fbc manby bowdler.
SOLICITORS

3 April 2019

THE WEST MIDLANDS RAIL FREIGHT INTERCHANGE ORDER

REPRESENTATIONS FOR
THE INGLEWOOD INVESTMENT COMPANY LIMITED
REFERENCE 20015438

FBC Manby Bowdler LLP
Routh House
Hall Court
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Telford
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TF3 4NJ
NACB/SRT/933834/6

PART I INTRODUCTION AND SUMMARY

1. **Introduction:** The Inglewood Investment Company Limited ("Inglewood") has lodged representations against the DCO, dated 24 October 2018. These representations expand on the points made in those representations. This document includes several appendices which are lodged separately: Appendix 1 Title Plan and Register SF632933 and filed abstract; Appendix 2 Appeal Decision 3169548; Appendix 3 Minerals Local Plan; Appendix 4 Appendix from Minerals Local Plan (page 18-19) and Appendix 5 PBA/JLL West Midlands Strategic Sites Study 2015

2. Inglewood has also instructed a chartered surveyor, Bruce Owen, of Owen Land and Property Limited, to prepare a report for the assistance of the Examining Authority. The report and its several appendices are lodged as a separate representation.

3. The DCO seeks compulsory purchase powers over an area of 297Ha including Inglewood's land holding. Inglewood is content for its representations to be considered on the basis of written representations, and does not seek a CPO hearing.

4. For ease of reference, the original October 2018 representations are repeated in this document so that the further representations now made can be seen in context..

5. In summary (and this summary is duplicated as a separate file for ease of reference by the ExA):
   5.1. Inglewood supports the basic principle of the DCO, and considers that a strategic rail freight interchange in this general location would be an appropriate response to the need identified in the National Planning Statement for National Networks[1].
   5.2. To be considered as a rail freight interchange, for the purpose of the DCO procedure, the land must comprise at least 60Ha[2].
   5.3. There is no necessary correlation between the scale of the planning consent within the DCO, and the extent of the CPO powers given to the Applicant.
   5.4. The Application should be considered on the basis that the disputed land ownership identified below is resolved and that Inglewood own parcel 103 so that this parcel is part of the expropriation proposed.
   5.5. In 2008 Kilbride brought forward a project for a smaller scheme which (i) excluded parcels 101, 102 and 103 on the north side of Vicarage Road, and (ii) did not include any land to the south of Vicarage Road. This is a strong indication that a smaller scheme would be viable.

[1] NPS paragraph 2.28, 2.29 and 2.36; 2.42 – 2.58
[2] This minimum is prescribed by s26(3)(b) Planning Act 2008

5.6. The Applicant does not demonstrate that the acquisition of the Inglewood land is essential for the creation of a viable interchange. The Applicant does not demonstrate why the scale of the land-take has increased during the consideration of the project. The evidence brought forward in the Alternative Site Assessment, the statutory Statement of Reasons, the Planning Statement, the Statement of Economic Benefit and the Market Assessment, simply builds on an *assumption* that the project is one that covers 297Ha: the extent of this acquisition is *more than is reasonably required* to establish a viable project and is therefore contrary to Government policy.

5.7. In the absence of any attempt by the Applicants to explain the viability of their scheme, Mr Owen of Owen Land and Property has examined the cost and returns, assisted by Gleeds and by JLL, companies which are well known in their relevant areas of expertise. The expert evidence of Mr Owen establishes that if granted planning permission, then, without the Inglewood land, the Applicant's scheme would meet a reasonable expectation for a developer's return on risk and investment, and indeed is regarded by Mr Owen as being '*significantly in excess'* of what '*could reasonably be expected*'[3]*.* This must lead to a conclusion that whilst in planning terms the scheme is one for which permission should be granted, there is no compelling case for the Inglewood land to be expropriated from them. The effect of the expropriation would simply be to create a super profit on their part. This is precisely the kind of situation which Government policy[4] seeks to avoid.

5.8. The time scale for the development of the interchange on the Inglewood land, in terms of policy, is into the remote future. It is inappropriate to expropriate land not required for development within a reasonable timeframe. Government policy requires an exceptional case to be made out for such acquisition.

5.9. The effect of acquisition now would sterilise an allocated mineral reserve. Extraction of that reserve would not prejudice the DCO project. No consideration has been given to the sensible and achievable potential for realising the mineral allocation and then proceeding with the development.

5.10. Inglewood are the owners of a relevant part of the allocated mineral reserve. The Book of Reference should be amended to make expressly clear that Inglewood is the owner of the minerals.

5.11. The Applicants have put forward an ambiguous position on the question of whether they propose to acquire Inglewood's minerals. Despite a request for clarification, the Applicants have not resolved that position. The Book of Reference is a statutory document and it should be clear and should be consistent with the statutory Statement of Reasons.

5.12. The Inglewood land includes an area which is already allocated as a mineral reserve within the Minerals (Local Development) Plan. There is no need for that allocation

[3] Owen Report, 7.75, 1.21

[4] Paragraph 16, Guidance Related to Procedures for the Compulsory Acquisition of Land under the Planning Act 2008

to be sterilised, and to do so is contrary to normal planning policy. Since there is a sensible prospect for the mineral to be extracted without apparent prejudice to the project, given the timescales, that prospect should not be prevented through the CPO powers being given to the Applicant.

5.13. The Mineral Code should be excluded. Its incorporation gives the Applicant the power to prevent extraction and given what is said in the Application Documents, it appears that the Applicant would prevent extraction, leading to sterilisation. By excluding the Code, that potential is removed. No attempt has been made to explain the reasons for its incorporation, something which is required by the Government guidance, so as to avoid the risk of sterilisation.

5.14. No compelling case exists, in the public interest, as to why the Inglewood land has to be acquired. The authorisation of compulsory acquisition would therefore be contrary to policy.

5.15. The ExA should confirm the DCO in so far as it provides for planning consent for the warehousing development. This would still mean that if the development is implemented and the railhead is provided, then the Inglewood land can be used to provide phase 3 or 4 of the development.

5.16. In the meantime, Inglewood would be in a position to secure planning consent for the mineral extraction envisaged by the Minerals Local Plan. This would serve the already identified need for aggregates in this area. If an application were to be made, then the County Council might indeed also be prepared to grant permission on the unallocated land to the south of Vicarage Road, but that is a matter for their judgment. However when considering after use of any of that land, the County would be able to condition either agricultural after use, or warehousing development in accordance with the DCO permission

PART II GENERAL CPO ISSUES

6. **Policy on Use of CPO powers:** The Government policy on the use of compulsory purchase powers is longstanding; in its most general sense it is currently stated in the Guidance on Compulsory Purchase Process and The Crichel Down Rules[5]. The policy[6] is simple: "*A compulsory purchase order should only be made where there is a compelling case in the public interest*". It is a fundamental principle of the British constitution that the state does not interfere with private ownership save as a last resort; nowadays that principle also finds roots within the Human Rights Convention and Act[7].

7. It is accepted that a CPO can be made even if the requirement for the land is not chronologically immediate. The determining issue[8] is whether '*there are sufficiently compelling reasons for the powers to be sought at this time'*. This involves consideration of the intended use of the land, the necessary resources and the reasonableness of the time-scale. As the Guidance recognises[9], there may be situations whether the CPO is not justified in the public interest at the time of the making of the Order. As the policy states[10], *'only in exceptional circumstances would it be reasonable to acquire land with little prospect of the scheme being implemented for a number of years'*. It is therefore the policy of the Government that the reasonableness of giving the Applicant the CPO powers which it requests is tested at the point of the Order being made.

8. The Government policy is carried forward in respect of the DCO procedure under the Planning Act 2008, but for this purpose it is given additional statutory force[11]: a CPO may only be made if the Secretary of State is satisfied that the specified conditions are met; one of them is *'(3) The condition is that there is a compelling case in the public interest for the land to be acquired compulsorily'.* The Act therefore embodies the concept of 'compelling case'.

9. The Government has published specific Guidance Related to Procedures for the Compulsory Acquisition of Land under the Planning Act 2008[12]. This document reinforces the longstanding policy of the government. Particular reference is made to:
   9.1. Paragraph 13, in respect of the 'condition' as to 'compelling case' it says that "*For this 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*

[5] Ministry of Housing Communities and Local Government 2015, updated to 2018
[6] MHLG paragraph 2, 12
[7] Article 1 of the First Protocol, which apply equally to corporate entities
[8] MHLG paragraph 13
[9] Paragraph 13
[10] Paragraph 14(b)
[11] Planning Act s122
[12] Department of Communities and Local Government (September 2013)

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".

9.2. Paragraph 11(i) which says that "*the Secretary of State will need to be satisfied that the land to be acquired is no more than is reasonably required for the purposes of the development*".

9.3. Paragraph 16 which shows that there will be situations where the CPO and the planning consent of the DCO would not have the same boundaries : "*There may be circumstances where the Secretary of State could reasonably justify granting development consent for a project, but decide against including in an order the provisions authorising the compulsory acquisition of the land. For example, this could arise where the Secretary of State is not persuaded that all of the land which the applicant wishes to acquire compulsorily has been shown to be necessary for the purposes of the scheme*".

10. The scheme of the Planning Act 2008 is that notice to treat has to be served within 5 years; this is a longer than the normal period of 3 years for notice to treat or vesting. It is a recognition by Parliament that schemes may be of a larger scale than is usual under CPO. But it is still a short time by comparison with the projections of the Applicant within this Application; the indicative phasing projections assume that if the development were to commence immediately, the final phases (in which the Inglewood lands lie) would not occur until 2030-2033.

11. It is Inglewood's submission that

11.1. The policy as to the application of this concept is no different than for CPOs generally, because Parliament clearly used a term (the condition as to a 'compelling case') which was in the lexicon already;

11.2. this condition must be satisfied not just generally but in respect of the Inglewood landholding specifically;

11.3. for the reasons developed in this Representation, the Applicant does not show that acquisition of the Inglewood land is necessary in the public interest;

11.4. the Applicant does not show that acquisition of the Inglewood land is reasonably required within the 5 year time frame envisaged by the Act, so that the state is being asked to sanction CPO powers to expropriate land from Inglewood today, without any present indication that the land will be essential.

12. **Land Ownership:** October 2018 Representation: *This objection is made by the landowner and relates to land parcels 101, 102, 103, 110, 111, 112, 113 as shown on Sheets 4 and 5. This land principally comprises warehousing land (Works No.3) but it also includes highways and*

structural landscaping. (The Objector asserts title to the disputed freehold parcel forming part of parcel 103).

