MINUTES OF EVIDENCE

taken before

The Chairman of Committees, House of Lords

and

The Chairman of Ways and Means, House of Commons

on the

ABLE MARINE ENERGY PARK DEVELOPMENT CONSENT ORDER 2014

Wednesday 2 April 2014

in Committee Room 3A

Present:

Lord Sewel	Chairman of Committees
Lindsay Hoyle MP	Chairman of Ways and Means

In attendance:

Nicholas Beach	Counsel, House of Lords
Peter Brooksbank	Counsel, House of Commons

Ian McCulloch (of Bircham, Dyson, Bell LLP) appeared as agent for Able Humber Ports Ltd, the applicant for the order (memorials 1A and 2A)

Paul Irving (of Winckworth Sherwood LLP) appeared as agent for Associated British Ports, the petitioner against the order (petitions 1 and 2)

Petitioners	Agent
1. Associated British Ports [*General Objection*]	Paul Irving
2. Associated British Ports [*Amendment*]	Paul Irving

Ordered at 2.29 pm: That the Parties be called in.

1. **LORD SEWEL**: Hello. Let me introduce myself and my colleague. I am the Chairman of Committees in the House of Lords.

2. **LINDSAY HOYLE MP**: I am Deputy Speaker and Chairman of Ways and Means.

3. **NICHOLAS BEACH**: I am Nicholas Beach, Deputy Counsel to the Lord Chairman of Committees.

4. **PETER BROOKSBANK**: I am Peter Brooksbank, Deputy Counsel in the House of Commons.

5. **LORD SEWEL**: Let me explain the purpose of the hearing. It is taking place because the Able Marine Energy Park Development Consent Order 2014 triggered certain conditions in its parent Act, the Planning Act 2008, making it subject to special parliamentary procedure. Under this procedure, two petitions have been presented against the order by Associated British Ports, the sole petitioner. They, in turn, have been objected to by the memorialist, the applicant for the order, Able Humber Ports Ltd.

6. We are here today not to take a view on the substance of the Able Marine Energy Park Development Consent Order—let me make that absolutely clear. The purpose of this hearing is a very narrow one, laid down by the Statutory Orders (Special Procedure) Act 1945 and the standing orders of both Houses governing this particular type of parliamentary procedure.

7. It requires us to consider the petitions and the objections, and decide some very specific questions. The first is whether each petition is proper to be received—in other words, whether all the rules governing the petitions have been correctly adhered to. The second is whether the petition asking for amendments to be made to the order would be more accurately classified as a petition against the order as a whole and lastly whether the

petitioner is sufficiently affected by the order, or by the relevant provisions of the order, to be entitled to argue its case before a Joint Committee. That is known as their locus standi. Once we have heard the oral submissions from the parties, we will answer those questions for each petition and then report our decisions to both Houses.

8. I shall give you a rough indication of how we will proceed. We propose to begin the proceedings by hearing an oral submission from the agent for the applicant, Ian McCulloch of Bircham Dyson Bell. We will endeavour to save our questions until the end of Mr McCulloch's submission, although if we feel the moment might be lost we shall interrupt as necessary, but I hope that that will not be necessary.

9. Once we have completed our questions, we may wish to deliberate in private for a short while to consider what we have heard. We shall then hear an oral submission from Paul Irving of Winckworth Sherwood, who is the agent for the petitioner. Mr Irving will then be questioned by us.

10. There are no formal rules that govern the right of reply in hearings such as these, and while we intend to take a reasonably relaxed view, we do not wish to have endless arguments tossed backwards and forwards. I expect that we will allow the parties to question matters of factual disagreement and possibly for the applicant to make very brief comments following the petitioner's submission, but we will make our decisions on that as we proceed. When we have heard the submissions, we will deliberate on them in private.

11. We have made a number of points to the parties in advance of this hearing that are intended to assist them with their submissions. The most significant of those is perhaps worth repeating here.

12. We intend to adopt the decision taken in relation to an earlier special procedure order on the Rookery South (Resource Recovery Facility) Order 2011, but we do not have the power to restrict the scope of consideration of petitions by a Joint Committee.

However, if such a Joint Committee is appointed as a result of this hearing, we wish to place it on record that we strongly encourage it to be consistent with Section 128 of the Planning Act 2008 by focusing its work on the issues of compulsory purchase of special land. Mr McCulloch, would you like to open by addressing the hearing?

13. **IAN McCULLOCH**: Good afternoon, and thank you. I am instructed to appear before you by our client, Able Humber Ports Ltd, which I shall refer to as "Able" for the purposes of this hearing—the applicant, under the Planning Act 2008, for the Able Marine Energy Park Development Consent Order.

14. By way of additional introduction, on my left is my partner, Mr Angus Walker, and behind me is Mr Peter Stephenson, Executive Chairman of Able UK. Somewhere in the room is Mrs Pam Thompson, our senior clerk, who is going to hand you a bundle of documents to assist you in your consideration of our respective cases today. These documents have been agreed between Mr Irving and me as documents, which either one of us or both of us will wish to refer to during these proceedings.

15. The Secretary of State made the order on 13 January 2014. As the order authorises the compulsory acquisition of land belonging to statutory undertakers, it has, as you have just explained, been laid before Parliament as an order that is subject to special parliamentary procedure by virtue of the provisions of the Planning Act 2008 and the Statutory Orders (Special Procedure) Act 1945.

16. As a statutory undertaker, in its capacity as harbour authority and port operator, Associated British Ports, to which I shall refer as ABP for convenience, has lodged two petitions against the order, one of general objection and one for amendment.

17. Last night, we received a letter on behalf of the two Chairmen, indicating to us, as you have described, some points that you wished us to take account of in today's proceedings.

18. I would like to address immediately the first of the four points that you raised, as I infer that this was a matter you would like me to address you on upfront. This refers to paragraph 3 of Able's skeleton argument, in which we say that if ABP cannot prove that Section 128(2) of the Planning Act applies to part of its property interests, SPP does not apply and neither petition is proper to be received. This is at the last sentence of our skeleton argument, at paragraph 3.

