ID 022

SECTION 247 OF THE TOWN AND COUNTRY PLANNING ACT 1990

APPLICATION BY FOLKESTONE AND HYTHE DISTRICT COUNCIL TO STOP UP AND DIVERT HIGHWAYS AT PRINCES PARADE, HYTHE

APPLICANT'S
CLOSING SUBMISSIONS

Introduction

1. This inquiry is into an application made by the District Council of Folkestone and Hythe in March 2018 under s247 of the Town and Country Planning Act 1990 for an order to authorise the stopping up of an irregular shaped area of highway as leads off Princes Parade, and the diversion of a length of Princes Parade, at Hythe. The diversion of that part of Princes Parade would be on to a new road being constructed as part of the redevelopment of the site. The effect of the order would be to remove the highway rights over that part of Princes Parade to be stopped up and divert those highway rights over the new road. The Council's case for the order was set out in the report by Buckles of May 2021.[1]

The scope of the inquiry

2. The inquiry is to consider the direct consequences of what the order would do, namely stop up the existing highway on part of Princes Parade and divert it on to the new road. The inquiry is about highway rights. The inquiry is not to consider the consequences of the planning permission which has been granted. Impacts arising from the construction and existence of the development, including the new road, are not

[1] These closing submissions do not repeat evidence contained in the Council's four proofs of evidence and so should be read along with those proofs.

consequences of the order and do not fall for consideration.[2] It is the planning permission, and not the order, which authorises the construction of the new road.

3. The location of the new road is governed by the planning permission. The order simply diverts the highway right over the new road.[3] The inquiry is not to consider whether the new road should be constructed on a different route or in a different location. The diversion has no effect on the design or construction of the new road. It simply increases the number of vehicles which would use it.

4. The Inspector was right at the pre-inquiry meeting (PIM), in the note of the PIM, and in opening the inquiry, in what he said about the scope of the inquiry and what was relevant for consideration. The position was correctly stated in the Inspector's 'Post Meeting Note' dated 23 September 2021 (PPIQ006), following the PIM, where the Inspector said:

> "it is not open to myself, or the SoS, to revisit the Council's decision to grant planning permission. Objections pursued at the Inquiry should, therefore, be clearly related to the proposed stopping up, and not to the development itself" (p1) and
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> "It is the 'right' that is for discussion, not the construction. Therefore, surface water drainage, street lighting etc are not relevant considerations for the Inquiry" (p2).

5. In opening the inquiry, the Inspector repeated his position on the scope of the inquiry, saying that the order is with regard to the highway and that it does not allow anyone to re-visit the grant of the planning permission. He was right to say that it was imperative that this s247 process focuses on issues related to the stopping up and diversion and not to the development. As the Inspector put it in opening, it is the right to use the highway which is up for discussion, not the construction of the new road.

6. This is recognised by the campaign group in their communications with the inquiry, although not by their witnesses in their proofs of evidence. In their email of 5 October

[2] Mr Morgan accepted in XX that harm created by the development was not relevant harm for the purposes of the s247 consideration.
[3] Mr Morgan accepted in XX that the order does not authorise the construction of the new road and that this is authorised by the planning permission.

2021, the campaign group made clear that they were not seeking to invite the inquiry to consider the engineering or construction aspects of the new road, nor to consider alternative development proposals. Their amended statement of case accepts that it is not part of the inquiry scope "to consider alternative development to that for which planning permission has been granted" (para 29).

7. In their email of 12 October 2021, the campaign group expressly accepted that the inquiry's "jurisdiction does not include: (a) a re-consideration of the planning merits (or de-merits) of the development authorized by the planning permission; (b) a consideration of alternative development proposals to that which has planning permission". They said that they "accept that the focus is upon "the right" which it is proposed to be extinguished and exercised elsewhere". In opening, the campaign group again accepted the ambit of the s247 consideration, including that it excludes the construction and engineering aspects of the new road, as they are controlled by the planning permission and other processes.[4]

8. The great majority of objections relate to matters which the Inspector ruled at the PIM are irrelevant. This covers the construction and existence of the development, including the new road. It covers matters that are subject to and controlled by the planning permission. And it covers arguments that a different scheme should be promoted which does not stop up any section of Princes Parade.

