

The Lake Lothing (Lowestoft) Third Crossing Order 201[*]



Lake Lothing
**THIRD
CROSSING**

Document SCC/LLTC/EX/99: Response to ABP's Summary of Case at 8 March Hearing and to Second Written Questions 1.11 to 1.13

Planning Act 2008

The Infrastructure Planning (Examination Procedure) Rule 2010

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LAKE LOTHING THIRD CROSSING ("LLTC")		
RESPONSE TO SUMMARY OF ORAL SUBMISSIONS MADE BY ASSOCIATED BRITISH PORTS ("ABP") AT THE LLTC EXAMINATION HEARING HELD ON FRIDAY 8 MARCH 2019 ¹		
TOPIC	ABP COMMENTS ²	APPLICANT RESPONSE
PART 1 – COMPULSORY ACQUISITION		
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. 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").	<p>Under the terms of the dDCO, ABP is required to consent to the Applicant's use of compulsory acquisition powers. In doing so, it has the ability to impose reasonable conditions.</p> <p>That conditional consent would, in essence, be ABP's 'deal' that would enable the acquisition to take place. A 'no deal' outcome could only arise if ABP unreasonably withheld its consent to compulsory acquisition or sought the imposition of unreasonable conditions (as determined by an independent arbitrator acting under article 59 of the DCO). In all other scenarios, ABP would need to agree to the compulsory acquisition, which could be made subject to reasonable conditions. Since 'no deal' assumes ABP has sought to impose unreasonable restrictions, it is not a scenario that the Applicant considers should be given much weight.'</p> <p>The purpose of the Applicant advancing a Side Agreement at this stage is to seek to address a number of matters ABP has made in representations and to set out ways of working such that ABP</p>

¹ REP7-007

² The Applicant does not seek to set out all of ABP's points which have in any event been responded to in previous submissions, including in particular REP7-005, but has summarised the key points and responded accordingly.

		has greater clarity on how its concerns will be considered through the detailed design, construction and operation of the Scheme.
Permanent acquisition of land and Extent of Compulsory Acquisition Powers	<p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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</p>	<p>This response also forms the Applicant's response to SWQ 1.12: Document ABP: 2 of 3 – DL7, in para 1.7, appears to suggest the provision of “a right of eventual reverter over those parcels of land where the acquisition of freehold has been agreed by ABP” [REP7-007]. What is the Applicant's position in relation to this suggestion?</p> <p>The Applicant dealt with all of these points, and the Examining Authority's query, in its Deadline 7 submission REP7-005 under the heading Acquisition of plots 2-23, 03-04, and 03-05 and so refers in the first instance to that response.</p> <p>As an additional point in relation to the suggestion of a lease being granted by ABP, the Applicant's would note that it is still seeking to reach agreement with ABP such that a permanent transfer could be effected rather than the use of compulsory acquisition powers, as a long leasehold proposition would be least preferred.</p> <p>The starting point for this position is that the Applicant is seeking powers and statutory authority over ABP's land to construct physical structures to form part of a new highway. This structure and the road surface will need to be constructed, maintained, and crucially, operated as part of the Applicant's highway network. The preferred position would therefore be to have no fetter on its ability to exercise its powers as highway, street and traffic authority over the land and airspace involved, including in relation to the interaction of ABP with that structure.</p>

	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.	
Permitted Development Rights	<p>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.</p>	<p>This response also forms the Applicant's views in relation to SWQ 1.12:</p> <p>Document ABP: 2 of 3 – DL7, in para 1.11, suggests that the loss of the freehold at the location of the bridge would result in both the loss of an interest in this land and the loss of ABP's permitted development rights in connection with this land, should the bridge be removed at some later time [REP7-007]. Apart from 'the transfer of a leasehold interest' in the land, are there any other ways in which an interest in the land could be retained by ABP and are there any other ways in which permitted development rights could be again given to ABP in relation to this land?</p> <p>The Applicant discussed this point in its Deadline 7 submission REP7-005 under the heading Acquisition of plots 2-23, 03-04, and 03-05 and so refers in the first instance to that response, but also makes additional points below:</p> <p>Permitted development rights under Class B of Part 8 of the General Permitted Development Order 2015 ('GPDO') relate to 'operational land'. 'Operational land' is defined by section 263 of the Town and Country Planning Act 1990, and thus applying to the GPDO, as, in relation to statutory undertakers: 'land which is used for the purpose of carrying on their undertaking; and land in which an interest is held for that purpose'.</p> <p>The question of whether land is operational land then becomes a question of fact - is the land used for the purposes of the undertaking; if the answer to that question is yes, then permitted development rights would apply.</p>

		<p>As such, in a scenario where the Applicant had used its compulsory acquisition powers, but then had cause to decommission the bridge and thus would need to dispose of the land, that disposal back to ABP (as given its location no other party would be able to access or use it) would enable ABP to use the land for its undertaking, and thus its PD rights would be able to be utilised.</p> <p>The long term loss of permitted development rights should therefore not be seen as an additional 'ground' of alleged serious detriment for ABP in this regard – the Applicant accepts that the land that would be compulsorily acquired will be lost to ABP, but that should not be 'double counted' in a decommissioning scenario.</p>
Compulsory acquisition of the pontoon	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.	The Applicant discussed this point in its Deadline 7 submission REP7-005 under the heading Mooring (Plot 03-52) and does not repeat that response here.
Compulsory acquisition of airspace and other rights over land	<p>ABP 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.</p> <p>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.</p> <p>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</p>	The Applicant discussed this point in its Deadline 7 submission REP7-005 under the heading 'Airspace' Plots – 2-32, 2-33, 3-33, 3-34 and 3-35 and does not repeat that response here.

	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.	
Vehicular Access and Commercial Road	<p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p>	<p>This response also forms the Applicant's views in relation to SWQ 1.13: Document ABP: 2 of 3 – DL7, in para 1.28, states that "There is no means of access for Plots 2-32 and 2-33" [REP7-007]. ABP is requested to clarify this statement.</p> <p>The Applicant discussed this point in its Deadline 7 submission REP7-005 under the headings Use of Commercial Road and Shed 3 – 02/23 and the points there are not repeated here.</p> <p>However, the Applicant considers it is worth re-emphasising the following points:</p> <ul style="list-style-type: none"> the provisions of the interim CoCP require port access to be maintained during construction - that is secured through the DCO and so must be achieved; the Applicant was acutely aware that construction in the location chosen would necessitate revisions to port access arrangements; however it was also aware that the use of the Applicant's land powers is subject to ABP's consent. As a result of this, instead of arbitrarily applying land powers to the whole of the north bank, the Applicant recognised that arrangements would need to be made for a diversion as a condition of any consent for the Applicant's exercise of the limited extent of temporary possession powers sought; the Applicant has noted the provisions of article 11 of the draft DCO which enables the temporary stopping up, alteration or diversion of any street with the consent of the street authority (for Commercial Road, ABP). This

		<p>article, following recent precedent (e.g. Silvertown Tunnel Order 2018) does not limit such power to the Order limits, recognising that flexibility is required during construction of large schemes. As consent is required from the street authority the article recognises that a Scheme promoter would need to take additional steps to ensure that the diversion can be implemented - which is the case here. Taken with ABP's proposed Protective Provisions, it is clear that the Applicant would always be required to work with ABP to facilitate a diversion taking place; and</p> <ul style="list-style-type: none"> the Applicant has been undertaking discussions with ABP as to how the Applicant can best facilitate the mitigation of impacts of construction on ABP's tenants and in relation to access concerns, and has appended at Appendix A correspondence between the parties on these issues. These letters demonstrate that the parties are already considering detailed issues, building on the framework that was circulated in the draft Side Agreement sent to ABP on 1 March for comment.
Construction Compound	<p>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.</p> <p>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</p>	<p>The Applicant discussed this point in its Deadline 7 submission REP7-005 at Appendix A and does not repeat that response here.</p>

	terms? Will the proposed construction works sever the operational area and prevent vehicular transit to the west of the bridge works?	
ANNEX 2 – SUPPLEMENTARY NOTE – ISSUES REGARDING THE CPO AND DCO		
Paragraph 53 of ABP's Protective Provisions and Articles 20 and 22	<p>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.</p> <p>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.</p> <p>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).</p> <p>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</p>	<p>The Applicant set out in its Deadline 7 submission (REP7005) that the mechanism of compulsory acquisition powers of statutory undertakers' land being subject to that undertaker's consent is extremely well precedented.</p> <p>As noted there, such a mechanism proceeds on the basis that in making the DCO, the Secretary of State has been convinced that the giving of the power has been justified, and so it is given.</p> <p>This is particularly true given the strict tests under section 122 of the Planning Act 2008 for the DCO regime in relation to the authorisation of compulsory acquisition powers.</p> <p>This Examination process tests the justification for the powers, as set out in the Statement of Reasons, before it is then determined by the Secretary of State whether they should be given.</p> <p>As such, the Applicant acknowledges that there is nothing to prevent ABP from objecting to these powers on the basis that they are not <u>justified</u> under the section 122 and policy tests.</p> <p>The Applicant also notes that, importantly, the Secretary of State also consents not just to the power, but also to its extent, and the controls upon it. As such if the Secretary of State did grant consent for powers of compulsory acquisition of all of the land under ABP's control proposed on the Land Plans, it would be on the basis that he considered that there was justification to do so for the whole of that land.</p>

