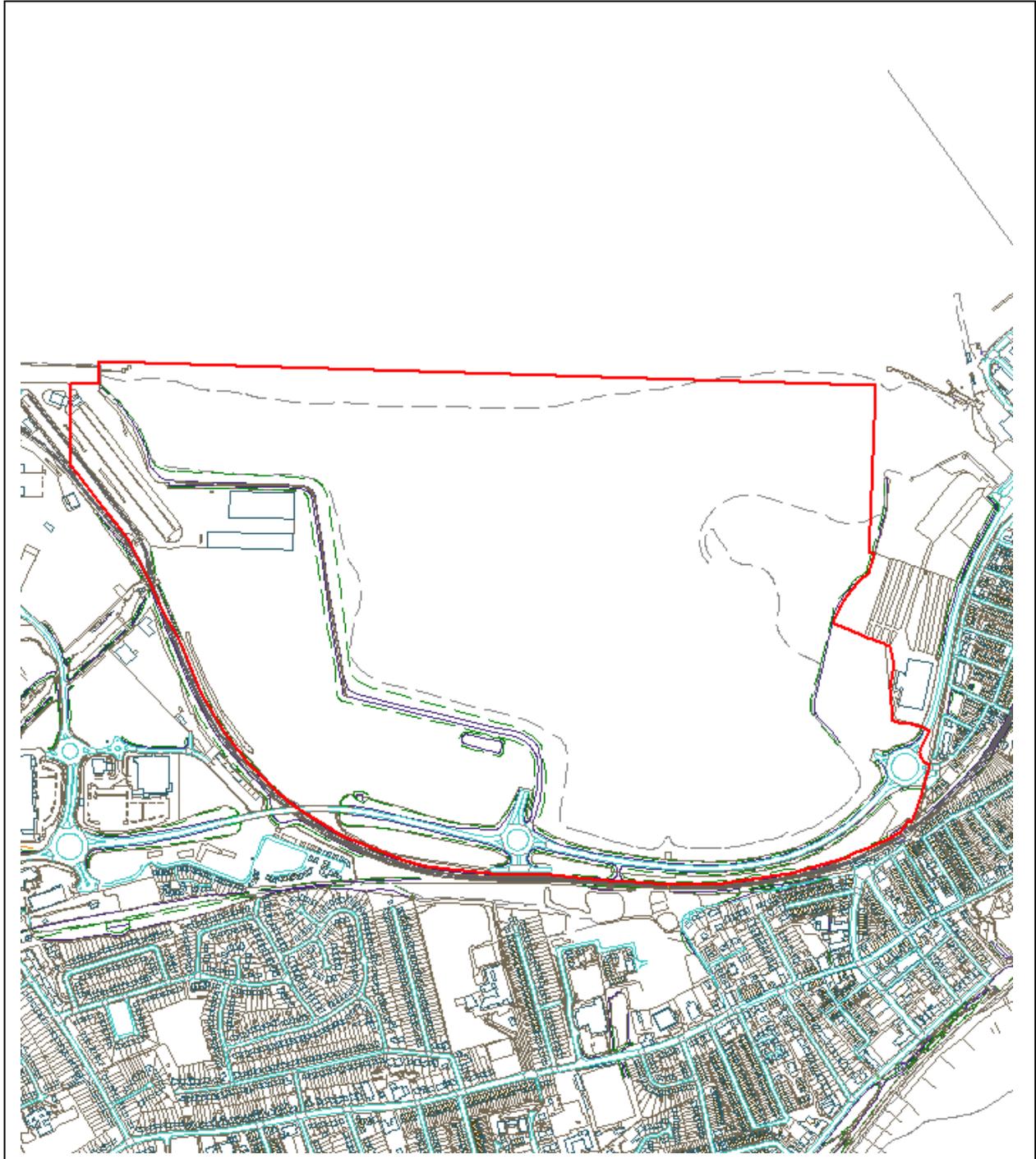


PLANNING COMMITTEE

2nd March 2022

REPORT OF THE ASSISTANT DIRECTOR FOR PLANNING

**A.2 PLANNING APPLICATION – 21/01792/VOC – BATHSIDE BAY STOUR ROAD HARWICH CO12 3HF**



DO NOT SCALE

Reproduced from the Ordnance Survey mapping with the permission of the Controller of Her Majesty's Stationery Office © Crown Copyright. Unauthorised reproduction infringes Crown copyright and may lead to prosecution or civil proceedings.

**Application:** 21/01792/VOC

**Town / Parish:** Harwich Town Council

**Applicant:** C/o Savills - Hutchison Ports (UK) Limited

**Address:** Bathside Bay Stour Road Harwich CO12 3HF

**Development:** Variation of condition 20 of permission 10/00203/FUL to require the approval and installation of an operational lighting scheme before the commencement of operation of the site (rather than the commencement of development)

## 1. **Executive Summary**

- 1.1 In 2003, Hutchison Ports (UK) Limited (“HPUK”) applied for planning permission for the construction of a new container terminal and small boat harbour at Bathside Bay, Harwich, and the provision of compensatory habitats at Little Oakley, Hamford Water. On 29<sup>th</sup> March 2006, permissions, inter alia, for reclamation works and a container terminal; a small boat harbour; the managed realignment of the coastline and creation of compensatory inter-tidal habitats off-site, and listed building consent in respect of the partial demolition of the long berthing arm attached to a listed Train Ferry Gantry were granted by the Secretary of State, following concurrent Public Inquiries held between 20<sup>th</sup> April 2004 and 21<sup>st</sup> October 2004. These developments were subject to rigorous assessments and were found on balance to be acceptable. In particular, with regard to the then Habitats Regulations, the Secretary of State found that Imperative Reasons of Overriding Public Interest (IROPI) outweighed the identified harm to the integrity of a European site (the Stour and Orwell Estuaries SPA).
- 1.2 In 2010 HPUK applied for replacement planning permissions for the reclamation works and container terminal (the Container Terminal), and a small boat harbour (the Small Boat Harbour). These permissions (10/00202/FUL and 10/00203/FUL) were granted by the Council on 14 February 2013 and remain extant, but development needs to have commenced on or before 29<sup>th</sup> March 2022.
- 1.3 This application seeks permission to vary one of the conditions (no20) on the 2013 planning permission for the Small Boat Harbour (10/00203/FUL). It is proposed that the wording is amended to change the timing of the condition. The original condition required that the details of the operational lighting were submitted and approved prior to the commencement of the development. The applicant has proposed that the wording is changed so that the details are submitted and approved, and the operational lighting installed, prior to each phase of the harbour becoming operational. There is a parallel application (21/01810/VOC) for permission to vary conditions attached to the 2013 Container Terminal permission.
- 1.4 Officers are satisfied that the variation proposed to the Small Boat Harbour permission is justified and acceptable. However, Natural England has raised an objection to this application and the Container Terminal application. In its objection Natural England takes the view that the likely effects of the proposed development on the Stour and Orwell Estuaries SPA and Coast & Heaths AONB have not been adequately addressed in the application material, and it has not been shown to Natural England’s satisfaction that the proposed compensatory habitats at Little Oakley would be sufficient. The applicant has met with Natural England to discuss its objection, following which on 11 February the applicant’s agent sent a letter responding to the points raised by Natural England; a copy of this letter is appended to this report as a background paper. It is the applicant’s view that the Environmental Statement and shadow Habitats Regulations Assessment submitted with the application provide an up to date assessment of the ecological value of the site and the potential impacts of the development, based on the best reasonably available information. It is also said that the proposed compensatory habitats at Little Oakley are sufficient and their delivery is properly secured. At

the date of this report it is not known if Natural England's objection is maintained. Any further updates on this will be reported to Members at the meeting.

- 1.5 In light of Natural England's recent objection, which at the time of writing this report has not been withdrawn, Officers are reluctant to recommend the grant of permission. It may however be that between publication of this report and the Committee meeting the position will have changed, and given the significance of the Container Terminal development, with which the Small Boat Harbour is inextricably linked, and the limited time in which to consider it, Officers believe it is appropriate to put the application before Members now. Officers will update Members as soon as possible of any change of circumstances.
- 1.6 If ultimately the decision is taken to grant this application, the new planning permission will need to restate the previous planning conditions (save as varied by the Committee) which will control the development. However, bearing in mind that a number of other pre-development conditions on the 2013 planning permission are being sought to be discharged (or partially discharged), pursuant to applications 21/01624/DISCON and 21/01816/DISCON, to enable the first phase to go ahead on existing land i.e. without land reclamation/marine works taking place, in line with the PPG these are provisionally recommended to be amended to compliance conditions wherever possible.
- 1.7 The work to update the planning conditions is on-going and it is therefore recommended that Members grant the Assistant Director of Planning authority to continue to update the remaining pre-commencement planning conditions (nos 3, 6, 8, 9, 10, 11, 12, 19, 21, 23, 24, 25, 26, 27, 28, 29, 30 & 32) as these are discharged by the Council through the discharge of conditions applications prior to the issuing of a new planning permission, pursuant to this application. There will also need to be appropriate planning obligations in place to ensure (among other things) delivery of the compensatory habitats at Little Oakley, and again the Assistant Director of Planning will require authority to approve such supplemental or other legal agreement as is necessary to make the development acceptable, so that if Members resolve to grant planning permission there is an appropriate legal framework of obligations in place.

**Recommendation:**

- (1) The Committee consider this report and any updated information provided.**
- (2) The Assistant Director of Planning be authorised:**
  - (a) to approve the completion of a supplemental or other legal agreement under section 106 of the Town and Country Planning Act 1990 to secure the provision of appropriate compensatory habitats and other matters necessary to make the proposed development acceptable;**
  - (b) subject to the conditions stated in section 11 below, and the revision of any conditions that require details to be submitted, to update on a provisional basis pre-commencement conditions to compliance conditions (nos 3, 6, 8, 9, 10, 11, 12, 19, 21, 23, 24, 25, 26, 27, 28, 29, 30 & 32), only where details have subsequently been submitted to and approved in writing by the local planning authority pursuant to 21/01624/DISCON and 21/01816/DISCON; and**
  - (c) to refuse planning permission in the event that an appropriate legal agreement has not been completed by March 29<sup>th</sup> 2022.**

## **2. Planning Policy**

- 2.1 The following National and Local Planning Policies are relevant to this planning application.

## National Policy

*NPPF National Planning Policy Framework July 2021*  
*National Planning Practice Guidance*  
*National Policy Statement for Ports (2012)*

## Local Policy

*Tendring District Shared Strategic Section 1 Local Plan (2021)*

SP1 Presumption in Favour of Sustainable Development

SP2 Recreational disturbance Avoidance and Mitigation Strategy (RAMS)

SP3 Spatial Strategy for North Essex

SP5 Employment

SP6 Infrastructure and Connectivity

SP7 Place Shaping Principles

*Tendring District Section 2 Local Plan (2022)*

SPL3 Sustainable Design

HP2 Community Facilities

HP3 Green Infrastructure

PP8 Tourism

PP12 Improving Education and Skills

PP14 Priority Areas for Regeneration

PPL1 Development and Flood Risk

PPL4 Biodiversity and Geodiversity

PPL5 Water Conservation, drainage and sewage

PPL7 Archaeology

PPL8 Conservation Areas

PPL9 Listed Buildings

PPL10 Renewable Energy Generation

CP1 Sustainable Transport and Accessibility

CP2 Improving the Transport Network

DI1 Infrastructure Delivery and Impact Mitigation

*Local Planning Guidance*

Essex County Council Car Parking Standards - Design and Good Practice

Essex Design Guide

### **Status of the Local Plan**

- 2.2 Planning law requires that decisions on planning applications must be taken in accordance with the development plan unless there are material considerations that indicate otherwise (Section 70(2) of the 1990 Town and Country Planning Act and Section 38(6) of the Planning and Compulsory Purchase Act 2004). This is set out in Paragraph 2 of the National Planning Policy Framework 2021 (the Framework) The 'development plan' for Tendring comprises, in part, Sections 1 and 2 of the Tendring District Council 2013-2033 and Beyond Local Plan (adopted in January 2021 and January 2022, respectively), together with any neighbourhood plans that have been brought into force.

### **3. Relevant Planning History**

- 3.1 The information in this section includes the planning history of the land the subject of the Container Terminal adjacent.

|                 |   |          |            |
|-----------------|---|----------|------------|
| 89/02099/OUT    | Proposed industry & warehousing area, business park, housing, retail park, hotel & leisure complex, open space, site for primary school, local shops and community centre, heritage centre, mooring basin, footpaths, associated roadworks, landscaping and reclamation of the southern end of Gas House Creek. | Approved | 04.03.1992 |
| 91/00985/DETAIL | Erection of 57 residential units.   | Approved | 10.03.1992 |
| 95/01439/FUL    | (Reclaimed Land at Bathside Bay, Harwich) Variation of 5 conditions (No's. 4, 7, 11, 22 and 27) and amendment to master plan land use allocations granted permission under reference TEN/2099/89  | Approved | 26.03.1996 |
| 96/01321/DETAIL | (Land at Bathside Bay, adjacent to Gas House Creek, off Stour Road, Harwich) Retail development comprising: Factory/Discount Outlets of varying sizes and public toilets  | Approved | 16.04.1997 |
| 98/00052/FUL    | (Bathside Bay situated between Parkeston Quay and) Variation to condition 3(a) of consent   | Approved | 02.06.1998 |

TEN/2099/89 to read within a period of 8 years commencing on the date of this notice

|              |  |                    |            |
|--------------|--|--------------------|------------|
| 02/01759/FUL | Retention of 2.4m high security fence  | Approved           | 12.11.2002 |
| 03/00600/FUL | Reclamation of Bathside Bay and development to provide an operational container port; such works comprising:- Engineering and reclamation works including construction of a cofferdam and 1.4 km quay wharf; Construction of a concrete block paved container handling and stacking facility with 11 quayside cranes and 44 Rubber Tyre Gantry (RTG) cranes and associated workshop, customs control, Border Inspection Post and mess buildings, substations, fuelling station and mast and crane mounted lighting; Development of a 6.13 ha rail terminal with 3 rail gantry cranes and heavy duty container transfer area linked to existing rail facilities; Associated office building, logistics facility, car and HGV parking and driver facilities; Site works, including additional hardstanding, structural landscape and mounding, wetland buffer, access internal estate roads and perimeter fencing. | Approved on appeal | 29.03.2006 |
| 03/00601/FUL | Development of a small boat harbour comprising; construction of a cofferdam wall and breakwater; reclamation; sheltered moorings for boats and wave wall; slipway and boat storage and tender compounds; public viewing and seating areas; Fisherman's store and fuel facility; and site works including access road, car parking and lighting, fencing and landscape mounds.  | Approved on appeal | 29.3.2006  |
| 03/00602/LBC | Partial demolition of the long berthing arm attached to the listed Train Ferry Gantry and associated remedial works.   | Approved on appeal | 29.03.2006 |
| 10/00201/FUL | Application under Section 73 of The Town and Country Planning Act 1990 (as amended) to vary  | Withdrawn          | 23.11.2012 |

Conditions 3 (phasing), 45 (Highways), 46 (Highways) and 47 (Highways) and to delete and replace Conditions 41 (Highways), 42 (Highways), 43 (Highways) and 44 (Highways) attached to planning permission 03/00600/FUL.

