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Mrs Jean McEntee
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Our Ref: NF/CL/00010043.312

Your Ref:

Date: 30 September 2010

BY SPECIAL DELIVERY AND BY EMAIL: jean.mcentee@pins.gsi.gov.uk

Dear Mrs McEntee

**Wildlife and Countryside Act 1981 Section 53
Suffolk County Council**

**(County Borough of Ipswich Definitive Map and Statement) (Restricted Byway 36)
Modification Order 2009**

**(County Borough of Ipswich Definitive Map and Statement) (Restricted Byway 37)
Modification Order 2009**

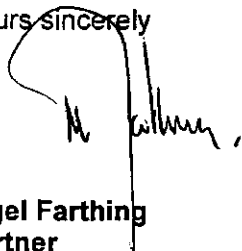
**(County Borough of Ipswich Definitive Map and Statement) (Restricted Byway 38)
Modification Order 2009**

**(County Borough of Ipswich Definitive Map and Statement) (Restricted Footpath 39)
Modification Order 2009**

**(County Borough of Ipswich Definitive Map and Statement) (Restricted Footpath 40)
Modification Order 2009**

Pursuant to the Order for Directions dated 25 June 2010 we enclose the Statement of Case on behalf of Associated British Ports, Objectors.

Yours sincerely



**Nigel Farthing
Partner
For and on behalf of Birketts LLP**

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**SUFFOLK COUNTY COUNCIL (COUNTY BOROUGH OF IPSWICH MAP AND
STATEMENT) (RESTRICTED BYWAY 37 AND FOOTPATHS 39 AND 40) MODIFICATION
ORDERS**

**STATEMENT OF CASE ON BEHALF OF
ASSOCIATED BRITISH PORTS, OBJECTORS**

1. GENERAL

- 1.1 This Statement of Case is made on behalf of Associated British Ports who have objected to the above Orders which, if confirmed, would have the effect of adding to the Definitive Map Restricted Byway 37 and Footpaths 39 and 40. Associated British Ports ("ABP") owns the Port of Ipswich including the land shown edged red and green on the attached plan marked "ABP1". The land edged red is commonly known as "The Island Site" and the land edged green "Cliff Quay". The Order routes for Restricted Byway 37 and Public Footpaths 39 and 40 lie entirely within land owned by ABP.
- 1.2 For many centuries Ipswich has been a significant commercial port. Prior to the construction of the wet dock the tidal channel of the River Orwell flowed close to the northern bank and access for loading or unloading of vessels was gained from a number of wharfs. Because the river is tidal at this point vessels would not have been able to access the wharfs at low water.
- 1.3 The wet dock was built between 1839 and 1842. The works were authorised by the Ipswich Dock Act 1837 which gave the Dock Commissioners power to construct the wet dock by redirecting the river along a new channel or cut ("the New Cut") across the marsh and pasture land on the inside of the bend in the river. Dams were formed to the south and west of the original course of the river and the dock basin was excavated and a lock formed giving access to the New Cut.
- 1.4 Various alterations have taken place since 1842 pursuant to a series of private statutes. Perhaps the most significant was the creation of a new lock gate at the southern end of the dock basin and the closing off of the original lock.
- 1.5 In the latter part of the twentieth century the dock was a busy commercial port involved in the import and export of general cargo and particularly agricultural products and timber. In the 1970's the West Bank Terminal was built and this, together with Cliff Quay, now accommodates much of the commercial business of the Port. In the years since the construction of the West Bank Terminal the

commercial use of the original dock basin has diminished and is now limited to some timber importing. It also accommodates two commercial marina operations.

1.6 This Statement of Case is in response to the Statement of Reasons prepared by the Order Making Authority and is in part by way of comment thereon.

2. LEGISLATION

2.1 The relevant legislation is identified in the County Council's Statement of Case.

2.2 The Ipswich Dock Acts 1837 and 1852 contained provisions for access to various parts of the dock. The Objector does not accept that any provision of the various statutes had the effect of creating a public right of way consistent with any of the routes objected to, namely, Restricted Byway 37 and Footpaths 39 and 40.

