where we explain in detail how and why SEGRO is application does not accord escape the direction made over section and that, unless and until This has been resolved. The Secretary of State simply has no jurisdiction to grant development consent with the proposed development and consequently none to grant compulsory position under the act. In addition to representing a legal barrier, the grant of the TCO is applied for the failure of the application to accord in the section 35 direction has direct implications for the compulsory acquisition case, as we expect to explain in Section Five our deadline. Two submissions. I then turn to alternatives. First, the approach so you'll have seen in our comments on the deadline. One submissions in section three that we explained that both timing and evidence are key. The burden is squarely on the applicant to demonstrate that it undertook a thorough, systematic and open minded examination of all recent alternative position, including modifications to the scheme, before deciding that this last resort is justified and on the evidence, there has been no evidence produced capable of satisfying that test. In this case, Prologis has itself identified five alternatives that represent pathways that could and should have been thoroughly examined by SEGRO before seeking compulsory acquisition powers. Not one has been identified by SEGRO as an alternative explored. SEGRO belated attempt to respond to those alternatives is wholly inadequate for the reasons explained in our deadline two submissions next unlikely or uncertain delivery of the DCA scheme and any associated benefits. Likelihood and regard to viability, timing and likely extent of deliveries are all important elements of the case

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being advanced by SEGRO. None can

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be accepted simply on the basis of the applicants assertions. There are matters called in for detail and reliable evidence and for thorough scrutiny through the inquisitorial examination process. I emphasise inquisitorially, because the fairness of the Planning Act system and its effectiveness as a means of guarantee the essential procedural safe demands for those whose land is proposed to be taken against their will depends critically on the actions of the AV are doing their best to respond to the material relatedly supplied by SEGRO, and have already demonstrated in their deadline three submissions, it is wholly mans and unreliable, but the examination process is led by The panel. They rather have the procedural tools needed to break and test the evidence. The evidence and SEGRO is only statement of reasons, creates at least substantial doubt that the DCA scheme is viable and would be delivered if the past requisition hands are granted. Indeed, Mr. Roberts appraisal goes much further the goes much further and shows on SEGRO, it scheme is demonstrated not viable confirmation of the compulsory acquisition powers therefore prevent implementation of development on the Prologis plan without delivering promised development in its place, I'm now going to hand over to

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Westman

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Smith. Mark Westman Smith,

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for the airport I'm

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going to pick up in relation to the comparison to the known ca world. So far as the APS land is concerned, the starting

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point is that there is a willing, capable and

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highly

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experienced developer actively

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promoting at least equipment development on the very land that SEGRO wishes to acquire into sale. As Mr. Robinson explained earlier in the known compulsory acquisition world, it's likely that planning permission will be forthcoming from joint application scheme, and that it will be implemented rapidly by the time the secretary of state makes the decision in this case, and probably much sooner. North West Leicestershire decision on the joint application will likely have been made. Compulsory acquisition is plainly not needed to facilitate or at the very least equivalent benefits from the development of that land. And Mr. Robinson describe the joint application as delivering some benefits over and above those two Prologis within the SEGRO application. And he gave examples of the training hub, Prologis training hub and include priest floor area of employment

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development within the joint application.

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He also explained why it's likely that the development would come forward on consultant in the no CA, world, a position which is also supported by Mr. Robert symptoms of such development, even if it is assumed generously that the DCO scheme would be viable and when SEGRO players, the comparison between the implementation of the PCA scheme and either no development coming forward

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or just

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the joint application,

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more likely,

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absent the compulsory purchase Plan

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was development will either firstly comes forward more quickly, because SEGRO enters into a drawn punishment to deliver that. As you are aware, being one of the DCA based alternatives that both the airport just have identified. And we say that's likely, because in the absence of compulsory acquisition powers, it will become commercially attractive to SEGRO, or development will come forward more quickly on the APS land, pursuant to the joint application, and soon after the reasons displayed by Mr. Robertson on the southern land pursuant to a separate planning so compulsory acquisition is not required, we say, to deliver development either on the APS land or the wider maintenance side. And as we set out in writing, there are well established and more proportionate alternative mechanisms which exist to ensure that such development is properly coordinated and comprehensive. So in substance, the compulsory acquisition powers possible inappropriately to provide commercial advantage over another, rather than to secure development. The I then turn to the adverse public interest implications, the frustration of the benefits of the joint application scheme is a substantial public interest consideration of itself that must be weighed on the detrimental side of the balance, and that harm would arise from the point in time the joint applications, it become permanent based temporary at the moment The compulsory acquisition has granted. And that fact that needs to be assessed, alongside the issue of uncertainty of delivery of the DCF scheme, SEGRO is now seeking state sanctioned expropriation of the land to achieve a commercial opportunity it was unable to obtain through the local and transparent and competitive process. The purpose is to enable it in essentially the same manner as its commercial right, and that means they cannot amount to compelling case. My learnerned friend earlier said it wasn't unusual for private developers to be granted CPA powers. We don't accept that on this side of the room, in particular, where the example you gave was regeneration of CPAs. And of course, those are under CPA powers only available to those section 66 in public interest. The fact that those local authorities using those powers then doesn't change the fact it's the LPA that's the wondering authority has to pass. We've also made the point in some of the airports post hearing submissions of CH, 1220, that for the government now to authorise what is being sought by the applicant does propose a material risk for a direct investment in that it begins to undermine the priority right to the economy. So in that context, to accept troubling precedent and send a likely chill signal to the appetite of other investors just conclude by coming back to the tests under 1222, and three and the CPO guidance, which we addressed in detail in our representation, which is only 13 and just make the following points. First, there is a specific and obvious failure against the test. 1222, in particular in this case, and that relates to plots. 1722, and

