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

ISSUE SPECIFIC HEARING 1

WEDNESDAY 11 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;
   (iv) Alistair Andrew, Strategic Planning Director at MAG; and
   (v) Simon Pratt, Managing Director – Transport at SCP Transport Planning.

Agenda Item 3: Legal basis of determination of applications

2. There was no real dispute between the parties on this issue.

Legal framework

3. The legal framework is set out in ***EFW Group Ltd v Secretary of State for Business, Energy and Industrial Strategy*** [2021] EWHC 2697 (Admin). The case concerned an unsuccessful application for judicial review of the decision not to grant a development consent order for one of two proposals for energy from waste development. The two projects were:

   (i) First, known as K3, which amounted to a proposal to increase the generating capacity of the consented Kemsley plant from 49.9MW to 75MW, and increase the total waste tonnage throughput from 550,000 to 657,000 tonnes per annum. This project simply involved an increase in the permitted capacities of the facility and did not require any physical works in order to achieve them; and

   (ii) Secondly, known as WKN, which was a new waste-to-energy facility capable of processing 390,000 tonnes of waste and generating 42MW of electricity.

4. The K3 project fell within the definition of a nationally significant infrastructure project as defined by section 15 of the PA 2008 on the basis that the final capacity for the Kemsley plant following the consenting of the K3 proposal would lead to a generating station which had a capacity in excess of the 50MW threshold.

5. The WKN project did not satisfy that criterion and therefore did not fall within the definition of an NSIP.

6. There was a section 35 of the PA 2008 to direct that the WKN facility be treated as a development for which development consent is required, and thereby bring it within decision-making processes of the PA 2008.

7. The ExA concluded that whilst in relation to the K3 proposal the NPSs formed the primary policy context for the examination given the statutory duty imposed

by section 104 of the 2008 Act, with respect to the WKN proposal it was section 105 (see paragraph 16 of the judgment).

8. At the time of his decision, the Secretary of State took the view that the Application should be treated as a whole and determined under section 104 of the PA 2008. He said that sections 104 and 105 were mutually exclusive and it would not be correct to determine different parts of the Application under different provisions (see judgment at [25]). However, by the time of the court hearing, the Secretary of State had changed his position and said that his approach had amounted to an error of law (at [50]).

9. The judge held that section 35 of the PA 2008 cannot be used to enlarge the scope of a NPS to include a project for which it was not designed to apply (at [58] and [60]). The scope of the NPS is determined by its terms and it will only have effect for projects within that scope. In that case the consequence was that the application for the development brought into the PA 2008 system via a section 35 direction (WKN) was not one for which the relevant NPS had effect and therefore fell to be determined under section 105. That was the case even though there was one application which embraced both the NSIP and the smaller scheme which fell below the thresholds. The K3 project had to be determined under section 104 being an NSIP for which a NPS had effect.

10. The courts have, therefore, confirmed that both sections 104 and 105 can apply to a single application for development consent.

The Order

11. Turning then to the Order in this case.

12. Part 1 of Schedule 1 **[PDA-005D, p.33 (PDF, p.35)]** is the Commercial and Business Development sought to be authorised. There is no relevant NPS in effect for this development. ***EFW*** is clear: the consequence here is that this development falls to be determined under section 105 and not section 104. This is of practical importance for decision making in this case, because it is this development which is the driving force behind the development as a whole. The commercial and business development must, therefore, be justified on its own in the absence of any policy or statutory presumption in favour. The same applies to Part 3 of Schedule 1 **[PDA-005D, p.36 (PDF, p.38)]** – Associated development which is clearly not an NSIP in its own terms and for which there is no relevant NPS in effect.

13. Part 2 of Schedule 1 **[PDA-005D, p.35 (PDF, p.37)]** – Alteration of existing highways is different. The development proposed to be authorised here meets the threshold of an NSIP on its own (under section 22 of the PA 2008). The National Networks NPS is in effect for this form of development. However, these works are mitigation and subsidiary in nature to the Part 1 works. They are not promoted as an NSIP in their own right.

14. EMA agree, therefore, with both the Applicant and Prologis that a pragmatic approach would be for the ExP to make their recommendation applying section

104 and 105 to the Part 2 works in the alternative. It is an approach that has been taken before (Net Zero Teesside).

15. In the first approach (under section 104), EMA submits that the fact that the Part 2 works are mitigation and the Part 1 works the reason they are proposed is an important and relevant matter that should be taken into account under section 104(2)(d) because it would be very odd if mitigation proposals that were not otherwise required were to be able to take full advantage of the policy support in the NN NPS independent of the Part 1 works they support. In particular, because the Applicant was clear that the Part 2 works would not be built out, if the Part 1 works were not consented.

