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Case No: CO/1116/2007

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 July 2008

Before:

MR JUSTICE KEITH

Between :

Associated British Ports

Claimant

- and -

- (1) Hampshire County Council
(2) New Forest National Park Authority
(3) Portsmouth City Council
(4) Southampton City Council
(5) Hampshire Minerals and Waste Authority

Defendants

Mr Keith Lindblom QC and Mr Gregory Jones (instructed by Taylor Wessing LLP) for the
Claimant

Mr Neil Cameron (instructed by Head of Corporate Legal Services, Hampshire County
Council) for the First, Second and Third Defendants

Hearing dates: 20-22 May 2008

Approved Judgment

Mr Justice Keith:

Introduction

1. The Planning and Compulsory Purchase Act 2004 (“the 2004 Act”) reformed strategic planning, both at the regional and local level. Among other things, it created a new framework for local planning documents. One such document is the core strategy. In this case, parts of a core strategy adopted by a group of local planning authorities are said to have failed the test of soundness laid down by the 2004 Act. The particular criticism is that the core strategy did not earmark a site near the docks at Southampton as a possible location for the berthing of vessels bringing crushed rock to the south coast by sea.

The relevant facts

2. The claimant. The claimant, Associated British Ports (“ABP”), used to be known as the British Transport Docks Board. It was originally in public ownership, but it has recently been acquired by a consortium of private investors. It is a statutory undertaker within the meaning of section 262(1) of the Town and Country Planning Act 1990, which means that it is authorised to carry on a dock or harbour undertaking. In that capacity, it owns and operates the port of Southampton, which is on the north eastern bank of the River Test in Hampshire. It is also the harbour authority for a more extensive area including Southampton Water and the navigable estuaries of the Rivers Test and Itchen. In that capacity, it is responsible for the regulation of shipping and the safety of navigation in the area under the Pilotage Act 1987.
3. The port of Southampton. The port of Southampton is the UK’s leading port for the handling of vehicles, the UK’s second largest container port, the UK’s principal port for cruise liners and a major port for the handling of cargo. Its growth and economic success is due primarily to its proximity to the main international shipping lanes, to which it is connected by water of sufficient depth to accommodate large vessels. Its commercial attraction is strengthened by its excellent road and rail links to the rest of the UK and the possible availability of land for expansion.
4. Dibden Bay. The need to expand the port of Southampton was foreseen a long time ago. In 1967, the British Transport Docks Board purchased land, which was then only partly reclaimed from the sea, on the opposite bank of the River Test. The intention was to create an area between Marchwood and Hythe into which the port of Southampton could expand well in advance of the need to use it. This land is known as Dibden Bay. With more land subsequently reclaimed from the sea, it comprises about 343 hectares, and has a frontage onto the River Test of about 2.1 kilometres. It is within the New Forest District, but outside the boundary of the New Forest National Park, having been specifically removed from inclusion within the National Park by the Secretary of State. In 2001 and 2002, a public inquiry was held into ABP’s application to construct a new terminal on the site, but in April 2004 planning permission was refused. However, alternative proposals are likely to be submitted since Dibden Bay is acknowledged to be the only site within the area on which the port of Southampton can expand. Indeed, it is one of the very few sites in the UK which are suitably located and able to handle the largest deep-sea container ships and other large vessels and their cargo.

5. *The local need for minerals.* Like other parts of the country, Hampshire requires an adequate supply of minerals. Aggregate is an essential component of that supply. In recent years, recycled material from construction and demolition sites has emerged as an important source for the supply of aggregate. But the more traditional form of aggregate, consisting of sand, gravel and crushed rock, is still required. Some sand and gravel is obtained locally, though parts of the county rely on marine-dredged gravel, which is landed at a number of wharves in and around Portsmouth and Southampton. However, Hampshire does not have its own source for crushed rock. The crushed rock it gets is limestone from the Mendips which is imported into Hampshire by rail, and granite from Scotland which is landed at the docks within the port of Southampton. Although small amounts of crushed rock are imported into one or two other wharves in and around Portsmouth and Southampton, they are not really suitable for this trade since (a) they do not permit deep-draught vessels which are conventionally used to transport crushed rock (see [36] below) to berth them, and (b) unlike the docks within the port of Southampton, they do not have rail connections, making it necessary for crushed rock landed there to be transported from there by road.
6. For some years ABP has been concerned that growing pressure on the limited space within the docks at Southampton would affect the landing of crushed rock there. That pressure resulted in the importation of crushed rock into the docks ceasing in 2006. That pressure comes from three sources. The first is that under section 33 of the Harbour Docks and Piers Clauses Act 1847 ABP is obliged to keep the harbour “open to all persons for the shipping and unshipping of goods and the embarking and landing of passengers”. The practical effect of that is that ABP must allow those who are willing and able to pay the relevant dues to load and unload vessels at the docks if the capacity of the docks permits it. The second is that commercial constraints restrict what ABP can do. For example, some of its customers may have long term agreements to use the docks, and that affects the docks’ capacity to take on new business. Moreover, the trade in crushed rock is a relatively low value trade, and it makes commercial sense for priority to be given to the much higher value trades which need the space. The third relates to its physical limitations. The depth of the water at some parts of the docks limits the type of vessels which can berth there, and appropriate plant and machinery is not available in all parts of the docks.
7. The possibility of the docks not being able to cater for the landing of Hampshire’s – indeed the south of England’s – requirements for crushed rock led ABP to consider a small part of Dibden Bay as an alternative site, even though planning permission for the construction of a new terminal on the whole of the site at Dibden Bay had been refused. It therefore sought to have a site of about 8 hectares at Dibden Bay safeguarded in the appropriate core strategy as a wharf for the landing of crushed rock. That did not mean that ABP tried to get the core strategy to *allocate* a part of Dibden Bay for that purpose. It merely sought to get the core strategy to recognise that a part of Dibden Bay could be used for that purpose, so that a final decision later on about the grant of planning permission for that purpose will not have been jeopardised by inappropriate development either on the site or in the vicinity in the meantime. However, before looking at the core strategy, and the legislative framework within which it was produced, it is necessary to identify national, regional and local policy intended to ensure an adequate supply of minerals.

Minerals policy

8. National policy. In November 2006, the Department for Communities and Local Government published “Minerals Policy Statement 1: Planning and Materials”. It is known as MPS1. It stated (para. 9) that one of the Government’s objectives was “to promote the sustainable transport of minerals by rail, sea and inland waterways”. In order to achieve that objective, among others, mineral planning authorities were required (para. 10) to carry out their functions in relation to “the preparation of plans ... and development control” in accordance with a series of national policies for minerals planning. One such policy identified in MPS1 was safeguarding (para. 13). That policy was (so far as is relevant to the present case) to

- “safeguard ... potential ... wharfage and associated storage, handling and processing facilities for the bulk transport by rail, sea and inland waterways of minerals, particularly coal and aggregates ... ;
- identify future sites to accommodate [these] facilities and reflect any such allocations in ... [local development documents] of district councils in two-tier planning areas. District councils in these areas should not normally permit other development proposals near such safeguarded sites where they might constrain future use for these purposes ...”

Another policy identified in MPS1 was bulk transportation (para. 16). The policy was to

- “seek to promote and enable the bulk movement of minerals by rail, sea or inland waterways to reduce the environmental impact of their transportation;
- promote facilities at ports and rail links that have good communications inland, so that bulk materials can be landed by sea and distributed from ports, as far as is practicable, by rail or water ...”

9. Regional policy. Chapter 11 of the Regional Planning Guidance for the South East, known as RPG9, set out minerals strategy for the region. A revised version was published in 2006. Para. 11.61 said that “sites ... for wharves and depots to handle imports of minerals or the distribution of raw materials and processed products ... should be safeguarded from other inappropriate development”. It added that “[m]ineral planning authorities should undertake assessments of the need for wharves and depots and, to assist the identification of those sites to be safeguarded, the following strategic criteria should be used:

- capacity to supply imported material to the region;
- proximity to market;
- value of the specialist infrastructure; and

- adequacy of existing or potential environmental safeguards.”

This policy was incorporated into Policy M5: Safeguarding of Wharves, Rail Depots and Mineral Resources, which provides (so far as is material):

“Mineral planning authorities should assess the need for wharf and rail facilities for the handling and distribution of imported materials and processed materials, and identify strategic sites for safeguarding in their mineral development frameworks. These strategic facilities should be safeguarded from other inappropriate development in local development documents.”

10. Chapter 9 of RPG9 set out the transport strategy for the region. Policy T7 identified Southampton as one of the ports whose role was to be maintained and enhanced through policies and proposals for infrastructure to be included in development plans. Policy T7 (as well as Policy M5) was later incorporated into the draft South East Plan, which will replace RPG9 in due course, and which is currently before the Secretary of State for consideration. However, since the draft was published, both the authors of the draft (the South East of England Regional Assembly) and the panel which considered it recommended that it be amended to identify Southampton as the first of the “gateway ports”, which would be required to give priority to the preparation of a master plan “as a means of identifying future landside infrastructure requirements”. ABP has already started on that exercise in relation to the port of Southampton, and the plan will inevitably focus on the safeguarding of Dibden Bay for possible expansion of the port.
11. Local policy. Local policy relating to the development of the port of Southampton and its possible expansion into Dibden Bay is to be found in three documents: the Hampshire County Structure Plan 1996-2011 (Review) (“the Structure Plan”), the first alteration to the New Forest District Local Plan (“the District Plan”), and the Hampshire, Portsmouth & Southampton Minerals and Waste Local Plan (“the Local Plan”).
12. The Structure Plan was adopted in 2000. Following the enactment of the 2004 Act, the policies in the Structure Plan were saved for three years until the end of September 2007, by when it was envisaged that the emerging South East Plan would have been adopted. Since it had not been adopted by then, the Secretary of State provided a list of the policies which would be saved in the meantime. Among those policies was Policy EC6, which related specifically to Dibden Bay. Para. 167 of the Structure Plan reads as follows:

“Dibden Bay is an area of former intertidal saltmarsh reclaimed over many decades by the deposit of dredged material from early development of the Port of Southampton. The site has, for many years, been identified as a possible site for port activities. Planning policies have, in one way or another, safeguarded the site from development pending a decision on the need to develop the site and it is identified in the current local plan as a Strategic Gap. However, the emergence of commercial arguments for port development on the site has

coincided with the designation of the foreshore as a Special Protection Area and the growing awareness of the potential impact of all forms of development on the New Forest.”

13. In the light of that introduction to the policy, Policy EC6 provided as follows:

“Port development requiring access to deep water may be permitted at Dibden Bay provided that it can be demonstrated that the need for the development outweighs its impact on:

- (i) areas of importance to nature conservation;
- (ii) the conservation, landscape or ecology of the New Forest; or
- (iii) local communities; and
 - (a) sufficient provision is made to offset the impact, including replacement or substitution of habitats or features lost and conservation of ecological networks; and
 - (b) that the required access can be achieved without serious disturbance to the countryside, coastal areas or communities affected and that maximum use is made of rail and sea routes; and that appropriate contributions are secured to fund infrastructure and services required as a result of the development.”