13. The Book of Reference for acquisition purposes and the Statement of Reasons is an important part of the statutory procedure, and both are required to be in a particular form so as to provide correct and important information to the Secretary of State as well as a proper justification for the use of CPO powers[13]. The Book of Reference has a specific regulation (r7) devoted to its content. Section 57 and 58 of the Planning Act 2008 are very specific as to the obligation of due diligence on the part of the Applicant in relation to ownership. The definition of land used in r7 includes all rights and interests in the land, and therefore include minerals. The details in the Book of Reference are not fully correct as to ownership of Inglewood land or as to ownership of the minerals. The minerals issues are dealt with later in these representations.

14. Inglewood is the owner of Heath Farm. Inglewood[14] is an investment company and holds the land for that purpose; it owns lands across Staffordshire totalling 682Ha. It does not farm its land itself.

15. Heath Farm is tenanted presently. The agricultural land quality is understood to be low lying Grade 3 agricultural land, capable of arable and grazing based agriculture[15]. The land is underlain by a sand and gravel reserve, which Inglewood intended to extract before returning the land to agriculture. This objective was consistent with its long term development aspirations for Heath Farm which is held and farmed with other land in the vicinity. Those development aspirations have included investment in the construction of new buildings; securing planning consent for the conversion of older buildings into residential dwellings (one of which is now occupied by the farming tenants presently, whilst the other is let on an AST); securing consent for the demolition of the old farm house and for the replacement of that farmhouse with a new farm house[16]. (The 'old' farmhouse has been demolished to implement the consent; the construction of the new house has been placed on hold pending the outcome of this Application). The location of the new farmhouse is shown below.

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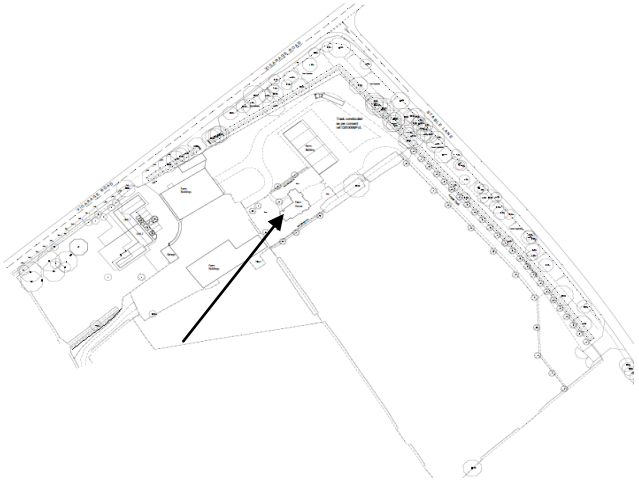
[13] See Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009; r5(1)

[14] Further detail about Inglewood and its history and present investment and development activity is given by Mr Owen in his report

[15] This is based on a report prepared for the objector by Savills, in January 2016 when Savills were then acting for Inglewood in the planning appeal for the new farm house mentioned later in this paragraph.

[16] See list of permissions within document 7-2A TRO50005-000453, page 21, 12/00006/FUL, 11/00530/AMEND (both implemented) and page 24 (16/00161/FUL – shown as 'refused' on the table; this was in fact allowed on appeal in 2018; see footnote 229 to Planning Statement TRO50005-000452 noting that the Appeal was allowed APP/C3430/W/17/3169548 see Appendix 2 to this representation



16. The total intended land acquisition from Inglewood (ignoring highway lands) is about 33Ha. Parcel 103 lies to the west of the part of Heath Farm which lies on the north side of Vicarage Road. The Book of Reference (TRO50005-000305 page 152) records that there is a dispute in relation to this land. To illustrate this point, the plans below are the Inglewood registered title SF632933[17], the Order map (extracted from document 2.1D), and, shown in yellow, the land referred to as OS Reference 1787 which belongs to Inglewood but which is currently erroneously registered to Piers Monckton (one of the parties promoting the Application) under title number SF527218.

17. Field 1787 (parcel 103) is in the possession of Inglewood and within the land farmed by their tenant. Mr Monckton has, for some time, accepted that field 1787 belongs to Inglewood. Mr Monckton registered his land holding some time ago, and at the time Inglewood's land was an unregistered title. Erroneously, Mr Monckton secured title to field 1787; this gave rise to an equitable right in Inglewood to secure the rectification of the title and formed an overriding interest in the land. The matter came to light when the Applicants approached Inglewood, in late 2016, concerning their desire to negotiate for the purchase of their holding, at which point Inglewood's lawyers picked up the discrepancy created by Mr Monckton's earlier registration.

[17] Appendix 1 to this representation

Inglewood then registered their holding but were unable to register the land wrongly registered by Mr Monckton. Mr Monckton and GFAL were asked to transfer the title to Inglewood, but had neglected to do so, despite Mr Monckton's acceptance of the legal position. The Statement of Reasons acknowledges his position[18]. A formal letter before claim has been served because the required documents remain unexecuted despite the assurances, and Mr Monckton has confirmed (in February 2019) that he will sign the necessary documentation and procure execution of that documentation by GFAL.

18. The dispute is therefore close to being resolved. There are some consequential effects of this:

18.1. Inglewood should be shown as owner of parcel 103.

18.2. The Book of Reference records Robert H Timmis as a tenant. He is not a tenant of parcel 103. He is not in possession of that field; the field is farmed by Inglewood's tenant. Mr Timmis is a tenant of other Monckton lands. This reference is incorrect. It should be ignored.

18.3. Similarly the Book of Reference records FAL and GFAL as having interests. They are understood to accept that such interests are renounced in light of the correction now to be made.

18.4. The Staffordshire Sand and Gravel Company Limited lease does not extend over parcel 101, 102 or 103.

19. Accordingly, the Inspector is invited to proceed on the basis that Inglewood is the owner of parcel 103 (so that the CPO powers would be applied so as to expropriate this parcel from Inglewood, not from Mr Monckton), and that the Book of Reference should be corrected so as to be read in light of the information above.

20. **Inglewood Support for the Principle of Development:** The Inglewood position in relation to the principle of development has always been supportive. Formally, their representations stated:

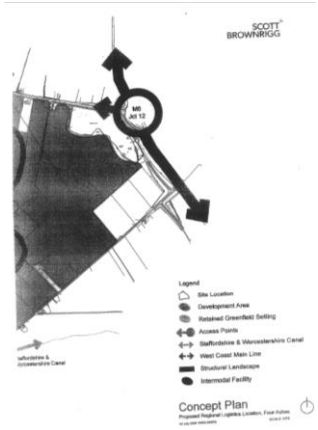
> *The principle of the DCO and of the WMRFI is not contested. The appropriateness of granting planning consent over the Objector's land is not contested.*

21. That remains the Inglewood position. Inglewood agree that there is a need for a project of this kind. Inglewood do not suggest that there is a better site for this project; they accept the overall conclusion that the site search has been appropriately carried out. Inglewood accept that the project should receive planning consent.

[18] See TRO50005-000303 3.19.10

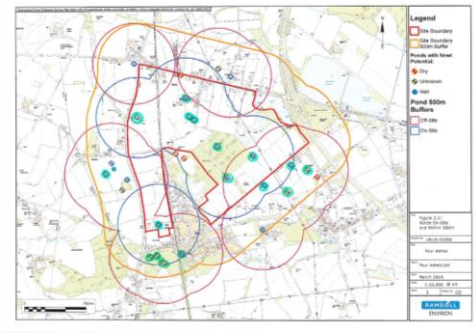
22. They depart from the position of the Applicants on two particular issues. The first is that this is a commercial project, and once established as a viable project, the 'market place' should be left to continue the development. The Inglewood land is not necessary for the project to be viable. These points are further developed by Mr Owen in his report. The second point of departure is that the Applicant seeks to expropriate the Inglewood land and to sterilise their minerals in the process.

23. **The Scale of the Application Scheme:** The general proposition of a rail freight terminal in this location was made public in late 2008. At that time, the proposal (which was being brought forward for consideration in the local development plan) was for development only to the north side of Vicarage Road, which excluded parcels 101, 102 and 103 altogether. The proposal seems to have been based on a 2006 plan showing a proposal over about 240 hectares.

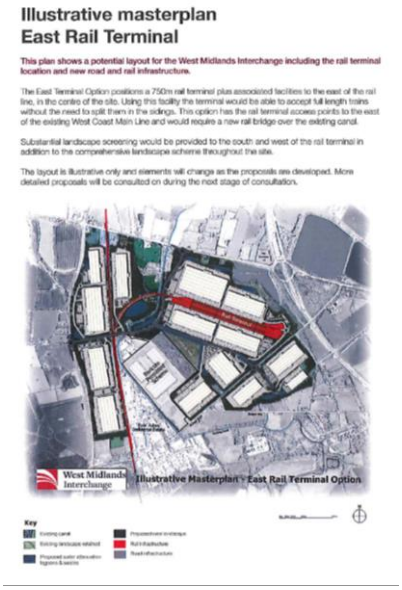


24. In 2012 Kilbride Group approached Inglewood to invite them to give them an option over parcels 101, 102 and 103, so that they might be included in their proposals. (The option was not granted to them).

25. Then, in April 2016 Kilbride approached Inglewood with a plan showing a red line boundary for the proposals, now including parcels 101, 102 and 103. At this point they only sought access to ponds owned by Inglewood on the south side, for the purpose of ecological study.



26. The proposal to include land to the south of Vicarage Road emerged only after that point. In June 2016 a non statutory consultation emerged as to two options, both of which included land to the south of Vicarage Road (though somewhat less land than is now proposed).



27. It has to be assumed that the original proposal was seen by Kilbride as being a viable proposal. Nothing has been said since then, at least not in any document before this Examination, to suggest that the original proposition or even the 2012 proposition should now be seen as unviable.

28. Inglewood's October 2018 representations stated that *No case has been made by the Undertaker to suggest that the acquisition of the whole area is necessary for the viability of the WMRFI. Indeed the indicative phasing plan suggests that parcels 101, 102, 103 would not come forward until 2030 whilst the remainder of the objector land would come forward in 2033.*

29. Inglewood note that the NPS requires that a judgment has to be made as to viability in relation to scale[19].

[19] See NPS paragraph 4.8

30. The design evolution described above is not set out within the Examination papers. Inglewood submit that it should have been included in the Application documents, because the requirements of the EIA process[20] require an Applicant to set out '*a description of the reasonable alternatives (for example in terms of development design, technology, location, size and scale) studied by the developer which are relevant to the proposed project and its specific characteristics and an indication of the main reasons for selecting the chosen option, including a comparison of the environmental effects'*. These earlier alternatives were certainly considered by the Applicant and the question of scale is particularly significant to the CPO issues under review here. Their exclusion from the Examination documentation is not explained by the Applicant.

