

(ABP: 2 of 2 – DL11)
Proposed Lake Lothing Third Crossing (TRO10023)
Associated British Ports (20013261)
Closing Submissions on behalf of Associated British Ports

Introduction

- 1 These closing submissions are submitted on behalf of Associated British Ports ("ABP"), the owner and operator of the Port of Lowestoft. They are by way of a structured aide memoir of ABP's case as set out in various written representations made both prior to and during the examination of the Lake Lothing Third Crossing (LLTC) proposals ("the Scheme") submitted by Suffolk County Council ("SCC"), the Applicant. They are not intended to either supplant or rehearse ABP's various written submissions made to the Examination and to which the Examining Authority is respectfully referred.

- 2 If the Scheme is approved it will result in the construction of a bridge, located in the middle of the Port of Lowestoft's operational Inner Harbour, that crosses the Port's navigable channel at a safety clearance height of 11 metres at HAT. Any vessels of a height greater than 11 metres, therefore, will not be able to traverse Lake Lothing without a bridge lift. The Port of Lowestoft's Inner Harbour will effectively have been cut in half by the Scheme.

- 3 As set out in ABP's written representations, the Port of Lowestoft is a statutory port undertaking¹ and ABP is particularly concerned as to the potential impact of the Scheme on its business, both existing and future. ABP is the UK's largest port operator, owning and operating 21 ports across the country. Together with its customers, ABP handled over 88 million tonnes of cargo in 2018, supported some 119,000 jobs and contributed £7.5 billion to the UK economy (based on latest published results, 2016).

- 4 As well as owning and operating the Port of Lowestoft, ABP is also the Port's Statutory Harbour Authority. In addition, ABP is the Competent Harbour Authority and, as such, provides relevant pilotage and related marine services.

¹ Extensive range of powers and duties which are set out in summary form below

- 5 The Port services the busy sea routes between the UK, Europe, and the Baltic States and is situated directly across the North Sea from a number of major competitor continental ports.
- 6 The Port of Lowestoft fulfils an important function within the transport and economic infrastructure of the east coast. The Port alone contributes over £30 million to the economy generally and supports over 500 local jobs either directly or indirectly - figures that over the past 12 months have experienced a distinct upward trajectory in terms of growth. In addition, the regionally unique advantages of the Port in terms of its existing facilities and strategic location as the UK's most easterly commercial port makes it ideal for both the current and proposed offshore wind, oil and gas energy sector - for both construction and long term maintenance - as well as aggregates and general cargo².
- 7 As has been made clear in its letter to the Secretary of State dated 31 May 2019, ABP is of the firm view that the Scheme, as currently proposed and pursued at examination by SCC, will cause "serious detriment" to ABP's statutory port undertaking, both in terms of existing and future operations. However, as ABP has been at pains to reiterate, it does not object to the principle of a third crossing of Lake Lothing. Its objection is to the location and form of the third crossing as currently being promoted by SCC on the basis that the bascule bridge as proposed would:
- (a) Bisect, at a low level, the Port of Lowestoft's Inner Harbour;
 - (b) Lead to the loss of operational berthing and supporting back land within the Port's Inner Harbour;
 - (c) Impede the operations of existing port operational tenants and occupiers;
 - (d) Introduce a dangerous safety hazard into the middle of an operational Port;
 - (e) Obstruct ABP's ability to perform and comply with its statutory duties;
 - (f) Act to the serious detriment to the carrying on of the statutory undertaking, namely the Port of Lowestoft, within the terms of section 127 of the Planning Act 2008; and

² So much has been recognised the recent visit to the Port of the Energy and Clean Growth Minister, Claire Perry, who launched the Offshore Wind Sector Deal including a £250 million investment in the offshore wind energy market

- (g) Act as a deterrent to future customer interest in that part of the Port lying to the west of the proposed bridge.

Statutory Duties and Powers

- 8 Section 2 of ABP's written representations (REP3-024) also notes that, as well as being the owner and operator of the Port of Lowestoft, ABP is also the Statutory Harbour Authority ("SHA") for the harbour area at Lowestoft³ and Competent Harbour Authority ("CHA") with respect to pilotage, which includes all the navigable waters within the Port and the seaward approaches. An important feature of being the statutory port undertaker is that ABP is able to undertake certain defined port related development within the "statutory port estate"⁴, whilst at the same time being (1) obliged to comply with numerous prescribed statutory duties and (2) fulfil various advisory obligations.
- 9 These statutory duties and powers are many and various and are set out, albeit in summary terms, in greater detail at ABP's Written Representations (REP3-024) at paragraphs 2.6 to 2.56. As the owner and operator of the Port of Lowestoft and the SHA, ABP is required to comply with a myriad of statutory duties and fulfil a variety of functions ranging from the safety of navigation to protection of the environment and from issues of health and safety to regulation by bye-laws.
- 10 In addition to its general statutory duties and powers, ABP is also vested with a range of powers relating to the construction, maintenance and operation of the Port, many of which derive from the powers granted by the Harbours, Docks and Piers Clauses Act 1847, together with an array of historical local legislation specific to the Port. The most significant of which are:
- (a) Transport Act 1981, in particular section 9 and Schedule 3. Fundamentally, this Act requires ABP to have regard to the safety of operations when carrying out its duty to provide port facilities at its harbours. Inevitably, the construction and then the continuing operation of what is in effect a low level bridge in the middle of an operational port will impede ABP's ability to perform and comply with the general duties and obligations contained in section 9 of the 1981 Act.

³ This extends from the Pier Heads in the Outer Harbour, inwards to Mutford Lock, including all of the tidal dock areas and Lake Lothing (up to the mean high-water spring tide level). See the plans at Annex 1A and 1B of DL3

⁴ See DL3 Annex 3

- (b) Harbours, Docks and Piers Clauses Act 1847, section 33 which requires a harbour authority to keep their harbour, dock, and pier open to commercial users for the shipping and unshipping of goods, and the embarking and landing of passengers. Sections 51 and 52 provide the power to appoint a Harbour Master and the Harbour Master's wide range of statutory powers and duties.
- (c) Dangerous Vessels Act 1985.
- (d) Dangerous Goods in Harbour Areas 2016.
- (e) Merchant Shipping Act 1995.
- (f) Pilotage Act 1987.
- (g) Health and Safety at Work, etc Act 1974 – It should be noted that ABP is seriously concerned that it will not be able to comply with the requirements of this Act by reason of the design of the proposed LLTC, in terms of both its location and height and by reason of the practical operational constraints that the new bridge will self-evidently create, ABP's ability to perform and comply with its wide ranging duties will be severely limited and constrained. This has the potential to lead to a consequential risk in terms of the health and safety of employees, tenants, occupiers, users and visitors to the Port – the legal liability and responsibility for which falls fully upon ABP and is not met by the present (inadequate) dDCO indemnity.
- (h) Corporate Manslaughter and Corporate Homicide Act 2007.

Advisory Guidance

- 11 In addition to ABP's general duties and statutory powers, ABP must also have regard to, and where relevant implement, the various marine and shipping safety codes and advisory guidance which are relevant to its operations at the Port, as listed below and explained in greater detail in ABP's written representations DL3 paras 2.39 – 2.55.
- (a) The Port Marine Safety Code;
 - (b) Guide to Good Practice on Port Marine Operations;
 - (c) International Ship and Port Facility Security (ISPS) Code; and
 - (d) Health and Safety Executive (HSE) Guidance.

- 12 The above summary of a very large number of statutes and advisory guidance are collectively designed to regulate operations within a port. The construction and operation of a new low level bascule bridge in the middle of an operational port, under the control of an external third party, must self-evidently act to the serious detriment of the statutory port undertaker. It will impede ABP's ability to perform its statutory duties and powers and, as a consequence, will potentially render ABP liable for events, occurrences and incidents which arise as a result of the existence of the bridge and which would not have arisen if the bridge had not existed.

The policy context for considering Lowestoft and the Scheme

- 13 The policy basis for the consideration of the scheme falls principally at the national level upon the National Policy Statement for Ports ("NPSfP"). With respect, this is important not only in and of itself but also due to the basis in terms of the Direction given by the Secretary of State under section 35 of the Planning Act 2008.
- 14 The relevant propositions are set out at paragraph 18.2 of the Clyde & Co letter to the Secretary of State of 31 May 2019, submitted at Deadline 11. It will be evident that there were a number of patent inaccuracies in SCC's application to the Secretary of State for the Direction. For example, the height of the proposed bridge will not, in effect, be 12m⁵ but, at best, 11m ignoring sea level rise which will impose a serious constraint on the passage of vessels. In addition, the bridge opening of the existing bascule bridge is not limited to a maximum 10 openings per day. As set out in evidence the examination, neither of these propositions are correct.
- 15 Beyond these points is a wider proposition, which was to assert that the Scheme:

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

- 16 Regrettably, as identified in evidence, this is the reverse of what the Scheme will achieve. Far from improving the conductivity of the port of Lowestoft, the Scheme will in fact critically impede collectively in terms of vessel passage and will do nothing to assist

⁵ Allowing for a safety margin of 1m

vehicle access to the Port, the entrance of which lies to the east of the proposed bridge and is beneficially entirely unaffected by it.

17 It is important that detailed consideration is given to that part of the NPSfP which sets out the Government policy for ports and the need for new port infrastructure – section 3 of the NPSfP. In ABP’s opinion, a correct understanding of this aspect of the policy context is important in order to understand the context in which the Port of Lowestoft undertaking is carried out. Such an understanding is also necessary to enable an appropriate assessment of the impact of the Scheme on the Port to be undertaken – a matter which is returned to elsewhere within ABP’s Written Representations (DL3) (for example, Section 21).