19. You are concerned that this raises a question as to your competence to decide on the applicability of special parliamentary procedure, and you have invited me to address you on this.

20. I would like to clarify Able's position. Able does accept that special parliamentary procedure applies to this order. That part of the sentence that claims conditionally that it does not is, on reflection, overstating Able's position.

21. We are where we are; Able is not inviting you somehow to disapply the application of the 1945 Act. Nor is it suggesting that the Secretary of State should somehow withdraw the order that it has laid before Parliament. What Able still claims, as in the final part of that sentence, is that if ABP cannot produce the necessary proof which we say it should produce, neither petition is proper to be received and the order should proceed through the special parliamentary procedure process unopposed.

22. The argument therefore is about whether or to what extent the petition is proper to be received, which clearly falls within your competence as the two Chairmen, under Section 3 of the 1945 Act. It is not about whether special parliamentary procedure should apply at all. I hope that allays some concern that you may have about any question about your competence in this hearing.

23. If I may, I shall address the other points that you have made during the course of my submission, although you will hear that as part of our case we will be inviting you to

review the decision you have taken at Point 4 to the effect that you have no power to restrict the scope of consideration of petitions by Joint Committee. Able's position is that restricting the scope of a petition is part of what locus standi issues are about; locus standi issues fall to be dealt with by yourselves.

24. May I begin by inviting you to orient yourselves with some reference to where in the country we are talking about? Although the treatment of the order on the land in question other than compulsory purchase is not a matter for this hearing, I thought it might briefly help if we at least acquaint ourselves with the land concerned.

25. To that end, I refer you to the bundle that you have. You will see that the general area of the Humber estuary with which we are concerned is shown in the first plan at Tab 1 which is a site location plan. You will then find at Tab 2: the key plan to the order plans. The area we are concerned with is the area shown in key plans 3 and 4, 8 and 9, and 7. You need not concern yourselves with the plans from 10 to 14 on the other side of the estuary, which are not included in this bundle.

26. At Tab 3—and I am not proposing to examine these in detail—we have reproduced for your information the relevant order plans. Sheet number 3 of 14 is perhaps the most relevant, at least so far as Able is concerned, because it depicts the land that you have read about in the skeleton argument known as the triangle site. The other sheets are also relevant to ABP's land in this matter.

27. It may be clearer if I seek to categorise ABP's land that is affected by the order in the following way. There is a triangular-shaped parcel of land on the south side of the Humber estuary with two narrow strips of land abutting it.

28. **LORD SEWEL**: Are you referring to any particular number?

29. **IAN McCULLOCH**: The most convenient one for you to see is at Tab 5, where we have reproduced to a slightly larger scale on a slightly different orientation the

land concerned. That shows in red on your copy the triangle that has been referred to. It also shows two narrow strips of land and an access way to the land, which as far as we are concerned is the principal area at issue.

30. Then there is a strip of land over which ABP enjoys a right of way to gain access to that triangle. That is also shown on Sheet 3 of 14—the first sheet at Tab 3. The right of way is shown on that sheet; the legend to it is the third legend on the key to the plan.

31. Finally, for completeness, we have included Sheet 7, which includes the Killingholme branch railway, because ABP is also concerned with the effect on that railway of the order and refers to it in its petitions.

32. Again, just for the record, we have included at Tab 6 the relevant extracts from the book of reference to the order of these relevant plots of land. That was just intended to give you a general orientation without getting bogged down in the detail of each plot.

33. If I may, Sir, I would now like to turn to the statutory framework within which we are having to work in these proceedings and in respect of this order. It begins with the Planning Act 2008, which is shown at Tab 7 of the agreed bundle.

34. Section 127 of the 2008 Act provides that, in the case of land belonging to a statutory undertaker that was acquired for the purposes of that undertaker's undertaking, a development consent order may authorise the compulsory purchase of the land to the extent that the Secretary of State is satisfied that the land can be purchased without it having to be replaced, provided that the compulsory purchase will not cause serious detriment to the statutory undertaker's undertaking. If so satisfied, the Secretary of State must issue a certificate to that effect.

35. In making the order, the Secretary of State confirmed that he was so satisfied. On 18 December 2013, he issued three certificates to that effect.

36. By Section 128(2) of the Act, also at Tab 7, a development consent order is subject to special parliamentary procedure to the extent that it authorises the compulsory acquisition of land that is either (a) the property of a local authority, or (b) has been acquired by a statutory undertaker, other than a local authority, for the purposes of its statutory undertaking, provided that the person acquiring the land—in this case Able—is not one of the types of body described in Section 129 and if the condition in Section 128(3) is met.

37. Able is not such a body, so I do not think that we need concern ourselves with Section 129. The section is included there just for reference, and I think it is common to us all that "special parliamentary procedure" means the procedure prescribed by the Statutory Orders (Special Procedure) Act 1945. The condition in Section 128(3) is also met and I do not think we need to concern ourselves with that condition. Able accepts that in this case it is not a point at issue.

38. I would like then, Sir, to turn to the 1945 Act, which can be found at Tab 8. Since the order for application was submitted, the 1945 Act has been amended by the Growth and Infrastructure Act 2013, but not so as to have retroactive effect on this order. We have therefore reproduced at Tab 8 the relevant provisions of the 1945 Act as they stood prior to being amended.

39. By Section 3 of the 1945 Act, a petition against an order that is subject to special parliamentary procedure stands referred to the Chairmen for consideration whether it is proper to be received.

40. By Section 4 of the 1945 Act, a petition against the order, which the Chairmen certify as proper to be received shall, if the order is not annulled by the House, stand referred to a Joint Committee.

41. By Section 5 of the 1945 Act, the order shall indeed stand referred to the Joint Committee, and that provision says what may then be expected from the Joint Committee in the way that it considers the petitions before it.