31. Inglewood have examined all the relevant documents within the Application papers to attempt to understand the Applicants position on this. The conclusion is that the Application fails to establish a case as to why compulsory purchase powers have to extend over the whole project.

32. The Alternative Site Assessment[21] document references the requirement for at least 60 hectares of land. The references as to size of site are at section 6 of the document, which contains a requirement for '*sufficient land*' for associated warehousing[22]; and it shows that a minimum threshold was set of 60 hectares, whilst also noting that given the need for warehousing, a single site would need to be 'much larger' than this (without giving any indication as to how much larger). The Assessment appears to have proceeded in 2016, commencing with the consultation of June 2016[23]. The Assessment does not appear to have looked at any proposal as to a SRFI which was smaller than the capacity of the site; it simply refers to the size of the site as 297 Ha[24].

33. Inglewood does not object to the conclusion of the site selection process, and would accept that it is better to run that process using a small area so as not to exclude potential sites. However, because there is nothing written within the Assessment to indicate how large a site needs to be in order to meet the perceived need, the Consequence is that the conclusion at 9.1.2 that the search area has taken into account '*a number of factors, including … meeting the recognised need'* is not based on any information as to how large a site is needed to meet that need. In other words, the statement does not preclude the potential that a smaller site could equally meet the need. Similarly, the conclusions at 8.10.42-46, including the phrase '*The site is of a sufficient size to accommodate a SRFI development and, importantly it is large enough to achieve the critical mass required for success and to accommodate the significant landscape*

[20] Schedule 4 to the regulations
[21] Document 7-2 TRO50005-000455; paragraph 2.1.3
[22] 6.1.3 third bullet point, in fact on page 30
[23] Document 7-2 TRO50005-000455, paragraph 7.6
[24] Document 7-2 TRO50005-000455, 8.10.8

and open space improvements required' should not be taken as evidence that the requirement is for a size of *at least* 297Ha.

34. The NPS requires an appraisal of this kind to be wide ranging, to test options and alternatives. Inglewood accept that the alternatives should not be inappropriately restricted[25]. But would submit that the Applicant has not tested the obvious option and alternative that a smaller site would meet the unmet need.

35. The Statement of Reasons TRO50005-000303 indicates that the DCO envisages up to 743,000 sq m of warehousing and ancillary service buildings. It is said at paragraph 4.22 that the proposal is a '*direct response to the scale of the unmet need'*. Inglewood do not accept that the proposal is a 'direct response', nor indeed that it represents the only potential response, to the scale of unmet need. The Applicants do not provide evidence about that aspect, so that the ExA cannot be satisfied on this crucial question.

36. The purpose for which the Inglewood parcels are to be used is set out in the table within the Statement of Reasons, at 3.27. The explanation given as to the reasons for acquisition are set out; however the statement made by way of justification at 4.3 is simply that *'that the proposed acquisition as detailed in the Book of Reference is required in order to carry out the development. The compulsory acquisition is limited to the minimum necessary in respect of land'*. The Statement of Reasons therefore presupposes that the development must be carried out in full, and therefore inevitably concludes that acquisition of all the land within the red line boundary of the planning application site is necessary. The explanation at 4.7 similarly presupposes that a development of the scale proposed is needed in order to meet the need identified. This does not in itself meet the required degree of case that is required for s122 Planning Act 2008.

37. The Statement of Reasons then suggests that reference should be made to the Planning Statement section 5, 14 and 16) and to the Statement of Economic Benefits[26], the Alternative Sites Assessment[27] and the Market Assessment[28].

37.1. The Planning Statement[29] does not include any information enabling consideration of whether the need for a SRFI project <u>has</u> to be as large as the development now being proposed.

37.1.1. It rehearses the policy background, which includes the now revoked draft RSS aspiration for Regional Logistics Sites, and the various thoughts as to the scale of the

[25] NPS 4.26-7
[26] TRO50005-000454
[27] TRO50005-000455
[28] TRO50005-000457
[29] TRO50005-000452

various sites that might come forward to meet that, across the whole region. Those thoughts are not a justification for the scale of the project now under consideration; they were unresolved when the RSS system was abolished in 2010.

37.1.2. It notes the URS and PBA/JLL Studies[30] (the PBA/JLL study is produced as Appendix 5 to these representations) as to regeneration effects from the provision of a site at Four Ashes : these studies were in 2013-15. The only information as to the scale of this project at that time was as to a smaller project which *excluded* the Inglewood lands[31]. The support offered could not therefore be said to be relevant as to why Inglewood lands need to be acquired. The URS study supported a site of between 200-250Ha. The later PBA/JLL study did not come up with a new statement on scale. The PBA/JLL report does not identify the amount of land that is required although it does follow the thrust of the earlier work. Neither study is therefore a sufficient justification for insistence on the scale of the current, larger, project.

37.1.3. The 2017 '*emerging'* study[32] is not an assessment of need, simply a record of possible provision.

37.1.4. The section of the Planning Statement on the scale of development[33] notes the threshold figure of 60Ha (rightly) as a planning threshold '*not one that is related to market demand operational requirements or viability*'. It is accepted that a critical mass needs to be achieved to make a viable project. However, as noted above nothing in the document justifies the statement that '*This proposal is a direct response to the scale of the unmet need for rail served warehousing in the northern / western quadrant of the West Midlands region*'.

37.1.5. Whilst the Statement attempts to link the size of certain identified projects with the obvious desirability for a critical mass with the NPS acknowledgement that smaller scale terminals are not viable or desirable, there is nothing in the Statement to establish a tipping point between the scale of *this* project at 297Ha and the point at which a project might risk unviability. Mr Owen does look at this tipping point aspect, and concludes that the scheme becomes viable by the end of Phase 3; Phases 4 and 5 can therefore be expected to be provided by the ordinary market place, with the DCO permission in place, but without compulsory acquisition[34].

37.1.6. Inglewood do not seek to assert that it would be sensible to limit projects to that tipping point[35], but if an Applicant is to establish the 'compelling' need for CPO powers specifically for the Inglewood land, it must surely establish that without the Inglewood land the project would be inappropriately prejudiced. The further into the future the

[30] See 7-1A TRO50005-000452 paragraph 5.2.22-39
[31] As demonstrated above
[32] 7-1A paragraph 5.46
[33] 5.4
[34] Owen 7.83-7.90
[35] Nor is it argued that a CPO has to be limited to the absolute minimum land requirement

need for the acquisition is, the less compelling the need is for the state to interfere. Otherwise the state is sanctioning the acquisition of land from one private land owner by another private land owner so that the present owner loses the value of that land and the acquirer gains it. The acquirer takes the land at 'existing use' value[36] but then realises a financial benefit by developing it at full development value. That result should only happen to the extent that there is a compelling need. To the extent that no compelling need exists, that is the part of the project which is significantly beyond the viability tipping point, the land owner (Inglewood) should be able to benefit from the enhancement of value attributable to the scheme. In short, the Statement does not establish that the project is in fact a direct response to the unmet need, and does not achieve anything remotely sufficient for CPO policy compliance. Compulsory Purchase powers would simply enable the scheme to deliver super profits to the Applicant investors[37].

37.1.7. At 5.4.11 there is a concern that '*calls to reduce the scale of a project should only be sanctioned in exceptional circumstances*': it is important to recognise that this is in the context of a postulated reduction in the scale of the project itself in order to meet landscape concerns. Inglewood do <u>not</u> propose the reduction in the scale of the project for planning purposes. Inglewood submit that whilst the project can indeed be given development consent for planning purposes, there is no compelling need for the use of compulsory purchase powers to achieve the project because a smaller project can deliver the *need*.

37.1.8. Section 15 of the Statement deals with Community Impacts. Among these matters is the proposal for mitigation in the form of the Calf Heath Community Park South (15.4.21 et seq). The projected Community Park, in its present form appears only to have been introduced after a community consultation stage. It does not appear to be said anywhere within the Design and Access Statement (which sets out various passages as to design evolution) or the Landscape or Ecological sections of the EIA, that the park is a vital component of any landscape mitigation strategy for any particular reason. The landscape bunds are part of the embedded mitigation for the purpose of acoustic assessment. There is no apparent consideration of the impacts of the development without the bunds, and therefore no consideration of whether the Community Park is essential. Whilst in theory it may be necessary to take land from an owner in order to provide mitigation for the harmful effects of aspects of a development that occur elsewhere, there is no particular reason in relation to this project why this Community Park land needs to be in the particular location chosen, or why it has to exist at all. There being no compelling need for it, it should not be

[36] That is, at the compulsory purchase regime valuation, which ignores the value attributable to the scheme.
[37] Owen, 7.96

regarded as fulfilling that criterion. Even if the Community Park were necessary, it would not mean that the remaining Inglewood land should be acquired : the land take on the south side of Vicarage Road could therefore be restricted to the land required for the bunding or for the Community Park.

37.1.9. Section 14 deals with heritage assets. At 14.2.12 it is said that '*It is proposed to demolish two non-designated heritage receptors, Heath Farm and Woodside Farm'*. Woodside Farm is not on the Inglewood land; Heath Farm (house) was on their land, until it was demolished pursuant to the planning permission facilitating the creation of a new farm house to serve the holding. It is no longer relevant to the Application.

37.2. The Alternative Site Assessment[38] is dealt with above. Inglewood are clear that the Assessment has demonstrated that none of the other sites meet the need (whatever the scale of that need is), as well as would the Application Site. Inglewood accept that, subject to the question as to whether the need for their land is compelling, there are compelling reasons why the need should be met by a site within the WMI overall site[39].

37.3. The Statement of Economic Benefits[40] simply rehearses the product from a site of this scale, without considering the necessity for CPO powers over the Inglewood land.