18 Further, the NPSfP clearly needs to be read as a whole. However, set out below, are some important aspects of section 3 of the NPSfP of relevance to the consideration of the effects of the Scheme on the Port. The NPSfP makes it very clear that ports – such as the Port - play an essential role in the UK economy (NPSfP, section 3.1). In terms of freight and bulk movements, this section of the NPSfP recognises the essential role of ports by making clear that:

“shipping will continue to provide the only effective way to move the vast majority of freight in and out of the UK, and the provision of sea port capacity will remain an essential element in ensuring sustainable growth in the UK economy”
(NPSfP, paragraph 3.1.4).

19 Unsurprisingly, particularly in the case of the Port, the NPSfP also recognises the essential role that ports play in the provision of the nation’s energy requirements. Amongst other things, ports are identified as having a *“vital role”* in the construction and servicing of offshore energy installations (NPSfP, paragraph 3.1.5). In this regard, Section 3.3 of the NPSfP sets out Government policy for ports. This *“fundamental policy”* is summarised (in para 3.3.1) and includes a policy approach to:

“encourage sustainable port development to cater for long-term forecast growth in volumes of imports and exports by sea with a competitive and efficient port industry capable of meeting the needs of importers and exporters cost effectively”

and in a timely manner, thus contributing to long- term economic growth and prosperity”.

20 The second aspect of this policy summarised in paragraph 3.3.1 of the NPSfP reflects a long-standing principle that the ports industry is market led and that the market – rather than Government or any other external body – is best placed to decide where and when port capacity is to be provided.

21 A series of critical aspects of policy do not appear to have properly figured in SCC’s formulated Scheme. Not only should port infrastructure seek to help meet the Government’s policies on sustainable development (NPSfP, paragraphs 3.3.3 to 3.3.8) but the NPSfP then goes on to set out the Government’s assessment of the need for new infrastructure. Paragraph 3.4.1 of the NPSfP helpfully summarises the position by explaining that:

“The total need for port infrastructure depends not only on overall demand for port capacity but also on the need to retain the flexibility that ensure port capacity is located where it is required,....., and on the need to ensure effective competition and resilience in port operations.”

22 In locational terms, capacity must be in the right place. Reflecting the ‘market led’ approach set out in its fundamental policy, the NPSfP makes it clear that the Government does not wish to dictate where port development should occur, but rather recognises that the market is the best mechanism for getting this right (NPSfP, paragraphs 3.4.11 and 3.4.12). To that end, the NPSfP makes it clear that UK ports compete with each other and ports within Europe, and that such competition drives efficiency and lowers costs. NPSfP highlights that effective competition requires sufficient spare capacity to ensure real choices for port users. It is also made clear that ports need to operate at efficient levels, which is specifically highlighted as not being the same as operating at full physical capacity (NPSfP, paragraphs 3.4.13).

23 The Port must also be resilient. The NPSfP makes it clear that spare capacity helps to assure the resilience of national infrastructure. It is made clear that the Government believe that resilience is provided most effectively as a by-product of a competitive ports sector (NPSfP, paragraph 3.4.15).

- 24 In consequence, for the reasons that the policy makes clear, excluding the possibility of providing additional capacity through port development would be an outcome strongly against the public interest (NPSfP, paragraph 3.4.16). Of particular pertinence to the position of Lowestoft, Section 3 of the NPSfP concludes (section 3.5) by providing guidance to the decision maker on assessing the need for additional capacity. Amongst other things it is made clear that in respect of developments which support the development of offshore sources of renewable energy, the decision maker should accept the need for such developments.
- 25 With respect, in context of the scheme as proposed national policy provides clear guidance as to its current inadequacy.
- 26 Beyond that, the local plan also acknowledges the importance of the Port, stating that *“Lowestoft, along with Great Yarmouth will be important centres in the construction, operation and maintenance of offshore renewable projects”* as well making clear that *“The Port of Lowestoft will be an offshore renewables centre of excellence supporting the employment of a significant number of people.”*⁶

Impacts

Compulsory Purchase

- 27 The new bridge, as currently proposed, would enter the Port's statutory estate at a location approximately 850 metres from the existing A47 Bascule Bridge. It would bisect the operational quayside of the Port's Inner Harbour and would cross through the middle of the Port's Inner Harbour on a series of piers. In short, SCC is seeking:
- (a) The permanent acquisition of approximately 3,084 square metres (of land) that falls under the bridge piers, both on ABP's Port landside and within the watercourse of the river bed (including the location of a new leisure craft waiting pontoon);
 - (b) The permanent acquisition of 2,343 square metres or airspace and rights over the existing highway access to the Port and LLTC bridge deck;

⁶ See Waveney local plan 2019 "vision for Lowestoft" page 21

- (c) The permanent acquisition of 4,325 square metres of rights over Commercial Road which is the only highway access to the Port, together with additional rights around the highway and the new bridge; and
- (d) The temporary possession and occupation of 40,396 square metres of land and water within ABP's statutory port estate for construction purposes.

28 The Examining Authority is respectfully referred to ABP's DL8 submission (1/3) at page 11, which sets out ABP's position regarding the impact of the Scheme on permitted development rights and also the effects arising both from the CPO and temporary possession powers.

29 Suffice to say, the effects arising from the CPO and the Scheme are materially adverse to ABP's position and the documents and submissions provided by ABP during the examination process explain ABP's opposition to the CPO.

The proposed new LLTC Bridge: Why this is novel

30 ABP was surprised at the suggestion from SCC that there are other comparable examples to that which is being proposed by the Scheme. Despite specifically testing the point no evidence has come available to support the contention that there are any other bridges that cross a statutory port or harbour that are of a size and/or height comparable to the proposed LLTC, save for one, namely in the Port of Newport which will be crossed by Welsh Government's proposed M4 motorway relief road. In this respect, Welsh Government have agreed that the M4 relief road will cause serious detriment to the Port of Newport, which will have to be mitigated.

31 In context of the other evidence given on behalf of ABP and the submissions made therefore, it will be fair to observe that the Examining Authority and the Secretary of State will inevitably need to be mindful of this attribute of novelty when giving consideration to the issue of serious detriment below.

32 The Examining Authority will recall that, in the context of the 'serious detriment' test, ABP did refer on a number of occasions to the acceptance by Welsh Government that

their proposed M4 Relief Road Scheme, in an unmitigated form, would have had a serious detrimental impact on ABP's Port of Newport.

33 During the course of the LLTC examination, the Applicant did respond along the lines that the Welsh Government's decision with regard to the M4 Relief Road had not been published and the ExA could not, therefore, assume that a bridge located through the middle of an operational port would cause serious detriment and that ABP's assertions in this respect should be given no weight.

34 The ExA should be aware, however, that the Welsh Government has today published their decision on the M4 Relief Road Scheme (4th June 2019) and of significance is the fact that paragraphs 8.195 *et seq* the Inspectors Report find as follows:-

"The proposals as originally envisaged in the initial publication of the draft Schemes and Orders would have been seriously detrimental to the undertaking of the Port of Newport in terms of the restriction on shipping and the inadequate provision to accommodate displaced vessels in the South Dock. The impact that the scheme would have had on the businesses of the tenants of ABP would also have been severe and the structural security of the proposed viaduct would have been threatened.

Following the redesign of the scheme adjacent to the proposed viaduct and binding letters of agreement between the parties, the objection from ABP, the Newport Harbour Commissioners, the Port Security Authority and most tenants of ABP have been withdrawn. I draw attention to those agreements, and conclude that they confirm a most satisfactory potential way forward for all concerned, either separately or individually.

I further conclude that all the accommodation works agreed by the parties within the Docks are necessary to avoid the otherwise serious detriment to the undertaking of the Port. Any particular disadvantages to tenants could be met by the consideration of compensation.

I have studied the proposed engineering measures to offset and prevent the potential ship/viaduct collision and I am satisfied that these proposals, when

taken together, would reduce the probability of an incident occurring to reasonably acceptable levels. The on-going monitoring and management of these facilities is so important that they should constantly be kept under review."

- 35 The ExA will want to note that the First Minister of Wales, the Rt Hon Mark Drakeford has accepted the Inspector's Report and conclusions, but has ultimately decided that the M4 Relief Road Scheme should not proceed due to the "*affordability of the project in the context of the Welsh Government's overall capital budget*".⁷

Unresolved matters – design, the provisional navigation risk assessment, navigation safety, vessel simulation

- 36 Significantly, both for the purposes of this submission and the DCO examination, the detailed design of the Scheme has yet to be resolved. It might be considered that this is of minor or limited significance and can simply be left to a subsequent stage. However, as was made abundantly clear through evidence, the design has a series of critical consequences for the operation of the port, including satisfactorily resolving the provisional navigation risk assessment and for the statutory harbour authority to be convinced by realistic vessel simulation that the navigational safety of vessels using the port can be appropriately assured.
- 37 ABP, via its DL8 submission 2/3 and its Vessel navigation video, illustrates even in benign weather conditions challenge provided to vessels and their masters in utilising the harbour as currently configured. The introduction of a new structure consequences of which in terms of wind movement and differential sheer means that even at this stage of the process satisfactory performance of any bridge structure cannot presently be assured.
- 38 For the present, these critical factors remain at large further compounding the serious detriment that will be caused by the Scheme.
- 39 Whilst ABP has, by way of reflection of its responsibilities as SHA and CHA, constructively engaged both in the run-up to the examination and during the examination itself in trying to satisfactorily make progress with SCC upon these features, its identified

⁷ Paragraph 5.2 of the M4 Corridor Around Newport Decision Letter, dated 4 June 2019

concerns still remain unresolved and there has been a marked absence of appropriately qualified and justified evidence to support the assertions made by SCC, particularly having regard to the qualifications and experience of those who provided evidence to the examination on behalf of ABP.