The Structure Plan concluded that Policy EC6 “establishes the criteria which will be used to determine any such proposal which comes forward”.

14. The *District Plan* was the subject of a public inquiry to consider objections to it. In relation to Dibden Bay, the inspector recommended that the text of the District Plan should be amended to show that “[p]ort development requiring access to deep water may be permitted at Dibden Bay ... provided that it complies with the requirements of Policy EC6 of the Structure Plan”, and provided that the developer completes such assessments and takes such measures as are “necessary to ensure that the development is acceptable in land use planning and transport terms and in the context of local plan objectives”. This recommendation was adopted by the New Forest District Council.

15. The inspector also recommended that the District Plan should reflect the circumstances in which development in the strategic gap between Marchwood and Hythe would be permitted. The wording which he recommended was:

“If port proposals on this site meet the requirements of Structure Plan Review Policy EC6, are granted planning permission and are carried out, the need for the Strategic Gap between Marchwood and Hythe will be overridden.”

However, when the District Plan was adopted, this recommendation was watered down. The sentence now read:

“If port proposals on this site meet the requirements of Structure Plan Review Policy EC6, are granted planning permission and are carried out, then that part of the Strategic Gap would be overridden, *but the amount of land taken for development should be minimised to retain as much of the Strategic Gap as possible.*” (Emphasis supplied)

ABP challenged the adopted plan by a claim to the High Court, and before that claim could be heard, the District Council agreed to withdraw the emphasised part of the sentence.

16. Whereas the Structure Plan and the District Plan looked at port development in Dibden Bay in general terms, the *Local Plan* concentrated on the importance or otherwise of Dibden Bay in the context of the movement of minerals and waste. It was adopted by the first defendant, Hampshire County Council (“HCC”), the third defendant, Portsmouth City Council (“PCC”), and the fourth defendant, Southampton City Council (“SCC”), in December 1998. In its original form, it had proposed that a site *within* the docks at Southampton be safeguarded as a deep-water aggregate wharf. ABP objected to that proposal, and in the examination in public which considered its objection, the inspector acknowledged that “the development [of a deep-water aggregate wharf could not] be accommodated elsewhere in the port”, and said that it was “essential that [Dibden Bay] be safeguarded” for this purpose. He recommended that the Local Plan be modified to show land at Dibden Bay as a preferred site for the importation of aggregate by sea.
17. In the event, the Local Plan which was finally adopted acknowledged that if a suitable site could not be safeguarded within the docks, the development of a deep-water aggregate wharf at Dibden Bay might be permitted. It made that comment in the context of a discussion about *new* sites for facilities for the landing of importation of aggregate by sea or rail. At para. 5.59, it stated:

“The only site that has been suggested to date by prospective developers as being physically suitable for high capacity new deep-water wharfage for the large scale landing of sea-borne aggregates is at Dibden Bay on the western side of the River Test. In the event of any proposal for development at Dibden Bay which does not include provision of an aggregates wharf being put forward, an appropriate area of land (approximately 8 ha) will be safeguarded for a deep-water aggregates wharf. In the event that no other port development at Dibden Bay takes place, a high capacity deep-water aggregates wharf may be permitted provided that:

- (a) it can be demonstrated to the satisfaction of the local planning authorities that the need for the development outweighs its impact on:
 - (i) areas of importance to nature conservation;
 - (ii) the conservation, landscape or ecology of the New Forest;

- (iii) local communities;
 - (b) sufficient provision is made to offset the impact, including replacement or substitution of the habitats or features lost and conservation of ecological networks; and
 - (c) the required access can be achieved without serious disturbance to the countryside, coastal areas or communities affected.”
- 18. This statement of principle was reflected in four policies which the Local Plan adopted. Policies 22 and 23 identified the criteria which proposals for new or improved wharves would be required to meet. Policy 24 identified nature conservation and amenity constraints on future developments at a number of *existing* wharves which it identified. Policy 21 is the only one of the four policies saved by the Secretary of State beyond the end of September 2007. It identified the actual wharves which the mineral planning authorities would seek to safeguard for the landing of sea-borne aggregate. Apart from identifying a number of *existing* wharves, Policy 21 merely said that the mineral planning authorities would seek to safeguard “any other sites where permission is granted for the establishment of an aggregates wharf ... or where such use is established without the need for planning permission”. Although Dibden Bay was not expressly referred to in Policy 21, the policy in relation to the establishment of an aggregate wharf there was apparent from the text in para. 5.59.
- 19. This accords with what the inspector said in his report following the Dibden Bay inquiry. He referred to the Local Plan having provided for about 8 hectares of land at Dibden Bay to be safeguarded for deep-water aggregate wharfage, and having indicated that the development of an aggregate wharf may be permitted there, subject to similar criteria to those set out in Policy EC6 of the Structure Plan being met, he noted that the County and District Councils had proposed that the Harbour Revision Order should be modified to include a requirement that part of the Dibden Terminal should be retained for the provision of an aggregate wharf. He expressed the view that that proposal was consistent with the objectives of the Local Plan. “Without such a modification”, he said, “there is a danger that a unique opportunity to provide a deep-water aggregates wharf at Dibden Bay might be lost.”

Core strategies

- 20. Overarching principles. Regs. 6(1) and 6(3) of the Town and Country Planning (Local Development) (England) Regulations 2004 (SI 2204/2004) (“the 2004 Regulations”) identify what a core strategy is. It is “any document containing statements of –
 - (i) the development and use of land which the local planning authority wish to encourage during any specified period;
 - (ii) objectives relating to design and access which the local planning authority wish to encourage during any specified period;

- (iii) any environmental, social and economic objectives which are relevant to the attainment of development and use of land mentioned in paragraph (i);
- (iv) the authority's general policies in respect of the matters referred to in paragraphs (i) to (iii) ...”

Such a document is one of the development plan documents which make up the local development documents specified in the local development scheme. Since a core strategy is a local development document, the local planning authority, when preparing the core strategy, must have regard, among other things, to (a) national policies and advice contained in guidance issued by the Secretary of State, (b) the regional spatial strategy for the region, and (c) any other local development document which has been adopted by the authority: see section 19(2) of the 2004 Act. In addition, section 24(1)(a) of the 2004 Act requires the core strategy to be in general conformity with the regional spatial strategy. That is why the national, regional and local policies set out in [8]-[19] above are relevant.

21. The core strategy has an important role to play in the new framework for planning documents. That role was described in Planning Policy Statement 12: Local Development Frameworks, which was issued by the Office of the Deputy Prime Minister in 2004 to coincide with the enactment of the 2004 Act. It is known as PPS 12. Thus, para. 2.9 of PPS 12 reads:

“The core strategy should set out the key elements of the planning framework for the area. It should be comprised of a spatial vision and strategic objectives for the area; a spatial strategy; core policies; and a monitoring and implementation framework with clear objectives for achieving delivery. It must be kept up-to-date and, once adopted, all other development plan documents must be in conformity with it ...”

22. Two features of the core strategy are particularly relevant for present purposes. First, it is intended to operate for a significant period of time. Para. 2.10 of PPS 12 says that it “should set out the *long-term* spatial vision for the authority's area and the strategic policies required to deliver that vision.” (Emphasis supplied). That is reinforced by para. 2.14, which reads:

“The local planning authority should ensure that policies and proposals in the core strategy provide certainty for the future. The time horizon of the core strategy should be for a period of *at least 10 years* from the date of adoption. However the core strategy should aim to look ahead to any longer-term time horizon which is set out in the relevant regional spatial strategy. The core strategy should be kept under review and the horizon rolled forward in subsequent reviews of the document.” (Emphasis supplied)

Secondly, the core strategy was required to “set out broad locations for delivering the ... strategic development needs” (para. 2.10), but it “shall not identify individual sites” (para. 2.12). That is reinforced by para. 2.16, which reads:

“Policies relating to the delivery of site specific allocations, such as critical access requirements or broad design principles which may be sought, must be set out in a development plan document. They may be in the site allocation(s) development plan document(s), in an area action plan or in a separate development plan document. They should not form part of the core strategy ...”

23. The strategic nature of the core strategy means that that is where “tough decisions” need to be made. That was what the Planning Inspectorate said in a leaflet issued in October 2006 setting out the Inspectorate’s early experiences of examining development plan documents. It went on: “... strategic decisions cannot be left to subsequent [development plan documents]. If strategic decisions are devolved to subsequent [development plan documents], Inspectors will find it difficult to test the relationship between the [development plan documents].” The Inspectorate expanded on that in a document issued in June 2007 identifying the lessons which had been learned from examining those development plan documents which had been produced by then. Para. 5.1 of the document reads:

“[Local planning authorities] should be clear at the outset that the Core Strategy is where real and probably tough decisions have to be made. It is erroneous to presume that important strategic decisions can be devolved to subsequent [development plan documents], where it becomes more difficult to determine the effects at the strategic level. The Core Strategy should provide a clear guide for the preparation of the subsequent [development plan documents] or provide a base against which those [development plan documents] can be assessed. A Core Strategy must provide a strategic framework for lower level plans to target the delivery of issues and objectives of the Core Strategy through subsequent [development plan documents] ...”

An example of how that was intended to work, which serves as a useful illustration for present purposes, was set out in para. 5.2 of the document, which reads:

“Taking housing as an example, the Core Strategy must not leave the question of the general allocation of the level of housing to settlements open on the grounds that this can only be done once housing sites have been identified in a housing or Site Allocation [development plan document]. The strategy should be driving the allocation of sites not the other way around. In this way, where it is clear that there are certain sites, key to the delivery of the overall strategy, whose location is not open to extensive debate (either because of existence of barriers to growth elsewhere or because of overwhelming positive qualities of the site), then it is entirely appropriate for such sites to be mentioned in the Core Strategy.”

24. *The application of these principles to minerals.* The effect of sections 16(1)-(3) of the 2004 Act was to equate a minerals and waste development scheme with a local

development scheme. Accordingly, the key features of a core strategy for a local development scheme apply to a core strategy for minerals in much the same way. Indeed, para. 2.11(i) of PPS 12 dealt specifically with the core strategy for minerals. It said that such a core strategy “should take account of the need to contribute appropriately to national, regional and local requirements at acceptable social, environmental and economic costs ...”

25. *Independent examination.* Section 20(1) of the 2004 Act requires the local planning authority to submit a development plan document (and therefore a core strategy) to the Secretary of State for independent examination by an inspector appointed by the Secretary of State. The key provision for current purposes is section 20(5), which provides (so far as is material):

“The purpose of an independent examination is to determine in respect of the development plan document –

- (a) whether it satisfies the requirements of sections 19 and 24(1) ...,
- (b) whether it is sound.”

The inspector is required to make such recommendations as he thinks appropriate, giving reasons for them. The effect of section 23 is that the local planning authority may only adopt a development plan document – and therefore a core strategy – with such modifications to it as the inspector has recommended.