37.4. The Market Assessment[41] attempts to demonstrate demand[42] and to set it against supply[43]. In fact, the text of the report does not allow any analysis of the manner in which the assessment has been made. The position in the West Midlands is stated to be one of acute undersupply. But the Assessment is no more than a review of the dynamics of the market place[44]. Inglewood accept that the overall scheme will provide a significant enhancement of the supply of floorspace; but on the phasing indications given by the Applicants, the Inglewood land will not make any contribution to that demand until 2030[45]. That is so far off as to make the contribution irrelevant to the current undersupply. It is accepted that the site would provide a valuable contribution to large scale and high quality units, and that the provision is well located.

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[38] TRO50005-000455
[39] To paraphrase the ultimate conclusion of the Assessment at 9.1.13
[40] TRO50005-000454
[41] TRO50005-000457
[42] Paragraph 1.1.3
[43] 5.3.6
[44] A point accepted at 7.1.3
[45] The Planning Statement TRO50005-000452 5.3.3 notes that PBA/JLL express a preference for a 15 year supply; they make the point that this is not a policy requirement, and in that context they note that there is in fact a 17 year supply albeit that part of the provision is clearly deliverable whilst part is potentially deliverable (roughly 50-50). It is considered to be unsafe to translate that aspiration as to what policy could say into a justification for a particular supply side statement

38. It is important to see demand and need as being different things. Indeed need may mean different things for different purposes. Need might be said to represent the part of demand which should be met, in the public interest. Thus it might well be the case that in the West Midlands, there is a demand for warehousing space; one might say that that demand was so pressing that it was important that the development system should allocate land for part of it, and, that is the part recognised as a 'need'; but it would require a much more pressing case to say that there was a compelling case for CPO powers to meet that need. It would be a remarkable coincidence if demand, need, and compelling need all happened to align on 297 Ha.

39. The onus of proof must rest entirely on the Applicant because of the CPO policy requirements.

40. In short there is no logical reason why the development consent for planning purposes should not be granted, but for the CPO powers over the Inglewood land to be withheld.

41. The conclusion which Inglewood invite the ExA to reach is that the Applicant has not established that the project has to be as it is proposed to be in order to achieve critical mass. Inglewood therefore invite the ExA to conclude that whilst a project is highly desirable and meets the policy requirements for a compelling case in general, the papers before the Examination do not justify as conclusion that that case is made out as large as 297Ha.

42. **Is the Use of CPO Powers Necessary:** The October 2018 representations stated that : *By virtue of s156 of the 2008 Act the DCO enures for the benefit of the owner. The landowner disputes that it is necessary or that there is any compelling case in the public interest for its land to be acquired (save for highway purposes). If the DCO is made and implemented by the Undertaker, so that the principal infrastructure is provided, and if there is in due course a market for the development, then the landowner/Objector themselves can bring their land forward at that time.*

43. If the Inglewood land is made the subject of the DCO planning consent, then (assuming that the development is phased) it will be legally 'begun' for the purpose of the Act by prescribed works within earlier phases (s154) assuming that they are carried out within the time period prescribed; this will 'commence' the development for the benefit of all areas of land, whether within the CPO or not; the benefit of the permission runs with the land, so that the consent can be relied on whoever is the owner of the Inglewood land (s156). Phasing conditions would preclude development in Inglewood land until the earlier phases were at an appropriate stage.

44. This means that as and when the earlier phases have been brought forward to an appropriate level, the Inglewood land would be capable of being brought forward without any further formality being required.

45. A project which would replace agricultural use with a commercial use would be one seized upon by the landowner as a more valuable use for his land. There is no reason at all to suppose that Inglewood, a company which holds the land for investment purposes would resist development for which planning permission existed and for a use for which a demand existed. Indeed the premise of the Applicant is that this is a market led development. Inglewood would bring the land forward as and when the market was ready for it. This is a matter more fully explored in Mr Owen's representation.

46. The Applicants have chosen a project of 297Ha. They might have chosen 200Ha or 400Ha or any other scale: nothing in the Application establishes any basis on which to conclude that any one of those figures represents what is necessary in the public interest. There is no 'science' behind the decision to take this amount of land, certainly none that has been explained. Indeed, as shown above, the Applicant initially developed a smaller scheme, and specifically discounted the Inglewood land; they must have been of the view that that scheme represented an acceptably viable scheme at that time and so the question is what has happened since then to require that the scheme is made larger to be viable; equally what would happen to the present scheme if the Inglewood land were to be removed. Nothing in the Application answers these questions.

47. **The reason is that the Applicants have conflated the planning and CPO considerations in their thinking and have not set out a case on the two aspects separately.**

48. The October 2018 representations stated that *No case has been made by the Undertaker to suggest that the acquisition of the whole area is necessary for the viability of the WMRFI. Indeed the indicative phasing plan suggests that parcels 101, 102, 103 would not come forward until 2030 whilst the remainder of the objector land would come forward in 2033. But whereas there is a compelling case for acquisition of land to establish the rail infrastructure and a viable (smaller) warehousing area, the removal of this Objector's lands from the DCO would not prejudice the functionality of the WMRFI which would remain consistent with the policy criteria (NSIP and Explanatory Memorandum 2.3 require a 60Ha site; this site is 297Ha). The removal of an area of strategic landscaping would not prejudice the landscape or visual impact of the development.*

49. The phasing of the Inglewood element as the final stage of the project is noted above. Mathematically it is highly unlikely that a land element not due to be developed until 12 years down the line would have any appreciable effect on the viability of the scheme : the 'present value' of the ability to develop that part is so limited that it would add nothing. The overhead cost of developing a scheme of this kind is necessarily pooled across the acquired land; viability is dictated by the return on that overhead. As Mr Owen shows, that return is significant and a significant developer's profit is achieved within Phases 1-3 of the development. Indeed Mr Owen shows that Phases 4 and 5 can deliver additional profit without the Inglewood land. Mr Owen's Figure 7.4 is a powerful indication as to the profit that will be generated by the Applicant's scheme, without the Inglewood land having been compulsorily acquired by the Applicant. The profit on cost, which is the method which Mr Owen explains would be used by a developer[46], is 12.92%, and as he puts it at 7.75 of his report '*that is significantly in excess of that that could reasonably be expected'.*

50. What the Applicant would achieve through the CPO powers – whether by design or not – is the ability to acquire land at existing (agricultural) use value and then to land bank it against the commercial development potential in many (12+) years time. By then a developer would have expected to have ensured that a scheme had made a sensible return on investment. If the Applicant had demonstrated that for a particular reason, the investment return was indeed assessed on the basis of such a long time frame, that might be a basis for a different conclusion, but nothing in the Application, including the Market Assessment and the Economic Benefits papers suggest an unusual viability assessment has been applied. As Mr Owen explains at 7.82, and in his table at Figure 7.5, if the Inglewood land is compulsorily acquired, the developers profit on cost is then put at 15.06%. That is a wholly unreasonably position, and one that lies completely outside the policy of the government, that compulsory purchase should only be authorised where there is a compelling case in the public interest.

51. If the DCO were to be permitted without the Inglewood land it would still be a substantial project, and well above any claimed threshold in the Application papers.

52. CPO powers are not necessary therefore to bring forward the economic benefits of the proposal on this part of the site.

[46] See Owen, paragraph 7.29- 7.33

PART III MINERALS, MINING CODE AND CPO OF MINERALS

53. **Minerals:** This part of the representation focuses on the implications of the DCO as to minerals. Within this section there is significant reference to case law; it is not thought that the case law will be in any sense controversial; it is assumed that the ExA will have access to the relevant law reports from the citations given, but if an authorities bundle is required by the Applicants or by the ExA it can be provided.

54. The sand and gravel in question for the purposes of these representations are very close indeed to the surface.

55. There is a coal seam at a deep level.

56. **Mineral Ownership**: The freehold title to Heath Farm is registered under Title No. SF632933. That registered freehold title includes not only the surface of the land but also everything below the surface,[47] subject only to the limited exception in respect of certain 'mines and minerals' referred to below.

57. On the surface of the land stands Heath farm — that is, the farm fields (primarily Grade 3 agricultural land), the farmyard & buildings, and (until it was demolished) the farmhouse[48].

58. The topsoil of the farm is about 0.3 – 0.5m deep[49], and consists of loamy sand and sandy loam.

59. The subsoils of Heath Farm then consist primarily of a layer of sand and gravel, less than a metre below the surface of the Farm, and with a depth of up to about 3.9 metres. Those sand and gravel subsoils extend across the whole of Heath Farm - fields and buildings alike - rest on and is supported by those subsoils.

60. Those sand and gravel subsoils are common across the whole district. They can be excavated, but only by means of open excavation from the surface of the land. That inevitably destroys the surface of the land in the process. The sand and gravel subsoils have already been excavated from the surface of significant areas of what was, previously, neighbouring farmland - until its destruction by that surface excavation of the sand and gravel subsoils.

61. As the registered freehold proprietor of Heath Farm, Inglewood is the owner of the sand and gravel subsoils under the surface of the Farm. They form part of its freehold land and title.

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[47] See Bocardo SA v Star Energy UK Onshore Ltd UKSC 35, [2011] 1 AC 380; and further paragraph 68 below.

[48] See paragraph 15as to the planning permission for demolition of the existing farmhouse and construction of a replacement on another part of the farm.

[49] See Document 6.2 TRO50005-000377 Summary of Ground Conditions, page 4

62. Inglewood is therefore entitled, as owner, to excavate those sand and gravel subsoils from the surface of the Farm, subject only to planning. In that regard, and as shown in the section below as to the Minerals Plan, the current local development plan has already allocated for excavation the sand and gravel subsoils under parcels 101, 102 and 103 of Heath Farm, so that the grant of planning permission would be expected absent material considerations indicating otherwise. As is set out later in these representations the allocation would allow the excavation of between 330,000T and 420,000T depending on the buffers applied[50]. (The remainder of the sand and gravel on the southern part of Heath Farm is thought to comprise between 448,000T and 607,000T).

63. *The 1922 exception in respect of mines and minerals:* Heath Farm is situated above part of the South Staffordshire Coalfield - the section sometimes also referred to as the Cannock Coalfield. In the 19th and 20th centuries the Cannock Coalfield contained many active collieries. Deep beneath the Farm (at perhaps c670m below the surface) there are believed to be substantial coal seams, including the seam known as the Eight Foot Coal.

64. In that regard, entry 2 in the Property Register to the registered title of Heath Farm records that the freehold title to Heath Farm excludes the mines and minerals excepted by a Conveyance of Heath Farm and other adjoining farmland dated 10 May1922[51].

