PLANNING ACT 2008

APPLICATION BY SEGRO PROPERTIES LIMITED FOR THE EAST MIDLANDS GATEWAY PHASE 2 AND HIGHWAY ORDER 202X

APPLICATION BY SEGRO PROPERTIES LIMITED FOR THE EAST MIDLANDS GATEWAY RAIL FREIGHT INTERCHANGE MATERIAL CHANGE ORDER

POST HEARING SUBMISSION

COMPULSORY ACQUISITION HEARING 1

TUESDAY 10 MARCH 2026 AT 10:00

ON BEHALF OF

EAST MIDLAND INTERNATIONAL AIRPORT LIMITED

EAST MIDLANDS AIRPORT PROPERTY INVESTMENTS (INDUSTRIAL) LIMITED

Interested Party References: [redacted]

Appearances

1. The following people attended on behalf of East Midlands International Airport Limited and East Midlands Airport Property Investments (Industrial) Limited ("EMA"):

   (i) Mark Westmoreland Smith KC – of Francis Taylor Building;
   (ii) Jon Riley, Partner at Pinsent Masons LLP;
   (iii) Ross Corser, Senior Associate at Pinsent Masons LLP; and
   (iv) Alistair Andrew, Strategic Planning Director at MAG.

2. EMA set out in its Relevant Representations its position in relation to compulsory purchase **[RR-013D, s.8] [RR-015D, s.8]**. EMA's representations at CAH1 built upon those submissions. The Relevant Representations also explain: the structure and ownership of the EMA/ MAG group companies **[RR-013D, s.3] [RR-015D, s.3]**; the EMA interest in the Order Land **[RR-013D, s.4] [RR-015D, s.4]**; the EMA/ Prologis planning application ("the Joint Application") and the relationship between EMA and Prologis **[RR-013D, ss.5-6] [RR-015D, ss.5-6]**, all of which is relevant to and underpin the submissions made at CAH1.

Agenda item 2: general case on compulsory purchase

3. Mindful that the ExP requested that any site-specific submissions should be reserved to the later CAHs, EMA made brief comments on the following issues on which the Applicant was asked to set out its position:

   (i) the statutory and policy tests relevant to CA and/ or TP under the Planning Act 2008 ("PA2008") and the Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land, September 2013 ("the Guidance");

   (ii) the structure and content of the Statement of Reasons; and

   (iii) the structure, content and up-to-date position of the Funding Statement.

The statutory and policy tests relevant to CA and/ or TP under the PA 2008 and the Guidance

4. The starting point is to recognise powers of compulsory acquisition are draconian. They sanction the appropriation of property against the will of the landowner. Particular caution is required where the powers are granted to a private developer (rather than to the state). Further caution still is required, where the powers are contemplated to be granted to a private developer to acquire the land of another private developer for the purposes of developing the land for the same type of development as proposed by the landowner itself.

5. Section 122 PA 2008 requires, as a condition prior to the grant of compulsory purchase powers, that: the land is required for the development to which the development consent relates; or is required to facilitate or is incidental to that

development; and that there is a compelling case in the public interest for the land to be acquired compulsorily.

6. Those tests raise the following key issues in this case:

7. First, need: the short point is that compulsory acquisition is not required to deliver the benefits of industrial and logistics development to the north of Hyam's Lane. The public interest is entirely blind as to who delivers the benefits derived from such development on the EMA/Prologis Land. There is no benefit at all to the public interest in the Applicant delivering those benefits on the northern part of the main site as opposed to another highly experienced and capable developer of industrial and logistics development (such as Prologis) which could justify the grant of compulsory acquisition power.

8. So whilst there might be a need for industrial and logistics development (and EMA does not contest that), that does not translate to a need for CA powers over the EMA/ Prologis Land.