3. GENERAL LEGAL PRINCIPLES

3.1 Wildlife and Countryside Act 1981 Section 53

For this Order to be confirmed it will be necessary for the order making Authority to prove on the balance of probabilities:-

"Section 53(3)(c) The discovery by the Authority of evidence which (when considered with all other relevant evidence available to them) shows:-

(i) That a right of way which is not shown in the Map and Statement subsists or is reasonably alleged to subsist over the land in the area to which the Map relates being a right of way to which this Part applies.

3.2 Reasonably alleged to subsist

At this confirmation stage of the process it is not sufficient for the Applicant to establish that a right of way is reasonably alleged to subsist. The requirement is that the Applicant establishes that the right of way **subsists**. A reasonable allegation is not sufficient (*Todd & Bradley v Secretary of State for Environment Food and Rural Affairs [2004]*). In the case of the three routes to which this objection relates the conclusion of the County Council Officer responsible for investigating the claims, Jane Stevenson, was that whilst the evidence is sufficient to raise a reasonable allegation it is not sufficient to satisfy the test for confirmation. Her advice was that, in the event of objections to the Orders, the Council should not support them at Inquiry.

3.3 Burden of Proof

The burden of proof lies with the Applicant to establish, on a balance of probabilities, that the Orders should be confirmed.

4. **RESTRICTED BYWAY 37**

4.1 The effect of this Order, if confirmed, will be to add to the Definitive Map a Restricted Byway from the southern end of Foundry Lane along New Cut East for the full length of the Island Site, crossing the lock by means of the swing bridge and terminating at the western end of Ship Launch Road.

4.2 Summary of Objector's case

4.2.1 It is accepted that Section 27 of the 1837 Act required the Dock Commissioners to make a road 40 feet wide from approximately the south eastern termination of the Order route to the southern side of the original lock and from the northern side of the lock to approximately the north western termination of the Order route.

4.2.2 The route provided for by Section 27 was not a continuous route because it was interrupted by the original lock.

4.2.3 The route provided for by Section 27 was not a public road.

4.2.4 The northern section of the Order route, from the southern end of Foundry Lane to the original lock was made up as a vehicular right of way and became a public vehicular roadway known as "the East Road".

4.2.5 The section of the route to the south of the original lock gate was not made up as a 40 foot roadway.

4.2.6 Following the construction of the new lock pursuant to the 1877 Act the contemplated bridge or weir over the New Cut was not constructed, with the result that the southern section of the route was inaccessible to vehicular traffic until the early part of the twentieth century.

4.2.7 The southern section of the route was not part of the East Road. Instead it was referred to variously as the Avenues, Promenade or Plantation.

4.2.8 Such public rights as may have existed, or been considered to exist over the Avenues, were not in the nature of a right of way.

4.2.9 Such public rights of way as may have existed on the Island Site were brought to an end pursuant to the provisions of Section 124 of the 1913 Act.

4.2.10 The effectiveness of the closure of the Island Site is adequately attested to within the evidence produced by the County Council in its Statement of Reasons.

4.3 Legislation

Paragraph 5 of the County Council's Statement of Reasons correctly identifies the relevant provisions of the 1837 Act. However:-

- 4.3.1 The Act did not provide for a continuous route akin to that claimed as the lock gate giving access from the New Cut to the dock basin ran through the middle of the Island Site and no provision for crossing was made.
- 4.3.2 It is not accepted that Section 22, which required the Commissioners to make "public Wharfs and Quays", had the effect of authorising the construction of a public highway, and particularly not a highway consistent with Restricted Byway 37. The provision that Wharfs and Quays built pursuant to that Section should be "free and public Quays" should not influence the interpretation of Section 27.
- 4.3.3 Section 27 required the Dock Commissioners to construct a road with a width of at least 40 feet. The purpose of this road is specified to be "*for the Passage of Cattle, Carriages, and Foot Passengers, from the End of the present Ballast Wharf along the East Side of the Dock and thence along the South End of the said Dock to the Entrance Lock or outer Dock Gates, and from the said Entrance Lock or Dock Gates along North Side of the intended new Cut or Channel and across the Head or West End of the said Dock to St Peters Dock*".

