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Rt. Hon. Chris Grayling MP
Secretary of State for Transport
Department for Transport
Great Minster House
33 Horseferry Road
London
SW1P 4DR

Our Ref
BG/10028565

Your Ref

Date:
31 May 2019

Dear Secretary of State,

**Proposed Lake Lothing Third Crossing, Lowestoft
Associated British Ports - Port of Lowestoft
Section 127 of the Planning Act 2008**

1 Summary

- 1.1 I write on behalf of our client, Associated British Ports ("ABP") the owner and operator of the Port of Lowestoft and the Statutory Harbour Authority.
- 1.2 On 13 of July 2018, Suffolk County Council submitted to you, through the agency of the Planning Inspectorate, an application for a Development Consent Order ("DCO") to be made under the provisions of the Planning Act 2008. The DCO application was accepted by the Planning Inspectorate on 9 August 2018.
- 1.3 As you will be aware, the County Council are seeking approval for the construction of a low-level, single leaf bascule bridge through the middle of the Port of Lowestoft's Inner Harbour. The scheme is known as the Lake Lothing Third Crossing ("LLTC").
- 1.4 If you are minded to approve the DCO application, then in so doing you will be approving the construction of a bridge, located in the middle of the Port of Lowestoft's operational Inner Harbour and crossing the Port's navigable channel at a safety clearance height of 11 metres. 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 LLTC.
- 1.5 By locating the bridge across the middle of the Inner Harbour – and we should point out that other more sensible options were available, the promotion of which would have avoided considerable time and expense and avoided an unfortunate waste of public money - the County Council also need to acquire compulsorily land and rights within the statutory port estate. ABP holds this land in its capacity as statutory port undertaker.

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- 1.6 The immediate impact of the LLTC scheme on existing port operations will be seriously detrimental.
- 1.7 The extent of the serious detriment caused by the bridge must, however, be viewed on an escalating and cumulative scale. The impact will be multiplied in terms of future commercial operations, operator perception, proposed port expansion and the Port's consequential inability to meet the needs of, amongst others, an off-shore energy market which Government has recognised as being of critical importance to the UK economy.
- 1.8 ABP has objected to the LLTC proposal and is currently participating in the NSIP examination process which began in December last year. A fundamental issue which our client wishes you to address is that of the serious detriment that the LLTC scheme will cause to the Port of Lowestoft within the provisions of section 127 of the Planning Act 2008 ("PA 2008").
- 1.9 At the commencement of the examination, our client instructed us to delay a formal reference of the LLTC scheme to you in the context of the section 127 "serious detriment" test because it hoped that the time afforded would give the County Council the opportunity properly to recognise and acknowledge the serious damage that the LLTC scheme would inflict on the port – something that the Council have to date unfortunately ignored or simply not understood – and thereby enable them either to withdraw the scheme in its entirety and promote a more sensible option or, if the scheme is to proceed, to enable them to offer to ABP a package of measures that would mitigate the serious detriment that will otherwise be caused to the Port.
- 1.10 Unfortunately, even at this late stage in the process, the County Council have still failed to offer any meaningful measures of mitigation.
- 1.11 Having given notice of our client's intention to raise the section 127 "serious detriment" test, our client acknowledges with thanks the time that the ExA has already given to the consideration of this issue under the Act as part of the examination process. Our client does believe, however, that it is entirely appropriate at this stage, in addition to the evidence already presented to the examination, to write to you formally to request that in light of the serious detriment that will be caused to the Port of Lowestoft if the LLTC scheme is allowed to proceed as currently proposed, then by virtue of the statutory powers granted to you by Section 127 of the Planning Act 2008 ("the Act"), you determine that you are unable to approve the compulsory acquisition of land and rights within the Port statutory estate.
- 1.12 For your assistance this letter - and we apologise in advance for its length but it would simply not be possible properly to explain the critical damage and long-lasting impact that will be caused to the port by way of a brief summary – addresses the issues arising as follows –
 - a) A summary introduction to Associated British Ports;
 - b) The LLTC scheme;
 - c) Section 127 of the PA 2008 – the "serious detriment" test;
 - d) Serious detriment –
 - The compulsory purchase of the statutory port estate, (section 10);
 - Loss of berthing and berthing utility/flexibility, (section 11);
 - Obstruction/impediment, (section 12);

- Impact on existing operations, (section 13);
- Impact on future flexibility, (section 14);
- Impact on commercial perception of the Port and, hence, the ability to secure future business, (section 15);
- Failure to mitigate, (section 16);
- Lack of an indemnity, (section 17);
- The section 35 Direction, (section 18); and
- Conclusions and a "minded to" determination, (section 19).