<p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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</p>	<p>The Applicant therefore acknowledges that it is required to fully justify why it needs to acquire all of the land required and it has done so in the Statement of Reasons, explaining that it is the physical footprint of the Scheme at this stage of design plus the limits of deviation.</p> <p>Flowing from this, it is the Applicant's position that ABP would not be able to <u>unreasonably</u> veto the use of compulsory acquisition powers over its land, once the Secretary of State has determined that powers should be granted over the full extent of it, and therefore would not be able lawfully to use the consent mechanism in the protective provisions to frustrate implementation of the Scheme.</p> <p>The focus of the consent of the Protective Provisions is therefore on the 'how' of the powers being used, not the 'what' or the 'where'.</p> <p>It is the case that if ABP could reasonably show that the 'how' could not work, then they would be able to reasonably refuse consent, but in doing so it would have to show that it acted reasonably in determining that such a consent could not be granted. The Applicant does not argue, however, that <u>any</u> attempt to qualify the powers would be unreasonable.</p> <p>It is in that context in which the debates have been held in this Examination – ABP have raised a number of points as to their concern that the compulsory acquisition powers would not 'work' for ABP and the Applicant has responded by saying that will be dealt with through the consent mechanism – and that is indeed the case.</p> <p>However, because those controls exist, that is not the question that falls to be considered for the purposes of whether or not the</p>
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	<p>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.</p> <p>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.</p> <p>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.</p>	<p>DCO is made - that question is whether each plot meets the relevant tests to justify its inclusion within the made Order.</p> <p>Article 22 is relevant to the question of when the Applicant comes to ABP to seek consent for use of powers on its land. That is because at the stage when this consent is sought, the final design will be known and so the answer to the article 22 test of whether that specific land, having taken account (or not, as the case may be) of limits of deviation, is 'required' for the Scheme, will be known. Any dispute in that regard would be able to taken to arbitration by ABP.</p> <p>Finally, in relation to timeframes, the Applicant notes that the dDCO includes provisions for timeframes both in relation to consents and with regard to the mechanisms by which arbitration will take place. This reflects recent trends in DCOs, such as the Millbrook Gas Fired Power Station DCO, to provide certainty as to timing in the interests of efficient and economic scheme delivery.</p>
ANNEX 3 – SUPPLEMENTARY NOTE – SERIOUS DETRIMENT		
Points Raised in Part 2 of the Covering Submission	<p>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.</p> <p>He set out that in considering serious detriment:</p> <ul style="list-style-type: none"> undertaken in that area it is not just a matter of compulsory acquisition, but also in terms of the impact of the Port more broadly; when considering the 'carrying on of an undertaking' a holistic approach should be taken and that size is not a determining feature (see Hinkley); a judgement is required which will include the importance of the operations but that is only one component of the test, including 	<p>The Applicant discussed these concerns in its Deadline 7 submission REP7-005 under the heading Characterisation of the Serious Detriment Test and does not repeat the points made there here.</p> <p>In response to ABP's bullet points here, however, it can confirm that it agrees that the test is a broad one that is affected not just by the land to be compulsorily acquired in isolation but also by the consequence that acquisition would have on port operations. It also agrees that size of land affected must be seen relative to its use within the statutory undertaking of the port.</p> <p>As ABP indicates, however, underlying the test is a judgement – is there a detriment and is it of a nature or scale or importance to</p>

	<p>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;</p> <ul style="list-style-type: none"> • it should be noted that the introduction of a new bridge at height through a working port is a unique set of circumstance; • the future undertaking as well as the current operation needs to be considered; • the Port undertaking should be understood in its broadest sense – including the commercial operation of Port and port activities; • there is no precedent or requirement to show that an effect "must be proven to be at least reasonably likely" as set out in the Applicant's Port Impact Paper; • 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. 	<p>amount to serious detriment to the carrying on of the statutory undertaking?</p> <p>In so doing the ExA and the Secretary of State can consider current and future operations, but in making the judgement as to whether there is a detriment or whether it is serious, they will also need to ascertain what those future operations will be in order to make the judgement as to whether there is serious detriment to those operations - in other words, identifying the future operations underpins identifying the detriment caused, and its level of seriousness.</p> <p>It is the Applicant's position that it is within that lens of multiple judgements being made that the written and oral evidence in relation to both compulsory acquisition and navigation needs to be considered.</p> <p>In particular whether matters being made a little less 'efficient' or not 'best fit' in the Port (such terms that were used by ABP in the 1 April hearing) or that a new bridge is regarded by ABP as 'undesirable' should not, in the Applicant's view, be judged as either a 'detriment' or 'serious'. It should be borne in mind that the effect of the 'serious detriment' test is to preclude compulsory acquisition of the affected land, which (in order to separately satisfy s.122 PA 2008) should be assumed to be land for which a compelling case in the public interest to justify compulsory acquisition can be otherwise shown. The 'serious detriment' test therefore precludes the required land assembly for a project which is otherwise in the public interest. It is the Applicant's position that Parliament did not intend to give statutory undertakers protection from all and any interference with the carrying on of their operations, but only in cases where there was 'serious detriment' such that the overall balancing of the public interest favoured the carrying on of the statutory undertaking unchanged over the implementation of the project in question. Where there would be a lesser degree of interference to the carrying on of the undertaking than 'serious detriment', which</p>
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		<p>might include changes resulting in a less 'efficient' way of working than an optimum or 'best fit', the compensation code would provide an adequate recompense for the loss of the land taken.</p> <p>In that context, the Applicant would also draw the Examining Authority's attention to the Able Marine Energy Project, where ABP made similar objections to this Scheme in relation to the proposed compulsory acquisition of a triangular piece of land that ABP proposed to be used as a deepwater jetty ('WDJ'). Here, the Examining Authority (para 18.202) stated the following in recommending the grant of CA powers in the DCO:</p> <p><i>Despite ABP's representations, the production of the Port Masterplan and the draft Harbour Revision Order the WDJ is clearly still at an early stage of project development. It is not certain that it will proceed. The WDJ may be required to support the further development of the undertaking, but the acquisition of the triangle site at this time would not obviously cause serious detriment to the carrying on of the undertaking. The Panel must conclude that it would cause little or no detriment to the current undertaking. The detriment is potential rather than certain – it is in the future; it will not arise if the demand does not arise; it may not arise if other sites for the WDJ within the ABP estate can be used.</i></p> <p>This was followed by the Secretary of State who ruled (para 42): <i>The Secretary of State accepted the Examining Inspector's recommendation to issue a certificate under section 127(2)(b) of the 2008 Act in respect of the "triangle site". The Secretary of State notes that on 20 November 2013 ABP applied to the Marine Management Organisation ("MMO") for a Harbour Revision Order under the Harbours Act 1964 to authorise the Immingham Western Deepwater Jetty ("IWDJ") which would use the triangle site. While he recognises the progress made by ABP in its development of this project since the close of the examination, he remains of the view that it is appropriate to issue the section</i></p>
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		<p><i>127 certificate as it is not certain that the IWDJ will proceed or that it must occupy the triangle site. He is accordingly satisfied that the acquisition of the triangle site for the purposes of the project would not cause serious detriment to the carrying on of ABP's undertaking</i></p> <p>The approach here reflects the approaches in <i>Hinkley</i> (the use of the subject land in the future of Bristol Port) and <i>Richborough</i> (the ability of SEW in practical and financial terms to build out its future reservoir proposals following the proposed acquisition) in making a judgement on the level of seriousness of a detriment by considering to <u>what</u> is the detriment being caused.</p> <p>The Applicant notes the parallels of Able Marine with the Scheme, particularly the reliance on an unpublished Masterplan to evidence the future scenario, and that the use proposed for the land affected could be undertaken elsewhere – a jetty in that case, berthing in this case, and that ABP was not able to convince that ExA that the loss of that particular piece of land would cause an inability for the jetty to be built elsewhere.</p> <p>The Applicant would suggest that there are parallels with those judgements made in Able Marine with the Scheme when considering the future scenario to which any detriment would be caused, particularly when one comes to consider actually how many berths will be used in the future compared to the loss created by the Scheme.</p> <p>Furthermore, the Applicant notes that even ABP recognised, at the 1 April hearing, that impacts on the port's business will only 'potentially' occur (1:22:10 of EV-16) and that it would be more 'difficult' to market Lowestoft (1.23:34 of EV-16) with some disadvantages. Mr. Harston of ABP concluded his remarks at the hearing by stating that the new bridge would create 'increased difficulties, increased risk and challenges in marketing and operating the Port' (1.36.25 of EV-16).</p>
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		Whilst the Applicant has made its case in this document and elsewhere that even these impacts are either mitigated or can be managed, it is apparent from the words used by ABP itself, that the 'detriment' is not set out as 'serious' or anything approaching that.
Who is the statutory undertaker?	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.	This is agreed by the Applicant.
What is the port statutory undertaking?	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.	This is agreed by the Applicant.
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?	<p>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').</p> <p>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.</p> <p>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,</p>	<p>The Applicant's position on this is clearly set out in its Deadline 7 submission REP7-005 under the heading Characterisation of the Serious Detriment Test.</p> <p>The Applicant has not attempted to mischaracterise the test or indeed substitute language, it has consistently sought to make clear that in determining seriousness and detriment a judgement will need to be made both as to the impact and what is impacted.</p> <p>In terms of understanding the extent of ABP's undertaking, the Applicant has recognised the extent of the undertaking since the application, as set out in the Statement of Reasons. It recognises that ABP's statutory and commercial undertakings are holistic but that section 127 does not extend to the success or failure of specific tenants within ABP's undertaking, as set out in the Applicant's Deadline 7 submissions.</p>

	<p>should not to be taken into account when determining whether section 127 is engaged.</p> <p>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.</p> <p>Despite the attempt made by the Applicant to re-interpret the legislation – its allegation being that there is a danger in "<i>substituting different language for the statutory test</i>" – the wording of section 127 is in fact unambiguously clear. It falls into two essential components, namely: –</p> <p>(a) First, that part of the statutory port estate which is to be compulsorily acquired is being used for the purposes of "<i>carrying on the statutory undertakers' undertaking</i>", and</p> <p>(b) Second, that the <i>compulsory</i> acquisition will cause - "<i>serious detriment to the carrying on of the undertaking</i>".</p> <p>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.</p> <p>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.</p> <p>As the ExA will appreciate, the legal reality is that the legislation – both national and local – has authorised ABP to carry on its business</p>	
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	<p>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.</p> <p>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. 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.</p>	
<p>On the basis of the above, is an impact that is "significant" or "important" the same as an impact that causes "serious detriment"?</p> <p>and</p> <p>How far does serious detriment extend?</p>	<p>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?</p> <p>ABP then goes on to summarise the ExA report and decision making in Hinkley and Richborough and considerations in the Newport case in relation to serious detriment.</p>	<p>From these submissions, and at previous and written submissions, it is clear that ABP claims serious detriment will occur as a result of the Scheme from three broad issues:</p> <ul style="list-style-type: none"> the detriment that is caused due to the direct loss of berth space – both at that specific location and what that means for vessel berthing at that location and the consequential impact on the amount of berth space available across the Port in both the current and future scenario; the detriment that is caused by the bridge's physical presence in terms of navigational risk and safety; and the operation of the bridge in terms of the timing restrictions in the Scheme of Operation and the number