The Section also provided:-

"And if in case the said Dock Commissioner shall at any Time erect or construct a Bridge across the Lock Pit or Entrance Lock or Channel leading from the said new Cut into the Dock the same Bridge shall at all reasonable Times and Hours be passable by Foot Passengers without Payment of any Tolls Dues or Duties whatsoever."

- 4.3.4 The provisions of Section 27 should be contrasted with the requirement in Section 17 to build a quay or wharf of 30 feet width along the northern and eastern quays which specifically provided that "*which new Quay to be so constructed as aforesaid shall be an open and public roadway for all persons, cattle and carriages*".
- 4.3.5 The provisions of Section 27 in relation to any bridge that might be built over the lock indicate that access over the bridge would only be available "at all reasonable times and hours". Necessarily this implies that access would not be available at all times and is therefore not in the nature of a public right of way exercisable as of right.

4.3.6 Section 124 of the 1913 Act gave the Commissioners power to stop up such public rights of way as existed on the Island Site. The exercise of this power was subject to certain conditions, namely:-

4.3.6.1 The acquisition of certain properties, compliance with which is confirmed by the letter of 31 October 1917 forming Item 34 to the Council's Statement of Reasons.

4.3.6.2 The expiration of a period of 5 years.

4.3.6.3 A resolution of Ipswich Borough Council consenting to the erection of the required gate or barrier. This requirement was repealed by Section 25(3) of the 1918 Act.

4.3.6.4 The erection of a gate or barrier on the East Road 13 yards or thereabouts from the junction with Foundry Lane. It is the Objector's case that the evidence contained in paragraphs 44 and 45 of the Council's Statement of Reasons unequivocally demonstrates that by the early part of the 1920's the Dock Commissioners were exercising control over access to the Island Site. The correspondence and newspaper reports comprising Items 49 to 52 of the Council's Statement of Reasons clearly demonstrate the level of feeling engendered by the control being exercised by the Dock Commissioners. The correspondence demonstrates a familiarity with the requirements of Section 124 and it is inconceivable that if any procedural requirement for closure had not been met it would have been overlooked.

4.3.6.5 It is asserted in the County Council's Statement of Reasons that it was also a requirement of the Act that the power to close public rights on the Island Site was to be effected within 10 years, failing which it lapsed. Reliance is placed upon Section 43 of the Act, but this relates only to "the works authorised by this Act". The provision for closure of any public rights is set out in Section 124 which falls within Part VII of the Act, headed Miscellaneous, and not in Part III which relates to Works. It is therefore not accepted that the power contained in Section 124 was subject to any time limit for implementation, but in any event the evidence suggests that public access was brought to an end in the early 1920's, well within the 10 year period expiring in 1928.

4.4 Dock Plans

By way of commentary on the Council's Statement of Reasons:-

- 4.4.1 Item 3. The feature annotated "roadway" on this 1843 plan refers only to the northern section of the Order route and appears to stop well short of the lock gates. No equivalent feature is shown south of the lock gates.
- 4.4.2 Items 4a to g (1875 Dock Plan). Again, the East Road is shown only on the northern section of the Island Site and appears to terminate with an apparent gate or barrier some way short of the lock. The southern section of the Island Site shows no similar feature but instead a substantial part of the site is depicted as "avenues, walks and garden". The Book of Reference for the parish of St Mary Stoke (the relevant page of which is not exhibited to the Statement of Reasons for Restricted Byway 37, but is included with the documents relating to Footpath 40) describes only one road on the southern part of the Island Site, being a "Private Roadway to the ballast wharf", and running along the eastern (dock) side of the site. The area over which the claimed route passes is described as "11. East bank of New Cut" with no reference to a road, public or otherwise. Similarly the 1898 plan (Items 6b and c) identifies the site of the claimed route as number 9 which is described in the Book of Reference as "Embankment, river wall and boat slip" – again no reference to a road.
- 4.4.3 Items 5 a to f (1877 Dock Plan). The East Road is depicted in a similar fashion to the 1875 plan. Again, no feature akin to a road is shown south of the original lock but a significant area is annotated "avenues and plantations".
- 4.4.4 Items 6a to d. This plan, dated 1898, shows the area south of the original lock to be inaccessible to vehicular traffic and with no feature recognisable as a road. A significant area remains annotated "the promenade, avenues and plantations".
- 4.4.5 Items 7a to d. This plan dated 1904 shows the original lock having been substantially in-filled but with a significant indentation from the New Cut with no apparent representation of a road or feature suitable for the passage of vehicles across the site of the old lock.
- 4.4.6 Items 8a to f. The 1913 Dock plan is the first of this series of plans to show an apparent route capable of being used by vehicles to pass across the site of the old lock. Accordingly, this is the first