42. Finally, in terms of the framework within which we are operating, I would like to refer to the standing orders relating to private business, and in particular to Standing Order 242 of the House of Commons and Standing Order 208 of the House of Lords, which I believe will be among your papers and so have not been included in the bundle.

43. I wish to draw your attention in particular to paragraph (3) of the standing order, which empowers the Chairmen to determine questions of locus standi and to decide as to the rights of petitioners to be heard upon their petition—I place some emphasis on those words—provided that that objection to their locus or such rights, and I place emphasis on the words "or such rights", has been made by memorial. The meaning, content and purpose of this particular provision are significant in the presentation of our case to you today, so I invite you to bear these words in mind.

44. If it would help for me to signpost to you in advance, as it were, where Able is coming from in the presentation of its case today, it can be summarised as follows.

45. First, in respect of the first two categories of land—that is, the triangle site and the right of way to it—ABP has failed to show that this land falls within the ambit of the relevant statutory provision. Therefore, whilst we do not deny that the order has become subject to special parliamentary procedure, its petitions are not proper to be received in respect of that land. If Able is found by you to be wrong on this, and you find that ABP has locus standi, its petitions should be restricted in their scope at the Joint Committee stage.

46. That is in relation to the first two categories of land. In the case of the third category—the foreshore—in which ABP holds a lease from the Crown in its capacity as

conservancy authority, ABP has not petitioned in that capacity. Its petitions are not, therefore, proper to be received in respect of that land.

47. In the case of the fourth category, ABP has no proprietorial interest in the railway. Its petitions are not, therefore, proper to be received in respect of that land.

48. In the case of the foreshore, there is no petition from the conservancy authority qua conservancy authority, and in the case of the railway, there is no petition from Network Rail.

49. Able therefore submits that the main focus of this hearing should concern the extent to which, if at all, ABP should be heard by the Joint Committee in relation to the triangle site and the right of way land.

50. The question that we wish to consider with you, Sir, is whether ABP's petitions concerning the triangle site and the right of way land are proper to be received at all. ABP claims to own the triangle site and its interests in the right of way land in its capacity as statutory harbour authority and port operator. This is challenged by Able.

51. In any event, the test for special parliamentary procedure is not how the land is being held now but whether it was acquired by the statutory undertaker for the purposes of its statutory undertaking—in other words, at the time of acquisition—and it is noteworthy that, under Section 128(1), the special parliamentary procedure is to apply to any property of a local authority but not to any land of a statutory undertaker.

52. In the case of a statutory undertaker, it applies only to land that has been acquired for the purposes of its undertaking—acknowledging that a statutory undertaker may have acquired land for purposes other than its statutory undertaking.

53. Able therefore submits that the onus of proof is on ABP to show that the triangle site and the right of way were acquired for the purposes of its statutory undertaking. If they were not acquired for the purposes of its statutory undertaking, we would say that Section

128 does not apply, or should not have applied, after all and that the petitions are not proper to be received.

54. ABP is the statutory successor to the British Transport Docks Board. The land in question was acquired by the docks board in 1967. The question, therefore, on a reasonable construction of Section 128, is whether the docks board acquired the land for the purposes of its undertaking. I do not think that is at issue between myself and Mr Irving.

55. The docks board was one of five boards created by the Transport Act 1962 upon the break-up of the British Transport Commission. The statutory undertaking of the docks board is defined in Section 9 of the 1962 Act by reference to its duty and powers. You will find the relevant extract of the 1962 Act at Tab 9 in the agreed bundle.

56. By subsection (1) of Section 9, it was the duty of the docks board to provide, to such extent as it thought expedient, port facilities at the harbours owned or managed by them.

57. Subsection (2) confers on the docks board the powers that it may exercise in the performance of its statutory duty.

58. Separately from this statutory duty in Section 9, the docks board is given the power by Section 11, which is in the same tab, to develop its land in such manner as it thinks fit and, in particular, to retain any part of its land that is not required for the purposes of its business and to develop it for use by others.

59. In short, the docks board was authorised to be a land owner and property developer alongside its statutory duty to provide port facilities. This is clear from the language of other parts of Section 11.

60. For example, subsection (4) begins with the words, "Where a Board", which includes the docks board, "propose under this section to develop any land for use otherwise than for the purposes of their business", and adds a proviso to subsection (4), with the

words, "Except as provided by the foregoing provisions of this subsection, a Board shall not have power to acquire land for purposes which are not related to any of the activities of the Board other than the development of land".

61. ABP acknowledges that the docks board had power to acquire land for general development, as opposed to port development. This is acknowledged in ABP's skeleton argument at paragraph 22, but ABP contends that that power is not applicable here.

62. Able contends, on the other hand, that the triangle site could well have been acquired pursuant to the power to acquire land for general development, and not pursuant to its statutory purposes.

63. ABP asserts at paragraph 9 of its petition of general objection and at paragraph 10 of its petition for amendment that the relevant land was acquired by the docks board for port and operational use on 12 March 1967. In Able's view, no sufficient evidence has yet been offered in support of this assertion.

64. In an attempt to produce some evidence to substantiate its claim, ABP has produced two items of evidence: a letter, to be found at Tab 11 of the bundle, dated 24 November 1965 from Dickinson, Davy & Markham, local land agents for the then owner, offering the land to the docks board because the land had been zoned for port development, and so a prospective buyer had withdrawn his interest in buying.

65. Able questions whether any weight can be given to this evidence. We have not been provided with the plan that was enclosed with the letter. Are we to assume that it refers to the triangle site? There is no explanation of what being "zoned for port development" meant in 1965—zoned by whom? While it may describe a planning status accorded to the land at the time, it does not follow that the land was purchased by the docks board for a Section 9 purpose, if I may call it that, as opposed to a Section 11 purpose.