2 Associated British Ports and Port of Lowestoft

- 2.1 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).
- 2.2 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.
- 2.3 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.
- 2.4 As you will be aware from 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, 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 500 local jobs either directly or indirectly – figures that over the past 12 months have experienced a distinct upward trajectory in terms of growth.
- 2.5 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 cargo.
- 2.6 Operationally, as the plan attached as **Appendix 1** indicates, the Port comprises two harbours -
- 2.7 **The Outer Harbour** – is used for the fishing sector, general cargo, heavy industrial manufacturing and the critically important offshore energy sector, both in terms of operations and management services.
- 2.8 **The Inner Harbour** - also accommodates the offshore energy sector, together with bulk and general cargo handling and aggregate facilities together with ship repair facilities including a dry dock.
- 2.9 Historically, the Port of Lowestoft has grown inwards from the sea – the first recorded port activities being those of the local fishing fleet operating from that part of Lowestoft that now falls within the Port's Outer Harbour. In order for vessels using the

inland waterways from Norwich to gain access to the North Sea, however, it was necessary to break through the strip of land separating Lake Lothing from the North Sea, thereby cutting across the existing coast road linking Ipswich with Great Yarmouth. Since then and today, the Inner Harbour has been separated from the Outer Harbour by a low, currently bascule, bridge carrying the A12/A47.

- 2.10 Significantly, the Port, together with the town of Lowestoft, has been recognised as a major hub for servicing the growing nationally significant offshore energy sector. Indeed, Lowestoft's importance in supporting the growing offshore wind market was highlighted in November 2018 by the Crown Estate's announcement that East Anglia was one of the five regions to be taken forward for Round 4 offshore wind leasing. This announcement built upon the Government's earlier decision in 2015 to grant Lowestoft CORE status (Centre for Offshore Renewable Engineering).
- 2.11 As a consequence of the Port of Lowestoft's close proximity to the East Anglia wind farm region in the southern North Sea, it is in a prime location to benefit from this future development potential. The Crown Estate's Webinar Update "Offshore Wind New Leasing" dated 29th April 2019 has merely confirmed the position to the effect that –
- a) Round 4 is intended to deliver projects that contribute to the UK's ambition of 30GW offshore wind by 2030;
 - b) A 60 year lease term is proposed to enable two project lifecycles if required; with
 - c) A ten year option period; and with
 - d) A proposed launch notice in late Summer 2019.
- 2.12 Indeed, we have noted that one of the specific reasons you cited in your Section 35 Direction for determining that the proposed LLTC could be viewed as a development consent project was that the scheme –
- "delivers the Port of Lowestoft's role in being the hub for the off-shore wind farms that are part of the East Anglia Array, a major energy supplier for the UK."*
- 2.13 The fact that the scheme will have precisely the opposite effect is a point to which we return below.
- 2.14 In similar measure, Waveney District Council has also acknowledged the importance of the Port in its emerging 2018 Local Plan, 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."*
- 2.15 Further, most recently as noted above, the Energy and Clean Growth Minister, Claire Perry, visited Lowestoft to launch the Offshore Wind Sector deal including a £250 million investment to develop the UK's offshore wind energy market – enabling one third of British electricity to be produced by offshore wind power by 2030. A copy of the Government Press Release is attached as **Appendix 2**.
- 2.16 It would not be out of place to note, in the context of these positive assertions in support of the Port and the critical future role that it has to play in the UK's energy market, that the Operations and Maintenance functions of the offshore energy sector, many of which are already located at the Port, are time critical. As such, any impediment, actual or perceived, which introduces time constraints upon the passage

of vessels to or from the Port has the potential to impact critically on those operations. A bridge which cannot be lifted during peak times and lies directly across the middle of an operational port introduces precisely the type of impediment and delay which vessel operators will have no choice but to avoid.

3 Compulsory Purchase

3.1 We do not propose in this letter to describe in detail the County Council's proposals for the compulsory acquisition of land and rights within the Port's Statutory Estate, as these matters are being considered by your appointed Examining Authority at the NSIP examination.

3.2 Bearing in mind the provisions of section 127, however, a short summary of the County Council's compulsory acquisition proposals would be appropriate. In brief, therefore, in terms of ABP's statutory port estate, the County Council propose:

- (a) permanently to acquire land that falls under the bridge piers, both within the watercourse on the river bed and on ABP's Port landside and new leisure craft 'waiting' pontoon mooring;
- (b) permanently to acquire airspace and rights over the existing highway access to the Port and bridge deck;
- (c) permanently to acquire rights over Commercial Road which is the only road granting access to the Port and around the highway and bridge; and
- (d) temporarily to possess and take occupation of land within ABP's quayside; and
- (e) temporarily to possess and take occupation of the entire width of Lake Lothing (thereby rendering it unnavigable).

3.3 For your assistance, we have attached, as **Appendix 3**, a schedule together with a plan detailing the County Council's proposed land take within our client's land ownership which forms part of the statutory port estate.

3.4 **Consequential serious detriment** – The compulsory purchase of part of the statutory port estate will of itself cause "serious detriment" to the Port undertaking. From that compulsory acquisition, however, flow a number of escalating and cumulative impacts including –

- (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;
- (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 the County Council to offer any measures to mitigate the serious detriment that will be caused by the scheme; and
- (g) **Lack of Indemnity:** A failure by the County Council to offer an indemnity to ABP in respect of the risks that the introduction of a dangerous hazard into the middle of the operational Port estate will create in perpetuity in terms of ABP's statutory responsibilities.

