

Your Reference Numbers: BC041001 and
TR051002

Date: 7th April 2026

To whom it may concern,

**ISSUE SPECIFIC HEARING ONE – EXAMINING PANEL ACTION POINTS
EAST MIDLANDS GATEWAY PHASE 2 (PLANNING INSPECTORATE REFERENCE: BC041001) AND
MATERIAL CHANGE ORDER TO THE EAST MIDLANDS GATEWAY RAIL FREIGHT INTERCHANGE AND
HIGHWAY ORDER 2016 (S.I. 2016/17) (PLANNING INSPECTORATE REFERENCE: TR051002).**

The responses from North West Leicestershire District Council ('NWLDC' – the Council) (Interested Party Reference Number ('IPRN') – FCB2E7A1E) in relation to the action points of the Examining Panel ('ExP') from Issue Specific Hearing 1 ('ISH1') are as follows.

Action Point No. 5 – Substantial Completion

The phrase "substantially completed" is used in several provisions of planning legislation, including in paragraph 5 of schedule 6 to the Planning Act ('PA') 2008 in relation to the power to make a change to a development consent order ('DCO') after "the relevant development" (i.e. the development for which consent is granted by the DCO, per sub-paragraph 5(7)) was substantially completed.

NWLDC understands that the phrase "substantially completed" is not defined in the PA 2008 or other relevant legislation. It therefore requires a judgement to be made as a matter of fact and degree.

In that regard, NWLDC notes the judgment in *Sage v Secretary of State for the Environment* [2003] 1 WLR 983, in which the House of Lords considered the phrase "substantially completed" in the context of section 171B of the Town and Country Planning Act ('TCPA') 1990. The development in question was a single dwelling. It was said at paragraph 6 of the judgment that, in determining whether the unauthorised building, engineering, mining or other operations are substantially completed, regard should be had to the "totality of the operations which the person originally contemplated and intended to carry out".

NWLDC considers that the *Sage* judgment provides useful guidance to the ExP in the context of paragraph 5 to schedule 6 to the PA 2008 in the absence of direct authority on the same.

NWLDC further notes the judgment in *Ardagh Glass Ltd v Chester City Council* [2009] EnvLR 34, in which the High Court was invited to apply the *Sage* approach in relation to a large glass container factory, again in the context of section 171B of the TCPA 1990. At paragraphs 54 to 56, it was said [with emphasis added]:

"54. I do not read that as meaning that in every case the totality of all the operations included in the planning application must be substantially completed before any element becomes immune. That is not what Lord Hope said. He said regard must be had to the totality of the operations. In the straightforward case that he was considering, having such regard to the totality of the operations Mr Sage contemplated, it was found to be clear that those operations were intended to produce one dwelling house. Those operations had not been substantially completed. Neither Lord Hope nor Lord Hobhouse were saying that, faced with a complex development, and having regard to the totality of the operations contemplated and intended to be carried out, the conclusion would still necessarily be that it all amounted to one set of operations all of which needed to be substantially completed before time began to run. Nothing they said rules out the possibility that having regard to the totality of the development leads to the conclusion that the development is made up of several distinct elements, each one of which is carried out by means of its own separate and distinguishable operations and

each element of which is capable of being substantially completed and (in the absence of a condition to the contrary) acquiring its own immunity.

55. Whether on appeal that would or would not be the right analysis of the development would, I repeat, be a matter of fact and degree for the inspector or Secretary of State. The point is not that the inspector or Secretary of State would necessarily find that a holistic approach would lead to identifying different elements as having been substantially completed at different times. The point is that, in my view, nothing said in Sage would prevent the Secretary of State from reaching that view as a matter of fact and degree.

56. In my judgement Sage does not support the proposition that, in respect of a very large and complex development, made up of several distinct, though physically and functionally connected, elements, substantial completion cannot be achieved for any part of it until the totality of all the operations are complete. And yet this appears to me to be at the heart of the defendant councils' consideration of the timing of enforcement action. That involves an error of law."