66. The second item of evidence produced by ABP in support of its assertion is a copy of the conveyance of the land to the docks board dated 21 March 1967, at Tab 12. It was produced by ABP during proceedings on the order, but this merely recites, at recital (iv), that the docks board was acquiring the land "in exercise of the powers conferred upon them by the Transport Act 1962". It does not say whether it was buying the land pursuant to its duty under Section 9 or in pursuit of its power to develop land under Section 11. The conveyance is therefore inconclusive and fails to prove that the land was purchased for the purposes of the docks board's statutory undertaking.

67. Neither item of evidence is exactly compelling evidence of the fact which, we say, ABP must prove to you. ABP might, for example, have come up with some extracts from relevant board minutes at the time, but it has not done so.

68. ABP cites the docks board's power in Section 14(1)(c) of the 1962 Act, in the extract with which you have been provided, at Tab 9, to acquire land "for the purposes of their business".

69. The development of land under Section 11 was part of the business of the docks board, as well as its statutory undertaking under Section 9. Therefore the reference to the power to buy land for the purpose of its business does not really prove anything.

70. In the absence of any positive evidence, ABP refers to a customary practice of harbour and railway undertakers to bank land for future use. This is at ABP's skeleton argument at paragraph 24. Again, this proves nothing as to the docks board's intentions when it acquired the land in 1967.

71. ABP then refers to its equivalent powers under the Transport Act 1981, at Tab 10. It refers to its current plans to develop the site. To Able, its intentions in 2013, demonstrated by its recent application for a harbour revision order, are tenuous evidence, to say the least, of the docks board's intentions 47 years ago.

72. If one were to feel any sympathy for ABP in having to prove the intentions of the board 47 years ago, one might consider the question with the benefit of hindsight over the past 47 years. For the past 46 of those years, the land has been farmed—indeed, it is still being farmed today. No application was submitted during this period for a port facility of any kind until Able made its application under the Planning Act.

73. To Able, it seems that ABP is struggling to prove that the land comes within the terms of Section 128 and, if any inference is to be drawn from all these circumstances, it is that the docks board did not buy the land for its statutory undertaking. Otherwise, we might have seen some kind of port facility there, or at least an application for one in the 46 years preceding ABP's very recent application for a harbour revision order.

74. I have to acknowledge that by the issue of his certificates under Section 127, the Secretary of State expressed the view that the land had been acquired for the purposes of the docks board's undertaking.

75. Able does not challenge the validity per se of those certificates. It was properly within the remit of the Secretary of State to issue those certificates on the information available to him. As it happens, this was not really an issue at the examination stage. At that time, the parties were focused on the merits of the proposed scheme, not on the applicability of Section 127.

76. The Secretary of State appears to have inferred the position, which he has adopted; perhaps he was more concerned with the issue whether the statutory undertaking of ABP would suffer serious detriment, particularly in the light of ABP's nascent plans, evidenced by its application for a harbour revision order late last year. In any event, Able does not accept that the Secretary of State's certificate means that ABP inevitably has locus and that its petitions are proper to be received.

77. It is open in our view for you to review the matter, as a matter of locus, and to form a view that, in the light of the arguments before you today, the petitions are not proper to be received. This does not put you at odds with the Secretary of State's decision to issue the certificates and lay the order before Parliament.

78. We accept that that is what has occurred, but we say that, when it comes to determining locus, which is within your remit, it is open to you to form a different view on whether the land which is to give ABP locus falls within the terms of Section 128 in the light of the evidence today—or, should I say, the absence of the evidence today.

79. Able submits that this falls clearly within the scope of Section 3 of the 1945 Act and the discretion afforded to the Chairmen under standing orders to which I have already referred. Able therefore submits that, if ABP has failed to prove to you that the triangle and the right of way land fall within the ambit of Section 128, ABP should forfeit any right that it might otherwise have had for its petitions to be received.

80. I would like to move on from that argument, which could be said in a sense to be a preliminary argument to deal with the situation, in case you find against me on this issue and conclude that the land in question was acquired by the docks board for the purposes of its statutory undertaking.

81. I intend to proceed from now on that basis. First, I address you on the subject of the petitioner's capacity. The purpose of special parliamentary procedure nowadays is to give protection for certain categories of land that are subject to compulsory acquisition. This is recorded in Erskine May on page 932 in the 24th edition.

82. Furthermore, in the words of the two Chairmen in the case of the Rookery South (Resource Recovery Facility) Order 2011—and I quote from the special report of the Chairmen in that case, which is at Tab 15—special parliamentary procedure is "to provide

protection to the rights of those whose special land is subject to compulsory acquisition and no more".

83. The Chairmen went on, "If it is possible to construe the 1945 Act as applying to the Order only to the extent that it authorises the compulsory acquisition of special land (in line with the wording of the 2008 Act) we consider that it should be so construed. Although the wording of the 1945 Act is difficult to reconcile with such an approach, it is not impossible to do so". That is at paragraph 12 of the special report of the then two Chairmen.

84. They went on: "We therefore conclude that, although the entire Order is subject to special parliamentary procedure, it is only the provisions of the Order which relate to the compulsory acquisition of the special land which should be treated as relevant for the purposes of deciding which petitions are proper to be received". That is at paragraph 13 of the special report.

85. Able respectfully agrees with these statements. Therefore, only a person directly affected by the compulsory purchase of special land should have locus standi to petition against a special procedure order.

86. Moreover, it would make no sense of this finding if a petitioner were to claim locus by showing that it was directly affected by virtue of the compulsory purchase of its land and then to petition on some other ground or in some other capacity.

87. For example, if a local authority were to claim locus because some of its land was being taken but it then objected to an order as highway authority on grounds unrelated to its land ownership, it would drive a coach and horses through the principle that for a petition to have legitimacy it must relate to the compulsory purchase of the petitioner's land.

88. By the same token, Able submits that there is no justification for granting locus standi to ABP in respect of its concerns about crossing the Killingholme branch railway line.

89. We say that, to determine whether a petition is proper to be received, it is necessary to consider two things—whether the petitioner is directly affected by the compulsory purchase, usually because the petitioner is the owner of the land or of rights over it, as is the case here. That is not disputed.