26. Although it is for the inspector to decide how to conduct the proceedings, he has “to ensure that the examination is conducted in accordance with the well-established principles of impartiality, openness and fairness”: para. D41 of PPS12. That means ensuring, among other things, “that everyone concerned has access to all the relevant information relating to the topics under discussion, including any relevant representations”: para. D43 of PPS 12. To that end, he must “question participants at the examination to ensure that all the information needed to determine the soundness of the plan has been given”: *op. cit.* And in examining the plan, the inspector must “consider all the representations and any changes which have been suggested by those making representations”: para. D7 of PPS 12.
27. *The test of soundness.* The term “sound” is not defined in the 2004 Act. Para. 1.3(vi) of PPS 12 talks of local development documents (and therefore of core strategies) having to be “soundly based in terms of their content and the process by which they are produced”, and having to be based on evidence which is “robust” and “credible”. And a guide issued by the Planning Inspectorate about the process of assessing the soundness of development plan documents (and therefore of core strategies) said that the term should be given its ordinary meaning of “showing good judgment” and “able to be trusted” within the context of fulfilling the expectations of the legislation.
28. The most definitive guidance is contained within PPS 12 itself. Para. 4.24 reads:

“The presumption will be that the development plan document is sound unless it is shown to be otherwise as a result of

evidence considered at the examination. The criteria for assessing whether a development plan document is sound will apply individually and collectively to policies in the development plan document. A development plan document will be sound if it meets the following tests:

Procedural

- i. it has been prepared in accordance with the local development scheme;
- ii. it has been prepared in compliance with the statement of community involvement, or with the minimum requirements set out in the Regulations where no statement of community involvement exists;
- iii. the plan and its policies have been subjected to sustainability appraisals;

Conformity

- iv. it is a spatial plan which is consistent with national planning policy and in general conformity with the regional spatial strategy for the region or, in London, the spatial development strategy and it has properly had regard to any other relevant plans, policies and strategies relating to the area or to adjoining areas;
- v. it has had regard to the authority's community strategy;

Coherence, consistency and effectiveness

- vi. the strategies/policies/allocations in the plan are coherent and consistent within and between development plan documents prepared by the authority and by neighbouring authorities, where cross boundary issues are relevant;
- vii. the strategies/policies/allocations represent the most appropriate in all the circumstances, having considered the relevant alternatives, and they are founded on a robust and credible evidence base;
- viii. there are clear mechanisms for implementation and monitoring; and
- ix. the plan is reasonably flexible to enable it to deal with changing circumstances."

The key questions to be asked on each of these tests, and the evidence required to fulfil them, are set out in the guide issued by the Planning Inspectorate referred to in [27] above.

29. I doubt whether Parliament can really have intended the first five of the tests of soundness set out in para. 4.24 of PPS 12 to be tests of soundness. Tests (i)-(v) appear to summarise sections 19(1), 19(3), 19(5), 24(1) and 19(2)(f) of the 2004 Act respectively. Since section 20(5)(a) requires development plan documents (and therefore core strategies) to satisfy the requirements of section 19 and 24, the requirement in section 20(5)(b) for development plan documents to be sound must refer to something else, because Parliament is unlikely to have been repeating the requirements of section 20(5)(a). It follows that the appraisal by the inspector of whether a core strategy is sound should focus on tests (vi)-(ix), though the inspector should bear in mind at all times that PPS 12 only provides guidance about how soundness should be assessed, and the appropriate test of soundness is ultimately for the courts to decide. Having said that, whether or not a development plan document is sound is for the inspector who conducts the independent examination. It is his judgment which counts. That judgment can only be challenged on conventional *Wednesbury* grounds, and the court should be slow to interfere with an inspector's judgement on soundness because of the danger of descending into the merits and trespassing on the role given to the inspector. That applies just as much to the inspector's judgment about whether or not a development plan document satisfies the requirements of sections 19 and 24(1).

The defendants' core strategy

30. The development plan document to which this case relates is the Hampshire Minerals and Waste Core Strategy ("the Core Strategy"). The preface to the Core Strategy outlined its "spatial vision", and the numerous references to the year 2020 in it show that the authors of the Core Strategy contemplated its existence until at least then. It was published in May 2006 by HCC, PCC, SCC and the fourth defendant, the New Forest National Park Authority. These four defendants combine to form the Hampshire Minerals and Waste Authority, which was named as the fifth defendant out of an abundance of caution, but since this body has no independent legal existence, it can be ignored for present purposes. I propose to refer to the four defendants as the mineral planning authorities. All references to the Core Strategy in this judgment are references to the original draft which was submitted to the Secretary of State for independent examination, rather than the Core Strategy in its final form as adopted by the mineral planning authorities, unless otherwise stated.
31. The Core Strategy identified Hampshire's need for crushed rock. In para. 20.6, it described crushed rock as "an invaluable aggregate mineral source for Hampshire", and much of what is referred to in [5] above comes from the section of the Core Strategy from which this quotation comes. Having said that, though, there are two sections in the Core Strategy which relate specifically to wharves – as well as rail depots: paras. 21.0-21.2 in the part of the Core Strategy relating to spatial strategy, and paras. 25.74-25.76 in the part of the Core Strategy relating to the control of development.
32. Para. 21.1 acknowledged that the importation of crushed rock from Scotland was an exception to the limited extent to which minerals could be brought into Hampshire by

sustainable transport. In the light of that, para. 21.2 read (leaving out all references to the movement of waste, which is not relevant for present purposes):

“The emerging South East Plan encourages the use of sustainable transport for the movement of minerals ... and given Hampshire’s two commercial ports [the other being Portsmouth] and railway infrastructure, it should be possible to increase the use of sustainable transport. Hampshire currently has ten wharves with planning permission for landing dredged material; seven of these are located within and around Southampton, the rest around Portsmouth. Crushed rock is predominantly landed at Southampton docks but for commercial reasons this cannot be guaranteed in the future. Hampshire also has one wharf in Southampton that is used for the shipping of scrap metal to overseas markets, there are very few similar facilities in the region and it is therefore considered of strategic importance. However this site is identified in Southampton’s Local Plan for redevelopment. If this proceeds, consideration will need to be given to relocation, preferably in Hampshire. Various bodies are investigating opportunities to use sustainable transport to move minerals ..., other than by road. Any new developments in this area will need to be taken account of during preparation of the Hampshire Minerals ... Plan.”

That resulted in the following policy – Policy S13 – relating to wharves and rail depots:

“The sustainable transport of minerals ... is supported and provision will be made for rail depots, sidings and wharves for the reception and movement of aggregates [and] recyclables ... by rail and short-sea shipping.”

The important point here for present purposes is that although the policy recognised the need for wharves for the reception and movement of aggregate, the policy was limited to wharves for the reception of aggregate by short-sea shipping, i.e. shipping around the coast.

33. In the part of the Core Strategy relating to the control of development in the context of wharves and rail depots, para. 25.75 read:

“Increasing the amount of sustainable transport of minerals ... is a key principle of this Strategy. It is important that development control decisions enable more minerals ... to be transported by sustainable means, this includes a policy framework that supports additional infrastructure for sustainable transport.”

That resulted in the following policy – Policy DC18 – relating to wharves and rail depots:

“New or extended wharves, rail depots and other transport infrastructure that enables the sustainable transport of minerals ... and resources by rail or sea will be permitted, provided the site is suitable for the use and it will not impede planned regeneration.”

This section of the Core Strategy continued in para. 25.76:

“A review of wharves and depots will be carried out during the preparation of the Hampshire Minerals ... Plan. This review will [assess] the ongoing suitability of existing sites, particularly in the light of their transport connections and regeneration proposals. It is likely that some new requirements will be identified and these should be generally supported.”

In effect, this policy established the principle that *new* wharves would be permitted (in addition to the extension of *existing* ones) if they were needed to ensure the sustainable transport of minerals, provided that the site was suitable for that purpose and the planned regeneration of the area was not impeded. A review would be carried out of the existing wharves to determine whether any more were needed.

34. There are two other policies which the Core Strategy dealt with which are relevant for present purposes. The first relates to safeguarding. Paras. 22.1 and 22.2 read:

“22.1 The emerging South East Plan recommends that Minerals ... Frameworks ... should safeguard infrastructure facilities ...

22.2 Given the conflicting demands for land and the increased premium on the price of housing land, it is important to safeguard minerals ... sites to preserve capacity for the future. However, sites should not be safeguarded where there is little realistic possibility of them being required in the future.”

That resulted in the following policy – Policy S14:

“All existing minerals ... sites, including associated transport infrastructure, which are needed for future requirements will be safeguarded. These requirements will be determined by a review of all such sites. Pending the outcome of this review, all existing sites will be safeguarded. Incompatible development, within 250 metres of existing or planned quarries and landfills or within 50 metres of other mineral ... operations, will not be supported.”

This section of the Core Strategy continued in paras. 22.3 and 22.4:

“22.3 With the exception of sites already allocated in existing Local Plans for alternative uses, all existing permitted

or operational minerals ... facilities, and 'saved' Preferred Areas are safeguarded. Planning bodies should consult the Mineral ... Planning Authorities prior to the consideration of proposals for development, on or within 250m of existing or planned quarries or landfill sites or in the case of other types of mineral ... site on the site of or within 50m.

22.4 A review will be carried out, and the Proposals Map updated accordingly, as part of the development of the Hampshire Mineral ... Plan. The purpose of the review will be to:

- (i) Assess whether all existing, permitted or operational minerals ... facilities, including wharves and depots, are appropriate for safeguarding taking into account operational effectiveness, overall future mineral ... needs and the degree to which alternative use of the land would promote positive regeneration on that site;
- (ii) Assess whether non-developed Preferred Areas, identified in the existing Local Plan, are suitable for future development.”

Read literally, this policy relates to the safeguarding of sites at which minerals are mined, such as quarries, and the transport infrastructure associated with such sites, rather than the safeguarding of wharves at which imported minerals can be landed – whether existing wharves or planned ones. But the better view is that the policy related to the latter as well. That is certainly how the inspector treated it in paras. 7.103-7.105 of his report.

35. The other relevant policy in the Core Strategy dealt with the methodology for the evaluation and selection of appropriate sites for minerals development. The policy was contained in Policy S18 which was headed Site Selection:

“Sites and locations for the minerals ... development required by this Strategy will be identified in the ... Hampshire Minerals Plan, using the methodology and factors identified in Appendix 2.”

Para. 24.5 stated that within the cities of Portsmouth and Southampton it was proposed to “maintain the required capacity for the import of minerals through aggregates wharves ...” As for Appendix 2 to the Core Strategy, it stated that a comprehensive review of *existing* sites would be carried out as part of the site selection process. That review would include a “review of all wharves and depots to consider their suitability for future safeguarding and their potential use for the movement of ... resources”. The methodology which would be used to identify locations and sites for inclusion in the Hampshire Minerals Plan involved a number of stages, but in the first stage industry, landowners, local authorities and interested stakeholders would be invited to submit proposals or identify “potential” sites, and “potential” minerals sites would also be identified by the mineral planning authorities’ own staff.

