Planning Inspectorate
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Event Transcript

Project:	East Midlands Gateway Phase 2
Event:	Preliminary Meeting (PM) – Part 2
Date:	10 March 2026

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Preliminary Meeting 10_3_26 session 2

Tue, Mar 10, 2026 11:29AM 37:28

SUMMARY KEYWORDS

Compulsory acquisition, procedural fairness, development consent, market competition, Prologis, East Midlands Airport, DCO application, environmental statement, socio-economic impact, viability analysis, state powers, pre-examination stage, MHCLG guidance, commercial interests, examination process.

SPEAKERS

Eventurous AV Team

00:45

AV, could I just have confirmation from the back of the recording has been restarted? Please. Thank you. We're discussion over that, and my colleagues would feel that, and I would like to feel that like if you could, Mr. Phil, but you could just run through your three points again, and then we'll give final giving the applicant another chance to have it, have it, just to make final their response, and then we'll go from there. Okay,

01:11

German point clear. I'm grateful. So the the basis for the application is set out in detail in our relevant representations, and I don't propose to rehearse every point orally, what I'll do is follow what I hope is a pragmatic approach and provide an overview the case so involves an unusual set of circumstances that have been created by the applicant. As you'll have seen the applicant was the unsuccessful under bidder in a fair and transparent, open market competition to acquire interest in the land north of Hyams lane and also to be selected as a development partner by East Midlands Airport to develop the land for essentially identical purposes and Prologis, a commercial rival, was the successful bidder and was selected as a development partner. And as you know, it's now working with the airport to promote a policy compliant development of the land through the joint application. And the applicant is therefore asking the Secretary of State to authorise the draconian step of depriving pro lodges and the airport of the land they wish to develop, and to do so against their will, using state powers to reverse the outcome of that commercial process. And in doing so, it aims to frustrate delivery of their proposed development so the applicant have can have the opportunity to try to develop that land itself. And I stress the word opportunity because there is but at its lowest, no certainty the land would, in fact, be developed as proposed if compulsory acquisition was authorised. Now, in its overall approach, the applicant statement of reasons implicitly recognises any logical justification for such a decision would need to involve a compelling explanation for why it can't just develop its own land, leaving pro lodges in the airport to develop the land they own or control for similar purposes, even if some limited compulsory acquisition was needed to secure access. And it's significant here that Prologis is a highly experienced developer in precisely this type of development. And we've explained that in section four of our relevant representations, unless any order granted provides otherwise, which would be a matter for the Secretary of State to decide, the order would automatically have the benefit, the owner would automatically have the benefit of the development consent granted on its own land. So in seeking to provide that justification, the applicant has advanced a case which relies, among other things, on the following key building blocks. First, the explicit assertion that development by the applicant of the land over which it has an option would be financially unviable and undeliverable without taking in developing my client's land as well, and that it could not fund the highway works needed. And the implicit, but notably not explicit, assertion that the DCO scheme is financially viable and deliverable with the highway works even when it has paid my clients in the airport the full open market value of their land reflecting its development potential in any other matters relevant to its value in the absence of the applicant's scheme. If that's not the applicant's case, of course, the development won't come forward, and the suggested benefits of the acquisition would fall away. And the implicit assertion that the public interest harm associated with frustrating the delivery of the development proposed in the joint application is outweighed by the possibility the applicant will build out the entirety of the development it now proposes, and that it will do so within the Freeport window, in other words, by 30th of September 2031, now our relevant representation points out the absence within the application documents of the evidence and analysis that would be needed properly to advance those arguments, so no viability evidence at all, and no assessment either in the environmental statement or the planning statement of the adverse socio economic and land Use consequences of frustrating the development in the joint application carried out on a realistic worst case basis, and without that evidence, pro logists and the airport cannot properly understand, assess, test and respond In its relevant representations and written representations to the case that is being made for the proposed interference with the peaceful enjoyment of their property rights that creates an obvious procedural unfairness. The basic requirements of procedural unfairness involve not just a right for Prologis to be heard,

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but also a right

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that is, sorry I'm getting somewhere.

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It's not, I think it may be someone online. So yeah, I think, shall I just, like, carry on?