90. Secondly, it is necessary to consider whether the petitioner has petitioned in that capacity, as landowner. Able submits that ABP has not petitioned in that capacity—or at least if it has done so it has done so only in respect of the triangle land and the right of way.

91. At paragraph 4 of each petition, ABP states that is petitioning in its capacity as harbour authority and port operator of Grimsby and Immingham. Able acknowledges that ABP goes on later in its petition to complain about the compulsory purchase of its land the acquisition of the right of way, because it owns that land. But it does so because it has petitioned in that capacity.

92. That situation is distinguishable from the case of the foreshore in which ABP owns this long-leasehold interest in its capacity as Humber conservancy authority. Although ABP did object to the order in both capacities, it has chosen not to petition this time in the capacity as conservancy authority.

93. If ABP has not petitioned as conservancy authority, it should not be heard on any objections it may have in that capacity. If ABP were allowed to piggyback one objection on to another in this way, it would make a mockery of the principle which the Chairmen pronounced in the Rookery South case. Able submits, therefore, that ABP has no locus in respect of the foreshore, because it has failed to petition in the correct capacity to do so.

94. ABP claims that it is justified in petitioning in respect of the foreshore because, as owner of the triangle land, it has riparian rights over the foreshore. Any such ground is based on its ownership of the triangle, not on its lease of the foreshore and if the triangle

land is compulsorily acquired, any incidental rights, such as rights of access to the water adjacent to it, are acquired with it.

95. That deals with our point on the capacity in which ABP has chosen to petition in this case. I turn now to ABP's argument that, once a petitioner has established its locus standi by virtue of its land being compulsorily acquired, it can object to any order provisions affecting it.

96. We say that, actually, a petition can be found to be properly received in part only. From ABP's perspective, it would render locus standi a peg on which the petitioner can subsequently hang almost anything. This is sometimes referred to as the "key to the door" interpretation. Once the door is unlocked, the petitioner, it is claimed, is free to roam the full extent of its petition in the room it then enters.

97. Able, on the contrary, contends that, when a petitioner is allowed locus standi on a particular ground, the petition can be found to be proper to be received only in respect of the issues in respect of which it was allowed locus. A limit can then be placed on the scope of the arguments that may be presented.

98. The secondary question, which I believe is on your minds and which is alluded to in your letter to us, is who decides this issue. Is it the Chairmen or is it the Joint Committee to which the order and the petitions are referred?

99. The arguments to the "key to the door" approach were canvassed before the two Chairmen at their hearing into the locus of the petition against the Rookery South order on 8 March 2012.

100. The arguments then presented in favour of this "key to the door" approach may be paraphrased as follows. First, on one construction of Section 3(3) of the 1945 Act, a petition that is proper to be received is proper to be received only in its entirety because the Planning Act did not seek to amend Section 3 of the 1945 Act expressly to allow parts

only of a petition to be admissible, in the way, for example, that the Transport and Works Act 1992 did in respect of orders for schemes of national importance. This argument is repeated by ABP at paragraph 12 of its skeleton argument.

101. Able's position is that, while it would have made things clearer if there had been some consequential revision of Section 3 of the 1945 Act to the effect that the Chairmen may certify that a petition is proper to be received in part only, this was not necessary because the Chairmen have always had such a power by virtue of the standing order to which I have referred.

102. Alternatively, if technically a petition is somehow indivisible as a single document, and can only be received as such, the Chairmen may circumscribe the terms upon which it will subsequently be considered.

103. I refer again to the words of the standing order: "The Chairmen shall have power to determine questions of locus standi and to decide as to the rights of petitioners to be heard upon such petitions, but only if objection to locus standi or such rights has been made" by a memorial. Of course, it has done. What do the words mean that I have emphasised if they do not allow the Chairmen to circumscribe the terms on which a petition may subsequently be heard?

104. Secondly, it was argued in support of the "key to the door" approach that the words "to the extent that" in Section 128(2) of the 2008 Act mean simply "if", thereby paving the way for the petitioner to object to the entire order, including the grant of development consent, which you might say was the principal purpose of the order, and reopening all or any issues that were considered at the examination stage of the order.

105. The Chairmen were not persuaded by this argument. At paragraph 12 of their special report, they conclude as much in so many words: "We find this argument unattractive".

106. They go on, later in the same passage, "We cannot accept that that"—i.e. a re-run of all the issues raised at the examination stage of the order process only if special land is involved—"can be what was intended by an Act whose purpose was to speed up and simplify the development consent process. The purpose of applying special parliamentary procedure is to provide protection to the rights of those whose special land is subject to compulsory acquisition and no more". That is the sentence I quoted earlier. "If it is possible to construe the 1945 Act as applying to the order only to the extent that it authorises the compulsory acquisition of special land (in line with the wording of the 2008 Act) we consider it should be so construed".

107. Finally, the Chairmen said, "Although the working of the 1945 Act is difficult to reconcile with such as an approach we are satisfied that it is not impossible to do so". Able respectfully agrees with these conclusions.

108. Thirdly, it was argued in support of the "key to the door", and is argued again here by ABP at paragraph 13 of its skeleton argument, by analogy or inference that, because a landowner whose land is subject to compulsory purchase by a Private Bill is entitled to lodge a petition against the principle of a Bill, the same applies in the case of a special procedure order. ABP, it is claimed, is therefore entitled by its petition of general objection, to complain of the order at large.

109. That argument, which is presented only by way of analogy, ignores the point that, in the case of a development consent order, the landowner has already had the opportunity to object to any aspect of the order affecting him.

110. The Chairmen concluded, at the end of paragraph 12 of their special report: "Although we have been referred by the petitioners to various precedents relating to decisions of our predecessors and Joint Committees in relation to compulsory purchase orders and Courts of Referees in relation to Private Bills we do not consider any of them to

be directly applicable to this case, the circumstances of which differ considerably". Able respectfully invites you to reach exactly the same conclusion in this case for the same reasons.