36. ABP was unhappy about parts of the Core Strategy. It lodged formal objections to the soundness of it. Broadly speaking, ABP made two points. First, although ABP noted that Policy S13 acknowledged the need for wharves for the reception and movement of aggregate, the policy was limited to wharves for the reception and movement of aggregate imported by short-sea shipping. ABP contended that the mass movement of crushed rock was a deep-sea activity, which was quite different in its infrastructure requirements from most coastal and short-sea shipping, and that although crushed rock was currently being imported from Scotland, the vessels which imported it were not the sort of vessels conventionally used in coastal waters. The low value but high weight of crushed rock meant that it could only be transported economically in deep-draught vessels, which meant, so I was told, that when laden the distance between the water line and the bottom of their hull would be considerable, sometimes as much as 14 metres. Wharves which were suitable for conventional short-sea vessels would be quite unsuitable for deep-draught vessels which required deep quays if they were to be able to berth. Moreover, there may come a time when crushed rock would be imported from places other than Scotland, making deep-draught vessels all the more necessary for their importation. Accordingly, ABP wanted Policy S13 to be amended to substitute the word “sea” for “short-sea shipping”.
37. Secondly, and more fundamentally, although ABP acknowledged that the Core Strategy was not the document in which specific sites for new wharves would be identified, nevertheless crushed rock was “largely” being imported in deep-draught vessels which currently could only berth at the docks at Southampton. Since space there was at a premium, the need to provide alternative deep-water wharfage and the fact that the reclaimed land at Dibden Bay had been identified as the only other location for the continuation of the importation of crushed rock should have been specifically referred to in the Core Strategy. In short, ABP suggested that para. 5.59 of the Local Plan should be adopted in para. 25.76 of the Core Strategy as the starting point for a policy relating to the provision of new deep-water wharfage for the importation of crushed rock. Dibden Bay, in other words, should have been safeguarded as a possible site for such wharfage.
38. The mineral planning authorities’ acknowledged the force of the first point. It therefore agreed to the wording suggested by ABP, provided that the words “including short-sea shipping” were added. However, they were not prepared to change the wording of the Core Strategy to reflect ABP’s second point. They responded to it in their representations to the inspector in three ways. First, they interpreted ABP’s statement that crushed rock was “largely” being imported in deep-draught vessels as meaning that crushed rock was for the most part being imported by sea. The mineral planning authorities made the point that it was also being imported by rail. Indeed, they commented that although 385,000 tonnes of crushed rock had been imported by sea in 2003, 565,000 tonnes had been imported by rail that year. Secondly, ABP’s anxiety about the need for alternative deep-water wharfage had been put to the company which carried out the importation of crushed rock, Foster Yeoman Ltd. Foster Yeoman was said not to have seen the possible threat to the landing of crushed rock at Southampton as a “significant concern”. Thirdly, the mineral planning authorities said that para. 25.76 of the Core Strategy related to *existing* sites. The evaluation of *new* sites – including new wharves nominated by industry – would be carried out in accordance with Policy S18. I shall come to ABP’s response to

these various points when I consider ABP's case on the report which the inspector was to produce, but ABP's overriding point was that unless Dibden Bay was safeguarded as a possible site for a deep-water aggregate wharf, the Core Strategy would be seen to have identified the need for new deep-water wharfage to handle the "invaluable" trade in crushed rock without giving guidance to subsequent development plan documents about how that need was to be planned for and ultimately met.

The examination in public

39. Section 20(6) of the 2004 Act requires any person who makes representations seeking to change a development plan document (and therefore a core strategy) to be given an opportunity (if he so requests) to appear before and be heard by the inspector. ABP requested such an opportunity, and the inspector's examination of the Core Strategy took place over eight days in February and March 2007. The day on which Policies S13, S14, S18 and DC 18 were discussed was 31 January 2007, and ABP's interests were being handled that day by representatives of Adams Hendry Consulting Ltd., chartered town planners, who had made the various representations on ABP's behalf previously.
40. It is unnecessary to spell out the detailed arguments which they deployed on behalf of ABP or the responses to them by representatives of the mineral planning authorities. To the extent that they are relevant to the issues which I have to decide, I shall refer to them in my analysis of the inspector's report. But in short what ABP was seeking to secure in the Core Strategy was a recognition of the need for new deep-water wharves for large vessels transporting crushed rock in both coastal waters and in international shipping lanes, the need to plan for the establishment of such wharves within the lifetime of the Core Strategy, and the credentials of Dibden Bay as a site for such a wharf, such credentials having already been recognised in the Local Plan. The recognition of these facts was said by ABP to be necessary if the Core Strategy was to satisfy the national policy in MPS1 for identifying and safeguarding potential wharfage facilities, and the regional policy in Chapter 11 of RPG9 for identifying wharves for the handling and distribution of minerals and safeguarding them from inappropriate development.
41. To that end, ABP suggested the following amendments to the Core Strategy. First, two additional paragraphs of text should be added after para. 21.2:

"21.3 A combination of deep water accessibility for large vessels, access to the rail network and a central south coast location means that Southampton has historically provided valuable facilities for the import of crushed rock in large vessels, to the benefit of Hampshire and a wider area of southern and south west England. However, as a low value high weight commodity, crushed rock is now unable to compete for space in the docks against higher value uses. The trade therefore ceased in 2006, and it is neither possible to safeguard a site within the existing docks for its resumption nor identify a new site within the existing docks.

21.4 During the lifetime of the Strategy, there will nonetheless be a continuing need for facilities for the import of crushed rock, which is most sustainably carried by sea, for distribution within Hampshire and further afield. Investment is therefore required to provide a new wharf. Within the New Forest Local Plan a site within the Port of Southampton, with easy access to deep water has been allocated for port development subject to certain criteria being met. The Minerals Planning Authorities will seek the provision of a high-capacity deep water aggregate wharf in this location, either separately or as part of those proposals.”

The amendments which it suggested to Policy S13 were as follows:

“The sustainable transport of all types of minerals ... is supported. ~~and~~ Provision will be made for all rail depots, sidings and wharves for the reception and movement of all types of aggregates [and] recyclables ... by rail and sea ~~short-sea shipping.~~”

42. Mr Keith Lindblom QC for ABP submitted that the requirements of PPS12 in [21]-[22] above would only be satisfied if the Core Strategy was to recognise what ABP had been pressing for. That may be so, but the requirements of PPS12 did not, so far as I can tell, play any part in the representations advanced to the inspector on behalf of ABP, and in any event, as Mr Lindblom acknowledged, the question now is not so much whether those requirements would be satisfied if the Core Strategy had recognised what ABP had been arguing for, but rather whether the Core Strategy as now adopted is unsound because it does not satisfy those requirements.
43. I should add something else. Mr Lindblom referred to the review of the suitability of existing sites to meet the requirements for the transportation of minerals. But that was, he said, to put the cart before the horse. You have to assess what your requirements are before you can say whether existing sites are sufficient to meet those requirements. The Core Strategy was the place for that assessment to have taken place, and it had failed to do so. Mr Lindblom described that as “the real point”. To the extent that Mr Lindblom was saying that this was what was being urged *on the inspector*, I cannot agree. ABP’s argument at the examination really proceeded on the premise that the existing sites were not sufficient to meet the requirements for the transport of minerals. It assumed that the case for an alternative deep-water wharfage had been established. The thrust of the argument was that land at Dibden Bay should be safeguarded for that purpose.
44. *The inspector’s report.* It is against that background that the inspector’s report has to be considered. It was sent to the interested parties at the end of May 2007. The relevant parts of it for present purposes are paras. 7.94-7.102 and recommendation 10. Since the argument before me focused very considerably on the language of that part of the report, I fear that there is no alternative but to set it out in full:

“Wharves and Rail Depots

Key issue – Is the Strategy for Wharves and Rail Depots consistent with national and regional guidance, soundly based and appropriate for Hampshire & the New Forest, particularly in terms of the adequacy of provision for importing crushed rock?

7.94 Policy S13 supports the sustainable transport of minerals and waste and provides for associated rail depots, sidings and wharves. RPG9 Policy M5 requires [mineral planning authorities] to assess the need for wharf and rail facilities for handling and distributing imported minerals and processed materials and identify strategic sites for safeguarding. The emerging [South East Plan] encourages the use of sustainable transport for movement of minerals and waste, whilst both national and regional policy envisage an increased supply of marine-dredged sand and gravel in the future. All this points to a need to identify and safeguard the necessary facilities for handling, transporting and distributing minerals and waste materials. However, RPG9 does not set out any apportionment for the import of such materials, or identify capacity requirements.

7.95 The [mineral and waste planning authorities] confirm that the [Core Strategy] safeguards all wharves and depots for the import of crushed rock and marine-dredged sand and gravel, apart from the Port of Southampton, for which ABP is the statutory authority. This [development plan document] does not itself identify strategic sites for wharves and depots or indicate whether present capacity will be maintained, increased or reduced, since this will be considered in a review of existing/future capacity in the subsequent Hampshire Minerals Plan. Until the results of this review are known, all existing wharves and rail depots are safeguarded under Policies S13 & S14, in line with MPS1 (¶ 13) & RPG9 Policy M5. At present, considerable quantities of crushed rock are imported into Hampshire, either by rail or via dockside wharves. Topic Paper [TP2] provides an overview of the current capacity at existing wharves, and estimates current throughput of some 2.29 [million tonnes per annum] and a maximum capacity of 4.39 [million tonnes per annum].

7.96 Policies S13 & S14 provide the general safeguarding necessary for existing wharves and rail depots, without being specific. Initial work on the review of facilities confirms that existing wharves have the capacity to handle almost twice as much material as currently occurs. Future requirements, including any additional capacity necessary will be identified in the subsequent [development plan document], following completion of the review of existing facilities. In the meantime, the potential capacity available at existing wharves

and depots will enable increased demand to be met. In my view, this strategy reflects national and regional policy (including the latest guidance in MPS1), will ensure sufficient protection of existing facilities and enable specific provision to accommodate the required capacity.

7.97 There is some concern that existing facilities will not be able to accommodate future handling and distribution of minerals, particularly the import of crushed rock at wharves in the Southampton area. Although Southampton Docks has imported considerable quantities of crushed rock into Hampshire, due to commercial considerations it now handles other materials, but the previous importer does not see the constraints over its availability as a problem. Crushed rock is also imported at other wharves and depots in the Southampton area. The [Core Strategy] (¶ 20.6) confirms that the import of crushed rock is an invaluable aggregate mineral resource for Hampshire, particularly since it has no indigenous hard rock resources.

7.98 However, although there are no controls on the quantities of crushed rock and other materials that are imported into Hampshire, such materials do not form part of the sub-regional apportionment for the county, since it is to some extent dependent on market demand. Furthermore, there are no estimates available at county-level of the future quantity of crushed rock imports. I recognise that Southampton Docks is one of the few deep-water docks able to handle long vessels, but the use of this facility to import and handle crushed rock or other minerals is not directly within the [mineral planning authorities'] control, and largely depend on commercial considerations and operators' needs.