Of course, the judgment in *Ardagh* was concerned with the issue of whether individual elements of a development could be substantially complete and immune from enforcement in circumstances where the development may not be substantially complete as a whole. Such considerations do not appear to arise under paragraph 5 to schedule 6 to the PA 2008, which is directed to the change to or revocation of a DCO.

Indeed, NWLDC notes that paragraph 5 to schedule 6 to the PA 2008 expressly refers to substantial completion of "the relevant development", which is defined in sub-paragraph 5(7) as "the development for which consent is granted by the development consent order".

Accordingly, NWLDC considers that "substantial completion" is to be determined by the ExP as a matter of fact and degree, and that the ExP ought to have regard to the totality of the development for which consent was granted by the DCO.

So far as it assists the ExP, NWLDC understands that the construction of the gantry cranes is the only element of the 2016 Order which has not been completed. In those circumstances, having regard to the totality of the consented development, NWLDC agrees with the applicants that the consented development is substantially complete notwithstanding the absence of the gantry cranes.

Action Point No. 8 – Consideration under sections 104 and 105 of the Planning Act 2008

NWLDC notes that development of a description for which a national policy statement ('NPS') has effect must be determined under section 104 of the PA 2008, whereas development for which no NPS has effect falls to be determined under section 105 of the PA 2008.

NWLDC further notes that the application here seeks permission for commercial and business development (part 1 of schedule 1 to the dDCO), alteration of existing highways (part 2 of schedule 1 to the dDCO), and associated development (part 3 of schedule 1 to the dDCO). NWLDC agrees with the applicants that the highway alterations are such as to constitute a nationally significant infrastructure project, for which the National Networks NPS is in effect.

On the question of whether the application should be considered holistically under only one of the two statutory provisions, NWLDC would refer the ExP to the judgment in *EFW Group Limited v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 2697 (Admin), in which the High Court had to consider whether it was wrong to apply section 104 of the PA 2008 to the whole of an application which comprised two energy from waste proposals, only one of which was of a scale as to fall within the scope of an NPS. At paragraphs 57 and 58, it was said [with emphasis added]:

"57. In my view the ExA was correct in his approach to sections 104 and 105 of the 2008 Act in the context of the present proposals. Clearly there is no dispute, firstly, that it is possible to include more than one project or development within the same application for a DCO and, secondly, that the K3 Project was one for which the NPS had effect, and therefore to which section 104 applied. Whilst I can see the force in the submissions of the

claimant in relation to the use of the word “application” in both sections 104 and 105, the use of this word needs to be understood in the context of the statutory framework as a whole.

58. To suggest that by incorporating a project in respect of which the NPS has no effect within an application for a separate free-standing project which does fall within the scope of an NPS it is possible effectively to enlarge the scope of the NPS so as to include a project to which it was not designed to apply would clearly run contrary to the overall statutory scheme. That overall statutory scheme places the NPS at the heart of the decision-making process, and prescribes specific procedures, including endorsement by Parliament, prior to its designation. The contents of the NPS cannot be questioned in the decision-making process: so much is made clear in sections such as section 106(1) which applies in the decision-making context, and which entitles the defendant to disregard representations which “relate to the merits of policy set out in a national policy statement”. Similar provisions are contained in section 87(3) respecting like representations to the ExA, and section 94(8) in relation to like representations made at hearings. It would be inconsistent with the centrality of the NPS within the statutory decision-making framework for its scope to be enlarged and its provisions bypassed by the manner in which an application has been formulated.

59. Whilst specific circumstances of the kind presented by the application in the present case may not have been directly foreseen by those framing the 2008 Act, it is clear that the overarching approach of the legislation is that decisions should be reached in relation to proposals for development in respect of which an NPS has effect deploying the framework within section 104 of the 2008 Act, whereas proposals for development within the statutory framework’s decision-making process for which there is no applicable NPS having effect are to be decided pursuant to the framework provided by section 105 of the 2008 Act. Such an approach clearly reflects the language of section 104(1) which refers to an NPS having effect “in relation to development of the description to which the application relates”. It is less consistent with a literal reading of section 105(1), but when that text is placed in the context of the purpose and structure of the legislation as a whole, it is clear that section 105(1) should be interpreted as applying to those discrete elements of an application which comprise proposals for development for which no NPS which has effect. I accept the submission of the defendant that section 105 of the 2008 Act should be interpreted as applying to free-standing parts of an application to the extent that “section 104 does not apply in relation to the application”. Such an approach reflects the purpose and intent of the legislation without unduly disturbing the effect of the statutory language. Thus, the ExA was correct to take the approach which he did.