Indemnity

- 40 The Scheme gives rise to the introduction of a second bridge, with effectively only 11 metres safe clearance and thereby introduces a consequential hazard into the middle of the operational port. This new bridge will present as a safety hazard both to users of the port in terms of risk of vessel strike, injury to operators within the port estate, injury to property and injury to users of the bridge – both vehicular and non-motorised users.
- 41 The indemnity currently offered to ABP by SCC under the dDCO is narrow and extremely limited in actual application. As explained in detail, by ABP (in the Clyde & Co letter to the Secretary of State dated 31 May 2019) it fails to indemnify ABP for the dangers, risks and hazards that it will introduce once constructed and in operation – and indeed at the last examination session, Counsel for SCC confirmed that SCC has no intention whatsoever to offer any form of indemnity to ABP during the bridge’s operation.
- 42 In the circumstances of the Scheme and in the context of ABP’s statutory duties and obligations in terms of safety and navigation, there can be no justification for requiring ABP to be responsible for and to bear liability for the risks that will follow as a result of the introduction of a hazard into its operational Port by a third party.
- 43 In brief, ABP requires an indemnity from SCC in circumstances where:
- (a) ABP suffers any form of loss or damage whatsoever without limitation; or
 - (b) Any claims of whatsoever nature are made against ABP; or
 - (c) ABP incurs any form of liability to SCC; or
 - (d) to any third parties whatsoever without limitation; and

ABP would not have suffered that loss or damage or such a claim would not have been made or such liability not incurred but for the construction or the existence or the location or the operation or use of the Scheme and whether the loss or damage or claim or

liability was caused either directly or indirectly by the fact of and effects of the construction or the existence or location or the operation or use of the Scheme.

- 44 In essence, this includes indemnification for any:
- (a) Losses incurred or suffered directly or indirectly as a result of any occurrence relating to or associated with the existence of the Scheme; or
 - (b) Losses incurred or suffered directly or indirectly as a result of any occurrence which would not have been incurred or suffered but for the existence of the LLTC; or
 - (c) Losses incurred or suffered in respect of claims or liabilities arising in relation to the Port or the activities of Third Parties on or at the Port or port operations; and
- which claims or liabilities would not have been made but for the existence of the LLTC.

45 Indeed, as well as providing the indemnity as requested, ABP will also require SCC to put in place adequate insurance to cover the risks introduced by the Scheme.

46 To date, SCC has failed to acknowledge that the standard indemnity commonly contained within DCOs is not designed to accommodate the type of fundamental risk and hazard which SCC now proposes to introduce into the middle of the operational statutory undertaking. In simple terms, the standard wording does not indemnify ABP for those new risks and hazards identified above and which extend to the potential actions or failures of not just SCC but a wide variety of third parties.

47 Without an appropriate indemnity, ABP could find itself corporately liable for the actions of others over whom it has no control. ABP cannot be expected to be responsible for and bear liability for the risks that will follow by the introduction of a bridge through the middle of an operational port.

Inadequacies of the environmental statement

48 Within ABP's written representations DL 3 (section 21) and DL7 1/3 (section 2), it set out concerns as to the adequacy of SCC's environmental assessment methodology in the context of the 'Private Assets' assessment contained within Chapter 15 of the Environmental Statement (ES). These were also additionally explored at the ISH on 7

March 2019 and in ABP's document titled 'Response to the Applicant's Response on Environmental Statement Matters' (submitted for Deadline 5 on 22 February 2019) ("ABP R").

49 The Examining Authority is respectfully referred to in terms of ABP's DL7 1/3 note, and ABP does not propose to rehearse further the argument here. Suffice to say, nothing stated by SCC nor written by them provides any proper basis to alter the conclusion that SCC's assessment of the effects of the LLTC Scheme on the Port contained within the ES is inadequate and the conclusions reached by SCC in this regard cannot be relied upon.

50 As was made clear at the ISH on 7 March 2019, this was not born of an approach seeking to undertake pedantic point scoring (as alleged by the Applicant) but instead was directed to demonstrating matters of importance which highlight that the Applicant has not properly scrutinised matters and, as a result, has (among other things) ended up with an assessment which suggests that the LLTC scheme only has a 'slight' adverse impact upon the Port. With respect, in context of the various impacts arising from the Scheme such a basis for assessment is at best unreliable and arguably perverse.

Funding

51 Notwithstanding the extensive exploration of this issue both in written representations⁸ and the ISH on 13th February 2019, SCC has to date failed to account for the additional funding required for mitigation/compensation measures and increased land acquisition costs which appear to have arisen, as well as the absence of transparency in the material set out in the SCC's various statements⁹.

52 SCC's Response to Written Representations (Document Reference: SCC/LLTC/EX/51), purports to deal with the concerns raised by reference to (a) the Funding Statement, (b) SCC's response to ExA question 3.7 to 3.10; and (c) a letter dated 29 January 2019 from the Council's Section 151 Officer, which states that the requisite funding will be available to the Scheme (i.e. Appendix E to the Applicant's Response to Written Representations).

⁸ Section 23 of ABP's Written Representations (23.11 TO 23.15), in its Deadline 4 submissions and Deadline 5 (3/5)

⁹ SCC Document 7.4 – APP 107

- 53 With respect, it has simply failed so to do. For the reasons given in ABP's Deadline 5 (3/5) submissions, SCC's Outline Business Case shows at Table 4-2¹⁰ a series of total cost elements attributable to the Scheme as at Q4 2015 prices. This identifies a total Scheme outturn cost of £91.73 million. The only item provided in respect of land acquisition cost is given as £3.63 million. There were no other sums accounted for by way of mitigation or compensation in respect of any parties adversely affected by the proposed Scheme.
- 54 SCC's Funding Statement⁴ builds upon the figures set out in the Outline Business Case. In particular, Paragraphs 3.2.4 to 3.2.9 set out that which is purported to be the Applicant's funding structure.
- 55 Firstly, the Scheme depends upon the provision of £75.39 million by way of a funding grant from DfT, which is subject to the satisfactory completion of all remaining statutory processes and the submission and approval by DfT of a full business case.⁵ We do not know whether this funding is time limited, as this information has not been provided by the Applicant.
- 56 As noted above, the cost of the delivery of the Scheme at that time was estimated to be £91.7 million. SCC's cabinet has agreed to underwrite the shortfall, which is identified as being £18.3 million – this figure comprises the additional £16.3 million required to meet the estimated scheme cost of £91.7 million, together with a further £2 million funding towards the Outline Business Case costs (i.e. a total cost of £93.7 million). None of those amounts are identified as relating to either compensation or mitigation for any other interested parties affected by the proposed Scheme.
- 57 It would appear that the local partners (comprising for these purposes not only SCC but also the New Anglia Local Enterprise Partnership) have committed to funding 20% of the total cost of the proposed scheme. Paragraph 3.2.7 states that "*this is currently estimated to be £18.3 million*". To that end, £10 million has been earmarked from the Council's Capital programme, with the remaining £8.3 million said to be "*anticipated to come from local contributions*". The Applicant would, it is assumed, seek to borrow the monies or draw on its reserves if required to do so to deliver the Scheme. If ABP's

¹⁰ p101

assumption is correct, however, that raises a greater level of attendant uncertainty than would be expected from a scheme of this sort and at this stage in the process.

58 Be that as it may, it is noted from paragraph 3.2.8 of the Funding Statement that the Applicant now expects the projected costs to rise by a further £8 million on the original Property Costs Estimate. That would appear to have raised the total cost of the project to £101.7 million.

59 There is no indication as to where the total extent of this funding (now amounting in total to £26.31 million, above the £75.39 million which the Applicant intends to obtain from DfT) will come from, or where this is provided for within the Applicant's funding figures.

60 On 21 January 2019, SCC published the Detailed Capital Programme 2019-22, which stated that the Scheme budget is forecast as £91.011 million (2018/19 to 2023 onwards) – some £10.679 million below the project Scheme cost as advised by the Applicant in the Funding Statement (as calculated above).

61 In addition, the Capital Programme identifies that £13 million is anticipated to be borrowed by SCC in respect of the LLTC. This appears to be an increase on the £10 million previously identified by the Applicant in the Funding Statement. Further, the Revenue Budget 2019-20 (also published on 21 January 2019) states that the Capital Programme was allocated £15.3 million in funding for the LLTC, but does not clarify where this funding is coming from. Taken together, these figures appear to suggest that the total cost of the project is now £103.69 million. Hence, it remains unclear how these figures relate to the funding position set out in the Funding Statement.

62 With respect, that is a wholly unsatisfactory factual basis upon which to take forward the Scheme.

Consequences of the Scheme for the Port

Navigational impacts

63 As set out earlier, ABP has a range of statutory duties and powers, a number of which relate to ensuring the safe navigation of vessels in the harbour. ABP has set out in detail

those concerns at section 12 from of ABP's written representations (DL3), ABP's DL5 Response to the Impact of the Scheme Report¹¹ and ABP's DL8 (1/3) comment on the applicant response to ABP's DL 5 and Oral Submissions at the 7 and 8 March 2019 hearings. The Examining Authority is respectfully referred to those documents.