|              |  |          |            |
|--------------|--|----------|------------|
| 10/00202/FUL | Application for replacement planning permission (in respect of planning permission 03/00600/FUL) subject to a new time limit (to 2021) for the reclamation of Bathside Bay and development to provide an operational container port; comprising:- Engineering and reclamation works including construction of a cofferdam and 1400 metre quay wall; Construction of a concrete block paved container handling and stacking facility with 11 quayside cranes and 44 Rubber Tyre Gantry (RTG) cranes and associated workshop, customs control, Border Inspection Post and mess buildings, substations, fuelling station and mast and crane mounted lighting; Development of a 6.13 ha rail terminal with 3 rail gantry cranes and heavy duty container area linked to existing rail facilities; Associated office buildings, logistics facility, car and HGV parking and driver facilities; Site works, including additional hardstanding, structural landscape and mounding, wetland buffer, internal estate roads and perimeter fencing. | Approved | 14.02.2013 |
| 10/00203/FUL | Application for replacement planning permission (in respect of planning permission 03/00601/FUL) subject to a new time limit (to 2021) for a small boat harbour (sic) comprising; engineering and reclamation works including construction of a cofferdam wall and breakwater; sheltered moorings for boats and wave wall; slipway and boat storage and tender compounds; public viewing and seating areas; Fisherman's store and fuel facility; and site works including access road, car parking and lighting, fencing and landscape mounds.   | Approved | 14.02.2013 |

|                 |   |          |            |
|-----------------|---|----------|------------|
| 10/00204/LBC    | Application for replacement listed building consent (in respect of listed building consent 03/00602/LBC) subject to a new time limit (to 2021) for the partial demolition of the long berthing arm attached to the listed Train Ferry Gantry and associated remedial works.   | Approved | 14.02.2013 |
| 21/01624/DISCON | Discharge of conditions 10, (Archaeological work) 11, (Construction management plan) 12, (Control of noise and vibration) 14, (Approved system for operating vehicles and plants) 15, (Percussive piling operation) 19, (Scheme of construction lighting) 21, (Construction dust management plan) 23, (Details of a wheel wash facility) 24, (Handling of materials) 26 (Scheme for concrete pouring) and 27 (Scheme for pollution control) of application 10/00203/FUL.  | Current  |            |
| 21/01625/DISCON | Discharge of conditions 3, (Scheme of phasing substantially) 12, (Archaeological work) 13, (Construction management plan) 14, (Control of noise and vibration) 16, (Reverse warning system) 17, (Percussive piling operation) 25, (Scheme of construction lighting) 27, (Details of luminaries) 29, (Construction dust management plan) 30, (Cleaning and maintenance programme) 32, (Wheel wash facility) 33, (Handling of materials) 34, (Ambient dust monitoring strategy) 36, (Flood evacuation plan) 38 (Scheme for concrete pouring and filling works) and 39 (Scheme for pollution control) of application 10/00202/FUL. | Current  |            |
| 21/01792/VOC    | Variation of condition 20 of application 10/00203/FUL to not release HPUK from the requirement to secure the prior approval and installation of operational lighting, but to defer submission, approval and installation in respect of these details prior to any operation of the SBH. The application sets out the proposed amended wording for this condition.   | Current  |            |

|                 |  |         |            |
|-----------------|--|---------|------------|
| 21/01810/VOC    | Variation of conditions 2 (Approved Plans / Documents), 28 (Operational Lighting), 41 (Highways), 42 (Highways), 43 (Highways), 44 (Highways), 52 (Operational Air Quality Controls) and 53 (Operational Traffic Noise Attenuation) of application 10/00202/FUL in respect of the proposed Bathside Bay container terminal, Harwich.   | Current |            |
| 21/01816/DISCON | Discharge of Conditions 3 - (Landscaping Scheme) , 6 - (Design and External Appearance of Buildings, Structures and Hardstanding Areas), 8 - (Details of Fences, Walls, Gates and other Enclosures), 9 - (Foul and Surface Water Drainage), 25- (Gas Migration and Accumulation), 28 - (Translocation of reptiles, Invertebrates and Costal Vegetation), 29 - (Vehicular Access from A120), 30 - (Scheme of Provision to be made for Disabled People to Gain Access to Public Areas) 32- (Scheme and Layout of Hard Standing for Vehicles)of application 10/00203/FUL. | Current |            |
| 21/01817/DISCON | Discharge of conditions 5, (Landscaping scheme) 7, (Details of the design and external appearance) 9, (Scheme showing full details of fences, walls, gates and other means of enclosure) 10, (Drawings showing foul and surface water drainage) 11, (Scheme for the design of the proposed Wetland Area) 35, (Details of measures to mitigate gas migration and accumulation) 40, (Scheme for the translocation of reptiles) 48, (Vehicular access) and 49 (Scheme and layout for hard standing for Lorries and cars) of application 10/00202/FUL.                     | Current |            |
| 21/02047/LBC    | Partial demolition of the long berthing arm attached to the listed Train Ferry Gantry and associated remedial works.   | Granted | 04.02.2022 |

#### 4. Consultations

Tree & Landscape Officer  
21.01.2022

No objection.

Babergh District Council

Raise no objection to the proposal.

Environmental Protection  
24.11.2021

They have reviewed the planning statement and the proposed variation of the condition and can confirm that they have no objections to make.

ECC Highways Dept

No response received at the time of writing this report, any views expressed will be reported to Members at the Planning Committee meeting.

Essex County Council  
Ecology (Place Services)  
24.01.2022

No ecological objection subject to commencement of the managed realignment project prior to use of any operational lighting on the site.

They have reviewed the documents supplied by the applicant, Sections 23 & 25 of the Environmental Statement and the Planning and Design Statement dated October 2021. These relate to the likely impacts of Phase 1 development including the Small Boat Harbour on designated sites, protected & Priority species, and details of mitigation and compensatory measures.

They are satisfied that there is sufficient ecological information available for determination of this (VOC) application to support commencement of the Small Boat Harbour element within Phase 1 only (terrestrial works) of the development.

They note that the applicant seeks permission to vary the trigger for provision of this information, not to release it from the requirement, but to defer submission, approval and installation prior to any operation of the Small Boat Harbour.

They welcome Section 25 of the Environmental Statement (shadow Habitats Regulations Assessment) prepared by Royal Haskoning DHV (13 October 2021) for this VOC application related to Small Boat Harbour under Phase 1 of this development. This has revisited the information in the 2003 Environmental statement (ES) - which triggered Stage 2 (Appropriate Assessment to consider if mitigation can avoid Adverse Effect on Integrity (AEOI), Stage 3 Alternative solutions and then Stage 4 Imperative Reasons for Over-riding Public Interest (IROPI) and compensatory measures to ensure the development protects the overall coherence of Habitats sites network. Section 25 therefore provides information to support review of the competent authority's Habitats Regulations Assessment (HRA) report for this development either alone or in combination with other plans and projects.

They are satisfied that the scope of the HRA should include Stour & Orwell Estuaries SPA and Ramsar and Southern North Sea SAC and that the reclamation of approximately 65ha of intertidal habitat in Bathside Bay will, without mitigation, lead to a likely significant effect (LSE). The impact pathways within scope therefore triggered further consideration at Stage 2 Appropriate Assessment to assess if mitigation can avoid any AEOI of the Habitats sites within scope. They have considered Natural England's advice included in section 25.3.3 and the Stage 2 Appropriate Assessment section which states that there will be AEOI from the development of Bathside Bay Container Terminal. They also note that, where only the qualifying features of a Ramsar site will be adversely affected, the tests are different and the LPA as the competent authority must take into account the wording of Article 4 of the Ramsar Convention which allows the UK Government as a contracting party, to delete or restrict the boundaries of designated Ramsar sites only "in its urgent national interest". Any benefits arising from the proposal must, however, demonstrably outweigh the harm to the acknowledged international conservation value of the site. The Stour & Orwell Estuaries Ramsar site therefore needs to be assessed, and consideration given, to the above requirement.

They consider that the assessment of likely impacts on Southern North Sea SAC is acceptable and agree that no AEOI of the Southern North Sea SAC is predicted from the development either alone or in combination with other plans and projects. They understand that section 25.5.2.1 and Table 25.7 do not consider any impacts on protected species (harbour porpoise) outside the SAC separately as the assessments are based on the North Sea Management Unit, which takes into account harbour porpoise in both inside and outside the SAC, in line with current guidance and thresholds for impacts identified by JNCC and Natural England. They are sufficiently satisfied with the scope of the in-combination assessment in section 25.3.3 paragraphs 14 & 15 that no additional disturbance is predicted from varying Condition 20 in combination with other plans and projects included in the assessment.

They agree with the shadow HRA conclusion that there will be no additional impacts from Phase 1 works including the Small Boat Harbour from varying the trigger for provision of information on lighting as required by Condition 20 so this VOC does not need the competent authority to amend its previous HRA report for this permitted development. They acknowledge that the proposed works comprising only Phase 1 of the Small Boat harbour are located entirely on land and mitigation to avoid disturbance, including lighting has been secured by Condition 20 to seek approval for operational lighting before any impacts occur, so this VOC has no impact pathway to affect habitat that supports the qualifying features of the Stour & Orwell Estuaries SPA and Ramsar site or Southern North Sea SAC.

They are satisfied that this proposal to vary Condition 20 will not alter the legal requirements secured for delivery of compensatory habitat (at Little Oakley) - in the Compensation Mitigation and

Monitoring Agreement (CMMA) (Royal Haskoning, 2004) Annex 1 of the Deed (CMMD) – and that the Phase 1 terrestrial works including the Small Boat Harbour will not lead to any additional disturbance which would alter this provision. They understand that the Phase 2 & additional phases within the marine environment (i.e. works below level of MHW spring tides) of the Bathside Bay project cannot be implemented without a marine consent from the MMO and that further EIA and HRA is required to support that consenting process.

They are aware that published Government guidance Habitats Regulations Assessments: protecting a European site (Defra and Natural England, Feb 2021) describes the requirements for the provision of compensatory measures and refers to points that should be considered in order to be confident that the proposed measures will fully compensate for the negative effects of a proposal. This includes how the compensation would be carried out, including how it will be managed and monitored over the time that is needed; and how it has been secured and how long the compensatory measures will take to reach the required quality and amount of habitat.

Section 25.6.5 Timing and habitat development provides background on the applicant's inability to state definitively when the seawall at Little Oakley would be breached (and, therefore, when intertidal habitat would begin to be created) in relation to the commencement of construction at Bathside Bay. They appreciate that the relative timing of the commencement of work at Bathside Bay, including the Small Boat Harbour and the creation of the managed realignment site was analysed in detail in the Compensation Mitigation and Monitoring Agreement (CMMA) (Royal Haskoning, 2004) the Deed in which it sits as Annex 1 (CMMD). This HRA report focuses on the predicted habitat colonisation following breach of the seawall and confirms that whilst invertebrates are likely to rapidly colonise the new intertidal mudflats, it may take 5-10 years for the invertebrate community structure to fully develop on maintenance dredgings which are to be pumped onto the site. It is therefore essential that there is no delay in commencement of the habitat creation and are satisfied that this VOC in relation to provision of information on lighting does not result in a delay as the CMMD remains a legal obligation. It is essential that the LPA secures appropriate and timely compensatory measures for the consented development to demonstrate its compliance with the Conservation of Habitats and Species Regulations 2017 (as amended). There needs to be no reasonable scientific doubt remaining as to the delivery of compensatory measures and, whilst absolute certainty is impossible to attain, the LPA needs to secure legally enforceable ways of preventing such effects in order to meet the Stage 4 HRA requirements.

With this level of certainty, they are satisfied that the shadow HRA for the Small Boat Harbour has demonstrated that this variation of condition 20 application does not seek to delay the creation of compensatory habitat that is necessary to maintain the required level of coherence of Habitats sites. This will enable the LPA to

demonstrate compliance with its statutory duties, including its biodiversity duty under s40 NERC Act 2006 and prevent wildlife crime under s17 Crime and Disorder Act 1998.

Recommendation: They recommend that the LPA, as the competent authority, has certainty of likely impacts on designated sites and can adopt the updated shadow HRA submitted by the applicant for Phase 1 works only to include the Small Boat Harbour, subject to formal consultation response from Natural England. The updated information to support HRA indicates that any likely significant effects can be ruled out from varying Condition 20 in relation to commencement of the Small Boat Harbour element of Phase 1 terrestrial works, and the CMMA and CMMD will retain the timing requirement for commencement of compensatory habitat creation before Phase 2 marine works of the development including operation of the Small Boat Harbour.

They therefore have no ecological objection to this VOC application to vary Condition 20 subject to commencement of managed realignment project prior to use of any operational lighting on the site.

Natural England

Natural England objects to this proposal. As submitted they advise that:

- It will have an adverse effect on the integrity of Stour and Orwell Estuaries Special Protection Area ('SPA') also designated as Stour and Orwell Estuaries Ramsar <https://designatedsites.naturalengland.org.uk/>;
- Any appropriate assessment made by the Council as competent authority, based on the information that has been so far provided by the applicant and made available to Natural England would be incomplete;
- Natural England remains to be convinced that the compensatory measures proposed are sufficient to meet the requirements of the Habitats Regulations both in terms of the certainty of their delivery and the substance of the measures. This is particularly the case where the assessment of the adverse effects being compensated for is incomplete.
- It will damage or destroy the interest features for which Stour Estuary Site of Special Scientific Interest ('SSSI') has been notified.

Natural England's further advice on designated sites/landscapes and advice on other natural environment issues is set out below.

#### Introduction

Natural England notes that the original planning permission to which these variations of condition applications relate was granted by the Secretary of State on the grounds of an Imperative Reason of Overriding Public Interest ('IROPI') on 29 March 2006. It is noted from paragraph 3.5.1 of the applicant's planning statement accompanying this application, that "the effect of permitting a section 73 variation of condition is to issue a new planning permission" and therefore they concur that a Habitats Regulations Assessment ('HRA') is required.

Natural England notes that information has been provided by the applicant which it is presumed will inform the HRA to be carried out by the Council. It remains the obligation of the Council to make its own HRA and to consult Natural England for the purposes of any appropriate assessment it makes during that process. They provide the advice on the assumption that the Council intends to rely on the information provided to date for the purposes of carrying out its HRA.

Paragraph 4.5.5. of the Planning Statement states that "the Habitats Regulations preclude the grant of planning permission pursuant to section 73 ...unless the same thought process has been undertaken by a decision maker as apply on an original grant of permission". In Natural England's view this involves a complete assessment for the purposes of the Habitats Regulations, including an appropriate assessment of the implications for the site in view of its conservation objectives and if necessary considering alternatives, whether there are imperative reasons of overriding public interest why it should proceed and compensatory measures. It is understood from the documents submitted by the applicant that it agrees with this approach and has sought to provide the information that will enable such an assessment to be made by the Council. It remains of course for the Council to satisfy itself as to whether it meets its obligations in this regard (i.e. that the development can proceed due to IROPI).

#### The site

The proposal site lies within the Stour and Orwell estuaries Special Protection Area (SPA) and Ramsar, which is recognised as an internationally important site for nature conservation. Accordingly, it is afforded the highest possible level of protection for an environmental site under both UK law and planning policy.

The Stour and Orwell estuaries SPA and Ramsar comprise extensive mud-flats, low cliffs, saltmarsh and small areas of vegetated shingle on the lower reaches. Breeding avocet feed upon the intertidal mudflats and use the grazing marshes to nest during the summer. The SPA also supports important numbers of overwintering waterbirds, which also use the mudflats extensively for feeding. The saltmarsh and grazing marsh provide important roosting sites, whilst some birds feed and roost on the surrounding arable land. The SPA also supports a large and diverse waterbird assemblage for which it is designated, including great crested grebe (*Podiceps cristatus*), cormorant, (*Phalacrocorax carbo*), dark-bellied brent goose (*Branta bernicla bernicla*), shelduck (*Tadorna tadorna*), wigeon (*Anas penelope*), gadwall (*Anas strepera*), pintail (*Anas acuta*), goldeneye (*Bucephala clangula*), ringed plover (*Charadrius hiaticula*), grey plover (*Pluvialis squatarola*), lapwing (*Vanellus vanellus*), knot (*Calidris canutus islandica*), dunlin (*Calidris alpina alpina*), blacktailed godwit (*Limosa limosa islandica*), curlew (*Numenius arquata*), redshank (*Tringa tetanus*) and turnstone (*Arenaria interpres*). The following species supported by the site are individually qualifying species of the SPA; Avocet, (*Recurvirostra avosetta*) Black-tailed godwit (*Limosa limosa islandica*) Dark-

bellied Brent goose (*Branta bernicla bernicla*) Dunlin (*Calidris alpina alpina*), Grey plover (*Pluvialis squatarola*) Knot (*Calidris canutus*), Pintail (*Anas acuta*) and Redshank (*Tringa tetanus*.)

