



# Department for Transport

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To: The Applicant

Date: 27 September 2019

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Dear Sir/Madam

## **Planning Act 2008 (as amended)**

**Application by Suffolk County Council ("the Applicant") for an Order granting Development Consent for the Lake Lothing Third Crossing.**

### **REQUEST FOR COMMENTS FROM THE APPLICANT**

Please see the attached letter from Clyde and Co sent on behalf of Associated British Ports on 13 June 2019, following the close of the Examination.

I would be grateful for any comments you may have on this correspondence.

**The deadline for any response is 11 October 2019.**

Responses to the matters outlined in this letter should be submitted by email to [LakeLothing@planninginspectorate.gov.uk](mailto:LakeLothing@planninginspectorate.gov.uk). If you will have difficulty in submitting a response by the consultation deadline, please inform the Project Team.

Your response will be published on the project page for the Lake Lothing Third Crossing on the National Infrastructure Planning website as soon as possible after 11 October 2019 at: <https://infrastructure.planninginspectorate.gov.uk/projects/eastern/lake-lothing-third-crossing/>

This letter is without prejudice to the Secretary of State's decision whether or not to grant development consent for the Lake Lothing Third Crossing and nothing in this letter is to be taken to imply what that decision might be.



Yours faithfully

Colin Dunn



The Planning Inspectorate  
Yr Arolygiaeth Gynllunio

## **TR010023: Lake Lothing Third Crossing**

Correspondence received after the close of the  
Examination at 23:59 on 5 June 2019

Item	From	Date received
1	Clyde and Co for <b>Associated British Ports</b>	13 June 2019

**From:** [Greenwood, Brian](#)  
**To:** [Richard Price](#)  
**Cc:** [O'Connor, Alison](#)  
**Subject:** Associated British Ports - Port of Lowestoft - proposed LLTC  
**Date:** 13 June 2019 15:58:11  
**Attachments:** [image001.png](#)  
[Letter to Secretary of State 13.6.19.PDF](#)

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Dear Richard,

Whilst fully aware that the examination has closed, as a matter of courtesy my client has asked me to forward the attached letter regarding the above project that I have today sent to the Secretary of State. We would be grateful, should it be appropriate, if you could in turn forward the letter to the ExA for their information.

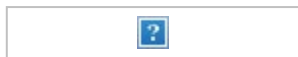
Many thanks,

Brian

**Brian Greenwood**

Partner | Clyde & Co LLP

**Direct Dial:** +44 20 7876 6140 | **Mobile:** [REDACTED]



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**If our account details change, we will notify these to you by letter, telephone or face-to-face and never by email.**

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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:  
13 June 2019

Dear Secretary of State,

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

I write further to my letter to you of 31 May regarding the above project sent on behalf of my client Associated British Ports, ("ABP").

As I mentioned in that letter, during the course of the proposed Lake Lothing Third Crossing (LLTC) examination, when responding to the ExA's questions regarding the statutory "serious detriment" test, ABP referred, on a number of occasions, to the fact that Welsh Government had accepted that their proposal to construct the M4 Relief Road through the middle of the Port of Newport in an unmitigated form, would in law have constituted "serious detriment" under the provisions of section 16 of the Acquisition of Land Act 1981 – which section is reflected in section 127 of the Planning Act 2008. You will recall that due reference was made to the Newport M4 scheme in my earlier letter to you of 31 May, at paragraphs 9.45 *et seq.*

Suffolk County Council's response at the time, through their legal advisors, was along the lines that as Welsh Government's decision regarding the M4 Relief Road had not been published the ExA could not take into account the fact that elsewhere in the country a proposal to construct a bridge through the middle of an operational port would cause serious detriment and that, as a consequence, ABP's assertions in this respect should be given no weight.

The LLTC examination closed on 5 June 2019. On the 4 June 2019, however, Welsh Government published the report of the Inspector who presided at the M4 Relief Road public inquiry (held in Wales under the provisions of the Highways Act).

As you are no doubt aware, although the appointed Inspector recommend that the Relief Road could be approved, the Welsh Government's First Minister has decided that the scheme will not in fact proceed on the grounds of cost and environmental harm.

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Having now had the opportunity to review the Inspector's report – which incidentally, was fully approved and accepted by the First Minister, we wish to take this opportunity to draw your attention to extracts from that Report which we believe are of particular significance to your consideration of the LLTC proposal – and I should add in this context, that we will also be copying this letter to the Examining Authority for their information, even though the examination has closed.

In brief, Welsh Government proposed to construct a bridge carrying the M4 Relief Road through the middle of ABP's Port of Newport. The practical implications for ABP were that the bridge would bisect the operational Port (as will the proposed LLTC) – albeit at a height twice that proposed by Suffolk County Council for the Port of Lowestoft.

ABP objected to Welsh Government's proposal on the grounds that the scheme would cause serious detriment to the Port of Newport within the terms of section 16 of the 1981 Act. ABP only withdrew its objection following Welsh Government's acceptance that their scheme would indeed breach the statutory serious detriment test and their consequential offer to provide a package of measures - which included the construction of a new quay in the Port's South Dock to balance the loss of utility that the Crossing would cause to ABP's ability to carry on its operations in the Port's North Dock and a comprehensive Indemnity to cover all losses and damage arising as a result of the construction and operation of the bridge. The entire package was designed to mitigate the serious detriment that would otherwise be caused to the Port.

In the light of the above, we would suggest that the report of the Inspector into the M4 Relief Road proposals, combined with the First Minister's approval of that report – has a significant bearing on your determination of the LLTC proposal.

