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Cc: [Greenwood, Brian](#); [Morgan-Welker, Carolyn](#)
Subject: Proposed Lake Lothing Third Crossing (TRO10023) - ABP (20013261) - Deadline 7 Submission (EMAIL 1 of 2) [CC-UK1.FID22462820]
Date: 15 March 2019 17:22:43
Attachments: [image001.png](#)
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Dear Sir,

We write on behalf of our client, Associated British Ports (Objector Reference 20013261), in relation to the above and specifically in the context of **Deadline 7**.

Please see attached the following documents for submission by our client:

1. Summary of oral submissions made by ABP at the examination hearing held on Thursday 7 March 2019 (**ABP: 1 of 3 – DL7**)
 - **Annex 1:** Government Press Release and Policy Paper dated 7 March 2019 relating to the Offshore Wind Sector Deal
 - **Annex 2:** Plan of Lowestoft Inner Harbour Berth Areas
 - **Annex 3:** ABP Lowestoft, Suspended Quay in the Inner Harbour Area
 - **Annex 4:** Supplementary Note on Bridge Transits Inward Bound just before the a.m. Restriction Period
2. Summary of oral submissions made by ABP at the examination hearing held on Friday 8 March 2019 (**ABP: 2 of 3 – DL7**)
 - **Annex 1:** Oral submissions made by ABP in respect of the Western Alternative
 - **Annex 2:** Supplementary Note on CPO and DCO Issues
 - **Annex 3:** Supplementary Note on Serious Detriment
 - **Annex 4:** Supplementary Note on the Port of Newport
 - o Attachment 1 – Plan of the M4 Relief Road
 - o Attachment 2 – Letter to the Secretary of State withdrawing ABP's objections to the M4 Relief Road Scheme
3. ABP Curriculum Vitae (CVs) (**ABP: 3 of 3 – DL7**)

Due to the size of the attachments, we will be submitting these documents in 2 separate emails. **This is EMAIL 1 of 2.**

Kind regards,

Alison

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(ABP: 2 of 3 – DL7)

Proposed Lake Lothing Third Crossing (TRO10023)

Associated British Ports (20013261)

**Summary of oral submissions made by ABP at the examination hearing held
on Friday 8 March 2019**

Adjourned Compulsory Acquisition Hearing 2

This post examination hearing note sets out the submissions made by Associated British Ports ("ABP") at the LLTC examination hearing held on Friday 8 March 2019 in relation to:

- Compulsory Acquisition; and
- Serious Detriment.

As these issues are linked, this summary is split into two parts dealing with the above issues.

For clarity, this hearing note also incorporates the following Annexures:

- **Annex 1** – Oral submissions made by ABP in respect of the Western Alternative;
- **Annex 2** – Supplementary Note on CPO and DCO issues;
- **Annex 3** – Supplementary Note on Serious Detriment; and
- **Annex 4** – Supplementary Note on the Port of Newport (including two attachments).

Where appropriate, these responses are cross-referenced to ABP's Written Representations and other submissions made by ABP for Deadlines 4 and Deadline 5.

At the hearing on 8 March 2019, ABP raised a number of matters relating to compulsory acquisition, which supplemented the detailed submissions made by ABP in its Written Representations in respect of Deadline 4 and Deadline 5. The individual matters raised at the hearing are set out in detail below.

1 PART 1 – COMPULSORY ACQUISITION

- 1.1 As noted by the ExA, ABP had submitted a written note outlining its concerns in respect of compulsory purchase matters as part of its Deadline 5 representations,

(ABP: 4 of 5 – DL5). Counsel, on behalf of ABP, explained that ABP's position in respect of these matters remains as stated in those submissions.

- 1.2 **Western Option** – Reference was also made at the opening of ABP's oral submissions to concerns raised by ABP with regard to the Applicant's western route alternative. These representations are summarised separately in **Annex 1 (ABP: 2 of 3 – DL7, Annex 1)**.
- 1.3 **Legal side agreements** - Exchanges have taken place between the parties in respect of the draft outline of possible side agreements to deal with the acquisition of rights but the matter is at very early stage at present.
- 1.4 As such, ABP considers that compulsory acquisition matters must be determined on the basis of the information currently put before the ExA at present (i.e. a "no deal world").

Permanent acquisition of land

- 1.5 In respect of matters relating to the permanent acquisition of land and airspace within the statutory port estate and the temporary possession of land for the construction of scheme and related impacts in relation to Commercial Road, ABP referred to the Land Plans - Sheet 3 of 5 - which marked the various parcels of land within the port estate over which the Applicant seeks rights and referred also to ABP's submissions in respect of compulsory acquisition outlined in Paragraph 9 of ABP's note on Compulsory Acquisition Matters (ABP: 4 of 5 - DL5).
- 1.6 It was explained that, as set out in Paragraph 9, ABP objects to the compulsory acquisition of any rights comprising part of the port estate.
- 1.7 ABP's very clear preference is that if land and rights are required for the scheme, such rights should be acquired by agreement by means of the grant of a long lease supplemented by the provision of covenants over such parcels of land as required, with a right of eventual reverter over those parcels of land where the acquisition of freehold has been agreed by ABP.

Extent of compulsory acquisition powers

- 1.8 ABP indicated that in its view, the powers of compulsory acquisition sought by the Applicant are too wide. Where there was a proven need for the freehold transfer of land for the scheme, ABP would only be prepared to transfer the minimum area land. Thus, in respect of the pillars for the bridge taking Plot 2-23 as an example, the area of the pillars themselves can only be acquired.
- 1.9 When looking at the extent of Plot 2-23 on Sheet 3 of the Land Plans against the Engineering Drawings, it is evident that a broad brush approach has been taken with a larger area of land identified on the plans than is actually required for the pillars.
- 1.10 Further, if land must be acquired within the Port estate, it should be, as noted above, only by means of the transfer of a leasehold interest so that, in the event the bridge is removed at the end of its lifespan (estimated 120 years), the land would automatically revert to ABP as the freeholder - otherwise the interest would be lost to ABP.
- 1.11 Otherwise, such alienation of the impacted land would mean, for example, the loss of ABP's permitted development rights granted to ABP in its capacity as a port statutory undertaker. If, on the other hand, a leasehold interest is negotiated, those rights would not be lost.
- 1.12 ABP pointed out that those proprietary rights will be required in terms of development, to enable repairs and maintenance to be carried out by ABP to the quay wall adjacent to the pillars.
- 1.13 The Applicant in response indicated that the precise scheme details had not yet been finalised, and whilst the full extent of some of the parcels of land identified may not ultimately be required the plans have been submitted as drafted in the context of the Rochdale envelope principle.
- 1.14 The Applicant also stated that the way the DCO is structured means that no acquisition can take place without ABP's agreement, not to be unreasonably withheld. Mr Robbie Owen (on behalf of the Applicant) suggested that Articles 20 and 22 of the draft DCO provided that the Applicant will be required to carry out further internal testing processes to establish whether land is required for the scheme if the DCO is

confirmed by the Secretary of State. In such circumstances, the Applicant considers that it would be right for the later test to identify the land within the port estate that is actually to be acquired, once the design of the scheme has been finalised.