The Ramsar site is designated for its large and diverse waterbird assemblage along with supporting wetland invertebrate and wetland plant assemblages and the following individually qualifying species; black-tailed godwit (*Limosa limosa islandica*), dark-bellied brent goose (*Branta bernicla bernicla*), dunlin (*Calidris alpina alpina*), grey plover (*Pluvialis squatarola*), knot (*Calidris canutus islandica*), pintail (*Anas acuta*), redshank (*Tringa totanus*).

### Natural England's Advice

#### 1. Appropriate Assessment

Natural England notes that the applicants accept that the proposed development will have Adverse Effects on the Integrity (AEOI) of the Stour and Orwell estuaries SPA and Ramsar site.

Whilst compensation was agreed for the scheme alongside the original permission Natural England must consider the HRA presented to them in the light of the most recent and best available evidence, based on their current understanding of estuarine processes in line with current caselaw and planning guidance.

Note Natural England's comments within the compensation paragraph below regarding the information underlying the appropriate assessment.

#### 2. Reasonable Alternatives

Natural England are not best placed to advise on the matter of alternatives and therefore have no view on this, which is a matter for the Local Planning Authority.

#### 3. IROPI

Natural England is an advisory body with a relatively narrow remit and therefore cannot advise on whether or not the project meets the tests of IROPI. They recommend that TDC seeks legal advice before making this decision but advise, for the avoidance of doubt and for audit trial purposes, that the authority should fully satisfy itself that the project remains imperative taking into account any changes to legislation, planning guidance, site proposals and national need.

In making a judgement of IROPI, particularly with regards to the 'overriding' aspect, the authority should have a full understanding of the ecological value of the site and the anticipated impacts (see comments below).

#### 4. Compensation

If the competent authority is satisfied that IROPI remains and of the absence of alternatives then it must also consider compensation. Section 68 of the Conservation of Habitats and Species Regulations 2017 states that the "appropriate authority

must secure that any necessary compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected."

Natural England note the updated information provided in the Environmental Statement (ES) including consideration of in-combination impacts from recent and current projects within the port and port approaches area.

They note that the shadow HRA section separates the Phase 1 works from the rest of the project and concludes no adverse effect on integrity if those works are conducted outside of the overwintering bird period. Natural England does not recommend retrospectively slicing the assessment of projects into phases. The project was originally assessed as a whole, and the environmental evaluations were conducted to support delivery of a complete development. They also advise that the supporting evidence for the conclusion of no AEoI does not fully consider the current potential for SPA and SSSI features, or other protected or priority waterbird species, within the designated areas adjacent to the proposed Phase 1 work areas - which do contain suitable habitat for breeding and overwintering species and is predominately undisturbed. Therefore, it cannot be concluded that there will be no LSE (impact pathway) and without mitigation there could be an AEoI.

Natural England are currently reviewing the ES provided to support the new planning application for the compensation site as part of the consultation received on 6th January 2022 and have previously engaged with the Applicant as part of the scoping exercise in 2021. At that time, they highlighted that further supporting surveys were required for Bathside Bay and Little Oakley to sufficiently update the original 2003 ES. They acknowledge that work has been done to demonstrate that elements of the original conclusions are still fit for purpose, using publicly available data sources. However, they do not consider that the current evidence provides the confidence to conclude that the proposed managed realignment at Little Oakley would still secure adequate compensation for the loss of Bathside Bay.

In addition Natural England highlights that EC Guidance on Article 6 (4) of the Habitats Directive states that "compensation ratios of 1:1 or below should only be considered when it is demonstrated that with such an extent, the measures will be 100% effective in reinstating structure and functionality within a short period of time". They do not believe that sufficient evidence has been provided to suggest this is the case for Little Oakley. It is unlikely that the compensation measures will be 100% effective in reinstating structure and functionality of the supporting habitats for designated site features of the Stour and Orwell SPA and/or maintain the coherence of the national site network. Since the original planning permission for the Little Oakley managed realignment site was granted, Natural England's understanding in respect of the Habitat Regulations has evolved in line with caselaw, alongside their knowledge around the development processes of coastal and marine compensatory habitats and how

they do and do not work. Therefore, they advise that a ratio greater than 2:1 should be provided.

Without certainty that the compensation proposed will deliver the same ecological value for the same affected features and that the full extent and nature of effects have been considered in the appropriate assessment, and/or evaluated, they cannot advise that the coherence of the network will be protected. Therefore, in their view the appropriate assessment is incomplete and does not make a complete assessment of the effects based on the best reasonably available information. Until they have confidence as to the nature and scale of the effects it is not possible to advise that the effects of the development will be compensated for. Consideration will also need to be given in the HRA for the potential impacts to Hamford Water SPA. Natural England is not aware of any evidence to show that the proposed compensatory site, which is functionally linked to the adjacent Hamford Water Special Protected Area, is of less importance than any other area of supporting habitat or designated habitat and features within the Hamford Water protected areas.

In July 2021 there was a consultation on DEFRA's draft 'Best practice guidance for developing compensatory measures in relation to Marine Protected Areas' whilst that is still in draft and focused on Marine Protected Areas they advise that the generic Principles of Compensation Measures (Paragraph 41) are also relevant to this proposal namely:

Compensatory measures should:

- a. Link to the conservation objectives for the site or feature and address the specific damage caused by the permitted activity;
- b. Focus on providing the same ecological function for the species or habitat that the activity is damaging OR, where this is not technically possible, provide functions and properties that are comparable to those that originally justified designation;
- c. Not negatively impact on any other sites or features;
- d. Ensure the overall coherence of designated sites and the integrity of the MPA [designated sites] network; and
- e. Be able to be monitored to demonstrate that they have delivered effective and sustainable compensation for the impact of the project. The monitoring and management strategy must require further action to be taken if the compensation is not successful.

It is Natural England's understanding that the Marine Management Organisation (MMO) Coastal Concordat signed up to by Tendring District Council in June 2021 states there needs to be regulatory agreement on how to proceed where there is overlapping legal requirements. Applicants will therefore need to provide the relevant information to both regulators to undertake the necessary assessments and support any decision on this proposal.

However, from the searches they have undertaken they are not aware that a marine licence exists for Bathside Bay Container

Terminal and had there been they would have expected to be consulted by the MMO on any variation requests and associated HRA assessment. This could be due to the limited lifespan of any Food and Environment Protection Act (FEPA) 1989 licence and/or Coastal Protection Act 1949 licence for the BBCT making them invalid when the Marine and Coastal Access Act 2009 came into existence in April 2010 resulting in them not being transposed over to a marine licence. Natural England advises that the onus is therefore on the Applicant to ensure that they have all the necessary legislative consents and sign off for the project.

In conclusion Natural England advise that the delivery of suitable compensation is uncertain, the relevant permissions are not in place, timings are unclear, and the ES does not follow Defra's draft best practice guidance (Best practice guidance for developing compensatory measures in relation to Marine Protected Areas). Therefore they advise that limited weight can be given to the sufficiency and deliverability of the compensation measures in any decision making.

#### 5. Landscape

As identified in the 2003 Landscape and Visual Impact Assessment (LVIA), the conclusion of which were confirmed by the 2021 update, the proposed development will have an adverse effect on the character and appearance of the Suffolk Coasts and Heaths AONB, which was extended via a Designation Variation Order in 2019 to include parts of the Stour Estuary and land to the south of the Stour Estuary within Essex.

The application site is located outside Suffolk Coast & Heaths Area of Outstanding Natural Beauty (AONB), but within its setting. The effects of the proposed development on the AONB were specifically considered in section 5.12 of the 2003 LVIA accompanying the original planning application, which concludes "The magnitude of effect and significance of impacts to the AONB, in overall terms, is considered to be locally moderate [adverse], intensifying adverse effects of port facilities already apparent in all views towards the site within the AONB." The 2003 LVIA also acknowledges that it will not be possible to fully mitigate the impacts, particularly on the waterside approach given the type and scale of development proposed and the lack of opportunities for on-site screening to the waterside frontage.

Despite acknowledgement of the adverse effects on the proposed scheme on the AONB, planning consent was granted in 2006 on the basis of IROPI, and the scheme was re-consented in February 2013 following judicial review.

However, in the intervening period between the issue of planning consent for the Bathside Bay scheme and the current applications for discharge and variation of conditions pertaining to the planning permission, the boundary of Suffolk Coast and Heaths AONB has been extended to enlarge the AONB. This has resulted in the boundary of the AONB being brought closer to the application site. In July 2020, the Secretary of State approved a Designation Variation Order for the AONB to include much of the Stour

Estuary and land to the south bank of the Stour Estuary within Essex. The AONB boundary now lies within approximately 1km of the application site to the north in Suffolk, and within 1.5km to the west within Tendring. Therefore, they advise that impacts to the settings of the AONB require due consideration.

As noted, the baseline information used in the preparation of the 2003 Landscape and Visual impact Assessment (LVIA) has been reviewed to determine if the conclusions remain valid. They acknowledge that work has been done to demonstrate that the original conclusions are still fit for purpose, however this approach to re-assessment is not ideal. The original LVIA is now 19 years old and since its production the landscape baseline has changed significantly due to the AONB extension and further industrial development around Felixstowe. Changes in national planning policy such as the NPPF have also been strengthened the protection given to AONBs and their settings. There have also been several changes to published landscape guidance and assessments in the intervening period.

The s73 application effectively triggers a new planning consent. Given the time elapsed, changes to the landscape baseline and designation and the inconsistencies in terminology used in the original report around the significance of impacts, Natural England suggest that the approach taken to updating the original LVIA obfuscates the determination of impacts to the setting of the AONB and that a new standalone Landscape and Visual Impact Assessment should be carried out to determine the significance of landscape and visual impacts to the setting of the Suffolk Coasts and Heaths AONB afresh, as extended in 2020. The objective of the LVIA should be to establish an up to-date landscape baseline, independent of prior assessment and to seek to determine objectively, based on best available and most recent evidence, the impact of the proposed development on the Landscape. It should fully assess impacts on the nationally designated landscape of the Suffolk Coasts and Heaths AONB including its 2020 extension, not to seek to confirm the previous conclusions of an LVIA that is now 19 years out of date and does not meet with the standards set out in the current GLVIA (2013) guidelines.

The differences in methodology employed in the 2003 LVIA and current best practice are set out in section 12.3 of the ES. The fact that this section of the report is two and a half A4 pages in length, highlights the extent of the inconsistencies between current best practice guidance and the methodology used in the 2003 report, which the applicant has sought at length to justify. The statutory purpose of the AONB is to conserve and enhance the area's natural beauty.

The Local Planning Authority should assess the application carefully as to whether the proposed development would have a significant impact on or harm that statutory purpose in determining the variation of conditions 21/01810/VOC 28 'operational lighting' and condition 20 of 10/00203/FUL. Relevant to this is the duty on public bodies to 'have regard' for that statutory purpose in carrying out their functions (S85 of the

Countryside and Rights of Way Act, 2000). The Planning Practice Guidance confirms that this duty also applies to proposals outside the designated area but impacting on its natural beauty.

In summary Natural England advises that LVIA in accordance with current guidelines should be provided and that the planning authority uses this up-to-date evidence along with national and local policies, together with local landscape expertise and information to determine the proposal. Your decision should be guided by paragraphs 176 and 177 of the National Planning Policy Framework which gives the highest status of protection for the 'landscape and scenic beauty' of AONBs and National Parks. Alongside national policy you should also apply landscape policies set out in your development plan, or appropriate saved policies.

They also advise that TDC take into account comments provided by the Suffolk Coast and Heaths AONB Partnership in determining the application. Their knowledge of the site and its wider landscape setting, together with the aims and objectives of the AONB's statutory management plan, will be a valuable contribution to the planning decision.

Marine Management  
Organisation  
10.01.2022

Please be aware that any works within the Marine area require a licence from the Marine Management Organisation. It is down to the applicant themselves to take the necessary steps to ascertain whether their works will fall below the Mean High Water Springs mark.

The Marine Management Organisation (MMO) is a non-departmental public body responsible for the management of England's marine area on behalf of the UK government. The MMO's delivery functions are; marine planning, marine licensing, wildlife licensing and enforcement, marine protected area management, marine emergencies, fisheries management and issuing European grants.

#### Marine Licensing

Activities taking place below the mean high water mark may require a marine licence in accordance with the Marine and Coastal Access Act (MCAA) 2009. Such activities include the construction, alteration or improvement of any works, dredging, or a deposit or removal of a substance or object below the mean high water springs mark or in any tidal river to the extent of the tidal influence. You can also apply to the MMO for consent under the Electricity Act 1989 (as amended) for offshore generating stations between 1 and 100 megawatts in England and parts of Wales. The MMO is also the authority responsible for processing and determining harbour orders in England, and for some ports in Wales, and for granting consent under various local Acts and orders regarding harbours. A wildlife licence is also required for activities that that would affect a UK or European protected marine species.

#### Marine Planning

As the marine planning authority for England the MMO is responsible for preparing marine plans for English inshore and offshore waters. At its landward extent, a marine plan will apply up to the mean high water springs mark, which includes the tidal extent of any rivers. As marine plan boundaries extend up to the level of the mean high water spring tides mark, there will be an overlap with terrestrial plans which generally extend to the mean low water springs mark. Marine plans will inform and guide decision makers on development in marine and coastal areas. On 2 April 2014 the East Inshore and Offshore marine plans were published, becoming a material consideration for public authorities with decision making functions. The East Inshore and East Offshore Marine Plans cover the coast and seas from Flamborough Head to Felixstowe. For further information on how to apply the East Inshore and Offshore Plans please visit our Marine Information System. The MMO is currently in the process of developing marine plans for the South Inshore and Offshore Plan Areas.

Planning documents for areas with a coastal influence may wish to make reference to the MMO's licensing requirements and any relevant marine plans to ensure that necessary regulations are adhered to. For marine and coastal areas where a marine plan is not currently in place, they advise local authorities to refer to the Marine Policy Statement for guidance on any planning activity that includes a section of coastline or tidal river. All public authorities taking authorisation or enforcement decisions that affect or might affect the UK marine area must do so in accordance with the Marine and Coastal Access Act and the UK Marine Policy Statement unless relevant considerations indicate otherwise. Local authorities may also wish to refer to our online guidance and the Planning Advisory Service soundness self-assessment checklist.

Environment Agency  
17.01.2022

We have reviewed all the applications in relation to this site and will not be looking to make any comment on the applications.

As we has previously discussed, when it comes to Variation and Discharge of conditions, if we did not request the original condition we will not look to comment on the applications. While the guidance you have below shows us as a statutory consultee for EIA applications, this is for the EIA application and the same criteria for Variation and Discharge conditions applies for EIA applications.

We have none-the-less reviewed the documents we have been forwarded by other interested parties as well as online at the planning portal and can confirm that we have no comment to provide as these do not fall within our remit. We do however advise as before to ensure you have consulted your emergency planners, but also to consult Natural England if not done so already.

Essex County Council  
Archaeology

The above application is for variation of conditions on application 10/00203/FUL for which there is a condition for archaeological

21.12.2021

investigation in advance of development. The condition has been part discharged to allow development to proceed on Phase 1 of the development however the condition has not been satisfied and will need to be applied to the variation of condition application.

## **5. Representations**

- 5.1 Harwich Town Council has no objection to this application.
- 5.2 No written representations have been received from members of the public at the time of writing this report.