06:45
Yeah, please do. I don't think, and we're not, I don't think there's anybody within the room. And if it's anything online, then clearly it's not obviously looking through anyway,

06:54
our current so I'll just repeat that the basic requirements of procedural fairness involve not just a right for pro lodges to be heard, but also a right that it be given sufficient information to enable properly informed representations to be made. Those requirements also mean it must not be unfairly taken by surprise through the production of late evidence. Now, if the necessary evidence is subsequently produced by the applicant, but only after the examination has commenced, my clients will have lost the opportunity to influence the way the examination is focused and organised through its relevant representation and its written representation and its PDA submission. Now that goes to a fundamental purpose of the relevant representation, in particular in ensuring the fairness and effectiveness of the examination system, and it's reflected in the guidance on what a relevant representation should contain and why. And so you'll be familiar with the mhclg guidance on the pre app, pre examination stage, and I just remind you of a few elements of it. Paragraph four explains one of the two reasons relevant representations are a crucial element of the NCIP consenting process, is they provide the means by which all interested parties set out their principal submissions and where practicable, the full particulars about the DCO application, the examining authority must consider the matters raised in the relevant representations when preparing the initial assessment of principal issues. And then paragraph six, the more comprehensive and detailed relevant representations are upon their submission to the planning inspectorate, the more information the examining authority has to make informed judgments about the initial assessment of principal issues for consideration during the examination stage. And then paragraph 13, this initial assessment of principal issues is intended to enable the examining authority to frame the examination so that the main master clearly identified and given proper time for analysis. This is the reason why relevant representation should be as comprehensive as possible, as set out above. Now, in addition to issues of procedural fairness, late production of the evidence undermines the effectiveness and efficiency of the examination process and leads to wasted work, unnecessary pressure on affected persons through the short timeframes

available for review and response once the examination is underway. And that's reflected in the guidance of 14 which tells us procedural decisions by the examining authority during pre examination are encouraged as an important way to facilitate front loading of handling applications and facilitate an efficient examination. And that compounds the initial unfairness of depriving pro lodgers of the full intended benefit of the opportunity to set out its case in relevant representations before the panel decides what's important and why and how the application should be examined. Now that's exacerbated by the highways issues, but I've dealt with those already. Now, one response to that might be, well, is this really it's the applicant's risk if it can't make out its case for compulsory acquisition when it's subject to scrutiny through the examination, well, then its application will be refused. But that's not a sufficient answer for the following reasons. First, the examination system has been designed to be effective on the assumption the material needed to support the application is set so that properly informed, relevant representations can be supplied to the panel once the effectiveness and procedural step has been undermined, the system can't operate as intended, and it would be unsafe to assume its efficacy in scrutinising the application and protecting the rights of affected persons will be unaffected. Second procedural and procedural fairness is a vitally important public interest consideration in and of itself, and it's no answer to a legitimate concern about the fairness of a process that it may well produce the right answer. In the end, the law is clear that if the principles of natural justice are violated in respect of any decision, it is immaterial whether the same decision would have been arrived at if that had not happened. And then, thirdly, as a matter of good administration and public interest, it would be very unfortunate to embark upon an expensive and time consuming examination in the knowledge that necessary evidence is significantly incomplete, without taking the opportunity that exists to sort this out beforehand, as once the examination starts, the opportunity that exists now to ensure fairness and effectiveness would have been lost. And so, in conclusion, for those reasons, and the reasons we set out more fully in writing what we ask, and what we have asked is that the panel defer the start of the examination for such period as is judged adequate to facilitate the production of the necessary additional material and for updated, relevant representations to be produced in response. So that those are my submissions, I've tried to encapsulate it in an overview.

12:24

Thank you. Before we come to the applicant during the middle of that, national highways raised their hand just before, just to make sure that they don't and they've put it down again. Can I just check national highways that they wish to make it whether they wish to make any comments at this point, I

12:51

on. Excuse me, sorry, Jeremy bloom national highways, no comment at this point,

12:58
thank you. We just saw your hand went up. We thought, hang on, just in case you just have something you wish to raise.

13:04
So no, I couldn't. Sorry, I couldn't. Couldn't hear the stream for a while, so

13:11
that's no problem now. Thank you,

13:14
yes, Mr. Booth, in response for the applicant.