- 1.15 In addition, paragraph 53 of ABP's Protective Provisions means that the Applicant, as the undertaker, must not acquire or use any rights without the consent of the Harbour Authority.
- 1.16 ABP in response expressed concern that it was not sure if that was a justification for acquiring the freehold interest, rather than a justification for acquiring any other rights. ABP also queried the rationale for such a provision and questioned its true purpose and intent. A Supplementary Note regarding this specific issue is separately set out in **Annex 2 (ABP: 2 of 3 – DL7, Annex 2)**.

Alternatives to compulsory acquisition powers

- 1.17 The draft DCO permits the entirety of the identified land parcels to be taken under the compulsory acquisition rights (as that is the nature of a development consent order) but that that would lead as noted to the loss of rights under the General Permitted Development Order 2015 in relation to those parcels of land. The scheme would therefore result in the seriously detrimental loss of such permitted development rights as an impact of the operation of the DCO.
- 1.18 In response to ABP's concerns regarding loss of permitted development rights, the Applicant stated that in order for the bridge to be a highway it must have highway rights which must be capable of being dedicated in perpetuity and only a freeholder can dedicate rights in perpetuity. Otherwise, the Highways Authority would only have leasehold interest in the land and even if the DCO provided the Highways Authority with the power to construct the bridge, it would not provide the Highways Authority with sufficient rights in perpetuity to operate and maintain the bridge.
- 1.19 ABP, however, did not see this as being an insurmountable issue, as required rights in relation to highway land can be granted by agreement between the parties.
- 1.20 The same points detailed above arise in many ways in respect of other components of the land identified as being subject to compulsory acquisition. ABP noted, for

example, that in respect of Plots 3-04 and 3-05 for the bridge supports and the area required to accommodate fenders, the transfer of the entirety of that land is proposed, including the water in channel. Given that these plots are located in areas where there is potential for emergencies to occur, ABP must have access to such areas to carry out its duties as Statutory Harbour Authority, for example, were persons to fall into the water to carry out emergency rescue operations, or in order to provide access for reasons such as repairs, clean-up, contamination/pollution etc. As far as ABP was concerned, it cannot be the case that the whole of the pink areas identified for Plots 3-04 and 3-05 will be required for the solid component of the bridge.

Compulsory acquisition of the pontoon

- 1.21 ABP does not see the Applicant's justification for compulsory acquisition of the pontoon (Plot 3-52) and certainly does not understand why the freehold needs to be acquired for the pontoon. As such, ABP requests further information from the Applicant in this regard.

Compulsory acquisition of airspace and other rights over land

- 1.22 ABP understands the Applicant's need for the acquisition of airspace (identified as the hatched pink and blue land), and the need for access to it, but does not agree that there is any need for acquisition of these plots.
- 1.23 ABP also requires access to those areas of quay wall which abut the bridge for maintenance and repair purposes as they are next to quay wall such as, for example, Plots 3-33.
- 1.24 By way of illustration, it was explained Town Quay has in the past been subject to catastrophic collapse, requiring 50 metres of new quay side to be rebuilt. ABP, therefore, must have the right to be able to carry out such maintenance and repair work within the vicinity of the new bridge, without constraint by the compulsory acquisition powers. ABP does not at this stage have any knowledge of the continued impact the bridge will have both during construction and for subsequent maintenance of the bridge, which means that this statutory right must be retained.

- 1.25 Similarly, Plot 3-34 (i.e. the central channel) is an area of water that will be subject to vessels regularly passing and re-passing and will need to be suitably dredged for the channel to continue to remain in operation, as well as to carry out maintenance. As broadly set out, the compulsory acquisition of the rights in respect of Plot 3-34 includes both airspace and rights in channel – it is not clear what the implications for ABP as Statutory Harbour Authority will be to maintain that channel. ABP cannot, however, accept any constraints in this respect.
- 1.26 ABP pointed out that air space and land is required in respect of Plot 2-32, which constitutes the access way into the Port at Commercial Road. In this context, ABP also pointed out that critically, it is unclear to ABP how the Port's occupiers/tenants will be able to continue their operations to the west of where the scheme work is proposed. There is no means of access provided for ABP in terms of draft DCO as proposed, in order to ensure the Applicant is able to maintain continuous traffic access landside along the northern shore where construction work will take place.
- 1.27 Indeed, significantly in this context, it was pointed out to the ExA that part of the proposed Commercial Road diversion is on land which is not included in the draft DCO.
- 1.28 In addition, the proposed diversionary route severs everything on the Port to the west of the bridge works. There is no means of access for Plots 2-32 and 2-33 and the draft DCO does not provide a mechanism by which access will be achieved.
- 1.29 ABP suggested that in the light of these material defects, the ExA is effectively being asked by the Applicant to wave a magic wand to deal with the issue of protection against severance of everything on Port to the west of the bridge works which has not been incorporated within the draft DCO. This is a patent defect.
- 1.30 It was also pointed out by ABP that the temporary possession of Plot 2-20 on the western side over the bridge required for the Commercial Road diversion could extend for the entire period of construction of the bridge – which would be operationally unacceptable.
- 1.31 The Applicant's only response to ABP's concerns in this respect was to refer to the possible side agreements and a potential lease or licence – the terms of which have

not even at this mid-stage in the examination process been outlined to ABP by the Applicant.

Construction Compound

- 1.32 In respect of Plot 2-22, this land contains the suspended quay (5 metres from quay side). This quay plays an integral part in port operations for the mooring, loading and unloading of ships. This plot will also include part of the proposed diversionary route, however it should be noted that the diversionary route cannot pass over the suspended quay due to weight restrictions.
- 1.33 It is not clear to ABP what precisely the Applicant's proposals are for this large length of berth and quay hinterland, critically positioned in the middle of the operational Inner harbour. It was made clear that it is critically important for ABP, if it is to operate as an efficient port undertaker, to know what it is that it will actually be able to do in this area with regard to mooring, loading and unloading of vessels and storage of cargo. What temporary occupation is actually required and on what terms? Will the proposed construction works sever the operational area and prevent vehicular transit to the west of the bridge works?
- 1.34 Without the required clarification, which has not been provided to date, how can the Harbour Master know in advance with any certainty what port related activities (for example, shipping and the mooring of vessels) will be practically possible in plots 3-01 and 3-10? As currently presented by the Applicant, it will be impossible to programme the occupation of those berths to the overall serious detriment of the port's undertaking – and this is irrespective of the difference in understanding between the Applicant and ABP as to berth sterilisation (165 metres as opposed to 62 metres).
- 1.35 ABP pointed out that it is very clear that the closure of Commercial Road will impact berth accessibility. This issue will be dealt with in respect of berth utilisation at the resumed hearing on 1 April 2019 (dealing with environmental matters including navigation). ABP's position regarding the impact on berth availability is set out in paragraph 10.52 of ABP's Written Representations to the Deadline 3 submissions, which sets out ABP's analysis of what will be lost in terms of extent of berths and difference of view between the Applicant and ABP.