## **6. Assessment**

### **6.1 Overview**

- 6.1.1 This application seeks permission to vary the wording of one planning condition (no. 20) that forms part of the planning permission granted by the Council in 2013 for the development of a Small Boat Harbour on land to the east of the proposed Container Port at Bathside Bay.
- 6.1.2 The application site is located on land near Gas House Creek which is situated on the eastern side of the bay, located to the west of the town of Harwich, on the southern side of the estuary of the River Stour. It is roughly opposite Shotley Gate, which is itself separated from the Port of Felixstowe to the east by the estuary of the River Orwell.
- 6.1.3 In totality, the application site covers approximately 7.3ha of land, of which approximately 4ha is inter-tidal land which will be dredged in the future to create the Small Boat Harbour.
- 6.1.4 When the proposals for the development of the Container Terminal at Bathside Bay were being drawn up, concerns were raised about the impact the works and subsequent operation of the port would have on the users of small boats used for recreation and fishing, who previously moored their boats within the bay. The Local Plan at the time also identified the area as being suitable for continued development and expansion of port facilities, as well as a mixed-use development and mooring basin. This all led to the proposal that a Small Boat Harbour would be provided by the developer of the container port adjacent to it. The Small Boat Harbour was designed to provide an alternative sheltered marine environment where boats could be moored or dock with facilities for use by both fishing and recreational boats, including by the Harwich and Dovercourt Sailing Club. Berthing facilities will be provided for at least 77 boats.
- 6.1.5 The 2013 planning permission for the Small Boat Harbour comprises:-
- Engineering and reclamation works, including construction of a cofferdam wall and breakwater;
  - Sheltered moorings for boats and a wave wall;
  - Slipway and boat storage and tender compounds;
  - Public viewing and seating areas;
  - Fisherman's store and fuel facility; and
  - Site works including access road, car parking and lighting, fencing and landscape mounds.
- 6.1.6 The applicant has stated that it intends to implement the extant permission for the proposed Small Boat Harbour on or before its expiration on 29<sup>th</sup> March 2022.

- 6.1.7 As set out within the planning history section of this report, HPUK have already made two separate applications to discharge the remaining pre-commencement planning conditions on the extant permission (the aforementioned nos 3, 6, 8, 9, 10, 11, 12, 19, 21, 23, 24, 25, 26, 27, 28, 29, 30 & 32), and Officers continue to assess these applications with the assistance of the relevant statutory consultees.
- 6.1.8 The applicant however considers that planning condition no. 20 would now be considered unreasonable, with reference to current legislation and Government policy (the PPG). This is because the condition requires the submission and approval of details for elements of the development prior to its commencement, even though the impact that would be controlled or mitigated would not occur at the outset of the development process, but on operation i.e after its implementation.
- 6.1.9 The applicant is not proposing that any of the imposed planning conditions are removed from the planning permission, simply that the wording of condition no. 20 is amended to change the 'trigger' for the submission of details from pre-commencement of the development to before first operation.
- 6.1.10 If this application is approved by Members, the Council will be issuing an entirely new planning permission, and will need to apply controls and requirements similar to those that were imposed on the original planning permission. However, it should be noted that whilst section 73 applications can be used to vary or remove (seek non-compliance with) planning conditions, they cannot be used to amend the time limit for implementation; consequently the condition specifying the timeframe within which the development should commence (condition no1) must remain unchanged from the original permission.
- 6.1.11 Because of the scale, nature and environmental impacts of the proposed development and the related Container Terminal development, the original planning application was accompanied by an Environmental Statement (ES), pursuant to the Environmental Impact Assessment (EIA) Regulations. This application to vary a planning condition is accompanied by a further ES which reviews the previous Environmental Statement and where appropriate updates its assessments. The ES completes the assessment by updating any effects that may have changed during the intervening period, since previously approved. The applicant's assessment and its conclusions are considered within the body of this report.
- 6.1.12 Originally, when the Secretary of State determined the proposals for the Container Terminal and Small Boat Harbour, this was alongside two further associated applications. These applications covered additional development and works which would be necessary to facilitate and mitigate the impacts of the combined development, namely:
- Engineering works to create new habitat to mitigate the ecological impacts of the Container Terminal development, including the breaching of the existing seawall at Little Oakley, and
  - Listed building consent for the partial demolition of the long berthing arm attached to the listed Train Ferry Gantry, Harwich and associated remedial works.
- 6.1.13 In 2010, HPUK submitted applications to the Council for replacement planning permissions to extend the period of time allowed to implement the development. Although three planning permissions and one listed building consent had been obtained originally in 2006, HPUK only submitted applications for replacement planning permissions for the Container Terminal and Small Boat Harbour developments, along with a new application for Listed Building Consent in respect of the Train Ferry Gantry. No application was made for a replacement planning permission for works to create compensatory habitats at Little Oakley. Subsequently, the planning permissions granted in 2006 lapsed in 2016.
- 6.1.14 The applicant submitted a new application for Listed Building Consent in respect of the Train Ferry Gantry works (21/02407/LBC) and a new planning application for the works at Little

Oakley (21/02144/FUL). Those applications were received some time after the application the subject of this report, and the latter is still being assessed by Officers, however Listed Building Consent was granted 4<sup>th</sup> February 2022. The different applications are inextricably linked, in that they are all necessary if the proposed Container Terminal and Small Boat Harbour are to proceed. It is possible to consider each proposal separately by assessing each scheme against the Development Plan, whilst having regard to all material considerations, but ultimately they stand or fall together. In particular, the Council will need to be satisfied that appropriate compensatory habitats will be created at Little Oakley before it can grant permission for the Container Terminal and Small Boat Harbour. The Little Oakley application has been called to Planning Committee for determination by Councillor Mike Bush at a later date.

## **6.2 Context and Background**

- 6.2.1 As highlighted above, in 2003 HPUK applied for planning permission for the construction of a new container terminal at Bathside Bay, Harwich, along with three associated applications for works to facilitate the development of the port, and to carry out works or development to mitigate some of the impacts of the proposal.
- 6.2.2 On 29<sup>th</sup> March 2006, permissions, inter alia, for the container terminal; the small boat harbour; the managed realignment of the coastline and creation of compensatory inter-tidal habitats off-site and listed building consent in respect of the partial demolition of the long berthing arm attached to a listed Train Ferry Gantry were granted by the Secretary of State. The Secretary of State's decision followed the recommendations of a Planning Inspector who conducted concurrent Public Inquiries between 20<sup>th</sup> April 2004 and 21<sup>st</sup> October 2004. These developments were subject to rigorous assessments and were found, on balance, to be acceptable. In particular, as regards the then Habitats Regulations, the Secretary of State found that Imperative Reasons of Overriding Public Interest (IROPI) outweighed the identified harm to the integrity of a European site (the Stour and Estuaries SPA). The permissions all required that the particular development, or work to the listed structure, be begun before the expiration of 10 years from the date of the permission or consent – in other words by March 2016.
- 6.2.3 In 2010, HPUK made an application for replacement planning permissions to extend the period of time allowed to implement the Container Terminal and Small Boat Harbour development. Those applications were considered by the Council to be consistent with the prevailing local and national planning policies and they were approved in 2013 with a new condition which required that the development commence by 29<sup>th</sup> March 2021.
- 6.2.4 The decision of the Council to grant the replacement planning permissions for the Bathside Bay Container Terminal and Small Boat Harbour was subject to an unsuccessful Judicial Review. Because a developer's plans to implement a planning permission would be delayed whilst a Judicial Review is considered and determined, planning legislation allows developers an additional year to implement a planning permission where a planning permission is subject to Judicial Review. This means that the current permission for the Bathside Bay Container Terminal and the Small Boat Harbour, granted in 2013, remains extant, but development must be begun on or before 29<sup>th</sup> March 2022.
- 6.2.5 The development of the Container Terminal and the Small Boat Harbour are both significant developments and by virtue of their scale, nature and location the developments will have some significant local impacts. The Secretary of State sought to control and mitigate these impacts through the use of planning conditions and planning obligations secured through S106 agreements and these were carried forward by the Council in 2013.
- 6.2.6 Planning permission for the Small Boat Harbour was subject to 32no separate planning conditions, of which 18no were 'pre-commencement conditions' – where the applicant is

required to submit and gain approval of details prior to the commencement of the development.

6.2.7 As explained above, the applicant has submitted separate discharge of condition applications which seek to discharge all of the other pre-commencement conditions, in addition to condition nos 14 and 15, with the exception of condition 20 which is the subject of this application.

### 6.3 Schedule of Conditions

6.3.1 The 32no planning conditions attached to the original planning permission are summarised below, along with the details of which ones were pre-development commencement conditions and the related discharge of condition application (DISCON), where relevant. Condition nos 14 and 15 are the subject of 21/01624/DISCON, with details having been submitted, but they are not pre-commencement conditions.

| Condition no. & purpose                              | Pre-comm. condition Yes/No | DISCON application Reference. |
|--|----------------------------|-------------------------------|
| 1. Time to commence                                  | No                         |                               |
| 2. Approved plans                                    | No                         |                               |
| 3. Landscaping scheme                                | Yes                        | 21/01816/DISCON               |
| 4. Landscape management plan                         | No                         |                               |
| 5. Approved document (Planning and Design Statement) | No                         |                               |
| 6. External materials                                | Yes                        | 21/01816/DISCON               |
| 7. Top soil  | No                         |                               |
| 8. Means of enclosure                                | Yes                        | 21/01816/DISCON               |
| 9. Foul & surface water drainage                     | Yes                        | 21/01816/DISCON               |
| 10. Archaeology                                      | Yes                        | 21/01624/DISCON               |
| 11. Construction Management Plan                     | Yes                        | 21/01624/DISCON               |
| 12. Noise & vibration                                | Yes                        | 21/01624/DISCON               |
| 13. Operation of plant                               | No                         |                               |
| 14. Plant audible alarms                             | No                         | 21/01624/DISCON               |
| 15. Piling   | No                         | 21/01624/DISCON               |
| 16. Piling – hours                                   | No                         |                               |
| 17. Noise levels                                     | No                         |                               |
| 18. Vibration levels                                 | No                         |                               |
| 19. Construction lighting                            | Yes                        | 21/01624/DISCON               |
| 20. Operational lighting                             | Yes                        |                               |
| 21. Dust management                                  | Yes                        | 21/01624/DISCON               |
| 22. Vehicles sheeted                                 | No                         |                               |
| 23. Wheel wash                                       | Yes                        | 21/01624/DISCON               |
| 24. Material storage                                 | Yes                        | 21/01624/DISCON               |
| 25. Gas mitigation                                   | Yes                        | 21/01816/DISCON               |
| 26. Concrete pouring and filling                     | Yes                        | 21/01624/DISCON               |
| 27. Pollution control                                | Yes                        | 21/01624/DISCON               |
| 28. Translocation of species                         | Yes                        | 21/01816/DISCON               |
| 29. Details of access to A120                        | Yes                        | 21/01816/DISCON               |
| 30. Access for mobility impaired                     | Yes                        | 21/01816/DISCON               |
| 31. Dredging – hours                                 | No                         |                               |
| 32. Internal roads & parking                         | Yes                        | 21/01816/DISCON               |

### 6.4 Proposals

- 6.4.1 The application seeks permission to vary the wording of planning condition no20 (operational lighting) from planning permission 10/00203/FUL, in respect of the proposed development of a Small Boat Harbour. The condition currently requires the submission and approval of an operational lighting scheme prior to the commencement of development. The applicant has applied to change the wording of the condition so that it is required to submit and gain approval for operational lighting, and install the approved lighting, prior to each part of the site coming in to operation.
- 6.4.2 The revised wording of the condition is listed below. The words which are struck out formed part of the original condition and are proposed to be deleted, the words in bold font and italics are new words that are to be added:

Condition 20 – Operational Lighting

No part of the hereby permitted development shall ~~be implemented~~ **commence operation** until a scheme relating to the provision and control of operational lighting **on that part** of the site has been **installed in accordance with a scheme which has been** submitted ~~to~~ and approved in writing by the Local Planning Authority. The lighting scheme shall be carried out in accordance with the scheme so approved.

## 6.5 Policy Considerations

### National Planning Policy

#### *National Policy Statement for Ports*

- 6.5.1 The National Policy Statement for Ports (NPS) is intended to provide the framework for decisions on proposals for new port development (Para.1.2.1). 'The NPS sets out the Government's conclusions on the need for new port infrastructure, considering the current place of ports in the national economy, the available evidence on future demand and the options for meeting future needs' (Para.1.2.4).
- 6.5.2 A new Container Terminal at Bathside Bay is listed in the NPS as being one of the permitted schemes that the Government is counting on to increase the national deep water container port capacity, helping to meet the growing need for this type of facility.
- 6.5.3 The NPS states that based on Government forecasts over the next 20-30 years there is a compelling need for substantial additional port capacity, to be met by a combination of development already consented and development for which applications have yet to be received. The NPS concludes by warning that 'Excluding the possibility of providing additional capacity for the movement of goods and commodities through new port development would be to accept limits on economic growth and on the price, choice and availability of goods imported into the UK and available to consumers. It would also limit the local and regional economic benefits that new developments might bring. Such an outcome would be strongly against the public interest' (Para.3.4.16).
- 6.5.4 It is noted that the NPS was published in 2012 and has not been subject to revision, indicating that the Secretary of State does not consider that circumstances have changed to an extent that the NPS needs to be. Officers note that since 2012 the Department for Transport have produced updated forecasts for UK Port Freight Traffic. The 2019 forecast continues to show very large increases in the level of container freight.
- 6.5.5 The NPS also states that the need for port infrastructure 'depends not only on overall demand for port capacity but also on the need to retain the flexibility that ensures that port capacity is located where it is required, including in response to any changes in inland distribution networks and ship call patterns that may occur, and on the need to ensure effective competition and resilience in port operations' (Para.3.4.1). The need for resilience has been

emphasised in the last few years where the media have reported bottle necks at UK ports which have led to delays and increased costs.

#### *National Planning Policy Framework 2021*

- 6.5.6 The NPPF states that the planning system should be achieving sustainable development. Achieving sustainable development means that the planning system has three overarching objectives, which are interdependent and need to be pursued in mutually supportive ways - economic objectives; social objectives and environmental objectives.
- 6.5.7 Local Planning Authorities are directed to ensure that local plan policies make provision 'for any large scale transport facilities that need to be located in the area, and the infrastructure and wider development required to support their operation, expansion and contribution to the wider economy' and take into account any relevant national policy statements (Para.106)
- 6.5.8 Guidance on habitats and biodiversity is given in Paras 179-182 of the NPPF. Broadly speaking, the Council should seek to protect and enhance biodiversity in the exercise of its planning functions. Where (as here) an appropriate assessment has shown that development would adversely affect the integrity of a habitats site, the presumption in favour of sustainable development in Para 11(d) does not apply.
- 6.5.9 In addition to national policy on biodiversity, s 40 of the Natural Environment and Rural Communities Act 2006 requires the Council, in exercising its functions, to have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity.

#### *Freeports*

- 6.5.10 In March 2021 the Government announced in the Budget the locations of eight new Freeports within England. Freeports are intended to be national hubs for global trade and investment across the UK. They also aim to promote regeneration and job creation as part of the Government's policy to level up communities. Freeport East, which includes Felixstowe and Harwich, was one of the eight designated sites in England. The Government propose that Freeports will benefit from incentives relating to customs, tax, planning, regeneration, infrastructure and innovation. The designation of Freeport East can be seen as recognition of the national importance of existing and proposed port operations at Felixstowe and Harwich.
- 6.5.11 Overall it is considered that there have been no material changes in national planning policy that would significantly alter the context within which the application should be assessed. Indeed the recent announcement about Freeport East and the fact that the NPS remains unchanged as the national policy on Ports after updated port traffic forecasts were produced in 2019 could lend some additional support to the proposals for the Container Terminal, and associated developments.

#### The Development Plan

- 6.5.12 Planning applications should be determined in accordance with the development plan unless material considerations indicate otherwise.

#### *Tendring District Shared Strategic Section 1 Local Plan (2021)*

- 6.5.13 The shared Part One of the Local Plan sets out high level planning policies for the North Essex Authorities (Tendring, Braintree & Colchester). Policy SP3 sets out the spatial strategy for development and states that existing settlements will be the principal focus for additional growth across the North Essex Authorities area within the Local Plan period. Policy SP5 is concerned with employment and the policy states that the North Essex Authorities will promote

a strong, sustainable and diverse economy and will pursue a flexible approach to economic sectors showing growth potential across the Plan period. The Container Port and Small Boat Harbour proposals are broadly consistent with both policies, being located on the edge of one of the District's main towns. As evidenced through the NPS the port sector, and container ports in particular, are a sector of the economy that has significant growth potential if suitable facilities are provided.

