

HYTHE AND DIBDEN PARISH: DESIGNATION OF A NEIGHBOURHOOD AREA

1. PURPOSE OF REPORT

- 1.1 **To consider the appropriate boundary for a Neighbourhood Area for Hythe and Dibden Parish, and to agree its designation.**

2. BACKGROUND

- 2.1. On 15 July 2015 Hythe and Dibden Parish Council applied to New Forest District Council (NFDC) and the New Forest National Park Authority (NFNPA) to designate the whole of Hythe and Dibden Parish a Neighbourhood Area under the Neighbourhood Planning Regulations 2012 ([Appendix A](#)). The proposed Neighbourhood Area is mostly within New Forest District, but a small area falls within the New Forest National Park.
- 2.2. NFDC and NFNPA held a joint public consultation on the proposed Neighbourhood Area, for six weeks which ended on Friday 18 September 2015. Under the Neighbourhood Planning (General) (Amendment) Regulations 2015 the two Councils have until 25 December 2015 to consider the proposed Neighbourhood Area designation¹.
- 2.3. A total of two letters making objections to the proposed boundary were received, from Southampton City Council (SCC) and Associated British Ports (ABP) (representations attached respectively as [Appendices B and C](#)). ABP own a large area of land within the proposed Neighbourhood Area, known as Dibden Bay, which is held by ABP for port operational purposes. It is known that ABP have aspirations for the future use of this land for port related activities in connection with the future expansion of the Port of Southampton. Both objections relate to the inclusion of ABP's landholdings within the proposed Neighbourhood Area. In addition, SCC objected to the inclusion of the deep water navigation channel within the proposed Neighbourhood Area.
- 2.4. A map is attached showing the ABP land holdings, Parish area and NFDC and NFNPA boundaries ([Appendix D](#)).

Planning status of land at Dibden Bay

- 2.5. Most of the ABP land holdings at Dibden Bay are in NFDC's planning area (a small part is in the New Forest National Park, see map at Appendix D).

¹ Guidance and regulations do not specify what happens if a decision is not made within the prescribed period.

- 2.6. A large part of Dibden Bay and the ABP landholdings are subject to national and international nature conservation designations; it is a Site of Special Scientific Interest and, on the foreshore also a Special Protection Area and Ramsar site.
- 2.7. Current Development Plan policies do not allocate land at Dibden Bay for development, although the Hampshire Minerals and Waste Plan includes land north-west of Hythe (as identified in the Port of Southampton Master Plan) as one of several areas safeguarded for possible potential minerals and waste wharfs. The supporting text in the Minerals and Waste Plan recognises that any development in this location will need to comply with the Conservation of Habitats and Species Regulations 2010.
- 2.8. Paragraphs 9.15 - 9.16 of the New Forest District (outside the National Park) Core Strategy make reference to Dibden Bay and in brief set out some of the main considerations which will affect any consideration of future development in this area. The Core Strategy recognises that Southampton is a major international deep sea gateway port of significant global and economic importance, and that Dibden Bay “...is the only area of land which is physically capable of accommodating significant expansion of the port...”. However, while the Core Strategy acknowledges that there may be a strong economic case for the physical expansion of the Port of Southampton, it advises that “any future expansion would, amongst other considerations, need to satisfy the requirements of the Habitats Regulations”.
- 2.9. Both this Council and the National Park Authority are currently reviewing their adopted Core Strategies. In doing so NFDC has undertaken to provide “...a reasoned justification and/or policies...which specifically address the future of Dibden Bay.” (See the attached Consent Order, [Appendix H](#)).
- 2.10. ABP has previously sought permission (including a Harbour Revision Order) for the development of Dibden Bay as a container port. These proposals were refused by the Secretary of State in April 2004, following a major public inquiry. In briefest summary, the Secretary of State’s decision letter ([Appendix G](#)) concluded that the potential benefits did not outweigh the potential harm to international and nationally sensitive sites. This decision does not mean that any future application by ABP would also, necessarily, be refused, but it would be a material consideration in the consideration of any new or revised application.

3. NEIGHBOURHOOD AREA DESIGNATION

- 3.1. It is for the Local Planning Authority to designate the Neighbourhood Area. Previous area designations within New Forest District have not given rise to objections to the boundary for the Neighbourhood Area being the whole Parish. With objections to the Hythe and Dibden Neighbourhood Area being received the Council must now consider how to respond to those objections. The next section of this report looks at the relevant Legislation and accompanying Guidance.

Legislation and Guidance

- 3.2. Section 61G of the Town and Country Planning Act 1990 , states as follows
(**emphasis added**)

s61G(4) In determining an application the authority must have regard to—

- (a) **the desirability of designating the whole of the area of a parish council as a neighbourhood area, and***

 - (b) the desirability of maintaining the existing boundaries of areas already designated as neighbourhood areas.*
- (5) *If—*
- (a) a valid application is made to the authority,*

 - (b) some or all of the specified area has not been designated as a neighbourhood area, and*

 - (c) the authority refuse the application because they consider that the specified area is not an appropriate area to be designated as a neighbourhood area,***
- the authority must exercise their power of designation so as to secure that some or all of the specified area forms part of one or more areas designated (or to be designated) as neighbourhood areas.*

- 3.3. Subsection (4) is ambiguous. On the one hand, it could be read as creating a statutory presumption, to which the Council must have regard, that it is desirable to designate the whole area of a parish council as a neighbourhood area., This interpretation would support a decision to designate the whole of Hythe and Dibden Parish as a Neighbourhood Area, as the Parish Council has applied for. However, subsection (4) could also be interpreted to mean that the Council must consider whether designating the whole parish area as a Neighbourhood Area is in fact ‘desirable’, this being a matter for the Council to determine. This is the interpretation adopted by ABP in their objection to the proposed Neighbourhood Area.
- 3.4. There is no judicial authority on which of these two interpretations is correct, and the Government’s Planning Practice Guidance (“the NPPG”) does not address the issue. However, guidance issued by the Planning Advisory Service supports ABP’s interpretation, advising that planning authorities “must consider ... how desirable it is to designate the whole of the parish area as a neighbourhood area”. Further, it is implicit in section 61G(5) that the Council should consider whether the area specified by the parish council is an appropriate area to be designated as a Neighbourhood Area. Case law² has established that section 61G(5) gives the Council a “broad discretion” when considering whether the specified area is appropriate, and that in exercising that

² R (Daws Hill Neighbourhood Forum) v Wycombe District Council 2014

discretion the local planning authority should have regard to the particular circumstances existing at the time the decision is made.

3.5. In the circumstances, it is clear that the Council will need to address the appropriateness of designating the whole of the parish, whichever of the two interpretations is correct. When deciding whether it is desirable/ appropriate that the whole of the parish area be designated, the Council should consider the main points of objection raised by ABP and SCC, in the light of current circumstances.

3.6. The NPPG provides advice on how planning authorities should approach the question of setting the boundaries of a neighbourhood area. Of particular relevance to this case:

a. Paragraph 41-032 refers to section 61G(4), and advises that

“In a parished area a local planning authority is required to have regard to the desirability of designating the whole of a parish area or town council as a neighbourhood area”

b. Para 41-033 identifies a number of factors that “could be considerations” when deciding the boundaries of a neighbourhood area. These include matters such as village or settlement boundaries which could reflect areas of expansion, the catchment area for walking to local services, the area where formal or informal networks of community based groups operate, the physical appearance or characteristics of the neighbourhood, whether the area forms all or part of a coherent estate, whether infrastructure features define a natural boundary, the natural setting or features of an area, and the size of the population living and working in the area;

c. Para 41-035 advises that the local planning authority should take into account the relevant body’s statement explaining why the area applied for is considered appropriate to be designated as such, and that:

“The local planning authority should aim to designate the area applied for. However, a local planning authority can refuse to designate the area applied for if it considers the area is not appropriate. Where it does so, the local planning authority must give reasons. ...

When a neighbourhood area is designated a local planning authority should avoid pre-judging what a qualifying body may subsequently decide to put in its draft neighbourhood plan or Order. It should not make assumptions about the neighbourhood plan or Order that will emerge from developing, testing and consulting on the draft neighbourhood plan or Order when designating a neighbourhood area.”

d. Para 41-036 considers whether a neighbourhood area can include land allocated in the Local Plan as a strategic site, as follows:

“A neighbourhood area can include land allocated in a Local Plan as a strategic site. Where a proposed neighbourhood area includes such a site, those wishing to produce a neighbourhood plan ... should discuss with the local planning authority the particular context and circumstances that may inform the local planning authority’s decision on the area it will designate.”

3.7. These matters are addressed in Section 4 below.

4. ANALYSIS

4.1. Applying the guidance at paragraph 41-035 of the PPG, the Council should seek to designate the whole of the parish (since that is what Parish Council has applied for) unless the Council considers this inappropriate.

4.2. The Parish Council’s reasons for including the whole of the parish are set out in its letter of 15 July 2015 (**Appendix A**), and are that the parish represents the full extent of the Parish Council’s administrative area of responsibility to provide services, and that the Neighbourhood Plan will give the local community the opportunity to engage in locally based land use decision making. The former point is a clear and coherent reason which is consistent with the area specified. With regard to the latter, it could be argued that the local community would have an opportunity to engage in local land use decision-making even if ABP’s landholding is excluded from the neighbourhood plan. However, exclusion would reduce the scope for the neighbourhood plan to deal with issues such as mitigating the possible impact of any future development at Dibden Bay on the local community. In any event, the fact that inclusion of ABP’s landholding is not essential for community engagement does not make its inclusion inappropriate.

4.3. ABP and SCC’s reasons for contending that designation of the whole parish is inappropriate are summarised and responded to as follows:

It is inappropriate for development control policies affecting Dibden Bay /the ABP land holding to be decided at Neighbourhood Plan level due to its ‘strategic nature’ and wider than local implications, economic and environmental

4.4. There is nothing in the Town and Country Planning Act (as amended), the Neighbourhood Planning (General) Regulations (as amended) or the National Planning Practice Guidance to support the view that land ownership or strategic aspirations or potential for its use should be given any particular weight in setting the boundary of a Neighbourhood Area.

4.5. The Government’s NPPG is clear on this point. Paragraph 41-036 confirms in response to the question “Can a neighbourhood area include land allocated in the Local Plan as a strategic site?” that a Neighbourhood Plan can include land allocated in a Local Plan as a strategic site. In the NFDC and NFNPA context Dibden Bay is not an allocated strategic site in any statutory Development Plan document. However, even if it were allocated, this would not render its inclusion in the neighbourhood area inappropriate.