- 1.36 The additional berthing restriction imposed by the 'knuckle' is addressed in Annex 6 to those submissions, as are the operational requirements in relation to the deployment of mooring lines. ABP is extremely concerned that the restriction on mooring on that length of quay would impact significantly on ABP's ability to operate that part of the Port.
- 1.37 ABP's view is that the rights sought by the Applicant are extremely widely drawn in the context of what the Applicant actually requires and without any attempt by the Applicant to mitigate these impacts; ABP has no option but to continue to resist the Applicant's proposed powers of compulsory of acquisition.

2 **PART 2 – SERIOUS DETRIMENT**

- 2.1 Counsel, on behalf of ABP, explained that the key points arising in relation to serious detriment had been raised by ABP previously in its Written Representations submitted for Deadlines 3, 4 and 5.
- 2.2 ABP sought to explain the matter of serious detriment not just in respect of compulsory acquisition matters but also in terms of the impact of the scheme more broadly on the Port. In particular, the difference between the parties as regards the extent of the sterilisation resulting from the scheme - the Applicant being of the view that 62 metres of working quay will be sterilised as a result of the scheme, whilst ABP's assesses the loss to be 165 metres (when measured in whole berths) - the matter comes back to the issue of berth sterilisation.
- 2.3 ABP stressed the "umbrella component" of serious detriment to the Port in terms of the carrying on of its undertaking in relation to such areas as impacts on marine and port operations, in addition to the generic element of serious detriment.
- 2.4 ABP was asked to clarify the scope and relationship between the elements of "carrying on of undertaking" in terms of 'serious detriment' and impacts that could be viewed as being "important" and/or "significant".
- 2.5 Counsel clarified that such terms can be applied in relation to how the statutory undertaker conducts its business when carrying on the undertaking, which requires a holistic approach. He warned that there is a danger of superficially assessing the loss

of a small area of land as not being important or significant because of its size alone. Size is not a determining feature when assessing significance or importance in terms of serious detriment. It was noted that this proposition had been accepted by the ExA and the Secretary of State in the examination of the Hinkley Point C Connector scheme, where the taking of a small area of land was deemed significant. The Port of Lowestoft is a nationally significant operation - and this comprises the port undertaking as a whole.

- 2.6 In determining impact, a judgement is required which will include the importance of the operations undertaken in that area but that is only one component of the test. The ExA needs to look at the port as a whole, not just the size of the impact. The introduction of a new bridge at height through a working port is a unique set of circumstances. The impact must therefore be considered on the port operations as a whole – including the assessment by those operating the Port as to how vessels can and will be accommodated (i.e. in term of movement of vessels), impact on tenants and perception of future occupiers.
- 2.7 The consideration of what falls within the general heading of the port's operations must include the Port's future undertaking as well as the current position – including direct and physical components - i.e. the direct impact of the compulsory acquisition of land but also the direct and indirect impact upon business, both existing and future, and anything that affects the port undertaking. The Port undertaking should be understood in its broadest sense – including the commercial operation of Port and port activities.
- 2.8 The Applicant suggested that the significant impact does not mean there is serious detriment to carrying on of the undertaking and that it is a matter of judgement looking at all relevant impacts on the carrying on of the undertaking.
- 2.9 The Applicant stated that the ExA should not be concerned with whom ABP has contracted, in that those are considerations that fall outside ABP's duties and obligations as the Statutory Harbour Authority – and as a consequence fall outside the section 127 serious detriment test.
- 2.10 The Applicant explained to the ExA that it has not taken into consideration the operations which ABP undertakes at the Port because it does not carry on those operations as a statutory undertaker.

- 2.11 ABP pointed out the fundamental flaw in the Applicant's reasoning. It drew attention to the Applicant's own Impact Report (i.e. Impact of the Scheme on the Port of Lowestoft - Document SCC/LLTC/EX/59) which states at paragraph 2.1.6, that the potential impact of the scheme on future matters "*must be proven to be at least reasonably likely*" in respect of whether it has potential to have serious impact. That is a fundamentally flawed interpretation of the statutory language of the serious detriment test, as there is no such requirement in either statute or precedent case law that requires ABP to provide evidence that any future activities are at least reasonably likely in order for them to constitute serious detriment. Further, serious detriment must be considered in the context of how ABP conducts its business as a statutory undertaker, and the Applicant cannot simply separate individual issues and consider them in isolation (for example, by failing to consider operations which ABP undertakes at the Port). These operations are inextricably linked to how ABP carries on its statutory undertaking and must form part of the overall consideration of serious detriment under section 127 of the PA 2008. Further information regarding this issue is set out in Section 5 of ABP's Deadline 5 submissions (ABP: 1 of 5 – DL5) and the Supplementary Note on Serious Detriment at **Annex 3 (ABP: 2 of 3 – DL7, Annex 3)**, which forms part of ABP's Deadline 7 submissions.
- 2.12 Counsel for ABP reiterated that the factual matters in respect of serious detriment are set out in ABP's Written Representations submitted for Deadline 3 and Deadline 5. He therefore did not repeat what was set out in ABP's submissions but confirmed that ABP maintains the significance of the impact for the Port and why the contention is made that there is serious detriment.
- 2.13 The ExA sought additional information from ABP regarding Welsh Government's proposals to construct a Relief Road for the M4 motorway in South Wales and the impact that proposal would have in terms of 'serious detriment' on the Port of Newport. Further information regarding this issue is set out in the Supplementary Note on the Port of Newport and Serious Detriment at **Annex 4 (ABP: 2 of 3 – DL7, Annex 4)**.
- 2.14 The ExA will be aware that, in view of the importance of this issue and the clear misunderstanding of the Applicant as to the application of the Section 127 serious detriment test, ABP has submitted a Supplementary Note on Serious Detriment at **Annex 3, (ABP: 2 of 3 – DL7, Annex 3)**.

(Annex 1 to ABP: 2 of 3 – DL7)

Proposed Lake Lothing Third Crossing (TRO10023)

Associated British Ports (20013261)

Supplementary Oral Submissions - Western Alternative

1. At the LLTC examination hearing session on Thursday 7 March 2019, ABP raised some general points relating to the consideration of a western alternative alignment for the LLTC scheme.
2. The ExA's attention was drawn to Annex 7 of ABP's 'Response to the Impact of the Scheme on the Port of Lowestoft Report' submitted for Deadline 5 (ABP: 1 of 5 – DL5), the Annex itself being titled 'Response to the Applicant's Response on the Western Alternative Report' (ABP: 1 of 5 – DL5, Annex 7).
3. Counsel, on behalf of ABP, explained to the ExA that it was not necessary to go through the Annex in detail, but simply made the point that the questions and queries raised in that Annex remained unanswered and undermined the conclusions on alternatives which had been reached by the Applicant.
4. In turn, these issues identified raised questions as to whether – in terms of the Applicant's proposed compulsory purchase of land within the port statutory undertaking – there is a compelling case in the public interest for the proposals.
5. Two issues in particular were highlighted by ABP, namely:
 - (a) Is there any further breakdown of the costs associated with the western alternative in comparison to the chosen central option? ABP notes that the revised work undertaken brings the costs for the two options closer together, and that there appears to be certain issues which would further reduce the cost of the western option.
 - (b) What inputs have been made by the Applicant, in considering these matters, with respect to the opening and closure times of the respective bridges.