representation of a continuous vehicular route consistent with the claimed Byway.

4.5 Railway Plans

- 4.5.1 The 1898 GER plan refers to the southern section of the Island Site as a “public promenade, river wall and foreshore”. There is no reference to any vehicular route.

4.6 Ordnance Survey Maps

- 4.6.1 Item 11a to b. The 1880 to 1884 sheets confirm the information given in the Dock Plans. The East Road is shown as a distinctive feature terminating at a point north of the lock. No equivalent feature is depicted south of the lock. The Avenues are graphically depicted as a recreational area with many trees and a number of seats.
- 4.6.2 Items 12a to c. The 1904 sheet shows the greater part of the original lock having been filled in but depicts no feature which might be interpreted as a road or way capable of being passed by vehicles forming a connection from the end of the East Road to the promenade.
- 4.6.3 Items 13a to c. The 1927 sheet is the first OS map to show a vehicular means of passage from the East Road (on this sheet for the first time referred to as “New Cut East”) and the area to the south of the old lock. There is, however, no feature to the south of the old lock annotated as a road. The promenade has a number of railway tracks running across it and the trees have gone.
- 4.6.4 Item 14. This 1951 OS map shows a line across New Cut East between the words “Cut” and “East”. This is consistent with the depiction of a gate or barrier across the road.

4.7 Records of Ipswich Port Authority and Ipswich Borough Council or Corporation

- 4.7.1 The minutes of 21 January 1913 (Item 17) demonstrate the distinction drawn between “the East Road” (being the route to the north of the old lock gate) and “the Promenade” (being the area to the south of the lock gate). In this and subsequent records and correspondence it is clear that the East Road was a term reserved only for the route north of the lock gates and was not at any stage applied to the area south of the lock.
- 4.7.2 This section of the Statement of Reasons demonstrates the strength of local feeling at the proposal to close those parts of the Island Site which

had been considered to be public. The evidence would suggest that the concerns related only to pedestrian use of the site, and in particular to the loss of the recreational facility provided by the area variously described as The Avenues, the Promenade, Gardens and Plantation.

4.8 Newspaper Articles

4.8.1 Reference has been made to the newspaper articles at paragraph 4.3.6.4 above.

4.9 Photographic evidence

4.9.1 It is acknowledged that photographs can assist in an understanding of the physical changes to the Dock and the context of the claimed routes. It is not accepted that the presence of people can, without further information, be evidence of status. For example, the County Council Statement of Reasons exhibits as Item 56 a photograph of the New Cut in 1899 and suggests that an inference can be drawn from the presence of a group of men by the fence, but these could just as easily be Dock employees as members of the public. Similarly, the men shown in Item 78 would appear to be operating the lock gates rather than members of the public. Little, if any, weight should attach to this evidence.

4.10 Other evidence of closure

Additional evidence suggesting closure or control of access to the Island Site is available as follows:-

4.10.1 Attached marked "ABP2" is a photograph of unknown date showing the East Road with a barrier spanning the road and horses and carriages behind.

4.10.2 Attached marked "ABP3" is a photograph believed to be dated approximately 1952 showing works being undertaken to widen the "neck" onto the Island Site at the northern end of New Cut East. To the left of the photograph, and beside New Cut East, is a substantial post which is believed to be consistent with a gate post. Attached to the post is a sign including the words "Private no thoroughfare". The post is believed to be in approximately the same position as the gate or barrier shown on the 1951 OS map (Item 14).