two, three. These are the blocks that are subject to the safeguarded area. Future duelling, 453, as is thought to be done through requirement 31 and this is safeguarding planning, correct. 124, D tooling is not part of this development. It is not part of or related to the development of the subject of the proposed DCA. Rather, it relates to third party future schemes and housing developments. So what is actually proposed here is compulsory acquisition over land for which the commitment made by the applicant under the 131 is to do nothing with it. And that is plainly not, in the words of section 1222, required for the DCA scheme. Or is it to facilitate it, or is it incidental? So we say that's clear failure against the statutory test. The second point relates to me, as Mr Philpot touched on that, and there is no need to UCA panels to deliver industrial logistics development here, for reasons explained and the public interest is entirely blind as to who delivers such benefits on the AV land. There is no benefit to the public interest in so very specifically, delivering the benefits of logistics and industrial development that could justify the grant of compulsory acquisition paths. That's important because we need it ordinarily, very powerful factor in compelling case balance, but in this case, it's absolutely because it can be provided through alternative means. That takes us to the third point in relation to alternatives. The specific guidance in that paragraph eight, CPA guidance, all reasonable alternatives to compulsory acquisition must have been explored, and that's been addressed by Mr. Philpott, but where there are reasonable alternative ways of delivering scheme, deliverance, and the applicant won't be able to show compelling case interest the compulsory acquisition pattern, precisely because there are those other ways of delivering the same benefits. 30 seconds left, and the case of press is a good inspiration. The fourth point is in relation to private loss. We'll come on to the viability evidence later this afternoon. The last point is in relation to the single developer, live argument that's made by SEGRO. We've addressed that in our relevant rep but it's well established that there are ways of contributions for delivering large and complex science. So for those reasons, we say there's no compelling case in the public interest. Thank you, Mr. Smith, I

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it move on to the questions Mr. Mr. Page is going

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to do. Thank you, Mr. Jackson, before I just jump in very, very swiftly, and if I've got matters out of turn, I do apologise. I should say Alexander booth kings Council, on behalf of the applicant, my understanding was looking at Agenda Item 3.2 before questions would be asked, I would be given an opportunity to respond, and I'm very happy to respond after questions are asked, but in circumstances where it was thought appropriate to have a response at this point. But

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from my perspective, I think some of this things that were covered in the presentation were probably covered in subsequent questions. If there's anything else to say at this point, then perhaps now would be a good time.

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Very happy. Mr. Booth would like to say, Well, I suppose I'm not proposing to respond in detail, because we'll necessarily respond in writing, but a number of points were raised. You won't be surprised to hear. We don't accept much of what's been said, and I'm looking to sort of kick off points as we dropped through them with at least a headline response for now, but I don't want to stray beyond participation. So if you're happy, I'd like to make these brief solutions I'm grateful. So Alexander booth kings Council, on behalf of the applicant, beginning, I'm going to run essentially in the batting order that letter ran through beginning with a compelling case point. I don't need to address that in any particular detail this morning. In fact, you heard another friend, Mr.Philpot, resort to the language of case for press and Rothschild and so on in reference to decisively demanding I've already made the point that the panel in no way need be intimidated or scared of that language. It is very familiar to those of us culturally purchased work. One point I do need to make is that the assertion as to the applicant having set the bar too low has fallen into error and leaving, therefore the panel into error is holding this conceived. There is not a shred of evidence that speaks to the point that the applicant doesn't understand what a compelling case amounts to. Beyond that, there is a discrete point on vibe of this. Again, I'm not going to get to that any great detail. Essentially, what said is that proposed would be out with the section 35 direction. And there was a discussion in relation to that at the first ch hearing, we are proposing a revised requirement to allow any concerns, sorry, to allay any concerns, and that will come through at deadline four. But then there is a bucket issue I just so I can just jump in on that section five point. So I know you're proposing a requirement to secure a carbon neutral campus, but I believe in representations from Prologis, they made the point that effectively, you need to be delivered in an office, and the relevant use for us, and not ancillary or kind of space. So could you just say that's simply not a correct reading of the section 35 direction? I don't want to go into much detail. I'm looking to provide headlines over here. But no, that's not a point of being set. There's no use class issue for us to grapple with. And if one looks at the terms of the section 35 direction, the carbon neutral campus and ancillary office, and indeed, I think I recall Mr. Philpot submissions look to head off the ancillary position. That isn't a position you can enough, it's perfectly appropriate. And when, when we provide you with the wording of the draft requirement, we're confident that the

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panel will

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be comfortable about what we propose,

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and that there

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will be no concerns to whether or not a

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BCo granted on that basis will fall in the virus. If I can see that section three, five talks about a substantial head office function. How would that fit within an auxiliary context? Going to have to turn up the turn up as a reference, and give me a moment to do so. Of course, I section 35 direction, sorry, Alexander booth kings councils, states in terms of Secretary of State notes that the proposed project comprises the following, as detailed or referred to in the applicant's qualifying request, a logistics and manufacturing hub, including a substantial carbon neutral campus, slash headquarters. And we say the term substantial doesn't apply to headquarters facility. It is properly read as being related to the carbon neutral campus element. One cannot, should not, cannot sensibly read that terminology, that is to say logistics and manufacturing, pub requiring a substantial headquarters. As I say, we'll set this out in writing, in a posterior submission, but we say that the substantial term, insofar as it has meaningful application in that context, relates to the provision of the custom campus. Thank you for that. Whether Prologis was to come back on that point, specifically now on behalf of Prologis. So I think probably it's best if we wait to see this new requirement. Obviously, the previous ones have been judged to be inadequate replacing it, but we're interested to hear this. We don't think on the face of it, that corresponds with our understanding of the direction, but we're very interested to see how Mr. Booth makes that work, so we'll wait to see. Thank you, Mr. Page, and just to come back very briefly on what Mr. Philbot has said, it's not a concession on the part of the applicant. But what you will understand, I know, is that in circumstances where you have raised an issue, you have raised a concern, we are seeking to craft a requirement which meets the concerns as raised by the examination. So it's not a question of us recognising any deficiency in your resume for but we're looking to reach a common ground, and we're looking to allay the concerns

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of the panel. Again. Thank you.