- 6.5.14 It is also noted that the North Essex Spatial Portrait identifies the Haven Ports as being important facilities not only locally, but also nationally with the role that they play in handling container ships and freight transport to and from the rest of the UK.

*Tendring District Section 2 Local Plan (2022)*

- 6.5.15 The previous Tendring District Local Plan (2007) contained specific policies regarding both the Bathside Bay Container Terminal and the Small Boat Harbour – Policies HAR1 & HAR10. Policy HAR1 sought to protect the site for the permitted use, but also guarded against variations to the scheme that had been approved that would be unacceptable in terms of local amenity; infrastructure; nature conservation interests; and designated heritage assets. The 2007 Local Plan is now superseded so these policies no longer carry any weight.
- 6.5.16 Policy PP14 designates Harwich Old Town as one of the Priority Areas for Regeneration. Modifications were also made to the Draft Publication Local Plan to add supporting text which lists one of the aims for regeneration as being to maximise the opportunity offered by 'Freeport' status and the proposals for expansion at Harwich International Port and Bathside Bay; and to support opportunities to improve water-based recreation facilities in the area (Para.6.10.8). The supporting text also refers to the designation of Freeport East and the unique opportunity this presents to build a truly global trade hub at the same time as accelerating opportunities in green energy and helping 'level-up' the economy.
- 6.5.17 Other policies of relevance include Policy SP1 which identifies Harwich & Dovercourt as being one of the District's four Strategic Urban Settlements, making this a preferred location for new development. Policy PP6 seeks to protect employment sites for employment generating uses. Whilst a small part of the designated employment site will be used to create the Small Boat Harbour this is being provided to facilitate the larger Container Terminal development. The employment and economic benefits of the Container Terminal scheme justify the small loss of land designated for employment purposes. Policy PP8 sets out the Council's approach to development associated with tourism. The policy states that proposals for marinas and boat harbours and associated facilities will be supported on appropriate sites, subject to general compliance with other development plan policies.
- 6.5.18 Chapter 7 of the Local Plan is entitled 'Protected Places' and contains a number of policies which seek to manage development in a way that protects against inappropriate development causing harm in terms of Flood Risk (PPL1); the rural landscape (PPL3); Biodiversity and Geodiversity (PPL4) and the historic environment (PPL7, PPL8 & PPL9). The Protected Places chapter is considered to be generally consistent with the approach taken in policies contained within the development plan as it then was in 2006 when the Secretary of State granted permissions, and in 2013 when the Council granted the replacement planning permissions.
- 6.5.19 Policy SP6 is concerned with Place Shaping Principles. The policy clearly seeks to protect the amenities of existing and future residents, referring to noise, vibration, smell, loss of light and overlooking. Although not specifically listed it is considered that protection of amenities should reasonably include lighting in general and not just loss of light.
- 6.5.20 It should be noted that the Inspector who reported on the original application to the Secretary of State concluded that it is inevitable that a development of the scale and nature of Container

Terminal application and the associated developments would be unlikely to accord with every policy contained within a development plan and that the correct the legal approach is to consider the policies of the development plan as a whole.

6.5.21 When determining the application, the Secretary of State concluded that the details of the proposals, supported by the suite of planning conditions and obligations, would ensure compliance with the vast majority of development plan policies. Whilst he accepted that there were some visual and landscape policy matters incapable of being complied with he concluded that overall, the proposals, as proposed to be mitigated and compensated, would accord with the broad thrust of development plan policies. The Council reached a similar view in 2013, and Officers consider that (provided the requirements of the Habitats Regulations are satisfied) this remains the case with the newly adopted Local Plan policies.

## **7 Assessment**

### **7.1 Overview**

7.1.1 Whilst it is accepted that this type of facility will need some form of external lighting for safety and security reasons there is also a need to ensure that the lighting design is appropriate and has been designed to account for relevant issues, including ecology, visual and residential amenity.

7.1.2 There have been no changes to planning policies which would indicate that there is no longer a need to control the external lighting of the site through the planning conditions.

7.1.3 The requirement to submit and gain approval of a lighting scheme needs to be linked to a clearly defined point in the development process. The wording of the original condition requires that the details be agreed prior to commencement of development. The applicant has proposed that the condition is amended so that the details need to be submitted, approved and installed prior to the part of the site where the lighting is installed becoming operational. The re-worded condition will still allow the Council to control the lighting design to ensure that a safe environment is created whilst also protecting visual amenity, ecology, energy efficiency and reducing the risk of unnecessary light pollution. The re-worded condition is considered to be consistent with relevant local and national planning policies.

### **7.2 Environmental Considerations**

#### Environmental Impact Assessment

7.2.1 The EIA Regulations cover applications made under section 73 of the Town and Country Planning Act 1990 i.e. those to carry out development without complying with a condition attached to an existing planning permission.

7.2.2 The current section 73 application for planning permission (together with the application regarding the Container Port) are for Schedule 1 development and thus are applications for EIA development within the meaning of Regulation 2 of the EIA Regulations. Accordingly, the Council must not grant planning permission without first taking the environmental information provided by the applicant into consideration.

7.2.3 HPUK submitted a full Environmental Statement (ES) when it made its original applications. The ES included an assessment of the specific impacts arising from the Small Boat Harbour as the proposed development was a direct consequence of the proposals to create the new Container Terminal. The examining Inspector and the Secretary of State were both satisfied that the ES that was submitted with the application met the requirements of the then EIA Regulations and provided sufficient information to assess the environmental impacts of the development. The ES was taken into account by the Secretary of State when granting the

2006 Permissions. The Secretary of State concluded that the benefits of the proposal outweighed any adverse environmental impacts when the proposed mitigating measures were taken into account.

- 7.2.4 As part of the section 73 applications in 2010, to extend the length of time in which the development must commence, the applicant submitted a Supplementary Environmental Report (SER) which reviewed the 2003 ES and updated the environmental effects that were considered to have changed during the intervening period, or which might arise as a result of the proposed changes.
- 7.2.5 The applicant has submitted with this application a further ES which reviews the previous ES and SER and updates the environmental effects that are considered to have changed during the intervening period, or which might arise as a result of the proposed changes. The ES includes an assessment of changes to applicable legislation and guidance for each of the technical chapters; updates to the baseline environmental conditions for each of the technical chapters scoped in to the assessment; and inclusion of additional chapters to account for changes to the EIA Regulations. The ES concludes by assessing whether the conclusions of the 2003 ES and 2010 SER remain valid.
- 7.2.6 It should be noted however from the representations above, that issues have been raised on both this and the sibling S73 application 21/01810/VOC (for the Container Terminal, also before Members at this Planning Committee meeting) in respect of the requirements of the Habitats Regulations and upon the effect of the proposals upon the AONB as extended. These representations challenge the adequacy of elements of the ES and these issues are discussed below.

#### Habitats Regulations

- 7.2.7 The Container Terminal development and the proposed Small Boat Harbour would lead to the cumulative loss of 69ha of intertidal habitat forming part of the Stour and Orwell Estuaries SPA/Ramsar site/SSSI. The Council is required by the Habitats Regulations to carry out an assessment of the implications of this, and is prohibited from granting planning permission unless satisfied that:
- there is no alternative solution;
  - the development must be carried out for imperative reasons of overriding public interest (IROPI);
  - necessary compensatory measures have been secured that ensure that the overall coherence of the national site network of SACs and SPAs is protected.
- 7.2.8 Concerns have been expressed about the adequacy of the updated ecological assessment within the ES, including whether a suitable assessment had been made of the potential in-combination impacts arising from this and other developments – both on-shore and off-shore. Of particular significance is the letter of objection from Natural England dated 4 February 2022, in which Natural England concludes:
- (1) The development will have an adverse effect on the integrity of Stour and Orwell Estuaries Special Protection Area ('SPA') also designated as Stour and Orwell Estuaries Ramsar.
  - (2) Any appropriate assessment made by the Council as competent authority, based on the information that has been so far provided by the applicant and made available to Natural England would be incomplete.
  - (3) Natural England remains to be convinced that the compensatory measures proposed are sufficient to meet the requirements of the Habitats Regulations both in terms of the certainty of their delivery and the substance of the measures. This is particularly the

case where the assessment of the adverse effects being compensated for is incomplete.

- (4) The development will damage or destroy the interest features for which Stour Estuary Site of Special Scientific Interest ('SSSI') has been notified.

7.2.9 Conclusions (1) and (4) are already common ground in that harm to the SPA and SSSI was accepted as an inevitable consequence of the development by the Inspector and Secretary of State in 2005/2006, and by the Council in 2013. As Natural England had been content with the 2003 ES and 2010 SER when the Council granted planning permission in 2013, and had also been content with the proposed compensatory habitats at Little Oakley (and indeed is a signatory to the S106 agreement for the development at Little Oakley) its recent objection represents a significant change of position.

7.2.10 In approving the original applications in 2006 the Secretary of State found that there was no alternative solution to the proposed container terminal at Bathside Bay, and having regard to the Secretary of State's decision, the Inspector's report, the NPS and the information provided in the applicant's ES and Planning Statement, this remains Officer's opinion to date. The Secretary of State also concluded that the national need for additional container terminal capacity constituted IROPI, and that adequate compensation measures had been proposed in response to the likely adverse effect on the integrity of the SPA.

7.2.11 In carrying out its own determination under the Habitats Regulations, the Council is entitled to have regard to the fact that the Secretary of State found that the Bathside Bay project should be carried out for IROPI, and to the advice given in the NPS on Ports referred to above.

7.2.12 Whilst it is true that a considerable period of time has elapsed since the first applications for the Container Terminal and Small Boat Harbour were submitted and approved, this is not evidence that the IROPI no longer exist. The global downturn that began in 2008 and the Coronavirus pandemic have both delayed the predicted increase in demand for container traffic, but there is nothing before the Council that casts serious doubt on the proposition that there is likely to be a long term increase in demand for container terminal capacity. Officers accept what is said in section 2.1.1 of the ES that "Volumes [of container throughput] have been growing at a [compound annual growth rate] of 2% over the period 2000-2020. Growth has been relatively stable, with the exception of the noticeable fall in volumes due to the financial crisis in 2009 and the stable throughput for the next few years until 2014. Volumes were also lower in 2020 due to the Covid-19 pandemic, but still above 2014 volumes." The ES goes on to say that national forecasts based on projected increases in GDP show national UK TEU volumes are projected to increase by a [compound annual growth rate] of 2%, reaching a throughput of almost 19m TEU by 2050; and the ports in the south-east will handle around 14m TEU by 2050, almost doubling compared to the estimated volumes for 2021 (7.2m) (section 2.3.1).

7.2.13 Comparing demand and capacity, the ES states at section 2.3.3:

"Ports typically start experiencing delays and congestion related issues when the utilisation exceeds around 85% of capacity, a level which is expected to be reached at a regional level in 2027. Based on an analysis of forecast demand versus current capacity (Figure 2.31), it is expected that regional capacity will be exceeded in 2036 if no ports undertake expansions. This implies that further capacity is likely to be needed by 2027. However, as discussed in section 2.1, operational capacity is typically lower than design capacity. This highlights the need for additional capacity earlier than this.

For Felixstowe in particular, capacity is likely to be exceeded by 2033 (Figure 2.32). However, it is predicted that the port will already be operating at a high capacity of over 85% from 2025 (i.e. the point at which delays and congestion related issues occur). It is therefore vital that additional capacity is provided to accommodate future volume

increases and maintain a competitive position in the market. BBCT, located in Harwich Haven when fully developed, could provide an additional 2.1m TEU, increasing the effective capacity of Felixstowe to 7.3m TEU. This should be enough to cover future demand until 2050. If the port reaches its target of 8m TEU then capacity utilisation would be 89% in 2050 according to the forecast.”

7.2.14 Past and predicted increases in demand support the Government’s belief expressed in the NPS that that there is a compelling need for substantial additional port capacity over the next 20–30 years, to be met by a combination of development already consented (including the Container Terminal at Bathside Bay) and development for which applications have yet to be received. In light of this Officers remain of the view that the IROPI that existed in 2006 still exist today.

7.2.15 To assist the Council in carrying out an appropriate assessment of the implications of the development as required by the Habitats Regulations, the applicant has included within section 25 of its current ES a “shadow appropriate assessment”. In relation to this Natural England states:

“We note that the shadow HRA section separates the Phase 1 works from the rest of the project and concludes no adverse effect on integrity if those works are conducted outside of the overwintering bird period. Natural England does not recommend retrospectively slicing the assessment of projects into phases. The project was originally assessed as a whole, and the environmental evaluations were conducted to support delivery of a complete development. We also advise that the supporting evidence for the conclusion of no AEol [adverse effect on integrity] does not fully consider the current potential for SPA and SSSI features, or other protected or priority waterbird species, within the designated areas adjacent to the proposed Phase 1 work areas - which do contain suitable habitat for breeding and overwintering species and is predominately undisturbed. Therefore, it cannot be concluded that there will be no LSE [likely significant effects] (impact pathway) and without mitigation there could be an AEol.”

7.2.16 The response from the applicant’s agent dated 11 February 2022, a copy of which is appended to this report, contests this. The agent states that the shadow HRA (section 25 of the ES) does not slice the assessment of the project into phases, nor does it slice the provision of compensatory habitat into phases, with it assessing the whole project. The reference to Phase 1 individually is made to demonstrate that those works do not trigger the need for compensatory measures. Therefore, the relevance of the reference to Phase 1 in distinction to the balance of the project is simply in directly linking the provision of compensatory habitat to effects upon the designated features of Bathside Bay. This is a position, secured by planning condition that is no different to the protection afforded by the existing planning permission.

7.2.17 In relation to the proposed compensatory habitats at Little Oakley, Natural England goes on to say (underlining added):

“Natural England are currently reviewing the ES provided to support the new planning application for the compensation site as part of the consultation received on 6<sup>th</sup> January 2022 and have previously engaged with the Applicant as part of the scoping exercise in 2021. At that time, we highlighted that further supporting surveys were required for Bathside Bay and Little Oakley to sufficiently update the original 2003 ES. We acknowledge that work has been done to demonstrate that elements of the original conclusions are still fit for purpose, using publicly available data sources. However, we do not consider that the current evidence provides the confidence to conclude that the proposed managed realignment at Little Oakley would still secure adequate compensation for the loss of Bathside Bay.”

In addition Natural England highlights that EC Guidance on Article 6 (4) of the Habitats Directive states that *“compensation ratios of 1:1 or below should only be considered when it is demonstrated that with such an extent, the measures will be 100% effective in reinstating structure and functionality within a short period of time”*. We do not believe that sufficient evidence has been provided to suggest this is the case for Little Oakley. It is unlikely that the compensation measures will be 100% effective in reinstating structure and functionality of the supporting habitats for designated site features of the Stour and Orwell SPA and/or maintain the coherence of the national site network. Since the original planning permission for the Little Oakley managed realignment site was granted, Natural England’s understanding in respect of the Habitat Regulations has evolved in line with caselaw, alongside our knowledge around the development processes of coastal and marine compensatory habitats and how they do and do not work. Therefore, we advise that a ratio greater than 2:1 should be provided.”

7.2.18 The applicant’s response is that “The predicted impact of the BBCT and SBH is a direct loss of 69ha of intertidal habitat and reduced exposure of approximately 3ha of designated intertidal habitat due to effect on tidal propagation. As reported in the CMMA/CMMD, the Little Oakley managed realignment is predicted to deliver 105ha of a mixture of intertidal mudflat, mudflat/saltmarsh transition and saltmarsh (with an additional 5ha of sand / shingle habitat). The total managed realignment site is 138ha, with the balance including fresh/brackish water habitat and the new borrow dyke system. The compensation ratio is therefore 1.7:1 to 1.8:1”.

7.2.19 The EC guidance referred to in Natural England’s letter states (among other things) that “compensation ratios are best set on a case-by-case basis”, “the final decision on the proportion of compensation must be justified” and “There is wide acknowledgement that ratios should be generally well above 1:1”. The amount of compensatory habitats proposed at Little Oakley was considered acceptable by Natural England in 2005 and 2013 and its current objection does not explain why a ratio greater than that proposed is necessary in the present case.