In short, the Inspector in his report concluded that the proposed M4 Relief Road would cause serious detriment to the Port of Newport.

In this regard, paragraphs 8.195 *et seq* of the Report state as follows:

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

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

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

*I have studied the proposed engineering measures to offset and prevent the potential ship/viaduct collision and I am satisfied that these proposals, when taken together, would reduce the probability of an incident occurring to reasonably acceptable levels.*



*The on-going monitoring and management of these facilities is so important that they should constantly be kept under review."*

In issuing his decision, you will be aware that the First Minister of Wales, the Rt Hon Mark Drakeford first formally accepted the Inspector's Report and conclusions but then ultimately decided that the Scheme should not proceed due to the "affordability of the project in the context of the Welsh Government's overall capital budget" (Paragraph 5.2 of the Decision Letter dated 4 June 2019).

Following the publication of the M4 Relief Road decision and the Inspector's Report, Suffolk County Council wrote to the Examining Authority suggesting that:

*"The passages of the Inspector's report relied on by ABP [which are quoted above] are not referred to or endorsed in the Welsh Government's decision letter, and it is not clear from the Inspector's report that the issues were ultimately contested (because ABP withdrew its objections to that scheme). The Inspector's comments need to be seen in that context.*

*In any event, as the Applicant has already set out (REP10-009, paras 6.3.11 to 6.3.15), the M4 Newport road scheme was a different scheme (a fixed bridge) with different effects on a different port, and the Inspector's comments were clearly made by reference to the facts of that particular case. They cannot be sensibly carried across to the Applicant's Scheme." (Doc Ref SCC/LLTC/EX/206)*

As you will appreciate, the comments above now submitted by Suffolk County Council – not surprisingly in rather more urgent in tone than those expressed at the LLTC examination – quite simply do not follow and cannot in law be correct.

It is patently clear from the Decision Letter that the only part of the Inspector's Report with which the First Minister did not agree was in respect of the overall balancing exercise arising from the - 'substantial adverse impact [of the project] on the Gwent Levels SSSIs and their reed network and wildlife, and on other species, and a permanent adverse impact on the historic landscape of the Gwent Levels' (Paragraph 6.12 of the Decision Letter).

As you will also appreciate, whilst the Inspector was fully aware that ABP and Welsh Government had reached an agreement on the package of measures required to offset the serious detriment that would otherwise be caused by the construction and operation of the motorway, the Inspector was equally fully aware that he had to reference the fact that he was – and through him, Welsh Government could be – satisfied that the issue of serious detriment had been acceptably mitigated. If he had not done so, then his finding that the proposed crossing would cause serious detriment within the terms of the 1981 Act would have meant that Welsh Government would have been unable to make the requisite Orders in relation to the compulsory acquisition of part of ABP's statutory port estate.

To this effect, paragraph 1.2 of the Inspector's Report makes it clear that although the Inspector, in light of the agreed mitigation, was no longer required to report separately to the First Minister on the specific issue of serious detriment he did confirm that –

*"in so far as it is relevant to the consideration of the case for the draft Schemes and Orders, the impact that the scheme would have on the Port of Newport has been considered and covered within this report."*



As such, ABP's withdrawal of its objection had a significant bearing on the Inspector's conclusions and recommendation that the M4 scheme could proceed. Indeed, in this context it is also of relevance that the Inspector considered that the -

*"..... mitigation measures which would be provided for ABP have been carefully tailored to ensure that they address the serious detriment that the port would otherwise suffer as a result of the scheme being constructed through it and goes no further than that package which would be necessary to address that serious detriment." (Paragraph 6.642 of the Inspectors Report)*


As a further counter to the County Council's recent comments to the Examining Authority, you will be aware that the process adopted by the Inspector for the M4 Inquiry and the First Minister reflects the process followed in the *Hinckley* decision (to which we referred in our letter of 31 May 2019), whereby an agreement was reached between the Bristol Port Company and Network Rail shortly before the Examining Authority's Recommendation Report was submitted to the Secretary of State. This meant that as a consequence, the Bristol Port Company's objections regarding serious detriment could be withdrawn before you issued your decision. In that case, however, as you are aware, the Examining Authority had concluded that the *Hinckley* scheme would have caused serious detriment to the undertaking of the Port of Bristol and it was only the fact that agreement had been reached between the parties that enabled the scheme to proceed.

In our view, the Examining Authority's conclusions in the *Hinckley* decision regarding serious detriment are accepted precedent, and have been relied upon by both ABP and the Applicant throughout the examination of the LLTC Scheme.

We would suggest that in the light of the points made above, for the County Council to suggest that the Inspector's findings in relation to M4 Relief Road Scheme – and the acceptance of those findings by the First Minister - are not relevant to the LLTC Scheme is misguided in the extreme.

The Secretary of State will be conscious that at present, the M4 proposal and the *Hinckley* proposal are the only two projects involving the construction of infrastructure across the middle of an operational Port – and in both case, statutory "serious detriment" was found to exist. The LLTC scheme provides the third precedent.

The use of relevant precedents in respect of legal reasoning and the application of underlying principles is accepted legal practice. As such, it is clear that the Inspector's decision in the *Hinckley* project and the M4 Relief Road Scheme represent the most specific, relevant and contemporaneous precedents in respect of serious detriment. We trust you will agree that the established precedent is equally applicable to the LLTC Scheme.



Brian Greenwood  
Partner  
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