64 However, it is pertinent to note that one glaring feature arising from the inchoate state of the design of the bridge, at the heart of this Scheme, is that it is presently not possible to undertake a Navigational Risk Assessment which is a fundamental requirement for port operations in order for a port to comply with the Port Marine Safety Code.

65 The effect of the Scheme and the proposed draft DCO is to seek to postpone consideration of this issue until a later stage and when the detail of the design of the bridge has been arrived at by SCC. That is not adequate¹². ABP and its expert officers remain of the view that the amendments suggested by SCC in the draft DCO regarding the NRA are insufficient and simply do not give ABP, as SHA, the critical assurance that its discharge of statutory functions requires.

Impact of the Scheme

66 The profound nature of the impacts of the Scheme have been recurrently identified and referred to by ABP in its written and oral submissions to the examination. It is not proposed to rehearse those submissions here. The Examining Authority are respectfully referred to ABP's submissions including ABP's written representations and as a collective aide memoir ABP's DL8 submission (particularly ABP: 1/3) which succinctly sets out ABP's position on a number of the most significant issues and also provides detailed references upon ABP's position upon them. The Examining Authority is respectfully referred to those referenced documents.

67 However, by way of a summary identification of the issues the scheme will involve the introduction of the bridge, the height of which will (both present and anticipated air draft requirements of vessels using the port, in particular CTVs) impose restrictions on movements and all materially affect vessel movements by reason of inhibitions on bridge

¹¹ REP05 -023

¹² Indeed, various significant (and consequential) other features also remain outstanding, such as fender design (for the protection of the bridge). That design will potentially have significant consequences for harbour operations and vessel passage through the harbour

lifts. That will have impacts upon the operation of the Port, having regard to both present and future growth assessments.

Air draft and CTVs

- 68 ABP's position regarding the air draft current and future trends is set out in:
- (a) Paragraphs 3.66 to 3.71 of ABP's DL5 Response to the Impact of the Scheme Report (REP5-023);
 - (b) Overview of CTV Characteristics Report ("CTV Report") (REP5-028); and
 - (c) Assessment of Trends in the European CTV Market, 4C Offshore Limited, submitted by ABP at Deadline 8.
- 69 Specifically, ABP's position regarding the impact of the Scheme on CTVs is set out in:
- (a) Paragraphs 3.72 to 3.76 of ABP's DL5 Response to the Impact of the Scheme Report (REP5-023);
 - (b) BVG Report (REP5-027); and
 - (c) CTV Report (REP5-028).

Future Growth Prospects

- 70 Whilst important, the CTV use of the Port is only one aspect of that which needs to be considered in context of its future growth prospects. ABP has commissioned other reports which have been provided to the examination. ABP's position regarding the future growth scenario is set out in:
- (a) Paragraphs 3.29 to 3.53 and 3.72 to 3.76 of ABP's DL5 Response to the Impact of the Scheme Report (REP5-023);
 - (b) BVG Report (REP5-027);
 - (c) Economic Study, Edge Economics, Annex 4A to ABP's Written Representations ("Edge Economics Report") (REP3-024);
 - (d) Berth Utilisation Assessment – Years 2015 to 2017, ABPmer (REP5-026);
 - (e) A post hearing note as part of ABP's DL8 submissions; and
 - (f) Assessment of Trends in the European CTV Market, 4C Offshore Limited, submitted by ABP at Deadline 8.

71 The BVG analysis applied a series of quite conservative assumptions which are based on the well informed views of the industry. No one has sought to suggest that BVG Associates are otherwise than the industry leading consultants. They have undertaken their assessment on a conservative and reasonable basis. Conversely, it is unclear as to the relevant expertise of those who provided rebuttals on behalf of the Appellant.

72 Collectively these indicate substantial prospective growth in the Port which has the prospect of being adversely affected by the Scheme.

Port security

73 ABP has detailed its concerns regarding Port security and its position on this issue is set out in:

- (a) Section 19 of ABP's Written Representations (REP3-024);
- (b) Paragraphs 8.1 and 8.2 of ABP's DL5 Response to the Impact of the Scheme Report (REP5-023); and
- (c) Deadline 11 representations.

74 Among the concerns raised by ABP, is its continuing ability to accommodate ISPS vessels, which reduces the Port's operational flexibility and is consequently detrimental.

Loss of berthing and berthing utility/flexibility

75 In terms of the Port's berthing capability, the impact of the compulsory purchase of the quayside and its hinterland extends far beyond that area of quayside directly lost to the scheme. The impact will in fact extend both upstream and downstream of the proposed LLTC.

76 A summary of ABP's representations are set out on pages 13 and 14 of ABP's DL8 submissions (1/3).

77 The practical reality is that the Inner Harbour comprises a number of distinct quayside areas, each with different characteristics, resulting from the sequential chronological development of the Port.

- 78 In short, some 165m of berthing, measured in whole berths, will be directly lost as a result of the LLTC Scheme – comprising North Quay 2, 3 and 4E. Although ABP notes that a small part of North Quay 2 would retain some limited functionality, this cannot be practically utilised without combining this quay length with North Quay 1 for use by large commercial vessels. As such, in real operational terms, the whole of North Quay 2 is lost as an independent berth space within the Port as a result of the Scheme.
- 79 In addition, a number of berths at the Port located to the west of the new bridge will suffer an indirect loss of utility as a consequence of the inability of ABP to ensure safe passage of vessels. This is as a result of SCC's intention to restrict the opening times of the proposed LLTC, so as to avoid bridge openings in the rush hours (which will, of course, coincide with high water at certain times of the tide cycle).
- 80 In assessing the impact of berthing utilisation and flexibility, it is important to understand how the Harbour Master directs shipping within the Port. Vessels are assigned to particular berths having regard to factors such as length and draught of vessel, nature of cargo, operational requirements, and duration of stay at the Port. This operational flexibility is materially inhibited by the introduction of the bridge structure.
- 81 As such, it is clear that the loss – both direct and indirectly – of berthing space and loading/storage hinterland will have a seriously detrimental impact on port operations both directly and indirectly. This in turn has a consequential impact on the amount of berth space available across the Port in both the current and future scenario.
- 82 The direct loss of berthing is best illustrated by the straightforward “car-parking” analogy. SCC, whose lack of understanding about the practicalities of port operations has become increasingly apparent over the course of the examination, have worked on the assumption that a vessel can effectively moor by means almost of a right-angled approach to the berth. Their argument is based on the defective logic that despite the loss of berthing space, the Harbour Master can berth vessels within a few metres of each other. The only expert evidence, based on a real understanding of port operations, has been provided by ABP. That patently demonstrates that when a vessel berths, it, has to make a safe oblique approach to its allotted berth in the same manner as a parking car, taking into account existing passing traffic and ‘cars’ already parked. Some cars/vessels are more manoeuvrable than others. Some will require special expertise/a

pilot – others will not. In either scenario, however, neither a car nor a vessel can simply park itself safely without sufficient and flexible space to manoeuvre. To suggest otherwise is, with respect, naïve and in context of the examination should be rejected.

- 83 From the above, it can be seen that the LLTC Scheme will have a seriously detrimental effect on both existing and as the commercial operations expand, future berth utilisation at the Port - particularly bearing in mind ABP's future plans for the Energy Park, to be located at Shell Quay – to the west of the bridge.

Obstruction/Impediment

- 84 The serious detriment that will be caused to the Port undertaking by the compulsory acquisition of part of the port estate will be exacerbated in practical operational terms by the consequential construction of a low level two-lane bridge through the centre of the operational Port. If approved, the LLTC will self-evidently cut the operational Inner Harbour in half.
- 85 The existing A47 bascule bridge, separating the Inner from the Outer Harbour, cannot be used to justify the Scheme. In contrast, it should be regarded as a fact of circumstance. It simply bears witness to the historical growth of the Port and the need to cut through from the North Sea to access Lake Lothing. In giving vessels in Lake Lothing direct access to the North Sea, inevitably the then Port owner had to cut through the existing coast road – thus the bridge.
- 86 The practical reality that differentiates the existing bridge from the proposed LLTC is that ABP as the statutory port undertaker and Statutory Harbour Authority has operational control of the opening of the existing bascule bridge in accordance with a negotiated scheme of operation. This means that ABP can genuinely assure the majority users of the Port that their passage to the sea will not be impeded by the bridge.
- 87 In the case of the proposed new bridge, SCC are attempting to impose an inflexible scheme of operation on the Port – to which we refer below - with a continuing threat that SCC will have full control of bridge opening.

88 In terms of the practical impact that the LLTC scheme will have on the Port, the following should be noted:

- (a) In a closed position, the proposed bascule bridge will have a minimum 12 metres Highest Astronomical Tide ("HAT") clearance under the bridge deck. This height does not, however, take into consideration the 'safety margin' required to be imposed for navigational safety reasons, presently presumed to be 1 metre (although as SCC have failed to undertake a formal Navigation Risk Assessment, but instead is relying on a defective 'preliminary' Navigation Risk Assessment, the safety of the bridge has not yet been properly assessed);
- (b) The navigable channel between the bridge piers and fenders that form part of proposed bascule bridge will be reduced to 32 metres – although as the design of the bridge has not yet been finalised, ABP is unable to assess the actual operational width in terms of, for example, large vessels with an overhang, e.g. a deck-mounted heli-pad; and
- (c) The maximum clearance under the LLTC will be further impacted by global sea level rise caused by climate change. It is widely accepted that, over the next 60 years, the sea-level at Lowestoft will have risen between 0.41m and 0.58m above 1990 levels (UK Climate Impacts Programme (UKCP09) (Lowe et al., 2009). It is inevitable, therefore, that the impact of clearance under the LLTC bridge deck will be further detrimentally impacted by the accepted projections in sea-level rise.