13:17
Thank you, sir, Alexander booth, on behalf of the applicants. So you've had, as an then friend, Mr. Philpott notes, a series of written documents from Prologis on this matter, and indeed, a supporting position from the airport. So I don't believe you have a written position from the applicant. As yet, I'm going to try and be as brief as I can. I don't think I'm going to be much longer than, or indeed any longer than Mr. Philippott was in making his submissions, but I've got to cover a little ground, because we've not put our position in writing as yet. So I mean, to begin with, the panel will not be surprised to hear that the applicant robustly rejects the suggestion on the part of the airport and Prologis, but I'm going to refer to Prologis from now on that it is appropriate to defer commencement of the examination. So I'm going to deal with the substance of that suggestion in a moment such as it is, and then I'm also going to deal with the procedural fairness point that Maloney friend raises. But before I do that, I'm going to make three preliminary points. The first is that it is, of course, necessary to put this request. That request is made by just it is not made by local authorities, statutory consultees or any other participant in the examination, Prologis have sought to rely upon representations from other bodies such as the District Council and national highways. But as a matter of fact, no party, save for Prologis and the airport, has suggested or sought deferral. None of the relevant authorities or bodies are seeking deferral. That is important, of course, because, to be clear, Prologis a commercial logistics operator and a direct market competitor of the applicant. Further, as the examination is aware. Prologis and the airport together are seeking to promote an alternative, we say, smaller anferior, inferior development, which will deliver less benefits. And they are seeking to deliver that on land which comprises part of the DCO red line area over which compulsory acquisition powers are sought. The in that context, it is important to note that a planning application was submitted for that proposal by the airport back in May 2024,

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coming up for two years ago,

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that application has not been determined.

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We are told by Prologis to expect a determination in 2026

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with construction commencing in fourth quarter, 26

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but of course, that assessment of the progress of the development is one that has slipped repeatedly. Notably, sir, in the course of statutory consultation for these projects, that is to say, the DCO and MCO Prologis assured that determination would take place in summer 2025

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and of course, that has not happened.

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Indeed, Prologis own website currently states that determination of the airport planning application will take place in winter 2025 that of course, has not happened. We are now in spring 2026 and the most up to date position, as the applicants understand it, is that there is no immediate prospect of determination, and indeed, only last week, on the sixth of March, national highways submitted a further objection, holding objection, I should say, in relation to that application, noting that traffic modelling has yet to be completed and agreed by national highways, and that national highways has not formally reviewed the proposed scheme mitigation for the SRN or the environmental statement. So what we have then is a position where a commercial competitor has a planning application in but which is going nowhere fast. So it's entirely understandable that in these circumstances, Prologis and the airport would wish to delay the progress of EMG two because they wish to give themselves more time to resolve the various issues with their own project and look to progress that whilst EMG two is

held back, whilst that is entirely understandable on the part of those parties, that does not mean for a moment that it's the right course for this panel. The panel is not here to protect the commercial interests of prologues or the airport. It's here to ensure that the application for the DCO is examined fairly and expeditiously. That's the first point. Second point is this, sir, the DCO and MCO applications were submitted in October last year and accepted by pinned on the 12th of November. Just to pause there. I mean, that is a matter of significance. Acceptance is not a straightforward mechanical process. It's one that involves qualitative scrutiny and judgement indeed, of course. So the applications were only submitted on resubmission, you'll recall. And again, importantly, the effect of section 55 3f of the 2008 Act is that the Inspectorate has already determined that the application is of a standard that the secretary of state considers satisfactory. That decision has already been taken by reference to the relevant guidance and has been taken correctly now. So that's not to say that acceptance of an application equates directly to a decision that is fit that it is fit for examination, because the statutory language doesn't establish that, however. So the fact of acceptance, nevertheless, is very significant, whether or not an application is ready for examination. And so in that context, also, we say that the examination should have regard to the section 55 checklist. I mean that is an extensive document. And in that regard, by way of example, we can note that whilst in their relevant representation, Prologis complained that the ES was deficient in the view of pins in that checklist. No, it was not. It was said to be satisfactory. And I think that's question 29 a, similarly, the complaint in the relevant rep on the part of Prologis that the funding statement is deficient, again, not. So says pins at matter 20 9h, also sir, in the context of acceptance, the examination, can note government guidance relating to acceptance. That guidance being April 2024 paragraph eight states in terms that a satisfactory standard of application, ie, one such as ours, is one that is internally consistent and proportionate in scale and content to the proposed development, concise, clearly written and well structured in terms of navigability through the range of documents. I mean, that's what we have here. Pins has already taken that view. Third, point. So what Prologis and the airport are asking this panel to do, I believe, is without precedent, because what they are asking you to do is having accepted the application at this preliminary meeting to defer commencement of the examination in circumstances where that examination is triggered once this preliminary meeting concludes. So they are seeking also that this panel break entirely new ground. And we say that is not how the mechanism of the 2008 act is intended to work, that you would somehow delay the close of this meeting artificially to avoid the commencement of the examination, so we say the application should be refused. I say that by way of those three preliminary observations, and I now want to touch briefly on each of the three substantive issues raised in support of their case for deferral. That is lack of evidence on viability, lack of analysis in the ES regarding socio economic consequences of the Prologis development, not coming forward and alleged deficiencies in the highway case. So none of these complaints have any substantive merit, that is to the extent they are said to justify the deferral of the start of the examination, they simply don't do so. And I'm going to take the last matter, first highways. So matters are well advanced with both LCC and national highways. Neither of those bodies is seeking deferral and albeit Prologis in its representation to sought to suggest otherwise that position, ie that no deferral is sought, has expressly been confirmed by the applicant with national highways and indeed also LCC. So the extent of matters remaining outstanding in highways terms is well within the normal range and will be addressed during the course of the examination. So of course, there has not been a transport DCO application which has not had some of these issues or similar to consider, there is absolutely nothing AV ordinary here. And the position is, in fact, very positive, and we are unusually well advanced. Indeed, we anticipate that the position may be entirely concluded with both LCC and national highways by deadline. Two, the complaints as voiced by Prologis are overstated, and looking at their most recent documentation being that 24th February letter, just to pick two, I mean, the Road Safety Audit stage one is cited. I mean, that has already been addressed. That has been dealt with. Similarly, their submission regarding the need to rebuild the assessment on the basis of the 2023 prtm, as I've already indicated, that supplementary analysis on the 2023 PR prtm has already been undertaken, and it has been endorsed by national highways,