7.99 I realise that Dibden Bay is allocated as a new deep-water wharf in the approved Structure Plan and adopted New Forest Local Plan (2005), which acknowledges its national and regional significance. It is also a location where deep-draught ships (such as those carrying aggregates) can be handled. However, there are no current plans to bring forward such a facility, and a similar proposal was rejected by the Secretary of State in 2003. There is no certainty that such a proposal (including an aggregates wharf) would be developed within the period of this [development plan document], particularly given the timescale involved, the history of this project and its potential impact on habitats, biodiversity and designated landscapes. The regional need for such a facility, including potential locations and the role of Southampton, has not been established in RPG9 or the emerging [South East Plan]. No recent assessment or [environmental impact assessment/sustainability appraisal/appropriate assessment] of a

specific site or proposal has been undertaken, which would be needed if the site was to be highlighted or proposed in this [development plan document]. Consequently, I find there is insufficient evidence to justify the inclusion of such a strategic proposal in this Core Strategy at this time, either as a new proposal or to offset any lack of availability of Southampton Docks. If such a proposal came forward as part of the site-selection stage in subsequent [development plan documents], it could be considered against the framework of this [development plan document], either as a proposal or an ‘omission’ site.

7.100 In all these circumstances, particularly given the potential capacity available for importing crushed rock and other minerals at existing wharves and depots, I can see no need to identify the need for additional facilities at this stage, in advance of the detailed review envisaged in the subsequent [development plan document]. In the meantime, there seems to be sufficient potential for the existing wharves and depots to accommodate any increased demand for additional capacity to import crushed rock and marine aggregates without the need for further facilities, deep-water or otherwise. Consequently, I cannot see sufficient justification to make specific provision for new deep-water wharves to handle long-distance transportation of crushed rock in this strategic [development plan document] at this stage.

7.101 However, the [mineral and waste planning authorities] suggest amending Policy S13 to recognise the significance of longer sea voyages for minerals, as well as short-sea shipping, since this is an important aspect of the movement of such materials. The [mineral and waste planning authorities] also suggest amendments to the accompanying text (¶ 21.2) to properly reflect the existing situation. With these suggested amendments, I consider the strategic policy relating to wharves and rail depots is soundly based.

7.102 Policy DC18 supports additional infrastructure to enable sustainable transport of minerals and waste materials, including new or extended wharves and rail depots, subject to site suitability. As part of the review of wharves and depots, any new facilities would be subject to Policy S18 and the process and factors set out in Appendix 2. I am satisfied that this provides an appropriate and supportive policy framework to consider proposals for new and extended facilities at the planning application stage and in subsequent [development plan documents]

Recommendation 10

In order to make the Strategy sound, the following changes are required:

(a) amend Policy S13 to acknowledge the need for longer distance sea shipping of minerals and waste materials;

(b) amend paragraph 21.2 to more accurately reflect the existing situation in terms of import of crushed rock;

(Change Nos. 28-29 in Annex A of my report)."

45. Change 28 to which the Inspector referred consisted of changes to para. 21.2 of the Core Strategy, which was now to read:

"The emerging South East Plan encourages the use of sustainable transport for the movement of minerals ... and given Hampshire's two commercial ports and rail infrastructure, it should be possible to increase the use of sustainable transport. Hampshire currently has ten wharves with planning permission for landing dredged material; seven of these are located within and around Southampton, the rest around Portsmouth. Crushed rock is *landed in two locations, however it is* predominantly landed at Southampton docks ~~but~~ and for commercial reasons this cannot be guaranteed in the future. *Whilst the emerging South East Plan gives no direction on the need or significance of the landings at Southampton docks, it is known that crushed rock also enters Hampshire by rail into depots at Eastleigh, Botley and Fareham, in small amounts at one other wharf and small amounts into the south west of Hampshire by road. Anecdotal evidence indicates a market preference in the South Hampshire area for rail importation. In the absence of regional guidance on this matter, it is not proposed to actively seek sites for deep-water crushed rock wharves, however should suitable opportunities arise out of nominations from industry and landowners, and/or as a result of the review of existing sites detailed in Appendix 2 paragraph 1.3, they will be included in the Hampshire Minerals Plan.* Hampshire also has one wharf in Southampton that is used for the shipping of scrap metal to overseas markets, there are very few similar facilities in the region and it is therefore considered to be of strategic importance. However, this site is identified in Southampton's Local Plan for redevelopment. If this proceeds, consideration will need to be given to relocation, preferably in Hampshire. Various bodies are investigating opportunities to use sustainable transport to move minerals ..., other than by road. Any new developments in this area will need to be taken account of during preparation of the Hampshire Minerals ... Plan"

Change 29 consisted of a change to Policy 13, which was now to read:

“The sustainable transport of minerals ... is supported and provision will be made for rail depots, sidings and wharves for the reception and movement of aggregates [and] recyclables ... by rail and sea, including short-sea shipping.”

In other words, change 29 incorporated ABP’s suggested wording to overcome the problem of limiting the policy to short-sea shipping.

The challenge to the Core Strategy as adopted

46. The Core Strategy was adopted with the inspector’s modifications by the first four defendants on 12 July, 28 June, 17 July and 18 July 2007 respectively. Notice of its adoption by the four defendants by local advertisement (as required by reg. 36(c) of the 2004 Regulations) was given on 20 September 2007. ABP decided to challenge its adoption under section 113 of the 2004 Act. That entitled ABP, being a body “aggrieved” by the Core Strategy, to apply to the High Court for parts of the Core Strategy to be quashed, on the grounds set out in section 113(6) that (a) those parts of the Core Strategy were not within Part 2 of the 2004 Act (which includes sections 19 and 24 of the Act), and (b) ABP’s interests had been “substantially prejudiced” by a failure to comply with a procedural requirement. It was pursuant to section 113 that ABP lodged its claim on 30 October 2007. Its case on (a) is that parts of the Core Strategy did not satisfy the requirements of sections 19 and 24 of the 2004 Act and were not sound, and were not within Part 2 of the Act for that reason. Its case on (b) is that a document relied upon by the inspector was never seen by its representatives with the result that they never had the opportunity to comment on it.
47. In the course of the hearing, a question arose as to whether the claim had been lodged in time. Section 113(4) required the application to be made “not later than the end of the period of six weeks starting with the relevant date”, and section 113(11)(c) provides that the relevant date in relation to a core strategy is the date when it was “adopted” by the local planning authority. Since more than six weeks had elapsed between 18 July 2007, which was the latest of the dates on which each of the first four defendants adopted the Core Strategy, and 30 October 2007 when the claim was lodged, the claim was at first blush out of time. However, it all depends on what the word “adopted” in section 113(11)(c) means. In my view, the process of adoption is not perfected or completed by a resolution of adoption by the local planning authority. It is only completed when the requirements of reg. 36 of the 2004 Regulations have been complied with. Since those requirements have only to be carried out “[a]s soon as reasonably practicable after the local planning authority” has adopted the core strategy, potential claimants would be deprived of the whole of the six weeks’ period to decide whether to mount a challenge in the High Court if the word “adopted” in section 113(11)(c) referred only to the formal resolution of adoption by the local planning authority. I am confirmed in that view by the fact that it represented the agreed position of both Mr Lindblom and Mr Neil Cameron, who represented some of the defendants. Indeed, that is what the defendants themselves thought: the local advertisement of 20 September 2007 which gave notice of the adoption of the Core Strategy said that any application to the High Court under section 113 had to be made within six weeks *from 21 September 2007*.
48. Four separate issues arise on ABP’s claim, and it is necessary to consider each of them in turn.

Issue (1)

49. The inspector noted in para. 7.97 of his report the mineral planning authorities' acknowledgement that crushed rock was an invaluable resource. Accordingly, the issue which the inspector had to examine was whether the Core Strategy properly addressed how Hampshire's needs for crushed rock during the lifetime of the Core Strategy were to be met. The inspector also noted in para. 7.97 of his report that "Hampshire has no indigenous hard rock resources". He was therefore alive to the fact that Hampshire's needs for crushed rock could only be met if it was imported. That, no doubt, is why, at the beginning of the relevant part of his report just before para. 7.94, he articulated the question which he had to address (which is described as a "key issue") as follows: is the strategy for wharves and rail depots (i.e. Policies S13 and DC18) consistent with national and regional guidance, soundly based and appropriate for Hampshire and the New Forest, particularly in terms of the adequacy of provision for importing crushed rock?
50. There were two strands of policy which should have guided the inspector's determination of that question. First, there was the guidance in PPS12 that core strategies had to set out the strategy for achieving the appropriate planning objectives. The core strategy was the place where tough strategic decisions needed to be made. Important strategic decisions were not to be left to subsequent development plan documents. In the context of a core strategy relating to an area's need for minerals, the effect of that guidance, in my view, was that if, as the inspector correctly acknowledged, the Core Strategy had to address "the adequacy of provision for importing crushed rock", it had first to address whether the existing facilities for importing crushed rock were sufficient to cope with the anticipated demand for it during the lifetime of the Core Strategy. And if the existing facilities for importing crushed rock might not be sufficient to cope with the anticipated demand for it up to 2020, the Core Strategy then had to identify what the strategy was for increasing those facilities so that the infrastructure to enable sufficient quantities of crushed rock to be imported could be put in place.
51. The second strand of policy which should have guided the inspector's determination of the key issue which he was addressing was the national and regional guidance contained in MPS1 and chapter 11 of RPG9, which said that potential sites for wharves for the importation of minerals should be safeguarded from inappropriate development. The effect of that guidance, in my view, was that if a strategy for increasing facilities for the importation of crushed rock was needed, the Core Strategy had to address whether that strategy should include the establishment of new wharves, how the possible sites for those new wharves should be identified, and how which of those which were identified should then be selected, so that in the meantime the "broad locations" of those sites, though not necessarily any specific sites, could be safeguarded from inappropriate development.
52. The inspector appears to have recognised the need at some stage to address whether the existing facilities for importing crushed rock would meet future requirements. As for Hampshire's future requirements for crushed rock, he noted in para. 7.98 of his report that they were "to some extent dependent on market demand", and that no estimate was then available about what that demand might be. As for Hampshire's current facilities for importing crushed rock, he acknowledged in para. 7.95 of his report that the Core Strategy did not "indicate" whether present capacity will be

maintained, increased or reduced”. However, the inspector noted that, whether present capacity would be maintained, increased or reduced, that would “be considered in a review of existing/future capacity in the subsequent Hampshire Minerals Plan”. The inspector was there referring to the review contemplated by Policy DC18, and since the question was whether the existing wharfage would be sufficient to cope with the anticipated demand, no doubt that review would address not only what the demand was likely to be, but also what wharfage was required to meet it.