89 In addition, as mentioned above, SCC has proposed a 'Scheme of Operation' to control the operation and maintenance of the LLTC. This Scheme will restrict opening of the LLTC during what the County considers to be 'peak traffic periods' which are in fact more restrictive than the current operating arrangements that are in place in respect of the existing bascule bridge at the Port for many years. SCC is in effect prescribing extended windows of restriction for the existing bascule bridge for those vessels which need to transit Lake Lothing (i.e. that are located to the west of the LLTC) and will need both an LLTC bridge lift and an existing bascule bridge lift to leave the Port. This will clearly detrimentally impact vessels navigating the Port, particularly those located to the west of the LLTC, who will suffer an unacceptable 'in-combination effect' from the restrictions imposed by the two bridges, thus resulting in unavoidable delay, and consequent costs for operators. It will also raise navigational safety issues for vessels which may become

'trapped' between the two bridges during restricted periods, without any safe refuge berth.

- 90 The timing restrictions which SCC wish to impose in the Scheme of Operation will create serious practical difficulties for ABP in terms of port operations. SCC's refusal to accept that vessels are generally getting larger flies in the face of both common sense – and the evidence provided by ABP to the ExA. It logically follows that an increasing number of vessels which have to access that part of the Port lying to the west of the proposed LLTC will be unable to pass under the bridge when it is in a closed position. The delay and additional cost that will be caused by the delay to the operator will inevitably lead to a consequential reduction in the attractiveness of the Port to vessel operators who will be affected by those restrictions. These impacts and consequences all point to the conclusion that the LLTC, the construction of which is dependent on the compulsory acquisition of part of ABP statutory port estate, will act to the serious detriment of ABP's port operations.
- 91 To add to this and very significantly, the serious detriment can only be exacerbated by the bridge's physical presence in terms of navigational risk and safety – factors which fall to the statutory responsibility of ABP – as well as operator perception.

Impact on existing operations

- 92 The proposed LLTC has both temporary (during construction) and permanent (during operation) impacts on the Port, both of which underline the significance of the serious detriment that will be experienced by the Port.
- 93 During construction of the LLTC, the use of ABP's land and berth space for Port operations by ABP, its tenants and its customers will be disrupted. This will consequently impact on the current operational viability of the Port. In this regard, it is worth adding that SCC, in its Environmental Impact Assessment of the Scheme, materially understated the impacts on ABP, especially for the period when the Port's only access (Commercial Road) will be closed for a period of time, with the only diversionary route subsequently identified during the ExA hearings as being directly over ABP's principal operational quays immediately adjacent to the construction works. This again adds to the serious detriment that the Port (and its tenants and marine users) will experience. That

SCC failed to allude to this in its application documentation is distinctly concerning both in terms of the concealment of the issue and the fact that it would appear that SCC has no remedy to this legal defect in the application process.

- 94 During operation of the LLTC, ABP will be permanently deprived of a strategic area of land within the statutory port estate, falling as it does in the middle of the operational Inner Harbour by reason of the fact that the LLTC encompasses land side, quay, berthing and river-bed.
- 95 Once construction of the LLTC has been completed, the two-lane bascule bridge constructed at a height of only 12 metres (11 metres above HAT to accommodate the anticipated required safety margin) through the heart of the Inner Harbour will continue to disrupt in perpetuity ABP, its tenants and its customers.
- 96 In addition, the port infrastructure of the kind in place at the Port of Lowestoft is extremely expensive to build and is almost entirely dependent on the suitability of location, options for which in the vicinity of the Port around Lowestoft are extremely limited. It would be next to impossible to replace or replicate the Port operational facilities that lie to the west of the proposed new bridge, or indeed underneath it. As a consequence, the Port's business will be at best damaged or, at worst, lost.

Impact on future flexibility

- 97 This enforced deprivation of part of the statutory Port estate of itself imposes an operational constraint on the Port. It is critical for every operational port – worldwide – that if the Port is to be correctly positioned to meet the existing and future demands of a fluctuating international market, it must have land available within the port estate to enable it to meet customer demands – which can arise at short notice and at times, with no notice.
- 98 This reality is recognised in the National Policy Statement for Ports, which, as has already been highlighted, makes clear that:

"...Effective competition requires sufficient spare capacity to ensure real choices for port users. It also requires ports to operate at efficient levels, which is not the same as operation at full physical capacity." (NPSfP, Paragraph 3.4.13)

- 99 Development at the Port is undertaken by ABP as and when required with a view always to improving its commercial operations. Ensuring that a Port is in the best position to retain existing business and capture future business opportunities is a constantly moving target. It must always be able to respond to market demand.
- 100 The only land actually available to ABP at the Port for future expansion lies to the west of the proposed LLTC. This quay side and hinterland will be severely constrained in terms of the access and use by large vessels that cannot pass under the new bascule bridge, due to the currently proposed operational restrictions and lack of an emergency refuge berth.
- 101 If the LLTC is constructed, it will impose a restriction on ABP's ability to develop the Port, due to the introduction of a permanent impediment being located by a third party in the middle of an operational harbour.

Impact on future business and commercial perception

- 102 The Port has positioned itself as a renewable energy hub for offshore wind farm projects the operators of which can use the Port's existing facilities. Due to the Port's location in the southern North Sea near a number of planned, consented and built offshore wind farms, it is ideally placed to accommodate the growth in the offshore wind energy market, as well as building on its traditional strengths in the gas and oil, agri-bulks and aggregates sectors.
- 103 In a "no bridge" scenario, it is expected that investment in the offshore wind industry will grow materially at the Port over the next 25 years due to a number of factors, such as:
- (a) the location of the Port in relation to the East Anglia zone; and
 - (b) the fact that the Port is a relatively 'ready to go' base for future renewable activities.

- 104 The primary concern of potential operators, as communicated to ABP by those operators, is the potential financial impact of consolidated shipping delays caused by the proposed LLTC over the 25-30 year lifespans of an offshore energy project, in an environment where Government targets are driving down the strike price for generating revenues.
- 105 Put simply, a five minute delay, caused by the existence of the proposed LLTC, to a vessel every day (carrying 12 to 24 technicians) over the life of a scheme amounts to a very substantial cost burden that will place the Port at a significant disadvantage in comparison to competitor ports that do not face such restrictions. As already highlighted, this is a significant risk in the context of a deliberately market led and competitive industry within which the Port operates.
- 106 To add to this, there is in addition, a further operator concern in terms of bridge failure. Bearing in mind that the design of the actual LLTC bridge has not even been finalised – bridge failure is a serious concern – particularly for an operator of a vessel trapped for an indeterminate period of time on the western side of the bridge.
- 107 As such, the new bridge will present as a serious impediment to ABP's ability to attract new business which instead will look to alternative locations at other Ports, either on the east coast or indeed across the North Sea in mainland Europe.
- 108 ABP is particularly concerned, therefore, that the construction of a second bridge through the middle of the Inner Harbour will impact negatively on the commercial perception of the Port and its ability to accommodate current and future business opportunities. In brief, ABP is concerned that the proposed bridge will act to the serious detriment of future port development as a result of:
- (a) The introduction of an impediment part-way along the inner part of the Port, directly impacting Port operations at the location of the LLTC and indirectly impacting on Port operations upstream of the proposed crossing point; and
 - (b) The imposition of peak time bridge opening restrictions; and
 - (c) The inability of ABP, as harbour authority, to have full operational control the opening of the bridge (in contrast to the existing A47 bascule bridge). This will, as a consequence cause economic damage both to the Port as a result of the

consequential loss of business and thereby the broader regional economy, at a time when the Port is in the relatively early stages of a transformation arising from the opportunities offered by the offshore wind construction and Operation and Maintenance ("O&M") activities. In this regard, the Port operates in a highly competitive environment – any factor (such as concerns over accessibility introduced by the proposed LLTC) that places the Port at a commercial disadvantage over competing ports will inevitably work to the serious detriment of the Port in what is a fluctuating and unpredictable market.

109 ABP has provided the Examining Authority with a wide range of independent technical and specialist expert evidence which assesses the impact of the LLTC on the Port. In short, these experts all conclude that the Port is well-placed to expand future operations and development at the Port but such future growth will be detrimentally impacted by the LLTC Scheme.

110 Although SCC disagrees with the information and conclusions provided in the expert reports provided by ABP, it is of some significance to note that SCC has singularly failed to provide any technical or specialist evidence to refute or rebut the evidence provided in ABP's technical reports. Neither has it provided any independent evidence to support its views.

111 In this context, we would remind you that in the case of *Hinkley Port C Connection Project*, the ExA Recommendation Report stated that:

"Whether detriment is 'serious' is not a technical matter but rather a matter, necessitating the calling of technical expert evidence, of planning judgement that the Secretary of State would have to make taking into account the full scale of the application."