<p>Secretary of State's Section 35 Direction</p>	<p>ABP notes the Scheme's Section 35 direction as stating that it <i>"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."</i> as well as setting some of the growth options for the Port.</p> <p>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 <i>"a hub for ... off-shore wind farms"</i>?</p> <p>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.</p> <p>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.</p>	<p>of vessels that would require an opening due to their height - the delay this would cause and thus the consequential attractiveness of the Port of Lowestoft in the future to vessels who may be affected by those restrictions (e.g. as an offshore hub).</p> <p>For each of those topics, the Examining Authority and the Secretary of State will need to determine whether the effect of the Scheme is a detriment, and in so doing, consider what current and future scenarios will that detriment be caused to, to ascertain its seriousness.</p> <p>The Applicant has sought to show in its submissions to date (for example, REP7-007) and at Deadline 8 (SCC/LLTC/EX/98), that there would either be no detriment, any detriment would not be serious, or that there is not a realistic future scenario where such detriment would become serious. Furthermore, where there could be issues that would lessen the detriment involved the Applicant has offered to deal with them (e.g. the security fence adjacent to the bridge; Shed 3 doors and oil booms).</p> <p>Notwithstanding the above, the Applicant also acknowledges that ABP has raised a number of other concerns relating to land that is to be temporarily possessed but that it has done so whilst in the context of discussions of serious detriment.</p> <p>However, the Applicant's position is that these matters do not relate to the compulsory acquisition of land, and thus the serious detriment test is <u>not</u> engaged when considering the impacts of the temporary possession of that land - in that instance the Examining Authority and the Secretary of State must just determine whether the Applicant should be granted the proposed powers over the temporary possession plots.</p> <p>The 'wider effects' which the Applicant agrees must be considered when considering the serious detriment test are those that flow from the compulsory acquisition of ABP's land, i.e. that</p>
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		<p>a bridge structure will exist and operate, potentially causing the issues set out above.</p> <p>Separate powers are applied for in relation to the temporary possession of land, and the consequences of them relate to that power, <u>not</u> the power of compulsory acquisition.</p>
Concluding comments	<p>The key elements that can be drawn from the above, therefore are that: 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. 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.</p>	<p>The Applicant agrees with the first part of this summary in terms of the first (a) and the first (b). In relation to the second (a), the Applicant accepts that the size of an area of land taken is not <u>necessarily</u> determinative (in that a small area of land could, depending on its location, have critical functional importance) but the size and extent of land taken is, nonetheless, a relevant factor. In relation to the second (b) the Applicant repeats its Deadline 5 submissions that the statutory language of 'serious detriment' should not be substituted by other terms. In relation to (c) and (d), the Applicant repeats its Deadline 5 submissions that the likelihood of future activities taking place is relevant to how much weight they should carry in any assessment of 'serious detriment'.</p>

Appendix A: Recent Correspondence between the Applicant and ABP

Date: 26 March 2019
Enquiries to: Jon Barnard
Tel: 0345 6031842
Email: lakelothing3rdcrossing@suffolk.gov.uk

Mike Stacey
Head of Projects - Commercial
Associated British Ports

By email only

Open Correspondence

Dear Mike

Temporary Possession of land in the Port of Lowestoft in relation to the construction of the Lake Lothing Third Crossing (“the Scheme”).

Thank you for your email of 20 March 2019; as it was quite lengthy, I have responded in detail in an Appendix to this letter rather than through email.

Additionally, there are some overarching matters that I would like to address to provide some context, partly in response to Annex 2 of ABP’s summary of oral submissions made by ABP at the adjourned Compulsory Acquisition Hearing, entitled *Supplementary Note – Issues regarding the CPO and DCO*.

Protective Provisions

In line with the Planning Act 2008 *Guidance related to procedures for the compulsory acquisition of land*, Suffolk County Council (“SCC”), as the Applicant, is required to demonstrate that any potential risks or impediments to the implementation of the Scheme have been properly managed.

SCC has therefore included within the application for development consent sufficient land for it to be able to construct and operate the Scheme. You will have noted that in our note on the hearings held on 7 and 8 March¹ we have provided additional information on the need for and scope of plots of land within the Port of Lowestoft. Appendix A to that document considers the temporary possession plots in further detail.

However, recognising that acquisition and/or occupation of such land could interfere with ABP’s statutory undertaking, protective provisions are included within the Order. Again as set out in our note on the oral hearings, SCC does not consider that the mechanisms therein relating to the acquisition or occupation of land provide for an impediment to the implementation of the Scheme. This is because, firstly, with consent for the Scheme having been granted, the principle that land will be needed to deliver the scheme is, at that point, established; and, secondly, statutory undertakers are expected to act with a degree of reasonableness.

¹ <https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/TR010023/TR010023-000903-Suffolk%20County%20Council%20-%20Response%20to%20ABP's%20Deadline%205%20and%20Oral%20Submissions%20at%207%20&8%20March%202019%20Hearings.pdf>

SCC notes that ABP accepted a similar arrangement with regard to the Tidal Lagoon Swansea Bay (“TLSB”)². Paragraph 3 of Schedule 8 of that DCO³ (For the Protection of Associated British Ports) reads;

Acquisition or use of port land

3.—(1) The undertaker must not under the powers conferred by this Order acquire or use, or acquire new rights over, port land without the consent of AB Ports.

(2) The undertaker must not exercise powers conferred by article 15 (authority to survey and investigate the land) or the powers conferred by section 11(3) of the 1965 Act (powers of entry) in respect of any port land without the consent of AB Ports.

(3) Article 25 (power to override easements and other rights) does not apply to any rights held by AB Ports for the purpose of its statutory undertaking, except with the consent of AB Ports.

(4) The consent of AB Ports under this paragraph must not be unreasonably withheld but may be given subject to reasonable conditions

Indeed, in making representations on this drafting, ABP stated⁴:

PP 3 – use of port land

It is normal and well precedented for statutory undertaker’s operational land not to be subject to compulsory purchase (but with its acquisition to be subject to consent which is not to be unreasonably withheld, so as not to be able to prevent the scheme proceeding). This is an important matter of principle for ABP. We consider that this provision should remain [alongside] the commercial negotiations which are continuing.

SCC understands that the commercial negotiations referred to above culminated in two leases (preceded by Option Agreements), the first related to the operational life of the project and the second on the temporary basis for construction⁵.

The Examining Authority for Tidal Lagoon Swansea Bay considered this matter at paragraphs 6.13.19 to 6.13.32 of its Recommendation Report, noting at paragraph 6.13.31, that in the light of the Protective Provisions afforded to ABP in the DCO by paragraph 3 of the Protective Provisions, ABP did not resist the retention of the powers of compulsory acquisition of its land in the DCO⁶.

SCC has adopted an identical approach to that ultimately agreed by ABP with TLSB:

- To include within the DCO the maximum extent of land that is required for the Scheme that is brought forward in the public interest, based on a reference design and its limits of deviation
- To include Protective Provisions within the DCO of a nature that ABP has previously accepted
- To seek to engage in commercial negotiations on the terms on which the acquisition/occupation will be made.

SCC reiterates that it is willing to enter in to commercial negotiations relating to the acquisition and possession of land. As you will be aware the current version of the Side Agreement issued to ABP on 1 March provides a process for both the permanent transfer of land and temporary occupation of the construction compound to be developed.

² The PPs put forward in ABP’s representations match those included in the Order as made.

³ <https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010049/EN010049-001990-Associated%20British%20Ports%201.pdf>

⁴ [https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010049/EN010049-003133-Tidal%20Lagoon%20\(%20Swansea%20Bay\)%20DCO.pdf](https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010049/EN010049-003133-Tidal%20Lagoon%20(%20Swansea%20Bay)%20DCO.pdf)

⁵ <https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010049/EN010049-001859-Associated%20British%20Ports%20Part%201%20of%202.pdf>

⁶ <https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010049/EN010049-002423-Associated%20British%20Ports%205.pdf>

⁷ [https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010049/EN010049-003137-Tidal%20Lagoon%20\(Swansea%20Bay\)%20%20Recommendation%20Report.pdf](https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010049/EN010049-003137-Tidal%20Lagoon%20(Swansea%20Bay)%20%20Recommendation%20Report.pdf)

SCC acknowledges that ABP's preference is for a leasehold in lieu of a permanent transfer of land. While SCC is willing to consider this proposition further, such an agreement can only be effected outside of the DCO process, as such until such time as ABP sets out the terms of such a leasehold, SCC cannot contemplate acceding to such a proposition. SCC therefore invites ABP to provide the terms of such an agreement.

With regard to temporary possession, SCC remains prepared to enter in to a licence agreement for the occupation of the relevant land. We have set out in Appendix 6 to the Side Agreement some matters that will be relevant to such a licence. SCC has requested ABP provides a copy of a 'standard licence' such that it may be refined for the purposes of the Scheme. SCC's anticipation nonetheless is that ABP, as landlord, would wish to draft the licence, but SCC can instead do that should that be ABP's preferred way forward.

SCC is also willing to consider whether one or more Option Agreements is an alternative way forward.

It is with the intention of progressing the commercial discussions that SCC, through its land agents, Ardent, has sought over many months to meet and discuss property matters with ABP's property representatives. In view of the remaining time for the examination, SCC would suggest that such discussions should commence in earnest.

The pursuance of a negotiated position between the parties is mutually beneficial in that should the Order be made there is a clear starting point from which to finalise detailed matters (i.e. the reasonable conditions that should apply) and a reduced likelihood of the need for resolution by arbitration, which cannot be in the interest of either party.