3.5 Before dealing with the detrimental impacts that we have identified above, we should first clarify the position with regard to the legal tests imposed by the Act.

4 Section 127 of the Planning Act 2008,

4.1 A pre-requisite for the implementation of the LLTC scheme as now proposed by Suffolk County Council is the compulsory acquisition of land owned by a statutory undertaker and operated as part of its statutory undertaking. As such, the proposed scheme can only be taken forward if under the provisions of section 127 of the Planning Act you are of the view that the compulsory acquisition of the statutory undertaker's land will not act to the 'serious detriment' of the operation of that undertaking.

4.2 The purpose of these formal representations is to explain to you why the proposed LLTC scheme will in fact have a serious and detrimental impact not just on existing Port operations but further, will have an immeasurably damaging impact on future port operations. Whilst we fully appreciate that the issues that have been raised in evidence at the examination on the subject of serious detriment will be comprehensively reported to you by the ExA, the detrimental impact caused by the bridge will be of such a scale that they will without doubt touch on the future commercial viability of the Port of Lowestoft – 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 Statutory Harbour Authority.

4.3 For your assistance, Section 127 of the 2008 Act provides as follows:

'127 Statutory undertakers' land

- (1) *This section applies in relation to land ("statutory undertakers' land") if –*
 - (a) *the land has been acquired by statutory undertakers for the purposes of their undertaking,*
 - (b) *a representation has been made about an application for an order granting development consent before the completion of the examination of the application, and the representation has not been withdrawn, and*
 - (c) *as a result of the representation the [Secretary of State] is satisfied that—*
 - (i) *the land is used for the purposes of carrying on the statutory undertakers' undertaking, or*
 - (ii) *an interest in the land is held for those purposes.*
- (2) *An order granting development consent may include provision authorising the compulsory acquisition of statutory undertakers' land only to the extent that the Secretary of State is satisfied of the matters set out in subsection (3).*
- (3) *The matters are that the nature and situation of the land are such that—*

- (a) *it can be purchased and not replaced without serious detriment to the carrying on of the undertaking, or*
- (b) *If purchased it 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.....*

4.4 Our client has throughout endeavoured to take a pro-active and collaborative approach with the County Council in the context of the LLTC scheme. This has been with a view to enabling the Council properly to understand the serious detriment that will be caused by their scheme and its impact on ABP's ability to carry out its statutory undertaking.

4.5 Unfortunately, in large part we believe the County Council's application process has paid scant, if any regard, to the Port and the impact of the LLTC scheme on the Port, its operations, its statutory duties and obligations or its customers.

4.6 Certainly, it is our client's firm view that neither of the statutory tests laid down in section 127 of the 2008 Act can be met by the LLTC scheme, as we discuss below.

5 **Section 127 - Statutory Undertaker's Land**

5.1 Before you can commence your consideration of our client's submission you will first have to satisfy yourself that the land, the subject of Suffolk County Council's proposed compulsory acquisition, is indeed land which - '*has been acquired by Statutory Undertakers for the purposes of their undertaking*', in accordance with Section 127(1)(a) of the Act.

5.2 We do not in fact believe that this is a point at dispute with the County Council, but for the record, we have attached, as **Appendix 4** a plan of the Port that delineates ABP's Statutory Port Estate.

5.3 The harbour was originally built by the Lowestoft and Norwich Navigation Company and developed by the Norfolk Railway Company following the construction of the Norfolk to Lowestoft railway.

5.4 In 1947, by virtue of the provisions of the Transport Act 1947, port ownership in the UK was to large extent regularised and ownership of and responsibility for ports was transferred from their then owners, by that time essentially railways companies, to the British Transport Commission.

Some years later, in 1962, ownership of those ports passed from the British Transport Commission to the British Transport Docks Board, a body constituted by the Transport Act 1962. Finally, on 31 December 1982, the Docks Board was reconstituted under the name Associated British Ports pursuant to section 5(1) of the Transport Act 1981. ABP, as the successor body, now operates all of its ports, of which the Port of Lowestoft is one, in its capacity as a Statutory Port Undertaker.

5.5 We trust that this is sufficient to satisfy the requirements set out in Section 127 (1)(a).

6 **Section 127 – The Statutory Tests**

6.1 We consider below the formal tests set down by the Act in terms of whether or not you should approve the proposed compulsory acquisition of part of ABP's port estate.

6.2 The tests falls under two separate heads. For your assistance, we deal with each in turn.

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

7.1 The first test is whether the land –

'can be purchased and not replaced without serious detriment to the carrying on of the undertaking'.

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

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

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

7.4 The overriding objective of the section 127 test is to enable the Secretary of State to ensure that in circumstances where a developer is seeking to acquire compulsorily part of a statutory undertaker's land, the ability of the statutory undertaker still to perform its statutory obligations is protected. In the context of the LLTC proposals, this statutory protection extends both to ABP's obligation to undertake its port operations as the statutory port operator and its statutory duties and obligations as the Statutory Harbour Authority.

7.5 We emphasise this point because we were rather surprised to hear counsel for the County Council trying to explain to the ExA 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 extraordinary suggestion to which we believe the ExA and we trust you will give no sensible credence – both in terms of the practical applicability of the test - and indeed legal precedent, as we explain below.