- 4.6. The letter from Winckworth Sherwood LLP on behalf of ABP (“ABP’s letter”) acknowledges this part of the guidance in paragraph 41-006, but draws attention to the following sentence, which advises those wishing to produce a neighbourhood plan which includes land allocated as a strategic site allocated to discuss the matter with the Local Planning Authority. In so doing, ABP misquote the NPPG slightly, suggesting this guidance is concerned with land ‘referred to’ in a local plan as a strategic site, rather than with land allocated in a local plan. While Dibden Bay is referred to, it is not allocated in the Core Strategy, and it could therefore be argued that the advice on which ABP rely is not strictly relevant. In any event, the Parish Council has discussed the inclusion of Dibden Bay with officers, who are satisfied that the Parish Council is aware of both the potential strategic significance of Dibden Bay and the important international designations which are likely to affect development of the site, and understands the Council’s position as set out in the Core Strategy. In the circumstances, there is no conflict with para 41-036.
- 4.7. ABP’s letter refers to case law [R (Daws Hill Neighbourhood Forum) v Wycombe District Council High Court] where the court upheld a local planning authority’s decision to exclude two strategic sites from a proposed Neighbourhood Area. However, that decision was based on the local circumstances which were particular to that case, and does not establish any legally binding precedent which would require the Council to exercise its own broad discretion in the same way. In particular, the strategic sites in the Daws Hill case either had a planning permission or an adopted Supplementary Planning Document for site development at the time of the decision. This was an important part of Wycombe District Council’s decision, because one of the primary purposes of the Daws Hill Residents Area was to influence the scale of development on the strategic sites. In the circumstances, the Court held that Wycombe District Council was entitled to conclude that the neighbourhood plan would be overtaken events, with the result that “false expectations would be raised and time and resources wasted.”
- 4.8. In contrast, there is no current planning application for port operations at Dibden Bay, nor any extant or lapsed consent for such use. Consent was previously applied for by ABP for the use of Dibden Bay as a container port, but in 2004, following a public inquiry, the Secretary of State agreed with the recommendations of the examining inspector to dismiss the proposal. As such, while Dibden Bay has strategically important potential, there is no formal planning commitment to the development of the site, and no certainty that any future consent would be forthcoming to realise that potential.
- 4.9. SCC argues that the place to test the strategic and national economic and environmental issues associated with Dibden Bay is through the Council’s own strategic Local Plan review and the national infrastructure planning process. However, as noted above, this does not mean that there is not a role for the neighbourhood plan, for example in addressing the mitigation of the possible impacts of development at Dibden Bay on the local community.

ABP land holding should be excluded from the Hythe and Dibden Neighbourhood Area because they are significantly different in character to the rest of the Parish

- 4.10. ABP's letter argues that "the Dibden Bay Reclaim and surrounding land is clearly of distinct and very different character to the rest of the proposed Neighbourhood Plan Area". Although ABP do not themselves make the connection, this argument could have been linked to the list of possible considerations set out in para 41-033 of the NPPG, which includes such matters as the physical appearance or characteristics of the neighbourhood, and the natural setting or features in an area.
- 4.11. In this regard, it is undoubtedly the case that Dibden Bay has a different character to other parts of the parish, such as the built up or urban area of Hythe. However, rural and coastal parishes frequently include areas of differing character, and the fact that one area of land has a different character to the remainder of a specified area does not itself make it inappropriate to include the former in the designated neighbourhood.
- 4.12. In the present case, the parish boundary of Hythe and Dibden is a longstanding, historically recognised way of identifying both the local community and the administrative area. This can be contrasted with a neighbourhood forum for a non-parished area, which has no accepted or pre-existing boundary, and where the criteria in para 41-033 of the NPPG may be particularly useful when deciding whether the specified area represents a coherent "neighbourhood". The fact that ABP's landholdings exhibit a different character to other parts of Hythe and Dibden does not detract from their association with the wider parish, or make their inclusion inappropriate.

There is potential for different plans to pursue conflicting policies for a major strategic site that only partially falls within the Neighbourhood Plan Area

- 4.13. ABP landholdings, based on the indicative map provided in their representation, are already in two local plan areas (and two parishes).
- 4.14. When the Parish Council is preparing its neighbourhood plan, it will need to have regard to national policy. Paragraph 184 of the NPPF states that the ambition of a neighbourhood "should be aligned with the strategic needs and priorities of the wider local area" and that "Neighbourhood plans must be in general conformity with the strategic policies of the Local Plan".
- 4.15. There is no basis in evidence to presume that the Neighbourhood Development Plan for Hythe and Dibden would not be prepared in accordance with the NPPF, having full regard to the strategic potential of the Dibden Bay site, and in parallel to the review in progress of the NFDC and NFNPA local plans (which would both also have regard to the wider context and strategic potential of Dibden Bay).
- 4.16. ABP and other interested parties have the opportunity to contribute and respond to proposals in the emerging Neighbourhood Plan when it is consulted upon, including

the right to respond to the submitted draft Neighbourhood Development Plan prior to its independent hearing – which would also have regard to any relevant strategic matters, in the light of national policy.

Use of a Neighbourhood Development Plan to ‘block’ development

- 4.17. SCC refer to the guidance in the Planning Advisory Service’s website section on Neighbourhood Plans where, at ‘Frequently Asked Question (4)’³ PAS advise that neighbourhood plans cannot be used to block development rather than promote it, because “*neighbourhood planning is about shaping the development of a local area in a positive manner*”.
- 4.18. This part of the PAS guidance is directed at the sort of policies a neighbourhood plan should contain, rather than the extent of the neighbourhood. SCC’s reference to it implies a concern that the parish council would use their neighbourhood plan as a vehicle for blocking future development at Dibden Bay. However, the Council has seen no evidence to suggest that this is what the parish council intends, and to conclude otherwise would be contrary to para 41-035 of the NPPG, which warns against “*pre-judging what the qualifying body may subsequently decide to put in its draft neighbourhood plan*”.
- 4.19. On 21 September 2015 NFDC and NFNPA jointly wrote to Hythe & Dibden Parish informing them of the two objections and inviting them to comment (Appendix E). The parish response (Appendix F) clearly shows that the parish understand the appropriate limits of Neighbourhood Plans in relation to strategic development, and the need to work within the context of local plans.

Objection to inclusion of the deep water navigation

- 4.20. Part of the deep water navigation channel for the Port of Southampton within the administrative area of Hythe and Dibden Parish. Insofar as SCC’s objection about including the deep water navigation in the Neighbourhood Area relates to potential use of a Neighbourhood Development Plan to ‘block’ development, the points of response in paragraphs 4.17 - 4.19 apply equally here.
- 4.21. In addition the Parish has stated its reasons for including the deep water channel and they relate to addressing foreshore wash, erosion and flooding (see Appendix F). These are all reasonable matters for a Neighbourhood Plan to consider, and in any event the land use planning system including neighbourhood planning applies to land up to the tidal low water mark.

³ http://www.pas.gov.uk/web/pas1/45-faq/-/journal_content/56/332612/15205/ARTICLE

Other considerations

- 4.22. Whilst not a matter that directly affects the Councils' decision about an Area Designation, it is contextually relevant in this case that a Consent Order between NFDC and ABP (August 2014) commits NFDC (among other things) to include in its Local Plan Review reasoned justification, and/or policies (whether by way of allocation, safeguarding, a criteria-based approach, or a combination of these) which specifically addresses the future of Dibden Bay. Future Local Plan coverage for Dibden Bay prepared in accordance with the Consent Order would either
- i. form part of the strategic context for the preparation of the emerging Neighbourhood Development Plan and assessment as to whether it meets the 'basic conditions' test of whether the Plan is in general conformity with the strategic policies contained in the development plan for the area (if the Hythe and Dibden Neighbourhood Development Plan is still being prepared and the district replacement local plan is adopted), or
 - ii. if the Hythe and Dibden Neighbourhood Development Plan were adopted first, supersede any policy treatment for Dibden Bay in the adopted Neighbourhood Development Plan that is not consistent with the replacement NFDC Local Plan when it is adopted.

5. CONCLUSIONS

- 5.1. If the correct interpretation of the Town and Country Planning Act 1990 S.61G subsection 4 is that it is to be considered 'desirable' of itself to designate the whole of a Parish area as a Neighbourhood Area, then this interpretation would support a decision to designate the whole of Hythe and Dibden Parish as a Neighbourhood Area, as they have applied for.
- 5.2. If, however, the correct interpretation of section 61G subsection (4) is that it is for the Council to decide whether designating the whole parish area as a Neighbourhood Area is 'desirable' (including by considering pursuant to subsection (5) the 'appropriateness' of the area proposed), the assessment in paragraphs 4.1 – 4.21 of this report reviewing the main points of objection raised by ABP and SCC supports a decision that the area proposed for designation by Hythe and Dibden Parish as a Neighbourhood Area, is desirable and appropriate.
- 5.3. Accordingly, whichever interpretation of subsection (4) is correct, there is no reason to depart from the advice at para 41-035 of the NPPG that the Council should aim to designate the area applied for. In this case, that area is the whole of the parish of Hythe and Dibden.

6. LEGAL AND FINANCIAL IMPLICATIONS

- 6.1. Upon adoption the Neighbourhood Plan for Hythe and Dibden Bay would become part of the statutory development plan for NFDC and NFNPA, to be applied alongside the district and Park Authority local plans for the determination of planning applications in the parish.
- 6.2. Under current government arrangements (which may change) the Councils are jointly eligible to claim grant funding awards as follows. This money is to ensure local planning authorities receive sufficient funding to enable them to meet the neighbourhood planning duties in the Town and Country Planning Act 1990 which are to provide advice or assistance; to hold an examination including appointing an examiner; and to make arrangements for a referendum.
- £5,000 upon Neighbourhood Area designation
 - £5000 upon submission of a Neighbourhood Plan for an independent examination
 - £20,000 upon a Neighbourhood Plan passing its examination.
- 6.3. Where, as is the case here, a Neighbourhood Area falls within the area of more than one local planning authority, including a National Park Authority, it is for the authorities concerned to agree who will act as lead and how to share the grant funding locally.