53. The difficulty with the approach adopted in the Core Strategy is that it did not take account of the need for the Core Strategy itself to set out the strategy for ensuring that the anticipated demand for crushed rock would be met. Since that was the place for tough strategic decisions to be made, it was not right for the critical question – whether the existing facilities were sufficient to cope with the anticipated demand – to be left to a subsequent review of those facilities. Without the Core Strategy addressing those questions, the Core Strategy left completely up in the air (a) whether a strategy was needed at all for increasing those facilities so that the infrastructure to enable sufficient quantities of crushed rock to be imported could be put in place, (b) if one was needed, whether that strategy should include the establishment of new wharves, (c) if so, how possible sites for those new wharves should be identified, and (d) how which of them should be selected, so that in the meantime the broad location of possible sites could be safeguarded from inappropriate development.
54. Indeed, in another passage in his report, the inspector appears to have recognised the indefensibility of the approach adopted by the Core Strategy. When dealing with Policy S14 (which related to the safeguarding of sites) he referred at para. 7.103 to the intention of the mineral planning authorities to conduct a review of those sites. At para. 7.105, he acknowledged that it was “unfortunate” that “questions of the future capacity and the provision of new facilities” – which I take to mean the determination of whether the existing sites were capable of meeting Hampshire’s future needs – were to be left to the review. He added that “this information should be available to guide the Strategy”, by which he must have meant that you needed to know the outcome of the review – namely whether the existing sites were or were not capable of meeting Hampshire’s future needs – if the Core Strategy was to explain the strategy for ensuring that Hampshire’s future needs would be met.
55. Despite that, the inspector took the view that the fact that an assessment of Hampshire’s needs would be addressed in subsequent development plan documents as a result of this review enabled him to endorse Policy S14, though to emphasise the importance which the review was to play, he recommended that Policy S14 be amended to add the following sentence (and to make corresponding changes to para. 22.3):

“Sites identified, in the Hampshire Minerals ... Plan, or on the Proposals Map, to fulfil the requirements of this Strategy, will also be safeguarded.”

The inspector’s description of the decision to leave the issue of whether the existing sites would meet Hampshire’s future needs to a subsequent review as “unfortunate” should have led him to the conclusion that the review should have *preceded* the Core Strategy and informed its contents. And for the amended Policy S14 to state that the

requirements of the Core Strategy would be fulfilled if sites identified in the review as needing to be safeguarded were safeguarded was really to beg the question which the Core Strategy rather than the subsequent review had to address – namely whether the existing sites were capable of meeting Hampshire’s needs, and if not what was the strategy for identifying the sites, so that in the meantime the broad location of possible sites could be safeguarded from inappropriate development.

56. The inspector appears to have justified his endorsement of Policies S13 and S14 on the basis of the information contained in a topic paper prepared by the mineral planning authorities which the inspector said at para. 7.95 “provides an overview of the current capacity at existing wharves, and estimates current throughput of some 2.29 [million tonnes per year] and a maximum capacity of 4.39 [million tonnes per year].” That led the inspector to state in para. 7.96 that “[i]nitial work on the review of facilities [contemplated by Policy DC18] confirms that existing wharves have the capacity to handle almost twice as much material as currently occurs”. I shall have more to say about that topic paper later on, but given that current wharfage capacity was said to have exceeded the current throughput of crushed rock by a significant margin, the inspector reasoned that there was no need to safeguard any other possible sites until the review contemplated by Policy DC18 had taken place. There was sufficient wharfage capacity to meet Hampshire’s needs for crushed rock for the time being. As he put it in para. 7.96: “In the meantime, the potential capacity available at existing wharves ... will enable the increased demand to be met.” That was no doubt why the inspector was content for the Core Strategy to limit the sites which would be safeguarded to “existing” sites “which are needed for future requirements”. If the review was subsequently to reveal that Hampshire’s needs for crushed rock in the future were such that new wharves for importing them had to be established, the sites identified in Hampshire’s Minerals Plan following that review as possible sites for new wharves could be safeguarded then.
57. I understand where the inspector was coming from, but the fact of the matter is that by putting off all the questions which the Core Strategy should have addressed to the subsequent review, the Core Strategy did not follow departmental guidance in PPS12 which required the Core Strategy, and not some subsequent document, to set out the strategy for ensuring that Hampshire’s anticipated demand for crushed rock would be met. Moreover, putting off the critical question about whether existing sites were capable of meeting Hampshire’s future needs for crushed rock (simply because it was thought that existing wharves had the capacity to meet Hampshire’s needs until a review had taken place) ignored that part of the departmental guidance in PPS 12 which required the Core Strategy to set out its long-term strategy over at least the next ten years. Nor did the Core Strategy follow the national and regional guidance in MPS1 and RPG9 which required the Core Strategy, and not some subsequent document, to safeguard potential sites at which crushed rock could be landed from inappropriate development. The inspector’s failure to pick up on the fact that the Core Strategy did not follow the departmental guidance in PPS12 is illustrated by what he said in para. 7.99 about the proposal for land at Dibden to be safeguarded as a deep-water aggregate wharf:

“If such a proposal came forward as part of the site-selection stage in subsequent [development plan documents], it could be

considered against the framework of this [development plan document] ...”

That was not a realistic suggestion since the Core Strategy did not provide a sensible framework as it contained no guidance about whether a new wharf would be needed, and if so how possible sites for such a wharf would be identified and how which of them should be selected.

58. It is true that section 19(2) of the 2004 Act merely required the mineral planning authorities to “have regard to” *national* policies (i.e. MPS1) and advice contained in guidance issued by the Secretary of State (i.e. PPS12), but if that guidance was to be departed from, good reasons for doing so had to be advanced: see, for example, the comments made by Purchas LJ in *Carpets of Worth Ltd. v Wyre Forest District Council* (1991) 62 P. & C.R. 334 at p. 342 (admittedly in the context of a local planning authority formulating its proposals in a local plan). Presumably, the mineral planning authorities gave no reasons for departing from the national policy and advice because they did not believe that it required what they wanted to leave to the review to be dealt with in the Core Strategy. In that respect, the mineral planning authorities could not be said to have had regard, i.e. proper regard, to that national guidance and advice. It is also true that the only relevant *regional* guidance which section 19(2) required the mineral planning authorities to have regard to was the regional spatial strategy for the region, but chapter 11 of RPG9 represented what the regional spatial strategy had to say about minerals, and in my view section 24(1) required the Core Strategy to be in general conformity with chapter 11 of RPG9.
59. In short, the inspector should have found that the parts of the Core Strategy which related to wharves – namely Policies S13 and DC18 – had not satisfied the requirements of sections 19 or 24(1) of the 2004 Act. Those parts of the Core Strategy were therefore not within Part 2 of the Act. Whether he should have found that that made the Core Strategy unsound as well is of no practical significance. The inspector’s failure to recognise that the Core Strategy did not satisfy the requirements of sections 19 or 24(1) was *Wednesbury* unreasonable.

Issue (2)

60. In paras. 7.94-7.100 of his report, the inspector referred to a number of considerations which contributed to his decision not to recommend that any land at Dibden Bay be safeguarded from inappropriate development. ABP contends that a number of these considerations should not have been relied upon by the inspector.
61. (i) Current wharfage capacity It will be recalled that as a result of the topic paper prepared by the mineral planning authorities, the inspector stated in para. 7.96 of his report that “[i]nitial work on the review of facilities [contemplated by Policy DC18] confirms that existing wharves have the capacity to handle almost twice as much material as currently occurs”. That led the inspector to conclude that there was no reason to safeguard any other possible sites until the review contemplated by Policy DC18 had taken place. If there was any “increased demand” for crushed rock “in the meantime”, existing wharves had the capacity to cope with that demand. Accordingly, it was “the potential capacity available for importing crushed rock and other materials at existing wharves and depots” which the inspector gave as the

principal reason in para. 7.100 for his view that it was unnecessary to consider “at this stage” whether “additional facilities” would be needed.

62. In [57] above, I dealt with the criticism that the approach in the Core Strategy which the inspector sanctioned did not have proper regard to national policies and advice, and was not in general conformity with the regional spatial strategy for the region. The criticism here is that the evidence which the inspector had did not justify his conclusion that existing wharves and rail depots had the capacity to handle Hampshire’s needs for crushed rock and other materials in the interim period until the review contemplated by Policy DC18 had taken place. His error was in assuming that the references in the topic paper to “current throughput” and “maximum capacity” related to crushed rock. In fact, they related to crushed rock *and* marine-dredged sand and gravel aggregate as well. When it came to crushed rock, what the topic paper actually showed – when read with the Annual Monitoring Report for 2005/06 published by the mineral planning authorities in December 2006 – was that of the nine wharves which were active in 2003, only two of them – Lymington and the docks at Southampton – were importing crushed rock in 2003. 5% of the crushed rock imported into Hampshire in 2003 was imported at Lymington, while 95% of the crushed rock imported into Hampshire in 2003 was imported at the docks at Southampton. Even then,
- (a) the crushed rock which was imported into Lymington was flint, whereas the type of crushed rock which Hampshire needed, according to para. 20.6 of the Core Strategy, consisted of limestone and granite, granite being the type of crushed rock which was imported at the docks at Southampton, and
 - (b) vessels with a length of 100 metres or more could not berth at Lymington, whereas the docks at Southampton have wharves which permit vessels up to 250 metres long to berth there.
63. Of course, these figures related to 2003, and the Core Strategy was supposed to be addressing future capacity. The monitoring report did not say that any of the other wharves which were active in 2003 could be used to import crushed rock in the future. Moreover, the topic paper noted that only the wharf at Marchwood and the docks at Southampton had the depth of water to allow the new fleet of larger dredgers which extract minerals at deep depths to berth, and the inspector was told by ABP’s representatives that even these vessels are smaller and lighter than the type of vessel used to import crushed rock. Indeed, the evidence before the inspector was that although a small amount of crushed rock was currently being imported at Marchwood, there was nothing to say that it was viable for the importation of crushed rock on the scale required. That left the docks at Southampton. However, although 95% of the crushed rock imported into Hampshire in 2003 had been imported at the docks at Southampton, that is no longer the case. For the reasons given in [6] above, crushed rock has not been imported at the docks at Southampton since 2006.
64. Accordingly, the state of the evidence before the inspector was that (a) the wharves which had been used to import most of Hampshire’s needs for crushed rock in the past, namely the docks at Southampton, were no longer available, (b) although the wharf at Lymington had imported a small amount of Hampshire’s needs for crushed rock in the past, it did not import the type of crushed rock to which the Core Strategy related, and did not have either the depth of water or the wharfage capacity to

accommodate long deep-draught vessels, and (c) the wharf at Marchwood was not viable as a site at which substantial quantities of crushed rock could be landed. Finally, there was no evidence that any of the other wharves which had been active in 2003 but which had not been used to import crushed rock in the past could be used to import crushed rock in the future. So far from supporting the conclusions which the inspector reached, the evidence before him supported ABP's claim that there was no robust and credible evidence to justify his conclusion that existing wharves had the capacity to meet Hampshire's need for crushed rock even for the limited period until the review contemplated by Policy DC18 had been completed, let alone for the period up to 2020 which represented the lifetime of the Core Strategy.