8 Section 127 (3)(b)

8.1 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'.

8.2 If you agree that the proposed LLTC scheme will cause serious detriment to the Port. - and we discuss the meaning of 'serious detriment' 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.

8.3 On a purely local level, the Port of Lowestoft 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.

- 8.4 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."

- 8.5 The only land temporarily available to our client at the Port of Lowestoft lies to the west of the proposed LLTC – which of itself causes difficulties for ABP. 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, an artist's impression of which is provided as **Appendix 5**. 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, that 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.
- 8.6 New port infrastructure of the kind proposed by ABP for the Energy Hub 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 elsewhere within the Port.
- 8.7 No other land exists that would be available for acquisition by ABP, nor indeed the County Council, which could genuinely offset the serious detriment caused by the LLTC.
- 8.8 Indeed of relevance is the fact that the County Council has also agreed 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 the County Council at Deadline 4 of the Examination).

9 **Serious detriment**

- 9.1 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.
- 9.2 In the case of the Port of Lowestoft, we are asking you 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 –
- i) the owner of the Port;
 - ii) the operator of the Port; and
 - iii) the Statutory Harbour Authority and Competent Harbour Authority.

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

Who is the statutory undertaker?

- 9.4 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.

What is the port statutory undertaking?

- 9.5 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, the County Council have accepted that those parcels of land within the Port impacted by the Scheme comprise part of ABP's statutory undertaking.
- 9.6 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.
- 9.7 Significantly, we would point out that 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.
- 9.8 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.
- 9.9 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 its current operations – 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.
- 9.10 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.

What constitutes 'serious' detriment?

- 9.11 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.
- 9.12 Of relevance is the fact that the 'serious detriment' test has been considered in a number of recent NSIP examinations - the two principal and relevant precedent NSIP decisions being the *Hinkley Point C Connection* and the *Richborough Connection* Projects.

- 9.13 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).
- 9.14 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).
- 9.15 Although the Examining Authority in terms of that project recognised that the area affected by the proposed development was relatively small – the Applicant proposed to position 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.
- 9.16 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).
- 9.17 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 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.
 - (d) 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.
- 9.18 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.
- 9.19 We would suggest that care must be taken not to construe a given loss or impact to be small and conclude as a consequence 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.

- 9.20 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.
- 9.21 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".

- 9.22 Of relevance is the fact that 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, (Paragraph 8.4.176 of the Recommendation Report), that:

"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."

- 9.23 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."

- 9.24 It should be noted that the Bristol Port Company, in its summary representations, use 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 Examining Authority to amount to "serious detriment".
- 9.25 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.
- 9.26 It is telling that the issue of serious detriment was also considered by the Examining Authority appointed to consider the *Richborough Connection Project*. In relation to that project, the statutory undertaker South East Water ("SEW") pointed out that there is no statutory definition of what is meant by 'serious' in the context of the Planning Act 2008 and no authority on the point.
- 9.27 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).
- 9.28 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].
- 9.29 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.

9.30 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".

9.31 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."

9.32 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 presents as 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.

How far does serious detriment extend?

9.33 ***Port operations*** - We trust that, in light of the above, we have established to your satisfaction 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.

9.34 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.

9.35 It must be a given that the extent of the impact of a given scheme on existing operations is a central component of the serious detriment test? As we have indicated, that consideration extends not just to the actual amount of land that the County Council wishes to acquire compulsorily – the direct impact, but also the indirect impact, restricted flexibility, consequent limitations etc, as we discuss below.

9.36 Disappointingly, however, the County Council 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, one example of which we have already mentioned at paragraph 7.5 above.

9.37 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 the County Council at Deadline 4 of the Examination), the County Council 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)

9.38 Whilst in paragraph 2.1.6, the County Council also –

"... agrees that consideration of this issue must be both based on current Port activities, but also its potential for the future"

9.39 The County Council do then suggest that ABP's potential for the *"future must be proven to be at least reasonably likely"*

9.40 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.

9.41 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 impede essential operational flexibility, which will in turn, constrain both current operations and future commercial prospects.

9.42 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.

9.43 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.

9.44 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.

9.45 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. 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.

9.46 Although the 'serious detriment' test was engaged in that case by ABP, it was not pursued in that the promoters of the scheme, Welsh Government, 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.

9.47 We would also add 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 to which we return below.

9.48 **Statutory duties and obligations** – We would finally add in the context of the above, that in our opinion, the test of serious detriment extends beyond the ability of the statutory undertaker to carry out its existing and future operations. In our view, 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 well 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.

9.49 We return to this element of the project below when we discuss the County Council's refusal to Indemnify ABP for the hazard that it proposes to introduce into the middle of the Port.

Key Points

9.50 The key points that can be drawn from the above, therefore are that:

9.51 For 'serious detriment' to be engaged the land the subject of the proposed compulsory purchase:

- (a) Must be statutory undertaker's land; and
- (b) Held by the owner in its capacity as a statutory undertaker.