SCC maintains however that the *finalisation* of mitigation measures (conditions) to minimise interference with ABP's statutory undertaking are best resolved once all the necessary information is available. That would include:

- Detailed design of the Scheme
- Detailed construction methodology
- Detailed construction phasing – week by week activities and space requirements
- Detailed tenant requirements (as far as can be predicated) including on (say) a week by week basis, including:
 - Berthing requirements
 - Quayside requirements
 - Vehicular movements
- Detailed programme of wider port activities, for example dredging

As construction of the Scheme will not commence for some 9 months detailing a mitigation strategy at this point for every eventuality would be impractical. As such SCC considers that the mechanism of reserving discussions on detailed matters to a later date is appropriate, and conventional practice. Additionally, contrary to ABP's suggestion that SCC seeks to "deal with it on the day", SCC wishes to resolve as much as possible as soon as possible (hence the provision of the Side Agreement), but nonetheless continues to believe that given the nature of port operations and construction activity (for example a grain vessel may arrive at short notice) there needs to be flexibility embedded within the management process.

That said SCC is seeking to address the headline matters of concern that ABP has raised through a Side Agreement, for example in relation to the construction compound SCC has proposed that:

- A licence for the occupation of the construction compound will need to be considered alongside the requirements for space or alternative marshalling arrangements for Dudmans (which could involve SCC occupying additional land, on terms to be agreed by ABP)

- A means of compensating ABP due to unavailability of quay space where alternative provision cannot be made and/or losses incurred in relocating users will need to be agreed.
- A traffic and access management action plan will be put in place to, *inter alia*
 - Set up a clear, safe and efficient movement system for ABP's Port traffic, occupiers' traffic and the Contractor's traffic.
 - Prevent traffic congestion immediately outside the Port entrance (especially at the intersection of Commercial Road and A47).
 - Identify the main access and egress points from any construction compound onto the Port road system.
 - Maintain and clean any length of road within the Port affected by the Scheme.
 - Installing and maintaining any safety and security fencing required by ABP in relation to the Works site(s) or related accesses.
 - Prescribe an access protocol for all contractors and visitors to the Port during the Scheme
 - Deal with security and health and safety matters (including without limitation statutory port security matters).
 - Accommodate all matters in respect of maritime and, if appropriate, rail traffic within the Port.
 - Take fully into account all health and safety matters, including interface with the Contractor.

SCC notes however that ABP is encouraging the Examining Authority to consider matters in a "no deal world" i.e. where ABP has declined the above mitigation measures offered by SCC through the Side Agreement.

Such an approach causes SCC to review, on that basis, whether the Side Agreement can have any contemporary purpose in view of ABP's apparent unwillingness to consider its undertakings in making representations to the Examining Authority.

While SCC considers that such an Agreement can provide an effective tool to manage the interface between SCC and ABP's interests, it is apparent to SCC that ABP is seeking to present a worst possible scenario to the Examining Authority ("no deal") to substantiate its case for serious detriment, which is in SCC's view, having regard to the measures that SCC is willing to put in place, overstated.

Notwithstanding the above, SCC recognises that ABP has some specific operational concerns in relation to the occupation of the construction compound and the temporary closure of Commercial Road and therefore has responded in further detail in the Appendix, attached. It is clear that options are available to resolve these points and, as noted above, SCC considers they can therefore be satisfactorily resolved, particularly with direct engagement with the Port's tenants.

ABP has noted to the Examining Authority that the land that would be required to effect the temporary diversion route of Commercial Road has not been included in the Order limits and therefore this is a fundamental impediment to the delivery of a diversion route. SCC would note that the inclusion of such land in the Order limits is unnecessary owing to the provisions of article 11 of the DCO which for convenience is set out below:

Temporary stopping up and restriction of use of streets

- 11.—(1) The undertaker may, during and for the purposes of carrying out the authorised development, temporarily stop up, alter or divert any street and may for any reasonable time—
- (a) divert traffic from the street; and
 - (b) subject to paragraph (3), prevent all persons from passing along the street.

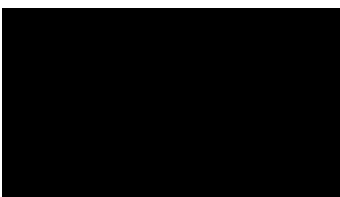
- (2) Without limitation on the scope of paragraph (1), the undertaker may use any street temporarily stopped up under the powers conferred by this article and lying within the Order limits as a temporary working site.
- (3) The undertaker must provide reasonable access for pedestrians going to or from premises abutting a street affected by the temporary stopping up, alteration or diversion of a street under this article if there would otherwise be no such access.
- (4) The undertaker must not temporarily stop up, alter or divert any street for which it is not the street authority without the consent of the street authority, which may attach reasonable conditions to any consent.
- (5) Any person who suffers loss by the suspension of any private right of way under this article is entitled to compensation to be determined, in case of dispute, under Part 1 (determination of questions of disputed compensation) of the 1961 Act.

As such, with the permission of the street authority (which would be ABP for the section of Commercial Road that is not adopted highway), SCC may divert Commercial Road and ABP may append reasonable conditions in consenting to that diversion. Therefore, this puts the diversion route on an equivalent footing to other land that SCC seeks to use during the construction process within the Port.

With respect to an indemnity, the forthcoming provision of the Newport indemnity is noted. That is however unlikely to change SCC's view on the necessity of an indemnity broader than that provided for in the DCO for the reasons explained in our submissions to date. That indemnity does already provide for SCC being liable for all claims and demands arising out of the construction of the Scheme, save for those attributable to the negligence of the harbour authority. As such liability relating to the management of the construction compound and associated diversions of traffic would be captured by the existing provisions.

SCC recognises that there are a number of matters that it does not appear we will reach agreement upon and in that scenario the appropriate course of action is for the Secretary of State to take those differences into account in coming to a decision on the Scheme. That said, SCC remains committed to working with ABP to narrow those differences wherever possible, in particular through a comprehensive Side Agreement. Consequently, SCC invites feedback on the current version as soon as possible and welcomes an opportunity to discuss the matter further.

Yours sincerely



Jon Barnard

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ABP Comments	SCC Comments
Inset A/B – a suggested HGV U-turn manoeuvre to give access to the Dudman’s weighbridge, with subsequently reverse off weighbridge and pull forwards along Silo quay.	
<ul style="list-style-type: none"> You appear to have overlooked the need for an HGV marshalling area – needed when HGVs need to be held, pending discharge of their grain etc loads to the silo complex. I attach a couple of photos taken last September that illustrates the extent of provision required. In simple terms, where are you proposing to hold safely these HGVs under your suggested arrangement? <ul style="list-style-type: none"> They cannot be held along Commercial Road without causing a traffic hazard given the width of the carriageway. Given that the exit from the Dudman’s site is only around 140m to the east of the weighbridge, this would in any event allow for a queue of only around 7 HGVs before the exit from Dudmans would become blocked. Notwithstanding that SCC’s inset A appears to suggest that HGV’s <u>will</u> have been held on Commercial Road (something I would question from a basic road safety point of view – see preceding point), the manoeuvre suggested is not one that is carried out currently as you suggest below – instead HGVs effect a much broader U-turn further to the west, thereby allowing access to the marshalling area. Under the Council’s proposal: <ul style="list-style-type: none"> What will prevent HGV drivers from driving into the on-coming lane of Commercial Road to effect a broader sweep? (and hence introducing an additional traffic hazard to the Port) Is SCC comfortable, from a safety perspective, with HGVs being ‘forced’ to face on-coming traffic to effect such a tight U-turn? Your analysis appears to overlook the fact that once an HGV has discharged its cargo it needs to be reweighed (to 	<ul style="list-style-type: none"> SCC is fully aware that Dudman’s requires space to marshal vehicles. They are a number of options which could be reflected in the Side Agreement framework, which could be used in tandem, not at all or to respond to different scenarios: <ul style="list-style-type: none"> HGVs could be held within plot 2-22. As stated previously SCC does not expect to need all this space all of the time SCC is also seeking temporary possession of plot 2-19, this plot can be used in concert with plot 2-22 Commercial Road is, to the point of entry to the Port, public highway. Temporary traffic regulation orders could be introduced (under either RTRA 1984 powers or pursuant to article 52 of the DCO) to limit parking if that was constraining available width or use traffic management measures, should they be required for highway safety. A radio call up facility could be used, with HGVs held in a different area of the Port to be agreed with ABP and movements therefore orchestrated to avoid congestion or conflicts. A form of Vehicle Booking System – the principal of which are commonly used in Ports, such as at the Port of Felixstowe, London Gateway, albeit at a much larger scale, could be developed to avoid coincidence of larger numbers of contractor and Port related HGVs The turning manoeuvre shown does not require use of the opposite carriageway; using the opposite side of the carriageway is therefore no more likely than it is today. In any event the person in control of the vehicle is able to make a judgement as whether it is safe to effect such a turn; visibility

calculate the weight of cargo discharged from the HGV) by exiting Dudmans and returning to the weighbridge. Under the Council's proposal:

- Would the HGV then have to rejoin the queuing lane along Commercial Road?
- What if the queue for the weighbridge is already more than 7 HGVs long?
- If the HGV then has to turn right to travel along Commercial Road to join the back of the queue, where would it effect a U-turn on Commercial Road? (to join the back of the queue that has formed to the east of the Dudman's exit)
- Once an HGV has been reweighed, it needs to exit the Dudman's site without interfering with other in-bound (laden) HGVs, in order to avoid traffic congestion/eventual paralysis (currently this is effected simply, by the HGV pulling forward off the weighbridge and crossing directly onto Commercial Road). Under the Council's proposal:
 - If laden HGVs are queueing along Commercial Road, the out-bound HGV will not be able to pull forward off the weighbridge and cross directly onto Commercial Road, because its exit will be blocked by in-bound (queueing) HGVs.
 - The only alternative would appear to be to then reverse off the weighbridge (as per inset B) and then go around the Dudman's facility for a second time, thereby doubling the traffic density through the narrowest part of the Dudmans site – with the inevitable effect on congestion and eventual paralysis of the terminal.
- It is also necessary, in my view, to then overlay Insets A, B and E, in order to consider the occasions when a grain vessel is being loaded at the same time as the temporary diversionary route between 3 shed and Lake Lothing is required.
 - How will the conflict between through traffic and Dudman's traffic be managed? (they appear to cross

in this location is good, and traffic is intermittent.

Alternatively, kentledge could be used to separate the lanes if ABP has an ongoing concern.