4.10.3 Attached marked "ABP4" is a bundle of correspondence dated November and December 1961. The first letter is written on behalf of the Ipswich and District Natural History Society and is addressed to the Town Clerk expressing concern at access along New Cut East being

restricted. The bundle includes a reply from the Secretary and Solicitor to Ipswich Dock Commission confidently asserting that any public rights of way on the Island Site were closed in accordance with the powers contained in the 1913 Act and that since that time the Dock Commissioners had exercised control over access to the site.

- 4.10.4 In recent times a series of gates have controlled access along New Cut East. No 4 gate is located approximately 85 metres south of Foundry Lane on the neck between the mainland and the Island Site. A gate has existed in this position since at least the early 1970's. Originally it was in two parts with a manned control box in the centre. The gate was regularly manned.
- 4.10.5 No 4A gate (the yellow gate) is located approximately 150 metres south from No 4 gate. The purpose of No 4A gate is to separate marina traffic from commercial traffic. This gate was only installed when the marina was built in 2000.
- 4.10.6 No 3 gate is located at the end of Ship Launch Road. This gate has been in position since at least the early 1970's. Attached marked "ABP5" is a photograph showing the installation of the new swing bridge in 1948/49 with a gate in the position of No 3 gate.

4.11 Conclusions in respect of Restricted Byway 37

- 4.11.1 There is evidence that the East Road, being a route from the end of Foundry Lane to a point north of the original lock, was constructed pursuant to Section 27 of the 1837 Act and that it was regarded as a road.
- 4.11.2 Although the 1837 Act made provision for a road to be made along the southern section of the Island Site, there is no evidence that any such road was in fact constructed.
- 4.11.3 Such public access as took place over the southern section of the Island Site was not in the nature of a right of way.
- 4.11.4 At no time prior to shortly before the 1913 Act was a continuous vehicular route available on the alignment of the Order route.
- 4.11.5 Section 124 of the 1913 Act contained power for the Commissioners to reserve the East Road and the Avenues for commercial use. The evidence taken together is sufficient to establish on a balance of probabilities that the power was used effectively and lawfully to stop up the East Road and to preclude further public access to the Avenues. In

consequence such public rights of way as may have existed were brought to an end in the early 1920's.

- 4.11.6 There is no evidence to support any claim of subsequent dedication or presumed dedication of any public rights over the Island Site. To the contrary, for the past almost 90 years the clear evidence is that the site has operated as a commercial port and any access has been closely controlled and managed by successive port owners.

5. **FOOTPATH 40**

- 5.1 The effect of this Order, if confirmed, will be to add to the Definitive Map a public footpath with a length of approximately 300 metres and a width varying from 12 to 28 metres. The route does not, at any point, connect to any existing public right of way.

5.2 Summary of Objector's case

- 5.2.1 The legislative context is identical to that described in relation to Restricted Byway 37 above.

- 5.2.2 The route was not created pursuant to any statutory power or duty. Its presence as a feature is, however, recognised within Section 31 of the 1852 Act.

- 5.2.3 For a highway to exist there must be a right of passage for the public at large over a defined route.

- 5.2.4 The claimed route does not represent a right of passage over a defined route and is therefore not in the nature of a public right of way.

- 5.2.5 Such public access as there was to the area was akin to use of a public park or recreation area which, if continued, might have qualified the area to be registered as a town or village green.

- 5.2.6 Such rights of access as the public may have enjoyed over the area were brought to an end pursuant to the provisions of Section 124 of the 1913 Act.

5.3 Legislation

- 5.3.1 The legislative provisions relating to the Island Site are the same for this route as for Restricted Byway 37 described above.

5.3.2 The 1837 Act makes no provision for, or reference to, the creation of the feature subsequently known as the Avenues. The existence of such a feature is however acknowledged within Section 32 of the 1852 Act which provides:-

"...and the said Dock Commissioners have not only made the same works, but have laid out and planted certain walks and avenues adjacent to the said Dock and channel, and the approaches thereto, on land belonging to or claimed by them, in order that a free circulation of air may be preserved, and the same may not only be rendered convenient for business, but contribute to the health and recreation of the inhabitants of the town".

There is no reference to the "walks and avenues" being used for the purpose of passage from one place to another but rather a reference to the use of the area for "health and recreation".