9.52 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 impact of which may encompass not just existing commercial operations but also future commercial opportunities for the statutory undertaking.

9.53 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."

9.54 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 an operationally important and 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:
 - (i) will be unable to retain its existing business; and/or
 - (ii) attract new business;
- (f) 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-
- (g) ABP's ability to compete for business will, therefore, be materially constrained;
- (h) 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
- (i) 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
- (j) 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.

9.55 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.

9.56 Accordingly, on a perhaps overly simplistic level, it is difficult to conceive how the proposed compulsory acquisition of an area of land located directly in the centre of the Port's Inner Harbour could ever be justified on the basis that it would not cause 'serious detriment to the port undertaking'?

10 Compulsory Purchase

10.1 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.

10.2 It would cross through the middle of the Port's Inner Harbour on a series of piers. The County Council 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;
 - (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.
- 10.3 In a Port with severely constrained port estate boundaries - yet a Port which is growing its existing operations whilst also looking to accommodate a substantial surge in the wind energy and oil and gas sectors – to the positive benefit of the UK economy and entirely in accordance with government policy – the compulsory acquisition of such a critical section of the statutory port estate will self-evidently have a seriously detrimental impact upon ABP's ability to carry on the port undertaking.
- 10.4 The County Council's refusal to accept what is clearly an irrefutable fact is extremely disappointing. This is bearing in mind that had the County entered into meaningful and genuine discussions with our client at an early stage in the process in terms of either locating the bridge in a more sensible location (to the west) or at the very least, in terms of mitigation, a letter such as this would not have been necessary and a considerable amount of public – and private – money would have been saved.
- 10.5 As it is, in total, the construction and eventual operation of the LLTC will deprive ABP, either permanently or temporarily, of over 50,000m² (some twelve and a half acres or five hectares) of land within the statutory port estate.
- 10.6 The position becomes even more telling when it is noted that in one of their written submissions the County Council actually agree with –
- "ABP's contention that serious detriment should not be considered purely in the light of the value of the undertaking of the land taken, but that attention should also be paid to the functional effect that is caused by compulsory acquisition being taken of that land – noting that the Scheme proposals includes the acquisition of airspace over the Port to build the new bridge."*
(Paragraph 2.1.5 of the "Impact of the Scheme on the Port of Lowestoft", Document EX/59, submitted by the County Council at Deadline 4 of the Examination).
- 11 Loss of berthing and berthing utility/flexibility**
- 11.1 Whilst the County Council's proposed compulsory purchase is effectively the starting point for consideration of the serious detriment that will be caused by the scheme – the taking of a statutory undertaker's land of itself cannot – as with *Hinckley* - just be considered in isolation. From the fact of compulsory acquisition stems an escalating and cumulative series of consequences for and impacts upon the Port.
- 11.2 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.

- 11.3 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.
- 11.4 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, as shown on the attached plan of the Port. 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.
- 11.5 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 the County Council'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).
- 11.6 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.
- 11.7 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.
- 11.8 The direct loss of berthing is best illustrated by the straightforward “car-parking” analogy. The County Council, whose worrying lack of understanding about the practicalities of port operations has become increasingly apparent during the last few months, 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. If the County Council had taken the trouble to commission expert evidence based on a real understanding of port operations, then they would have been advised, and thereby understood, 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, as do the County Council, is naive.
- 11.9 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.
- 12 **Obstruction/Impediment**
- 12.1 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.

- 12.2 The existing A47 bascule bridge, separating the Inner from the Outer Harbour, is 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.
- 12.3 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.
- 12.4 In the case of the proposed new bridge, the County Council are attempting to impose an inflexible scheme of operation on the Port – to which we refer below - with a continuing threat that the County Council will have full control of bridge opening.
- 12.5 In terms of the practical impact that the LLTC scheme will have on the Port, the following points 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 the County Council have failed to undertake a formal Navigation Risk Assessment, but instead are 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;
 - (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; and
 - (d) In addition, as mentioned above, the County Council 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. The County Council 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.

- 12.6 The timing restrictions which the County Council wish to impose in the Scheme of Operation will create serious practical difficulties for ABP in terms of port operations. The County Council'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 Examining Authority. 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.
- 12.7 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.
- 13 **Impact on existing operations**
 - 13.1 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.
 - 13.2 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 the County Council, in its Environmental Impact Assessment of the proposal, materially understated the impacts on the Port, 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 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. The fact that the County Council failed to identify this access requirement in its application documentation is distinctly concerning both in terms of the concealment of the issue and the fact that it would appear that the County Council has no remedy to this legal defect in the application process.
 - 13.3 Once the bridge is in place and in operation, ABP will have been 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.
 - 13.4 In addition, once 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.
 - 13.5 In this context, the fact cannot be over-emphasised that 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.

14 Impact on future flexibility

14.1 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 a 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.

14.2 This reality 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." (NPSfP, Paragraph 3.4.13)

14.3 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.

14.4 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.

14.5 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.

15 Impact on future business and commercial perception

15.1 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 as the UK's eastern most Port 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.

15.2 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.

15.3 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.