7.2.20 Natural England’s letter of objection continues:

“Without certainty that the compensation proposed will deliver the same ecological value for the same affected features and that the full extent and nature of effects have been considered in the appropriate assessment, and/or evaluated, we cannot advise that the coherence of the network will be protected. Therefore, in our view the appropriate assessment is incomplete and does not make a complete assessment of the effects based on the best reasonably available information. Until we have confidence as to the nature and scale of the effects it is not possible to advise that the effects of the development will be compensated for. Consideration will also need to be given in the HRA for the potential impacts to Hamford Water SPA. Natural England is not aware of any evidence to show that the proposed compensatory site, which is functionally linked to the adjacent Hamford Water Special Protected Area, is of less importance than any other area of supporting habitat or designated habitat and features within the Hamford Water protected areas.”

7.2.21 As already indicated, these concerns represent a change in Natural England’s position as it was at the inquiry in 2004 and in response to the applications for replacement permissions which were granted in February 2013. The applicant’s letter of response rejects the criticism that the appropriate assessment is incomplete for the reasons set out therein.

7.2.22 Natural England’s conclusion on the issue of compensation is as follows:

“In conclusion Natural England advise that the delivery of suitable compensation is uncertain, the relevant permissions are not in place, timings are unclear, and the ES does not follow Defra’s draft best practice guidance (Best practice guidance for developing compensatory measures in relation to Marine Protected Areas). Therefore we advise that limited weight can be given to the sufficiency and deliverability of the compensation measures in any decision making.”

7.2.23 In response to concerns about timing and delivery of compensation, the applicant states:

“... HPUK is proposing that the compensatory measures will be secured by a combination of the following:

a) a requirement in paragraph 3.1 of Schedule 1 of the Section 106 to let a contract securing the implementation of the Little Oakley Managed Realignment Scheme prior to the commencement of Phase 2 of the development, which is the point at which an adverse effect on the integrity of the SPA would occur; and

b) the obligations placed on HPUK by a deed dated 15 October 2004 between Harwich International Port Limited, Harwich Haven Authority, The Environment Agency and English Nature (which became Natural England in 2006) to deliver the compensation (and mitigation) works in accordance with the specifications and timescales set out in that document.

Should the application be granted, HPUK will therefore be under a clear legal obligation to deliver the compensation (and mitigation) works. NE is therefore incorrect to suggest that such delivery is uncertain or that timings are unclear”.

7.2.24 The Council’s Ecologist originally reviewed the submitted information and concluded that in respect of the Stour & Orwell Estuaries SPA and Ramsar and Southern North Sea SAC the reclamation of approximately 65ha of intertidal habitat in Bathside Bay would, without mitigation, lead to a likely significant effect (LSE). The impact pathways within scope therefore triggered further consideration at Stage 2 Appropriate Assessment to assess if mitigation can avoid any AEOI of the Habitats sites within scope. The Ecologist considered Natural England’s advice included in section 25.3.3 of the ES and the Stage 2 Appropriate Assessment section which states that there will be AEOI from the development of Bathside Bay Container Terminal. She also noted that, where only the qualifying features of a Ramsar site will be adversely affected, the tests are different and the LPA as the competent authority must take into account the wording of Article 4 of the Ramsar Convention which allows the UK Government as a contracting party, to delete or restrict the boundaries of designated Ramsar sites only “in its urgent national interest”. Any benefits arising from the proposal must, however, demonstrably outweigh the harm to the acknowledged international conservation value of the site. The Stour & Orwell Estuaries Ramsar site therefore needs to be assessed and consideration given to the above requirement.

7.2.25 The Ecologist considered that the assessment of likely impacts on Southern North Sea SAC was acceptable and agreed that no AEOI of the Southern North Sea SAC were predicted from the development either alone or in combination with other plans and projects. She understood that section 25.5.2.1 and Table 25.7 of the ES do not consider any impacts on protected species (harbour porpoise) outside the SAC separately as the assessments are based on the North Sea Management Unit, which takes into account harbour porpoise in both inside and outside the SAC, in line with current guidance and thresholds for impacts identified by JNCC and Natural England. She was sufficiently satisfied with the scope of the in-combination assessment in section 25.3.3 paragraphs 14 & 15 that no additional disturbance was predicted from varying Condition 20 in combination with other plans and projects included in the assessment.

- 7.2.26 The Ecologist agreed with the shadow HRA conclusion that there would be no additional impacts from Phase 1 works including the Small Boat Harbour from varying the trigger for provision of information on lighting as required by Condition 20 so this VOC does not need the competent authority to amend its previous HRA report for the permitted development. She acknowledged that the proposed works comprising only Phase 1 of the Small Boat harbour are to be located entirely on land and mitigation to avoid disturbance, including lighting has been secured by Condition 20 to seek approval for operational lighting before any impacts occur, so this application would have no impact pathway to affect habitat that supports the qualifying features of the Stour & Orwell Estuaries SPA and Ramsar site or Southern North Sea SAC.
- 7.2.27 Further the Council's Ecologist was satisfied that this proposal to vary Condition 20 would not alter the legal requirements secured for delivery of compensatory habitat (at Little Oakley) - in the Compensation Mitigation and Monitoring Agreement (CMMA) (Royal Haskoning, 2004) Annex 1 of the Deed (CMMD) – and that the Phase 1 terrestrial works including the Small Boat Harbour would not lead to any additional disturbance which would alter this provision. She understood that the Phase 2 & additional phases within the marine environment (i.e. works below level of MHW spring tides) of the Bathside Bay project cannot be implemented without a marine consent from the MMO and that further EIA and HRA will be required to support that consenting process.
- 7.2.28 The Ecologist was aware that published Government guidance Habitats Regulations Assessments: protecting a European site (Defra and Natural England, Feb 2021) describes the requirements for the provision of compensatory measures and refers to points that should be considered in order to be confident that the proposed measures will fully compensate for the negative effects of a proposal. This includes how the compensation would be carried out, including how it would be managed and monitored over the time that is needed; and how it would be secured and how long the compensatory measures would take to reach the required quality and amount of habitat.
- 7.2.29 The Council's Ecologist appreciated that the relative timing of the commencement of work at Bathside Bay, including the Small Boat Harbour and the creation of the managed realignment site was analysed in detail in the Compensation Mitigation and Monitoring Agreement (CMMA) (Royal Haskoning, 2004) the Deed in which it sits as Annex 1 (CMMD). The HRA report focuses on the predicted habitat colonisation following breach of the seawall and confirms that whilst invertebrates are likely to rapidly colonise the new intertidal mudflats, it may take 5-10 years for the invertebrate community structure to fully develop on maintenance dredgings which are to be pumped onto the site. It is therefore essential that there is no delay in commencement of the habitat creation and she was satisfied that this VOC in relation to provision of information on lighting would not result in a delay as the CMMD remains a legal obligation. It was however stressed that it is essential that the LPA secures appropriate and timely compensatory measures for the permitted development to demonstrate its compliance with the Conservation of Habitats and Species Regulations 2017 (as amended). There needs to be no reasonable scientific doubt remaining as to the delivery of compensatory measures and, whilst absolute certainty is impossible to attain, the LPA needs to secure legally enforceable ways of preventing such effects in order to meet the Stage 4 HRA requirements.
- 7.2.30 The Council's Ecologist was satisfied that the shadow HRA for the Small Boat Harbour has demonstrated that this variation of condition 20 application does not seek to delay the creation of compensatory habitat that is necessary to maintain the required level of coherence of Habitats sites. This would enable the LPA to demonstrate compliance with its statutory duties, including its biodiversity duty under s40 NERC Act 2006 and prevent wildlife crime under s17 Crime and Disorder Act 1998.
- 7.2.31 However, at a meeting held between Natural England, the applicant and the Assistant Director of Planning, Natural England expanded on its advice to TDC that *"...your authority should have a full understanding of the ecological value of the site and the anticipated impacts..."*,

stating that additional waterbird data (not referenced in the ES and shadow HRA) for Bathside Bay has been collected as part of the assessment of/monitoring for the Galloper offshore wind farm operations and maintenance facility ('the Galloper O&M facility'). It is understood that this data is not published or publicly accessible, and at the time of writing this report had not been provided to the applicant. The Council's Ecologist has stipulated that she maintains her position, provided that the ES and sHRA are updated with the Galloper monitoring data. If NE continues to object, then the Council will need to determine whether there are cogent reasons to override NE's objection. It is anticipated that Members will be updated on this matter at the Committee meeting.

- 7.2.32 Consequently, the Council's Ecologist recommends that the LPA, as the competent authority, has certainty of likely impacts on designated sites and can adopt the updated shadow HRA submitted by the applicant for Phase 1 works only to include the Small Boat Harbour, provided that it is updated with the Galloper monitoring data, and subject to considering the formal consultation response from Natural England. The updated information to support the HRA indicates that any likely significant effects can be ruled out from varying Condition 20 in relation to commencement of the Small Boat Harbour element of Phase 1 terrestrial works, and the CMMA and CMMD will retain the timing requirement for commencement of compensatory habitat creation before Phase 2 marine works of the development including operation of the Small Boat Harbour.
- 7.2.33 The Secretary of State was satisfied that the proposed managed realignment site at Hamford Water, Little Oakley, represented the necessary compensatory measures required under the Habitats Regulations. The Secretary of State granted planning permission for the engineering works and habitat creation at Little Oakley in 2006. Whilst that planning permission has now lapsed, the applicant has submitted a new planning application (21/02144/FUL) for that development. It is noted that that application has been subject to quite a number of objections and Officers have been discussing these issues with the applicant. The applicant has attended a public meeting at the invitation of Little Oakley Parish Council, to allow the local community to discuss concerns and to allow them the opportunity to see whether the scheme might be amended, to address some of those concerns whilst still delivering the required compensatory habitats. Pending a conclusion to these discussions the application remains under consideration by Officers, but will be reported to the Planning Committee in due course. Members will however need to be satisfied that the Little Oakley development provides sufficient mitigation for the adverse effects on the Stour and Orwell Estuaries SPA, and is adequately secured, before the present S73 application can be finally determined.
- 7.2.34 The works identified by the applicant as forming Phase 1 of the Small Boat Harbour and Container Terminal development are all proposed to be undertaken on existing land and the information provided by the applicant demonstrates that this will not affect the qualifying features of the SPA and Ramsar site. As such the carrying out of Phase 1 works will not adversely affect the integrity of the protected habitats and the development can commence without the need to have started work on creating the compensatory habitats at Little Oakley. The Council's Ecologist has reviewed the current application and concluded that she is satisfied that the delay in letting the Little Oakley contract and not 'getting started' on the managed realignment ahead of the Phase 2 marine works commencing, resulting in loss of SPA mudflats is still within the secured 2004 Deed and its Annex 1 Compensation Mitigation and Monitoring Agreement (CMMA/CMMD), which gives a maximum period between the Bathside Bay marine works and the creation of the compensatory habitats by way of breach of the sea wall at little Oakley of 27 months.
- 7.2.35 DEFRA guidance *Habitats regulations assessments: protecting a European site* (2021) states that "Compensatory measures should usually be in place and effective before the negative effect on a site is allowed to occur". The example given in the guidance of a port expansion is to the same effect. However, in 2005/2006 and 2013 Natural England did not consider that the compensatory habitats at Little Oakley had to be created before the Bathside Bay reclamation

works were carried out, and the S106 Agreements that secure the provision of the new habitats allow a period of time between the reclamation works and the breach of the sea wall at Little Oakley that will create the new intertidal habitats. The recent objection from Natural England says no more than that “timings are unclear”, but to date it has not said that the timings for the compensatory works provided for in the S106 agreements are no longer acceptable.

- 7.2.36 The applicant has proposed some changes to the S106 agreements. One change relates to the compensatory works. At present the S106 agreement that applies to the 2013 Container Terminal permission provides that “The Owner shall not implement the Container Terminal Development until it has let a contract securing the implementation of the Little Oakley Managed Realignment in a timely manner in accordance with the relevant terms of this Deed”. The applicant seeks a variation of this so that the contract for the Little Oakley works must be let before commencement of Phase 2 of the development (when the reclamation works take place), on the grounds that there will not be time to let a contract before 29 March 2022, when the development must be begun. On the basis that the other provisions of the S106 agreements relating to the compensatory works at Little Oakley remain unchanged, Officers consider that this variation would be acceptable.
- 7.2.37 Members should be aware that if a resolution to grant planning permission is passed, the Habitats Regulations require that the Council notifies the Secretary of State and seeks a derogation for permitting development which without compensation will lead to AEOI. The Secretary of State can then decide if he wishes to intervene.

#### Other Matters

- 7.2.38 Concerns were raised by other bodies (but not specifically by Natural England) about whether the ES also adequately assessed the in-combination impacts of the development when combined with permitted residential development within the area. The District Council has for some time now been assessing the in-combination impacts of residential development on the protected Essex coastal sites. In accordance with Natural England guidance, the Essex Coast RAMS has been adopted by the District Council. The scheme provides a means of ensuring that developers mitigate the impact of new residential development on the protected sites through a range of measures to divert and deflect visitors from going to them for daily recreation and to mitigate the impact of those who do visit through improved visitor management measures. The Council considers that it adequately mitigates the recreational impacts arising from residential development such that it does not give rise to additional cumulative impacts that require assessment with the proposed development.
- 7.2.39 A number of objections received have referred to a passage within the applicant’s planning statement which indicates that the port platform to be created at Bathside Bay could be used as a Green Energy Port, as opposed to the Container Port operation that planning permission was granted for. The objectors refer to the fact that the case for the IROPI was based on the pressing national need to increase container port capacity and this need is quite different to port capacity to support the growing off-shore wind sector.
- 7.2.40 The Council have sought Counsel’s opinion on this application, who has guided Officers in the assessment of the proposal. With regard to this matter of the Green Port, it has been concluded that such proposals are vague and it is currently difficult to discern what, if any impact they might have on the future operation of the port. Given the limited scope of a S73 application and the relatively modest change in conditions sought, it is considered that the primary purpose of the proposed development – to increase container terminal capacity to meet growing international demand at an appropriate location on the east coast – is not set to change. Any material change of use however would constitute development for which planning permission would normally need to be obtained.

### 7.3 Extended AONB Designation

7.3.1 The application site lies outside of, but is considered to be within the setting of, the Suffolk Coast & Heaths Area of Outstanding Natural Beauty (AONB). On the Tendring side of the Stour Estuary, the AONB boundary lies approximately 2.6km west of Bathside Bay, while the boundary of the Suffolk Coast & Heaths AONB on the northern (Suffolk) side of the Stour Estuary lies 1km opposite the application site. Paragraph 176 of the NPPF states that development within their setting should be sensitively located and designed to avoid or minimise adverse impacts on the designated areas.

7.3.2 In addition to the above concerns, Natural England considers that the applicant should not be relying on the 2003 Landscape and Visual Impact Assessment, saying:

“We acknowledge that work has been done to demonstrate that the original conclusions are still fit for purpose, however this approach to re-assessment is not ideal. The original LVIA is now 19 years old and since its production the landscape baseline has changed significantly due to the AONB extension and further industrial development around Felixstowe. Changes in national planning policy such as the NPPF have also been strengthened the protection given to AONBs and their settings. There have also been several changes to published landscape guidance and assessments in the intervening period.”

7.3.3 In Natural England’s view “a new standalone Landscape and Visual Impact Assessment should be carried out to determine the significance of landscape and visual impacts to the setting of the Suffolk Coasts and Heaths AONB afresh, as extended in 2020”.

7.3.4 The AONB Project Officer raised concerns to 21/01810/VOC that the applicant’s review of the previous Landscape and Visual Impact Assessment made no reference in the LVIA Chapter (Section 12 Part 1) to the fact the Suffolk Coast and Heaths AONB boundary was extended in July 2020 to include the south bank of the River Stour in Tendring and the River Stour itself. However, these comments were received prior to all sections of the LVIA Chapter being posted on the Council’s website.