65. I have not overlooked Mr Cameron's submissions about the use of rail depots. After all, the inspector had them in mind as well as wharves when he spoke of the existing facilities as being sufficient to cope with Hampshire's needs for crushed rock for the time being. Indeed, the topic paper showed that between the years 1996 and 2005 far more crushed rock had been imported into Hampshire by rail than by sea: rail imports of crushed rock peaked in 2001 at 731,000 tonnes, compared with marine imports of crushed rock peaking in 2002 at 436,000 tonnes. Moreover, the topic paper also said that most of the crushed rock which came into the docks at Southampton was used by Network Rail as rail ballast. Not only did much of that ballast leave Hampshire, but also an e-mail which Foster Yeoman had sent to Hampshire, and which Hampshire had passed on to the inspector, showed that since September 2006 a new supply agreement with Network Rail meant that all their requirements for rail ballast would be delivered from a terminal on the Isle of Grain in Kent.
66. In the light of that evidence, the inspector would have been entitled to conclude that Hampshire's requirements for crushed rock could, in part at least, be met by crushed rock imported by rail, and that less crushed rock was being imported into Hampshire by sea in view of the new supply agreement with Network Rail. But it was not suggested to the inspector that Hampshire's needs for at least some crushed rock to be imported by sea would be eliminated, and the fact remains that there was no robust or credible evidence to justify his conclusion that Hampshire's needs for such crushed rock as had to be imported by sea could be met – whether temporarily pending the review or until 2020 – by the existing wharves.
67. (ii) *Foster Yeoman's position.* The inspector acknowledged in para. 7.97 of his report that there was "some concern" that existing facilities would not be able to meet the anticipated demand for crushed rock in Hampshire. That was an unduly mild characterisation of ABP's position, but one of the reasons why the inspector thought that Hampshire's demands for crushed rock could be met, at least in the meantime, despite the "constraints over [the] availability" of the docks at Southampton, was because "the previous importer did not see these constraints as a problem". The inspector was plainly going on what the mineral planning authorities had written in their formal response to objections to the Core Strategy – namely that "this issue was raised with Foster Yeoman – the company that operates both the marine and rail importations of crushed rock – and they did not see ABP's comments – in terms of the threat to crushed rock landings at Southampton port – as a significant concern". ABP's case is that this completely misrepresents Foster Yeoman's true position.
68. What happened was that when ABP's representatives read this response, they asked to see the correspondence which formed the basis for the response. They were provided

with a copy of the e-mail referred to in [65] above. It was sent to HCC on 8 December 2006 which was *after* the mineral planning authorities' formal response to the objections, which was dated November 2006. So it could not have been the source of what was stated in the response. When this became apparent, Mr Cameron told me that his instructions were that what was said in the response came from a telephone conversation – presumably between Hugh Lucas of Foster Yeoman who sent the e-mail to HCC and Richard Read who is the officer within HCC with overall responsibility for the preparation of minerals planning policy. But Mr Cameron acknowledged that he could not rely on those instructions, because the fact that the information came in a phone call rather than in the e-mail was not disclosed to the inspector.

69. As it is, the e-mail does not bear out the mineral planning authorities' contention that Foster Yeoman did not see the fact that crushed rock could no longer be landed at the docks at Southampton as a significant concern. The relevant extracts from the e-mail read as follows:

“Foster Yeoman has closed the dock operation on good terms with the port operator but the reality has always been that land has only been available when not required for higher value uses. Unless there is land safeguarded for development (e.g. container handling facilities) it is very likely that there will be none available for aggregates as and when the market can sustain the very high port costs generated by other commercial uses.

A similar position is now faced on the Thames where pressure for redevelopment of berths for commercial and housing uses means that sites that are otherwise available for the import of aggregates are not released by landowners because of the huge disparity between commercial and housing value and that sustainable by an aggregates operation. This has resulted in the adoption of a safeguarding policy by the GLA backed up by CPO powers and currently being tested on appeal.

The difficulty at Southampton is that it is not currently economic to import through the dock for the general aggregates market but undoubtedly the pressure for an alternative to crushed rock from the Mendips and locally won sand and gravel will grow. In order to keep this option open it will be necessary to safeguard a potential site, alongside deep water berthing in open (undeveloped) use, retaining the option for aggregates as and when this becomes viable again.”
(Emphasis supplied)

It is true that Foster Yeoman did not say *in terms* that the unavailability of the docks at Southampton for the importation of crushed rock was “a problem”. But it acknowledged that the need for an alternative to crushed rock from the Mendips (which was imported into Hampshire by rail and road) would grow. If for one reason or another crushed rock could not be brought into the docks at Southampton, the need to find other ways of importing crushed rock had to be met. That was why Foster

Yeoman regarded it as “necessary” for a “potential site” to be safeguarded “alongside deep water berthing”. In short, this e-mail completely undermines the inspector’s belief that Foster Yeoman did not regard the unavailability of the docks at Southampton for the importation of crushed rock as a problem.

70. (iii) *The absence of an assessment of Hampshire’s needs for crushed rock.* The inspector made two points in para. 7.98 of his report. First, Hampshire’s future requirements for crushed rock and other minerals had not been identified, either at regional or county level. The reason for that was because those requirements were to some extent dependent on what the market’s requirements for crushed rock and other minerals were. Secondly, although the docks at Southampton were one of the few deep-water docks at which long vessels could berth, the mineral planning authorities could not *require* the docks at Southampton to be used for the importation of crushed rock, since the use of the docks was largely dependent on “commercial considerations and operators’ needs”.
71. The inspector recognised that the latter point might be a reason for safeguarding another site for landing crushed rock. Indeed, in para. 7.99, he considered in terms whether “any lack of availability of Southampton docks” justified safeguarding Dibden Bay as a possible site. The criticism which is levelled by ABP at the inspector relates to the first point he made. The fact that it may be difficult to estimate Hampshire’s future needs for crushed rock – because those needs would be dependent on what the market’s requirement might be for crushed rock – is no reason for not making an assessment of what those needs might be. I agree with ABP that without such an assessment, it was not possible to say whether Hampshire’s needs could be met by the existing wharves. But I do not think that the inspector was saying anything different. He was simply explaining in para. 7.98 why that assessment had not been made as part of his recitation of the relevant facts. I do not think that he was expressing a view about whether the reason advanced for not making the assessment was a good one. If the inspector is to be criticised at all, it is for his view that the assessment could wait for the review contemplated by Policy DC18 since existing wharves and depots were sufficient to meet Hampshire’s needs for crushed rock in the meantime. I have already dealt with that criticism in earlier parts of this judgment.
72. (iv) *The Dibden Bay proposal.* In para. 7.99 of his report, the inspector dealt specifically with Dibden Bay. He began by acknowledging that Dibden Bay was a site at which deep-draught vessels could be handled, and that Dibden Bay had been “allocated as a new deep-water wharf” in the District Plan. In fact, the District Plan had gone further than that and had said that “[p]ort development requiring access to deep-water” might be permitted at Dibden Bay. But the reasons the inspector gave in para. 7.99 for concluding that there was “insufficient evidence to justify” safeguarding Dibden Bay as a possible site for the building of a wharf for the landing of crushed rock were
- there were “no current plans to bring forward such a facility”
 - a “similar proposal” had been rejected by the Secretary of State in 2003
 - there was “no certainty that such a proposal (including an aggregates wharf) would be developed” within the lifetime of the Core Strategy.

He also noted that the regional need for “such a facility” had not been established in either RPG9 or the draft South East Plan, and that the site had not recently been assessed for its sustainability as a deep-water aggregate wharf or for the impact on the environment and the habitats of local wildlife which its development might have.

73. Various criticisms have been levelled at this passage in the inspector’s report, but they really boil down to four points. The first is based on the fact that the inspector described the proposal which had been rejected by the Secretary of State in 2003 as “similar” to ABP’s current proposal. In fact, it was not similar at all. The proposal which had been rejected in 2003 was a proposal for the macro-development of Dibden Bay. The current proposal was simply for a small part of Dibden Bay to be used as a deep-water aggregate wharf. It is said that there was no evidence before the inspector which could have led him to conclude that such a wharf could only be developed as an integral part of a much larger development at the site. In any event, the fact that the comprehensive development at the site had been rejected in 2003 did not mean that a revised proposal including a deep-water aggregate wharf which took into account the Secretary of State’s concerns which had resulted in planning permission being refused would not be approved.
74. I can see where ABP is coming from in this argument, especially with the references to “such a proposal” and “such a facility” in para. 7.99. But I regard it as inherently unlikely that the inspector would have misunderstood ABP’s representations in so fundamental a way as this argument suggests, especially as the inspector specifically referred later in para. 7.99 to the point that ABP’s proposal could “offset any lack of availability of Southampton docks” which was a reference to the unavailability of a deep-water aggregate wharf at the docks at Southampton which the inspector had been talking about in para. 7.98. So when the inspector described ABP’s current proposal as being similar to the one rejected by the Secretary of State in 2003, the similarity to which he was referring was that both proposals related to development at Dibden Bay (even though one set of proposals was considerably more extensive than the other). If that is right, his reference to “such a proposal” was a reference to ABP’s current proposal, and his reference to “such a facility” was a reference to a deep-water aggregate wharf.
75. This really feeds into the second point taken on ABP’s behalf, which was that the inspector set the bar too high. He chose in effect to decide whether land at Dibden Bay should be allocated in the Core Strategy, rather than simply safeguarded as a protective measure. I do not agree. I see no warrant for that suggestion at all in the language the inspector used.
76. Thirdly, ABP criticises the inspector for regarding as significant the fact that neither RPG9 nor the draft South East Plan identified the need for a new deep-water aggregate wharf. Whether or not they had identified the need for such a facility, the Core Strategy was required to assess whether there was a need for such a facility at the sub-regional level. In any event, objections had been lodged to the treatment of the port of Southampton in the draft South East Plan. Indeed, according to the panel considering those objections, more representations had been received on the topic than on any other topic relating to South Hampshire. It is said that the inspector ought to have acknowledged that the Secretary of State might amend the document, perhaps to provide support for development at Dibden Bay to encourage a fresh proposal to be made. At the very least, the inspector ought to have acknowledged

that the existence of the objections would impact on the weight he could attach to the document.