9. Even those objections that were potentially within the scope of the inquiry largely seemed to misunderstand the position, despite what had been said in the May 2021 Buckles report. The arguments which might potentially be relevant are obviously wrong – such as the suggestion that the road will be cut off so traffic will have to use the A259 or that parking is going to be lost and not replaced – or are misconceived – such as arguments that the new road will be less safe than the existing road.

10. Although Cllr Martin claimed that Hythe TC understood the proper scope of the inquiry in his oral statement on Day 5, it is plain that it did not. The TC's objection included

[4] ID3, para 26. The point made by the campaign group in para 30 of their statement of case has not been pursued at the inquiry. In any event, Mr Wickenden accepted in XX that, in his professional experience of highways development, it was not the case that all new highways in Kent were constructed by KCC.

complaints about the consequences of the construction, and the location, of the new road, neither of which are consequences of the order.

11. It appears that Cllr Martin still does not understand the proper remit of the inquiry. The new text added into his statement as ward councillor on Day 5 of the inquiry was entirely irrelevant. It covered matters such as the planning permission, ground conditions, the construction of the new road, the location of the new road, and drainage. These were matters which it was made abundantly clear at the PIM are not within the scope of this inquiry. If Cllr Martin does indeed understand the proper remit of the inquiry, then it is apparent that he is deliberately choosing to defy the clear rulings on the scope of the inquiry and make irrelevant points, rather than relevant ones.

12. It is telling that, until the proper scope of the inquiry became clear to them during the course of this inquiry, objectors mainly complained about the effect of the construction of the new road, as well as the effects of the wider development. This applied to the campaign group's witnesses as well. The campaign group's witnesses all went through a process of cutting down or amending the matters that they cited in their proofs as causing harm, better to reflect the consequences of the order, but then maintained the same assessments of harm and overall conclusions. This is wholly incredible. In his XIC, Mr Wickenden said that the scope of the inquiry was "far more nuanced than [he] had appreciated".

13. The witnesses accepted that the Inspector could not count as direct disadvantages of the order the construction of the development, including the construction and presence of the new road, and the use of the new road by development traffic. They accepted that, instead, these things formed part of the context or baseline against which the impact of the diverted traffic fell to be considered.[5] However, despite accepting that all the harm they described in their proofs which was caused by the construction and presence of the development, including the new road, and the introduction of traffic in the location of the new road, should be treated as part of the baseline for judging the scale of any harm

[5] For example, Mr Joyce accepted in XX that the context for considering the effect of the diverted traffic included the existence of the built development under the planning permission, the existence of the new road, and development-related traffic using the new road. He accepted that all that the Inspector should consider is the effect of the diverted traffic on top of all those matters.

which arose – and despite accepting that the only harm which could be counted as arising from the order was that from the diversion of Princes Parade traffic over the new road – they still maintained precisely the same conclusions about the scale of the harm.

14. This was most obvious in relation to the issues of the effects on the natural and historic environment, including the setting of the Royal Military Canal (RMC), tranquillity and biodiversity. The campaign group's proofs of evidence – like almost all objectors – complained about the construction of the new road, its presence (eg streetlighting),[6] and the introduction of traffic in this location. But that is all now accepted by the campaign group's witnesses not to be a consequence of the order. It is instead a consequence of the planning permission which has already been granted. Nonetheless, when objectors describe how they perceive the effects of the diversion of traffic under the order, they do so comparing it to the position as it exists at the moment.

15. The inability of the campaign group's witnesses to understand the scope of the inquiry was exemplified by Mr Joyce's XIC. He talked about the introduction of the new road affecting the legibility of the RMC setting.[7] He talked about traffic noise being introduced into a "quiet and peaceful place". And he talked about the impact of placing the new road so close to the RMC. These are all impacts of the development under the planning permission and not the diversion of traffic under the order.

16. Mr Whybrow did exactly the same thing in his XIC. He talked about the impact of the diverted traffic in a "dark and relatively undisturbed corridor" which was "unspoilt". The order would not be diverting traffic into such a setting. It would be diverting traffic into the developed site. It was plain from Mr Whybrow's evidence that the impacts he was concerned about arose from the construction of the new road and its alignment. These are not consequences of the order. They have been approved already under the planning permission.