and subject to what is said by LCC, we understand they have no quibble with that material either. Say that there has not been formal sign off, given we anticipate that that will be forthcoming very shortly. So in terms of highways, there's simply no case for deferral at all in terms of socio economic impact. The first point here to make, unequivocally and to the extent clarification is needed, is that if the DCO is implemented and development delivered, there will be no adverse impacts of the Prologis scheme not coming forward. That is because the benefits of the EMG two scheme far outweigh those of prologues. And to the extent, for example, that that scheme would offer employment and investment, the EMG two scheme will offer more what is said, and it is a narrow point, is that if the DCO is granted, that will kill the Prologis scheme in circumstances where the DCO may not be implemented and built out. We say that is a wholly artificial construct of the sort that the panel should not entertain. It is a notional scenario with no substance to it. And if the development consent is granted, EMG, two will be delivered. And again, a couple of short points, four short points to make. Here, briefly, one, it's repeatedly stated in the documentation that the intention of the applicant is to frustrate the Prologis scheme with respect. I mean that is, that is nonsense. The purpose is to deliver EMG two. It will be a necessary consequence that one cannot have both the AMG two and the Prologis scheme. But there is no intention to frustrate Second, it is important to note that the Prologis scheme does not benefit from planning permission. There is talk of frustrating by Prologis, frustrating of their development, but they do not have permission for it yet. Quite apart from the question of whether or not it is viable, three part of the panel and the Secretary of State's consideration of the DCO application, certainly as regards compulsory acquisitions, is the question of whether or not the development will be delivered. Were it thought that the development is actually not likely to come forward, that would undermine the case for compulsory acquisition. And so if the Secretary of State makes the DCO as sought, that will be because they rightly have confidence that the scheme will come forward.

26:49

The fourth point, and it's looking to the final of the three issues raised by Prologis is that the viability of the development is such that it is in the commercial interests of SEGRO to progress it. SEGRO can be relied upon to deliver it, because it is in their own commercial interest to do so. So there is no need to consider this issue that is the loss of the Prologis deliverment development, because that will only happen in circumstances where a superior, better scheme will be coming forward, which would of the Prologis site. However, sir, of course, to the extent that the panel did feel contrary to the applicant's view, that it would like to be provided with that analysis, then it is open to the panel to request that the applicant provide it, and it's perfectly orthodox to update an assessment. Either way, there's no difficulty. Lastly, there's the question of viability. So in terms of viability, Prologis make a number of points, some fair, some not so fair.