6. The Applicant responded to these points by indicating that they considered that they had provided sufficient information on these matters and in so doing specific attention was drawn to Table 8 and accompanying text, within Appendix B of SCC/LLTC/EX/51.
7. Both parties agreed that they would be happy to discuss these points further outside of the examination. It was made clear, however, that if following discussions ABP had outstanding concerns, ABP would bring this issue back to the ExA in an appropriate form.

(Annex 2 to ABP: 2 of 3 – DL7)

Proposed Lake Lothing Third Crossing (TRO10023)

Associated British Ports (20013261)

Supplementary Note - Issues regarding the CPO and DCO

This Supplementary Note is designed to act as a supplement to the submissions made by Associated British Ports ("ABP") in respect of issues relating to the draft Development Consent Order (Revision 3) and the proposed compulsory acquisition powers sought by the Applicant to facilitate the Scheme.

- 1 At the examination hearing that took place on Friday 8 March 2019, ABP raised its concerns regarding the compulsory acquisition powers sought by the Applicant in respect of land and rights contained within the Port estate, particularly relating to the breadth of the powers sought and whether the land and rights required to facilitate the scheme have been adequately justified, or could potentially be provided by other means (i.e. freehold transfer or long leasehold rights). ABP's summary of its Oral Submissions is provided at **ABP 2 of 3 – DL7**.
- 2 The Applicant dismissed ABP's concerns, as it considered that the way the DCO is structured means that no acquisition can take place without ABP's agreement (not to be unreasonably withheld). This is a reference to Paragraph 53 of ABP's Protective Provisions, which sets out the usual protections for statutory undertakers.
- 3 In addition, the Applicant considers that Articles 20 and 22 of the draft DCO provide that the Applicant will be required to carry out a further internal testing process to establish whether land is required for the scheme if is DCO made and the extent of the land to be acquired, and it is right, therefore, for the later test to be used to identify the actual land to be acquired. For this reason, the Applicant considers that the draft DCO is adequately flexible, and 'strikes the right balance' between competing interests.
- 4 ABP's consideration of these provisions referred to by the Applicant is set out in further detail below. Overall, however, ABP remains concerned that the draft DCO does not

provide ABP with adequate flexibility to protect its statutory interests. As such, ABP has no choice but to maintain its objection to the compulsory powers sought by the Applicant within the draft DCO.

Paragraph 53 of ABP's Protective Provisions

- 5 Relevantly, Paragraph 53 of ABP's Protective Provisions provides as follows:
- '(1) The undertaker must not, under the powers conferred by this Order, temporarily possess, acquire or use, or acquire new rights over, port land without the consent of the harbour authority.*
- ...
- (4) The consent of the harbour authority under this paragraph must not be unreasonably withheld but may be given subject to reasonable conditions.'*
- 6 In short, Paragraph 53 of ABP's Protective Provisions means that the Applicant, as the undertaker, must not acquire or use any power or rights conferred by the DCO without ABP's consent, such consent not to be unreasonably withheld but which may be given subject to reasonable conditions. In addition, if ABP fails to express its refusal within 30 days of any request made by the Applicant to exercise the powers contained within the DCO, then certain 'deemed approval' provisions apply.
- 7 On a strict legal interpretation of Paragraph 53(1), ABP considers that it has the ability to refuse consent for the Applicant to exercise its compulsory purchase powers granted by the DCO in respect of land and rights within the Port estate, provided that such refusal is not unreasonably withheld. In practice, this could provide ABP with the ability to frustrate the implementation of the scheme.
- 8 Given that ABP has clearly and repeatedly communicated its objections relating to compulsory acquisition of parts of the Port estate to the Applicant, both within the context of the examination and for some time prior to the commencement of the examination, and the Applicant has to date failed to acknowledge or address ABP's concerns as it considers that these can be addressed at a later stage during the NSIP process, then ABP considers that it would not be unreasonable for it to refuse to provide consent for the Applicant to exercise its compulsory acquisition powers on the basis of ABP's ongoing objections.

- 9 It may be that such refusal is based on a lack of justification for the compulsory acquisition, where ABP's refusal could relate to acquisition of whole plots identified within the Land Plans (for example, where such acquisition could be provided by agreement), or on the basis that the breadth of the compulsory acquisition sought is unreasonably large and ABP may only consent to the Applicant acquiring the minimum land required to undertake the scheme (for example, Plot 3-04 contemplates the permanent acquisition of an area of land that is larger than is required for the bridge pillars).
- 10 As such, ABP considers that Paragraph 53 provides it with the necessary statutory protection to allow ABP the right to veto the compulsory acquisition of any or all parts of the Port estate, provided that ABP has acted reasonably in the circumstances when refusing to provide such consent. If this is the case, then ABP agrees with the Applicant's view that its concerns regarding the Applicant's intention to compulsory acquire whole or parts of the Port estate may be able to be further discussed between the parties at a future time, to enable the Applicant with an opportunity to address ABP's concerns.
- 11 Conversely, however, it may be that the Secretary of State does not agree with ABP's interpretation of Paragraph 53, as it would require the Secretary of State to authorise the Scheme subject to the ability of ABP as a statutory undertaker to prevent the implementation of the authorised Scheme. ABP acknowledges that the Secretary of State may consider that the purpose of protective provisions is to qualify the Applicant's compulsory acquisition powers, once granted by the DCO, rather than providing ABP with a right to remove those powers, with such interpretation being based on the historical practice.
- 12 On that basis, however, Paragraph 53, is effectively rendered meaningless, in that it does not in reality do what the Applicant claims. Indeed, if ABP wished to limit or condition the terms of or the extent of the compulsory purchase of its port estate – then the Applicant could simply argue that as the Secretary of State has approved the compulsory acquisition by making the order, then it follows that any attempt to qualify the terms of the Order must be unreasonable.

- 13 If this is the case, then the Applicant was misleading the examination when it stated that ABP's ongoing concerns and objections would be adequately considered at a later time during the NSIP process once the design of the scheme has been finalised. The reality is that once the draft DCO is confirmed by the Secretary of State, then any further discussion between ABP and the Applicant will simply relate to the practicalities of how the compulsory acquisition powers are exercised rather than whether or not the specific compulsory acquisition powers are justified.
- 14 If there was a disagreement between ABP and the Applicant regarding the powers granted by Paragraph 53, that dispute would be subject to arbitration, however, ABP notes that the resolution of any arbitration would be subject to the commencement of the scheme being time limited by the restriction on funding provided by Central Government - a subject upon which the Applicant has remained silent.
- 15 On the basis of the above, ABP has no option, in the absence of any attempt by the Applicant to mitigate the serious detriment that the Scheme will cause to the port undertaking, but to continue to object to the compulsory acquisition powers sought by the Applicant.