- 15.4 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.
- 15.5 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.
- 15.6 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.
- 15.7 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); which will as a consequence -
 - (d) 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.
- 15.8 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.
- 15.9 Although the County Council disagrees with the information and conclusions provided in the expert reports provided by ABP, it is of some significance to note that the County Council 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.
- 15.10 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."

- 15.11 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."

- 15.12 Similarly, ABP is firmly of the view that in light of the lack of any real evidence being provided by the County Council, 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.

16 Failure to mitigate

- 16.1 Whilst the serious detriment created by the LLTC scheme can never be removed in its totality – if the County Council were prepared to commit to the provision of certain mitigation measures, sufficient to reduce the scale of serious detriment, then ABP may be prepared to reconsider its position.

- 16.2 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:

- (a) **Emergency Refuge Berth** - 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.
- (b) **Replacement Berthing** – 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.
- (c) **Indemnity** - a full indemnity, backed by commercial insurance, bearing in mind that by constructing a low bridge through the middle of an operational Port, the County Council is proposing:
 - (i) To introduce a dangerous hazard into the Port to the detriment of the Statutory Harbour Authority which will as a consequence,
 - (ii) 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.

- 16.3 Overall, ABP's 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.

16.4 Although ABP has sought to engage with the County Council with the objective of reaching an agreement on how it intends to address these matters, and despite providing the County Council with all request information and assistance in respect of these mitigation measures, disappointingly, the County Council has so far failed to discuss any measures that would assist in mitigating the serious detriment caused by the LLTC.

16.5 Indeed, to date the only measures which the County Council has offered to provide are those which it clearly cannot avoid, such as the provision of navigational aids and markers and oil spill prevention control measures, which are in any case otherwise required to be provided by the County Council under the dDCO.

17 Lack of Indemnity

17.1 If you determine to authorise the construction of the LLTC, the introduction of a second bridge, with effectively only 11 metres safe clearance will thereby introduce a consequential hazard into the middle of the operational port.

17.2 The 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.

17.3 The indemnity currently offered to ABP by the County Council under the dDCO is narrow and extremely limited in actual application. 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 the County Council confirmed that the County is not prepared to offer any form of indemnity to ABP during the bridge's operation.

17.4 In the circumstances of the LLTC proposal 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.

17.5 In brief, ABP requires an indemnity from the County Council 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 the Applicant; 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 LLTC 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 LLTC.

17.6 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 LLTC; 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.

17.7 Indeed, as well as providing the indemnity as requested, ABP will also require the Applicant to put in place adequate insurance to cover the risks.

17.8 To date, the County Council 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 the Applicant 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 the Applicant but a wide variety of third parties.

17.9 Without an 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.

18 Section 35 Direction

18.1 We are conscious that the LLTC Project has only assumed NSIP status as a consequence of your decision to issue a Direction under Section 35 of the Planning Act 2008. We do, of course, not seek to question the rationale for your decision to issue a Direction but we do feel that it important that you understand that, certainly in our client's view, you have been seriously misled by the County Council in relation to one – albeit one fundamental – aspect of their application to you.

18.2 In the application to you requesting that you issue a Section 35 Direction, the County Council made a number of statements in support of their application, one of which asserted that:

"In alleviating that congestion, connectivity between the SRN (Strategic Road Network), the Port of Lowestoft and major development sites ... is much improved ..." (para 11).

"Further the Port of Lowestoft already supports the nationally important offshore oil and gas industry and existing and prospective offshore windfarms ... The Port is also likely to play a role in the delivery of Sizewell C new nuclear power – as it it for Sizewell B. Offshore wind and new nuclear are both key planks in the Government's energy policy ..." (para 12)

"As such, better access to the Port and to the adjacent Enterprise Zone, which this Project provides, delivers on a number of national objectives, and further builds on the area's offer which also includes being a recognised centre for Offshore Renewable Engineering" (para 13)

"A bascule(lifting) bridge will be constructed to allow the passage of shipping within the inner harbour. When closed, the bridge will have a clearance of at least 12m" (Para 34)

"Due to its soffit height, the [existing] bridge, managed by Associated British Ports (ABP) (operator of the Port of Lowestoft) is timetabled to open up to ten times per weekday currently to allow vessels in to the Inner Harbour (Lake Lothing)" (Para 42)

"The Port of Lowestoft is already the Operations & Maintenance (O&M) base for the Greater Gabbard Offshore Windfarm and Galloper Windfarm have recently also committed to establishing a construction coordination base here" (Para 56)

"Furthermore, Scottish Power Renewables has also signed a thirty-year deal with the Port of Lowestoft for it to act as a construction and operations hub for the East Anglia ONE offshore windfarm" (Para 57)

"East Anglia ONE offshore windfarm is the first phase of the East Anglia Array, a 7.2GW Round 3 allocation which received development consent in June 2014. East Anglia ONE secured the largest Contract for Difference in the first allocation round and has been identified in the National Infrastructure Plan. A Final Investment Decision is expected in February 2016, with construction beginning the following year" (Para 58)