112 Additionally, in terms of the "evidence" provided by the applicant in the *Hinkley* case, the ExA Recommendation Report further states that:

"The BPC states that the use of "serious" is relevant not just for the purposes of s127, but also for determining whether or not there is a compelling case in the public

interest – the "planning balance". That question must be determined on the basis of properly qualified and technically competent evidence. The Applicant has not produced any witness with relevant qualifications to show that no detriment would result and there is, therefore, from the Applicant, an evidential vacuum... The only basis upon which any decision-maker can reach a decision is by reference to the evidence available."

- 113 Similarly, it is submitted that in light of the lack of any real evidence being provided by SCC, no credible weight can be given to it to support its view that there is no serious detriment caused by the LLTC Scheme to the Port.

Failure to mitigate

- 114 In context of the issue of serious detriment created by the LLTC scheme, for reasons dealt with further below this can never be removed in its totality. However, ABP has given consideration to the potential of mitigation measures which, if SCC were prepared to commit to provide, may be considered sufficient to reduce the scale of serious detriment, such that ABP may be prepared to reconsider its position.
- 115 As such, ABP has identified a range of measures which will to an extent mitigate at least some of the serious detriment that will be caused to the Port as a result of scheme. This mitigation comprises, in summary and amongst other things:

Emergency Berth

- 116 The provision of an emergency refuge berth on the eastern side of the proposed new bridge within the Inner Harbour to offset the serious marine navigation risks that could arise as a result of a vessel becoming trapped between the two bridges, should one of them fail. Examples of such a situation arising would be if the bridge failed and were to become stuck down or partially closed, or in certain circumstances, should the vessel itself fail.

Replacement Berthing

- 117 The creation of new berthing space in the Outer Harbour, to compensate for the permanent loss of berthing (and hence utility) in the Inner Harbour as a result of the proposed LLTC.

Absence of Indemnity

- 118 This is a feature of such profound significance that it is dealt with at greater length below.
- 119 ABP requires a full indemnity, backed by commercial insurance, bearing in mind that by constructing a low bridge through the middle of an operational Port, SCC is proposing:
- (a) To introduce a dangerous hazard into the Port to the detriment of the Statutory Harbour Authority which will as a consequence,
 - (b) Impair significantly ABP's ability to perform its statutory duties in the context of safety of navigation, as well as introducing a risk of vessel strike to the new bridge and potential injury to users of the bridge/vessel crews as well as damage to the vessel.
- 120 It should be noted that ABP's overall approach adopted in respect of mitigation is one of "equivalence" i.e. the provision of replacement assets and legal safeguards to offset the serious detriment that will otherwise be caused by the proposed LLTC. Equivalence will leave the Port neither better nor worse off as a result of the mitigation works. To date, no such mitigation has been forthcoming, which consequentially means that the Scheme in its present form must be regarded as unacceptable.

Serious detriment

- 121 As set out in more detail in the Clyde & Co. letter of 31 May 2019, ABP's clear contention is that the scheme will cause serious detriment to the port and as such that the terms of section 127 of the Planning Act 2008 are engaged.
- 122 This arises both as a direct consequence of the compulsory purchase of ABP's various land and rights interests identified above and also in relation to a number of further escalating and cumulative impacts all of which derive from the proposed compulsory purchase:
- (a) **Berthing utility:** The loss of essential berthing and operational berthing utility and flexibility;
 - (b) **Height restriction impediment:** The practical imposition of a height restriction, thereby acting as an impediment across the middle of the operational harbour –

- which incidentally, as far as we are aware, will be the only such bridge in the UK as far as we are aware;
- (c) **Impact on existing operations:** The permanent loss by compulsory acquisition of part of the statutory port estate – both land and sea-bed - falling within the middle of the Port's Inner Harbour;
 - (d) **Impact of future operations:** The loss of berthing space and essential practical mooring utility and critical operational flexibility required by every commercial port to manage its existing and future business;
 - (e) **Commercial deterrent:** The perceived creation of a physical, and thereby commercial, deterrent to both existing and potential future customers and businesses;
 - (f) **Failure to provide mitigation:** A failure by SCC to offer any measures to mitigate the serious detriment that will be caused by the scheme; and
 - (g) **Lack of Indemnity:** A failure by SCC to offer an indemnity to ABP in respect of the risks that the introduction of a dangerous hazard into the middle of the Port will create in perpetuity in terms of ABP's statutory responsibilities.

Section 127 of the Planning Act 2008

- 123 A pre-requisite for the implementation of the LLTC scheme as now proposed by SCC is the compulsory acquisition of land owned by a statutory undertaker and operated as part of its statutory undertaking. The proposed compulsory acquisition of part of a statutory undertaking brings into play the provisions of section 127 of the Planning Act which require the Secretary of State in such circumstances specifically to approve the compulsory acquisition – but only if he is satisfied that the compulsory acquisition will not act to the 'serious detriment' of the carrying on of that undertaking.
- 124 ABP's case is that the Scheme will have not just have a serious and detrimental impact on existing Port operations but potentially, an immeasurably damaging impact on future Port operations. Those impacts will be of such a scale that they will without doubt touch on the future viability of the Port– to the consequentially serious detriment of the local and regional economy – and indeed ABP's ability to comply with its statutory duties and fulfil its statutory obligations as the SHA.

125 It is submitted that the land, the subject of SCC's proposed compulsory acquisition, falls within the definition of land which - '*has been acquired by Statutory Undertakers for the purposes of their undertaking*', in accordance with Section 127(1)(a) of the Act. It is not understood that this issue is in dispute with SCC. This is sufficient to satisfy the test set out in Section 127 (1)(a).

126 Section 127 is subject to further tests: those under section 127(3)(a) and 127 (3)(b).

Section 127 (3)(a) – purchased and not replaced

127 The first test is whether the land – '*can be purchased and not replaced without serious detriment to the carrying on of the undertaking*'.

128 The question as to what constitutes “serious detriment” is considered below.

129 In terms of the impact on the '*carrying on of the undertaking*' – this falls into two parts:

- (a) the carrying on of port operations, which in terms of ABP's business and statutory obligations, is viewed as encompassing both existing and future port operations;
and
- (b) the ability of ABP, as a statutory undertaker, to comply with its myriad statutory obligations and duties.

130 The Section 127 test under the Act is designed specifically to protect the ability of the statutory undertaker to perform its statutory obligations – which extends to both its obligation to undertake its port operations as the statutory port operator and its statutory duties and obligations as the Statutory Harbour Authority. This point is emphasised in view of certain observations ventured by counsel for SCC at one of the examination sessions that the test of serious detriment was only relevant in terms of ABP's ability to perform its statutory duties and obligations and has no relevance in terms of ABP's ability to carry on its port operations as the statutory port undertaker. In ABP's view this was a quite an extraordinary suggestion to which we trust the Examining Authority will give no sensible credence – both in terms of the practical applicability of the test - and indeed legal precedent, as we explain below.

Section 127 (3)(b)

- 131 The second test is whether the land –*‘if purchased ... can be replaced by other land belonging to, or available for acquisition by, the undertakers without serious detriment to the carrying on of the undertaking’*.
- 132 If the ExA agree that the proposed LLTC scheme will cause serious detriment to the Port (for which, see further below) the only question remaining is whether the serious detriment caused to the Port by the permanent deprivation of berthing and port hinterland on the land side and land on the bed of Lake Lothing albeit also within the port estate, could be mitigated either by *‘replacement land’* belonging to the statutory undertaker, or land which is *“available for acquisition”* by the statutory undertaker.
- 133 On a purely local level, the Port estate is, and always has been, physically constrained. The Port is effectively located within the centre of Lowestoft and is enclosed by the town both to the north and south. Lake Lothing itself forms a natural boundary and the North Sea forms the boundary to the east. The harsh reality in the context of this statutory test is that the Port, by reason of its geographical boundary constraints, does not have *‘spare land’* that it can simply surrender for a highway scheme.
- 134 This lack of available land of itself imposes an operational constraint on the Port in that it is critical for every operational port – worldwide – that if it is to be correctly positioned to meet the existing and future demands of a fluctuating international market, it must have land available within the port estate so that it can meet customer demands – which can arise at short notice and at times, with no notice. This fact is recognised in National Ports Policy, which makes clear that:
- “Effective competition requires sufficient spare capacity to ensure real choices for port users. It also requires ports to operate at efficient levels, which is not the same as operation at full physical capacity.”*
- 135 The only land temporarily available to ABP at the Port of Lowestoft lies to the west of the proposed LLTC – which of itself causes difficulties for ABP.

- 136 That area of berthing and port hinterland has already been designated for a new Port facility to be known as the East of England Energy Park. The details of this proposed development have already been provided to the ExA but the practical obstacle to this essential development if the LLTC Scheme is approved as currently proposed, is that the length of berthing and port hinterland allocated for the Energy Park will effectively be sterilised in terms of 24 hour access and use by large vessels that clearly will not be able to fit under the new bascule bridge.
- 137 New port infrastructure of the kind proposed by ABP for the Energy Park has a very high capital cost and is entirely dependent on the suitability of location - options for which around Lowestoft are extremely limited. With a bridge across the middle of the operational Inner Harbour, critical berthing and landside will be lost which simply could not be replaced or replicated within the Port.
- 138 In consequence, no other land exists that would be available for acquisition by ABP, or indeed SCC, which could genuinely offset the serious detriment caused by the LLTC. It may also be noted that SCC has also made clear that *"there was little or no prospect of replacement land being made available for the purposes of section 127(3)"* (paragraph 2.1.4 of the "Impact of the Scheme on the Port of Lowestoft", Document EX/59, submitted by SCC at Deadline 4 of the Examination).