5.3.3 The effect of Section 124 of the 1913 Act is considered above in relation to Restricted Byway 37. The provision gives power to the Commissioners *"to reserve the said East Road and also the Avenues exclusively as a means of ingress and egress for persons having business upon so much of the Commissioners undertaking as lies southward of the said gate and between the Dock and the New Cut and to appropriate and use the site of the Avenues to and for the purposes of the Commissioners undertaking"*.

5.3.4 The language used is not confined to that required to stop up a public highway but is crafted in wider terms which include the stopping up of any highway rights, but also would entitle the Commissioners to exclude the public from any other areas of the site to which they had previously enjoyed access.

5.3.5 The comments made in relation to the effectiveness of the Commissioners' actions pursuant to Section 124 in relation to Restricted Byway 37 are equally appropriate to Footpath 40.

5.4 Dock Plans

5.4.1 The various dock plans consistently depict the Avenues as a broad and defined feature and variously describe it as "the Promenade, Avenues and Plantations" and "the Avenues". The Book of Reference to the 1875 Plan refers to the area as "Avenues, Walks and Plantations". The 1898 Book of Reference refers to "public Promenade, Avenues and Plantations".

5.4.2 None of the descriptions used suggest a means of passage along a defined route.

5.5 Ordnance Survey Maps

5.5.1 The 1884 and 1904 maps graphically depict the Avenues as a series of tree lined walks with the paraphernalia of a public park or recreation area, including numerous seats and a shelter known as "the umbrella".

5.6 Photographic evidence

5.6.1 The photographic evidence is consistent with the representation of the Avenues on the various maps considered. The photographs confirm the suggestion that the area was a popular place of public resort and recreation but do not give the appearance of the area being used for purposes consistent with it existing as a public footpath.

5.7 Conclusions in respect of Footpath 40

5.7.1 The Avenues have no statutory origin as a public right of way.

5.7.2 There is evidence that for a period from the middle of the nineteenth century until the early twentieth century the public had access to the Avenues but there is no evidence to suggest dedication of a public right of way.

5.7.3 The configuration of the area with a series of parallel walks, benches, a band stand or shelter, ornamental gardens, the employment of a curator resident on site is inconsistent with the area being a public right of way but entirely consistent with it having been used as a park or town or village green.

5.7.4 Any such public rights as may have existed were brought to an end as a result of the powers contained in the 1913 Act. Although this may not have resulted in the immediate exclusion of the public from the area it is clear that from the early twenties the Dock Commissioners exercised control over the area such that any continued public use of the site was not as of right.

6. **FOOTPATH 39**

6.1 The effect of this Order, if confirmed, will be to add to the Definitive Map a public footpath with a length of 530 metres located entirely within the working Cliff Quay owned and operated by ABP. The route does not, at any point, connect to any other

recorded or claimed public right of way and is therefore wholly inaccessible to the public.

6.2 Summary of Objector's case

6.2.1 There is some evidence that the Order route formed part of a public footpath along the sewer embankment from Cliff Road to Hog Highland, a place of public resort.

6.2.2 Evidence indicates that the only means of public access to Hog Highland was by way of the sewer embankment path.

6.2.3 The 1918 Act gave power to the Dock Commissioners to stop up the public footpath along the sewer embankment.

6.2.4 There is compelling evidence that by at least 1926 the Commissioners were exercising control over the use of the route.

6.2.5 Stopping up is as effective if the landowner exercises control over public access along the route as if the public are excluded entirely.

6.2.6 There is some evidence of continued public access to Hog Highland up to 1936 and possibly beyond, but such access was through Cliff Quay and therefore controlled by the Dock Commissioners and therefore not public access as of right.

6.2.7 Accordingly, the evidence supports any public rights of way over the Order route having been effectively stopped up in or about 1926.

6.3 Legislation

6.3.1 Footpath 39 has no statutory origin although its status is implicitly recognised by Section 11 of the 1918 Act which gives power for it to be stopped up.

6.3.2 The power to stop up contained in Section 11 was conditional only upon the Dock Commissioners owning the lands on both sides thereof and the power being exercised within 10 years from the end of the First World War.