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On then two alternatives, the only point I need to make in this context is that learned friend, seeks to place heavy emphasis on the need for evidence relating to both consideration of alternatives and a timing at which those alternatives were considered. And the headline here is that we are entitled to rely both upon consideration given and demonstrated prior to the submission of the application and also subsequent submission, consideration and analysis demonstrating the substantive content of what we previously decided on that then, in terms of the timing, the fourth point raised by learn trend related to delivery, and the question really, of whether or not I Think the SEGRO development will, in fact, be delivered as emphasis was placed on the inquisitorial system. What we say here is we are entirely happy for the panel to protest to an appropriate level viability, but more importantly, the deliverability of the SEGRO development. I'm not going to go now to what Mr. Roberts has to say regarding SEGRO not being viable, we will in due course make a substantive, substantial written response to that document. Suffice to say at this point that document is it's unfortunate, and indeed regrettable in terms of its lack of balance, and must say that it is fundamentally flawed, both in terms of how it approaches the viability analysis relating to the SEGRO scheme, and also, equally, if not more surprising, the viability analysis set to underpin the Prologis development. I'll come back to that later on. I think it was at that point that Mr. Philpott passed the baton to Mr. Westman Smith in terms of the issues my friend Mr. Westman Smith dealt with he was first speaking to the question of a comparison, the comparison, as between Prologis and the SEGRO schemes, you'll recall, intimated that it was likely the planning commission will be granted rapidly for the Prologis scheme. I'm not going to comment on that. Said, we will see what happens during the course of this examination, and the panel will be well aware of the previous promises that have been made by Prologis in terms of the determination of its joint application more than once, reference was made to the equivalent benefits that will be delivered in circumstances where compulsory and acquisition power are not inferred. We say that protestation is with respect. It's meaningless and transparently wrong. The only substantive issue raised this morning was the question of the training hub. There is to be a physical training hub provided as part of the Prologis development. In our written response, we will address at something practice of SEGRO, in terms of employment skills training, both at EMG one, as anticipated in EMG two, there is no benefit there at all that is illusory. The other benefit cited by measuring was the increased floor area of development on land north of Highhams Lane. It's right to say there will be increased development footprint on the land north of Highhams Lane. But of course, increased footprint delivered over the entirety DCS side dwarfs that which is Prologis will provide what is said, it's said by then from Mr. Philpott, then from Mr. Westman and also Mr. Roberts, is that there is no need for compulsory acquisition powers, because development will come forward on the land of the South.

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I mean, that is quite simply

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wrong.

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There is no planning permission for such a free standing development is not an application, nor is there any scheme, nor is there any viability case. And insofar as it said, slightly surprised, somewhat Cavalier approach to this issue, what said is there will be a viable, viable development in some circumstances where there is no knowledge, no knowledge shown on the part of Prologis for the airport, as to what the highways mitigation package would need to be for a development, which came forward just on the southern hand, because what's been said at present is this, we will have development at the North heights Lake, and we will produce some highways mitigation works. We don't know what those will be, because they haven't been agreed with national Highfields yet, but it said we will provide some, and they're relatively minor. What's then said is you may bring forward land to the south, and you won't have to bring forward the green package. You'll bring forward something else, a lot less. We don't know what, but it will apparently be a lot less. So what that essentially amounts to is a proposition that you will have a greater quantum of development than we in British north of Highhams Lane, a significant source of development South Highhams Lane, so a greater quantum than we are proposing pursuant to the DCO, and that whereas The Green package is required by national highways in order to mitigate the impacts of the DCO scheme. That same package of works won't be required in relation to a great department of development. And if one pauses for a moment except analysis and for the effective parties, Prologis and mag to suggest that development will come forward on the south we don't need to worry about how many that's cast. We then came on to the question of adverse considerations and considerations adverse to the public interest. The one that lane Westman has led with, or the frustration that got your scheme. We say, of course, we know this already, that so far as there would be frustration on that scheme, instead, there would in fact, be delivery of a greater quantum development across the entirety of the DCO site area. So in so far as it said, those benefits of the joint application, we lost that to straw man, because, in surprise, it said that regen CPOs don't provide a justification. They don't provide a precedent, a sort of scenario that I'm positing, or I positive this morning I hear what my learned friend says, that's entirely wrong. The fact that we would have a senior hammers rather than an LTA in the context of regen CPO is nothing to the point what we're not concerned about is it being a proposition well recognised by public authorities, as in certain circumstances, one commercial developer will lose out to their detriment and potentially to the benefit of the other in circumstances where that is what is necessary in order to bring forth comprehensive development of a large site. That is a principle. We say it's well established. No friend then spoke to a failure to address section 122, tests. I mean, I think that probably is something that's dealing with in terms of written representations. I don't want to strain to be on your patience. The one point I would make, very briefly, in relation to plot 172, slash two and three, is that lane Fed said, Well, there's a commitment to do nothing with that land. So how can they possibly justify the cultural AV Liam bits, that's not right, or whether Mosman, who is using the landscape to be any commitment. I leave that there, and I suppose I close on what I thought was perhaps the least credible points I've met a friend raised this afternoon, which was that in some way were the panels and the Secretary of State to confirm compulsory acquisition powers in this context that would set a troubling precedent, which would undermine foreign investment confidence in UK PLC, because it would amount to state sanctioned interference with proprietary rights. I mean that is simply, I do use this term, advisedly laughable. There is a strong, well established principle of compulsory acquisition within the UK jurisdiction, and it will in no way lead to any sort of reduction in investment confidence. I do say that is a jury and unnecessary, unless there's anything further from my response.