“Serious detriment” in context of s127

- 139 The serious detriment test set out in s127 of the Planning Act is holistic. It requires the decision maker to consider the serious detriment caused by a given project, in the context of the whole – whilst recognising that “serious detriment” of itself appears in a myriad of guises, the sum of its parts.
- 140 In the case of the Port, it is necessary to consider the serious detriment that will be caused to the Port in terms of the statutory undertaker’s ability to carry on its statutory undertaking which for ABP encompasses its obligations and duties as the owner of the Port, the operator of the Port; and the Statutory Harbour Authority and Competent Harbour Authority.

141 The following points are relevant to establishing whether or not the section 127 'serious detriment' test is engaged:

- (a) Who is the statutory undertaker?,
- (b) What is the port statutory undertaking?
- (c) What constitutes serious detriment?
- (d) How far the serious detriment extend?

(1) Who is the statutory undertaker?

142 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 statutory port undertaker for the Port of Lowestoft.

(2) What is the port statutory undertaking?

143 A precondition for the engagement of section 127 is that the land in question the subject of the proposed compulsory acquisition must be land owned by a statutory undertaker and held for the purposes of that statutory undertaking. In terms of the LLTC Scheme as it impacts upon the Port of Lowestoft, SCC has accepted that those parcels of land within the Port impacted by the Scheme comprise part of ABP's statutory undertaking.

144 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'), which are set out principally in the Transport Act 1981, albeit supplemented by a myriad of other legislative instruments.

145 Significantly, the section 127 test does not make any distinction between the specific statutory obligations and duties placed on a statutory undertaker in its capacity, in this instance as the Statutory Harbour Authority and the undertaker's carrying out of its commercial port undertaking. Indeed, 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 or three-part entity – ownership of the port, the carrying on port operations as a business and the statutory duties of the SHA – but a single holistic undertaking.

146 In addition, the consideration of what falls within the general heading of the port's operations must include the Port's future undertaking as well as the current position – including direct and physical components - i.e. the direct impact of the compulsory acquisition of land but also the direct and indirect impact upon business, both existing and future, and anything that affects the port undertaking. The Port undertaking must be viewed in its broadest sense.

147 As such, the serious detriment test must be considered in the context of ABP both as the SHA with its consequential statutory duties and obligations and ABP as the owner and commercial operator of the Port.

(3) What constitutes 'serious' detriment?

148 There is no statutory definition of 'serious detriment'. That said, the term "serious detriment" itself suggests that the test should be more than just trivial, but not necessarily severe.

149 Of relevance is the fact that the 'serious detriment' test has been considered in a number of recent NSIP examinations - the two principal precedent NSIP decisions being the *Hinkley Point C Connection* and the *Richborough Connection* Projects.

150 In the *Richborough Connection DCO* application, the Examining Authority considered that the term 'serious detriment' goes beyond just 'detriment', and that something would be 'serious' if it was 'important or significant' (Paragraph 9.9.101 of the Recommendation Report).

151 In the *Hinckley Point C Connection Project*, the Examining Authority agreed that the Bristol Port Company (the statutory undertaker for the Port of Bristol) required inherent flexibility to develop its port estate going forward if it was to be able to fulfil its obligations as the statutory port undertaker, both in terms of vessel passage and the future construction of port buildings and facilities within the port estate (paragraph 8.5.275 of the Report to the Secretary of State).

152 Although the Examining Authority in terms of that project recognised that the area affected by the proposed development was relatively small – namely the construction of

connecting power cables through the statutory port estate - in comparison to the whole of the port estate available to the statutory undertaker, they were also of the view that the particular location proposed for the overhead cables would be likely to cause serious detriment to the carrying on of the port undertaking. Further, it was noted that the area of the statutory port estate affected represented an important part of the resources available to the Bristol Port Company and the Examining Authority agreed that there was a paramount need for the Port to be able to retain the ability to use the impacted land in a flexible manner (paragraph 8.5.276 of the Report to the Secretary of State).

- 153 The key points arising from the *Hinkley* and *Richborough* precedents are as follows:
- (a) The serious detriment test includes consideration of both current and future activities.
 - (b) The question of serious detriment must be decided on the basis of properly qualified and technically competent evidence. In this regard, in the Port of Bristol case, the ExA determined that personnel with intimate knowledge of the port are best placed to provide such evidence. Conversely, as is the case with the LLTC proposal, where an applicant has failed to provide any witnesses with relevant qualifications and/or experience to show that no detriment would result, the applicant will have presented its case in an evidential vacuum.
 - (c) Serious detriment goes beyond detriment - something would be serious if it was 'important or significant'. The question as to whether any detriment is important or significant, has to be judged having regard to how the statutory undertaker conducts its business. Any consideration of the statutory test must take into account how the affected body fulfils the duties and standards that apply to it as a statutory undertaker. In other words, the decision-maker cannot simply separate individual issues, considering them in isolation. On the contrary, the decision maker must in law adopt a holistic approach to the question of serious detriment.
- 154 In determining the scale of the impact, ABP accepts, therefore, that a judgment has to be made as to the importance of that part of the port estate specifically impacted by the Scheme. That, however, is only one component of the test. The decision maker is required to take a holistic approach and in the context of the LLTC scheme, assess the impact on the Port as a whole.

155 It is submitted that care must be taken not to construe a given loss or impact to be small and, therefore, conclude that the loss or impact cannot be significant or important and thereby cannot amount to "serious detriment". That would be an error, as already noted in the *Hinckley* decision.

156 In the *Hinkley* decision, the Examining Authority, and consequently the Secretary of State, determined that whether or not the Scheme would cause serious detriment to a port undertaking, the amount of area actually affected by the proposed development when compared with the whole of the port estate was irrelevant. Further, in the *Hinckley* decision, the objections of the Bristol Port Company ("BPC") in the context of National Grid's proposal to erect a power connecting cable across the port, were summarised as follows –

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

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

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

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

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

157 Relevantly, the amount of statutory area that was impacted by National Grid's proposal was approximately 2.7% of the Port of Bristol estate. As such, National Grid sought to argue that the operational loss of such a small amount of area could not cause serious detriment to current operational requirements nor to the Port operator's flexibility to undertake future development by reason of the "vast scale of land available to the BPC". National Grid also sought to argue that (Paragraph 8.4.176 of the Recommendation Report):

"In the context of such a large port and holding, the area affected would be small and the effect upon that small area is limited to a reduction in the height of what could be built in some parts of that small area, assuming that is the form of development that the BPC eventually decides it wants. There is no reason to believe that such development, if needed, could not successfully be accommodated elsewhere within the Port. Whilst it is not disputed that a small reduction in flexibility to develop in one small area is a detriment, it is not properly capable of amounting to a 'serious' detriment to the Port's operation."

- 158 The Examining Authority rejected National Grid's argument, and found as follows (Paragraphs 8.5.275 and 8.5.276 of the Recommendation Report):

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

We recognise that the area affected would be relatively small in comparison to the whole of the land available to the statutory undertaker. However, we have been persuaded by those with an intimate knowledge of the Port that the constraints imposed by the proposed development in this particular location would be likely to cause serious detriment to the carrying on of the undertaking. The land affected represents an important part of the resource available to the BPC, and there is a paramount need to retain the ability to use this land in a flexible manner. However, as indicated above, this concern would be overcome by the alternative proposal that provides for an increase in the height of the pylons, and hence ground clearance in this location."

- 159 It should be noted that the Bristol Port Company, in its summary representations, used both the words 'significant' and 'serious detriment'. Whilst the impact the subject of the objection could, on one level, be viewed as a relatively small (essentially the erection of power cables across the Port) the reality is that although the works proposed were

indeed relatively small when viewed in the context of the whole statutory port estate, the impact on both existing and future port operations was considered by the ExA to amount to 'serious detriment'.

160 Of particular relevance is the fact that the summary of the Port of Bristol's case quoted above was accepted by the Examining Authority in concluding that the erection of the power cable would indeed cause serious detriment to the port undertaking.

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

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

163 The Examining Authority continued that: –

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

164 The applicant, National Grid Electricity Transmission plc, argued, as summarised by the Examining Authority at para 9.8.70 of its Report that the proposed project would not cause serious detriment because, amongst others:

- (a) There was no undertaking being 'carried on' by SEW (in that SEW were attempting to protect land that would be the subject of a future development proposal for a reservoir;
- (b) The reservoir proposal had no funding;

- (c) The reservoir proposal could still be developed despite the compulsory acquisition; and
- (d) Whilst it was accepted that some amendments would need to be made to SEW's proposal these did not amount to serious detriment.

165 In their conclusions, the ExA found, at paragraph 9.9.101, that there:

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

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

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

167 As far as the LLTC Scheme is concerned, it is clear that the introduction of a new bridge at low height through a working port is a unique set of circumstances. The impact must therefore be considered in the context of the port's operations as a whole – including the assessment by those operating the Port as to how vessels can and will be accommodated (i.e. in term of berth utilisation, movement of vessels), impact on tenants and perception of future occupiers.

(4) How far does serious detriment extend?

168 It is submitted that, in light of the above, ABP has established that the serious detriment test requires a holistic approach, not just a consideration in isolation as to whether discrete elements of the statutory undertaker's operations may or may not be detrimentally impacted.