7. ENVIRONMENTAL, EQUALITY & DIVERSITY IMPLICATIONS

- 7.1 The overarching objective of plan-making is to meet future development needs in accordance with the principles of sustainable development including safeguarding important landscapes, habitats and species. By planning positively Hythe and Dibden Parish can help to secure high quality development which best protects the local environment and meets local peoples' needs.

8. CRIME & DISORDER IMPLICATIONS

- 8.1 No direct implications.

9. RECOMMENDATIONS

- 9.1 That the whole of Hythe and Dibden Parish be designated as a Neighbourhood Area.

10. PORTFOLIO HOLDER ENDORSEMENT

I have agreed to the recommendation of this report.

Signed: E J HERON

Date: 16 November 2015

Date Notification of this Decision given: 17 November 2015

Last date for call-in: 24 November 2015

For further information contact:

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Appendices:

- A. Letter from Hythe and Dibden Parish Council seeking Neighbourhood Area designation dated 15 July 2015
- B. Objection from Southampton City Council dated 17 September 2015
- C. Objection from Associated British Ports dated 18 September 2015
- D. Map indicatively showing ABP landholdings, and the boundaries of Hythe and Dibden Parish Council, NFDC and NFNPA
- E. NFDC letter dated 21 September 2015 to Hythe and Dibden Parish Council
- F. Hythe and Dibden Parish Council response to (E) dated 11 November 2015
- G. Dibden Bay decision letter, Secretary of State, 20 April 2004
- H. Consent Order dated 11 August 2014



HYTHE AND DIBDEN PARISH COUNCIL

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Serving the communities of Dibden, Dibden Purlieu and Hythe

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15 July 2015

Dear Mr Elliott & Mr Avery

APPLICATION FOR DESIGNATION OF A NEIGHBOURHOOD AREA FOR HYTHE & DIBDEN

Hythe and Dibden Parish Council intends to prepare a Neighbourhood Plan. Please consider the information in this letter as our application for the designation of a Neighbourhood Area under the Neighbourhood Planning Regulations 2012.

1. Map showing plan area

Please find enclosed the map indicating the parish of Hythe and Dibden which is the area of the application. The majority of this area falls within New Forest District Council with a small area to the north-west falling within the New Forest National Park Authority.

2. A Statement explaining why the intended area is considered appropriate

The parish of Hythe and Dibden represents the full extent of Hythe and Dibden Parish Council's administrative area of responsibility to provide services. The parish supports 20,000 residents and the preparation of a Neighbourhood Plan will give the local community the opportunity to engage in locally based land use decision making.

3. Hythe and Dibden Parish Council is a qualifying body

I confirm that Hythe and Dibden Parish Council is a qualifying body under the Localism Act and a relevant body (section 61G of the 1990 Town and Country Planning Act, amended) for submitting this application.

Yours sincerely

Stephanie Bennett
Clerk to the Council

Enc.



Mr C Elliott
Head of Planning and Transportation
New Forest District Council

Mr S Avery
Director of Park Services
New Forest National Park

Direct dial: 023 8083 4602
Please ask for: Mr G Tuck
Our ref:
Your ref:
Date: 17th September 2015

By email only

Application for designation of a neighbourhood area for Hythe and Dibden

Thank you for consulting us on the above application. I note that the intended area is based on the Hythe Parish boundary and therefore covers not only the built settlements of Hythe and Dibden, but the whole of the potential Port of Southampton expansion land at Dibden Bay and the deep water channel.

In this particular case the proposed use of the parish boundary for the neighbourhood plan area therefore raises major concerns.

The Port of Southampton is a major international port of critical importance to the national as well as the local economy. The Port is the largest in the U.K. for cruise passengers and vehicle imports / exports; and the second largest for containers. Government policy, particularly the National Policy Statement on Ports, supports appropriate port expansion to sustain national economic growth.

The Port of Southampton Masterplan indicates the need for port expansion at Dibden Bay in the longer term. Clearly this raises significant economic, environmental, social and infrastructure issues. The NPPF explains that neighbourhood plans should develop plans that support strategic development needs (para 16).

The Planning Advisory Service's website section on Neighbourhood Plans includes a 'Frequently Asked Questions' section, and question 4 is particularly pertinent in this case:

"4. Can neighbourhood plans be used to block development rather than promote it? No. Neighbourhood planning is about shaping the development of a local area in a positive manner. It is not a tool to stop new development proposals from happening and should reflect local and national policies. Neighbourhood plans and orders should not promote less development than set out in the local plan or undermine its strategic policies".

In this case there are strategic and national economic and environmental issues associated with Dibden Bay. The place to test these is through New Forest District Council's strategic Local Plan review and the national infrastructure planning process. A neighbourhood plan should not be used to frustrate or prejudice the outcome of these strategic plans or processes.

We acknowledge that the relationship between any port expansion and neighbouring communities is one of the wide range of planning issues which would need to be considered. A neighbourhood area could be designated which covered only the existing built up area of Hythe and Dibden. A neighbourhood plan could then be prepared for this area which could include

reference to how the relationship between any port expansion and residential areas is managed. However the principle of port expansion should be addressed elsewhere.

Therefore Southampton City Council objects to the inclusion of the Dibden Bay area and the deep water channel within the proposed neighbourhood area for Hythe and Dibden.

I hope that helps in your considerations and I am of course happy to discuss these issues further.

Yours faithfully

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Our Ref: BG/10995/52

18 September 2015

Dear Sir

**Hythe and Dibden Parish Council - Proposed Neighbourhood Area Designation
Associated British Ports**

We write on behalf of our client Associated British Ports (ABP) with regard to the above.

We understand that the Hythe and Dibden Parish Council have (by letter dated 15 July) formally notified you as the relevant Local Planning Authority that it intends to promote a Neighbourhood Plan. It has, as a consequence, applied to your Authority under the provisions of the Town and Country Planning Act 1990 and the Neighbourhood Planning Regulations 2012 for designation of a Neighbourhood Area.

As the relevant Planning Authority, you will be only too well aware that under Section 61G of the 1990 Act you are required to - "*have regard to the desirability of designating the whole of the area of a parish council as a neighbourhood area....*" (section 61G(4)(a)). In addition, by virtue of Section 61G(5)(c) you are also empowered to refuse an application for designation of a Neighbourhood Area if you consider - "*that the specified area is not an appropriate area to be designated as a Neighbourhood Area*".

The purpose of writing to you on behalf of our client ABP, therefore, is to draw your attention formally to the fact that a large area of land owned by our client, Dibden Bay and surroundings, and which is held by our client as port operational expansion land for the Port of Southampton, falls within the prospective Neighbourhood Plan Area as now proposed by the Parish Council.

We should say at the outset that our client fully supports the concept of neighbourhood planning and should the Parish Council wish to take forward a Plan for an appropriate area, then in the light of the Parish Council's obvious interest as to ABP's future aspirations for Dibden Bay, our client would be more than happy to assist and liaise with the Parish Council during the neighbourhood plan promotion process. That said, however, we are strongly of the view that in light of its strategic character, it would be entirely inappropriate for ABP's Dibden landholding actually to be incorporated within the Hythe and Dibden Neighbourhood Plan Area.

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In so saying, we are fully conscious that Planning Practice Guidance (at paragraph 036) does indicate that a Neighbourhood Area can include land referred to in a local plan as a strategic site. It does, however, continue by stating that –

“Where a proposed Neighbourhood Area includes such a site, those wishing to produce a Neighbourhood Plan or Order should discuss with the Local Planning Authority the particular planning context and circumstances that may inform the Local Planning Authority’s decision on the area it will designate.”

We would also draw your attention to the provisions of the National Planning Policy Framework. This, at paragraph 183, confirms that neighbourhood planning gives communities direct power to:-

“set planning policies through neighbourhood plans to determine decisions on planning applications” -

It continues, however, at paragraph 184 by stating that:-

“The ambition of the neighbourhood should be aligned with the strategic needs and priorities of the wider local area. Neighbourhood Plans must be in general conformity with the strategic policies of the Local Plan..... Neighbourhood Plans and Orders should not promote less development than set out in the Local Plan or undermine its strategic policies.”

One of the principal objectives of neighbourhood planning is to enable the “*relevant body*”, in this instance the Parish Council, to exercise direct “*local*” planning powers over its area. If, as appears to be the case, the Parish Council wish to include our client’s Dibden landholding within their Neighbourhood Plan Area, then it must follow that the Parish Council have aspirations to promote some form of planning control over that part of ABP’s Dibden landholding that falls within the Council’s parish boundary.

In the light of the strategic nature of ABP’s Dibden landholding, however, any development of that site will have wider connotations for the locality – indeed region - than for just the Hythe and Dibden parish community. On that basis, development control over Dibden Bay exercised at Neighbourhood Plan level, would we suggest, be entirely inappropriate.

We assume it is accepted by both your Authority and the Parish Council that Dibden Bay must be viewed as a strategic site – certainly this fact has been accepted by your Authority through the last Local Plan review. On that basis, it must also be accepted that the inclusion of ABP’s Dibden landholding within the Neighbourhood Area and as a consequence any subsequent Neighbourhood Plan, cannot be an appropriate means by which to address the strategic planning issues arising in relation to that site.

The future development of ABP’s Dibden landholding will of course be an issue for consideration as part of the emerging Local Plan process. We would suggest that the inclusion of ABP’s Dibden landholding within the Neighbourhood Plan has the potential to raise the confusing prospect of two Councils promoting conflicting policies in relation to development proposals for a major strategic site that only partially falls within the Neighbourhood Plan Area.

Indeed, as not all of ABP’s Dibden landholding actually falls within the Parish of Hythe and Dibden, as detailed by the attached draft plan, when the site is brought forward for development by ABP, the Parish Council will find itself in the rather unenviable position of having to promote and defend policies in relation to only part of the area. This, of course, runs entirely contrary to Government policy in terms of consistency and certainty and, of itself, emphasises why Dibden Bay and surroundings should be treated as being very different to the rest of the proposed Neighbourhood Plan Area.

Turning to the site itself, the character of the area must be a relevant consideration when considering whether it should be included within the Neighbourhood Plan Area. Indeed, this aspect was considered in the case of *R.(Daws Hill Neighbourhood Forum) -v- Wycombe District Council [2014] 1WLR1362*. The Dibden Bay Reclaim and surrounding land is clearly of a distinct and very different character to the rest of the proposed Neighbourhood Plan Area. The reclaim is port operational land, created and held by ABP for the Port of Southampton as strategic expansion land. You are fully aware of the status of Dibden Bay as provided in your Authority's own Core Strategy and indeed the similar recognition given to the site by Southampton City Council in their Core Strategy.