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Thank you, Mr. Booth. So we'll proceed on to the questions to so the applicant and affected persons will have seen some questions already set out in detail, 3.2, bullet points one through five such I don't propose to to repeat now, so instead, I'll give a short Tracy each question in turn, and then Pause to your responses first from the applicant to speak. Parties in attendance that wish to speak will have an opportunity at the end, once all questions answered. So starting with the first bullet point question, what is the definition of likely under the EIA regulations, and should the contented displacement of socio economic benefits of the joint application by the delivery of the DCO scheme

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be assessed as a likely significant effect within the environmental statement over to the applicant? Suppose please Alexander booth kings Council for the applicant. And so I'm going to take these secrets of questions and my answers to them relatively briefly. If you want more from me, do please ask for it. This question of likely in this context, to be clear, it does not require sorry, in order for a significant effect to be likely, it is not required that that effect is more probable than not. That is to say the balance of probabilities. There's a healthy body of both UK and EU case law demonstrating that in order for something to be likely, it must connect a real risk and a serious possibility of a significant effect. That is to say it's not likely, just because it's possible, there has to be a serious possibility, and that serious possibility has to be grounded in evidence.

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It

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can't be a question of speculation. So that's a headline in terms of likely, and I can give you case law references in that respect, but I don't suppose that point is going to be particularly controversial in terms of whether or not it is likely that there will be displacement of a socio economic benefits of the joint applications by the DCO scheme in circumstances where the DCO scheme is not delivered, and therefore those self same benefits aren't wrapped up and delivered with interest by the DCA scheme. And we say that just quite simply, not in any way likely it doesn't cross the threshold. Viability analysis has been provided by the APS. The objectives will respond to that in due course. This afternoon, we say it is in no way likely doesn't cross the threshold, and therefore is, sorry the non delivery, non delivery, if the

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DCO scheme were consented

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and delivered and delivered, sorry,

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this place intended benefits of the joint application is that likely? Should it be in the environment statement?

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I do apologise, that is likely, and indeed it is extremely probable, but in circumstances where the benefits

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that would

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be displaced will be delivered with

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interest

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by the scheme that is promoted the subject of the DCO application. Then, no, that's not a matter of proper consideration, because they are to be lost.

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Are you drawing conclusions before you've gone through due process and the environmental statement and methodologies within the environmental state that assessed their socio economic effects, as far as I understand, you have not assessed that displacement within the environmental statement. You've come to a conclusion that, well, the entry to scheme is bigger and so there will not be negative side effects of displacing joint application. We haven't actually gone through the due process of assessing it within the background statement. Is that

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correct? I need to take instructions on that to the size point. But my answer would be that in circumstances where the benefits of that joint application development

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are

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subject to concern, and the concern is that they will be displaced, ie, not delivered by they would not be delivered in circumstances where the DCA scheme came forward, ie, the delivery scenario, we say that those self same benefits would necessarily be delivered for them and more by the DCO scheme, and in those circumstances, to borrow the terminology of learned friends Mr Westman Smith for matters, Mr.Philpot, I mean, the environmental assessments would be blind to who delivers those benefits. It doesn't matter whether it is Prologis delivering them. Or SEGRO, if the benefits are to be delivered and they would be delivered, then there is no significant

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environmental effect. Prologisation. Thank you, sir., Philpott,

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KST and on behalf of Prologis, just dealing them with the first world I'm assuming you'll get to go through each in turn, so I'll confine myself to the first one. Likely. That's the way that the bank is put in the fantasco decision, and we can supply a copy of that helpful summary. And a real risk means one that's more than a bare possibility, that doesn't require proof, effects will probably occur. Now, in any given case, a number of outcomes may be likely, not a binary position, the environmental statement should assess each such scenario in order to understand the likely effects of the project In that legal context of the socio economic benefits of the joint application would be displaced on the grant, including GCA with CA powers. And I know that Mr. Booth says that that is likely Inquisitors, extremely Prologis, and for the reasons that Prologis explained in its written representation, implementation of any management would only be likely once a shadow of compulsory exposition has been lifted. Despite my client's appetite and willingness to move rapidly to build out the development once consented the commercialist for customers under the shadow of compulsory acquisition will be unlikely to be acceptable. That effect flows from the decision to approve the project, which includes all authorisations needed to carry out the development proposed, and that includes, here, the granted development consent and the necessary powers to implement that consent. And I know we're going to come on to that question. I so. And of course, if planning permission has been granted by the time Secretary State determine the application issue, when such effect is likely, is entirely straightforward, but even absent that, it would be at least probable that the joint application development would be implemented in the absence of the DCS in a scenario where the DCS scheme is fully delivered, what it relates to the benefits of the joint application scheme would still be displaced By the taken in that step, and that would be relevant to considering the overall socio economic effects of displacement on a net basis. Best case scenario, that's the best case looking into the future for the applicant, it's necessary the decision maker to understand what has been displaced, to understand how much has to be netted off, is an essential step towards a judgement on what might be regarded as an additional benefit of the scheme Inquisition. Context, on the applicant's case, I stress that's necessary, but it's not a sufficient step to allow that judgement to be made, because for the purposes of compulsory acquisition, it must also be common ground that it would remain necessary to consider what would be likely to happen to the southern Hand absent compulsory acquisition beings hours being granted the short answer to the question is, it's plainly and the DIA process can't be short circuited by an assertion about vendors associated with one skis without understanding

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what it

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would discuss. Thank you. Eastmidlands Mark Westman Smith released. Thank you. So I'll come back to the applicant. So my current understanding is you agree that it's a likely significant effects, either displacement effects application. Therefore the EIA regulations require, the requires that the environment of stake clears an assessment that likely significant effect, and yet it doesn't. Is that a reasonable assessment