9. This is an important point. There is actually a very important public benefit in the restrained use of compulsory purchase power. Proprietary rights are the basic building block of the economy. State interference with them can only trend towards putting off investment in those rights (for example foreign direct investment) and the UK economy. The Government cannot afford to undermine the rights to own and freely exercise proprietary rights. Unprincipled and too ready use of compulsory purchase powers risks undermining the fundamental building blocks of the economy and thereby UK plc.

10. Secondly, viability. The Applicant relies on the twin assertion that its development is viable and EMA's/ Prologis' is not. The Applicant stated that it would seek to prove the first, but not the latter.

11. As to the first, EMA will review the Applicant's evidence and respond to it.

12. As to the latter, the Applicant cannot demonstrate (the burden being on the Applicant to do so) a compelling case for it to be awarded compulsory purchase powers by mere assertion. That would (a) not satisfy the tests and (b) would undermine proprietary rights in the UK (see above). Moreover, EMA and Prologis need to understand the case that is being made for the compulsory acquisition of its land to be able to respond to it. It is simply not understood on what basis this assertion is made.

13. Moreover, the Applicant's first and second points cannot stand together. The basis of the first, as set out in paragraph 5.57 of the Statement of Reasons **[APP-019D, p.25]** is that the land to the south of Hyam's Lane is not viable without the land to the north and, as such, the Applicant needs to acquire that land to the north of Hyam's Lane to make its scheme viable. Adding a non-viable scheme to another non-viable scheme is not going to assist the Applicant. It is an irrational argument and a decision to award compulsory powers in reliance on this point would be legally vulnerable.

14. Finally, with regards to viability, EMA pointed to the continuing failure on the Applicant's part to acknowledge the value of the access across the north part of the EMG2 main site, without which the southern part cannot be developed. The Applicant's suggestion that the viability of the northern part of the Site is dependent on the value of the access is, again, pure assertion without explanation. The value of the access is not relied on at all by EMA/ Prologis in the context of the Joint Application.

15. Thirdly, highways: As set out in the preliminary meeting by Prologis, EMA and Prologis are at a material disadvantage at the start of the Examination as, whilst the Applicant sought to emphasise how far advanced it was with regards to highways, that was a reference to behind the scenes discussions with the highways authorities. In consequence, EMA (and Prologis) do not have the full picture and cannot properly determine their positions on highways matters at the time they are asked to submit their written representations which is, of course, a key submission in the Examination process. This is all despite the PA 2008 system being designed to be front loaded. EMA will review the updated highways position once shared by the Applicant. In so far as there is any suggestion that the highways package is a benefit justifying the wider whole, that raises in principle concerns, mitigation should be to address the impacts of the Scheme and not to go beyond that and on that basis justify compulsory purchase of other land (which is not even related to the highways works).

16. Fourthly, alternatives: Paragraph 8 of the CPO Guidance: "*The applicant should be able to demonstrate to the satisfaction of the Secretary of State that all reasonable alternatives to compulsory acquisition (including modifications to the scheme) have been explored*." Where there are reasonable alternative ways of delivering a scheme, it will be hard for the Applicant to demonstrate a compelling case in the public interest. In this case both EMA and Prologis have put forward a number of alternative ways of delivering the scheme (most fully in section 14 of the Prologis Relevant Representation **[RR-024D, p.28]**). This explains how the DCO scheme could be modified to avoid or substantially reduce the need for CA whilst still delivering a comprehensive development of the land in the Order Limits. If the SoS concludes that alternatives to CA should have been pursued instead of the DCO scheme, it could lead to a decision to remove some or all of the proposed CA provisions. This does not itself preclude the grant of development consent. In the circumstances that have arisen here, alternatives to CA are available that can achieve the underlying objectives of delivering industrial and logistics developments. These include, for example, joint venture arrangements that would enable the development to proceed without the Applicant needing to acquire any interest in the land owned by EMA or Prologis or an arrangement whereby access is provided across the northern part of the main site.