In closing, we should emphasise again that this letter is not intended to be taken in any way as being hostile to the Parish Council's aspirations for the designation of a Neighbourhood Plan Area. Our client is very conscious that its Dibden landholding and its future will play a large part in the life of the Hythe and Dibden community. Indeed, our client would welcome the opportunity to meet with the Parish Council to discuss its aspirations for the Dibden Bay site at an appropriate time, and indeed would be happy to assist the Parish Council, should such assistance be required, in the formulation of policies that may impact, albeit peripherally, upon the future development of the Dibden landholding.

That said, however, we must repeat that we consider it entirely inappropriate for ABP's Dibden landholding to be included within the Neighbourhood Plan Area and would ask that your Authority so determine.

Should your Authority or the Parish Council wish to discuss any of the foregoing, we would be happy to do so.

We look forward to hearing from you as soon as may be convenient.

Yours faithfully

A handwritten signature in blue ink that reads "Winckworth Sherwood LLP". The signature is written in a cursive, flowing style.

Winckworth Sherwood LLP

DT 020 7593 5016

DF 020 7593 5099

bgreenwood@wslaw.co.uk

cc. Mr Chris Elliott, Head of Planning and Transportation, by email only

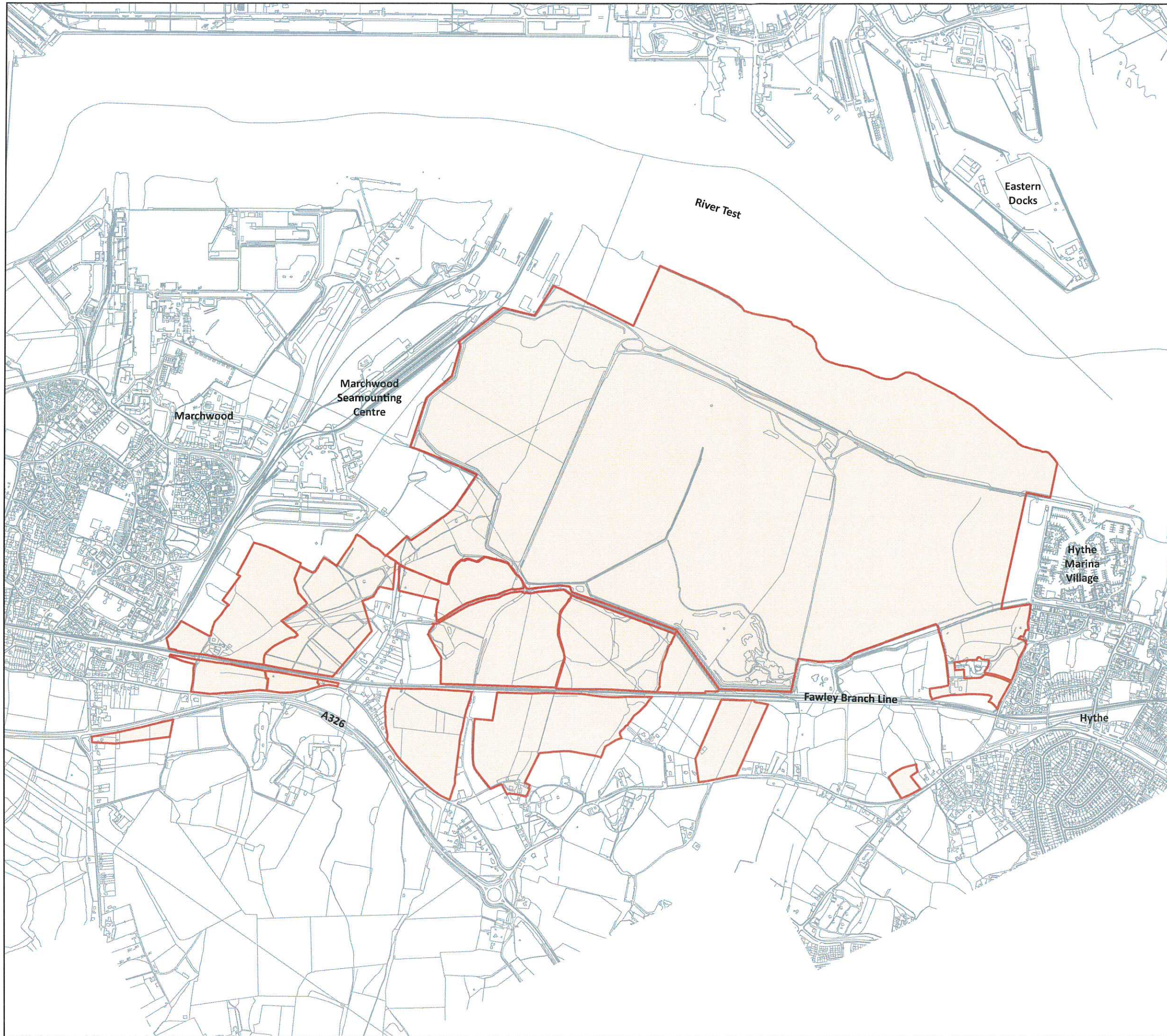


Figure 1 : **ABP landholding**

 Land Owned by ABP

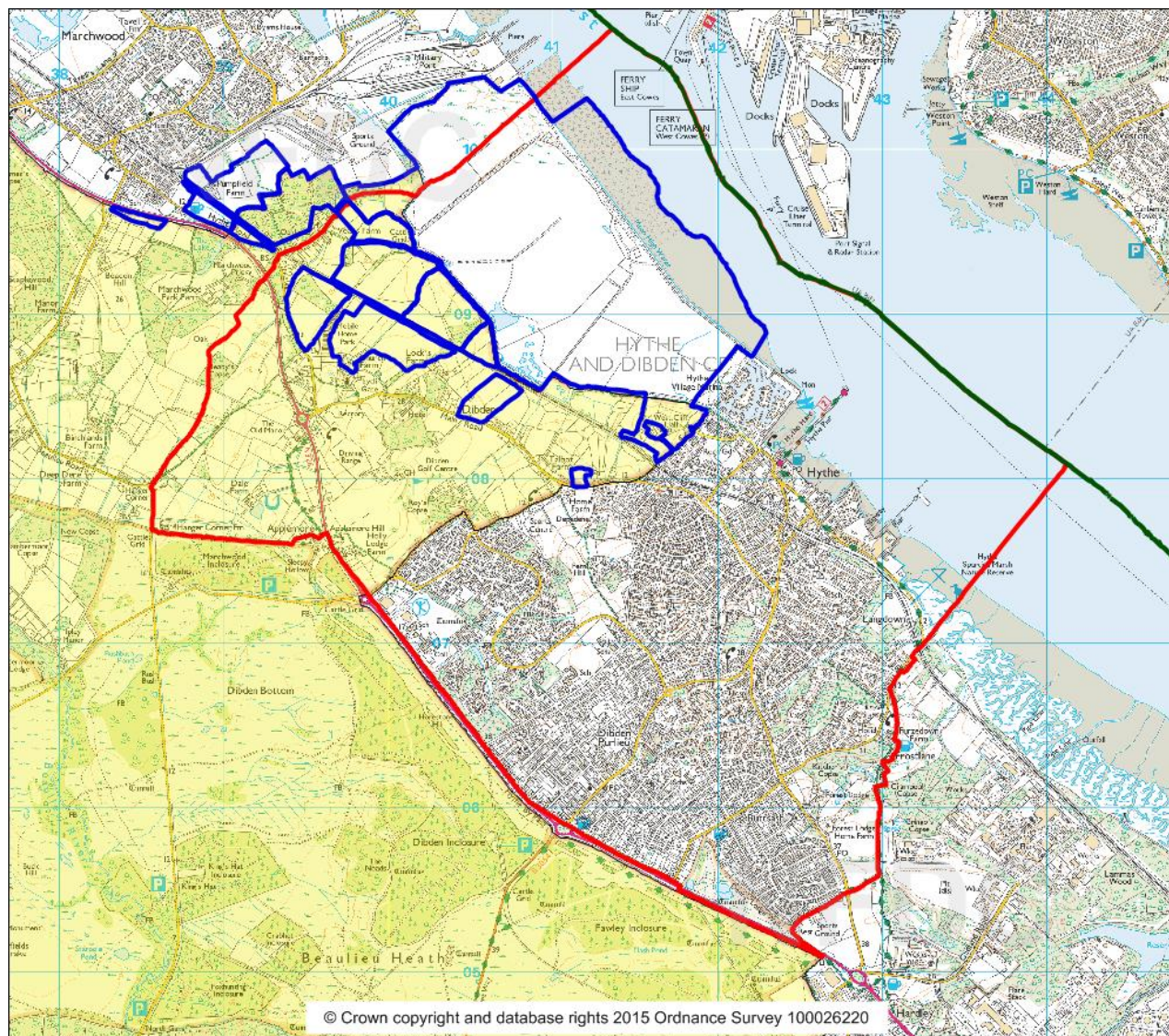
DRAFT



Scale 1: 15 000 @ A3

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Appendix D: Map of indicative ABP landholdings at Dibden Bay




New Forest
DISTRICT COUNCIL
Tel: 023 8028 5000
www.newforest.gov.uk

-  New Forest District boundary
-  New Forest National Park
-  Hythe and Dibden Parish boundary
-  ABP landholding

Not to scale

Planning and Transportation

Head of Service: Chris Elliott

Hythe & Dibden Parish Council
The Grove
25 St. John's Street
Hythe
Hampshire
SO45 6BZ

My Ref: AH/HytheDibdenNP
Your Ref:

Date: 21 September 2015

Dear Sir/Madam

HYTHE & DIBDEN NEIGHBOURHOOD AREA BOUNDARY CONSULTATION

I am writing jointly on behalf of New Forest District Council and the National Park Authority in connection to objections received to the proposed Hythe and Dibden Bay Neighbourhood Area. Associated British Ports has objected to the inclusion of its Dibden landholding within the Neighbourhood Area designation. Southampton City Council has also objected to inclusion of the Dibden Bay area and part of the deep water navigation channel.

Both objections are attached for consideration.

Before this Council and the National Park Authority make a decision about the appropriate Neighbourhood Area boundary we would like to provide an opportunity for the Parish Council to explain why it considers it appropriate to include Dibden Bay in the Neighbourhood Area designation. In particular, if it is the Parish Council's view that the Neighbourhood Area should include the ABP land holdings and/or the deep water navigation channel, please outline the types of issues you would envisage that the Neighbourhood Plan may seek to address in these areas.