Articles 20 and 22 of the draft DCO

- 16 In this context, it should also be noted that contrary to the assertion of the Applicant at the examination, Articles 20 and 22 of the draft DCO do not restrict the compulsory acquisition of ABP's land. As such, they do not address ABP's ongoing concerns regarding the powers of compulsory acquisition sought by the Applicant. In addition, similarly to the above, it appears the Applicant was misleading the examination when it suggested ABP's concerns would be adequately addressed at a later stage of the NSIP process. ABP's oral submissions made in respect of these Articles are summarised separately at **ABP: 2 of 3 – DL7**.

(Annex 3 to ABP: 2 of 3 – DL7)

Proposed Lake Lothing Third Crossing (TRO10023)

Associated British Ports (20013261)

Supplementary Note – 'Serious Detriment'

- 1 At the examination session held on the morning of Friday 8 March, dealing with the adjourned topic of compulsory acquisition, the ExA sought further clarification as to the application of the "serious detriment" test provided by section 127 of the Planning Act 2008 in the context of the Applicant's proposed compulsory acquisition of parts of ABP's statutory port estate.
- 2 This note is designed to supplement the summary of the oral submissions made by both the applicant and ABP at that examination session provided for this Deadline 7.
- 3 As the ExA are aware, the issue of 'serious detriment' has been rehearsed by both parties previously in their written submissions, and the ExA is referred to:
 - (a) **ABP:**
 - (i) Written Representations - Section 9, 8 January 2019;
 - (ii) Comments on the Applicant's Response to ABP's Relevant Representations – Paragraph 14 (Issue Number LD2) of Deadline 4 (ABP: 1 of 5, DL4); and
 - (iii) ABP's Response to Impact on the Scheme on the Port of Lowestoft Report – Deadline 5 (ABP: 1 of 5 – DL5).
 - (b) **The Applicant:**
 - (i) Statement of Reasons, Document 4.1 – Paragraphs 6.1.10 to 6.3.23; and
 - (ii) Impact of the Scheme on the Port of Lowestoft (Document Reference SCC/LLTC/EX/59).
- 4 It is not the intention of this note to repeat and duplicate the written submissions already before the ExA. ABP does feel, however, that in the light of the worrying lack of understanding as to the application of the serious detriment test evidenced by the

Applicant's response to the ExA's questions at the examination session on Friday 8 March, further clarification is required.

5 In brief, the components of the legal test as set down in section 127 of the Act, insofar as it applies to the Port of Lowestoft in the context of the LLTC proposal, are as summarised by the Applicant itself in its Statement of Reasons, paragraph 6.2.3 – namely that –

"Section 127(2) provides the DCO may include provisions authorising the compulsory acquisition of statutory undertakers' land only to the extent that the Secretary of State is satisfied of the matters set out in subsection 127(3), which are that the nature and situation of the statutory undertaker's land is such that:

- it can be purchased and not replaced without serious detriment to the carrying on of the undertakings; or*
- if purchased, it can be replaced by other land belonging to or available for acquisition by, the undertaker, without serious detriment to the carrying on of the undertaking."*

6 At the hearing session, the ExA queried, in the context of the carrying on of ABP's statutory undertaking, the relationship between something that amounts to serious detriment and an impact which may be "important" or "significant".

7 In response, ABP pointed out, as noted in its summary of the oral submissions, that the test set down by the legislation is holistic.

8 So as to ensure that there is no doubt as to ABP's approach to 'serious detriment' and the section 127 test, however, this Supplementary Note is designed both to underline ABP's position and at the same time correct a number of errors made by the Applicant both in the interpretation of and the applicability of the legal test, as evidenced by the Applicant's responses at the examination session.

9 To establish whether or not the section 127 'serious detriment' test is engaged, it is necessary to approach the issue in stages, as set out below.

Who is the statutory undertaker?

10 It is agreed by all parties that in the context of the LLTC proposals, the statutory undertaker for the purposes of the section 127 test is ABP in its capacity as the port undertaker at Lowestoft.

What is the port statutory undertaking?

- 11 A precondition for the engagement of section 127 is that the land in question the subject of the proposed compulsory acquisition must be statutory undertaker's land. In terms of the LLTC Scheme as it impacts upon the Port of Lowestoft, the Applicant has accepted that those parcels of land within the Port impacted by the Scheme comprise part of ABP's statutory undertaking.
- 12 As far as the Port of Lowestoft is concerned, that port statutory undertaking comprises both the commercial port operations that ABP carries on at the Port as the statutory port undertaker and the duties and obligations that fall to it as the Statutory Harbour Authority, ('SHA').

Should the ExA view the operations undertaken by ABP at the Port as being distinct from the obligations falling upon ABP as the Statutory Harbour Authority?

- 13 This references the distinctly ill-founded proposition put forward by the Applicant, who claimed that the serious detriment test applied only to the impact that the LLTC scheme would have on ABP's ability to undertake and comply with its statutory obligations as SHA. The Applicant argued that there is a distinction between ABP as the SHA with its consequential statutory duties and obligations, and ABP as the owner and commercial operator of the Port.
- 14 The argument placed before the ExA by the Applicant was that the serious detriment test only applied to ABP in its capacity as the SHA and that the ExA should not be concerned as to the impact on ABP's tenants and customers (those with whom ABP has "contracted"). This, the Applicant claimed, was because ABP's commercial operations (i.e. its business), are distinct from ABP's statutory obligations and therefore, should not to be taken into account when determining whether section 127 is engaged.
- 15 Indeed, the Applicant repeated that, in its view, the commercial/business activities of ABP fall outside its duties as the SHA and in a response to a specific question from the ExA reiterated that in its view the serious detriment test was not concerned with the operations of ABP's tenants and occupiers.
- 16 This is a fundamentally flawed interpretation of the section 127 test and ABP finds it extremely worrying that the Applicant has so completely failed to understand the extent of ABP's Port of Lowestoft statutory undertaking and its port operations.

17 Despite the attempt made by the Applicant to re-interpret the legislation – its allegation being that there is a danger in "*substituting different language for the statutory test*" – the wording of section 127 is in fact unambiguously clear. It falls into two essential components, namely: –

- (a) First, that part of the statutory port estate which is to be compulsorily acquired is being used for the purposes of "*carrying on the statutory undertakers' undertaking*", and
- (b) Second, that the *compulsory* acquisition will cause - "*serious detriment to the carrying on of the undertaking*".

18 The ExA will note that at no place in the wording of the section 127 legal test (as set out fully at para 9.6 of ABP's Written Representations), does the legislature make any reference, either directly or indirectly, to there being a distinction in terms of the engagement of section 127 between the specific statutory obligations and duties placed on the SHA and its commercial port undertaking.