17. Fifthly, Private Loss: There is no real assessment of private loss to EMA and Prologis. This is a material omission and is required by law (it is part of both the compelling case and proportionality considerations in the context of human rights) and policy. Private loss is a key part of the balance that is required to determine whether or not there is a compelling case in the public interest.

18. Paragraph 13 of the CPO Guidance states that for the compelling case condition to be met:

> "*the Secretary of State will need to be persuaded that there is compelling evidence that the public benefits that would be derived from the compulsory acquisition will outweigh the private loss that would be suffered by those whose land is to be acquired. Parliament has always taken the view that land should only be taken compulsorily where there is clear evidence that the public benefit will outweigh the private loss.*"

19. Similarly, in the context of human rights, paragraph 10 provides:

> "*The Secretary of State must ultimately be persuaded that the purposes for which an order authorises the compulsory acquisition of land are legitimate and are sufficient to justify interfering with the human rights of those with an interest in the land affected*."

20. Note: it is trite that companies have human rights and enjoy protection under Article 1 of Protocol 1 to the European Convention on Human Rights ("ECHR") which protects the right to peacefully enjoy property (see, for example, the European Court of Human Rights judgment in *Sunday Times v. United Kingdom* (Application no. 6538/74) dated 26 April 1979).

21. In both these contexts private loss requires careful evaluation. This has not been properly done in this case.

22. In light of all the above points, there are material issues with the Applicant's case on compulsory purchase powers.

23. There is a further important point in relation to the benefits side of the equation. Determining whether there is a compelling case requires the consideration of multiple factors. The consideration of public benefits form part of this. In this case that consideration needs to be undertaken in a way that includes accounting for public interest *harms* associated with granting the CA powers. The EMA/ Prologis scheme will be stopped by the grant of the powers (as the landowner is required to mitigate its losses and any monies spent in the face of CA powers would likely not be reasonably incurred). All this for the *chance* of the Applicant building out its scheme (in circumstances where the Applicant has said that parts of its scheme are unviable). As such it is important that the loss of the benefits to be delivered by EMA/ Prologis is properly included in the balance. This is particularly important given that the CA powers are sought to be justified by a land use which is *already* proposed by the land owner.

Structure and content of the Statement of Reasons

24. EMA has the following principal concerns:

(i) These are generalised statements of need and benefit rather than detailed explanation of why CA is justified over land already being promoted for the same type of development;

(ii) A failure properly to address the obvious alternatives of co-operation and co-ordination with Prologis and MAG;

(iii) No analysis of private loss to EMA; and

(iv) No proper analysis of the public interest detriment in the frustrating of the Joint Application (especially if the DCO development is not implemented as envisaged).

The Structure and content of the Funding Statement

25. Paragraph 17 of the CPO Guidance states the funding statement should provide "*as much information as possible about the resource implications of both acquiring the land and implementing the project for which the land is required*."

26. This is important. The policy requirement is not to set a threshold above which the level of information is acceptable, but is to take a maximalist approach ("*as much as possible*"). The Funding Statement plainly fails in that regard.

27. EMA has set out its submissions on the funding statement in its Relevant Representations **[RR-013D, s.3] [RR-015D, s.10]** The key points are that: first, the funding statement indicates that SEGRO intends to rely almost exclusively on funding from its parent company, rather than seek equity investment or agree debt funding but no evidence has been provided to the ExP that the parent company has allocated funding for the development costs of EMG2 which would be capable of drawdown and no evidence of a parent company board decision to fund the development costs has been provided; and, secondly, EMA note that the Applicant ascribes no value to the access to their land across the EMA and Prologis Land and, as such, are under estimating the cost of the scheme.

Agenda Item 3: statutory undertakers

28. EMA has a dual role: (i) as a principal landowner in the EMG2 main site and (ii) as the airport operator and statutory undertaker.

29. Pursuant to Schedule 2 of the Airports Act 1986, EMA is a statutory undertaker as defined by the Acquisition of Land Act 1981 and is the Aerodrome Safeguarding Authority for East Midlands Airport.