I look forward to hearing from you by 23 October 2015.

Yours faithfully

Andrew Herring
Planning Policy Officer
Planning & Transportation
Tel No: 023 8028 5588
email: andrew.herring@nfdc.gov.uk

Attached: Responses by ABP and Southampton CC to the Neighbourhood Area consultation (Sept 2015)



Disability Helpline
023 8028 5000

newforest.gov.uk

Appletree Court, Beaulieu Road, LYNDHURST, SO43 7PA



HYTHE AND DIBDEN PARISH COUNCIL

The Grove, 25 St. John's Street, Hythe, Hampshire SO45 6BZ

Serving the communities of Dibden, Dibden Purlieu and Hythe

STEPHANIE BENNETT - Clerk to the Council

Tel: (023) 8084 1411

email:stephanie.bennett@hytheanddibden.gov

Mr Mark Williams
Principal Policy Planner
Planning Policy
New Forest District Council
Appletree Court
LYNDHURST
SO43 7PA

P4/3/CH/BE

11 November 2015

Dear Mr Williams

Thank you for your letter dated 21 September, 2015 informing the Parish Council of the objections made by Associated British Ports and Southampton City Council.

Further to our meeting on 10 November 2015 to discuss these matters, I have now had an opportunity to discuss this with the Chairman of our Planning Committee. We believe that the proposed boundary of the Neighbourhood Area boundary should remain as submitted and contain the land known as Dibden Bay owned by Associated British Ports and the deep water channel.

Neighbourhood Planning is based on a process of openness and transparency to enable a community an influence on what happens in its own Neighbourhood. The process includes a requirement to take into account relevant strategic plans of other authorities and agencies and this Council fully intends to follow those processes.

We also appreciate that a major port proposal would likely be a national infrastructure project, and that such projects have their own consent process. Whilst not our intention, we formally acknowledge that it is not the appropriate role of a Neighbourhood Plan to either promote or obstruct a nationally significant infrastructure project.

Having said that, there is no impliance within the Neighbourhood Planning Process that a single landowner can require a Neighbourhood Planning process to remove a definitive piece of land and we do not believe that this is an intention within the processes. This community wishes to engage in the offer from Government to develop their own vision for this area, in consultation with all partners, and use these strong tools to influence what is developed and delivered in this Neighbourhood.

It is entirely reasonable and appropriate for our Neighbourhood Plan to consider matters that may affect the local community and identify how local concerns should be taken into account or addressed where there would be significant implications for the Parish and local communities.

We would consider it a negative step not to include land held by ABP as that removes the considerations for the surrounding infrastructure and community development if such a development was found to be acceptable through the appropriate decision-making process.

We welcome the offer of help from all bodies during the process of Neighbourhood Plan preparation and believe that all parties will gain valuable insight into the views and identified strategic needs of this Neighbourhood that will assist it in delivering its long term vision and the strategic aims of our bordering authorities.

Regarding the deep water channel we feel that it is important to include this as erosion of the foreshore and flooding is a key concern of this community and will be raised during any planning consultation. The research and provision of data in relation to 'wash' and 'scouring' will be a requirement of the community.

This Parish has recently completed the delivery of an action plan for a ten year vision. We find ourselves in the position of needing to review our plan and consultation is statistically likely to raise both land use and service needs of the community. It therefore suggests that the two processes should be combined at a consultation phase with the land use and infrastructure elements then extracted to feed into the Neighbourhood Planning process.

It is not our intention to deliver a conflicting plan to that of the Local Plan and we feel that this statement by ABP shows a disregard for the professionalism of this Council. We recognise that a Neighbourhood Plan needs to sit within the context of a Local Plan to deliver a 'localism' that is constructed by the Neighbourhood. This Council believes it has a positive and fruitful working relationship with both the National Park Authority and New Forest District Council and we look forward to working with them on this Neighbourhood Plan that includes all the area within the Parish boundary.

Yours sincerely

Chris Harrison
Chairman – Hythe and Dibden Parish Council

Dibden Bay - Decision letter

Contents

Decision Letter	2
Application process	3
Summary of Inspector's recommendations	3
Summary of the Secretary of State's decisions	3
Summary of Inspector's conclusions on the case for Orders	4
Secretary of State's Consideration	9
Overall conclusions by the Secretary of State	13
Post-Inquiry Events	15
Decision	16

Decision Letter

Messrs Winckworth Sherwood
Solicitors and Parliamentary Agents
35 Great Peter Street
Westminster
London
SW1P 3LR

Our Ref: P89/24/59

20 April 2004

Dear Sirs

Harbours Act 1964: Port of Southampton (Dibden Terminal) Harbour Revision Order

Transport and Works Act 1992: Fawley Branch Line Improvements Order

Town and Country Planning Act 1990: Stopping up of Highways (County of Hampshire) (No.) Order

1. I am authorised by the Secretary of State to inform you that consideration has been given to the Report of the Inspector, Mr Michael Hurley BA, Dip TP, MRTPI, on the Public Inquiries held initially in Hythe and subsequently in Southampton from 27 November 2001 to 12 December 2002, following objections made to the Port of Southampton (Dibden Terminal) Harbour Revision Order for which you formally applied under Section 14 of the Harbours Act 1964 on behalf of your clients, Associated British Ports, on 28 September 2000. The Report of the Inspector also covers the applications for:
 - the Fawley Branch Line Improvements Order under the Transport and Works Act 1992 ("the TWA Order");
 - a direction as to deemed planning permission ("the planning direction") for works provided for in the TWA Order, under section 90 (2A) of the Town and Country Planning Act 1990; and
 - an Order under Section 248 of the Town and Country Planning Act 1990 for the stopping up of parts of the highway at Hythe Road, Marchwood.
2. The applications which you made for planning permission for improvements to the A326 public highway and for railway noise barriers, and for an Exchange Land Certificate under the Acquisition of Land Act 1981, were considered concurrently at the same Public Inquiries and are the subject of a separate Decision Letter to be issued on behalf of the First Secretary of State.
3. A total of 6,141 persons or organisations objected to the proposed development, including representations direct to the Secretary of State and those to the New Forest District Council in respect of the planning applications. A small number of objections have been withdrawn. There were 190 other representations made, including 172 expressions of support for the proposed development.
4. The Inspector's Report of all the concurrent Public Inquiries is enclosed. Attached to that Report is the report of the assessor who sat with the Inspector, Professor Keith Dyer MSc, PhD, FGS, who was appointed by the Secretary of State to advise on erosion, sedimentation and related matters and in particular on the proposed recharging of the foreshore between Hythe and Cadland. The Inspector was also assisted by the Deputy Inspector, Mr Andrew Philippon BSc, C Eng, FICE, MIHT and Dr Chris Gossop BSc, MA, PhD, MRTPI.

Application process

5. The Harbour Revision Order, if made, would authorise the construction of a new deep water terminal at Dibden Bay, Hampshire with a quay length of some 1,850 metres, and amongst other things provide for dredging and other works, access roads, various ancillary matters, including compulsory acquisition of land and extinguishment of certain rights, footpath diversion, a recharge of the foreshore and provision of a conservation area.
6. The TWA Order, if made, would authorise the construction of works and the compulsory acquisition of land for the purpose of improving the existing Fawley branch line and the connection with the London-Weymouth main line. The Order would also, amongst other things, authorise a change in status of part of the branch line and remove, from certain parts of the land to be acquired or appropriated, their designation as a strategic freight site.
7. The Office of the Deputy Prime Minister is today issuing, on behalf of the First Secretary of State, a decision letter about the applications for planning permission for alterations to the A326 highway and for the erection of noise barriers alongside parts of the Fawley Branch Railway line and an Exchange Land Certificate.

Summary of Inspector's recommendations

8. The Inspector recommended in section 36 of his Report that the Harbour Revision Order, the Highway Stopping Up Order and the TWA Order **not be made** and that the associated planning direction **be refused**. He recommended also that the applications for planning permissions and an exchange land certificate be refused.

Summary of the Secretary of State's decisions

9. For the reasons given in this letter, the Secretary of State agrees with the Inspector's recommendations on the Harbour Revision Order, the Highway Stopping Up Order, the TWA Order and the associated planning direction. **He has, therefore, decided not to make those Orders and not to give the requested planning direction.**

Summary of Inspector's conclusions on the case for Orders

10. The Inspector's conclusions on the issues relating to the proposed orders (including issues requested in the Secretary of State's statement of matters for the Public Inquiries) are set out in section 36 of his Report. Paragraphs 36.647 to 36.677 of that Report provide a summary of his conclusions and set out his overall balancing of those conclusions. References below to paragraph numbers are to paragraphs in the Inspector's Report, unless otherwise stated.
11. The Inspector structured the conclusions of his Report by considering first the adequacy of the Environmental Statement prepared by the Applicant and then the matters about which the Secretary of State stated in his letter of 25 July 2001 that he particularly wished to be informed. Following examination of these matters, he then reviewed what he considered the main issues under various topics, concerning in particular the need for additional port capacity in relation to the public interest, the extent to which alternative solutions in the public interest were available and the impact of the proposed development and its relation to proposed offsetting measures.
12. The main conclusions reached by the Inspector are set out below and are followed by the Secretary of State's consideration of them.

Adequacy of the Environmental Statement for the draft Harbour Revision Order (HRO)

13. The Applicant submitted an Environmental Statement of the likely effects of the proposed development, in accordance with the requirements of Schedule 3 to the Harbours Act 1964. The Inspector considered that the Environmental Statement as originally put forward by the Applicant did not sufficiently define the development which might be authorised and thus was incompatible with previous case law [36.5 - 36.7]. The remedy was to limit the scope of the draft HRO to achieve a degree of congruence between the development assessed in the Environmental Statement and the development which would be authorised by the HRO [36.8]. The Inspector considered that the addition of certain modifications to the HRO, including some of those proposed by the Applicant, with the conclusion of obligations under Section 106 of the Town and Country Planning Act 1990 [36.30], would be sufficient to ensure that the proposed development would accord with that described in the Environmental Statement [36.31]. The Inspector concluded that the Environmental Statement, taking into account the afore-mentioned changes, was adequate as to its identification and assessment of the main environmental effects of the project and complied with the requirements of the Harbours Act 1964 [36.39, 36.43].

