Dear Sirs

Suffolk Minerals and Waste Local Plan Examination – Response to Suffolk County Council Legal Opinion

We act on behalf of Associated British Ports (ABP) in respect of the above matter. The purpose of writing is to provide the Inspector with a response to the ‘legal opinion’ being relied upon by Suffolk County Council in respect of the matters raised by ABP.

We are grateful for sight of the legal opinion which has been provided by the examination programme officer via email to ABP’s planning advisors – Adams Hendry Consulting Ltd – and is, for ease of reference, set out within this submission in italicised text.

The County Council have submitted that -

*Policies of this nature have been in previous versions of the plan and have not been challenged legally, either by ABP or others. There has been no change in the law or policy which suggests that situation has changed in the meantime, or that policies which were previously sound are now unsound.*

We would at the outset query whether the above submission made by the County Council is actually a “legal opinion”. With the greatest respect to the authors of that submission, it does appear to us to be rather more a statement to the effect – “that is how it was done in the past and we do not think past practice should change”.

We would suggest that such a submission does rather miss the point that was being made by our client and our client’s planning advisors and is, we would suggest, unsustainable in law in the specific circumstances of this case – namely the application, or otherwise, of a policy to an area of land held by a statutory undertaker for the purposes of its statutory undertaking.

The Inspector’s consideration of whether the Plan complies with the requirements of soundness must be based on the issues raised in respect of the particular policies the subject

By Email: [redacted]

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Programme Officer
Suffolk Minerals and Waste Local Plan Examination

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Date: 2 July 2019

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of the examination, irrespective of whether these policies formed part of previous versions of the Plan.

As such, County Council's above submission is not a reason to consider whether the safeguarding policy in question is sound. Just because a policy or a position has not been challenged in the past does not, either in law or indeed logic, mean that it cannot now be challenged. If the County Council and the Inspector have the legal and policy position set out to them, then they have to take account of that position – even if it is the first time it has been set out to them.

This point from the County Council is, therefore, irrelevant to the issues which ABP's evidence set out and which has to be taken into account by both the Council and the Inspector.

The County Council have also submitted that -

ABP have statutory powers and duties, as do many other organisations and landowners affected by the plan and its policies. That does not mean that they are exempt from the Plan's requirements or entitled to be treated differently from other landowners or bodies affected by the policies in the plan by virtue of their legal status. It also does not mean that their operational land is consequently exempt from planning policy.

ABP accepts that its ports are not exempt from the requirements of a local plan – that is not the point it is seeking to make. Rather, it is necessary to ensure that the Plan's requirements are sound in the first place. In determining whether the Plan's requirements are sound, regard has to be had, amongst other things, to the statutory basis that brought ABP's ports into existence and against which they operate, in order to consider whether policies impacting that operational land are justified and effective. The land within the port's statutory estate must be treated in that way.

The County Council have suggested that -

ABP have the benefit of permitted development rights, again as do other bodies and individuals with an interest in land. Those rights are statutory and are capable of being altered, enlarged or removed by legislation following national Government policy. Again, they must be read in conjunction with the policies in the plan. They are not a reason for saying that policies in the plan cannot apply.

This response represents a misunderstanding of ABP's evidence. ABP is not saying that because it benefits from permitted development rights within its ports that the policies of the Plan do not apply.

ABP's position, in summary, is that in light of the statutory and legislative framework within which its ports have to operate – and in particular the statutory 'open port duty' – it cannot be justified nor could it be effective, and as a consequence, not sound, for the planning authority to seek to limit or control a part of the statutory port in terms of the trade that it can handle – which is effectively what the safeguarding does.

For development proposals that can be undertaken under permitted development rights, the content of policies within the development plan is not directly relevant – primarily because planning permission already exists for such development. ABP's concern, however, relates to the potential situation whereby it brings forward development proposals for port activity within the port that fall outside of the permitted development rights regime, for example by reason of applied EIA thresholds. If such development is located on a site safeguarded for minerals and
waste purposes, then the development would be contrary to the development plan, albeit that it would be in compliance with the statutory basis of the port and its operation.

As such, it must be the case in law that a policy will be unsound if it has the ability to create a conflict between the plan and ABP’s statutory port undertaking by inhibiting the ongoing use of any part of the statutory port estate for port related development, in circumstances where development located on a safeguarded site does not relate to a particular minerals or waste related trade or use.

For the avoidance of any doubt, ABP are not suggesting that safeguarding is not a relevant consideration. Rather, ABP is making it clear that safeguarding can only apply (and consequently be sound) in circumstances where ABP disposes of part of the operational port estate which is subject to the safeguarding or somehow puts those safeguarded sites to a non-port related use.

Overall, the above submission from the County Council does not, in ABP’s view, address the concerns it has raised within its evidence.

As will be noted from the brief response provided above, ABP considers that the County Council’s submissions based on its ‘legal opinion’ does not address the concerns which it has raised in evidence to the examination.

Yours sincerely

Clyde & Co LLP