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[6] For consideration of the impact of streetlighting see eg CD3 at 8.214, CD13 at 4.103-4.123, CD25, CD26, CD93 at 7.8, and CD94 at 5.151-5.152. KCC Ecology's final comments of 30.7.18 (CD45) did not mention the streetlighting. The RMC path would be below 1 lux from the streetlights (see Andrews, 5.43, 5.47 and XIC).
[7] This is in any event a bad point, given the historic presence of the towing path south of the RMC, as shown in CD103 at p31 and p39 (figs 13 and 21), which is now reduced to a footpath (see CD7, p236).

17. Even when Mr Whybrow was repeatedly reminded in XIC of the proper scope of the inquiry, he kept talking about the impacts of the construction of the road in its location. He refused repeated invitations in XIC to depart from his use of the word "wreck" in light of the acceptance of the narrowed scope of the impacts and the changed baseline, and kept suggesting that the diverted vehicles would wreck, spoil or destroy the peace, quiet and tranquillity of the site. Later, in XX, he accepted that the baseline should be taken as including the development of the new buildings and the new road, and its use by development traffic, so that the context would not be an "unspoilt" or "dark and relatively undisturbed corridor".

18. What people should do, but do not do, is consider the direct impacts of the order in the context of the position which has been authorised by the planning permission – with the development, including the new road, in place and the new road used for development traffic. All the order would authorise on top of this is the use of the new road by the diverted traffic, in addition to the development traffic. Looked at in this way, as it should be, the additional impact caused by the order is in truth not significant, as explained by the Council's witnesses.

19. It is a sad reflection of the desperation of the position of the campaign group and other objectors that, even when they recognise that they need to face-up to what the legal framework says, they refuse to accept the consequences which so obviously follow from their concessions, namely that the order diverting the traffic does not cause the impacts they complain about.

20. The fact that much of the objectors' evidence has not been tested by cross-examination affects the weight that can be given to it. Untested evidence carries less weight. Evidence which has not been tested by cross-examination will normally carry limited weight because it has not been challenged and probed. The accuracy and reliability of the evidence has not been established. The Inspector does not have the benefit of seeing whether and how well the evidence has stood up to scrutiny. Such evidence should also carry less weight because the light which a witness' demeanour during cross-examination would throw on their evidence is lost. For interested persons like Cllr

Lesley Whybrow[8] and Cllr Jim Martin,[9] who were prepared to be cross-examined initially but then changed position, the inescapable inference is that they were afraid that their evidence would not withstand scrutiny.[10]

The legal framework

21. This inquiry is to consider the direct consequences of the stopping up and diversion of the highway right. The best way to explain the position is probably by using the words of the Court of Appeal in the *Vasiliou* case (CD106; pp515-516):

> "If the consequence of what seems to me to be the natural construction of section [247] were to enable an aggrieved objector to re-open the merits of a planning decision in this way, I would see much force in this argument. Parliament cannot have intended such a result. But in my view these fears are ill-founded. A pre-requisite to an order being made under the limb of section [247] relevant for present purposes is the existence of a planning permission for the development in question. Thus the Secretary of State for Transport's power to make a closure order arises only where the local planning authority, or the Secretary of State for the Environment, has determined that there is no sound planning objection to the proposed development. I do not think that there can be any question of the Secretary of State for Transport going behind that determination. He must approach the exercise of his discretion under section [247] on the footing that that issue has been resolved, in favour of the development being allowed to proceed. It is on that basis that he must determine whether the disadvantages and losses, if any, flowing directly from a closure order are of such significance that he ought to refuse to make the closure order. In some instances there will be no significant disadvantages or losses, either (a) to members of the public generally or (b) to the persons whose properties adjoin the highway being stopped up or are sufficiently near to

[8] Lesley Whybrow submitted the campaign group's objection to the order dated 29.5.18

[9] Although Cllr Jim Martin refers in his statement to his professional qualifications and experience – and purports to draw on his professional experience, knowledge and expertise to provide evidence in the form of his professional opinion – his statement did not comply with the RICS Practice Statement on surveyors acting as expert witnesses. The statement does not contain a statement of truth or an expert declaration, does not recognise the duty of an expert, does not distinguish between opinion and submission, does not comply with the Inspector's pre-inquiry rulings, and maligns the professional competence of another expert (indeed accusing them of manipulating data, a very serious allegation, albeit this was struck-through in the revised version of the statement).