Statement of Matters

14. The Secretary of State does not see a need to set out in detail each and every item the Inspector considered as part of the Statement of Matters listed in the Secretary of State's letter of 25 July 2001.
15. The Inspector considered that the particular works described in the draft Orders applied for would be necessary if the development were to proceed [36.46 - 36.50], with certain exceptions, concerning the Hythe Marina Bund, the Pumpfield Farm Park and Ride scheme and the Hythe to Cadland foreshore recharge [36.51 - 36.61]. The Inspector considered that some of the proposals for compulsory purchase of land were not justified [36.62 et seq].

16. The Inspector considered that assessment of the compatibility of the scheme with national, regional and local planning and transport policies was in general a matter of balancing economic, social and environmental considerations, which he considered in more detail under particular topics [36.76 - 36.77, 36.87, 36.111, 36.114, 36.126 - 36.128, 36.146, 36.153]. With regard to local planning policies he identified Policy EC6 of the Hampshire Structure Plan (Review) as being the key determining County policy concerning port development at Dibden Bay [36.139], the criteria for which the proposed development would have to meet in preference to the requirements of other local policies.
17. The Inspector considered that no reliance could be placed on the Appropriate Assessment undertaken by the Applicant under the Conservation (Natural Habitats, & c.) Regulations 1994 SI 1994 No 2716 ("the Habitats Regulations"). He noted that the Applicant no longer adhered to the initial conclusion that the proposed development would not adversely affect the integrity of the European sites considered. Moreover, the Applicant had made no assessment of the effects of the proposed development on the River Itchen cSAC (candidate Special Area of Conservation) [36.166]. The Inspector considered that, contrary to the view put forward by the Applicant, the proposals would be likely to have an adverse effect upon the integrity of the designated conservation sites. In reaching this view the Inspector found against the Applicant's "functional approach" towards assessing environmental impact [36.169 - 36.172]. He considered the Applicant's assessment fundamentally flawed in that it treated compensatory measures as mitigation and wrongly relied on proposed habitat creation outside the European sites in concluding that the development would not adversely affect their integrity [36.184].
18. The Inspector saw no unacceptably adverse impacts of the scheme on soil, air quality and climatic factors, the archaeological and architectural heritage, rights of navigation, tourism and recreation, road traffic generation locally and on the wider road network and certain other matters referred to in the statement of matters about which the Secretary of State particularly wished to be informed by the Inspector [36.225 et seq, 36.248, 36.462 et seq]. He noted some adverse effects upon visual impact for the Hythe Conservation Area [36.229] and on residential amenity [36.231].
19. The Inspector considered that, while the proposed mitigation measures would be effective in reducing some of the adverse environmental effects of the proposed development, it would not be possible to devise an effective package of mitigation measures which would wholly eradicate the adverse environmental effects of the proposed development [36.223].
20. With regard to the works proposed in the TWA Order he noted the potential for noise disturbance to residents from increased use of railways, especially at night, and of increased delays at level crossings [36.237- 36.238, 36.249]. Otherwise he found no evidence of likely adverse effects [36.239 - 36.241].

Main Issues

Need for the Project and overall port capacity

21. The Inspector noted in his summary the favourable contribution the Applicant's proposals would make to the development of the port of Southampton and to the national and local economy [36.648 - 36.651]. He considered that the development proposed at Dibden Bay would achieve the objective of the Harbour Revision Order and that there were no realistic alternative sites within the locality which would meet the needs of the port of Southampton for additional container handling capacity [36.319 - 36.322 and 36.649]. Nor would re-configuration or better management of present facilities within the port of Southampton be likely to achieve any more than a limited increase in container handling capacity [36.310 - 36.318].

22. The Inspector considered that it had not been demonstrated that the proposed terminal would be commercially viable or that it would be capable of attracting the necessary funding. However, that was not to say that the scheme would fail to attract the necessary funding or that it would not be a commercial success [36.102]. The Inspector considered that the Government's policy with regard to demonstrable commercial viability should be applied even-handedly between different schemes and noted that other prospective container port developers might also refuse to disclose sufficient financial information to show that their projects were demonstrably commercially viable [36.108].
23. The Inspector considered that, with its present diversity of commercial activities - vehicle import/export, bulk imports and passenger cruise activity as well as the existing container terminal - the future of the port of Southampton would not be put at risk in the event of permission for a new container terminal being refused, though it would miss out on some benefits of additional traffic [36.295 - 36.300]. Nor did the Inspector consider that there would be a serious adverse effect upon the local economy and local employment, beyond the foregoing of direct opportunities, if the project did not go ahead [36.302 - 36.307]. The Inspector also drew attention to the advantages enjoyed by Southampton in terms of location and its deep water berths as factors in retaining its existing volume of business [36.83].
24. The Inspector concluded that the UK's container trade could be expected to continue to expand rapidly and that the Dibden Terminal would provide more than half of the identified additional quay length requirement for container capacity in the South East of England. It would make good use of connections by sea and to the national road and rail networks, and with improvements to the rail network rail could carry up to 35% of landward movement of containers [36.650]. This would ease the burden on the road network, in line with Government policy for modal transfer of freight. The Dibden Terminal would also stimulate the local economy. Its construction and operation would each provide a major source of local employment [36.651].

Environmental considerations

25. The Inspector attached considerable weight to the benefits of the project, which he saw as matters of public interest. However, he was in no doubt that the proposed terminal would do substantial environmental damage. The development would have an adverse effect on the amenity of local people, particularly as a result of noise disturbance, visual impact and delay at level crossings. These effects would weigh in the balance against the proposal but might not be sufficient to be determinative [36.652].
26. The Inspector attached greater significance to the damage that would be done to the character of the New Forest Heritage Area, a landscape subject to the highest level of protection. Although he recognised the Applicant's efforts to minimise potential harm to the landscape, he considered that the project would have an urbanising effect and that its impact would be apparent across a wide area [36.653].
27. The Inspector considered that the most significant harm arising from the proposed Dibden terminal would be to nature conservation interests. There would be direct impacts on sites of local and national conservation importance and on internationally protected sites, to which he attached paramount importance. He had no doubt that the proposed development would damage the integrity of the Solent and Southampton Water Ramsar site and Special Protection Area (SPA). He considered also that it could not be ascertained that the proposed development would not adversely affect the integrity of the Solent Maritime cSAC and the River Itchen cSAC [36.654].

Legal and Policy Tests

28. The Inspector considered therefore that the legal tests the Dibden terminal had to satisfy would be particularly stringent. He also considered the project against policy tests [36.655, 36.658].

29. The Inspector concluded that there was no alternative solution, within the requirements of the Environmental Statement under Schedule 3 to the Harbours Act 1964, to the proposed project, the objective of which was to expand substantially container handling capacity for the Port of Southampton [36.40 - 36.45, 36.655]. But to go ahead the project had to satisfy the criterion of "imperative reasons of overriding public interest", in accordance with the Habitats Regulations. This reflected Government policy, as set out in "Modern Ports - a UK policy", on the protection of internationally designated sites [36.658].
30. The Inspector doubted that it could satisfy that criterion, for a number of reasons. There was no assurance the works would go ahead if authorised and no contract, provisional or otherwise, in place with a potential terminal operator [36.656]. Neither Government policy nor Regional Planning Guidance, nor local policies indicated that nature conservation protection policies would be overridden by the need for development specifically at the port of Southampton [36.659, 36.661].
31. The Inspector considered that a project satisfying a test of public interest might reasonably be expected to attract a substantial degree of support from bodies representing the public interest. However, he noted that with the exception of the Southampton City Council, no public body had expressed support for the Dibden Terminal project at the Public Inquiries. The weight of public opinion, as expressed at the Inquiries and in the written representations, was heavily against the proposed development [36.660].
32. The Inspector considered that if the foreseeable national need could be met without the Dibden Terminal, there would be no imperative reasons of public interest that should override the protection of the internationally designated nature conservation sites [36.662].
33. The Inspector recognised the potential adverse competitive consequences to the national economy of a failure to proceed with the proposal in the absence of sufficient container handling capacity at UK ports. The key question for the Inspector was therefore whether without the proposed terminal there was a reasonable prospect of sufficient capacity being provided at UK ports to handle the expected growth in the UK's container trade in the foreseeable future [36.663].

Alternative means of serving the public interest

34. The Inspector accepted that unless substantial new port development took place in the South East of England, the UK would have insufficient container handling capacity to handle its foreign trade. He considered that the problem was likely to start to have an effect in about 2006 and that by 2015, the shortfall would be of the order of 3km of deep water container quay. He doubted the usefulness of predictions beyond 2015 [36.665].
35. There were three other schemes being developed in the South East for expanded deep-water container handling capacity, at London Gateway, Bathside Bay and Felixstowe (Landguard) which could, in various combinations, address or exceed the identified quantitative national need for additional capacity [36.666]. The Inspector could not predict whether these developments would proceed but nor was he able to rule out them not proceeding [36.667].
36. The Inspector noted that there were additionally proposals for new container ports at Hunterston on the River Clyde and at Scapa Flow in the Orkney Islands. He considered that, whatever their merits, these were located too far away to be realistic alternatives for meeting the needs of the South East of England [36.336, 36.337]. The Inspector concluded that a further possible development at the Isle of Grain was not credible as an alternative in the immediate future, given the absence of formal proposals for development of container handling capacity there [36.335].

37. The Inspector considered it unlikely that any of the other three South Eastern proposed container terminals could be operational before the forecast shortfall in national handling capacity began to have an impact in 2006. On the other hand, he concluded that there was no guarantee that the proposed Dibden Terminal would be operational in 2006. However, the Inspector, citing in support of his views European Commission guidance contained in "*Managing Natura 2000*", was not convinced that a temporary lack of handling capacity should be regarded as an imperative reason of public interest that should override the protection of internationally designated sites [36.668].
38. The Inspector considered it a reasonable prospect that any shortfall in national container handling capacity would be short-lived and thus there were, at present, no imperative reasons of overriding public interest to support the Dibden Terminal project, sufficient to outweigh its adverse impacts. He recognised that this conclusion was based on a finely-balanced judgement on which others might conclude differently and that a different conclusion might be drawn if certain other proposed developments failed to materialise [36.669 - 36.670].

The Adequacy of the Applicant's proposed offsetting measures

39. The Inspector identified the third and last main issue to be whether the offsetting measures proposed by the Applicant would be adequate in environmental terms. The Inspector considered the answer to be clear-cut, namely that the proposals advanced by the Applicant would not be adequate to permit the Secretary of State to meet the requirements of regulation 53 of the Habitats Regulations. Nor would they meet the wider requirements of Policy EC6 of the Structure Plan Review. The Inspector considered that this should be determinative and, accordingly, recommended against the HRO being made [36.671].