- The analysis does not prohibit a vehicle recirculating to be reweighed (which SCC is aware of the need for); the reweighing arrangements would be considered in light of how the marshalling space was provided for. Clearly traffic management/marshalling can be used to bypass any queues, which presumably is the situation today where those laden and unladen HGVs need to coordinate their access to the weighbridge.
- A further alternative would be temporary provision of a second weighbridge at the exit point (i.e. eastern end) of the Dudman site to avoid the need for any recirculation and reduce any congestion. This option would appear to improve the efficiency of Dudman's operations from that today. SCC is happy to consider the provision of such mitigation measures through the Side Agreement.
- As a general point, conflicts in traffic movements can be resolved with traffic management (that is the point of it); clearly a vehicle will not be put in a position where it is, for example, blindly reversing in to two-way traffic. Inset E was provided as an indicative option: clearly that route can be realigned in light of prevailing requirements.

<p>each other using a scissor-manoeuvre immediately to the west of the weighbridge).</p> <ul style="list-style-type: none"> ○ a robust safety case be made to deal with HGVs reversing off the weighbridge whilst 2-way through traffic passes along the temporary diversionary route? 	
<p>Insets C/D – appears to show two different possible ways of reversing an HGV into shed 3</p>	
<ul style="list-style-type: none"> • I note your comment that “it would seem sensible to review the position at a later date when the final dimensions of the pier and associated protection are confirmed” together with the offer to make alterations to the building should the need arise. This does, however, cause us some concern in that ABP cannot agree a speculative proposal which has the potential to impact seriously on the operation of the Port on the assumption (hope) that when the detailed designs are completed after the DCO has been made, everything will work to our satisfaction. <ul style="list-style-type: none"> ○ Has any assessment of the building structure been carried out by the Council to confirm that the building can be altered in a way that provides sufficient (and safe) access and egress if the bridge pillars do indeed get in the way. ○ If so, may we see a copy please? ○ If no such assessment has been undertaken, how do you propose to give ABP sufficient comfort that the ongoing utility of the building will not be impaired? • How does SCC propose to maintain access to the eastern end of the building during construction of the proposed LLTC? (noting that the building currently has two occupiers – Petersons at the eastern end and World Offshore Marine at the western end). • How does SCC propose to maintain the security of the building during the period when alterations to the access are being undertaken? (noting that high value equipment is stored within it). 	<ul style="list-style-type: none"> • The tracking information provided shows that vehicles can enter the shed, or reverse up to the shed door in its current position without being impeded by a pier, following construction of the bridge. Clearance under the bridge in this location will be in excess of 5.3m (that secured in the DCO for Commercial Road) (because the soffit natural continues to rise away from Commercial Road towards Lake Lothing). • As explained previously, the ‘pink land’ encompasses the subterranean elements of the pier (i.e. the pile cap) and additionally a limit of deviation applied to that. It is evident from the drawing that the pier itself has a far smaller footprint than the pile cap and consequently there is full confidence that the pier will not obstruct the door of Shed 3 post construction. • SCC has accepted that access to this door is likely to be impeded during the construction process. SCC is prepared, if ABP sees it necessary, to develop alternative access proposals more fully at this point, though would request as built drawings of the Shed and a dialogue to be facilitated by you with Petersons and World Offshore Marine to ascertain their access requirements in terms of size, frequency, timing, number of vehicular movements etc to develop an appropriate solution. • The building is a steel portal frame with profiled metal cladding; such buildings are not typically complicated to modify. • Maintaining security of the building at all times would be a specification of any works contracted, which could be checked by ABP pursuant to their consents required under the Protective Provisions and the Side Agreement. Security measures could include provision of security guards.

Inset E – temporary diversionary route between 3 shed and Lake Lothing whilst Commercial Road is shut.

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| <ul style="list-style-type: none"> • The route shown, to the west of 3 shed, crosses an area currently occupied by World Offshore Marine who have the right to load and unload vessels along a predetermined section of quay where your proposed diversionary route passes. They also occupy the western part of 3 shed. <ul style="list-style-type: none"> ○ What are SCC's proposals to deal with this? (in effect the diversionary route shown would require the temporary relocation of that company – who are, incidentally integral to the EA1 off-shore wind farm operations). • I note that the route shown actually takes a significant proportion (around 25% I would estimate) of plot 2-22 (additionally the proposals shown in Insets A and B appear to also reduce further the effective size of plot 2-22). <ul style="list-style-type: none"> ○ Does this mean that SCC's contractors will require additional temporary possession of land at the Port to make up a shortfall? ○ If so, where? ○ If not, this does rather suggest that the original logic behind the CPO being sought is flawed, a concern we have raised elsewhere e.g. in relation to plot 2-23, 3-03 and 3-05. It might help our understanding of your needs if we were to have your explanation of these requirements from 'first principles' as we remain far from clear on the need and justification for this particular aspect of the CPO. • For how long do you anticipate the temporary diversionary route to be set up? <ul style="list-style-type: none"> ○ For how long will the concrete blocks you have shown in the picture below need to be in place along the quay side? (thereby preventing use of the quay) ○ How does the Council propose to protect the side of 3 shed from sideswipes by vehicles? | <ul style="list-style-type: none"> • SCC would welcome the opportunity to discuss any concerns World Offshore Marine has (including in relation to Shed 3) to understand their loading/unloading requirements, frequency of such need and quay space that is needed adjacent to the berth. SCC would want to understand their operations in more detail and the circumstances that would eliminate the possibility that a different length of quay could be used for a period of time. The mitigation measures would be determined once further details were available. • SCC's contractor would phase works to ensure that Commercial Road was not closed (as it is required to do pursuant to the CoCP) and therefore the diversion needed if the diversion route could not be satisfactorily accommodated due to that space being in use by the construction compound • As has been stated previously, the extent of land identified as being required temporarily sets out the maximum required at any given point in time, it may not be required all the time, hence it may be possible to be flexible in that requirement having regard to the need to meet conditions set by ABP, acting reasonably. • The justification for plots has been addressed in the main body of this letter and in previous submissions to the Examining Authority. • In the same way that SCC will seek a temporary possession from Network Rail to install the section of deck over the East Suffolk Line (in accordance with the protective provisions agreed with Network Rail), SCC will require a 'temporary possession' of part of Commercial Road for the similar installation of the deck between pier 6 and pier 7, thus requiring the road's temporary diversion. As ABP will be aware, SCC has assessed that the closure of the navigation channel to install and commission the central lifting span to be no longer than three weeks. We therefore expect the |
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<ul style="list-style-type: none"> ○ How does the Council propose to manage the movement of cyclists through the area – given the presence of railway lines running parallel to the quay (you will appreciate that the shallow trough the rail line is buried in acts as a hazard to cyclists as it runs parallel to the direction of travel, with the attendant risk of cycle wheels getting trapped in the trough and cyclists losing their balance and falling off). ○ How do you propose to manage the movement of pedestrians along the temporary diversion? (presumably they will also have to be segregated from the HGV route and the quay edge?) • You have asked for a copy of ABP's risk assessments relating to a previous temporary diversionary route along the side of 3 shed – I suspect you are referring to the specialist transit of two long loads (each consisting of a long, but light, pontoon structure) that were unable to manoeuvre onto Commercial Road without the need to remove and subsequently reinstate fixed structures, so the pragmatic decision was taken to slowly manoeuvre these two loads along between 3 shed and the quay. I would suggest that is quite different from the situation envisaged during the construction of the proposed LLTC because: <ul style="list-style-type: none"> ○ Commercial Road remained fully open at this time for all other traffic ○ The transit of the two long loads was very closely supervised at all times by operational staff, hardly a practical proposition for what may amount to prolonged periods of time during construction of the proposal. • I can also confirm that, to the best of our knowledge and belief, there has never been an instance when Commercial Road has been closed in the manner suggested by SCC. • In any event, however, recently ABP has carried out a fundamental reassessment of its work place transport procedures, following a number of incidents including, 	<p>installation of the deck across Commercial Road to be no longer than this and therefore the diversion of Commercial Road to be of a similar order of time.</p> <ul style="list-style-type: none"> • Measures to ensure the diversion route was available and safe for traffic would therefore be in place for an equivalent period of time, pursuant to the Traffic and Access Management Action Plan proposed in the Side Agreement. • Kentledge could be used either side of the route to protect Shed 3 and the suspended deck from vehicle overrun • Cyclists and pedestrians could be separated with a lighter weight barrier from the quay edge. Cyclists could be asked to dismount. It is noted the railway tracks currently cross Commercial Road, without any obvious mitigation in place for cyclists
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tragically, a small number of fatalities on dock estates where work place transport issues were a contributory factor. This underlines the need for:

- A formal assessment from first principles of the hazards that the Council's proposals introduce to the Port during the construction phase of the proposed LLTC (and for this reason, I am of the view that any previous risk assessments covering the movement of a long load along the quay are not relevant).
- The mitigation required to address those hazards.
- Specific indemnification of ABP against the liabilities that may follow as a result of the proposal (see below).

Mr Jon Barnard
Project Manager
Lake Lothing Third Crossing
Suffolk County Council
Endeavour House
Russell Road
Ipswich
Suffolk
IP1 2BX

By email only

5 April 2019

OPEN CORRESPONDENCE

Dear Jon

Temporary Possession of land in the Port of Lowestoft in relation to the construction of the Lake Lothing Third Crossing (“the Scheme”)

Thank you for your letter of 26 March 2019, together with its appendix.

Rather than repeat the points upon which we do not agree, it would perhaps be more instructive to consider the things that are either missing or glossed over in your responses.

I would suggest that most of these are matters that the ExA will certainly wish to understand better in order to consider properly the merits (or otherwise) of the proposed Scheme as it is currently formulated.

The overall approach that the Council appears to be adopting is to focus on justifying the powers sought in the dDCO on the basis of alleged precedent rather than actually explaining and justifying – other than in superficial terms – how things will actually work in practice “on the ground” whilst the proposed Scheme is being constructed and during operation.

On the basis of what you have provided to date, it is ABP’s view that the ExA will be in some difficulty in recommending approval of the proposed Scheme.

A common theme throughout your response of 26 March 2019 is to avoid going into any detail, whilst any potential solutions that are being offered (if they are actually being offered by the Council) are being prefaced by the statement that they “could be considered” or “might be provided”.

To be of any assistance to the ExA (or indeed ABP) a more rigorous approach is required, as set out in ABP’s responses that appear in the Appendix.