Agenda Item 4: Interoperability between the Planning Act 2008 and the Town and Country Planning Act 1990

16. The following points should be noted with regards the implications of any grant of planning permission on the northern part of the EMG2 main site.

17. First, the Joint Application is no impediment to the decision making required on this Application. The position is simple: if the Applicant can persuade the Secretary of State that its own proposals are acceptable and that there is a compelling case in the public interest for granting the proposed powers of compulsory acquisition, approval of the Joint Application could not frustrate either the grant of the DCO or the implementation of the proposed development. Conversely, if the Secretary of State is not so persuaded, that would mean either the Applicant's development proposals had not been judged acceptable or that the potential public benefits do not justify the compulsory acquisition and frustration of delivery of the development in the Joint Application.

18. Secondly, there is no certainty that if the DCO is granted, the development that it authorises will be delivered either in full or at all, or that any or all of it would be delivered within the Freeport benefits window. The likelihood of delivery and its extent and timescales are matters calling for evidence and analysis, and that is currently missing.

19. Thirdly, at the same time, there is reasonable certainty that if the DCO is granted with CA powers, that it would be enough to frustrate delivery of the development proposed in the Joint Application. The adverse public interest consequences associated with that effect of making the DCO need to be examined and assessed, and that is currently missing in the application material. The impacts relating to the frustration of the Joint Application if the DCO granted are a material consideration in the context of this application. This is not an impact on the ability to determine the DCO *but* an impact on what needs to be considered in the determination of the DCO. As EMA has pointed out, the Applicant has not addressed this issue in its Application and ES, for example in the context of socio-economic impacts. The examination needs, therefore, to include careful consideration of the net public benefits of the proposed development.

20. Fourthly, the local planning authority must determine the Joint Application on its own merits. There are no legal or policy reasons why more than one planning

permission or development consent cannot exist for the same or overlapping land. The local planning authority must determine each valid application for planning on its own merits in accordance with section 38(6) of the PCPA 2004 (the courts have made clear that a local planning authority is under a statutory duty to determine an application (see *GOESA* *R (GOESA Ltd) v Eastleigh Borough Council* [2022] EWHC 1221 (Admin)). As such, the issue for the local planning authority is simply whether the proposed development is policy compliant and an acceptable use of land. If it is, planning permission should be granted unless material considerations indicate otherwise.

21. Fifthly, there is then the position where both the DCO and Joint Application are granted. In those circumstances, two consents will exist in parallel and it is then for the person or persons controlling the land to decide which to implement. Article 42 in the draft DCO is designed to address that situation. EMA do not contest the principle of inclusion of that article. Article 42(1)(a) allows a planning permission granted under the Town and Country Planning Act 1990 in respect of the land to be implemented even if that would be incompatible with a provision in the DCO. Art. 42(2) allows the Applicant to avoid enforcement action for breach of the terms of the DCO and allows it to carry on implementing other parts of the DCO if it (or someone else) has implemented an inconsistent planning permission on part of the site.

Agenda Item 6: Need and Alternatives

22. EMA made the following points in relation to alternatives and the consequences if the Joint Application was to frustrate the delivery of the DCO scheme.

23. The first point is as was identified by the Applicant at ISH1: the grant of planning permission for the Joint Application would be no bar either to the grant of the DCO or the delivery of the development consented under the DCO.

24. That is plainly right, but nonetheless was a surprise to hear the Applicant say the same as it is currently telling the local planning authority for the Joint Application the opposite. To the local planning authority it is being said that the "*approval of the* [Joint Application] *would undermine the DCO process*" and it would mean that the "*certainty of timeline afforded by the recent DCO application and certainty of delivery achieved by the powers sought in the application being lost*" (see the Applicant's representations to the local planning authority, being provided to the ExP at Deadline 1 by Prologis). The ExP will note that the Applicant's positions about the same point are inconsistent but it has now settled on a position which is correct.

25. Secondly, EMA identified in its relevant representation a series of realistic alternatives **[RR-015D, §8.12]** which centre around collaboration and co-ordination between EMA/ Prologis and the Applicant to deliver industrial and commercial development to the north of Hyams Lane. The Application material does not properly address these alternatives.

26. In its submissions, the Applicant sought to draw a straight line between the study of alternatives in an Environmental Statement and alternatives in the context of

the compulsory purchase powers and the compelling case in the public interest. The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 require a description of the reasonable alternatives studied by the developer. It is a reporting exercise on what the developer has looked at.

27. Alternatives in the context of compulsory acquisition are quite different. They are critical because the existence of an alternative fundamentally undermines the compelling case for the grant of the compulsory powers. Especially so here, where the alternatives are alternative ways of delivering that part of the scheme to the north of Hyams Lane and so capable of delivering the benefits claimed for the DCO scheme in relation to that land.