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Alexander kings Council on behalf of the app two points, firstly, in relation to the various observations, by mark westerman and Mr Philpott, he began dealing with environmental assessment matters were then drifted away towards compulsory acquisition, and talk of netting off and additional benefits and so on. It's simply not relevant in this context. What we are concerned with is, well, certainly what I understand the panel view to be concerned with is the question of the environmental assessment and whether or not all likely significant effects have been considered. And it's right to say that in circumstances where a there is a significant effect which is likely, then that should be the subject of analysis. However, there are two big Howevers here. The first is the basis on which the question is posited, assumes permission will be granted for this development, and also assumes that such development is viable, such that it would in fact be implemented in the absence of in the absence of the DCA. Now we say that is not a correct basis from which to start, because there is no credible evidential position demonstrating viability will come on to why that is initial plan, and that certainly, as yet, there is no plan permission to carry out this development, and in circumstances where one is considering like a significant effect, The question of what are currently hypothetical development aspirations and the extent to which they are properly had regard to in the context of environmental assessments, and at the very least, is moot. So I don't accept the premise, if you like, of the question. What I do say is likely, is that in circumstances where there will be where in circumstances, where the DCO is granted and development comes forward, we say it will come forward. It stands to reason that development for another, as yet unconcented and non demonstrated, non demon, viable scheme cannot come forward. So there would be potentially displacement there, but as to whether or not that amount of likely significant effect, I just actually can't see how the building blocks stack up, and at very, very best, that is a wholly artificial scenario and circumstances where any development that would be brought forward pursuant to a permission which hasn't yet been granted would be delivered under this DCO in any event. So we'll come away and put you a formal position in writing. But that's how I see it. I don't say that we do accept it's a likely, significant debate. What I do say is the likelihood and the probability, a strong, overwhelming probability, is that our scheme will be delivered. That's where I am confident. I can't as to whether or not they're ever going to get permission, their development will ever be viable, would ever be delivered? I can't speak to that. The evidence isn't before the panel. To that effect, not to

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drag this point on, but what you the steps you just described go to high probability, rather than just likelihood. You've said that it's likely, likely, significant effect. You spoke about the two criteria, one of those being viability and doubts about whether it will come forward or not, but that, I'm not clear, that that undermines the likely test whether it's a

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likely significant effect or

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not, seems more than a big possibility. For example, that the application is in as being considered this detail there, and this sufficient detail to grapple with you're talking about, you know, the end point, potential certainty, but that doesn't necessarily go to the starting

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point of likely

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significant.

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Alexander booth kings Council for the applicant so I know that. So just so I'm clear as to the point you're making, as I understand it, what you're saying is, look, it may be the case that permission won't be granted. It may be the case that the development isn't viable when we come forward, but there must be a serious possibility that permission will be granted. It will be viable. And in those circumstances, given

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that your

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development, what we say, our development, will come forward, and that development wouldn't come forward, that those the loss of that development must be a significant, a likely significant effect. Thank you very much. I understand that I then end up falling back on the proposition I've already elaborated on, which is any benefits or any substantive impact of development. Beneficial substantive impact that would be lost by reason of that development not being able to come forward would be delivered pursuant to the DCO. But I think now probably a better understanding.

49:09

We spent time on that point. So thank you for those contributions. So moving on to the second question, what is the definition of a project under the EIA regulations, and should be contended sterilisation, socio economic benefits of the joint application by the DCO scheme, if granted consent but not delivered, scenario, could those be assessed as a likely significant effect.

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Alexander booth, Kings Council behalf os the applicant, the non delivery scenario, sir, I have to say that that was not a concept that I had previously considered in the preparation for this examination, having considered it since the agenda was provided, our and my instinctive response that impacts resulting from the non delivery of development cannot comprise part of the project. The project is that a development is not the consenting

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process.

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So my instinct is that the panel is correct in so far of the proposition, and that this therefore wouldn't be, or rather impact of the development. The DCA being consented but not implemented would not be properly the subject of environmental assessment. That said, I think, were the DR, were the panel to pursue the point, it would be helpful both for all parties and indeed, for Secretary of State, for the panel to set out its reasoning in the alternative, that is, to proceed on the basis that the consequences of non delivery of the project are not properly the subject of environmental assessment, but also in circumstances where they are properly considered, because we wouldn't want this to be a scenario where subsequently further down to nine, a point of law such as this was considered by was needing to be considered by cause we want to have clarity

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from the map of the Secretary of State on it.

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Thank you, Prologis. Thank you, Sir Philpot kings Council, Prologis, so before I say what I was proposing to say, I just want to quickly pick up what I understand to do the applicants position notice to be said. It's not the point that it occurred to him before he'd seen the panel's agenda. Surprised by that representation started, we raised it squarely, but I also know secondly, he wants the positions up