"A development consent application has now also been submitted for the East Anglia THREE windfarm and Scottish Power Renewables is currently in the process of revising agreements with the Crown Estate which are likely to see two further phases of development in the southern half of the East Anglia Array, while Vattenfall is developing its own proposals for the northern portion of the Array. This represents a development pipeline of 10-plus years which Lowestoft will have a crucial role in delivering". (Para 59)

"In addition to the Port's role in supporting NSIPs offshore, EDF Energy, in its Stage 1 consultation material, stated that the Port of Lowestoft could provide for the storage and transhipment of Abnormal Indivisible Loads (AILs) and bulk materials required for the construction of the Sizewell C new nuclear development, as it was for Sizewell B". (Para 60)

"The focus of activity associated with the existing and prospective NSIPs is around the Port of Lowestoft and associated development sites centred around, but both north and south of, Lake Lothing. As such, access to this area both for commercial traffic and the necessary workforce will be critical to the successful delivery of these projects, but as has been highlighted this is a significant issue at the moment, particularly with respect to the operation of the SRN, which makes north-south movements between the Port and the development sites and indeed between the development sites (as illustrated in Appendix J) difficult." (Para 61)

"Delivery of the Project in the near future would be critical to support the delivery of NSIPs, whose demands of Lowestoft will escalate rapidly towards the end of this decade when construction activity is anticipated to intensify across the various projects." (Para 62)

- 18.3 You will already have noted from the above a number of patent inaccuracies in the County Council's application – for example, the height of the proposed bridge will not be 12m but, at best, 11m ignoring sea level rise which will impose a serious constraint on the passage of vessels.
- 18.4 In addition, the bridge opening of the existing bascule bridge is not limited to a maximum 10 openings per day. These misleading assertions have of course already

been corrected in evidence given by ABP at the current examination and we trust duly noted by the Examining Authority.

- 18.5 What is of particular concern, however, is as a result of the general thrust of the County Council's application understandably taken into account by yourself when issuing the decision, in granting the application and issuing the Direction, you state that the LLTC 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"

- 18.6 As you will have gathered, the statement above is precisely what the LLTC scheme will not do.
- 18.7 It is disappointing that before submitting their application to you the County Council did not bother to consult ABP - a simple step which would have avoided the perpetuation of such a fundamental inaccuracy.
- 18.8 The harsh reality is that far from improving connectivity to the Port of Lowestoft, the project will in fact critically impede connectivity in terms of vessel passage and will do nothing to assist vehicle access to the Port, the entrance to which lies to the east of the proposed bridge and is entirely unaffected by the bridge.
- 18.9 Unfortunately, the reality is that the County Council have chosen a line for the bridge that passes through the middle of an operational port thereby contradicting totally a fundamental limb of their application to you under Section 35 of the PA 2008. Alternative options were available to the County Council, one of which would have passed across Lake Lothing upstream to the west of the Inner Harbour and which would not have led ABP to object to this proposal from the outset.

19 Conclusion

- 19.1 As you will appreciate, the ExA has received detailed written representations from our client during the course of the examination which is now in its closing stages.
- 19.2 In view of the Examining Authority's understanding of the issues arising, we do not propose to trouble you with a full summary of our client's representations in that, as you will appreciate, they go beyond the strict remit of Section 127 of the Act and will in any case form part of the ExA's report to you.
- 19.3 In terms of compulsory acquisition and the consequential section 127 test, however, ABP is firmly of the view that its concerns relating to the detrimental impact should be specifically drawn to your attention.
- 19.4 Our client is firmly of the view that the impact of the LLTC scheme on the Port of Lowestoft must be viewed both directly and cumulatively, and as we have noted above, our client is conscious of the time that has been given to consideration of the "serious detriment" test by the ExA during the course of the examination.
- 19.5 As far as the direct impact is concerned, the proposed compulsory acquisition of land within the statutory Port estate will deprive ABP of existing berth space within the Port's Inner Harbour. It will also, in view of the need to undertake works in the riverbed, constitute an obstruction to the safe navigation within the Port.
- 19.6 The extent of the serious detriment caused by the compulsory purchase, however, should be seen as a series of escalating and cumulative impacts on the Port of

Lowestoft and ABP, in its capacity as the owner and operator of the Port – the Statutory Harbour Authority – and, of course, the statutory undertaker.