Turning to the protective provisions included in the dDCO for the proposed Scheme, it is of no assistance to compare the proposed Scheme to the Tidal Lagoon Swansea Bay DCO. The circumstances of that NSIP proposal were entirely different – as are the two Ports. For a start, the promoter of that DCO was not promoting a bridge through the middle of an operational port and in terms of the size and layout of the two port estates, there is no comparison. Tellingly, issues of 'serious detriment' were not raised by ABP in responding to that proposal. Suffice to say, the negotiations, representations, protective provisions and commercial arrangements agreed by ABP in respect of the Tidal Lagoon Swansea Bay scheme are not applicable precedents and have no bearing in relation to the LLTC Scheme (and, I would add, references to other so-called NSIP precedents such as Silvertown Tunnel are similarly irrelevant in that they do not deal with the particular circumstances of the proposed Scheme – being a public highway and bridge proposal across an operational port).

As regards the temporary diversion of Commercial Road and the point raised in your letter of 26 March 2019, that "...the inclusion of such land [being land within the Order limits] is unnecessary owing to the provisions of Article 11 of the dDCO.." – we fundamentally disagree with your analysis of the powers sought within the dDCO.

Article 11 is broadly defined to apply to "any street", by reference to Section 48 of the New Roads and Street Works Act 1991. This would include Commercial Road. As such, the powers of Article 11 are not limited to the DCO land, but extend to the issue as to whether the alteration/diversion of the street is required to carry out the proposed development, which includes the section of Commercial Road, in private ownership, within the Port that will be temporarily closed by the Council.

ABP recognises that Article 11 of the dDCO provides the Council with power temporarily to divert streets for the purposes of carrying out the Scheme. Such a diversion, however, can only be undertaken within a 'street' or 'public highway', in reliance on powers provided under separate legislative instruments. It is clear that the Article 11 power does not extend to the implementation of diversionary routes over any private land – and certainly not private land owned by a Statutory Undertaker and held for the purposes of its statutory undertaking. Such land does not constitute a 'street' (including a public highway) for the purposes of the New Roads and Street Works Act 1991.

In this regard, ABP notes that the Council's own website confirms that - *"diversion routes must be of the same or higher category of road as the road which has been closed in order to cope with the same types of vehicles which would have been expected to use the closed road. In some rural locations where this is not possible, a lesser category route may be agreed if there is no other alternative."*

We note that there are no alternative highways within the vicinity of Commercial Road which would avoid the need to locate the proposed temporary diversionary route over the Port estate. This lack of alternative route does not, however, enable the Council simply to implement a diversionary route over private land.

Your proposed location of the temporary diversionary route between 3 Shed and Lake Lothing, is across port operational land (to be precise common-user storage areas), part of which is also deployed as required as a marshalling yard for HGVs, associated with Port tenants. It forms part of the statutory Port estate and is a key part of land owned by ABP for its statutory undertaking.

This area does not constitute a street under the 1991 Act, nor is it a highway. As a consequence, the Council does not have the power under the dDCO to implement the diversionary route over this land.

It follows that if the Council is to obtain temporary possession over parts of the Port estate required for the purposes of implementing the temporary diversionary route, the affected land must form part of the dDCO. In addition, the necessary temporary possession powers must be specifically identified for the purpose of the temporary diversionary route. Patently, that is not presently the case.

If the Council is able obtain the requisite powers over the Port estate to implement the diversion, the other requirements of Article 11 will apply.

At present, the suggested diversion for Commercial Road cannot be undertaken by the Council without ABP's consent, subject to reasonable conditions, in accordance with Article 11(4).

You should be aware that in light of the seriously detrimental impact that your suggested proposals will have on port operations, ABP is not minded to grant consent for the use of the strip of land between 3 Shed and Lake Lothing as a diversionary route during construction of the proposed crossing. The fact that the Council appears not to have carried any health and safety risk assessment of the adequacy of its proposals also clearly does not assist your case.

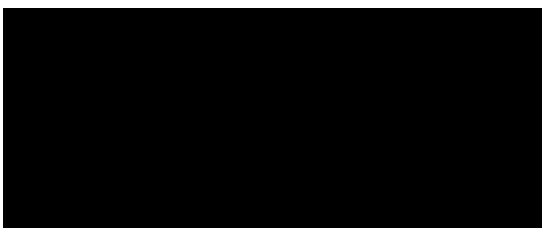
The reality is that the County Council has given little or no thought to the operational and safety concerns that ABP has now been raising for a while, whilst at the same time taking the view that a comprehensive indemnity, protecting ABP from the risks that the County Council is introducing to the Port by virtue of the operation of its proposed Scheme, is not required.

As such, ABP is left with little option but to maintain vigorously its objection to the proposed Scheme.

If the County Council considers it a worthwhile activity ABP is still prepared to provide comments on the draft side agreement previously rushed out by Pinsents. You will, however, appreciate that to be of any utility to ABP, new provisions will have to be added, in particular, on how the Council intends to replace the loss of berths within the Port, wording that allows more for a more flexible operating regime of the Scheme's bascule leaf, together with an indemnity that protects ABP from the risks that the County Council is introducing to the Port.

Before we embark on such an exercise, however, I do need the County Council to confirm that it is willing to see the inclusion of such provisions and also provide an undertaking as to the costs of amending the draft agreement provided by Pinsents.

I await your response.

A large black rectangular redaction box covering the signature area.

Yours sincerely

Michael Stacey

Head of Projects – Commercial

Copies: Andrew Harston, Regional Director ABP
Brian Greenwood, Partner – Clyde & Co
Michael Wilks, Consenting Manager, LLTC
Robbie Owen, Partner – Pinsent Mason

Appendix

Insets A/B – suggest HGV U-turn manoeuvre to give access to the Dudman's weighbridge etc.

SCC Comments	ABP Response
<p>SCC is fully aware that Dudman's requires space to marshal vehicles</p>	<p>Thank you for your explicit acknowledgement of this, although the Council's mitigation concepts (they amount to no more than this as will be demonstrated below) generally don't appear to acknowledge the scale of provision required.</p>
<p>There are a number of options which could be reflected in the Side Agreement framework, which could be used in tandem, not at all or to respond to different scenarios:</p> <ul style="list-style-type: none"> ○ (1) HGVs could be held within plot 2-22. As stated previously SCC does not expect to need all this space all of the time ○ (2) SCC is also seeking temporary possession of plot 2-19, this plot can be used in concert with plot 2-22 ○ (3) Commercial Road is, to the point of entry to the Port, public highway. Temporary traffic regulation orders could be introduced (under either RTRA 1984 powers or pursuant to article 52 of the DCO) to limit parking if that was constraining available width or use traffic management measures, should they be required for highway safety. ○ (4) A radio call up facility could be used, with HGVs held in a different area of the Port to be agreed with ABP and movements therefore orchestrated to avoid congestion or conflicts. ○ (5) A form of Vehicle Booking System – the principal of which are commonly used in Ports, such as at the Port of Felixstowe, London Gateway, albeit at a much larger scale, could be developed to avoid coincidence of larger numbers of contractor and Port related HGVs 	<p>Using the same numbering:</p> <p>(1) As a statement, this is of no practical comfort to ABP – how many HGVs could be held within plot 2-22? For what duration? What provisions would be put in place when plot 2-22 is not available? In addition, in ABP's communication of 20 March a number of points were raised that appear not to have been specifically addressed by the County Council – they are repeated here for ease of reference:</p> <ul style="list-style-type: none"> • In simple terms, where are you proposing to hold safely multiple HGVs (say 20) under your suggested arrangement? (photos supplied in original email). • Given that the exit from the Dudman's site is only around 140m to the east of the weighbridge, this would in any event allow for a queue of only around 7 HGVs before the exit from Dudmans would become blocked. Where do the other 13 HGVs go? <p>(2) How do you expect plot 2-19 to be used "in concert"? Your drawing 1069948-WSP-SGN-LL_C13-DR-CB-0018 appears to show plot 2-19 being required for the construction of the bridge span over the railway line, which is to be built parallel to the railway and then rotated into position. If that is the case, how can it be made available to alleviate problems related to the marshalling of vehicles for Dudmans?</p> <p>(3) The potential use of TTROs is noted – has the Council satisfied itself that Commercial Road is sufficiently wide at this point to safely accommodate two-way HGV traffic and a third queueing land for Dudman's HGV traffic, even with a TTRO in place? Where do you anticipate vehicles that would otherwise have parked on Commercial Road (but now cannot due to the existence of the TTRO) being</p>

	<p>parked?</p> <p>(4) Who will establish the radio call up facility and which areas of the Port do you anticipate being used? Does the County Council anticipate entering into a commercial agreement of such additional area (if one is available) and, if so, for how long?</p> <p>(5) I note you comment that a VBS “..could be developed..” – by whom? At whose cost? Also implicit in any VBS is the need to hold vehicles somewhere off-site in advance of their booked slot elsewhere to avoid congestion building up along the rest of Commercial Road – a common problem with VBS systems is that drivers arriving early simply park up as close as possible to their destination, thereby causing congestion to other road users. How would the County Council intend to manage this potential problem along Commercial Road? (further use of TTROs will surely just compound parking problems elsewhere).</p>
<p>The turning manoeuvre shown does not require use of the opposite carriageway; using the opposite side of the carriageway is therefore no more likely than it is today. In any event the person in control of the vehicle is able to make a judgement as whether it is safe to effect such a turn; visibility in this location is good, and traffic is intermittent. Alternatively, kentledge could be used to separate the lanes if ABP has an ongoing concern.</p>	<p>This statement is not correct – the manoeuvring space allowed for today is far more generous than is shown in the County Council’s plan, which appears to show a ‘jack-knife’ type U turn which HGV drivers, in our experience, prefer to avoid as it dramatically increases tyre wear and tear (it will also accelerate wear and tear of the carriageway). The only way of reducing the severity of the manoeuvre is by pulling into the on-coming lane. Your proposal to deploy temporary ‘Kentledge’ barriers is noted – over what length of road would you intend to deploy it? Are there any secondary considerations e.g. the adequacy of night-time lighting levels, access into other plots e.g. 2-31 and 2-19 being restricted by the use of barriers?</p>
<p>The analysis does not prohibit a vehicle recirculating to be reweighed (which SCC is aware of the need for); the reweighing arrangements would be considered in light of how the marshalling space was provided for. Clearly traffic management/marshalling can be used to bypass any queues, which presumably is the situation today where those laden and unladen HGVs need to coordinate their access to the weighbridge.</p>	<p>SCC’s response is not understood – could the County Council provide ABP with a scaled drawing showing how the Council proposes that Dudman’s traffic will be managed in practice? To be of any assistance it will need to show HGV queueing areas for up to, say, 20 laden HGVs waiting to be weighed and how unladen HGV will circulate to enable them to be reweighed and subsequently leave the terminal. This really goes to the heart of ABP’s concern with Dudmans i.e. on the basis of the information provided to ABP, the County Council appears not given this any proper consideration to the safe operation</p>