65. The Abstract of Title setting out the terms of that 1922 Conveyance is filed at the Land Registry with the registered title to Heath Farm (SF632933). The Abstract of Title shows that the Conveyance dated 10 May 1922 (between Francis Monckton as Vendor, Lady Gertrude Monckton as Mortgagee, and Mr Isaac Hawksworth of Heath Farm as Purchaser) was a sale of the farm house, farm buildings and agricultural farmland known as Heath Farm, which at that time included c.93 acres (c37Ha) of farmland. The Conveyance contained a detailed schedule of the parcels of agricultural land, showing that the Farm at that time was operated as a mixed farm, with a variety of arable and pasture fields. Following the description of the Farm that was being thereby conveyed, the Conveyance then contained a limited exception and reservation in respect of 'mines and minerals' in these specific terms:

> '*Except and reserving unto the Vendor and Mtgee and his and her heirs and assigns all mines and minerals in and under the said land and hereds hereby conveyed with full power for the Vendor and the Mtgee and all persons claiming under him or her to sink any pits or shafts or to erect or construct any buildings machinery engines roads tramways waterworks*

[50] The value of sand and gravel in today's market is around £2.02 per Tonne

[51] *"There are excluded from this registration the mines and minerals excepted by a Conveyance of the land in this title and other land dated 10 May 1922 made between (1) Gertrude Monckton (2) Francis Monckton and (3) Isaac Hawksworth."* See Appendix 1. The copy is very indistinct so that the terms of the conveyance as printed in the abstract are set out in full below

waterways airways or other works and conveniences necessary or desirable for the purpose of working getting carrying away converting or disposing of such mines and minerals or for any purpose connected therewith and to stack and lay up any minerals and refuse which may be raised out of any such mines making reasonable compensation to the surface owners and occupiers for the time being for such damage as may be done in the course of getting and working such mines and minerals'.

66. *The sand and gravel subsoils of the Farm were not within the 1922 'mines and minerals' exception:* For completeness, it should noted that that 1922 exception did not except from the land conveyed to Mr Hawksworth the sand and gravel subsoils of the Farm. That is (in summary) for the following reasons:

67. First, as referred to above, under English property law the freehold of land prima facie includes not only the surface of the land, but also everything below the surface. Thus the freehold owner of the land is prima facie the owner of everything beneath the surface, including all soils, subsoils, rocks & strata, as well as any minerals that are to be found there[52]. That is the prima facie position; and it will be the case unless (and then only strictly to the extent that) there has been an alienation of something below the surface to someone else, either at common law[53], or by statute[54] or by a conveyance.

68. Secondly, if land is conveyed subject to an exception in favour of the vendor, that is construed strictly, and against him; the exception will only apply to things which were clearly excluded[55].

69. Thirdly, and as an example of that second point above, "*only by the clearest words can the owner of mines and minerals under an exception and reservation reserve to himself the right to destroy the surface of the land conveyed*[56]*.*" Thus: "*The keynote of the law which controls the relations of surface owners and mineral owners is ... that 'the mere fact of giving a right to sink pits and to work or get coal does not of itself establish a right to get rid of the common law right*

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[52] Bocardo SA v Star Energy UK Onshore Ltd UKSC 35, [2011] 1 AC 380, at [27] *("the owner of the surface is the owner of the strata beneath it, including the minerals that are to be found there, unless there has been an alienation of it by a conveyance, at common law or by statute to someone else"*); and see Mitchell v Mosley [1941] 1 Ch 438 at 450

[53] The common law exception to that principle is limited to gold and silver (which anciently belong to the Crown)

[54] The modern statutory exceptions apply to coal {vested in the state by the Coal Act 1938 and successor legislation - now the Coal Industry Act 1994, which vested it in the Coal Authority) and to petroleum, vested in the Crown under the Petroleum Act 1998

[55] See e.g. Stirling LJ in Savill Bros Ltd v Bethell (1902] 2 Ch 523 "*it is a settled rule of construction that where there is a grant and an exception out of it, the exception is to be taken as inserted in favour of the grantor and to be constructed in favour of the grantee'*

[56] McLean Estates Ltd v The Earl of Avlesford [2009] EWHC 697 (Ch) at [23]; North British Railways Co v Budghill Coal and Sandstone Co [1920] AC 116 at 126; New Sharlston Collieries Company Ltd v Earl of Westmoreland [1904] 2 Ch 443n; Bishop Auckland Industrial Co-operative Society Ltd v Butterknowle Colliery Company Ltd .[1904] 2 Ch 419

of the surface owner to have his surface undisturbed. ... The 'letting down' of the surface by underground workings is so injurious to the user of the surface by the surface owner that is not reasonable to construe a contract as giving the mineral owner the right unless the words of the contract make this plain[57]*…"*

70. Fourthly, the exception in this case, in the 1922 Conveyance of Heath Farm, was limited to an exception in respect of "*all mines and minerals in and under the said land*". The relevant case law makes it clear that the sand and gravel subsoils of Heath Farm are not within the scope of that exception.

70.1. Thus in Lord Provost & Magistrates of Glasgow v Fairie (1888) 13 App Cas 657, Lord Halsbury, Lord Chancellor, approved (at 672) this statement by James LJ as correct: *"Here the thing which the defender claims to work is the common clay which constitutes the subsoil of the greater part of the land of this country, which never can in any locality be wrought by underground working, but under all circumstances is only to be won by tearing up and destroying the surface over the entire extent of the working. When such a right is claimed against the owner of the surface, I ask myself: Did anyone who wanted to purchase or acquire a clay-field, whether by disposition or reservation, ever bargain for it under the name of a right of working minerals? In the case of a voluntary sale of land with reservation of minerals, I am satisfied that we should not permit the seller to work the clay to the destruction or injury of the purchaser's estate, because we should hold that the conversion of the estate into a clay-field was not within the fair meaning of the reservation.",* whilst later in the same case, Lord Watson likewise observed (at 679) that where there was a conveyance of land, subject to an exception of the 'mines and minerals', then the land conveyed *"cannot be restricted to vegetable mould or to cultivated clay: but that it naturally includes; and must be held to include, the upper soil including the subsoil, whether it be clay, sand, or gravel",*

70.2. Likewise, in North British Railways Co v Budhill Coal and Sandstone Co [1920] AC 116 the House of Lords had to decide whether the sandstone which formed the substratum of the land and district was a mineral, and held that it was not. In doing so they set out the relevant test for ascertaining whether something is within the scope of an exception in respect of minerals. Lord Loreburn, Lord Chancellor, said as follows (at 126 - 128): *In many parts of England and Scotland sandstone forms, as here, the substratum of the soil, with, no doubt, other kinds of rock intermixed, If it be a mineral, then what the railway company bought was not a section of the crust of the earth subject to a reservation of minerals, but a few feet of turf and mould, with a right to lay rails upon it, and liable to be*

[57] Bishop Auckland Industrial Co-operative Society Ltd v Butterknowie Colliery Company Ltd [1904] 2 Ch 4191 per Vaughan Williams LJ at 435

destroyed altogether, unless the company chose on notice to buy the ordinary rock lying beneath it. For no one pretends that there is anything exceptional in this sandstone, either in point of higher value or rarity. It was agreed at the Bar that this was the ordinary freestone or sandstone. If the respondents are entitled to work this substance under this railway, the same must be true of chalk, or clay, or granite, or any other rock which forms the crust of the earth. …. I will not adopt so startling a conclusion unless I am compelled by a decision of this House, from which there is no escape. There is no such decision.... In the first place, I think it is clear that by the words 'or other minerals' exceptional substances are designated, not the ordinary rock of the district In the second place, I think that in deciding whether or not in a particular case exceptional substances are minerals the true test is that laid down by Lord Halsbury in Lord Provost of Glasgow v. Fairie (1888) 13 App Cas 657. The Court has to determine 'what these words meant in the vernacular of the mining world, the commercial world, and landowners' at the time when the purchase was effected, and whether the particular substance was so regarded as a mineral"

70.3. In Waring and Foden [1932] 1 Ch 276 those and other like authorities were applied by the Court of Appeal in a case concerning almost identical facts to those of Heath Farm. Waring concerned another farm in Staffordshire - Booth's Farm. Booth's Farm, like Heath Farm, rested on subsoils primarily consisting of beds of sand and gravel. Indeed the beds forming the subsoils of Heath Farm were traditionally termed part of the same "Bunter pebble beds" as formed the subsoils of Booth's Farm. Like Heath Farm, Booth's Farm was also situated in the Staffordshire Coalfield, with coal seems lying deep below it. Like the 1922 Conveyance of Heath Farm, the 1925 conveyance of Booth's Farm had contained a reservation of "all mines, minerals, and mineral substances". The Court of Appeal had to decide whether or not the beds of sand and gravel beneath the surface of the Farm were "minerals" and hence whether or not they were within the scope of the exception from the conveyance. The Court of Appeal held that the beds of sand and gravel were clearly not "minerals" and were clearly not within the scope of the exception. Lawrence LJ said as follows (at 296): "*The common soil of the district in which Booth's Farm is situate consists of sand and gravel lying immediately underneath a thin layer of cultivated top-soil averaging about twelve inches in thickness. The evidence of geologists is that this substratum of sand and gravel forms one of the Triassic group of strata known as the Bunter pebble beds with an addition of some glacial drift. There is a wide belt of this pebble bed and glacial drift formation stretching from the mouth of the Tees to the mouth of the Exe, comprising many thousands of square miles. In the particular locality in question this belt is from three to four miles wide. There are many gravel and sand pits scattered over a wide area in the immediate neighbourhood of Booth's Farm, and one of the gravel pits is on the farm itself. In these circumstances it cannot possibly be said that in the district in question sand and gravel are substances which are rare and exceptional in*

character. Further, the sand and gravel are not substances which are exceptional in use or value; they are used mainly if not wholly for building and road-making purposes, and their commercial value depends entirely on local requirements and facilities for transport"

70.4. As with Booths Farm, so with Heath Farm, *"it cannot possibly be said that in the district in question sand and gravel are substances which are rare and exceptional in character*"

71. Fifthly, as noted above[58], Heath Farm is situated above the Cannock Coalfield section of the South Staffordshire Coalfield. That contained many active collieries at the time of the 1922 Conveyance of Heath Farm, and substantial coal seams (including the Eight Foot Coal) are believed to lie deep beneath the Farm (at perhaps c670m below the surface). Booth's Farm in Waring v Foden (above) was likewise situated above the busy South Staffordshire Coalfield. As the Court of Appeal noted in Waring, there were "*seams of coal, ironstone and fireclay at a considerable depth below the surface of Booth's Farm*", all of which were clearly minerals, and the existence of those was "*amply sufficient to explain the reason for and object of the reservation in the conveyance of July 28, 1926*[59]". The same applies here