111. Fourthly, I believe that it has been argued that, as an order can only be laid before Parliament as a whole and can only be annulled by Parliament in its entirety, somehow the full scope of any petition against it must be considered by the Joint Committee.

112. This argument fails to distinguish between the two separate stages for an order under special parliamentary procedure: that under Section 4 of the 1945 Act, when an order may by resolution be annulled, and that under Section 5, when an order is being considered by a Joint Committee. The analogy is that a Bill cannot be amended at Second Reading—it can only be passed or fail—whereas any part of a Bill can be considered in Committee. In short, the then Chairmen concluded at paragraph 27 of their special report, "We do not agree with the 'key to the door' interpretation".

113. It did not quite finish there, because the Chairmen believed that there were some inconsistencies in the statutory framework. They decided that it should therefore be left to the prerogative of the Joint Committee to decide how widely or narrowly it should interpret its remit in relation to the petitions. In our view, and in our submission, they were not obliged to do that but chose to do that, which is understood within the context and in the circumstances that they were grappling with.

114. The Chairmen encouraged the Committee to be consistent at least with the terms of Section 128 of the 2008 Act by inviting the Committee to focus on the compulsory purchase of the special land. In other words, they encouraged the Committee to take a narrow interpretation.

115. The Chairmen also concluded that they did not have power to direct any committee to opt for one interpretation or another. That is an issue that we wish you to reconsider in this case.

116. With that last proposition—that you simply had no power to direct the committee—Able respectfully disagrees and invites you to reach a different conclusion this time. I am mindful of the letter that you wrote to us last night, but that is our position today: we invite you to reconsider the view that you have already expressed in paragraph 4 in your letter.

117. In Able's view, the Chairmen were perfectly entitled to restrict the scope of the subsequent hearing in the Rookery South case by the Joint Committee by determining that only those matters that justified the Chairmen to grant locus standi should be considered by the committee.

118. In support of this view, we refer again to Standing Orders 242 and 208, paragraph 3, and the words in them that I have already emphasised. I have already questioned what the words that have been emphasised mean if they do not authorise the Chairmen to circumscribe the Committee's remit.

119. Able surmises that if this standing order had been brought more directly to the attention of the Chairmen and given closer scrutiny at the Rookery South hearing, the Chairmen might well have taken a bolder view than they were inclined to do as to what they were authorised and capable to decide.

120. These words clearly authorise the Chairmen not only to determine the locus of the petitioner but to decide on the matters upon which the petitioner, if locus is granted, may be heard.

121. In considering the extent of the Chairmen's powers, it is also relevant to consider the respective merits of the cases before you today, not the merits of the scheme being promoted but the merits of the arguments before you today.

122. The Government have concluded as a matter of policy that special parliamentary procedure should no longer apply in instances such as this. They have concluded that the examination stage under the 2008 Act provides an adequate opportunity for a statutory undertaker to argue that its land should not be taken.

123. To give a statutory undertaker a second attempt to defeat the compulsory purchase is disproportionate and inconsistent with the aims of the development consent order regime, which is to strike a new balance between the right of statutory undertaker to object to proposals and the need for nationally significant infrastructure to progress in a timely manner.

124. As we all know, this has now been enacted in the Government and Infrastructure Act 2013 and so this order is the last to which the previous position applies. That Act has also clarified the position under Section 3 of the 1945 Act. This is shown at Tab 16—the amendments made to Section 3 by the 2013 Act.

125. However, Able's position is that this is no more than clarification of what was already possible, for the reasons that I have given. ABP's position is therefore outmoded and inconsistent with current policy. ABP is seeking to take advantage of what is now a historic situation.

126. Able submits that you should feel fortified by the current policy position in deciding that, in so far as the petition is proper to be received, its admissibility at the Joint Committee stage can and should be narrowly circumscribed so as to reflect the policy intention that lies behind Section 128.

127. If the Chairmen decide upon a restricted scope for any hearing before a Joint Committee, as we believe was very much their preference in the Rookery South case, it will achieve a number of things.

128. It will spare the Committee from having to consider these issues again—the ones that we are considering today—when they will already have been considered by yourselves at this hearing.

129. It will spare the parties the expense of preparing for a full hearing into the whole order when there is the possibility that the Committee will then rule that the admissibility of the petitions should be restricted to those elements that gave ABP locus standi.

130. It will ensure that ABP's case is restricted to issues affecting the capacity in which it has petitioned; and avoid a repetition of another potentially protracted process by ensuring that ABP's case is confined to the purpose for which special parliamentary procedure is intended.

131. It is not as if ABP would have done anything different during the examination stage if it had known that it would not be able to avail itself of special parliamentary procedure subsequently. It did not hold back on its case against the order, but submitted a fully fledged opposition to the order as a whole.

132. If the petition is to be limited just to the compulsory acquisition of land owned by ABP as the harbour authority, we submit that the following paragraphs should be excised, or regarded as inadmissible from the petitions of ABP. Rather than reading them out and everyone trying to make a note of them, we have produced a separate note and additional document for you, which sets out the paragraphs of ABP's petitions that Able contends should not be admissible if locus standi is allowed.

133. If you are minded to report to the Joint Committee as to their remit, this in our view should influence you and form the substance of any such report, whether that be a

decision by you or, for that matter, a recommendation by you. These are issues for the Chairmen to determine, because the petitions cannot otherwise be proper to be received.

134. Alternatively, if the Chairmen decide to leave to be dealt with by the subsequent Joint Committee the question of the extent to which a petition should be heard, the Chairmen should make clear and firm recommendations as to the scope of the hearing by the Joint Committee.

135. You are aware that we have raised issues about the status of the respective petitions of ABP—the petition of general objection and the petition for amendment. You invited me to address you on that subject in the letter that we received from you last night. I turn to that now.