19 Indeed on the contrary, it is self-evident from the wording of the section that the test encompasses the "statutory undertaking" – and the statutory undertaking is not a divided two-part entity – the carrying on port operations as a business and the statutory duties of the SHA – but a single holistic undertaking.

20 As the ExA will appreciate, the legal reality is that the legislation – both national and local – has authorised ABP to carry on its business operations as a "statutory undertaker" in much the same way as a railway undertaking, an airport operator, a gas transporter or a water or electricity undertaker.

21 Thus, for example, by virtue of Part 8, Class B of the TCPA (General Permitted Development) (England) Order 2015, the legislature has granted ABP as a port statutory undertaker – not in its capacity as a SHA – permitted development rights for port related development on its operational land, as defined:

"B. Permitted development

Development on operational land by statutory undertakers or their lessees in respect of dock, pier, harbour, water transport, or canal or inland navigation undertakings required –

- (a) *for the purpose of shipping, or*
- (b) *in connection with the embarking, disembarking, loading, discharging or transport of passengers, livestock or goods at a dock, pier or harbour, or with the movement of*

traffic by canal or inland navigation or by any railway forming part of the undertaking".

22 It is equally self-evident from the above that, in granting ABP permitted development rights as a statutory undertaker for the purposes of its undertaking, the legislature is looking at the port undertaker as a holistic single entity. To attempt to distinguish the duties of ABP as SHA from the carrying on of its port operations is simply an attempt by the Applicant to distract and confuse from the clear intent of the legislation.

23 ABP is disappointed that at this stage in the examination process, the Applicant has still failed to understand the true extent of ABP's operations and its statutory undertaking.

On the basis of the above, is an impact that is "significant" or "important" the same as an impact that causes "serious detriment"?

24 As the ExA noted at the examination hearing, there is a dispute between ABP and the Applicant as to whether the impact caused by the LLTC extends to the loss of 62 metres of operational berth and quayside as opposed to the 165 metres of lost berthing (when measured in whole berths) identified by ABP. This is an issue that will be considered by the ExA at the next examination session on Monday 1 April, but the point made by ABP at the 8 March hearing is that whatever the terminology employed – "significant", "important" or "serious detriment" – all fall under the same umbrella component, namely, what is the true impact of the compulsory acquisition on ABP's ability to carry on its port statutory undertaking?

25 As ABP explained at the hearing, there is a danger that construing a given loss or impact to be small could of itself automatically mean that the loss or impact could not be significant or important and thereby amount to "serious detriment". Thus, in the Hinckley decision, (to which reference has been made by ABP in its Written Representations at para. 9.17, 8 January 2019 and para. 6.37 of ABP: 1 of 5, submitted for Deadline 5), the objections of the Bristol Port Company ("BPC") in the context of a proposal by National Grid to erect a power connecting cable across the port, were summarised as follows -

"The applicant's proposed development will have significant adverse impacts on BPC's land, the conduct of its commercial port activities, and the respective business interests of its customers and tenants ...

BPC's present objection can be taken to include the following ...

The serious detriment to which BPC, as a statutory undertaker, would suffer if compulsory acquisition were to be authorised, including:

(a) significant loss and/or impairment of essential operational flexibility caused by the location of the applicant's apparatus; and

(b) air draught constraints resulting from inadequate OHL clearances which would constrained warehouse development and the use of cargo handling equipment within the dock estate".

26 As the ExA will be aware, the BPC in its summary representations use both the words 'significant' and 'serious detriment'. Whilst the impact the subject of the complaint could, on one level, be viewed as a relatively small – essentially the erection of power cables across the Port – the reality is that although the works proposed were indeed relatively small when viewed in the context of the whole statutory port estate, the impact on both existing and future port operations was considered by the ExA to amount to 'serious detriment'.

27 Indeed, the ExA will recall that the Applicant sought effectively to disparage the quotation cited by ABP from the decision of the ExA in relation to the Hinkley C Connection Project on the basis that the extract cited was merely a recitation by the ExA of the objector's case as opposed to being part of the decision.

28 As was pointed out by ABP at the examination hearing, however, the summary of the objector's case was in fact accepted by the ExA in concluding that the erection of the power cable as proposed would indeed cause serious detriment to the port undertaking.

29 Indeed, it is unfortunate that in attacking the quotation provided by ABP in its Deadline 5 representations, the Applicant significantly omitted to acknowledge that ABP had in fact, at paragraph 6.40, cited an extract from the ExA's conclusions, which merit repeating:

"Nonetheless it must be borne in mind that the essential infrastructure of the commercial Port of Bristol is nationally important and of great strategic significance to the country. To meet the varying and changing demands of its customers and world trade, the BPC needs flexibility to develop its land and provide the necessary buildings and facilities upon it. The BPC's senior personnel explained at the ISH, the way in which the Port needs to operate and impact that the proposed development would have on the way in which their operation is carried on.

We recognise that the area affected would be relatively small in comparison to the whole of the land available to the statutory undertaker. However, we have been persuaded by those with an intimate knowledge of the port that the constraint imposed by the proposed development in this particular location would be likely to cause a serious detriment to the carrying on of the undertaking. The land affected represents an important part of the resource available to the BPC, and there is a paramount need to retain the ability to use this land in a flexible manner...".

30 It is telling that the issue of serious detriment was also considered by the Examining Authority appointed to consider the Richborough Connection Project. In relation to that project, the statutory undertaker South East Water ("SEW") pointed out that there is in fact no statutory definition of what is meant by 'serious' in the context of the Planning Act 2008 and no authority on the point.

31 In the light of this, SEW argued that the *'word should therefore be given its ordinary meaning, namely 'important' or 'significant'... SEW notes that, on this basis, something would be serious if it was important or significant,*" (ExA's Report of Findings and Conclusions, paragraph 9.8.56).

32 The ExA continued that:–

"The detriment under S127 is to the carrying on of SEW's undertaking, thus the issue of whether any detriment is important or significant has to be judged having regard to how SEW conducts its business. This needs to take account of how it fulfils the duties and standards that apply to it as a statutory undertaker ... " [Para 9.8.57].

33 In the Richborough case, the Applicant, National Grid Electricity Transmission plc, argued, as summarised by the ExA at para 9.8.70 of its Report that, in brief, the proposed project would not cause serious detriment in this case because, amongst others:

- (a) There was no undertaking being 'carried on' by SEW (in that SEW were attempting to protect a future proposal to develop the impacted land for a reservoir);
- (b) The reservoir proposal had no funding;
- (c) The reservoir proposal could still be developed despite the compulsory acquisition; and
- (d) Whilst it was accepted that some amendments would need to be made to SEW's proposal these did not amount to serious detriment.

34 In their conclusions on this particular issue, the ExA found, at paragraph 9.9.101, that there:

"is also no doubt that the term 'serious detriment' goes beyond just 'detriment' and we concur with the SEW suggestion that something would be serious if it was important or significant".