[10] A good example of the misleading content of Cllr Martin's statement is the contention that the design review report "was not taken into account when determining the planning application". This report was (1) expressly cited in the committee report (CD3, 8.129 and 6.8) and (2) appended to the committee report, so all members of the committee had a copy of it when determining the planning application. Another example is the plan produced by Cllr Martin, showing two HGVs on the road and a retaining structure. This contrasts starkly with what the position will actually be, as shown on ID4.

> it that, in the absence of a closure order, they could bring proceedings in respect of the proposed obstruction. In such instances the task of the Secretary of State for Transport will be comparatively straightforward. In other cases there will be significant disadvantages or losses under head (a) or under head (b) or under both heads. In those cases, the Secretary of State for Transport must decide whether, having regard to the nature of the proposed development, the disadvantages and losses are sufficiently serious for him to refuse to make the closure order sought. That is a matter for his judgment. In reaching his decision he will, of course, also take into account any advantages under heads (a) or (b) flowing directly from a closure order: for example, the new road layout may have highway safety advantages.
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> Of course, some proposed developments are of greater importance, from the planning point of view, than others. When making his road closure decision the Secretary of State for Transport will also need to take this factor into account. But here again, I do not think that this presents an insuperable difficulty. In the same way as it is not for the Secretary of State for Transport to question the merits, from the planning point of view, of the proposed development, so also it is not for him to question the degree of importance attached to the proposed development by those who granted the planning permission. The planning objective of the proposed development and the degree of importance attached to that objective by the local planning authority will normally be clear. If necessary, the planning authority can state its views on these points quite shortly. Likewise, if the permission was granted by the Secretary of State for the Environment on appeal, his decision letter will normally give adequate guidance on both those points. Either way, the Secretary of State for Transport can be apprised of the views on these points of the planning authority or of the Minister who granted the planning permission. The Secretary of State for Transport will then make his decision on the road closure application on that footing. In this way there will be no question of objectors being able to go behind the views and decision of the local planning authority, or of the Secretary of State for the Environment, on matters which were entrusted to them alone for decision, viz, the planning merits of the development."

22. As Mr Justice Holgate put it in the *Network Rail* case: "the confirmation procedure for the stopping up order does not provide an opportunity to re-open the merits of the planning authority's decision to grant planning permission, or the degree of importance in planning terms to the development going ahead according to that decision" (CD107; para 49(4)). Other relevant principles from the case law are set out in the May 2021 Buckles report (CD66).

Assessment of the planning application

23. The realignment of the road was included in the planning application and the grant of planning permission deals with the "planning ramifications" of that.[11] Mr Morgan accepted in XX that the realignment of the road was covered by the planning permission granted.

24. It is worth remembering that the key issues identified in relation to the merits test were all matters which were assessed and considered at the planning permission stage. The planning application included the realignment of the road and it is clear from the application documents and the officer's report to committee that these issues, as they related to the realignment of the road, were considered.[12] Cllr Love was wrong to say that the traffic impacts of the realignment of the road were not considered as part of the planning application. The realignment was expressly considered in, for example, the Transport Assessment (TA).[13]

25. It is of course legitimate for the proper areas of overlap to be considered again at this inquiry, where they are also direct consequences of the order. It would, however, be very surprising if they were now judged unacceptable when previously the entire development – including the construction of the new road and its use by both development traffic and diverted traffic – was found to be acceptable by the local planning authority. That decision was not subject to a call-in, survived judicial review, and has since been endorsed by the local plan inspector.

26. It would be all the more surprising when it is remembered that, in relation to the realignment of the road, there was no outstanding objection from any of the statutory consultees. Kent County Council, the local highway authority, had no concerns. Historic England had no concerns about the realignment of the road and indeed considered it beneficial to separate the buildings from the canal. The Environment

[11] See *Vasiliou* at p513.
[12] See eg the committee report, CD3, at 1.4, 8.131, 8.135, 8.136, 8.157, 8.170, 9.7, etc. The ecological effects of site clearance and the road were also considered in the report, eg at 8.196 and 8.214.
[13] CD18, 5.5-5.7, 5.20, 7.3. See also CD10. Cllr Love's argument that there would be displacement of traffic was expressly noted in the committee report (CD3, 6.5).