in the alternative. Well, that's all well and good, but that can only be done if the assessment is reliable. One can't have one's cake. There may be a case for this being assessed. As we've said right from the outset, you need to provide the assessment otherwise that second option of considering it's an alternative or alternatives to refuse them anyway, I'll come back to what I was going to say in response to the direct question. Now, the project here does comprise development as defined, which includes physical words, although, if need, not having regard to the definition of development in the legislation, it could, of course, also include a change of use, or indeed an intensification of use. And a project for the IA purposes can include continuation of existing use. And the European Court of Justice has held, for example, that a legislative act to extend the life of an existing nuclear power station engages dia because that legislation, whilst not itself authorising physical works, was, in the court's words, inextricably linked with upgrading the works that would then be needed, even though further decisions will be required. And we'll provide a copy of that judgement with our notes after the hearing. But the cases into the environment, Maloney and I've always certainly mispronounced that, my Belgian, it's not so good against conseil the ministers, again, we must certainly handle that reference 2020, Environmental Law Reports nine and in particular paragraph 71 and 72 we think are helpful what the court said in those two paragraphs, and they're short, if I just read them out in the light of those various factors, measures such as those at issue in the main proceedings, as the legislation, cannot be artificially dissociated from the work to which they are inextricably linked when assessing in the present instance whether they constitute a project within the meaning of the first incident of Article One, two, AV, EIA directive, it must therefore be held as such measures and the upgrading Work Institute would be linked there too, together constitute a single project with a meaning of that provision, solidifying the fact that they're very difficult to make, the fact that the implementation of those measures requires the adoption of subsequent acts in respect to one of the power positions, concerns such as the issue of the new specific consent for the production of electricity for industrial purposes does not change that analysis. So that's what the court said, and that approach reflects the precautionary principle and the broad purposive approach the courts take to the interpretation of the EIA directed and the language used by the court artificially dissociated. Is carefully chosen. The whole EIA framework is designed to take a broad approach which ensures environmental protection and scrutiny, not a legalistic narrow thread which avoids such scrutiny. Now in this case, there is a single legislative act, the making of a statutory instrument, consent order, which includes development consent and other authorizations, including the compulsory position which are intended to enable that development to be implemented, and are thus inextricably linked to it to comprise a single project for the purposes of EIN and the assessment of adverse socio economic effects arising from the decision that allows the development to proceed. Can't ignore the environmental effects which would float from that decision and occur whether or not the proposed development is implemented, whether those environmental effects are classed as direct or indirect. They are the effects of the decision that allows the proposed development to proceed and are inextricably linked to the physical works of which consent is sought. Now, in many, if not most cases, adverse effects and development occur as a direct result of physical activity associated with implementing land development, but that's an issue of causation in case specific analysis, not law, as this case illustrates that's not always so. Moreover, there's no legal principle that confines the requirement to assess adverse effects that occur in that way. Now this case concerns compulsory acquisition, but thinking about it more widely, the same point would apply equally to other provisions included in the DCO which need not involve development as defined, such as stopping up or diversions of rights away, where a development consent order requires such measures to be taken to facilitate the proposed development, the socio economic impacts arising will always be assessed in the IEA process. That's familiar, not to do so would be highly artificial and would fail to affect the actual environmental effects of the project as it is experienced by those most directly affected. Finally, the issue on dia that's encapsulated by the panel's question is one of law, not judgement, whilst the law makes clear that it's for the decision making to reach a judgement about the scope of a project and the accuracy of environmental information, that judgement has to be exercised as a legal

framework, the identification of the project and thus the effects to be assessed is artificially constrained by reference to erroneous point of principle. Decision Making will go wrong in law, essentially, that's what the EC judge. But even if what we say about the legal

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obligations

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is wrong or put to one side, those effects are, in any event, an obligatory material consideration outside of the IA on the facts of this case, if the Secretary of State was to grant a development consent as applied for, without taking account the sterilisation of social economic benefits in a non delivery scenario, the failure is to take account of an obligatory material consideration, the Secretary of State can't be sure the dcsp on the evidence non delivery. The non delivery scenario is at least a realistic possibility, as is partial or delay at all realistic. Any assessment of the case being made for compulsory acquisition would therefore have to consider the implications of defining to that effect, and the Secretary said, will need to be advised to the panel's conclusions and recommendation of life based implications follows them one way or another. An assessment of this issue is essential. We can't insist that it's provided we're just an effective person, but from the outset, we've made very clear what the consequences are.

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Thank you. Mr you touched on a few things, and we'll come on to in the next bullet point East Midlands Airport, see if they have anything to add.

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Mark Westman Smith for East Midlands Airport, be no surprise, Mr. Philpott, I have confirmed these answers, so I'm going to take time to repeat answers.

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Thank you. Did the applicant want to conduct?

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Alexander booth kings Council, on behalf of the applicant? Yes. So very briefly. Firstly, Lane French reference, Journey is relevant, prep and the extent to which that point, or this point was addressed there. I have to say, even reviewing it again, I don't see it there with any clarity, but that's not a substantive one in terms of the substance of what learned. Friend has just said, we'll come back on this issue in writing. But what I do need to come back on is, I think the misunderstanding as regards what we said in terms of the panel making recommendations from the alternative, and that is this, we say that it may well be that the panel is correct. We don't say that the panel is but we say it may well be the panel is correct that, in fact, impacts of non delivery are not properly susceptible to environmental assessment. However, in case they are, we say that the panel could also consider a position where, as a matter of principle, the impacts of the non delivery of a consented project are properly the subject of environmental assessment. However, in this case, we say that there is no requirement or need for detailed consideration, because the effects are not likely. Significant effects. Firstly, they're not likely because we say it is not yet established that there will, in fact, be any Prologis development consented environment that would come forward, and in circumstances where we say our development will be delivered for all the stoves that are thrown at it by Prologis and the airport. And the further point, which I should have made in the context of the previous topic, but it's relevant here also, it's not just a question of likely, but it's a question of whether or not the effect is significant. And we say it's not a significant effect, leaving aside likelihood, because in circumstances where development of the Mac Prologis land is proposed for logistics development of the sort that is the subject of the joint application, in circumstances where instead of Prologis delivering that, we would be delivering

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our

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version of that development on the lack of the client, whether it's one or the other, that's not significant to help you. So on either basis, is it a likely significant effect? So to be clear, we say that there should be findings from the panel alternative but those alternative findings are, firstly, impacts of development that isn't actually delivered. Don't properly form part of the environmental assessment, or in the alternative, yes, they do, but here, those impacts wouldn't be likely significant

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impacts, if

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that's so. Thank you. Just one clarification, how would we assess it? In the alternative, we don't have the information on the environmental statement that assesses it in the first place? No,

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because that in circumstances where that's been scoped out, because we say that that is not, I mean, that would be a question of

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in

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circumstances where the panel felt actually, in the alternative, my scenario B, we would like to be provided with those impacts, because we do not think or we do think they clear the threshold, both in terms of likelihood and in terms of significance, then I mean, that would be a different proposition. And of course, that would be something that we, the applicant, would have to consider, but our position, as I just indicated, would be to the effect that even were the events that of non delivery properly considered in those circumstances, they're neither likely nor significant and therefore aren't properly the subject of assessment in the ES.