	<p>of Dudmans preferring, it would appear, to “deal with it on the day” (in this regard ABP reiterates that it would be sensible to involve an independent road traffic assessor to advise on how the risks are best mitigated).</p>
<p>A further alternative would be temporary provision of a second weighbridge at the exit point (i.e. eastern end) of the Dudman site to avoid the need for any recirculation and reduce any congestion. This option would appear to improve the efficiency of Dudman’s operations from that today. SCC is happy to consider the provision of such mitigation measures through the Side Agreement.</p>	<p>The County Council’s response is noted – presumably the cost of such provision by SCC would extend to the operation and maintenance of a second weighbridge for the duration of the Council’s occupation of any part of plot 2-22? Your confirmation of this is requested.</p> <p>ABP also notes that the provision of a second weighbridge will not diminish the requirement for SCC to produce a drawing indicating how it sees traffic circulating in this area, or the need for an independent assessment of the work place traffic implications of these proposals.</p>
<p>As a general point, conflicts in traffic movements can be resolved with traffic management (that is the point of it); clearly a vehicle will not be put in a position where it is, for example, blindly reversing in to two-way traffic. Inset E was provided as an indicative option: clearly that route can be realigned in light of prevailing requirements.</p>	<p>As a statement of the banal, it is somewhat difficult for ABP to disagree with this general point being made.</p> <p>However, it remains ABP’s view that it is necessary for the Applicant to demonstrate to the hearing how it intends to deal with the specific concerns raised by ABP – and to do so requires a more rigorous approach than stating the very generic mitigation measures that “could be considered” or “might be provided”.</p> <p>Such a non-committal approach provides no comfort at all to ABP – I would also remind you that, in the event of an incident occurring, any ensuing HSE investigation will start with how ABP managed traffic within its Port. As the organisation that will be called to account for its work place traffic management procedures, ABP must be provided with sufficient operational and safety assessments during construction of the proposed Scheme, in order to form an informed view of the merits of that proposal (the ExA may also consider it necessary to see such assessments too).</p> <p>The County Council also appears not to have responded to the following points raised in ABP’s communication of 20 March:</p>

	<ul style="list-style-type: none"> Has the Applicant given consideration to the overlay of Insets A, B and E, in order to consider the occasions when a grain vessel is being loaded at the same time as the temporary diversionary route between 3 shed and Lake Lothing is required. <ul style="list-style-type: none"> How will the conflict between through traffic and Dudman's traffic be managed? (they appear to cross each other using a scissor-manoeuvre immediately to the west of the weighbridge). Can a robust safety case be made to deal with HGVs reversing off the weighbridge whilst 2-way through traffic passes along the temporary diversionary route? <p>The County Council's response is requested.</p>

Insets C/D – HGV reversing manoeuvre into shed 3

SCC Comments	ABP response
<p>The tracking information provided shows that vehicles can enter the shed, or reverse up to the shed door in its current position without being impeded by a pier, following construction of the bridge. Clearance under the bridge in this location will be in excess of 5.3m (that secured in the DCO for Commercial Road) (because the soffit natural continues to rise away from Commercial Road towards Lake Lothing).</p>	<p>Does the Applicant assert this in a “real world” situation? Both insets C and D show long-distance reversing manoeuvres around blind corners – in the case of inset D, around a 180 degree corner. Does the County Council assert that this would be considered to be a safe manoeuvre of an HGV in the ‘real world’. If yes, what evidence can the County Council present to back up its assertion?</p> <p>Does the County Council intend to erect a fence around plot 2-23 (as would be within the Council's rights)? Or will vehicle be able to run over the pier foundation cap? If so, would that be subject to any restrictions such as axle loadings etc.</p>

	For the record ABP is not asserting that there is a height issue at this location – so the references to 5.3m clearance, whilst being noted, are somewhat superfluous.
As explained previously, the 'pink land' encompasses the subterranean elements of the pier (i.e. the pile cap) and additionally a limit of deviation applied to that. It is evident from the drawing that the pier itself has a far smaller footprint than the pile cap and consequently there is full confidence that the pier will not obstruct the door of Shed 3 post construction.	This is noted – please refer to my question above. Also if the County Council does intend to erect a fence around the pier (or the plot), is it likely to obstruct visibility? (noting that certain types of fencing will).
SCC has accepted that access to this door is likely to be impeded during the construction process. SCC is prepared, if ABP sees it necessary, to develop alternative access proposals more fully at this point, though would request as built drawings of the Shed and a dialogue to be facilitated by you with Petersons and World Offshore Marine to ascertain their access requirements in terms of size, frequency, timing, number of vehicular movements etc to develop an appropriate solution.	<p>I will enquire as to whether up-to-date as-built drawings are available – if not easily available, it may be necessary for the Council to carry out its own survey.</p> <p>Could you please clarify what is meant by access being “impeded” in your response – in practical terms, does this mean access will be not be possible? If so, for how long does the Council anticipate that there will be no access to the eastern end of shed 3?</p>
The building is a steel portal frame with profiled metal cladding; such buildings are not typically complicated to modify.	Noted – the Council's somewhat speculative response would be dealt with by a survey of the building.
Maintaining security of the building at all times would be a specification of any works contracted, which could be checked by ABP pursuant to their consents required under the Protective Provisions and the Side Agreement. Security measures could include provision of security guards.	<p>Please confirm the Council's willingness (and ability) to fund the provision of security guards for the duration of any such works.</p> <p>It may also be the case that shed 3 – either in part or in whole – would be rendered unusable (practically speaking) as a result of the cumulative effects of the proposed Scheme during construction. If this proves to be the case, as would appear likely, can the County Council propose an alternative form of provision of 3 shed to enable existing occupiers to continue their operations – this is especially relevant if access to the eastern door will not be possible for an extended duration. For the County Council to not make alternative provision will cause further detriment to the Port.</p>

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Inset E – temporary diversionary route between 3 shed and Lake Lothing whilst Commercial Road is shut

SCC Comments	ABP response
SCC would welcome the opportunity to discuss any concerns World Offshore Marine has (including in relation to Shed 3) to understand their loading/unloading requirements, frequency of such need and quay space that is needed adjacent to the berth. SCC would want to understand their operations in more detail and the circumstances that would eliminate the possibility that a different length of quay could be used for a period of time. The mitigation measures would be determined once further details were available.	I shall take the matter up with the Regional Director and Head of Commercial (for the reasons indicated in ABP's response of 20 March 2019 to the County Council).
SCC's contractor would phase works to ensure that Commercial Road was not closed (as it is required to do pursuant to the CoCP) and therefore the diversion needed if the diversion route could not be satisfactorily accommodated due to that space being in use by the construction compound	ABP would be grateful if the County Council would clarify what is meant by this statement – it seems to suggest that plot 2-20 (Commercial Road) is now not required by the Applicant for the proposed Scheme?
As has been stated previously, the extent of land identified as being required temporarily sets out the maximum required at any given point in time, it may not be required all the time, hence it may be possible to be flexible in that requirement having regard to the need to meet conditions set by ABP, acting reasonably.	<p>ABP's response is largely the same as previously stated – that it remains ABP's view that it is necessary for the Applicant to demonstrate to the hearing how it intends to deal with the specific concerns raised by ABP – and to do so requires a more rigorous approach than simply asserting that "...it may be possible [for SCC] to be flexible..". What if it's not possible to be flexible?</p> <p>Such a non-committal approach provides no comfort at all to ABP.</p>
The justification for plots has been addressed in the main body of this	ABP will be responding separately on this either the letter accompanying this appendix, or in its other submissions. In short, it

letter and in previous submissions to the Examining Authority.	remains ABP's view that SCC's case for CP is not yet made.
In the same way that SCC will seek a temporary possession from Network Rail to install the section of deck over the East Suffolk Line (in accordance with the protective provisions agreed with Network Rail), SCC will require a 'temporary possession' of part of Commercial Road for the similar installation of the deck between pier 6 and pier 7, thus requiring the road's temporary diversion. As ABP will be aware, SCC has assessed that the closure of the navigation channel to install and commission the central lifting span to be no longer than three weeks. We therefore expect the installation of the deck across Commercial Road to be no longer than this and therefore the diversion of Commercial Road to be of a similar order of time.	<p>Further clarity on this statement is requested by ABP, as follows:</p> <ul style="list-style-type: none"> • What is the estimated duration of the County Council's occupation of plot 2-20? (the response appears to suggest "no longer than three weeks"?). In this regard ABP takes the view that it is the alleged need for plot 2-20 that drives the need for a temporary diversion of Commercial Road between 3 shed and Lake Lothing – has ABP misunderstood the Council's position? • For approximately how long will the alternative diversion route between 3 shed and Lake Lothing be required (allowing for setting out and dismantling of barriers etc)? • What is the estimated duration of the County Council's occupation of plot 2-22, either in whole or substantially in whole? • How does the need for the County Council to take around 1/3rd of plot 2-22 in order to create the temporary diversionary route affect its overall land requirements? • Does the County Council see any possibility of that part of North Quay running alongside plot 2-22 being used for berthing vessels during construction works? Under what circumstances would it be possible to use these berths?
Measures to ensure the diversion route was available and safe for traffic would therefore be in place for an equivalent period of time, pursuant to the Traffic and Access Management Action Plan proposed in the Side Agreement.	<p>As has been stated previously, ABP remains unconvinced that the diversion route is viable or safe. This is a further example of the ExA (and ABP) being asked to 'take it as read' that the Applicant will devise a viable route.</p> <p>In ABP's view the risk exposure implications for ABP are so significant that ABP cannot take the Applicants reassurance on trust – it therefore remains ABP's view that an independent assessment of SCC's diversionary route proposals must be undertaken, together with consideration of any implications of that assessment in terms of</p>