60. The question arises as to whether or not the section 35 direction which was made in relation to WKN has the effect of bringing it within the scope of the decision-making framework pursuant to section 104. In my view it does not.”

In light of the above, and the dDCO submitted by the applicants, NWLDC considers that this is a case in which more than one development proposal has been included within the same application. As such, NWLDC considers that it is appropriate for the ExP to adopt a “split” approach which ensures that development for which a NPS is in effect is considered under section 104 of the PA 2008, whilst other development for which no NPS is in effect is considered separately (and without broadening the scope of an NPS) under section 105 of the PA 2008.

That being said, NWLDC recognises that matters incorporated within an NPS may still be important and relevant to a determination under section 105 of the PA 2008, with the High Court confirming at paragraph 39 of the judgment in *EFW Group* that “a decision-maker is not precluded from taking into account matters incorporated within an NPS in determining an application to which section 105 applies, so long as they are both important and relevant to the decision under consideration.”

Action Point No. 9 – Implications of EMG1 DCO Article 5(2)

At the outset, NWLDC recalls that there was some discussion in ISH1 of the status of the planning permissions that have been granted by NWLDC for development within the Order limits of the East Midlands Gateway Rail Freight Interchange and Highway Order 2016 (‘the 2016 DCO’).

For the avoidance of doubt, NWLDC refers the ExP to the well-established principle that a public law decision, which includes a grant of planning permission, is effective unless and until it is successfully challenged in a court of

competent jurisdiction. In *R(Majera) v Secretary of State for the Home Department* [2022] AC 461, the Supreme Court explained the position at [29] [with emphasis added]:

“29. Accordingly, if an unlawful administrative act or decision is not challenged before a court of competent jurisdiction, or if permission to bring an application for judicial review is refused, the act or decision will remain in effect. Equally, even if an unlawful act or decision is challenged before a court of competent jurisdiction, the court may decline to grant relief in the exercise of its discretion, or for a reason unrelated to the validity of the act or decision, such as a lack of standing (as in *Durayappah v Fernando* [1967] 2 AC 337) or an ouster clause (as in *Smith v East Elloe*). In that event, the act or decision will again remain in effect. An unlawful act or decision cannot therefore be described as void independently of, or prior to, the court’s intervention.”

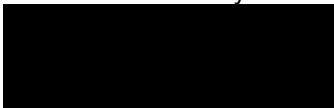
None of the planning permissions granted by NWLDC in relation to development within the Order limits has been challenged before a court within the 6-week time limit that applies to challenges under the planning acts. As such, none of those permissions is void, and the ExP is to proceed on the basis that they remain in effect.

Article 5(2) of the 2016 DCO in turn provides that it does not constitute a breach of the Order if development is carried out within the Order limits pursuant to a planning permission granted under the TCPA 1990. It follows that the implementation of any of the planning permissions granted by NWLDC does not give rise to a breach of the Order which could be injuncted or enforced against.

That being said, in light of the judgment in *Hillside Parks Ltd v Snowdonia National Park Authority* [2022] 1 WLR 5077, NWLDC recognises the possibility that the implementation of planning permissions granted by NWLDC could have implications for the ExP’s decision on the dMCO, insofar as the planning permissions could depart materially from the 2016 DCO and future compliance with the 2016 DCO could now be physically impossible. Ascertaining whether that is in fact the case will require the ExP to understand and consider the planning permissions that have been granted by NWLDC. Accordingly, NWLDC intends to provide further information in relation to the planning permissions in its Statement of Common Ground with the applicants.

I trust that this information is of assistance to you.

Yours sincerely

A black rectangular redaction box covering the signature of the Principal Planning Officer.

Principal Planning Officer (Major Projects)

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