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Thank you. Move on to the . Follow my question some of the context of this question already touched upon your previous submissions. So the question is, how many DCOs have consented but never delivered? Does this indicate whether the DCO scheme has been consented but not clear that it is likely and should be assessed accordingly, whether within environmental statement or by some other means, if it fell outside the scope of the EIA regulations. But we're still relevant first please.

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Alexander booth kings Council, on behalf of the applicants, I'm certain there are a number of layers we say to the answer on this firstly, and we will come to the numbers that you've requested in a moment. Indeed, we'll provide best evidence surprise we can at deadline for informal tables to our submission. But what we say is this, we do not consider that the question of whether or not all DCOs granted have, in fact, been implemented and built out, is a matter that would assist the examining our Lord Secretary of state, because the circumstances of different infrastructure schemes are so very different. There are so many different contexts. For example, the question of whether or not this event is in no way informed by whether or not a high risk scheme, publicly funded and potentially subject to a wholly different government policy is delivered or not. I mean, there are different considerations which input into the likelihood. What I would say is that the most helpful proxies for the purposes of the panel's deliberations would be PCA was granted in relation to strategic rail freight interchanges. Now, strategic rail freight interchanges are not exact comparators with the development which is the subject of this examination. They have very significant infrastructure requirements in terms of delivery of rail terminals. Will not know, but it's not an exact however that is the nearest, and we say that is potentially a health proxy for the panel to consider for srfi, gcas have been granted that in relation to the Daventry international rail freight terminal. That's Prologis development, the East Midlands gateway, RFI, that's one of ours. Northampton gateway is RFI, again, that's one of ours. And the West Midlands interchange, srfi, promoted by four ashes limited in which I was also involved. All four of those have been or are being built out. And we say that that is a useful proxy, and that that goes to our proposition, that as and when we get Development Centre, we're going to build out our project, returning to the bigger picture, the broader canvas, which we say really assist, but we wish to assist the power. Nonetheless, on the basis of our research, some 168 bcos have been consented. Some 10. I'm using the word some advising me, because I can't swear to the absolute numbers here, some 10, 6% have been cancelled, and that is largely publicly funded schemes being cancelled due to government policy changes or funding decisions, or energy projects being cancelled for commercial Reasons linked to government energy policy or funding schemes. There are four road schemes, being the AV one warfare, the A 12 chelsford, the A three of green of which we know a great deal, of course, and the A 47 brunsford scheme. There are five energy schemes, and there is one waste water scheme, the

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Cambridge wastewater treatment plan. Now

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those are all schemes which effectively have been consented in their council but we say they don't really assist in this context. I should say that in identifying a figure of 168 and then 10 Council schemes we've ignored. DCO is recently consented and still within implementation period, because that's not really a relevant or helpful indicator. And should say there are a number of others where the petition is not entirely clear on the basis of the documentary documentary material, but that's our best guess in terms of assisting panel. But what we say is that broader canvas doesn't really assist and then, in fact, you're best focusing on broadly equivalent bcos and that into the Sri.

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Thank you, Prologis, thank you, sir. Mark Casey on behalf of Prologis and just dealing first with the first part of the bullet point, whether non delivery should be assessed at all as part of the environment that they can do otherwise on the basis of the applicants contention is not a likely outcome. Predoxically wrong as a matter of basic principle of inquisitorial body, such as the panel simply to accept an assertion made by the applicant that non delivery isn't a realistic possibility to examine and test the applicants case. But that would be the case whether or not delivery is actively confessed by the APS. But in this case, we know that part of the applicants case is actively contested by the two main APS, both of whom are experienced commercial developers and who've advanced detailed written evidence and submissions in support of their position, and haven't regarded that evidence of those submissions non delivery is at the very least a realistic possibility. Now, in addition, we have considered the panel's request for information on DCOs that have been consented but not delivered and the time available, we don't claim to have undertaken a comprehensive, systematic exercise and investigating the status of all made. DCA, it sounds like the applicant may be able to do that. So what follows is simply a selection of cases that members of our team have to be aware of. So that's the status. But even then, we've identified numerous examples before, we tend to identify them, and I'll deal with some and then Mr. Westman Smith will deal with some others that he's more familiar with. And so best place perhaps to help. It's important to stand back and think about the context. This is, despite Mr. Booth's protestations, a relatively unusual DCO application, because it's a business and commercial scheme. So far, there are no examples of such schemes being granted a DCO and being implemented, notwithstanding that having been available since the regulations allowed 2013 is its nature, business and commercial development, such as this one is more likely than those that are supported by public subsidy, and those which are in the nature of a major power station to end up with partial delayed implementation, because this is a commercial scheme with no public subsidy, whether that's an important direct funding or some sort of price support mechanism, as in the case of energy generation, it will stand or fall on its commercial viability, which will be affected by market conditions at the time, and the evidence on liability, as we sit here today, we say it's not encouraging. Now in our post hearing, note the supply list of the projects we will refer to that were consented but not implemented with a brief crazy and saving facts so far as open public domain. So I'll pass over to Mr. Wesstman Smith So the first is the im green energy terminal that was a green energy terminal and hydrogen production facility on the Humber that was going to produce green hydrogen from imported a mania. It was promoted by Associated British ports with Air Products as the customer who would be so you're very frustrated with all of this, of course, you and I spent a happy six months dealing with it, expected to deliver over four and a half billion pounds of economic value and create 14 jobs. DCO, granted on the sixth of February last year, had subsequently cancelled summer of last year, citing an absence of firm policy support and financial backing from the UK Government. Second one, the North, killinghome power project that was a gas fired generating station of killinghome, promoted by CJ and killinghome, limited DCA granted on the 11th of September, 2014 generating station is still not been implemented despite the passenger more than a decade there have been subsequent amendment orders Made to extend the time limit of commencement, October 2021, benefits of the audit UK Limited and further amendments to the project required by unit Enterprise year as of yet not implemented. That is an example, not only a non implementation, but also delayed implementation, which at least we've said is at least a real possibility.