6.4 Dock Plans

The Dock Plans and Book of Reference do not assist in determining the presence of a physical path or its status.

6.5 Ordnance Survey Maps

6.5.1 The 1884 OS, which predates the construction of the sewer embankment, does not suggest the presence of any feature on the Order route. The 1904 Edition depicts the sewer embankment with apparently ordered planting of trees behind. The route is annotated FP. This would suggest that the route was created between 1884 and 1904. There is no evidence to suggest whether, or how, the route became dedicated as a public footpath. The 1927 OS, the survey date of which is not known, shows the construction of the northern part of Cliff Quay and consequent removal of the sewer embankment. No feature representative of a footpath or other right of way through the new Quay is shown.

6.5.2 The 1950 OS shows the extension of Cliff Quay and the construction of Cliff Quay Power Station with only a residual isolated length of the original sewage, or Greenwich Farm, embankment remaining.

6.6 Records of Ipswich Port Authority and Ipswich Borough Council or Corporation

6.6.1 The records are of limited value in the context of this matter but do convey a clear intention that the footpath would be closed when the development of Cliff Quay took place and the route became subsumed within a working port.

6.6.2 Newspapers articles

6.6.2.1 The newspaper articles are of value in that they document the control exercised by the Commissioners over public access to Cliff Quay. In particular, the article of 9 July 1926 (Item 21) confirms a notice was displayed reading "No Admittance except on business". The article reports a case heard by the Magistrates concerning an employee of the Commissioners, Mr Denny, seeking to prevent a member of the public, Mr Otto, from accessing Cliff Quay. Although the defence of Mr Otto raised issues as to whether Mr Denny had the appropriate paraphernalia to demonstrate his position, there was no suggestion that the Commissioners did not have power to exclude the public.

6.6.2.2 Other press reports, particularly in 1934 and 1936 (Items 22 and 23) it is suggested demonstrate continued public access to Cliff Quay or the embankment beyond. Interestingly, the report of 28 June 1936 refers to the Commissioners being

unwilling to “curtail any public **privilege**” and states that in the prior years the public had enjoyed “**practically** unrestricted access” to the embankment. This supports the contention that the Commissioners were allowing access as a privilege and exercising some degree of control; access was therefore not enjoyed as of right. Although prior to that date the Commissioners had not physically closed the route, it is established that they proposed to do so thereafter, but to allow limited continued public access during daytime and subject to various conditions.

6.7 Photographic evidence

- 6.7.1 Item 32 is said to be a photograph taken in the 1920's and to show steam powered piling equipment which is presumably commencing the Cliff Quay development.
- 6.7.2 Item 34 depicts Cliff Quay in use in 1928.
- 6.7.3 Item 36 depicts the remnant sewer embankment path and trees, and interestingly notes that this location “is reached from the road through the Cliff Quay”. There is no suggestion that the site is accessible by any other means. This is consistent with an argument that the Commissioners permitted access through Cliff Quay to Hog Highland from approximately 1923 when control was assumed over the route and the public rights stopped up. Thereafter access to any part of the route, being through Cliff Quay, was permissive.

6.8 Conclusions in respect of Footpath 39

- 6.8.1 On a balance of probabilities it is reasonable to conclude that by the time of the 1918 Act a public pedestrian right of way existed along the sewer embankment which included the Order route.
- 6.8.2 A power to stop up the public rights of way along the sewer embankment was given by Section 11 of the 1918 Act. The Dock Plans and Book of Reference establish that the conditions of ownership of adjoining lands were fulfilled.
- 6.8.3 Taken together, the evidence of the maps and plans, the Dock Commission and Corporation Records and the newspaper articles and photographs, demonstrate, at least on a balance of probabilities, that from the mid 1920's, and certainly by 1926, the Commissioners had assumed control over public access. The control of access, as

evidenced by the presence of signs and the restriction of admittance to the Quay, is sufficient demonstration that the public right of way was effectively stopped up in accordance with Section 11.

Dated this 30th day of September 2010

Birketts LLP
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Ref: NF/CL/10043.312

Solicitors for the Objectors, Associated British Ports