77. I do not regard the fact that the inspector did not refer to these latter considerations in his report as significant. He was aware that the draft South East Plan was an emerging one, and that its final form could say something about development at Dibden Bay. But to the extent that the inspector regarded as significant the absence of any reference in RPG9 to the need for a new deep-water wharf, I fear that he fell into error. RPG9 was not the place for a discussion whether a particular facility was needed in a particular area. In relation to wharves, rail depots and minerals reserves, Policy M5 left that assessment to mineral planning authorities. But did the inspector regard the absence of any reference to a regional need for a deep-water aggregate wharf in RPG9 as significant? Mr Cameron argued that he did not. He merely mentioned RPG9 – and the draft South East Plan for that matter – as part of his recitation of the facts. I do not agree. The more I have read para. 7.99, the more obvious it is that the absence of a reference in RPG9 to the regional need for a deep-water aggregate wharf is one of the factors which caused the inspector to conclude that there was “insufficient evidence” to justify safeguarding land at Dibden Bay for such a purpose. The word “[c]onsequently” at the beginning of the penultimate sentence in para. 7.99 can mean nothing else.
78. Finally, ABP criticises the inspector for regarding as significant the fact that Dibden Bay had not recently been assessed for its sustainability as a deep-water aggregate wharf or for the impact on the environment and the habitats of local wildlife which the development of Dibden Bay might harm. The basis of the criticism is that such appraisals are necessary before a site is allocated for a particular use, but not before a site is to be safeguarded for that purpose. When the inspector said that these assessments “would be needed if the site was to be highlighted or proposed” in the Core Strategy, he was in effect putting the cart before the horse by relying on the absence of such appraisals as a reason for concluding that there was insufficient evidence to justify safeguarding Dibden Bay as a possible site for a deep-water aggregate wharf, when such appraisals would only be required at a later stage in the process.
79. Mr Cameron attacked that argument on two fronts. First, he argued that the inspector was doing no more than recording the factual position – and recording it accurately – when he said that these assessments had not been carried out. I disagree. When you read para. 7.99 as a whole, it is plain that he regarded the absence of such assessments as *a* factor to be taken into account in coming to the conclusion that the evidence for safeguarding Dibden Bay was insufficient. Secondly, Mr Cameron argued that even if the inspector regarded the absence of such assessments as a relevant factor, he was entitled to do so for two reasons. First, in truth ABP was asking for something more than a statement that Dibden Bay should be safeguarded if the last sentence of ABP’s proposed wording of para. 21.4 of the Core Strategy (set out in [41] above) was anything to go by. Secondly, in any event, ABP’s representatives were said to have acknowledged at the examination in public that the assessments had to be carried out if the site was to be safeguarded.
80. I cannot accept either of these reasons. As for the first, the wording which ABP proposed for para. 21.4 of the Core Strategy was that the mineral planning authorities should “seek the provision of” a deep-water aggregate wharf at Dibden Bay. But

since the wording which ABP proposed for the last sentence of para. 21.3 referred to the impossibility of *safeguarding* a site within the existing docks (or identifying a new site there), ABP was suggesting that the way a deep-water aggregate wharf was to be provided was by safeguarding land at Dibden Bay for that purpose. As for the second, what one of ABP's representatives actually said at the examination in public, when the absence of such an assessment was pointed out, was:

“It would need to be done. You are talking of [a] procedural requirement that can easily be done.”

I do not think that he was acknowledging that the assessments had to be done *then*. He was merely accepting that they would have to be done at some stage, and that it would not be a major task to do them.

81. Conclusion on issue (2). For these reasons, a number of the considerations which contributed to the inspector's decision not to recommend safeguarding land at Dibden Bay from inappropriate development should not have been relied on by him, and accordingly that undermines his conclusion that with the modifications which he recommended those parts of the Core Strategy which related to Policies S13 and S14 would be sound.

Issue (3)

82. It will be recalled that Policy S13 was originally limited to wharves for the reception and movement of aggregate imported by short-sea shipping. The mineral planning authorities acknowledged that shipping other than short-sea shipping was also an important element in the transportation of aggregate, including the crushed rock which was coming from Scotland. The mineral planning authorities therefore amended Policy S13 by agreeing to the wording suggested by ABP, provided that the words “including short-sea shipping” were added. The need for a suitable amendment was accepted by the inspector in para. 7.101 of his report, but there is said to be an inconsistency between (a) the change to the Core Strategy which he recommended in recommendation 10(a) – namely that Policy S13 be amended “to acknowledge the need for longer distance sea shipping of minerals ...” – and (b) the language which he recommended should be used in Policy S13 to reflect that need – namely that the last few words of Policy S13 should read: “... recyclables ... by rail and sea, including short-sea shipping”. The argument is that the language which the inspector recommended be used does not in truth reflect the view which everyone shared that longer distance sea-shipping was an important element in the transportation of aggregate, including crushed rock.
83. This argument is far too refined for my taste. The fact is that the language which the inspector said should be used did not limit Policy S13 to wharves for the reception and movement of aggregate imported by sea to shipping of a particular kind. It merely added, for the avoidance of doubt, that it included wharves for the reception and movement of aggregate imported by short-sea shipping. That did not have the effect of excluding wharves for the reception and movement of aggregate imported by longer distance sea-shipping. If anyone subsequently wishes to argue that it did, they need only to be referred to recommendation 10(a) to explain what the inspector's language was intended to convey.

Issue (4)

84. In the course of the examination in public, ABP's representatives sent an e-mail to the programme officer (who looked after the administrative aspects of the examination) to which was attached ABP's suggested wording for the Core Strategy. That was on 2 February 2007. This was passed to the inspector, and copies were sent to the mineral planning authorities. HCC chose to respond, and that response (which was dated 9 February) was sent to the inspector on 12 February. Neither ABP nor its representatives ever saw a copy of that response. It looks as if it was not sent to them. Indeed, Mr Cameron told me that HCC had no evidence that a copy of it was sent to them. The first time that ABP or its representatives knew about HCC's response and that the inspector had considered it was after the commencement of these proceedings when they saw the documents attached to Mr Read's witness statement, one of which was a copy of the response.
85. The failure to send ABP's representatives a copy of the response was compounded by what happened then. Thinking that the mineral planning authorities had not responded to their suggested wording for the Core Strategy, ABP's representatives wrote to the programme officer on 27 March expressing surprise about the absence of a response. That was drawn to the attention of the inspector who expressed the view in an e-mail to the programme officer that the matter was "most unfortunate", and that it was "important" for ABP's representatives to be provided with a copy of HCC's response. However, HCC thought that the inspector was referring to another document which had been circulated on 13 February (i.e. only a day after it had sent its response to the inspector), and it assured the inspector in effect that the document to which the inspector had been referring had been sent to ABP's representatives. ABP's representatives had by then responded to the document which had been circulated, and the inspector was therefore under the impression that *that* document constituted ABP's response to HCC's document of 9 February. He therefore wrongly thought that he had had the benefit of ABP's representations on the document whereas he had not.
86. ABP's case is that the failure to provide its representatives with a copy of HCC's document of 9 February meant that, in breach of para. D41 of PPS12, the examination had not been conducted in accordance with the principles of fairness. Although the inspector had been obliged by para. D7 of PPS12 to consider the document of 9 February, the principles of fairness had been breached because ABP's representatives had not had access to it as required by para. D43 of PPS12. Had they been provided with a copy of the document, they would have made representation on its contents. The representations which they would have made have been identified in the evidence filed on behalf of ABP. Since there is at least a chance that those representations would have influenced the inspector to adopt the stance which ABP was urging, there was a risk that ABP had been prejudiced by this procedural failing. The fact that the test is that of a risk of prejudice, rather than actual prejudice, is borne out by a number of cases, some of which were referred to in *R v Secretary of State for the Environment ex p. Slot* [1998] JPL 692.
87. I acknowledge, of course, that fairness has to be determined in its context, and an examination in public of the kind contemplated by section 20(6) of the 2004 Act is different from a court hearing where there are parties or even a planning inquiry determining an appeal from the refusal of planning permission. But PPS12 is a clear

guide to what fairness requires in an examination in public of this kind, and in my view fairness in that context required ABP's representatives to be provided with a copy of the document of 9 February so that they could comment on it. It is true that para. D37 of PPS12 says that the examination "will be conducted on the basis that those taking part will have read all the relevant documents", but that presupposes that the party knew, or should have known, about the relevant document's existence.

88. For their part, the mineral planning authorities contend that ABP's representatives should have known about the document of 9 February. A core documents list was published on HCC's website. It was regularly updated as new documents were produced. The document of 9 February appeared in the 10th version of the core documents list issued on 2 March, and on all subsequent versions of the list. There is no evidence one way or the other whether the documents on the list could be accessed and downloaded, and I am sceptical about whether ABP's representatives should be expected to have scoured through every version of the list to check that they had been provided with all relevant documents. They could have expected to be provided with a copy of any relevant document. In any event, when the inspector became aware that they had not been provided with a copy of the document of 9 February, he required them to be provided with it, and even then they were not.
89. But that is not the end of the matter. There is the question of prejudice. The issue is not whether there is a risk that ABP was prejudiced by the fact that its representatives did not make the representations in response to the document of 9 February which would have been made if they had been provided with a copy of it. The issue is whether ABP was "substantially prejudiced" by that fact. That is the language of section 113(6)(b) of the 2004 Act. No prejudice – let alone substantial prejudice – would have arisen if the result would ultimately have been the same. I am very sceptical indeed about whether the representations which ABP's representatives would have made would have affected the outcome. The points which the representatives would have made were all points which had been made, in one form or another, either in previous written representations or orally at the examination itself. I acknowledge that the impact on the inspector of a document which purported to refute the document of 9 February point by point – even if it made points which had previously been made – might just have affected the report in its final form in some way, but I regard that possibility as so remote that I do not believe that it can be said that ABP's interests have been *substantially* prejudiced by the failure to comply with the procedural requirement to act fairly.

ABP's remedies

90. If, as I have found, parts of the Core Strategy were not within Part 2 of the 2004 Act, the court may quash the relevant part of the Core Strategy – either generally or as it affects ABP's "property": see section 113(7) of the 2004 Act. Although I was addressed at some length about the appropriate remedy in this case, by the time the argument concluded, there was agreement – at any rate among the parties who were represented – that I should not proceed to determine the appropriate remedy at this stage. They wanted to see whether, in the light of my judgment, the appropriate remedy could be agreed. I was prepared to go along with that united front. Accordingly, I simply give the parties liberty to restore this claim in the event that they wish the court to hold a remedies hearing. It is important to maintain the momentum of the case and not allow things to drift, and I direct that if the claim is to

be restored for a remedies hearing, one or other of the parties should apply within 28 days of the date of the handing down of this judgment for a date for that hearing.

91. In the circumstances, it will not be necessary for anyone to attend the handing down of this judgment. I leave it to the parties to see if they can agree an appropriate order for costs in the light of this judgment. If there is to be a remedies hearing, the issue of costs can be decided then. If there is not to be a remedies hearing, and if the parties cannot agree an appropriate order for costs, they should notify my clerk of that within 28 days of the date of the handing down of this judgment, and I will decide what order to make as to costs without a hearing on the basis of such written representations as the parties wish to make. The time for filing any notice of appeal from the judgment should start to run from (a) 28 days after the date of the handing down of this judgment if a remedies hearing is not sought, or (b) the date of the remedies hearing.

Postscript

92. Finally, I cannot leave this case without commenting on the exhibits to the various witness statements which have been filed, and the bundle of documents which was prepared for the hearing. There was some duplication in the documents which were exhibited. It is not necessary to exhibit to a witness statement a document which has already been exhibited. Those responsible for drafting witness statements should remember that if a witness wishes to comment on a document which has already been exhibited, he can do so without exhibiting the document itself.
93. But the real problem was with the form of the trial bundle. The structure of it was that each witness statement was followed by the documents exhibited to it. However, this was classically a case for the exhibits to have been divided up subject by subject, and for them then to have followed each other chronologically with an index. In that way, it would have been much easier to locate particular documents and to follow the relevant events as they unfolded. The witness statements which exhibited the documents identified what documents were being exhibited to it, but without an index it was very difficult to see where those documents were in the bundle, and the pages on which a particular document started and ended. These difficulties could have been lessened if the witness statements had been annotated with the page numbers in the bundle, but not even that had been done. I do not wish to be judgmental, but in summary the preparation of the bundle should not simply be the mechanical reproduction of materials. Some thought should be given to the format which would be of greatest use to the judge.