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Mark Westman Smith for the airport, there are two projects that we're aware of that still are within the implementation period, but nonetheless no progress has been made. First place is the key be three carbon capture power station that was granted consent in December of 2022 it was the first power station to be consented with carbon capture, and they're currently no signs of activity in terms of implementation and construction. Similarly, the Manston airport PCA, that was a project to reopen and redevelop Manston airport into a dedicated air freight facility able to handle air cargo movements per year. That was granted again in 2022 and there's no been no substantive on site implementation limitation of PCA, and again, that is within its time limits, but it needs to be implemented by August next year. So time is tight on that. But an example where the DCO is no longer it's the tidal lagoon Swansea bay that was a proposed title Lane project, approximately 320, megawatts in Swansea Bay, and again, that would have been the UK's first title being scheme, the DCA was granted in June 2015, following financial strain with government funding being called, the project was never lawfully commenced. There was some litigation about that and survey and preparation which had been carried out the material operations and the court will be confirmed in 2022 DCA had lapsed, didn't commence within the time limit. And then there's the international advanced manufacturing Park in Sunderland. This was a scheme that was promoted by jointly by two local authorities. They obtained a section 35 direction for the advanced manufacturing car. They supported it by producing an area action plan to take the proposed site out of the Green Belt the promoting Council doing very little site initially, and land owners were resistant to having their sites taken where they wanted to deliver similar developments themselves, but the Council were able to acquire a third site during the information of the area action, and that action grant contains specific development plan policies around comprehensive development, coupled with the prospect of compulsory acts acquisition under a DCA, mostly discouraged the remaining land owners from trial to develop. And there came a point where the council was needed consent faster than the DCA process would deliver, and the council successfully applied to their intersection, 25 direction to allow under the council's controls. And despite the fact that infrastructure ended early, only a few units and subsequent point arrived where the clients took the view that the DCA process wasn't required, and so they saw the replication section 35 direction. And further planning applications following. So despite the section 25 direction, and despite that direction identifying national need that was over a decade ago, and less than half the size has been deferred. So it brings to the fact that business and commercial DCA are more susceptible to commercial headwinds than more generally addressing typical infrastructure needs such as rails and rail and promoters and local partners ultimately can prefer to pivot back to the TCPA process, and neither a certain things like direction in this case, nor specific development plan, the policies to promote site or guarantees of delivery to show susceptibility to the commercial market, and where One looks at all of that evidence as a whole. There's both specific evidence in relation to this scheme, which would come on to in terms of viability evidence, but the fact that a number of commercial DCS have been put forward not yet to be built out for points to the credibility of the non delivery scenario, but it is a realistic possibility, and therefore should be lifting up. Thank you. Does the applicant want to come back quickly before we move on to the next?

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Thank you very much, sir. Alexander booth kings Council for the applicant very briefly, sir, you've heard from learned friends, and what they have done is cite a number of specific DCA that have been granted in relation to a number of specific projects. I mean, the first point I noticed is that nothing is said. Nothing was said about my bullet point, which is the question of what actually serves as the best comparator, we say, the srfi, DCOs. And there doesn't seem to be any dispute on that point. London premier spoke to developments such as the incoming green energy terminal, of course, as he recognised, the reason that did not come forward, or at least a reason that did not come forward, was a lack of government policy commitment. That's not something that we'd hear then. learned friend, Mr. Westman Smith, was dealing with Madison airport and qv three carbon capture and so on. I'm not going to address those on the basis that a they are wholly different developments to that which we are seeking development in certain respect for and also because they are within the implementation period. Insofar as parallels are sought to be drawn between our development and the SWAT made tidal lagoon development. Again. I mean, that's just, it's apples and orangutans. It's just completely different issues there. And of course, that's another government funding point. As friend noted, of course, we're not concerned with government funding. We aren't susceptible to withdrawal funding by the government friends. Final observation was to try and draw parallels with the councils who have promoted the development at

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Sunderland

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again. I mean, that's a wholly different piece. It's

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not our development, and it's not who we are. And in that context, it's notable that this isn't a pair of

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councils

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seeking to promote the development this is secret. Now we have previously promoted two applications for development concern, and we have built out in the process of building up to develop a consent schemes as granted. So we are in a wholly different position, and we can stand by our track record. The only further point to make was that I understood the position to be as known premise to Philpott representative, which is that there have been, as yet no commercial and business DCOs for granted. Known premise to Westman Smith, I think was suggesting that Sunderland development was such a DCO there was the section 35

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direction. It was sought to be revoked, and revoked.

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There we have it. That's That's when Mr Philpott says, well, there has been no commercial and business DCO built out. It's important to note that no commercial and business DCO has yet been granted. So we say that's no sort of precedence or no sort of basis on which to say this one might be granted. Rather, look to the srfi DCOs and look to the fact that we promote the two agreement

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builders like this. Thank you.

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Thank you. Mr Philpot, I'm mindful we're

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running non response on the S and R. What is accepted. We'll be dealing with DCA which have not been implemented. We haven't been making submissions about others which have listened.

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Thank you. Okay, we'll take a short break, 10 minutes, just as a couple Break. So we'll come back into 25 Just curious.

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