	additional land-take, further deprivation of berthing, impact on customers of the Port etc, all of which impinge directly on Serious Detriment to the Port.
Kentledge could be used either side of the route to protect Shed 3 and the suspended deck from vehicle overrun	Please provide a cross-sectional drawing illustrating the County Council's proposal to accommodate protection measures, segregation measures and, of course, a roadway and walking route within the strip between 3 shed and Lake Lothing, taking account of the restrictions imposed by the suspended deck structure.
Cyclists and pedestrians could be separated with a lighter weight barrier from the quay edge. Cyclists could be asked to dismount. It is noted the railway tracks currently cross Commercial Road, without any obvious mitigation in place for cyclists	See above point. As regards the comment that railway tracks cross Commercial Road, they do so at an oblique angle, they do not run parallel to the direction of travel as would be the case for cyclists using the diversionary route. This means that cycle wheels are, in practice, unlikely to get caught in the buried tracks that cross Commercial Road, unlike the proposed diversionary route.
	<p>The County Council appears not to have responded to the following points raised in ABP's communication of 20 March:</p> <ul style="list-style-type: none"> • In any event, however, recently ABP has carried out a fundamental reassessment of its work place transport procedures, following a number of incidents including, tragically, a small number of fatalities on dock estates where work place transport issues were a contributory factor. This underlines the need for: <ul style="list-style-type: none"> ○ A formal assessment from first principles of the hazards that the Council's proposals introduce to the Port during the construction phase of the proposed LLTC (and for this reason, I am of the view that any previous risk assessments covering the movement of a long load along the quay are not relevant). ○ The mitigation required to address those hazards. ○ Specific indemnification of ABP against the liabilities that may follow as a result of the proposal.

	The County Council's response is requested.
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Date: 12 April 2019
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Mike Stacey
Head of Projects - Commercial
Associated British Ports

By email only

Open Correspondence

Dear Mike

Temporary possession of land in the Port of Lowestoft in relation to the construction of the Lake Lothing Third Crossing (“the Scheme”).

Thank you for your letter of 5 April 2019 together with its appendix. I am also responding to your email regarding the Port Impact Paper of 10 April.

I do not disagree that the focus of the Council is justifying the powers sought in the dDCO as this is what we are required to do. The MHCLG Guidance on the Compulsory Acquisition of Land is quite clear on this point. These powers have been justified on a Scheme-specific basis as set out in the Explanatory Memorandum, and, as they relate to parcels of land, in the Statement of Reasons.

As we have set out in evidence, the matter of how the powers are implemented is a matter properly considered in the context of the Protective Provisions; that is their purpose. We have now agreed Protective Provisions with all other statutory undertakers affected by the Scheme, most recently Network Rail.

In that case a section of deck needs to be erected over an operational railway and at this point in time the detailed design of that span, its construction methodology, how and when the temporary possession of the railway will be taken, the precise terms on which the Network Rail land will be occupied and related matters are not confirmed but under discussion with Network Rail.

It is clearly not proportionate or necessary for the purposes of securing development consent and associated powers of compulsory acquisition that every last detail of the delivery of the Scheme must be resolved and this is recognised by all other Statutory Undertakers affected by the Scheme. It is certainly not the case that it needs to be demonstrated to the Examining Authority (ExA) how traffic management works. The Council, as traffic authority, is competent in the field of traffic management and we are happy to engage with ABP on any safety audits/risk assessments it believes are required before traffic management or mitigation measures are put in place in the Port. As I stated previously, the indemnity in the Protective Provisions covers matters related to the construction of the Scheme.

I do not therefore consider that the ExA will be in difficulty in recommending the Scheme be granted development consent, because we have justified the proposed land take, what it will be used for and how it will be funded. Furthermore, the Secretary of State can have comfort that ABP as harbour authority will benefit from protective provisions. This should not be characterised as ‘deal with it on the day’ mentality, it is the standard ‘tried and tested’ process through which large infrastructure projects which interface with other statutory undertakings are delivered.

Article 11

Article 11 would provide the power for the Council to 'alter or divert any street' and 'divert traffic from the street'. The article does not set any expectation or restriction as to how this will be carried out, and importantly, does not impose a limit on the power (or its consequences) taking place within the Order limits.

The only restriction applied to the power is that the consent of the street authority for the street that is to be diverted or altered must be obtained. The article is silent on how this is obtained, leaving it to the promoter to seek the necessary consents and agreements it needs to utilise that power. In particular, there is no restriction on that diversion being undertaken on private land, if that is necessary and has the street authority's consent and (if different) the landowner's consent.

In liaising with ABP, the Council is doing so mindful of ABP's role both as street authority for Commercial Road, and the landowner of land that may be required for such a diversion. The position has always been that under the Protective Provisions, ABP's consent as landowner would be required and therefore, no purpose would have been served in providing any compulsory land power for article 11.

I note that if the Council had sought to include powers for all potential permutations of a diversion of Commercial Road, this could have led to temporary possession powers being shown on the plans for virtually the entire North Quay, which I imagine ABP would not have appreciated.

Side Agreement

The Council very much still wishes to agree a Side Agreement with ABP and considers the second draft provided on 1 March, alongside the Deed of Covenant provided on 6 March and draft control Tower lease issued on 4 April, collectively, are all documentation that should provide ABP with comfort in a number of matters on which it has made representations. It is disappointing that ABP does not recognise this and still has not responded especially given that we did agree that we would prepare a draft.

I am prepared to consider the addition of clauses to the Side Agreement, if ABP is willing to seek a compromise position on those matters relating to Indemnity, the Scheme of Operation and berth loss, having regard to the Council's submissions on ABP's position on these matters.

I am and always have been content to provide a fee undertaking for Clyde & Co, though it is a little disappointing that you have waited 6 weeks to seek one when it could have easily been requested well before now. Indeed I should be grateful if you would confirm that consideration has been given to the Side Agreement in that intervening period, i.e. that it will not only be looked at for the first time once that undertaking has been given. Would you please ask Clyde & Co to liaise with Pinsent Masons.

Port Impact Paper

Thank you for your detailed comments on the Port Impact Paper. You may recall that in the discussion at the Issue Specific Hearing on 1 April, the specific topic which led to Mr Bedford offering to update the paper was to address the anomaly in Vessel Survey 2 relating to BST/GMT and to reflect that I believe we are now agreed that ABP operates the A47 Bascule Bridge in general accordance with the 2018 Notice. To that end we do not currently propose to make any further updates to that report other than in section 5.2, and as such it should therefore continue to be read alongside our subsequent submissions.

We have, in response to your comments on that section 5.2, specified that two minutes was the 'grace period', rather than 'a few' and there were two corrections made in the tables, acknowledging some summation discrepancies.

You had a number of other queries in relation to section 5.2, most of which were broader points that have been discussed through various submissions and so are not repeated here. To assist in your understanding, it should be noted that:

- the data presented in Chapter 5 is all business days, with weekends/public holidays excluded
- the data in Table 7 relates to 59 minute periods
- the data in Table 8 relates to 60 minute periods
- transit time is taken in to account in Table 11
- vessels passing the Scheme bridge location are derived from the vessel survey
- data throughout is derived from the vessel survey in the periods described. It does not therefore include Petersons, but does for example include Galloper, before it vacated Shell Quay.

Statement of Common Ground

You will be aware the next deadline for Statements of Ground is the 26 April. We will therefore be sending you an updated version shortly.

Appendix

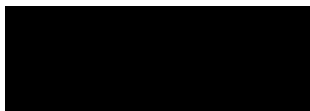
You provided further very detailed comments in the Appendix to your letter, relating to 'how' the temporary possession powers SCC is seeking would be implemented. The purpose of us providing with you some initial commentary in my last letter of 26 March was to reinforce that the Council is aware and has taken on board the concerns raised by ABP and will work with ABP at the appropriate time to resolve those issues. It remains my view that now is not the appropriate time to be discussing the level of detail that ABP appears to desire.

That said, you have set out a number of queries to which I respond briefly to below:

- Inset A/B- you raise similar comments to those previously raised and thus the answers remain broadly the same. There are a number of options available which as set out can be discussed with ABP at the relevant time once the construction programme is further advanced and ABP has full details on the nature of the operations that need to be accommodated in the Port at the same time. There appears to be an assumption throughout your Appendix that every element of the Scheme is being simultaneously constructed and therefore all land over which the Council is seeking an interest will be required all the time. As explained previously, this is not the case for this Scheme, nor is it typically the case for any linear scheme. A second general point to be reinforced is that if mitigation measures need to be put in place by the Council to manage traffic which results in costs being incurred, that cost will not fall to ABP, or its tenants. A similar situation prevails with regards to the costs associated with operating a second weighbridge for Dudman's, if required.
- Inset C/D – again the points are the same as previously raised and if ABP is not content with the long term positioning of the door in Shed 3, we are happy to discuss how that may be resolved both during construction and operation of the Scheme, and I note that the draft Side Agreement provides a mechanism for this to be resolved. We have previously sought to engage with Petersons to discuss how the Scheme will impact on Shed 3 and their operations and how that impact may be mitigated, and I believe we are waiting permission from Andrew Harston to do so.
- Inset E – for clarity the point being made here, which is a general point, is that the construction works can be sequenced to avoid certain scenarios; as such we would not block the diversion route for Commercial Road at the same time Commercial Road needs to be closed (indeed we couldn't owing to the provisions in the Code of Construction Practice). The other points essentially request further information on points already responded to, namely durations of occupations of certain areas, which for reasons explained previously the Council cannot be definitive on at this stage of the project. In relation to the impact on berthing during construction you will be aware that we have proposed certain provisions in the Side Agreement and proposed licence for the site compound in this vein.

I recognise that a number of your detailed questions remain unanswered. However I can assure you that we have a full appreciation of the concerns ABP has and we look forward to working with the site team to resolve them at the relevant time, within the framework created by the DCO and the proposed Side Agreement.

Yours sincerely



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