Agency concluded in July 2018 that the buffer zone was acceptable, as the wider western end compensated for the narrower eastern end (CD53).

Necessity test

27. The Secretary of State can authorise the stopping up and diversion if he is satisfied that it is necessary to do so in order to enable development to be carried out in accordance with the planning permission which was granted in July 2019. The question as put by the Inspector in opening the inquiry is whether the closure is necessary to implement the proposed development in accordance with the planning permission granted.

28. As to the necessity test, there is no real dispute that the stopping up and diversion of this part of Princes Parade is necessary to enable the development to be carried out. This is accepted by the campaign group,[14] which concedes that all that is required is "a conflict or *potential* conflict between a planning permission and the continued existence along its present line" of the highway (emphasis added).[15]

29. The law is clear that necessity may be satisfied by the existence of either a physical obstacle or a legal obstacle to the development proceeding without the highway being stopped up and diverted. The focus is on what development the planning permission allows to be carried out.[16] The evidence which demonstrates that the necessity test is satisfied is set out in section 4 of Mr Woodhead's proof. In addition to the plans identified by Mr Woodhead, it is useful to consider the general arrangement plans (CD88-90).

30. In physical terms, parts of the buildings and their associated external structures such as parking, ramps and steps – including the leisure centre building with detailed planning permission – are to be built on the highway. The new splash wall is to be built on the

[14] See eg CD67 (page 2) and the proofs of Mr Joyce (para 7) and Mr Morgan (paras 14 and 19). In opening his XX of Mr Woodhead, Mr Moys said that he wanted to make clear beyond any doubt that there was common ground on the necessity test being met between the campaign group and the Council as the principal parties to the inquiry. Mr Moys repeated this in his XIC of Mr Morgan on the late morning of Day 4.
[15] See SPPCG's statement of case at para 11 and ID3 at para 22.
[16] See the High Court in *Network Rail* at paras 52 and 55.

highway. The new wider promenade is also to be built on the highway, including structures for seating and landscaping. These are obvious practical impediments to the development proceeding without the highway being stopped up.[17] The existence of buildings or works on a highway would, but for the order, constitute an obstruction of the highway. In legal terms, there are various conditions which, to a greater or lesser extent, require development to be carried out on the highway and which would be incompatible with the continued existence of the highway right in that location.

31. The only basis on which objectors contest the necessity test is the argument that the development could be re-designed to avoid the need to stop up and divert the road. This argument is impermissible in law, as even the campaign group accepts. The necessity question must be asked in relation to the development which has planning permission. This was made clear by the Court of Appeal in *Vasiliou* which referred to the order being "necessary in order to enable the development in question to proceed" (p512).[18] The *Calder* case makes clear that it is not appropriate under s247 to postulate other development where the necessity arises from the permitted development (CD104-105).

32. As the Inspector has recognised in his rulings on the scope of the inquiry,[19] it would not be lawful under s247 to consider alternatives to the development to be carried out in accordance with the planning permission which has been granted. Mr Morgan accepted in XX that it was not relevant to this process to consider whether there would be a less harmful position for the road to be constructed in and that consideration of how else the development could be undertaken was entirely irrelevant, for all purposes, to the s247 process.

33. As the topic of alternatives was raised by the campaign group in its original statement of case, it was addressed in the proofs of evidence provided on behalf of the Council. That evidence stands to explain why, even if relevant, arguments on alternatives are misconceived. This is nothing new. The mitigating effect of realigning the road were recognised by Historic England in their comments on options at the pre-application

[17] Cllr Love accepted in XX that the construction of both the new splash wall and the widened promenade would be inconsistent with the exercise of highway rights over the highway land.
[18] See also the High Court in *Network Rail* at para 49(1).
[19] At the PIM, the Inspector said that he has no power to consider a differently designed development.

stage.[20] This was also recognised by the 2004 local plan inspector, who, when commenting on the proposal to re-align the road as part of the proposed development, said that "leaving Princes Parade in place and locating dwellings towards the north of the site would … be even more likely to adversely affect the character of the RMC" (CD115, para 3.1.350).[21] Although not a relevant consideration, it is clear that the re-alignment of the road as included in the planning permission is the best option for the layout of the development.