136. **LORD SEWEL**: Before you do that, can I just ask one question? There was a subtle change of vocabulary as you developed your argument towards the end. You had previously relied on quoting statute and legislation, but you then referred to the current policy position. Is there anything to be made of that?

137. **IAN MCCULLOCH**: I am not suggesting that ABP is not entitled to be here today; of course, it is legitimate in law for it to seek to exploit what opportunities are available to it in the law applicable at the relevant time. That is not part of our case.

138. What we are saying is that in doing so, in availing themselves of a situation that no longer applies on policy grounds, this attempt to reopen the whole issue and the hearing by a further Joint Committee has no merit to it. That is a legitimate factor for you to take into consideration when you decide how far you go in your decision and recommendations.

139. Able's final point relates to the status of ABP's two petitions—the petition of general objection and the petition for amendment. This is, as I say, to address you on point 2 of your letter of last night. If the Chairmen find that ABP has locus standi in some form or

other, Able wishes to draw attention to the artificiality of ABP lodging two petitions rather than one.

140. Taking first the petition for amendment, it seeks certain amendments to the order at paragraphs 30, 37 and 40. If one then takes the petition of general objection, it states at paragraph 35 that, if the amendments are not made, ABP prays that the order be not approved at all.

141. ABP's reasoning for the amendments and its reasoning for the order not to be made if the amendments are not made are identical. In other words, the petition of general objection is a mere make-weight which adds nothing to the petition for amendment.

142. Of course, if the amendments are made, ABP's concerns would be completely addressed. This is hardly surprisingly because the amendments are, of course, wrecking amendments. The amendments proposed are not merely to accommodate ABP; they are designed to thwart Able's scheme.

143. It could be argued in these circumstances—and perhaps more conventionally it might be argued—that the petition for amendment is in truth a petition of general objection, which is merely dressed up to look like a petition for amendment only. In Able's view, the better argument is that the petition of general objection contains no argument that is not contained in its petition for amendment.

144. Therefore the petition of general objection serves no purpose. It adds nothing. It is not therefore proper to be received on any ground that is not raised in the petition for amendment. As the petitions contain the same arguments, they can be treated as one.

145. If the petition of general objection is accepted without limitation, it will be used by ABP as a key to a door to a much larger room, which again will undermine the policy intention of SPP.

146. ABP claims, at paragraph 32 of its skeleton argument, that it has shown respect for the underlying policy intention of SPP. Able says that it would have shown more respect if it had submitted a petition for amendment only.

147. I conclude with a summary of the points that I have sought to present to you today. As a preliminary issue, ABP has failed to prove that the triangle land and its interest in the right-of-way land were acquired for the purposes of its statutory predecessor's undertaking. Therefore, neither petition is proper to be received.

148. The Chairmen have power to determine this because the Chairmen have power to determine all questions of locus standi; and locus standi should not be granted in respect of a petition that fails the test in Section 128 of the 2008 Act.

149. The purpose of SPP nowadays is to provide protection to the rights of those whose special land is subject to compulsory acquisition and no more. Therefore, only a person directly affected by the compulsory purchase of that land should have locus standi to petition against a special procedure order and only if the petitioner petitions in that capacity.

150. To determine whether a petition is proper to be received, it is therefore necessary to consider whether the petitioner is directly affected by the compulsory purchase and whether the petitioner has petitioned in that capacity.

151. Both these tests must be passed. If either petition is considered to be proper to be received at all, it is proper to be received in part only, based on the reasons for the petitioner's locus standi being allowed. A petition can be found to be proper to be received in part only.

152. Alternatively, even if a petition is found to be indivisible as a petition per se, it can be found to be inadmissible in part only when it comes to the subsequent hearing of the Joint Committee. The extent of admissibility of the petitions can also be left to the Joint Committee to determine, but it does not have to be dealt with in that way.

153. If the Chairmen leave the issue to the Joint Committee to decide, they should make clear and firm recommendations as to the proper, limited scope of the Committee proceedings in the light of their findings on locus standi and their reasons for allowing locus.

154. The "key to the door" interpretation is largely based on analogies and inferences rather than precedent. At best, it is unpersuasive; it did not persuade the Chairmen in the Rookery South case.

155. The alternative interpretation is more compelling in the light of the discretion given to the Chairmen under the standing orders relating to special procedure orders, regardless of the terms of Section 3 of the 1945 Act. It avoids a nonsense being made of the underlying purpose of SPP in the case of special land. There is no merit in allowing the petitions to be heard, as it would be inconsistent with current policy. Today, special parliamentary procedure would not apply to the order.

156. If the Chairmen decide that the petitions are not proper to be received in whole or in part or that their admissibility should be restricted, the petitioner is not prejudiced in that the petitioner would not have acted differently at any earlier stage.

157. The petition of general objection and the petition for amendment are, in substance, the same. The petition of general objection is either not proper to be received as a petition of general objection or, at least, other than on the grounds it contains its argument on locus.

158. Therefore, if it is proper to be received at all, it can be ignored because it adds nothing to the petition for amendment. Therefore, we say that neither petition is proper to be received; or, if only the petition for amendment is proper to be received, it should be received only in part or it should be treated as admissible only in part; or, for that matter, if both petitions are held to be proper to be received, they should be received only in part or should be treated as admissible only in part, and on the same grounds for both.

159. **LINDSAY HOYLE MP**: Mr McCulloch, I wonder whether you are really disappointed that you have won the argument already—you have won the CPO and the politics should be done with, but you are here today.

160. Do you believe that it is right that you are here today, or do you actually feel that you have won the arguments already and this is just bitterness by ABP that has dragged you here today, because it has not accepted an overwhelming decision that has already been taken? It is just looking for a loophole—and this is it.

161. **IAN MCCULLOCH**: I cannot express a personal opinion on such a matter, can I? I represent my client. Able is no doubt disappointed that ABP has not accepted the outcome of the DCO proceedings and has found it necessary to delay its authorised scheme by this means, which is a sort of procedural opportunity available to it—we do not deny that, but we say that it is no longer consistent with current practice.