Secretary of State's Consideration

Environmental Statement for the HRO

40. The Secretary of State agrees with the Inspector's conclusions, for the reasons he gives, on the adequacy of the Applicant's Environmental Statement in so far as it meets the requirements of the Harbours Act 1964.

Statement of Matters

41. The Secretary of State agrees with the Inspector's conclusions, for the reasons he gives, on the issues identified in the Statement of Matters.

Main issues

Need for project

42. The Secretary of State agrees with the Inspector's conclusions on need for the project in relation to the port of Southampton, the economy of the South East of England, and the wider economy. With regard to financial viability of the project, he draws attention to his policy, as set out in "Modern Ports - a UK Policy", which is that where solely private funding is involved developers are best placed to assess their projects' sources of funding and commercial viability.

Alternative means of serving the public interest

43. The Secretary of State agrees that the UK will require new port development to meet forecast container handling capacity to handle foreign trade and considers that development in the South East of England would be appropriately placed to meet that need. He notes the existence, referred to in several places in the Inspector's Report, of three other proposed projects in the South East of England for the expansion of container capacity ports, and their individual forecast potential handling capacities.
44. At the time of the Public Inquiries these projects were at more or less early stages of development. Since the Inspector's Report was received by the Secretary of State, a Public Inquiry has been held into the proposals for London Gateway, a date has been set for a Public Inquiry into the proposal for terminal development at Bathside Bay and a formal application has been made for works at Felixstowe South (Landguard).
45. The Secretary of State considers that these proposals are therefore firmer than was the case at the time of the Public Inquiries. The Secretary of State does not prejudge whether any of those developments would proceed but he concurs with the Inspector that, in principle, they are feasible and credible alternatives for meeting forecast national needs within the short to medium term. There is no reason at this stage to rule them out as not being capable in principle of providing the additional capacity for container handling in the South East of England which has been identified in the Inspector's Report.
46. The Secretary of State notes, in addition, the Inspector's references and conclusions concerning projected developments at Hunterston and Scapa Flow. He accepts that the location of the two Scottish projects referred to makes them in relative terms less realistic alternatives to a Dibden Terminal than would be the case with the afore-mentioned three southern English projects. The Secretary of State agrees with the Inspector's conclusion that the Isle of Grain is not credible as an alternative given the absence of formal proposals for development of container handling capacity there [36.335].

47. On the question of meeting a predicted short-term shortfall in capacity, the Secretary of State agrees with the Inspector's interpretation of guidance from the European Commission in *Managing Natura 2000*, which states that short term economic interests or other interests which would only yield short term benefits for society would not be sufficient to outweigh the long-term conservation interests protected by Council Directive 92/43/EEC of 12 May 1992 on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive") [36.668]. He therefore concludes that a predicted shortfall in handling capacity for a short term should not be determinative in assessing imperative reasons of overriding public interest.
48. The Secretary of State notes, moreover, the Inspector's conclusion that there is no guarantee that the proposed Dibden Terminal would be operational in 2006 [36.668]. The Secretary of State agrees and draws attention to the long construction period of up to ten years for the Dibden Terminal identified in the Report and to uncertainties over the precise uses of its land area, which may cast doubt as to whether the project would be capable of meeting a potential shortfall of capacity in 2006. The Secretary of State, while accepting that additional container handling capacity is needed nationally, has no particular reason to identify a precise year or years in which a shortfall in capacity would arise if no further development projects were to proceed.
49. In the light of the foregoing, the Secretary of State sees no reason to depart from the reasoning and conclusions of the Inspector in this respect in paragraphs 36.664 - 36.670 of his Report.

Environmental matters, including the adequacy of the Applicant's offsetting measures

Consideration of alternatives

50. The Secretary of State agrees with the Inspector's assessment of the alternatives to the project in so far as they are required to be considered for the purposes of Schedule 3 to the Harbours Act 1964, namely that it is legitimate to consider only those which would meet the needs of the port of Southampton [36.41 - 36.42] and that no suitable alternative which would meet that need exists within the locality [36.319 - 36.322].
51. The Secretary of State notes, however, that the consideration of alternatives for projects which would have a significant impact upon a site designated in accordance with the Habitats Regulations must necessarily range more widely. The Secretary of State agrees with the Inspector's conclusion that the Applicant's proposal would have a significant effect upon the integrity of designated sites. It follows that consideration of alternatives must concern alternative ways of avoiding impacts on the designated sites. The Secretary of State considers that such alternatives would not be confined to alternative local sites for the project. He draws attention to the European Commission's methodological guidance on the Assessment of Plans and Projects significantly affecting Natura 2000 sites, which interprets article 6 (4) of the Habitats Directive. The guidance states that a competent authority should not limit consideration of alternative solutions to those suggested by a project's proponents and that alternative solutions could be located even in different regions or countries. On this point, the Secretary of State refers to the reasons set out in paragraphs 43 - 49 above.

Assessment of the Project

52. The Secretary of State considers it necessary first to consider the definition of the project to be assessed. He agrees with the view of the Inspector, who accepted the Applicant's broad definition of the project and considered that there was no legal authority supporting the suggestion of some objectors that a "core" component of the project be differentiated from the other measures proposed of an environmental character [36.167 - 36.168].

53. The Secretary of State agrees with the Inspector that, contrary to the view put forward by the Applicant, the proposals would have an adverse impact upon the integrity of the designated sites. The Secretary of State also agrees with the Inspector that the Appropriate Assessment undertaken by the Applicant, in accordance with the Habitats Regulations, is inadequate as regards both its conclusion and its coverage [36.166].
54. The Secretary of State agrees with the Inspector that the Applicant's proposed off-setting measures cannot be considered as mitigation in terms of the Habitats Regulations. As the Inspector noted, the Secretary of State's practice distinguished clearly in the Harwich dredging case between measures which would mitigate adverse effects upon a site and those which would provide compensation [36.177]. The Secretary of State agrees with the Inspector's interpretation of European Commission guidance contained in *Managing Natura 2000* on the difference between mitigation and compensation measures [36.178 - 36.182] and concurs that the Applicant's Appropriate Assessment and its conclusion are fundamentally flawed in this regard [36.184].
55. With regard to the adequacy of particular off-setting measures, the Secretary of State notes the Inspector's conclusions that the proposed Dibden Creek and Church Farm Nature Conservation Area, while considered beneficial features in themselves [36.380, 36.210], are of small scale in comparison to the area of protected habitat to be lost to the terminal scheme and that their quality [36.206] and value to the species of bird for which they are intended is uncertain, [36.432 - 36.435, 36.453].
56. 55. As for the proposed re-charge of the foreshore from Hythe to Cadland, he notes the Inspector's views of its uncertain effects [36.207, 36.449]. He further notes that the Inspector has accepted the views of the specially appointed assessor, Professor Dyer, [36.370] and of the nature conservation bodies that the proposed re-charge is at best of uncertain benefit, such a measure being untested on this scale anywhere else [36.351]. Moreover, there is a strong possibility in the view of many of the experts giving evidence at the Public Inquiries that the re-charge would in fact worsen the impact of the scheme on the designated sites and on the internationally and nationally important bird populations using them. The Secretary of State notes the conclusion of the Inspector that no part of this recharge scheme, including a proposed pilot recharge, is considered satisfactory or should be permitted [36.373, 36.376 - 36.377, 36.452].
57. In all circumstances the Secretary of State agrees with the conclusions of the Inspector in his paragraph 36.671 that the off-setting measures proposed by the Applicant would not be adequate compensatory measures as required under regulation 53 of the Habitats Regulations and article 6 (4) of the Habitats Directive .
58. The Secretary of State has been copied correspondence between the Applicant and English Nature dated 8 and 9 October 2003 since the close of the Inquiries. He notes that English Nature agree with the table of habitat loss provided by the Applicant concerning the impact of the project on designated sites. He notes that, in principle, English Nature agree, subject to phasing and deliverability, that a habitat creation package addressing that habitat loss could provide adequate compensation. However, he notes that no concrete proposals have been put forward and so nothing in this correspondence suggests that he should depart from the conclusions reached in paragraph 57 above.
59. The Secretary of State also notes from English Nature's letter of 21 January 2004 (sent him since the close of the Inquiries and enclosed with this letter) that English Nature believe that agreements subsequently reached between themselves, the Applicant and the Environment Agency concerning a proposed mitigation package, would, if guaranteed to be implemented, enable the Secretary of State to ascertain there would be no adverse effects on the integrity of the River Itchen cSAC. With regard to the other three internationally designated sites, however, the Secretary of State notes that English Nature's views on adverse effects and on the inadequacy of the Applicant's compensatory measures remain unchanged.

60. The Secretary of State as a competent authority is required under regulation 48 (1) of the Habitats Regulations to undertake an Appropriate Assessment of the likely impact of the proposals on designated European sites should he be minded to consider consent for a project affecting such sites.
61. The Secretary of State has in any case as a matter of policy sought advice which would be relevant to an Appropriate Assessment of the proposed project under Regulation 48 (1) and (3) of the Habitats Regulations. In the opinion of English Nature, as the Secretary of State's statutory adviser, which was presented in evidence to the Inquiries, the Dibden terminal project would have a likely significant effect alone and in combination with other plans or projects on each of the Solent and Southampton Water SPA, the Solent and Southampton Water Ramsar site, the Solent Maritime cSAC and the River Itchen cSAC. The position of English Nature is set out in their letter of 21 January 2004 to the Secretary of State. The Secretary of State notes that there is a serious prospect that the impact on the River Itchen cSAC can be eliminated by measures which could be taken by the Applicant (albeit that it does not yet appear that final agreement has been reached on this). However, even after taking account of the measures relating to the River Itchen cSAC, English Nature advises that in respect of the other European and Ramsar sites, there is no new information that could affect the content or conclusions of an Appropriate Assessment of the implications for any of these sites and that it is not possible for the proposals to avoid an adverse effect on their integrity. It remains the position of English Nature that the package of measures offered by the Applicant at the Inquiries is inadequate to provide compensatory measures required by regulation 53 of the Habitats Regulations 1994.
62. Having taken the advice of his statutory advisers, the Secretary of State concludes, in agreement with the Inspector, that the proposal would have negative consequences for international and European conservation sites. He further concludes, in agreement with the Inspector, that the compensatory measures proposed by the Applicant would not adequately off-set the detriment caused to natural habitat were the proposed terminal to go ahead.
63. The Secretary of State is persuaded by the reasoning of the Inspector on this point and by the advice of English Nature. In the circumstances he considers that he should not give consent for the Harbour Revision Order to be made, having regard to the requirements of regulation 53 of the Habitats Regulations and of article 6 (4) of the Habitats Directive.
64. As the Secretary of State does not propose to authorise the project he sees no reason to undertake his own Appropriate Assessment under the afore-mentioned Habitats Regulations.