34. Moreover, the Court of Appeal in *Network Rail* explained that 'necessary' does not mean essential or indispensable, but rather: required in the circumstances of the case (para 25).[22] It is clear therefore that the necessity test does not require an applicant to show that the stopping up is essential, merely that it is required for what is proposed in the case. It is required here for the creation of the new widened promenade (with the splash wall) and the construction of buildings under the planning permission, both the leisure centre and the residential and commercial buildings.

Cllr Love's argument on outline planning permission

35. Cllr Love, but not the campaign group, has run an argument that it is not possible to satisfy the necessity test in relation to an outline planning permission until after approval of the detailed design. This is legally illiterate. Section 247(1) refers to "planning permission granted under Part III" of the 1990 Act, which includes planning permission granted on application and by development orders, for example. An outline planning permission is a planning permission, with exactly the same status as a 'full' permission. It is well-established that an order can be made under s247(1) for an outline planning permission and, indeed, for development to be carried out under permitted development rights, where there would be no approval of a detailed design. Section 253 of the 1990 Act even allows the process for a s247 order to be commenced before

[20] HE letter of 22.9.16 in the PDAS (CD7) at p236. This was about a month after the internal discussion of options shown in the email dated 20.8.16 (CD118), the context of which Mr McKay explained in XIC.
[21] Mr Morgan accepted in XX that the 2004 local plan inspector's concern was about the development of the open land of the site and that this had been overtaken by the grant of planning permission in 2019 (CD115). He also accepted that the 2004 local plan inspector's report was based on PPG13, which is now more than 20 years old, where planning policy on walking and cycling had moved on.
[22] See also the High Court in *Network Rail* at para 53.

planning permission has been granted. It cannot have been Parliament's intention that a s247 order can only be made once a proposal has been approved in detail.

36. Cllr Love's reasoning depended on the propositions that the parameter plans carry little weight, and are little more than sketches showing an ambition, and that there is no certainty about the design of the development until the approval of reserved matters. This ignores both the effect of condition 6 and the fact that the detailed design is being developed in line with the parameter plans, as shown by CD68 and CD88-90 and as confirmed by the Council's witnesses after checking with the design team.

37. It is plain at this stage that the stopping up of part of Princes Parade is required for the construction of the new, widened promenade, together with the splash wall, all of which is under the outline element of the planning permission. There is absolutely no need whatsoever to wait for the approval of details under the permission before being able to appreciate that part of Princes Parade must be stopped up. The promenade is a significant element of the development under the planning permission and is plainly part of the development to be carried out in accordance with the planning permission granted, to use the words in s247(1).

38. This is not a case where the development in the outline planning permission could possibly be laid out on the application site to avoid the need for the stopping up (even if the need for stopping up in relation to the detailed planning permission element was ignored). The new, widened promenade – which takes up most of the width of the existing highway land[23] and the entire length of it – must be where it is shown to be on the material listed in condition 6. The new, widened promenade cannot be constructed anywhere else other than on top of the existing promenade and the existing highway. Even if some outline planning permissions leave room for doubt about the need for the stopping up of an existing highway, this one plainly does not.

39. That is enough but, beyond that, it is clear that the development zones shown on the plans covered by condition 6 are in part on highway land (see eg CD79, CD80, CD81 and CD83). The planning permission allows development on that land and so, again to

[23] The southern half of the landward carriageway and all the seaward carriageway.

use the words in s247(1), it is necessary to stop up the highway to enable development to be carried out in accordance with planning permission granted. It was explained by Mr Justice Holgate in the *Network Rail* case that "the terms of the planning permission, including its conditions and the drawings determining how the development authorised is *allowed* to be carried out are relevant to the application of the necessity test" (CD107; para 52; emphasis added). He also made clear that an order may be made "where a planning permission *allows* development to be physically carried out on the route" (CD107; para 55; emphasis added). The Council is *allowed* to construct buildings on the two development zones under the outline planning permission, including those parts which are currently highway land.

40. The overlay plan (CD68) and the general arrangement plans (CD88-90) make clear that buildings are proposed on highway land. The Council's witnesses have confirmed that the detailed design which is coming forward under the conditions on the planning permission includes buildings sited on the existing highway land. Unless part of the benefit of the outline planning permission is to be taken away – that is, the right to construct buildings in the development zones – and the Council is to be sent back to the drawing board to design a new development, then stopping up is necessary for the buildings covered by the outline element of the permission.