- 19.7 As we trust you will have appreciated from the above, a critical limb of the serious detriment that will be caused to the Port is that by bisecting the Inner Harbour with a low bridge, across which passing road traffic will have precedence, Suffolk County Council will undoubtedly be damaging ABP's ability to secure further business from the offshore wind energy sector. Bearing in mind the importance of the Port to the County's local and regional economy, this fact of itself does seem to be somewhat self-defeating. It also supports an underlying concern that the County Council and its advisers have simply not understood, or taken the time or effort to understand, the nature of the Port's existing operations and the future commercial opportunities available to it - and the seriously detrimental impact that their bridge proposals will have on both the Port's operations and its opportunities.
- 19.8 The extent of this operational impact, however, will be compounded by the fact that the serious detriment will extend as a consequence to the deflection of future business opportunities from the Port, not just in the offshore wind sector, but also to potential aggregate, agribulks, general cargos and offshore oil and gas business.
- 19.9 We would reiterate that our client has made it clear from the outset that it does not oppose the principle of a third crossing over Lake Lothing. Our client fully acknowledges that Lake Lothing of itself divides the town of Lowestoft and that traffic congestion does on occasion arise at times when the existing bascule bridge has to be raised to allow the passage of commercial vessels.
- 19.10 As such, ABP has endeavoured to reach some form of agreement with Suffolk County Council with a view, if not to remove all of the serious detriment that would be caused to the Port by the bridge as that is not considered actually to be possible or realistic, but at least to mitigate some of the serious detriment so as to enable ABP to continue its Statutory Port operations.
- 19.11 As far as we are aware, there are no other bridges that cross a statutory port or harbour that are of a size and/or height comparable to the proposed LLTC – apart that is, from the Port of Newport which will be crossed by Welsh Government's proposed motorway relief road and which Welsh Government have agreed will cause serious detriment to the Port which will have to be mitigated.

20 The section 127 test

- 20.1 The purpose of this written submission, therefore, is to demonstrate to you that in view of the 'serious detriment' that would be caused to the Port if the LLTC application is approved, you should formally determine that you are not actually in a position to approve the compulsory acquisition of part of our client's statutory undertaking on the basis of the current LLTC scheme proposal.
- 20.2 As you are aware, if you are to approve the compulsory acquisition, you must first be satisfied either that:
 - (a) Land within our client's port estate, held by ABP in its capacity as a Statutory Undertaker, *'can be purchased and not replaced without serious detriment to the carrying on of the undertaking'* (section 127(3)(a)); or
 - (b) If the land within our client's Port estate is compulsorily acquired for the proposed highway scheme, it *'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'* (section 127(3)(b)).

- 20.3 As far as the first test is concerned, we have described in some detail the irretrievable current and future operational impacts that will be caused by the construction of a low level bascule bridge through the middle of the Port's Inner Harbour.
- 20.4 As to the second test, we similarly hope that we have demonstrated that there is no land available to replace the Port operational land that will be lost to the LLTC scheme, either adjacent to, or within the vicinity of, the Port.
- 20.5 We trust, therefore, that in respect of both of these tests, we have demonstrated to your satisfaction that you should not approve the compulsory acquisition of part of ABP's statutory port estate under Section 127 of the Act for the simple reason that Suffolk County Council's LLTC scheme cannot proceed as currently promoted, without causing 'serious detriment' to the Port and ABP's ability to carry out its statutory undertaking.

A "minded to" determination

- 20.6 In closing, we would reiterate that ABP is not opposed to the principle of a third river crossing of Lake Lothing. ABP's objection is to the location of the bridge through the middle of an operational Port. If the County Council had undertaken a proper due diligence exercise of its proposals before settling its scheme, that exercise would have demonstrated and concluded that the selected location for the LLTC now being promoted is simply operationally indefensible.
- 20.7 That said, the County Council and ABP are, as the parties approach the closing stages of the examination process, faced with a seemingly intractable problem.
- 20.8 ABP as the owner and operator of the Port and the Statutory Harbour Authority 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.
- 20.9 To date, the County Council 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.
- 20.10 Bearing in mind the large amount of public money that has already been expended – and we would suggest, in large part wasted if the County Council had instead taken note of ABP's objections to its proposals in the first place - it is perhaps pertinent to note that a decision not to approve the acceptability of the compulsory acquisition of part of the statutory undertaking will not necessarily prevent the LLTC bridge ever being built.
- 20.11 Whilst ABP accepts that it may now be too late for the County Council to withdraw its scheme and promote an acceptable location for the bridge, we are instructed to inform you that our client may be prepared to withdraw its objections to the current scheme if the County Council would be prepared to provide a genuine package of measures to mitigate the serious detriment that would otherwise be caused to the Port.
- 20.12 We are, of course, well aware of the time constraints imposed by the PA 2008 upon you and the ExA in terms of determination. Should you agree with our client, however, that the scheme as currently being promoted by the County Council would cause "serious detriment" to ABP's Port of Lowestoft, then rather than at this juncture refusing to approve the compulsory acquisition of part of ABP's statutory port estate, it would be open for you to issue what would effectively be a "minded to" determination.

- 20.13 If you were to indicate to all parties that you are "minded to" refuse to approve the compulsory acquisition of ABP's land, that would provide the County Council, on the assumption that it still wishes to construct the bridge, with the opportunity to approach ABP with a meaningful package of mitigation measures, including an acceptably termed indemnity.
- 20.14 ABP is, and always has been, perfectly happy to discuss possible access and construction arrangements with Suffolk County Council – provided that in so doing, the Council acknowledges the serious detriment that will be caused to the Port by the bridge and is prepared genuinely to enter into discussions with ABP with a view to agreeing means by which the serious detriment caused by the LLTC scheme can be mitigated.
- 20.15 We hope that you will agree our proposal above offers a constructive way forward, but should you require any further information please do not hesitate to contact us. For your information, a copy of this letter has been forwarded to PINS.

Yours sincerely

Partner

Clyde & Co LLP