30. The Applicant seek compulsory powers over land held as the airport operator and that includes Plot 2/6 over which Works 14b and c are proposed (which works form part of what is known as the Active Travel Link (see Sheet 2 of the Lands Plans **[APP-028D]** and Sheet 2 of the Works Plans **[APP-033D]**).

31. At the hearing, EMA confirmed that it was investigating how that land is held and that it would report back to the ExP on that issue. This has been done in EMA's

Deadline 1 submission CAH1 Action Points. In short, subject to a mapping discrepancy that is being investigated, there is no airport operational land included (or at least intended to be included) in the Order Land.

32. EMA object to the acquisition of this land. It is not satisfied that the Applicant has demonstrated a compelling case for the acquisition of land for the Active Travel Link. The proposed use of this link appears to be very small and insufficient to justify compulsory acquisition (**[APP-085, §9.5]** indicates a 2% active travel mode share (of which only a proportion would wish to use the Active Travel Link).

33. Furthermore, without prejudice to our position on need, EMA is now in discussions with the Applicant about alternative ways of delivering the proposed link, for example, like construction under licence and then an agreement with EMA to keep open as a link or dedicate as a PROW.

<u>The revocation of the A1 in Northumberland: Morpeth to Ellingham Development Consent Order 2024</u>

34. During CAH1, the ExP raised the decision of the Secretary of State to revoke the A1 Northumberland (Morpeth to Ellingham) DCO (TR010059-002170-A1, Decision Letter dated 24 May 2024) ("the **Morpeth Decision**") following the removal of funding for that scheme. The ExP invited the parties to consider what implications it might have in this case and, in particular, the ExP asked whether, if a fundamental change in deliverability arising from the absence of secure funding renders a scheme non-viable, the converse would mean that the presence of secure funding renders a scheme viable.

35. The Secretary of State's reasons for the revocation of the A1 in Northumberland: Morpeth to Ellingham Development Consent Order 2024 are set out in paragraph 22 of the decision letter. It reads:

> "*The Secretary of State considers that exceptional circumstances exist which justify the revocation of the DCO. These circumstances fall into four key areas. Firstly, a fundamental change in deliverability, notably the absence of secured funding, which renders the scheme no longer viable. Secondly, a shift in strategic priorities, whereby the scheme no longer aligns with current national or regional transport policy objectives. Thirdly, the removal of planning blight from affected land. And fourthly, the need to support better planning outcomes, enabling land previously safeguarded for the scheme to be released for alternative infrastructure or development projects that are more responsive to local growth needs*."

36. In that case there was a change in strategic priorities and a withdrawal of funding which meant that the scheme would not be delivered. As a result, there was no continued justification for the CA powers and, moreover, the continued existence of the CA powers blighted the land without the potential to deliver the benefits that justified them in the first place. This was a publicly funded scheme where the public funds were withdrawn.

37. This Application does not rely on public funds in the same way and, as such, in EMA's view there are no direct lessons to be learnt. The decision does show, however, the Secretary of State recognising that where there is doubt about deliverability (including where it occurs due to viability concerns), that will inevitably undermine the case for compulsory acquisition.

38. Turning to the specific question raised by the ExP, does the presence of funding render a scheme viable, the clear answer is no. Viability means essentially that there is sufficient commercial profit in a scheme to incentivise a developer to go ahead. That is a world apart from a publicly funded scheme such as the Morpeth scheme. The fact that SEGRO's parent company could on the face of it fund the DCO scheme in theory does not mean it is viable. If SEGRO's parent company acts as a rational commercial player in alignment to its fiduciary duties to its shareholders, it would only fund the DCO scheme if it is going to generate profit. As such the existence of funds is not the same as a decision to fund or funding or viability. This is made explicit in paragraph 17 of the CPO Guidance which notes that there may be projects which are not intended to be financially independent. This is not such a scheme.