Dr Burrell's arguments

41. Dr Burrell's evidence goes nowhere.[24] He is hopelessly confused and his analysis is obviously wrong. His suggestion that the development does not conform to the planning permission is nonsensical. The development can only take place in line with the planning permission. The planning permission defines the development and so there cannot be a conflict between the two. Beyond that, Dr Burrell wrongly thinks that the leisure centre is in the eastern development zone. It is not. They are in two different places. The leisure centre is well to the east of the eastern development zone. As to his comparison of cross-sections, Dr Burrell is not comparing like-with-like. Section

[24] Dr Burrell declined to be cross-examined.

BB on page 72 of the PDAS is through the eastern development zone.[25] Section RMC-S1 on ID4 is much further to the east, east of the leisure centre and almost at the end of the site. The two sections are in two significantly different locations, but Dr Burrell confuses the two.

42. Dr Burrell wrongly thinks that the red line boundary of the detailed permission is fixed by reference to the positioning of the new road. It is not. The red line boundary is defined by reference to the map base of the plans at CD69-71. The new road is within the red line boundary of the detailed permission,[26] but the red line boundary does not change if the position of the new road changes. The position of the new road is not outside the red line area for the detailed permission. Dr Burrell's hypothesis is wholly misconceived.

43. Dr Burrell refers to letters from the EA about the buffer zone, but fails to refer to the final one, where the EA did not require a condition for the provision of a buffer zone (CD53). Dr Burrell has also misunderstood s247. The precise location of the new road, and whether or not the new road is to be constructed in accordance with the planning permission, has no bearing whatsoever on whether the necessity test is satisfied. The necessity test is satisfied because of the need for development to take place on the existing highway land, but that development does not include the construction of the new road.

44. In any event, Dr Burrell is clear in his statements that he is not challenging the validity of the planning permission. As he recognises, conditions 4 and 6 set "rigid requirements" for what development comes forward under the planning permission. The local planning authority, and the statutory bodies consulted, will ensure that the details approved under the conditions comply with the conditions, and the drawings and design parameters secured by the conditions. If any of Dr Burrell's points were valid – which they are not – they would be addressed in the process of discharging the conditions. They do not give rise to any issues for this inquiry.

[25] And is not part of the PDAS secured by condition 6 anyway.
[26] Compare CD90 and CD69-70.

Cllr Love's modification argument

45. The Inspector said in opening the inquiry that a modification to the order would only be a possibility if it is fully discussed and interrogated at the inquiry. He made clear that, if anyone wished to propose a modification, it would need to be fully explored at the inquiry. The only person suggesting a modification was Cllr Love. He has not put forward any details of the modification he suggested in his 5 October 2021 letter. It was clear from his XX that he was not making a serious suggestion for a modification. His suggestion seemed to be for a partial stopping up and diversion of Princes Parade, to stop up the highway south of the detailed application boundary (including all the car parking for the leisure centre) and then divert the highway onto a new road on the same line as the proposed new road to the rear of the new leisure centre.

46. Cllr Love had plainly not thought through what this would entail. Not only would this retain much of the new road, and most of the traffic calming that he complains about, such a diverted highway would run through the middle of the eastern development zone and would therefore prevent the construction of much of the development which has planning permission. Such a modification would prevent, rather than enable, development to be carried out in accordance with the planning permission granted. It would be entirely contrary to the purpose of s247. It would not therefore be lawful under s247(1).

Merits test

47. As to the merits test, the Secretary of State will need to decide whether, on its merits, the order should be made.

48. Mr Morgan's proof included the view that the merits test was not satisfied. It was, however, clear from his proof[27] and from his answers in XX that he did not understand the legal test he was purporting to apply. When he was so hopelessly confused about the legal test, no weight can be placed on the view expressed in his proof.

[27] See eg para 16.

Direct consequences of the order

49. The merits test involves consideration of the direct consequences of the order.[28] It is important to remember that the highway is being diverted, so that a replacement highway right is proposed between the two ends of the stopped up road. The highway right is not being lost. It is being diverted from part of the existing Princes Parade on to the new road. No accesses to premises are affected by the order.