35 That said, in the following paragraph, the ExA also found that the proposed development:

"would have a limited adverse effect, in terms of physical interaction on the future mitigation for the reservoir proposal Furthermore, these rights (sought by the Applicant) would not prevent SEW from constructing or operating the reservoir. When this finding of limited physical adverse effect is related to SEW's undertaking, we do not consider that this effect would be of serious, important or significant detriment in relation to the carrying on of the undertaking."

36 As raised at the examination hearing, and as supplemented by its various written submissions, ABP is of the firm view that the LLTC proposal will have a serious detrimental impact on ABP's ability to carry on its operations at the Port of Lowestoft – that serious detriment being both significant and important.

Secretary of State's Section 35 Direction

37 Indeed, in this context, the ExA will recall that, in March 2016 when the Secretary of State approved the Applicant's request under section 35 of the PA 2008 Act for the LLTC scheme to be given NSIP status, one of the reasons for so determining was that the scheme:

"Delivers the Port of Lowestoft's role in being the hub for the off-shore wind farms that are part of the east Anglia Array, a major supplier for the UK."

38 Whilst ABP welcomes the Secretary of State's recognition of the critical part that the Port of Lowestoft can play going forward in helping to secure the UK's energy supply, ABP is bound to query how a scheme that has the effect of bisecting the Port's Inner Harbour and thereby significantly damaging its future operational prospects as a port undertaking can ever be viewed as delivering the Port's role as *"a hub for ... off-shore wind farms"*?

39 Indeed, ABP is somewhat concerned to note that in Suffolk County Council's application to the Secretary of State for a Section 35 Determination (dated 24

February 2016), the County Council cites as 'qualifying criteria' in relation to the Port of Lowestoft the following:

- "11. *In alleviating that congestion, connectivity between the SRN, the Port of Lowestoft and major development sites, including the Great Yarmouth and Lowestoft Enterprise Zone (estimated to provide over 13,000 jobs) is much improved, addressing the widely held perceptions of local businesses that infrastructural constraints are undermining confidence in investing.*
12. *Further, the Port of Lowestoft already supports the nationally important offshore oil and gas industry and existing and prospective offshore windfarms. Some of those windfarms have themselves been consented as NSIPs, for example Galloper and East Anglia ONE Offshore Windfarms - and more are expected to follow, notably future phases of the East Anglia Array. The Port is also likely to play a role in the delivery of Sizewell C New Nuclear Power Station – as it did for Sizewell B. Offshore wind and new nuclear are both key planks in the Government's energy policy (including National Policy Statements EN-1, EN-3 and EN-6).*
13. *As such, better access to the Port and to the adjacent Enterprise Zone, which this Project provides, delivers on a number of national objectives, and further builds on the area's offer which also includes being a recognised Centre for Offshore Renewable Engineering (CORE) and a beneficiary of Assisted Area Status."*

40 Whilst ABP is pleased to note that even the Applicant accepts the potential growth of business in the Port, which as the ExA is aware, is already being realised since the beginning of the examination, the ExA will also have noted that far from bestowing any benefit operationally on the Port of Lowestoft, the impact of the LLTC scheme will in fact be to limit and restrict ABP's existing and future business operations – entirely contrary to the distinctly misleading statement included within the Applicant's Section 35 Application – the contents of which incidentally, were not discussed with ABP before its submission.

How far does serious detriment extend?

41 In the Applicant's responses to questions from the ExA at the examination hearing on Friday 8 March, reference was made by the Applicant to its acknowledgement at para 2.1.4 to 216 of its Deadline 4 Response – "Impact of the Scheme on the Port of Lowestoft (Document EX/59) that it agreed that:

- (a) *"there was little or no prospect of replacement land being made available for the purposes of section 127(3)." (para. 2.1.4)*

- (b) *"it also agrees with ABP's contention that serious detriment should not be considered purely in the light of the value of the undertaking of the land taken, but that attention should also be paid to the functional effect that is caused by compulsory acquisition being taken of that land – noting that the Scheme proposals includes the acquisition of airspace over the Port to build the new bridge." (para. 2.1.5)*
- (c) *"it also agrees that consideration of this issue must be both based on current Port activities, but also its potential for the future; although it is considered that this future must be proven to be at least reasonably likely (for the Scheme's impacts to therefore be considered in the context of whether it has the potential to constitute 'serious' detriment)." (Para. 2.1.6)*

42 As ABP explained at the examination hearing, reiterating comments made in its Deadline 5 response at para. 6.37 *et seq*, the last proviso in sub-paragraph (c) above is fundamentally flawed.

43 It is based on a serious misunderstanding by the Applicant as to the intended reach of the section 127 test, as demonstrated by both the Hinckley C and the Richborough decisions, and indeed the issues that arose in relation to Welsh Government's M4 Relief Road proposals in South Wales and its impact on the Port of Newport - as noted in Supplementary Note on the Port of Newport, submitted by ABP for Deadline 7.

44 In brief, the Hinckley C decision found that the proposed scheme would impact on the Port's future "*flexibility*" (see para. 29 above).

45 With regard to the Richborough scheme, SEW attempted to argue that serious detriment was engaged even though the project which it was alleged would be impacted did not exist and further, was neither defined nor funded. As a consequence, the ExA determined that it could not conclude that the section 127 serious detriment test had been engaged.

46 As far as the LLTC scheme proposals are concerned, however, unlike the position in Richborough, ABP is already operating a defined and existing port facility – with an expanding defined portfolio of business as evidenced by recent new occupiers/arrivals at the Port.

47 As for the Welsh Government's M4 Relief Road scheme, whilst not promoted under the PA 2008 as an NSIP, the section 127 test in the PA 2008 actually replicates the 'serious detriment' test in section 16 of the Acquisition of Land Act 1981. In fact, as

noted by ABP, 'serious detriment' was not engaged in that case because the promoters of the scheme agreed that serious detriment would be caused by the bridge crossing and as a consequence, committed to deliver measures that would mitigate the serious detriment and restore equivalence.

Concluding comments

48 The key elements that can be drawn from the above, therefore are that:

49 For 'serious detriment' to be engaged:

- (a) The land the subject of the proposed compulsory purchase must be statutory undertakers' land; and
- (b) Held by the owner in its capacity as a statutory undertaker.

50 In addition, the 'serious detriment' caused by the proposed project:

- (a) Does not have to be large in scale or extent; but
- (b) Must have a detrimental impact determined as being 'serious' and/or 'significant' and/or 'important';
- (c) Which may affect the future flexibility of the Port's undertaking; and
- (d) The relevant undertaking encompasses not just existing commercial operations but also those planned for the future for the statutory undertaking whether defined or anticipated for the future – provided that the serious detriment can be shown to present a real threat to the Port statutory undertaking.

51 In ABP's view, all of the above components are brought into play by the Applicant's proposals for the LLTC Scheme, and are if anything, underlined by the Secretary of State's own confirmation of:

"the Port of Lowestoft's role in being the hub for the off-shore wind farms that are part of the east Anglia Array, a major supplier for the UK."