72. Sixthly, applying and interconnected with the second to fifth points above, the limited "power" which was excepted from the conveyance of Heath Farm, in connection with the exception of the "mines and minerals", was the power "to sink any pits or shafts", together with the power to erect and construct associated buildings and machinery etc. The words "sink any pits or shafts" permitted the digging and lining of long, narrow, vertical passages, giving access to a mine below, of the kind classically associated with traditional coal mining[60]. Thus what was permitted by the exception from the 1922 conveyance of Heath Farm was the underground mining of minerals, primarily coal, with the power to "*sink any pits or shafts*" (and construct associated buildings & machinery etc) if required. That limited power, excepted from the conveyance of Heath Farm, did not permit any surface quarrying or excavation of the excepted minerals, or the destruction of the surface by the owner of the excepted minerals[61]. It has no application at all to the sand and gravel subsoils of the Farm: first, they are not minerals for the purpose of the interpretation of the conveyance and the exception; and secondly, the sand and gravel subsoils could only be excavated from the surface of the Farm, and by destroying the surface of the Farm in the process. Thus the limited terms of the power both further reinforce the fact

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[58] See paragraph 63 above

[59] Lawrence LJ at 296. See also McLean Estates Ltd v The Earl of Aylesford [2009] EWHC 697 (Ch) at [8] and [23]: "*What the parties must primarily have had in mind was coal and the hope that the Warwickshire coalfield would be found to extend at a workable and recoverable depth beneath this land,*

[60] see e.g. Dand v Kingscote (1840) 6 M. & W. 174

[61] Bishop Auckland Industrial Co-operative Society Ltd v Butterknowle Collier Com an Ltd [1904] 2 Ch 419, per Vaughan Williams LJ at 435

that the sand and gravel subsoils were not "minerals" within the scope of the exception[62]; and make it plain that the owner of the excepted "minerals" is not in any event entitled to extract even the excepted "minerals" by way of surface quarrying or excavation.

73. Inglewood is thus the owner of the sand and gravel that would be worked from the surface of the land.

74. **The Interpretation of the DCO as to the Definition of Minerals:** the references in the DCO (and accompanying documents (such as the Book of Reference Statement of Reasons and Planning Statement)) to minerals, through the incorporation[63] of Schedule 2 of the Acquisition of Land Act 1981 (the Mineral Code)has to be interpreted in the present day.

75. Inglewood submit that the interpretation of the term today must be that Inglewood's sand and gravel reserve is a mineral for the purpose of the DCO:

75.1. Firstly the Minerals Plan[64] shows that sand and gravel are now considered to have such qualities of exceptionality that the site is formally allocated for extraction of the aggregate minerals.

75.2. Secondly, this is recognised by the Applicants in their drafting of the Book of Reference and Statement of Reasons and their Planning Statement[65].

75.3. Thirdly the DCO incorporates of the Mining Code, in a context in which the only mineral referenced by the Applicants is the sand and gravel reserve: the very indication that the sand and gravel reserves allocated under the Minerals Plan extension site allocation 'are not a significant or important mineral resource' is an irrefutable indication that the Applicants are treating the reserve as a mineral for the purpose of the DCO.

75.4. Fourthly the indication in the Statement of Reasons that certain areas are subject to the current interests of Staffordshire Sand and Gravel in relation to the reserves of sand and gravel would make no sense unless the DCO treated sand and gravel as a mineral for the purpose of the DCO.

76. **The Applicant's intentions in relation to the acquisition of the mineral interests in Inglewood's lands.** The October 2018 representations says:

> *The DCO incorporates the Mineral Code save for paragraph 8(3). The minerals found within the Objector's lands are sand and gravel, and are owned by the*

[62] See McLean Estates Ltd v The Earl of Aylesford [2009] EWHC 697 (Ch) at [16] — [24]
[63] Article 29
[64] Appendix 3 and 4 to these representations
[65] Book of Reference TRO50005-000305 paragraph 1.18/22 and references to Calf Heath Quarry and the extraction of the remaining *minerals* therein; Statement of Reasons TRO50005-000303 3.12 and the use of the hatched pink shading to indicate where mineral interests are being acquired; Planning Statement TRO50005-000452 Paragraph 2.4.6 7.2.4/5 and Figure 7

Objector. The Objector's understanding is that it is not the intention of the Undertaker to acquire the Objector's mineral interests; however the DCO is ambiguous as to whether the minerals are 'expressly named and conveyed', and this ambiguity should be resolved. The Statement of Reasons 3.12 recognises that an active working of this kind of mineral is inconsistent with the DCO; the Objector's minerals are not under active working but (as to parcels 101, 102, 103) are allocated in the current development plan. Were it not for the DCO (if granted) the working of this mineral would be permitted. [The parcels are not in fact subject to the tenancy to SSG claimed at 3.19.17 of the SofR].

77. The normal position is that if a CPO is made over land, then, in the same way as would a normal conveyance, it has the effect of providing for the acquisition of everything that is within the land as well as the surface. Minerals may be excepted from the power of acquisition

78. After lodging this representation, nothing was heard from the Applicant about the point made in this part of the representation.

79. Inglewood wrote to FAL's solicitors on 20 February 2019[66] inviting clarification as to the first paragraph of the representation. No response has been received to that letter. The main point in that letter was that in the Statement of Reasons, at 3.19.17 there is an express indication that FAL intend to acquire the minerals lying beneath plots 101, 102 and 103; that indication is at odds with the express indications elsewhere, that the minerals in those plots and other plots owned by Inglewood, were not to be acquired.

80. The point being made in the letter was not thought to be a difficult one, and the absence of a simple response is therefore both inexplicable and worrying. Inglewood will therefore explain the background to the ambiguity and apparent equivocation in more detail.

81. The DCO identifies an intention to acquire minerals under the CPO powers in Articles 24 and/or 25, by reference to the Book of Reference (see Article 24(1)). The Book of Reference 1.22 explains that '*Land shown hatched pink on the Land Plans is land which is subject to rights to extract mines and minerals. The minerals interests in these parcels is proposed to be subject to compulsory acquisition pursuant to articles 24 and/or 25 of the DCO. This land will also, if necessary, be subject to the general powers in Part 5 of the DCO such as the power to override private rights where they are inconsistent with the authorised development'* But by contrast 1.18 says that *'Land shown tinted pink on the Land Plans is proposed to be subject to the compulsory acquisition of the freehold, leasehold, tenant and occupier interests as well as*

[66] Ex Document TRO50005-000569

the overriding of or extinguishment, suspension or interference with any third party rights pursuant to articles 24 and 25 of the DCO. This land will also be subject to the general powers in Part 5 of the DCO such as the power to override private rights where they are inconsistent with the authorised development'

82. The Minerals Code is incorporated, so that sand and gravel would only be acquired if they are 'expressly named and conveyed' within the DCO[67].

83. Parcels 101, 102 and 103 are shaded in block pink on the DCO Land Plans, sheets 4 and 5, identifying them as subject to the acquisition of 'land and rights'. In contrast parcels within the current Calf Heath Quarry planning permission are shaded hatched pink, indicating that they are only to be subject to compulsory acquisition of the interests in mines and minerals. The point made is that whilst the difference in shading between the hatched and solid pink indicates that the Calf Heath Quarry land is to be treated differently to Inglewood's parcels, it does not indicate definitively whether the solid pink encompasses acquisition of the land *and* the minerals, or whether it is intended to indicate only acquisition of the land. The generic label of 'rights' is of course broad enough to indicate the right to extract mines and minerals but does not necessarily or expressly do so.

84. Moreover, the land that currently comprises Calf Heath Quarry is owned by Mr Monckton who is one of the parties backing the SPV undertaker Applicant for the DCO. As such it is understandable that there is no need to compulsorily acquire title to the land within his ownership, but only to acquire interests in the minerals, which lie with a third party, SSG. As such the difference in treatment of the different parcels of land is unsurprising. The table of parcels in the Book of Reference identifies sites 101, 102, 111, 112 and 113 as comprising 'mines and minerals', in respect of which the ownership is recorded as being unknown. These representations explain later why the ownership can and therefore should be clearly stated in the statutory Book of Reference which defines the scope of the acquisition. The Book of Reference table does not explain what 'rights' are to be acquired.

85. Paragraphs 7.2.4-5 of the Planning Statement[68] seek to justify the intention that 'no further minerals (outside of the existing SS.12/08/681 consent) will be worked within the Order Limits, including the new allocation', on the basis that the allocation is the smallest allocation in the Minerals Plan and is therefore not a 'significant or important minerals resource'. Whilst this does not necessarily indicate an intention to exclude the mineral interests, it confirms that there

[67] Paragraph 2(1) Schedule 2 Acquisition of Land Act 1981
[68] TRO50005-000452

is at least no intention to use them within the development which may tend to support the view that the Applicants do not think that they need to be acquired.

86. Paragraphs 7.2.15-18 of the Planning Statement also confirm there is no intention to work the minerals. But even within those paragraphs there is at one point an indication that extraction would be detrimental, and yet at another an indication that the minerals *would* be used '*sustainably within the constraints of the Proposed Development and retained for extraction should it be determined appropriate once the use of the Scheme is complete'*. (This appears to contemplate some use within the development but as is developed below, the supposition that the mineral might be available at the decommissioning of the scheme is impossibly far fetched: the reality is that the mineral would be effectively sterilised.)

87. The conflicting indications are at paragraph 3.12 and 3.19.17 of the Statement of Reasons[69], which expressly indicate that parcels 101, 102 and 103 are to be the subject of the acquisition of mineral rights. The reference to SSG is erroneous in the context of these parcels, but the intended acquisition is clear: this is an express 'naming and conveying' passage.

88. It is not clear either whether the conflicting statements in the Book of Reference and the Statement of Reasons is to be reconciled by a conclusion that the solid pink shading indicates areas where the land itself as well as the rights over the mineral interests are to be acquired.

89. The conclusion reached is that there is a correctable ambiguity as to the effect of the DCO, and that unless corrected it will be difficult to know with certainty whether the interests in mines and minerals are intended to be acquired in parcels 101 102 and 103. That ambiguity should not be left to be resolved in future litigation.