- 169 For example, it must be the case that detriment caused by the loss of berthing cannot be linked solely to the 'direct' loss of berth space. Legal precedent has established that size alone is not a determining factor when assessing significance or importance in terms of serious detriment. The true impact of the berthing loss must be considered in terms of its direct and indirect impact on both operational activities and an individual statutory undertaker's duties and obligations as a whole.
- 170 It must be taken as given that the extent of the impact of a given scheme on existing operations is a central component of the serious detriment test. With respect, that consideration extends not just to the actual amount of land that SCC wishes to acquire compulsorily – the direct impact, but also the indirect impact, restricted flexibility, consequent limitations and other matters also set out in these submissions.
- 171 Disappointingly, however, SCC has sought to mischaracterise the scope of the serious detriment test throughout the examination by attempting to impose a limit on the scope of the test. In addition, at paras 2.1.5 and 2.1.6 of the "Impact of the Scheme on the Port of Lowestoft", Document EX/59, (submitted by SCC at Deadline 4 of the Examination), SCC agreed with –*“ABP’s contention that serious detriment should not be considered purely in the light of the value to the undertaking of the land taken, but attention should also be paid to the functional effect that is caused by compulsory acquisition being taken of that land”* (para. 2.1.5)
- 172 Whilst in paragraph 2.1.6, SCC also *“... agrees that consideration of this issue must be both based on current Port activities, but also its potential for the future”*, SCC then suggest that ABP's potential for the *“future must be proven to be at least reasonably likely”*
- 173 As ABP has pointed out in response, however, there is in fact no legislative requirement or legal precedent which could be taken to support that assertion. That said, the facts do actually seem to speak for themselves – the future prospects for the Port of Lowestoft in terms of wind energy and oil and gas, to say nothing of aggregates and improved rail capability have been amply demonstrated in evidence provided by ABP to the Examining Authority.

- 174 It is clearly not a legal requirement for future potential operations to be specifically identified in order for the decision maker to undertake an assessment of the proposed detriment caused. Certainly, there is no statutory requirement or precedent to support such an assertion. It is ABP's view that it is sufficient that the decision maker is satisfied that the proposed compulsory acquisition will significantly impair essential operational flexibility, which will in turn, constrain both current and future operations.
- 175 Thus, the Secretary of State in *Hinckley* found that the proposed scheme would impact on the Port's future "*flexibility*" (see 9.2 above) – without, it should be noted, being specific as to the exact nature of future requirements.
- 176 In *Richborough*, SEW attempted to argue that serious detriment was engaged even though the operation which it was alleged would be impacted did not exist and further, was neither defined nor funded. The ExA in that instance, however, determined that it could not conclude that serious detriment in terms of the section 127 test would be caused by the proposed project.
- 177 As far as the LLTC scheme proposals are concerned, however, unlike the position in *Richborough*, ABP is already operating a defined and existing port facility – with an expanding defined portfolio of business as evidenced by recent new occupiers/arrivals at the Port.
- 178 In this respect, ABP would also draw your attention to the issues that arose in relation to Welsh Government's M4 Relief Road proposals in South Wales and its impact on the Port of Newport – para 32 *et seq* above refers. Whilst not promoted under the PA 2008 as an NSIP, the section 127 test in the PA 2008 actually replicates the 'serious detriment' test in section 16 of the Acquisition of Land Act 1981. Although the 'serious detriment' test was engaged in that case by ABP, it was not pursued in that the promoters of the scheme accepted that serious detriment would be caused by their project – effectively the construction of a motorway bridge through the middle of that Port - and as a consequence, committed to deliver measures that would mitigate the serious detriment and restore equivalence. It may be also be noted that Welsh Government agreed to indemnify ABP for all losses and liabilities falling to ABP which would not have arisen but for the introduction of the bridge into the operational Port – a point which will be returned to below.

Statutory duties and obligations

- 179 In the context of the above, it is submitted that the test of serious detriment extends beyond the ability of the statutory undertaker to carry out its existing and future operations, as if the act of compulsory acquisition detrimentally impacts upon ABP's ability to carry out its operations, and that compulsory acquisition is required in order to facilitate the construction of a low bridge across the middle of an operational Port, then the test of serious detriment is also engaged if, as is the case, the consequence of the scheme is that ABP may not be able fully to comply with its statutory obligations as the Statutory Harbour Authority – those duties and obligations extending to safety of navigation, safety of users of the port, the open port duty etc.
- 180 From the above it is submitted that:
- (a) For 'serious detriment' to be engaged the land the subject of the proposed compulsory purchase:
 - (b) must be statutory undertaker's land; and
 - (c) be held by the owner in its capacity as a statutory undertaker.
- 181 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 will seriously impact upon the statutory undertaker's ability to comply with its statutory duties and obligations - in this case as the Statutory Harbour Authority;
 - (d) Which may affect the future flexibility of the Port's undertaking; and
 - (e) The relevant undertaking encompasses not just existing commercial operations but also those foreseen in the future for the statutory undertaking whether specifically planned or "only" anticipated for the future – provided that the serious detriment caused by the proposed development can be shown to present a real threat to the Port statutory undertaking.

- 182 In ABP's view, all of the above components are brought firmly into play by the Applicant's proposals for the LLTC Scheme, and are if anything, underlined by the Secretary of State's own confirmation, in the section 35 Direction, of: "*the Port of Lowestoft's role in being the hub for the off-shore wind farms that are part of the east Anglia Array, a major supplier for the UK.*"
- 183 As a consequence, the separate components that together make up the "serious detriment" that the LLTC scheme will have on the Port of Lowestoft fall into a number of conjoined impacts which together escalate the scale of the serious detriment going forward. In short, these impacts include the following (which are considered in more detail below):
- (a) ABP will be permanently deprived of a strategic area of land within the port estate, falling in the middle of the operational Inner Harbour, as a result of the LLTC, encompassing land side, quay, berthing and river-bed;
 - (b) The use of ABP's land and berth space for Port operations by ABP, its tenants and its customers will be disrupted during construction of the LLTC, which will consequently impact on the current operational viability of the Port;
 - (c) Once construction of the LLTC has been completed, the two lane bascule bridge constructed at a height of only 12 metres (11 metres above HAT to accommodate the anticipated required safety clearance) through the heart of the Inner Harbour will continue to disrupt in perpetuity ABP, its tenants and its customers;
 - (d) The bridge will act to the serious detriment of the Port's future operational viability by virtue of the location, height, operational restrictions of the bridge; so that-
 - (e) ABP's ability to meet customer demand will be severely limited by the perception of two bridges across the Port, leading to the risk that ABP:
 - (f) will be unable to retain its existing business; and/or
 - (g) attract new business;
 - (h) ABP's ability to accommodate customers and key trades, particularly during times of peak traffic when the bascule bridge will not be opened for vessel movements will be impaired, resulting in loss of business and/or delays to

vessels, with consequential long-term (or even permanent) damage to the Port's market reputation; with the consequence that-

- (i) ABP's ability to compete for business will, therefore, be materially constrained;
- (j) That loss of trade will adversely affect ABP's ability to maintain and invest in essential Port infrastructure in discharge of its statutory duties; and
- (k) The Port's strategic significance for the UK will be seriously damaged and its economic contribution locally, regionally and nationally will be adversely affected; and
- (l) The Port's ability to continue to be a significant contributor to achieving the UK's renewable energy needs, entirely in accordance with Government policy, will be severely impeded.

184 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 that the serious detriment 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.

Conclusions

185 In light of the evidence submitted during the course of the examination it is, with respect, abundantly clear that the Scheme, comprising not only the compulsory acquisition of land and rights but also the introduction of a new bascule bridge in an operational Port, will not only have serious consequences for the Port but will be of a sufficient magnitude that it engages and surpasses the test of serious detriment set out in section 127 of the Planning Act 2008. To that end, ABP via its solicitors has now written to the Secretary of State to specifically highlight this issue.

186 As has been made abundantly clear at all relevant stages (including in its written representations, and in the 31 May 2019 letter to Secretary of State), ABP is not opposed to the principle of a third river crossing of Lake Lothing. ABP's original objection was to the location of the bridge through the middle of an operational port. If SCC had approached the formulation of its Scheme in a properly considered way, it is

hard to conceive how that would not have readily demonstrated even to SCC that the selected location for the LLTC now being promoted is simply operationally indefensible.

- 187 ABP, as the owner and operator of the Port and the SHA, cannot, for the reasons detailed above, accept the location of the bridge as currently proposed if the serious detriment that will be caused by the LLTC scheme is not mitigated. To date, SCC has singularly refused to acknowledge the serious detriment that its scheme will cause and has, as a consequence, refused to discuss any meaningful mitigation measures with ABP.
- 188 The logical conclusion which must be drawn is that the Scheme, as proposed, should not be confirmed.
- 189 That is clearly regrettable, given the large amount of public money that has already been expended. However, in a spirit of pragmatism, ABP has nonetheless reflected upon the state of affairs indicated to the Secretary of State that it may still be prepared to withdraw its objections to the Scheme if SCC would be prepared to provide a genuine package of measures to mitigate the serious detriment that would otherwise be caused to the Port. It has suggested to the Secretary of State that if he were to indicate that he would be minded to refuse the compulsory acquisition of ABP's land, that would provide SCC, upon the assumption that it still wished to construct the bridge, with the opportunity to approach ABP with a meaningful package of mitigation measures, including an acceptably termed indemnity.
- 190 That constructive considered approach has not been advanced lightly by ABP. Nonetheless, the purposes of the Examining Authority's appreciation of the position, and for the purposes of the examination, ABP's position remains one of regretful opposition and it invites the Examining Authority to recommend that the development consent order not be made.

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