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It is right to say

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that the case for compulsory acquisition does point to the comparative viability of the DCO scheme on the one hand, and the alternative form of development which prologues proposes on the other hand. That is to say that they be left to deliver development on the northern land and land to the south of heims lane is built out by the applicant. The first of those two alternatives is viable. The second, that is to say, Prologis has suggested alternative for the applicant is not viable. Now in light of the representations made in respect of the application, the applicant is content to provide its viability analysis to the examination and undertakes to do that by deadline. One, however, three short points on this Firstly, there is no justification for deferral of the examination, nothing unusual regarding provision of information requested by a participant in an examination as part of that examination. Second, it is not right to say that Prologis is uncited on there have been without discussions going on for some months regarding viability between the parties. So of course, I cannot refer to the detail of those discussions, because that would be inappropriate. But I can refer to the fact that those discussions having taken place, and whilst I do not definitively, do not waive prejudice as regards those discussions, I can say that Prologis will not see anything substantively different when the viability analysis is provided on an open basis as compared to what they have previously seen. Third sir, the position of the applicant is that, in fact, Prologis own development is likely to be unviable. So we say that will not come forward. And what we suggest is that both we and Prologis provide viability analysis of respective schemes to the examination at deadline one, and then, of course, so the panel will have all relevant material before it. Drawing those three strands together, the issues raised by Prologis simply do not justify deferral. We say they are either artificial points or points that fall be considered by the panel in the normal course of an examination. Thank you, Mr. Booth. One minute, nine seconds, point raised by learner friend towards as regards procedural fairness, sir, it is not accepted that there would be any procedural unfairness in circumstances where the examination were to proceed as anticipated. The 2008 act and regulations do not provide for a rigid and inflexible process, and they do provide for an examination which takes some six months. There will be no undermining of the process. If material on viability is submitted at level one, all parties will have sufficient representations

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to the panel, and in so far as it's stated that

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provision of that material at that deadline would frustrate the power and the ability of the panel to shape how the examination proceeds. Again, that's simply not accepted.

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The principal issues

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are not set in stone, as you have already indicated, and indeed, in any event, they embrace the matters that we have discussed previously, so they are already matters which are before this examination, so the principles of natural justice would not be violated, and there will be no unfairness to either Prologis or the airport insofar as they will be afforded an opportunity to address you on all relevant matters and to consider the materials within the context of the examination that the applicants rely upon. Thanks, sir, Mr.

32:31

Philpot but is there any very quick response you wanted to make?

32:34

AV, yes, sir, if I can.

32:37

So I want to start by making this point. What we are seeking here in terms of approach, in terms of information and sequence of Information Analysis response is how the act is meant to operate. This has been designed, not just in general, but in detail, through the regulations and the guidance as an overall package to ensure fairness and efficiency, one can't cherry pick and draw attention to the fact that the examination is six months without recognising that that comes with important procedural safeguards about the front loading of the process and the role of the relevant representations and the written representations based on that front loaded information in ensuring fairness and efficiency for those who are affected by the proposed use of draconian state powers to take their land against their will, it has to be seen as a package. The initial acceptance of an application for examination does not in any way bind an examining authority, or in this case, a panel, as to their ultimate view in terms of its the adequacy of the information provided. Sometimes that can play out in terms of a recommendation for refusal that can happen in this case, we're a step earlier than that. We're seeking to ensure that the process is fair and allows for a recommendation to emerge from a process which has allowed all parties to participate fairly and effectively. Malone AV, friend refers to a situation without precedent. But of course, this is in itself, when one steps back a situation without precedent, and I described the genesis of this situation, it is not surprising that the act recognising the multiplicity of situations that will emerge over the years that it is ultimately put into practice allows some scope for flexibility in timing before the examination commences. There is flexibility in the pre examination stage that disappears once the examination starts, so that there is inbuilt flexibility here. Now so far as the substantive points that have been made, so far as the adequacy of the environmental statement, an initial view as reflected in the checklist that an ES has been submitted and is adequate does not, of course, preclude the examining authority from reaching a different conclusion during the course of an examination, or indeed in advance of an examination. We've set out why. We say it's inadequate. We say that that point is clear, and if it's not rectified, it becomes a legal problem in due course. Similarly, the case that is made in terms of whether you can simply assume, therefore, that what is put forward, without the analysis that we say has to be undertaken on a realistic, worst case basis, if that is not taken into account. That is a legal problem. It is an obligatory material consideration, ignored and there has been no suggestion that gap is going to be filled. We are told that highways information will come at deadline, one that, of course, aligns with the time when our written representations will be put in. We are told that there will be information put forward about the viability of the scheme that is said to justify the taking of our land again, that will not come in until the written representations have been submitted. So for all of those reasons, we don't consider that to be a satisfactory answer, and we maintain our request

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very final, because you obviously, applicant, obviously does get final word.

37:11

No, no, I'm grateful for the offer, but I don't seek to make any further submissions.

37:15

Okay, fine. So which if the if the two, three of us disappear off for 10 minutes and we'll come back at quarter past