162. Therefore, yes to that extent, but without looking to Mr Stephenson behind me to strengthen the language in which I reply to your question, there is a considerable degree of disappointment on Able's part in this regard.

163. **LORD SEWEL**: You said at some stage, "We are where we are". It is a procedure, although it might not be one that is captured by current practice, but it is where we are.

164. **IAN MCCULLOCH**: Yes, I cannot deny that. If I were to do so, I would be arguing that this order should somehow be withdrawn—and that comes back to the issue of competency which you thought that I was seeking to argue and inferred from the skeleton argument that I was seeking to argue.

165. I cannot really believe that it is the right thing to take you that far in that direction to say that the order should just be withdrawn, but I can argue—and do, on behalf of Able—that the special procedure order should be allowed to continue unopposed. It is

subject to special parliamentary procedure; we accept that—it has been laid before Parliament. But that does not mean to say that petitions have to be heard by a Joint Committee. If you decide that they are not proper to be received and that the petitions have no locus on all or any of the points, it can proceed unopposed rather than opposed, which is what Able would wish to see happen.

166. **NICHOLAS BEACH**: I would just like to probe, if I may, the preliminary issue that you raised relating to the nature of the land, whether it had been required for the purposes of the statutory undertaking, and the effect of that issue in relation to these proceedings.

167. I understand your position to be that the land is not properly said to be acquired for the purposes of the statutory undertaking, and therefore that, in your words, we would say that Section 128 does not apply.

168. I confess that I find it difficult to distinguish between saying that Section 128 does not apply and not saying, as you suggest that you do not, that the order is not lawfully being made, because the only reason why the order is being made is because Section 128 applies. I would therefore quite like you, if you do not mind, to address that point.

169. My subsidiary point is that the way you phrase the argument is that it becomes an issue of locus, in the sense that it is not open to you to challenge the validity of the order, but you say that the issue is none the less relevant to locus standi. I would be grateful to hear more on that.

170. The issue on locus standi, as I understand it, is whether or not the interests of property of the petitioner have been specially or directly affected by the order. It is not entirely clear to me how the answer to that question is any different by virtue of whether or not it was acquired for the purposes of the statutory undertaking, if one accepts that you cannot challenge the validity of the order.

171. **IAN MCCULLOCH**: Can I have a brief word with my colleague? Mr Walker just wanted me to make clear what we are saying.

172. One reason why we accept that the order is inevitably subject to SPP is because there is other land of statutory undertakers, which is to be compulsorily acquired, which is the subject of the order—for example, the land of Network Rail, which has chosen not to petition. So it is not part of our case that but for this we would not be here. The order would have been laid before Parliament. What our case surrounds is the question of the legitimacy of the petition that has been made against it.

173. Referring to Section 128, we are not able to prove ourselves the purposes for which that land was acquired. We say that if ABP claims legitimacy for its petition, it should prove that it falls within the terms of Section 128: the onus of proof is on ABP.

174. We have challenged ABP on this and it has not really risen to the challenge. For that reason, we say that the petition is not proper to be received. This raises an intriguing question of whether a petition being proper to be received or not is precisely the same as locus standi to be heard.

175. I am somewhat ambivalent about that. When I thought about it, I readily admit that I went around in a bit of a circle. I think that your question may have been going around a similar circle. It can be described as dancing on the head of a pin.

176. In essence, this process is about whether this petition should be heard or not. It has the language of "proper to be received". It has the language of "locus standi". Whether those two concepts are exactly the same or in some intellectual way slightly different from each other I do not think matters. Our position is that these petitions should not be heard because ABP has failed to demonstrate to you that the test in Section 128 has been satisfied.

177. As I said in my submission, we acknowledge that the Secretary of State formed a view on this, because he issued a certificate to that effect in respect of ABP's land, as well as

Network Rail's land. However, it was not argued at the examination stage, no evidence was presented to him and the issue was not really challenged at any earlier stage.

178. It is therefore completely understandable that the Secretary of State should, on the material before him, have concluded that this land belonged to a statutory undertaker and he therefore at least inferred, in the absence of any evidence to the contrary, that it was acquired for the purpose of its undertaking. However, we say that that is step one, and we are now at step two where the Secretary of State has formed that view and laid the order before Parliament.

179. The question now for you is whether these petitions are proper to be received. We say that the onus now falls on ABP to prove to you that this really meets the test in Section 128. In other words, the Secretary of State's certificate is not conclusive on this matter. It was sufficient for him to lay the order before Parliament, but it was not conclusive on the matter because it is now for you, as a matter of whether a petition is proper to be received or not, or as a matter of locus standi, or either or both, to determine whether the test in Section 128 has been passed or not.

180. Now that we have laid the challenge at the door of ABP, we say that they have not successfully risen to that challenge and therefore the petition should not be heard.

181. **LORD SEWEL**: Why is it necessary for them to prove that to us? Why can we not assume, as the Secretary of State assumed?

182. **IAN MCCULLOCH**: Well, because if we make the challenge that they have failed to comply with the terms of the relevant provision in the Act, the onus is on ABP to prove that they have done.

183. **LORD SEWEL**: Okay. I think we need some time on our own at the moment. Could I ask you to enjoy the Corridor for a few moments?

Sitting suspended.

184. **LORD SEWEL**: We have decided that we wish to hear Mr Irving's arguments. What I will say next depends upon Mr Irving's answer to this question: how long do you think that it would take you, Mr Irving?

185. **PAUL IRVING**: Thank you. We actually put in quite a full written submission; it was rather more than just a skeleton. If it is acceptable to you, I intend not to go through every word of that in my submission but to summarise the key points. On that basis, I thought it would probably take about half an hour.

186. **LORD SEWEL**: We have other things happening, as you can imagine. We will reconvene tomorrow at 10.30 am. Thank you very much.

Public session adjourned at 4.06 pm.