7.3.5 Section 12.1.1.8 of the LVIA review states:

“There have been several changes to published landscape guidance and assessments and the baseline situation since the 2003 LVIA, including an extension to the Suffolk Coast and Heaths Area of Outstanding Natural Beauty (AONB). These are not considered to materially affect the assessment of effects upon landscape and visual receptors. It is therefore concluded that the findings of the 2003 LVIA remain valid.”

7.3.6 In response to the comments raised, the applicant draws the Council’s attention to the fact that the AONB extension is referred to on a number of other occasions within the review, including references to relevant development plan policies and other guidance and assessments. Also found within the LVIA review is a description of discrete areas of the extension, with particular reference to the study area; a summary of baseline evidence prepared to inform the extension; a comparison of the Landscape Character Units described in the 2003 LVIA with the equivalent, current baseline LCA in relation to the extended AONB, with predicted effects (Table 12.7); and a consideration of viewpoints in the 2003 LVIA, with specific reference to their location in relation to the pre/post 2020 AONB extension.

7.3.7 Although the AONB extension was only approved in 2020 it is evident that the extension was being promoted back in 2004 when the Inspector held the Public Inquiries into the proposed developments. The Inspector considered the impact on what was the designated AONB in 2004 before proceeding to consider the impact on the AONB if the AONB were to be extended along the south bank of the river towards Parkestone ie akin to that now in place. The

Inspector concluded that the extended AONB would have limited inter-visibility and where views in to, or out of, the AONB were found, these were views often shared with quayside cranes, at Felixstowe and Harwich International Port, and the oil refinery at Parkestone. The Inspector concluded the level of harm to be Minor Adverse and in his judgement the Container Terminal and Small Boat Harbour would not seriously damage views into or out of the area of the possible AONB extension.

- 7.3.8 Having assessed the evidence presented Officers are satisfied that the Landscape and Visual Impact Assessment, in conjunction with the current ES and LVIA review, provides a reasonable assessment of the visual impacts of the development within the setting of the AONB, as extended, and no further evidence is required.

#### **7.4 Traffic Assessment**

- 7.4.1 In addition to the ES the section 73 applications for the Container Terminal and Small Boat Harbour are also accompanied by a Supplementary Transport Assessment. In a similar manner to the ES, the applicant has undertaken a review and assessment of the original Transport Assessment and the modelled impacts and updated the effects that may have changed over time.
- 7.4.2 The supplementary report concludes that the baseline data remains valid and the future years forecast of traffic volumes remains robust. With the package of highway works and improvements secured through the planning permission conditions, the conclusion remains that the Container Terminal and Small Boat Harbour will not have a significant transportation impact. The report goes on to state that the assessment indicates that the increased volume of traffic during the construction phase does not require mitigation works to ensure that there is no significant transport impact. The Highway Authority (Essex County Council) and National Highways have both assessed the supplementary transport report (also submitted with 21/01810/VOC) and neither take issue with the updated assessment or the conclusion that the applicant has reached.
- 7.4.3 Overall, having taken careful account of the original ES, the updated ES, the comments of the original Inspector and Secretary of State; and the views expressed by statutory consultees, it is considered that the proposed change to the wording of condition 20 and the delayed submission of operational lighting details would not result in any material adverse impact over and above those set out in the original reports which were clearly judged by the Secretary of State to be acceptable in principle, when taken with the proposed mitigation measures.

#### **8. Section 106 Agreement**

- 8.1 The provision of the Small Boat Harbour is secured through the S106 agreement for the Bathside Bay Container Terminal. There are no changes proposed to the substance of the planning obligations in relation to the provision of the Small Boat Harbour, although a supplemental agreement will be formed to carry the provisions over to the planning permission, the subject of this planning application, if the decision is taken to approve it.

#### **9. Other Considerations**

##### Discharge of Planning Conditions

- 9.1 As previously stated the applicant has submitted two applications (21/01624/DISCON and 21/01816/DISCON) to discharge the pre-commencement planning conditions imposed upon the extant planning permission (10/00203/FUL); at the time of writing this report these were awaiting delegated approval following receipt of all consultation responses.

- 9.2 If Members ultimately resolve to approve this Section 73 application, and there is no intervention by the Secretary of State, then the Council will be issuing a new planning permission and will need set out the planning conditions that it considers are necessary in respect of the proposed development. If the same conditions were transferred from the 2013 planning permission to this new permission, then the applicant would need to apply to discharge the same pre-commencement conditions, notwithstanding that they had been discharged in relation to the 2013 permission.
- 9.3 Since the original planning permissions were granted, the Government had introduced legislation which imposes restrictions on the use of pre-commencement conditions. The Government imposed these rules with the aim of speeding up the planning process by discouraging decision makers from including unnecessary pre-commencement planning conditions that might slow down starts on-site and consequently drive up costs, or even prevent development from happening at all.
- 9.4 Section 100ZA(5) of the Town and Country Planning Act 1990 states that planning permission for the development of the land may not be granted subject to a pre-commencement condition without the written agreement of the applicant to the terms of the condition.
- 9.5 The Government's Planning Practice Guidance also emphasises to local planning authorities that pre-commencement conditions should only be used where there is a clear justification for the requirement and that this is likely to mean that the requirements of the condition are so fundamental to the development permitted that it would otherwise be necessary to refuse the whole permission. A pre-commencement condition that does not meet the legal and policy tests may be found to be unlawful by the courts and therefore cannot be enforced by the local planning authority if it is breached.
- 9.6 If the Council resolves to grant the new permission, it must be mindful of the current policy and legislation regarding the use of pre-commencement conditions. Given that the Council may well approve details submitted through the two discharge of conditions applications for this development, on the whole it is considered that it would be unnecessary for the applicant to submit all of that information again via discharge of conditions applications prior to the commencement of development. At the time of writing this report the applicant had been invited to submit the details submitted pursuant to 21/01624/DISCON and 21/01816/DISCON as part of this S73 application. This will allow the Council to list the plans and documents as approved plans on this new planning permission (if granted) and by turning conditions requiring the submission of details prior to commencement of development into 'compliance' conditions which require the development to be carried out in accordance with the approved plans and details, there will be no need to seek approval of the same details a second time.
- 9.7 As Officers are continuing to work on discharging these pre-commencement conditions, it is recommended that the Planning Committee grant delegated powers to the Assistant Director of Planning to revise the wording of the other pre-commencement conditions, to make them compliance conditions, if/when the Council approve the details submitted by the applicant.

## **10. Conclusion**

- 10.1 In 2003, Hutchison Ports (UK) Limited ("HPUK") applied for planning permission for the construction of a new container terminal at Bathside Bay, Harwich. On 29<sup>th</sup> March 2006, permissions, inter alia, for a container terminal; a small boat harbour; the managed realignment of the coastline and creation of compensatory inter-tidal habitats off-site, and listed building consent in respect of the partial demolition of the long berthing arm attached to a listed Train Ferry Gantry were granted by the Secretary of State, following concurrent Public Inquiries held between 20<sup>th</sup> April 2004 and 21<sup>st</sup> October 2004. These developments were subject to rigorous assessments and were found on balance to be acceptable. In particular, with regard to the then Habitats Regulations, the Secretary of State found that Imperative

Reasons of Overriding Public Interest (IROPI) outweighed the identified harm to the integrity of a European site (the Stour and Orwell Estuaries SPA).

- 10.2 In 2010 HPUK applied for replacement planning permissions for the reclamation works and Container Terminal, and the Small Boat Harbour. These permissions (10/00202/FUL and 10/00203/FUL) were granted by the Council on 14 February 2013 and remain extant, but development needs to have commenced on or before 29<sup>th</sup> March 2022.
- 10.3 This application seeks permission to vary one of the conditions (no20) on the 2013 planning permission for the Small Boat Harbour (10/00203/FUL). It is proposed that the wording is amended to change the timing of the condition. The original condition required that the details of the operational lighting were submitted and approved prior to the commencement of the development. The applicant has proposed that the wording is changed so that the details are submitted and approved prior to that part of the harbour becoming operational.
- 10.4 Officers are satisfied that the variation is justified and acceptable. The permission (as varied) would be consistent with the Council's planning policies, and the other conditions and proposed planning obligation would secure the required protection of environmental, ecological and amenity interests on operation of the proposed development. Further, the Planning Practice Guidance (PPG) stipulates that pre-commencement conditions should only be used where there is a clear justification, which is likely to mean that the requirements of the condition (including the timing of compliance) are so fundamental to the development permitted that it would otherwise be necessary to refuse the whole permission.
- 10.5 As the proposed development would harm the SPA, the Council is required to carry out an appropriate assessment of the implications of the development for the SPA under the Habitats Regulations. Furthermore, it is prohibited from granting planning permission unless satisfied that:
  - there is no alternative solution;
  - the development must be carried out for imperative reasons of overriding public interest (IROPI);
  - necessary compensatory measures have been secured that ensure that the overall coherence of the national site network of SACs and SPAs is protected
- 10.6 Officers consider that there is no alternative to the Container Terminal development (with which the Small Boat Harbour is inextricably linked) and there is a national need for additional container terminal capacity amounting to IROPI. The proposed compensatory measures to make up for the loss of 69ha of intertidal habitat within the SPA consist of the creation and maintenance of 138ha of new intertidal habitats at Little Oakley, Hamford Water, which are secured by S106 agreements.
- 10.7 The Council has received an objection from Natural England, the appropriate nature conservation body, which takes issue with the information provided by the applicant in its Environmental Statement. At present Natural England considers that it is not possible for the Council to carry out an appropriate assessment on the basis of the ES. It also considers that the proposed compensatory works at Little Oakley have not been shown to provide satisfactory mitigation for the adverse effects on the SPA. The Council is required to give due weight to the expert advice of Natural England.
- 10.8 The applicant has responded in detail to Natural England's objection and the Council's Ecologist has also considered the adequacy of the information and proposed compensatory measures put forward by the applicant. A further response from Natural England is awaited. In light of Natural England's current objection officers are reluctant to make a positive recommendation for the grant of planning permission, although ultimately it is for Members to consider whether the requirements of the Habitats Regulations have been met. It is possible

that further dialogue between the Council, the applicant and Natural England before Members consider this application will provide a resolution to the objection. In any event, progress can be made on updating pre-commencement conditions where details have been approved, and on agreeing suitable wording for revised S106 agreements.

## 11. Recommendation

### 11.1

- (1) The Committee consider this report and any updated information provided.**
- (2) The Assistant Director of Planning be authorised:**
  - (a) to approve the completion of a supplemental or other legal agreement under section 106 of the Town and Country Planning Act 1990 to secure the provision of appropriate compensatory habitats and other matters necessary to make the proposed development acceptable;**
  - (b) subject to the conditions stated below, and the revision of any conditions that require details to be submitted, to update on a provisional basis pre-commencement conditions to compliance conditions (nos 3, 6, 8, 9, 10, 11, 12, 19, 21, 23, 24, 25, 26, 27, 28, 29, 30 & 32), only where details have subsequently been submitted to and approved in writing by the local planning authority pursuant to 21/01624/DISCON and 21/01816/DISCON; and**
  - (c) to refuse planning permission in the event that an appropriate legal agreement has not been completed by March 29<sup>th</sup> 2022.**

### 11.2 Conditions and Reasons

- 1) The development shall be commenced on or before 29th March 2022.

Reason - To comply with the requirements of Section 91 of the Town and Country Planning Act 1990, as amended by the Planning and Compulsory Purchase Act 2004 to ensure consistency with the planning permission for the construction of the Bathside Bay Container Terminal and to allow sufficient time to implement highway mitigation and improvement measures therefore, other infrastructure improvements and the provision of compensatory habitat.

- 2) The development hereby approved shall be implemented in accordance with the following plans, drawings and documents hereby approved:

|                 |   |
|-----------------|---|
| H1002/01        | Application Boundary                      |
| H1002/02 Rev. B | Small Boat Harbour Master Plan            |
| H1001/03        | Existing Topographic Survey               |
| H1001/07        | Lighting Layout                           |
| H1001/08        | Fisherman's Store Location Plan           |
| H1001/09        | Fisherman's Store General Arrangement     |
| H1001/10        | Fisherman's Store Sections and Elevations |
| H1001/11        | Fisherman's Store East Elevation          |
| H1001/12 Rev. A | Division Wall Sections                    |
| H1001/13        | Train Ferry Pier Termination Details      |
| 1514LO/50       | Landscape Proposals                       |
| 1514LO/51       | Details of Quayside (Landscape)           |
| 1514LO/52       | Structural Landscape Works                |
| 1514LO/53       | Illustrative Planting Insets & Sections   |

Planning and Design Statement dated April 2003  
Planning Statement dated October 2021  
Environmental Statement dated 13 October 2021

Reason - For the avoidance of doubt and in the interests of proper planning.

- 3) No part of the development hereby permitted shall be begun until a landscaping scheme including a programme in accordance with the indicative scheme shown in application drawings 1514LO/50, 1514LO/52 and 1514LO/53, including details of screen mounding and tree planting, has been submitted to and approved in writing by the Local Planning Authority. The scheme as so approved shall be implemented during the first planting season following completion of topsoil dressing works at the development site. Any tree or shrub dying or becoming seriously diseased within five years of planting shall be replaced by a specimen of the same or similar species in accordance with the approved scheme.

Reason - To ensure the establishment of a new landscape character in the interests of visual and residential amenity.

- 4) The small boat harbour hereby permitted shall not be brought into use as such unless and until a landscape management plan, including long term design objectives, management responsibilities and maintenance schedules for all landscape areas, has been submitted to and approved in writing by the Local Planning Authority. The landscape management plan shall be carried out as so approved.

Reason - To ensure the long term maintenance of the landscaping elements of the development.

- 5) The development shall be carried out in accordance with the Planning and Design Statement dated April 2003 identified in Condition 2 above except insofar as otherwise provided for in any condition attached to this permission.

Reason - To ensure that the development is carried out in accordance with the design principles set out in the relevant documents.

- 6) No phase of the development shall begin until details of the design and external appearance, including materials of the buildings, structures and areas of hardstanding to be constructed within the development, according with the Planning and Design Statement dated April 2003 and identified in Condition 2 have been submitted to and approved in writing by the local planning Authority. The development shall be carried out in accordance with the details as so approved.

Reason - To enable proper control to be exercised over the design and external appearance of the development in the interests of visual amenity.

- 7) Except with the prior written agreement of the Local Planning Authority and Local Highway Authority, top soil comprised in the development is not to be undertaken using material from any source other than from the managed realignment site at Little Oakley and which shall not be delivered from the said site at Little Oakley other than by sea.

Reason - To ensure that beneficial use is made of available materials and to minimise HGV road traffic entering the site, in the interests of highway safety.

- 8) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (or any Order amending, revoking and re-enacting that Order with or without modification), no development shall begin until a written scheme showing full details of fences, walls, gates or other means of enclosure has been submitted to and approved in writing by the Local Planning Authority. The development hereby permitted shall be carried out in accordance with the details as so approved.

Reason - In the interests of security and visual amenity.

- 9) Development pursuant to this planning permission shall not begin until drawings showing both foul and surface water drainage (including the provision of all oil and diesel Interceptors) connected with the development have been submitted to and approved In writing by the Local Planning Authority and thereafter any works in relation to the development shall be undertaken in accordance with the drawings as so approved except as otherwise first agreed In writing by the Local Planning Authority.

Reason - To prevent pollution.

- 10) No part of the development (including ground works) hereby permitted shall commence until a programme of archaeological work to the site (including marine archaeology and any works which might be necessary and practicable to preserve any archaeological remains in situ) has been submitted to and approved in writing by the Local Planning Authority. The development shall be carried out in accordance with the approved programme.

Reason - To allow proper investigation and recording of the site, which is potentially of archaeological and historic significance.

- 11) No part of the development hereby permitted shall be commenced until a written Construction Management Plan (CMP) together with a certificate that the same has been submitted in that form to National Highways and Natural England has been submitted to and approved in writing by the Local Planning Authority and Local Highway Authority. The CMP shall include details of the management during the construction phase of the development of the matters contained in Conditions 12 to 18 inclusive (construction noise and vibration), a Construction Traffic Management Plan in accordance with the Bathside Bay Construction Traffic Management Plan produced by ERM and dated 7th June 2004, Condition 19 (construction lighting) and Condition 21 (construction dust management) of this permission.