90. It is understood, but the Applicants are asked to clarify for the avoidance of any doubt, that, by contrast, there is no indication of any intention to acquire mineral interests or rights in Inglewood's parcel 113.

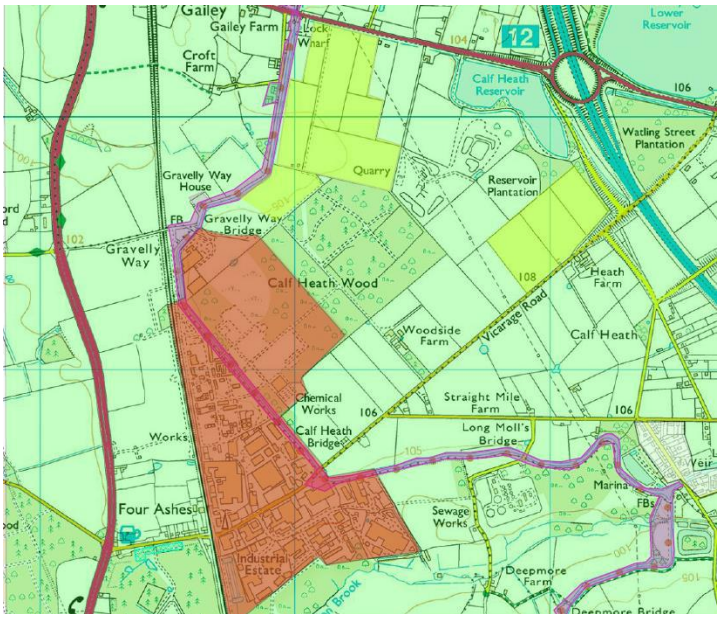
91. **The Undesirable Sterilisation of the Mineral Reserve and the Mining Code.** The second aspect of the representations on the minerals element covers two interrelated aspects and was stated as follows:

> *The Undertaker recognises that the existing consented mineral extraction area is close to exhaustion; but, whilst the Undertaker suggests that these parcels are not of importance, they are nonetheless part of the development plan allocation, and are an area imminently expected to be*

[69] TRO50005-000303

brought forward into the market place. The effect of the Code being incorporated is to except the minerals from the acquired interests and therefore from the compensation payable for the land. The minerals are surface minerals[70] *and extraction would be imminent. Because the minerals are shallow and would be worked from the surface the acquisition of them subject to the Code will improperly limit or interfere with the owner's right to appropriate compensation. The policy is that the Code should not be incorporated automatically; and the Undertaker has not established a valid basis for incorporation of the Code. The DCO should be amended to provide expressly for the acquisition of the minerals in these parcels if that is what is intended, but if not, for the exclusion of the Code.*

92. **Minerals Plan**[71]**:** As indicated, the Inglewood land is underlain by sand and gravel. The Planning Statement[72] provides an aerial photograph of the workings of the Calf Heath Quarry. The Planning Statement notes[73] the extension to the quarry which is proposed within the recently adopted Minerals Local Plan; it is suggested in that document that the allocation is '*the joint smallest minerals allocation (and the smallest sand and gravel allocation) in the Minerals Plan'.* The allocation is of the land to the north of Vicarage Road, ie plots 101, 102 and 103. The plan below which is taken from the Applicant's Planning Statement Document 7-1A page 6 shows the allocation in yellow; (it is the eastern part adjacent to the motorway which is relevant to Inglewood's case). The field shown with the number 108 within it, is the 'disputed' parcel Field 1787 (CPO parcel 103) referred to above.



[70] In the sense that they would be worked from the surface
[71] See Appendix 3 and 4 to these representations
[72] TRO50005-000452 Document 7-1A page 10, photograph dated October 2017
[73] 7-1A page 15, 2.4.6, and Figure 7

93. There has been a long term national policy for preferring the extension of existing workings over the creation of entirely new workings. National policy is current set out in the NPPF chapter 17.

94. The allocation of sites for mineral workings within a local plan is a complex interrelationship of '*the need to achieve an acceptable balance between the supply of minerals and the impact of mineral operations on local communities and the environment*[74]'. The need is met by providing for a landbank against a production capacity requirement, so that a ready supply is always accessible to developers; this accords with the NPPF requirement.

95. The recently adopted Minerals Local Plan focuses supply on the extension of existing sites (such as Calf Heath Quarry) for as long as that was possible and only then identifying new sites through the development control process[75]. In this way the plan would achieve its objective of locating sites where adverse impacts can be avoided or minimised.

96. Whilst the allocation may be the smallest in the area, it is allocated in order to play its part in meeting the need; if it is not worked, then unallocated sites will have to be worked, defeating the objective of the plan to leave those sites until allocated sites were exhausted[76]. The passage quoted from the Planning Statement, and the further indication that this accounts for only 2% of the allocation in the local plan[77], may be factually correct, but it completely fails to engage with the planning basis on which the allocation was made, and the consequence of sterilising the mineral. It was the case that it was felt appropriate to make this allocation within the Minerals Local Plan, to serve the development needs of the area, bearing in mind the balance struck by the plan.

97. But for the DCO, Inglewood, as owners of the sand and gravel mineral reserve under plots 101, 102 and 103 would have brought forward the allocation with a view to securing the grant of planning permission for extraction. The allocation of the land within the Minerals Plan supports the prospect of planning permission being granted for the working of the minerals underlying those parcels. Section 38(6) of the Planning and Compulsory Purchase Act 2004 mean that the determination of the application that would have been made would have to be in accordance with the development plan as a whole unless material considerations indicated otherwise – and paragraph 205 of the NPPF would be applicable so that great weight would have to be given to the benefits of mineral extraction. The quantity of mineral likely to have been extracted would

[74] Minerals Local Plan page 36, paragraph 7.4; but reference should also be made to Chapter 2 as to the need for a variety of quarries despite the wide distribution of aggregate reserves.
[75] Minerals Local Plan 2.21
[76] See Policy 1 and especially 1.4 and 1.6
[77] Paragraph 7.2.4 page 121

have been between 330,000T and 420,000T[78]. This is aggregate reserve is an important element in the delivery of other forms of development. The location within the Green Belt is not an obstacle to permission, because paragraph 146 of the NPPF indicates that mineral extraction is not inappropriate development. The allocation was made in full knowledge of the green belt location of the site (and the earlier phases of extraction were also green belt). There are no apparent material considerations militating against the extension to the quarry that was planned through the development plan allocation processes. At the least, planning permission being granted for the extension should be regarded as a probability.

98. If the mineral rights are not acquired under the DCO, then, given the content of Planning Statement 7.2.15-17 there is a likelihood that if Inglewood served a notice under the Minerals Code, the Applicant would serve a counter notice and prevent extraction.

99. The point being made here is that the overwhelming probability that the technical sterilising effect of the DCO, will lead to an actual loss of the contribution that this allocation would have made. Inglewood would have a route to compensation in those circumstances, whether or not the minerals are legally acquired[79]; that is not the issue here : the issue is that the planned benefit of the minerals to the development industry represented by the development plan is unnecessarily lost.

100. It is the case that the land on the south side of Vicarage Road is not allocated. This does not mean that in due course that land might not have been given planning permission – the need for aggregates is ongoing, and either within the plan period (upon the exhaustion of sites allocated) or in a new local plan, Inglewood would have aimed for the allocation of land to the south side as well. A significant reserve exists in that area.

101. (It should be noted that the reserve to the south west and to the south of the southern area of Heath Farm was the subject of extraction in the 1950s-1970s. Mineral extraction here has been important for many years)

102. **Impact of the development on the Minerals Allocation** The indicative phasing within the Planning Statement[80] places the land to the north of Vicarage Road as Phase 3 and the land to the south as Phase 4, these phases respectively being developed in 2029/30 and 2030/33. This is the very end of the period covered by the Minerals Plan.

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[78] This is based on excavation to a maximum depth of 4m, with clean sand and gravel lying beneath 1m overburden down to a depth of 3.6m; calculated on the basis of 1.5T/m^3 The range of figures depends on the buffer zones applied

[79] Either by compensation under the CPO if acquired or through the application of the notice and counter-notice procedures of the Minerals Code if the mineral rights are not acquired. However, the effect in both situations the mineral is sterilised rather than being extracted.

[80] Figure 15 page 42 and the table at page 43

103. The Planning Statement covers minerals in more detail at section 7.2 (Page 120). It indicates that the depth of working of the current, unrestored, quarrying operations at Calf Heath Quarry '*would form the platform for part of the Scheme*[81]'. The mineral reserve is in a lateral, flat, superficial deposit in this area, and a depth of up to 4m would be excavated to remove the mineral. There is no reason to suppose that on the allocated site, or indeed the southern lands, the same would not apply if the reserve were to be worked.

104. The intended after use of the existing quarry was for restoration to agriculture. There is no reason to suppose that that could not be similarly envisaged for the extension, either at a lower (vertical) level than at present or back to current land levels. The permission that might be obtained for extraction could (if the DCO is in place) provide for restoration to be in a form facilitating afteruse consistent with the DCO requirements in the same way as the current quarry will provide a platform. Note that if lowering the ground level gives rise to the ability to further reduce overall cut and fill requirements, then buildings can be set a fraction lower. There would be visual benefits from this[82].

105. The cut and fill arrangements described in the EIA[83], are not critically calculated given the overall size of the site. The FFLs shown on eg ES Fig 4.2 show 2m tolerances, and it follows that the 'neutral cut and fill' approach adopted would not be adversely impacted to any material degree by a 2m deposit of sand and gravel being taken prior to the construction of the intended buildings.

106. **NPS Implications** It is said within the planning statement that if the DCO is granted the mineral in Inglewood's lands would *not* be worked[84] (this statement is not a formal covenant). But on that basis, the effect of the DCO as it currently stands, would be the sterilisation of the allocated reserve.

107. The Planning Statement[85] notes the NPS preference for safeguarding of mineral reserves[86]. This is a policy which is to be followed *'as far as possible'*. No attempt appears to have been made to follow it at all. No attempt has been made to facilitate prior extraction of the resource as suggested in NPS 5.119. The Planning Statement simply recites the supremacy given to the NPS and the downgrading of the development plan policies. That principle is obviously correct, but the Applicants have not addressed the balance which is inherent within the NPS.