Overall conclusions by the Secretary of State

Conclusions on Application for Harbour Revision Order

65. The Secretary of State agrees with the Inspector that, in accordance with the relevant conservation legislation, the project can only be allowed to proceed for imperative reasons of overriding public interest.
66. The Applicant asserts that other sites for proposed container terminals suggested by objectors as alternatives are not alternatives to this project, the object of which is to achieve expansion of container handling capacity in the port of Southampton. The Secretary of State agrees with the Inspector that this is the case with regard to fulfilling the requirements of Schedule 3 to the Harbours Act 1964 and similarly with the other orders and applications, though not with regard to fulfilling the requirements of the Habitats Regulations.
67. The Secretary of State has no reason to suppose that proposals for other container developments may not in time be put forward. There are three credible proposals in the South East of England already identified in the Inspector's Report. In considering impacts in this case, the public interest for which an internationally and nationally designated site would be adversely affected is different from the interests of the Applicant or of the port of Southampton. The Secretary of State considers the public interest to be of wider application and to include the economy of the South East of England and beyond. The Secretary of State agrees with the Inspector that there are credible alternatives for container port development, for the reasons already given in paragraphs 43 - 49 of this letter. While the Secretary of State agrees with the Inspector that it is not possible at this stage to determine whether other projects will be approved or proceed, he agrees there is equally no reason to rule them out as credible alternative proposals.
68. Subject to paragraph 69 below, the Secretary of State agrees with the Inspector's conclusions and accepts his recommendations. Overall, the Secretary of State agrees with the Inspector that the disbenefits of the scheme, as borne out by its impact on internationally and nationally environmentally sensitive sites, outweigh the potential benefits.
69. The Inspector concluded that there were considerable competing public interests at stake as to whether the proposals should be permitted and that ultimately there were value judgements to be made by Government [36.647]. The Secretary of State, while not disputing that he must make value judgements in balancing the public interests referred to, observes that the Inspector nevertheless considered that the conclusions he drew on the merits of the proposals on environmental grounds were clear-cut and determinative in recommending against the applications [36. 671]. For the reasons explained above, and because of the importance which the Government places on meeting its obligations under European Community law and the Ramsar convention, the Secretary of State accepts the Inspector's recommendation that the HRO not be made.

Conclusions on Applications for TWA Order, Stopping Up Order, planning permissions and exchange land certificate

70. It was the Inspector's view that the other applications - for orders, planning permissions and an exchange land certificate - were contingent upon the application for the Harbour Revision Order. In view of his recommendation against making of the HRO he considered that there was no need for these other applications. The Secretary of State shares that view on contingency with regard to the applications for which he is the confirming authority and accordingly those applications are refused.

Dibden Bay - Decision letter

71. Insofar as the proposed TWA Order is concerned, there is no evidence to suggest that the powers sought under that Order were required other than in connection with the Dibden Terminal scheme itself. In the light of his decision not to authorise that scheme, the Secretary of State sees no reason to make the TWA Order or to give the associated planning direction [36.673].
72. Insofar as the proposed Stopping Up of Highways Order is concerned, there is no reason to suppose that the application is justified or has any prospect of success, in the light of the Secretary of State's decision not to make the HRO [36.676].
73. The remaining applications fall to be determined by the First Secretary of State.

Post-Inquiry Events

74. In addition to matters referred to above, a number of other matters raised since the close of the Public Inquiries call for comment.
75. The Secretary of State received a letter dated 23 February 2004 from Macfarlanes, on behalf of their clients, the Peninsular and Oriental Steam Navigation Company, which invited the Secretary of State to consider new evidence on matters of port capacity and need, and raised issues of channel access to the port of Southampton, for which savings were sought in any HRO to be confirmed by the Secretary of State.
76. The Secretary of State subsequently received a letter dated 27 February 2004 from Bond Pearce, on behalf of the Applicant, stating that the matters raised by Macfarlanes were clearly long out of time. The Secretary of State agrees. In so far as Macfarlanes purport to provide additional information, the Secretary of State considers that these were matters for which the appropriate fora were the Public Inquiries and sees nothing to suggest that the Inquiries did not address these issues adequately at the time. The Secretary of State notes the submission from Bond Pearce that the points raised by Macfarlanes should not be allowed to delay the decision and he agrees. To re-open these matters would cause considerable delay and debate. He considers that there is an important public interest in giving decisions promptly and that in the circumstances the matters raised by Macfarlanes should not be allowed to delay the decision and that the letter from Macfarlanes should not be taken into account. The Secretary of State has also received further correspondence from Macfarlanes dated 22nd March 2004 which he does not consider it appropriate to take into account and further considers that it is unnecessary to delay taking the decision in order to allow others to comment on the submissions contained in the letter.
77. The Secretary of State has received correspondence from the RSPB. Although he has reviewed the correspondence, in view of his conclusions in this letter, and on the basis of the evidence of the Public Inquiries, the Secretary of State considers that it is unnecessary to take the matters raised in the correspondence into account in reaching his decision.
78. The Secretary of State has received a letter from Dr Julian Lewis MP which requested that he take into account the Inspector's Report of the Public Inquiries into applications for Orders and outline planning permission for a new container port at London Gateway before reaching a decision on the applications concerning Dibden Bay. The Secretary of State does not consider it appropriate to take into account the submissions made by Dr Lewis and further considers that it is unnecessary to delay taking the decision in order to allow others to comment on the submissions contained in the letter.
79. The Secretary of State has also received a letter from Leigh, Day and Company, on behalf of their clients the Residents Against Dibden Bay Port (RADBP). The Secretary of State does not consider it appropriate to take into account the submissions made by RADBP and further considers that it is unnecessary to delay taking the decision in order to allow others to comment on submissions contained in the letter.
80. No other post-inquiry correspondence received raises any new matters not already considered at the Inquiries that are relevant to the decision or which, in the interests of fairness, needs to be circulated to the parties for comment.
81. At an advanced stage of the consideration of this decision, the Secretary of State has received the Inspector's Report of the Public Inquiries into the applications for Orders and outline planning permission for a new container port at London Gateway. Having undertaken an initial review of the Report, he does not consider it appropriate to take it into account or revise his conclusions in this letter.

Decision

82. Having carefully considered the Inspector's Report and the issues raised by all the parties and post-Inquiry correspondence to the extent set out above, the Secretary of State accepts the Inspector's recommendations and has decided that the following orders not be made for the reasons given above:

- Harbours Act 1964: Port of Southampton (Dibden Terminal) Harbour Revision Order;
- Transport And Works Act 1992: Fawley Branch Line Improvements Order (and the associated planning direction);
- Order under Section 248 of the Town and Country Planning Act 1990, which would authorise the stopping up of parts of the existing highway at Hythe Road, Marchwood.

A copy of this letter with the Inspector's Conclusions on the Main Issues is being sent to those who made an appearance at the Inquiries and/or requested a copy of the decision. A copy of the decision and the Inspector's Report will be made available in addition on the Department for Transport website (www.dft.gov.uk)

Yours faithfully,

Phil Carey
Head of Ports Division
Authorised by the Secretary of State to sign in that behalf
Phil Carey
Head of Ports Division
Department for Transport
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SW1P 4DR

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT (Planning Court)

Claim No: CO/2384/2014

BETWEEN:

Associated British Ports

Claimant

-and-

(1) New Forest District Council

(2) Secretary of State for Communities and Local Government

Defendants



CONSENT ORDER

UPON the parties having agreed to settle on terms contained within the attached schedule

AND BY CONSENT

IT IS ORDERED THAT:

1. The claim is withdrawn.
2. There be no order as to costs.

Dated

Signed:.....

Osborne Clark
One London Wall
London
EC2Y 5EB
Ref: BJG/1014422

Solicitors for the Claimant

(1) Signed:.....

Andrew Kingham (Barrister) on behalf of
New Forest District Council
Appletree Court
Beaulieu Road
Lyndhurst SO43 7PA
Ref:

(2) Signed:..... *Z. Atkinson for the Treasury Solicitor's Department*

The Treasury Solicitor's Department
1 Kemble Street
London WC2B 4TS
Ref: Z1413632/ASM/B5

Solicitors for the Defendants

ADMINISTRATIVE COURT OFFICE
BY CONSENT ORDER AS ASKED

11 AUG 2014

MARTIN P. COWLIN
Senior Legal Manager

By the Court

SCHEDULE

1. The Council's intention is that the Local Plan Review (i.e. Core Strategy and LP2) will formally commence in September 2014, and that Associated British Ports (ABP) will be first consulted not later than December 2014 on the provision which the Review Plan should make in respect of Dibden Bay. ABP will be consulted at all formal stages of the Local Plan review process and the Council will invite technical discussions with ABP in between the formal stages.
2. The Council's objective and intention is to submit the Local Plan Review for examination by early 2017, with a view to adoption by the end of 2017.
3. The Local Plan Review submitted for Examination will include reasoned justification, and/or policies (whether by way of allocation, safeguarding, a criteria-based approach, or a combination of these), which specifically address the future of Dibden Bay, and in doing so will:
 - (a) recognise that Dibden Bay is the only area of land which is physically capable of accommodating significant expansion of the Port of Southampton – a facility of significant local, regional and national economic importance;
 - (b) recognise that Dibden Bay is held by ABP for port operational purposes in connection with the future expansion of the Port of Southampton;
 - (c) take account of the national and international designations affecting Dibden Bay and its surroundings;
 - (d) set out the considerations which a planning application(s) and/or application(s) for development consent for the development of land at Dibden Bay for port and port-related purposes would need to address.
4. Pending the adoption of the Local Plan Review any application for planning permission relating to ABP's land at Dibden Bay will be determined on its merits, in the light of the provisions of the adopted development plan (in accordance with section 38(6) of the Planning and Compulsory Purchase Act 2004) and other material considerations, including this consent order.