Furthermore, the CMP shall incorporate environmental measures to protect biodiversity, to include the following:

- a) Risk assessment of potentially damaging construction activities.
- b) Identification of "biodiversity protection zones".
- c) Practical measures (both physical measures and sensitive working practices) to avoid or reduce impacts during construction (may be provided as a set of method statements).
- d) The location and timing of sensitive works to avoid harm to biodiversity features.
- e) The times during construction when specialist ecologists need to be present on site to oversee works.
- f) Responsible persons and lines of communication.
- g) The role and responsibilities on site of an ecological clerk of works (ECoW) or similarly competent person.
- h) Use of protective fences, exclusion barriers and warning signs.
- i) Containment, control and removal of any Invasive non-native species present on site

The development hereby permitted shall be carried out in accordance with the CMP as so approved.

Reason - To ensure that the construction impacts of the development are kept within acceptable limits; and to conserve protected and Priority species and allow the LPA to discharge its duties under the Conservation of Habitats and Species Regulations 2017 (as amended), the Wildlife & Countryside Act 1981 (as amended) and s40 of the NERC Act 2006 (Priority habitats & species) as updated by the Environment Act 2021.

- 12) No part of the development hereby permitted shall be commenced until details relating to the control of noise and vibration from the construction of the development have been submitted to and approved in writing by the local Planning Authority. These details shall include the following:
- (a) definitions of roles and responsibilities;
  - (b) the adoption of best practice for the specification and Procurement of quiet plant and equipment;
  - (c) consultation and reporting processes for noise and vibration;
  - (d) noise and vibration monitoring procedures including recording measures and the location of measuring instruments;
  - (e) action to be taken in the event of non-compliance with (b) to (d) above;
  - (f) a record of the occasions on which percussive piling operations take place;
  - (g) complaint response procedures;
  - (h) a requirement to provide environmental noise awareness training to operatives; and
  - (i) construction methods for percussive piling designed to minimise the noise generated by such operations through practical methods such as shrouding or other appropriate alternative methods.
- The development hereby permitted shall be carried out In accordance with the approved details.

Reason -To ensure that the noise and vibration impacts of the development are kept within acceptable limits.

- 13) All plant, machinery and vehicles used on site in constructing the development shall be fitted with effective silencers at all times which shall be maintained in accordance with the manufacturers' recommendations and current British Standards applicable thereto. No such plant shall be left running when not being operated.

Reason -To ensure that the noise impacts of the development are kept within acceptable limits.

- 14) Where any vehicle or plant is required to be fitted with a reverse warning system, such vehicles or plant shall not be used or installed prior to the approval of such a system in writing by the Local Planning Authority. In operating such vehicles or plant the approved system shall be used.

Reason -To ensure that the noise impacts of the development are kept within acceptable limits.

- 15) No percussive piling operation for the development shall be carried out except in accordance with a programme for that phase which shall first have been approved in writing by the Local Planning Authority. The said programme shall provide that:

(i) no percussive piling operations shall be undertaken in relation to the construction of the development during more than thirteen weekends in any six months; and

(ii) except with the prior written approval of the Local Planning Authority no more than three hours of percussive piling of tubular piles for the main quay wall shall take place on any day.

Reason -To ensure that the noise impacts of the development are kept within acceptable limits.

- 16) Except with the prior written agreement of the Local Planning Authority, no percussive piling operations shall be undertaken in relation to the construction of any part of the development outside the hours of:

(a) 08:00 to 18:00 Monday to Friday; and

(b) 09:00 to 13:00 on Saturday;

or at any time on Sundays or Bank or Public Holidays, provided that percussive piling operations may be undertaken in relation to the construction of the development outside the permitted hours:

(i) in the case of emergency, or

(ii) where piling is required on the grounds of safety or environmental protection; and

(iii) In either case the situation would otherwise be dangerous to life or limb.

The Local Planning Authority shall be promptly notified in writing of any event of this type and the reason why percussive piling took place outside the permitted hours.

Reason - To protect residential amenity during construction.

17) The noise from construction activities in relation to the development shall not exceed the following daytime free-field equivalent sound pressure levels, as measured at a height of 1.5 m above ground level at the nearest residential property to the development:

(a) 67 dB LAeq 12H and 85 dB LA1 5 mins (in relation to percussive piling operations) during the hours of 07:00 to 19:00 on Mondays to Fridays, excluding Bank Holidays;

(b) 55 dB LAeq 1hr during the hours of 19:00 to 23:00 on Mondays to Fridays, excluding Bank Holidays;

(c) 67 dB LAeq 6hr and 85 dB LA1 5 mins (in relation to percussive piling operations) during the hours of 07:00 to 13:00 on Saturdays; and

(d) 50 dB LAeq 1hr at all other times.

Reason - To ensure that the noise impacts of the development are kept within acceptable limits and to protect residential amenity.

18) Vibration levels from piling or other construction activities in relation to the development, as measured immediately adjacent to the nearest residential property or vibration sensitive structure for that phase shall not exceed a peak particle velocity of 5mm/s.

Reason - To protect residential amenity.

19) No part of the development hereby permitted shall be begun until a written scheme of construction lighting has been submitted to and approved in writing by the Local Planning Authority. The scheme shall include details of:

(a) definitions of roles and responsibilities;

(b) design including locations of the construction lighting;

(c) Installation of the construction lighting;

(d) management of the construction lighting; and

(e) construction lighting monitoring procedures and action to be taken in the event of non-compliance. The development hereby permitted shall be carried out in accordance with the approved scheme.

Reason - In the interests of visual amenity and ensure safety.

- 20) No part of the hereby permitted development shall commence operation until a scheme relating to the provision and control of operational lighting on that part of the site has been installed in accordance with a scheme which has been submitted to and approved in writing by the Local Planning Authority. The lighting scheme shall be carried out in accordance with the scheme so approved.

Reason - To minimise any possible glare or sky glow caused by the operational lighting for the development and to minimise the effect of the operational lighting on navigational aids or signs, public roads and local residential areas.

- 21) No part of the development hereby permitted shall begin until a construction dust management plan has been submitted to and approved in writing by the Local Planning Authority. The construction dust management plan shall include details of:

- (a) definitions of roles and responsibilities;
- (b) the adoption of best practice for the specification of plant and equipment;
- (c) the consultation and reporting processes;
- (d) dust monitoring procedures;
- (e) action to be taken in the event of non-compliance; and
- (f) complaint response procedures.

The development hereby permitted shall be carried out in accordance with the approved plan.

Reason - To ensure that appropriate construction dust management measures are in place.

- 22) All vehicles used to transport materials to or from the site during construction shall be sheeted so as not to deposit materials on the highway.

Reason - To prevent deposits on the highway and the emission of dust in the interest of local amenity and highway safety.

- 23) No part of the development hereby permitted shall be commenced until written details of a wheel wash facility and its location have been submitted to and approved in writing by the Local Planning Authority and Local Highway Authority. The development hereby permitted shall be carried out so as to ensure that vehicles leaving the development site during construction first pass through the approved wheel wash facility.

Reason - To prevent the deposits of materials on the public road network.

- 24) No part or the development hereby permitted shall be operated until a plan for the handling of materials and stockpiling of new construction materials on site (using physical containment, partial shielding where available and water misting/sprays where appropriate) has been submitted to and approved in writing by the Local Planning Authority. The development hereby permitted shall be carried out in accordance with the approved plan.

Reason - To prevent the migration of dust off the site.

- 25) No part of the development hereby permitted shall be commenced until details of measures to mitigate gas migration and accumulation, in accordance with the recommendations contained in the Bathside Bay Development Project Landfill Gas Investigation Report Ref E6702/1991/OCT/L6, have been submitted to and approved in writing by the Local Planning Authority. The development hereby permitted shall be carried out in accordance with the approved details.

Reason - To prevent gas migration and minimise gas accumulation, in the interests of public safety.

- 26) No part of the development hereby permitted shall be commenced until a scheme for concrete pouring and filling works has been submitted to and approved in writing by the Local Planning Authority. The scheme shall include the following:

(a) monitoring procedures; and

(b) remedial action works to be undertaken in the event of spillage.

The development hereby permitted shall be carried out in accordance with the scheme as so approved.

Reason - To minimise risk of accidental pollution of watercourses during construction works.

- 27) No part of the development hereby permitted shall be commenced until a scheme for pollution control has been submitted to and approved in writing by the Local Planning Authority. The development hereby permitted shall be carried out and operated in accordance with the scheme as so approved.

Reason - To prevent the migration of pollutants from the site to adjoining land and for public safety.

- 28) No site clearance for the development hereby permitted shall be commenced until a scheme for the translocation of reptiles, invertebrates and coastal vegetation within the site has been submitted to and approved by the Local Planning Authority. The scheme shall include the following:

(a) exclusion fencing to be erected around the site;

(b) tinning to be carried out over a minimum of 60, 70 or 90 suitable days for a low, medium or high population level respectively, between the months of March and September;

(c) relocation of the reptiles found to areas of suitable habitat outside the exclusion fencing.

The development hereby permitted shall be carried out and operated in accordance with the scheme as so approved.

Reason - To avoid harm to reptiles, invertebrates and coastal vegetation.

- 29) Development shall not begin until details of the means of vehicular access to the site from the A120 have been submitted to and approved in writing by the Local Planning Authority and the Local Highway Authority. The development shall not be operated until the vehicular access has been constructed in accordance with the approved details and opened to traffic.

Reason - In order that the A120 Trunk Road continues to serve its purpose as part of the national strategic road network and to satisfy the reasonable requirements of road safety on the A120 and connecting roads.

- 30) Development pursuant to this planning permission shall not begin until a scheme of provision to be made for disabled people to gain access to public areas forming part of the development shall have been submitted to and approved in writing by the Local Planning Authority. The agreed scheme shall be implemented before the development hereby permitted is brought into use.

Reason - To ensure disabled persons access to buildings on the site.

- 31) Except with the agreement of the Local Planning Authority, no dredging operations shall be undertaken in relation to the construction of the development outside the hours of:

(a) 07:00 hours to 19:00 hours Monday to Fridays;

(b) 07:00 hours to 13:00 hours Saturdays;

or at any time on Sundays or on Bank or Public Holidays.

Reason - To ensure that the noise impacts of the development are kept within acceptable limits and to protect residential amenity.

- 32) Before the development is begun written details of the layout, construction and surfacing of the internal roadways and hardstanding for cars comprised in the development shall be submitted to and approved in writing by the local Planning Authority and Local Highway Authority. The development shall be implemented in accordance with the details so approved and retained thereafter.

Reason - To ensure a safe layout and a satisfactory standard of construction for internal roadways.

### 11.3 Informatives

#### Positive and Proactive Statement

The Local Planning Authority has acted positively and proactively in determining this application by identifying matters of concern within the application (as originally submitted) and negotiating, with the Applicant, acceptable amendments to the proposal to address those concerns. As a result, the Local Planning Authority has been able to grant planning permission for an acceptable proposal, in accordance with the presumption in favour of sustainable development, as set out within the National Planning Policy Framework.

#### Legal Agreement Informative

This application is the subject of a legal agreement and this decision should only be read in conjunction with this agreement.

#### Highways Informatives

On the completion of the Development, all roads, footways/paths, cycle ways, covers, gratings, fences, barriers, grass verges, trees, and any other street furniture within the Site and in the area it covers and any neighbouring areas affected by it, must be left in a fully functional repaired/renovated state to a standard accepted by the appropriate statutory authority.

All work within or affecting the highway is to be laid out and constructed by prior arrangement with and to the requirements and specifications of the Highway Authority; all details shall be agreed before the commencement of works.

The applicants should be advised to contact the Development Management Team by email at [development.management@essexhighways.org](mailto:development.management@essexhighways.org) or by post to:

SMO1 – Essex Highways Colchester Highways Depot,  
653 The Crescent,  
Colchester CO4 9YQ

The Highway Authority cannot accept any liability for costs associated with a developer's improvement. This includes design check safety audits, site supervision, commuted sums for maintenance and any potential claims under Part 1 and Part 2 of the Land Compensation Act 1973. To protect the Highway Authority against such compensation claims a cash deposit or bond may be required.

### Sustainable Urban Drainage Informatives

Essex County Council has a duty to maintain a register and record of assets which have a significant impact on the risk of flooding. In order to capture proposed SuDS which may form part of the future register, a copy of the SuDS assets in a GIS layer should be sent to [suds@essex.gov.uk](mailto:suds@essex.gov.uk).

Any drainage features proposed for adoption by Essex County Council should be consulted on with the relevant Highways Development Management Office.

Changes to existing water courses may require separate consent under the Land Drainage Act before works take place. More information about consenting can be found in the attached standing advice note.

It is the applicant's responsibility to check that they are complying with common law if the drainage scheme proposes to discharge into an off-site ditch/pipe. The applicant should seek consent where appropriate from other downstream riparian landowners.

The Ministerial Statement made on 18th December 2014 (ref. HCWS161) states that the final decision regarding the viability and reasonableness of maintenance requirements lies with the LPA. It is not within the scope of the LLFA to comment on the overall viability of a scheme as the decision is based on a range of issues which are outside of this authority's area of expertise.

We will advise on the acceptability of surface water and the information submitted on all planning applications submitted after the 15th of April 2015 based on the key documents listed within this letter. This includes applications which have been previously submitted as part of an earlier stage of the planning process and granted planning permission based on historic requirements. The Local Planning Authority should use the information submitted within this response in conjunction with any other relevant information submitted as part of this application or as part of preceding applications to make a balanced decision based on the available information.

## **12. Additional Considerations**

### Public Sector Equality Duty (PSED)

- a. In making your decision you must have regard to the PSED under section 149 of the Equality Act 2010 (as amended). This means that the Council must have due regard to the need in discharging its functions to:
  - b. A. Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act;
  - c. B. Advance equality of opportunity between people who share a protected characteristic and those who do not. This may include removing or minimising disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; taking steps to meet the special needs of those with a protected characteristic; encouraging participation in public life (or other areas where they are underrepresented) of people with a protected characteristic(s); and
  - d. C. Foster good relations between people who share a protected characteristic and those who do not, including tackling prejudice and promoting understanding.
- e. The protected characteristics are age, disability, gender reassignment, pregnancy and maternity, being married or in a civil partnership, race including colour, nationality and ethnic or national origin, religion or belief, sex and sexual orientation.
- f. The PSED must be considered as a relevant factor in making this decision but does not impose a duty to achieve the outcomes in section 149 and section 149 is only one factor that needs to be considered, and may be balanced against other relevant factors.
- g. It is considered that the recommendation to grant permission in this case would not have a disproportionately adverse impact on a protected characteristic.

#### Human Rights

- h. In making your decision, you should be aware of and take into account any implications that may arise from the Human Rights Act 1998 (as amended). Under the Act, it is unlawful for a public authority such as the Tendring District Council to act in a manner that is incompatible with the European Convention on Human Rights.
- i. You are referred specifically to Article 8 (right to respect for private and family life), Article 1 of the First Protocol (protection of property) and Article 14 (right to freedom from discrimination).
- j. It is not considered that the recommendation to grant permission in this case interferes with local residents' right to respect for their private and family life, home and correspondence or freedom from discrimination except insofar as it is necessary to protect the rights and freedoms of others (in this case, the rights of the applicant). The Council is also permitted to control the use of property in accordance with the general interest and the recommendation to grant permission is considered to be a proportionate response to the submitted application based on the considerations set out in this report.

#### Finance Implications

- k. None

### **13. Background Papers**

- a. In making this recommendation, officers have considered all plans, documents, reports and supporting information submitted with the application together with any amended documentation. Additional information considered relevant to the assessment of the application (as referenced within the report) also form background papers. All such information is available to view on the planning file using the application reference number via the Council's Public Access system by following this link. However for ease, the letter from the

applicant to the Council which responds to the objections raised by Natural England (dated 11<sup>th</sup> February 2022) is appended here.