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[81] TRO50005-000452 Paragraph 7.2.3
[82] See landscape Figure 12.12
[83] Chapter 5, 5.39 et seq
[84] 7.2.5 page 121, and 7.2.15-17
[85] TRO50005-000452
[86] See NPS 5.169 and Planning Statement 7.2.6 et seq; 7.2.7 notes that this is also a Minerals Local Plan policy

108. The assertion at Planning Statement 7.2.16 as to mineral extraction '*significantly'* risking stability[87] is made without any supporting evidence. It is improbable. Indeed after making that claim, the author of the Planning Statement draws back from it in the conclusion section, at 7.2.22 simply saying that it '*could contribute towards increased risk of land instability'*; but, again, there is no evidence put forward to substantiate even that thought. The area is of the same geological make up as the existing quarry – any stability problem would be no greater or worse than that identified for the existing quarry area (where, as the Planning Statement envisages, the extraction of sand and gravel will lead to the creation of a usable platform for building purposes, where foundation design is straightforward). Removal of a superficial deposit is an entirely different proposition than removal of ground well beneath the surface, something which may well cause unexpected surface problems of subsidence. This assertion should therefore be completely discounted.

109. The passage referred to in the Planning Statement, in 7.2.16, about the extraction of minerals being contrary to paragraph 5.119 of the NPS needs to be looked at carefully. The NPS paragraph is about mitigation of existing problems of land stability referred to in paragraphs 5.117/8 of the NPS. The mischief being addressed is that of land instability threatening the proposed development; so the policy talks about preventing unacceptable risks from such problems, and of ensuring that any necessary investigations are carried out to assess risk. Paragraph 5.119 is about the *range of mechanisms* to address risks through mitigation. It specifically countenances that prior extraction of the mineral may be a solution; prior extraction has not been considered by the Applicants in their Planning Statement.

110. Similarly, the suggestion that there would be a need to import materials to 'restore' the foundation levels should not be seen as greatly problematic. In the first place, the existing planning consent envisaged restoration for agriculture including some importation of material to form a sub base to the top soil; the environmental and sustainability impacts of that have already been taken into broad account and were found acceptable, so that it is more likely than not that a similar conclusion would be reached as to a planning consent for extraction on the Inglewood land. Secondly, reduction of the FFL would appear to be sensible in visual terms in any event[88]. The Design and Access statement, paragraph 6.6.2/3 shows that the FFLs are a response to the topography across the site and that the heights of the buildings have an *'important bearing'* on likely visual effects. Those effects in turn drive the heights of the screen bunding. Thirdly, there is no indication of any threat to the existing groundwater regime[89].

[87] In the context of NPS paragraph 5.119
[88] The Design and Access Statement (Doc 7.5) shows the design evolution and has a section dealing with FFLs which allows interpretation of the FFL parameters plan.
[89] Planning Statement 7.2.17

111. It is clear from the description in the lengthy Design and Access Statement and the Design Evolution section of the EIA, that the mineral allocation and the question of attempting to secure the ability for the mineral to be extracted has had no impact at all on the design evolution.

112. The NPS paragraph 5.169 as to safeguarding minerals sits in a section dealing with the expectations placed on the Applicant. It is followed by a section on the resultant decision making. The assumption being that the Applicant would explain how it has framed the application so as to provide the evidence needed for the decision.

113. The NPS confirms that conflict with a development plan, here, the Minerals Local Plan, due weight should be given – and, here, but subject to the overriding character of the NPS, great weight must be given to the conflict. This is especially so since the conflict is avoidable, and is one on which the Applicant has failed to provide any substantive evidence to support assertions as to the risk, or the severity of risk perceived or as to the inability to extract the mineral before the development proceeds

114. There has been no attempt to evaluate the benefits of the development against the impact of sterilising the material for the foreseeable future; it is simply stated that the benefit of the development outweighs the need for the mineral. Even if the Inglewood land were required immediately, that is not a sufficient answer to the NPS policy, but since the NPS indicates that consideration ought to be given to safeguarding, it is an important flaw in the proposal.

115. The foreseeable future is, in the context of this development, completely indefinite. The Decommissioning section of the EIA (Chapter 5) speaks of '*operation indefinitely'*; the suggestion in the Planning Statement that one might conclude that the mineral sterilisation is not permanent is a fallacy depending on the construction of a hypothesis of the life of the development that is at odds with the assumption as to decommissioning which is of redevelopment and adaptation. It is an attempt to mask the reality of complete sterilisation for all foreseeable purposes.

116. There is a complete failure to deal with the obvious aspiration of the NPS of the potential for working out the mineral. Such an aspiration would not impact on the indicative phasing. It is an alternative scenario which could and should have been thought through within the EIA. The EIA is supposed to look at reasonable alternatives considered. It is a serious flaw in the EIA.

117. **The Mining Code:** The Code is currently incorporated into the DCO[90]; the reason for this being proposed by FAL is that the acquiring authority does not then pay any compensation for

[90] By Article 29. The Code is contained within the Parts of the 1981 Acquisition of Land Act which are thereby incorporated. Mines are excepted from the conveyance or vesting process unless expressly included

the mineral being sterilised. Instead the owner of the minerals is allowed to serve a separate notice to work the minerals, which FAL can then either allow to occur or can pay compensation separately from any compensation for the acquisition of the land itself.

118. The government policy on this is clear. The Guidance[91] as to the incorporation of the Code is that

> *Since this may result in the sterilisation of minerals (including coal reserves), the mining code should not be incorporated automatically or indiscriminately. Therefore, authorities are asked to consider the matter carefully before including the code, and to omit it where existing statutory rights to compensation or repair of damage might be expected to provide an adequate remedy in the event of damage to land, buildings or works occasioned by mining subsidence'*.

119. The decision as to incorporation or otherwise of the Code is a matter of judgment. In many instances that judgment will lead to incorporation. There is no indication within the documents lodged with the EA as to what consideration has been given to this guidance. Nothing is said by way of explanation within the Planning Statement; the reference in the Explanatory Memorandum[92] is purely factual as to the effect of the provision.

120. The overall policy of the NPS the NPPF and the Minerals Local Plan is against sterilisation of the mineral reserve. Extraction would not prejudice the development under the DCO, either in terms of phasing or in terms of subsidence risk. The foundations for the development have not yet been devised and can be devised so as to deal with the new platform level created after extraction as they will be on the current mineral working area.

121. Where a policy indication is given in Guidance issued by the government, it is reasonable to expect the body making the formal proposal for the use of expropriation provisions which would have the effect of sterilising a mineral resource to explain why it has chosen that course; it should explain what consideration has been given, to show the necessary obligation of careful consideration. That has not been done, and it is a flaw in the evidence supporting the Application.

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[91] The Compulsory Purchase Process and the Crichel Down Rules : Guidance – published by the MHCLG 2018 (updating 2015 edition) – paragraph 191

[92] 6.67

PART IV CONCLUSIONS

122. **Conclusions:** In conclusion, Inglewood is the owner of the sand and gravel reserve across the whole of Heath Farm. An allocation has been made within the Minerals Local Plan for part of the Inglewood landholding. Significant weight should be given to a development plan allocation, notwithstanding the policy supremacy of the NSIP. However the NSIP contains a particular policy cautioning against the sterilisation of mineral reserves. Very significant weight must be given to that policy, since it underpins the policy balance which Parliament has approved.

123. It is clear that the effect of the DCO if consented and implemented would be to sterilise the reserve. There is an inadequate justification for that, on any view of the Applicant's case. But in fact the phasing plan which the Applicant puts forward demonstrates that working the reserve could be facilitated within the Minerals Local Plan period anyway. The reserve should not be sterilised unless there is a compelling case in the public interest, and none is shown here.

124. If the mineral were to be worked, then the effect would be that the land would be let down to a lower level, consistent with the existing Calf Heath Quarry levels. Those levels appear satisfactory for the Applicant. The cut and fill calculations put forward in the application for the DCO are not precise (the building heights are indicative, and the FFL is subject to a tolerance of 2m), so that there is no particular case on that ground for sterilisation. Reduction of effective building height, by the reduction of the FFL would be beneficial in visual terms. The extraction is not inconsistent with the DCO

125. The Applicant has not made any attempt to explore this issue in the evolution of its design. It ought to have done so. Since the issue is linked to a development plan allocation and directly relates to a NSIP policy to safeguard minerals, it was a reasonable alternative that ought to be considered.

126. The Applicant has sought to include the Mining Code without providing any justification for that despite the requirement to give careful consideration before including it.

127. The DCO should therefore be amended to exclude the Mining Code.

128. The DCO should also be amended to exclude the Compulsory Acquisition proposals against the Inglewood lands so that it can work its minerals prior to the development of warehousing on the worked ground.

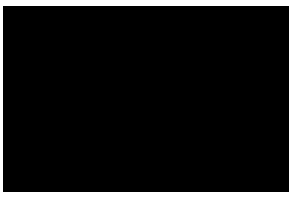
129. Whatever decision is made in relation to the minerals aspects, Inglewood submit that there is no compelling reason for confirming the CPO is relation to their lands. The DCO is

supported, but if the Applicant wishes to have CPO powers in addition, a proper justification for each element of land acquisition has to be provided.

130. This would require a high degree of proof, because in doing the state is supporting the expropriation of land to provide a benefit to a commercial entity to the prejudice of the present landowner.

131. The scheme is a market driven scheme. A developer such as the Applicant would assess the viability of the scheme on the basis set out in section 7 of Mr Owen's evidence. He explains why a 10% ratio of developer's profit on cost would expected for a pre-let/funded commercial scheme with planning consent achieved through the DCO. The scheme reaches a notional tipping point at the end of Phase 3, broadly corresponding with the scheme as proposed until 2016. The Inglewood lands are not required until the tail end of the development project, many years hence, as part of Phases 4 and 5. If the Inglewood land is excluded from Phases 4 and 5, the scheme delivers a profit on cost ratio of 12.92%, a figure which Mr Owen describes as significantly in excess of that which could reasonably be expected from a scheme of this kind; in other words it would be deliverable in the market. It is unreasonable to allow *additional* land to be taken now in these circumstances. The effect as demonstrated by Mr Owen is to allow the Applicant to take the land at its existing use (compulsory purchase regime) valuation and then to profit from it by achieving a further, super, profit, with a profit on cost ratio of 15.06%. The Applicant is entitled to expect support for its CPO in so far as land is needed to get the project underway, but the Applicant cannot expect that support for unlimited acquisition.

132. The onus lies on the Applicant to make its case, and it has not done so. Authorisation of acquisition in these circumstances would be contrary to the Human Rights provisions of Article 1 of the First Protocol.



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