28. The realistic alternatives in this case include simply removing Article 7 of the draft Order (the provision which seeks to displace the default position under the Planning Act (section 156), namely that the owners of the land benefit from the DCO) and withholding compulsory purchase powers over the EMA / Prologis land and so would not even include change to the development proposed. Any issues about contributions towards the cost of necessary infrastructure etc. would be dealt with through familiar commercial or planning mechanisms that are commonly used to deliver large sites.

29. The ExP asked whether the Joint Application could be considered a reasonable alternative without assessing its viability, in particular, given that the Applicant is going to seek to demonstrate that its scheme is viable. However, the issue of viability is raised in this case by the Applicant to support its case for compulsory acquisition. It makes two assertions which it states supports its case for compulsory acquisition powers: (i) that the DCO scheme is viable – which assertion it has now at ISH1 undertaken to seek to prove through the submission of evidence (on which EMA will comment in due course) and (ii) that the Joint Application is not viable and so not a reasonable alternative. The latter, the Applicant intends to leave as pure assertion and unproved. It is for the Applicant to make its case for compulsory acquisition. The ExP/ SoS cannot safely rely on pure assertion to justify the grant of (draconian) compulsory purchase power. The law is quite clear, any doubt is to be resolved in favour of the landowner and not the person or body seeking the compulsory purchase powers (see the Court of Appeal in ***Prest v Secretary of State for Wales*** [1983] 1 WLUK 416 "*If there is a reasonable doubt on the matter, the balance must be resolved in favour of the citizen*"). As such, the context of the DCO application and the Joint Application are materially different. The Joint Application is a commercial scheme being brought forward in the usual way without seeking powers of compulsory acquisition. There is no coherent basis on which to believe that there is any issue with the viability of our scheme. These very different contexts are not to be equated. It is for the applicant to rule out the reasonableness of an alternative.

30. Thirdly, the Applicant's rejection of a multi-developer approach on this site is misplaced. The realistic alternatives in this case result in a multi-developer approach to delivering on the EMG2 main site. And it is not clear from the application material that the applicant gave serious and detailed consideration to these before submitting its application which sought compulsory acquisition powers, before resorting to that draconian step, any or all of those five

alternatives will be capable of delivering the benefits claim for ought to have been considered.

31. It is important to understand that the Freeport concept does not imply that the Freeport would be developed in one go, or via a single developer. On the contrary, the dispersed sites that make up the Freeport point away from such a conclusion. The expectation has always been that there will be several independent developments. There is a Freeport Board which fosters greater collaboration and coordination and an associated Members Agreement that explicitly contains a clause that each party's land ownership should be respected. Therefore, there is no expectation that compulsory acquisition will be necessary or an appropriate part of the Freeport model. If the Joint Application is delivered, it would be a very substantial benefit in and of itself, and would not prejudice other parts of the Freeport coming forward. The benefits that are undoubtedly in existence here in terms of access to the rail terminal and a very convenient location for this type of development generally, are not a differentiator between the Joint Application or the DCO application, or indeed any subsequent application for the southern development of the land. There is no difference, for example, in the ability of developers to access the rail terminal, depending on who they are in if the Joint Application was delivered within the Freeport window, it would be a very substantial in and of itself, and it would not prejudice other parts of the Freeport coming forward.

32. In so far as the Applicant relies on the section 35 direction to reject the multi-party approach, it is misplaced. The section 35 direction does not preclude a multi developer approach at all. It is neutral in that respect.

33. Thirdly, in terms of the consequences of not providing the highway works if only the Joint Application, the highways package is to mitigate the impacts of the scheme. The Joint Application similarly will mitigate its impacts. As such and in principle, the position is that there will be no material consequences for the highways network.

34. Fourthly, the Applicant referred to the cost that might be associated with any ransom element in terms of access. That is simply not material because if compulsory acquisition goes ahead, the valuation principles will include any such ransom payments. As such it should not make any difference one way or the other.

35. In summary, there is no evidence before the Examination that the Applicant sought to explore a series of realistic alternatives in a serious and structured way, including in discussion with those who would potentially be partners in a multi developer approach before deciding that it would instead opt for the draconian option of seeking compulsory acquisition to take the EMA/ Prologis land for itself.

Item 7: traffic and transport

36. EMA (and Prologis) is not privy to the latest highways information provided to and discussed with the Highways Authorities. This was set out by Prologis in making its application to delay the Examination. In the result, EMA was "*in*

listening mode" for this Agenda Item and will respond to the latest highways information when it is made available to all parties.