52 The fact that it is not just ABP's off-shore wind energy business operations that will be detrimentally impacted by the LLTC scheme, but extends also to the oil and gas sector, general cargoes and aggregates, merely underlines the seriousness of the detriment that would actually be caused to the Port of Lowestoft by an unmitigated LLTC Scheme.

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The Rt. Hon. Chris Grayling MP
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By Special Delivery

Our Ref

BG/10028352

Your Ref

Date

2 February 2018

Dear Secretary of State

**Associated British Ports - Port of Newport
Welsh Government – Proposed M4 Relief Road
Representations and Objections under Acquisition of Land Act 1981, section 16**

We write in relation to the above on behalf of our client Associated British Ports, the owner and operator of the Port of Newport.

As you are aware by various letters addressed to you over the past 21 months, we have made representations under section 16(1) of the Acquisition of Land Act 1981 on behalf of our client, objecting to the draft Highway Schemes and Orders including draft Compulsory Purchase Orders that have been published by the Welsh Government in furtherance of their proposals for the construction of a new section of the M4 motorway to the south of Newport. The representations relate to the seriously detrimental impact on the Port of Newport that will result from those Schemes and Orders as published.

ABP's representations, in summary, concern the Welsh Government's proposed design for that part of motorway crossing the Port which consists of an elevated section of motorway with associated junction and slip road that would bisect the Port, thereby introducing vessel and operational height restrictions which would cause "serious detriment" to ABP's statutory undertaking.

This "serious detriment" would arise both on the basis that the compulsory acquisition by the Welsh Government of land within our client's statutory port estate, which in terms of impact

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would act to the serious detriment of the carrying on of ABP's statutory undertaking - *section 16 (2) (a) of the 1981 Act*, and that the serious detriment could not be avoided by the replacement of the land that would be lost to ABP by the Welsh Government's compulsory acquisition - *section 16 (2) (b) of the 1981 Act*.

Our client's concerns are compounded by the fact that the introduction of an elevated section of motorway through the middle of the Port will lead to:

- The operational separation of the two docks at Newport (North and South Dock); and
- The introduction of new risks and hazards to ABP's operations, including vessel superstructure impact with the bridge, funnel smoke emissions across the bridge and risks to the port due to accidents on the elevated section of motorway - as well as raising the unwanted potential of serious injury and/or loss of life.

No other Port in the UK has to contend with such risks.

Over the course of the past six months ABP has been in detailed and constructive discussion with the Welsh Government who have recognised both the serious detriment that would be caused to the Port by the motorway scheme and the new risks that the construction of a motorway and junction in the middle of an operational Port will introduce to users of the Port and users of the motorway.

In terms of "serious detriment", the construction of the motorway bridge at the restricted height proposed will divide the Port into three parts - namely (a) that sector adjacent to North Dock to the north of the bridge; (b) that sector to the south and east of South Dock; and (c) that sector to the north and west of South Dock, but bounded to the north by the motorway. This means, for example, that the Port's fleet of mobile cranes will be restricted to one of these 3 sectors with no ability to move between the other sectors, which is essential to provide operational continuity and flexibility at the Port without wasteful triplication of cranes.

A further consequence of the restricted height of the bridge is that the Welsh Ministers will have to narrow the Junction Cut access into North Dock, in that by restricting the width of vessels, that restriction will by correlation limit the height of vessels able to enter North Dock, thereby reducing the risk of vessel strike with the bridge. As a direct result of this beam and height restriction, however, ABP will lose its ability to use North Dock to anything approaching its full extent - representing a very significant impairment of some 1,000 metres of berth space within the statutory undertaking of North Dock.

The measures designed to meet the "serious detriment" which have been offered by the Welsh Ministers include the construction of 303 metres of new quay in the Port's South Dock and the repurposing of an area of land adjacent to the quayside within the Port's former coal terminal, also in South Dock.

In addition, in order to address the operational problems that will be created by the construction of the motorway through the Port estate and to minimise the new risks and hazards introduced to the Port -

- a) The Welsh Ministers, as noted above, both in terms of serious detriment and mitigation generally, will narrow Junction Cut from its current width of 19.5 metres to 13.5 metres to reduce the risk of vessel collision with the structure of the elevated section of motorway by restricting the beam of vessels able to enter North Dock, meaning that only small height-restricted vessels will be able to pass into North Dock for as long as

the elevated section of motorway is in place. In addition, the construction of the elevated section of motorway will prevent ABP from widening the entrance into the North Dock in future given the height restrictions introduced by the elevated motorway. ABP's intention had been to widen Junction Cut from 19.5 metres to at least 30.0 metres.

- b) The Welsh Ministers will relocate elsewhere within the port those of ABP's tenants who are adversely affected by the scheme.
- c) In recognition of the operational constraints that the elevated motorway and the consequent height restriction on access between the northern and southern part of the Port will create for the movement of mobile cranes within the Port, the Welsh Ministers have agreed to fund the purchase of two new mobile cranes for North Dock.
- d) Welsh Ministers will provide a swing bridge across the entrance to Junction Cut thereby enabling mobile cranes and port traffic to access both sides of the Port, thus avoiding the height restriction introduced by the elevated section of motorway.
- e) In recognition of the changes to the profile and management of the risks affecting the Port because of the scheme and the measures set out above, the Welsh Ministers will enter into a Deed of Indemnity and Insurance to manage the risks of loss or damage to the Port because of the construction and operation of the motorway.

ABP has not objected to the principle of a relief road for the M4 in that the need for such a project is, in ABP's view, a matter entirely for the Welsh Ministers.

ABP also recognises the need to place this highway scheme in a broader South Wales context and wishes to work in collaboration with the Welsh Government - not against it - so as to ensure that Wales has the capacity, by all modes of transport to meet the opportunities for economic and trade growth which our client trusts will arise in the years to come.

On that basis and in light of the measures outlined above to which the Welsh Ministers have committed, our client is prepared to withdraw all of the representations and objections that have been made to you on its behalf objecting to the highway scheme under the provisions of section 16 of the 1981 Act.

In order to ensure the delivery of the "package" of measures outlined above, the Welsh Ministers have today entered into a Settlement Agreement (which encompasses matters such as timing of delivery, identification of works to be undertaken within the Port, construction and property issues), an Access Agreement (under which ABP grants the Ministers a licence to enter the Port to construct the motorway bridge and junction and to maintain it going forward). The Welsh Ministers have also agreed to indemnify ABP, by way of a Deed of Indemnity and Insurance, against all loss or damage caused to ABP as a consequence of the construction and operation of the motorway through the Port.

We are instructed to make clear that ABP's representations and objections made to you in relation to the M4 Relief Road are only being withdrawn in the expectation that the Welsh Ministers will comply fully with and deliver all of the obligations and undertakings to which it has committed in the legal agreements noted above.

We are today copying this letter to the Welsh Ministers, similarly withdrawing our client's objections to the Draft Highway Schemes and Orders in terms which make reference to this letter, and a copy of that letter is attached.



Clyde & Co LLP

cc. The Welsh Ministers
The Planning Inspectorate