50. In short, the effect of the order is to extinguish the public highway rights over part of the existing Princes Parade, freeing the land from the burden of the highway rights, and creating a new highway right over the length of the diversion. A new highway right is provided in substitution for the old highway right.

51. The order means that people would no longer be able to drive or park on that part of Princes Parade. However, those who walk or cycle can use the new, widened promenade, as well as the new road. Those who drive will have to use the new road. Depending on the time of day, between two-thirds and three-quarters of the traffic using the new road will be as a result of the diversion.[29] The road over which people exercise their vehicular highway right will be different. It will be a physically better and safer road for the exercise of the highway right. This is what really matters for the exercise of a highway right, not the view from the route of the highway.

52. A direct consequence of the order will be to divert the highway right from the existing stretch of Princes Parade on to the new road. However, the majority (some 60%) of the existing Princes Parade will remain unaffected by the order. The views and the parking available there, including in front of part of the site, will remain. Those who want to be able to park on Princes Parade next to the existing promenade will be able to do so on the majority of Princes Parade which will remain.

[28] See eg *Vasiliou* at pp512, 515-516.
[29] Fitch, 5.1.3, 6.5.15. This was accepted by Mr Wickenden, who also agreed that, if there was dispersal of diverted traffic, the proportion of development traffic on the new road would be higher than the quarter / third figures.

53. The campaign group has presented its case on the negative consequences of the order on the assumption that the order could lead to the blocking of the existing highway at any time after the order is made.[30] This is misconceived. The Council's written and oral evidence has confirmed that the existing highway would only be stopped up once the new road was open. This is within the control of the local planning authority pursuant to condition 30 (and condition 13), as explained by Mr Woodhead in XIC and XX. It is unthinkable that the phasing for the realignment of the highway sought and approved under the conditions would allow the existing Princes Parade to be stopped up before the new road was open. Mr Morgan eventually accepted in XX that there was no real prospect of the existing road being closed before the new road was opened.

54. Most importantly, however, even though the order as a whole would become legally effective from the time it was made, the relevant provision of the order makes clear that the stopping up of the existing Princes Parade will not take place until the new diverted route is available. This is expressly provided for in Article 2(1) of the draft order (CD63). There is a big difference between the order becoming effective and the part of the order effecting the stopping up taking effect. This argument is yet another false spectre raised by the campaign group.

55. Another fundamental problem with the campaign group's evidence, and the points made by objectors, is that, even when they were purporting to focus on the impact of the diverted traffic over the new route, they were considering the impacts of that against the baseline of the existing position of the site as undeveloped. This is the wrong baseline. The order would come into effect in concert with the planning permission which has previously been granted. The planning permission has authorised the construction and use of the development – including the new road and associated structures such as streetlights, and the use of the new road for development traffic.[31] The impact of diverted traffic pursuant to the order would be felt on top of the impacts of these things.

[30] ID3, para 30.
[31] The planning permission of course also envisaged the use of the new road for diverted traffic, but that falls to be considered separately for the purposes of this inquiry.

56. For the purposes of assessing the impact of the order, the development of the site and the use of the new road are part of the baseline. The planning permission will have transformed the site from the green and tranquil place the objectors describe.[32] The diversion of traffic under the order would not introduce traffic to the new road, it would only increase the traffic on the new road, adding diverted traffic to development traffic. For the purposes of judging what are the direct disadvantages of the order, comparing the effects of the diverted traffic to the present situation, rather than the true baseline or context in which they would actually be experienced if the order was made, massively over-states the adverse impacts of the diverted traffic. It is a misleading analysis and one that could not lawfully be adopted by the Secretary of State.

The location of the new road

57. The campaign group makes the entirely fanciful suggestion in their statement of case that the route of the new road is "merely illustrative" and "liable to change". There is no basis for this suggestion whatsoever. It is contradicted by the evidence of its planning witness, Mr Morgan, who said in XX that the whole alignment of the road was fixed by the planning permission. Part of the route of the new road is fixed by the detailed planning permission and condition 4. The rest of the new road needs to connect with that. The remainder of the route of the new road is fixed by the outline planning permission via condition 6 and the design code listed at (i) and the drawings listed at (iv)-(vi).

58. It would in any event be pointless to seek the order to divert the highway over the new road as shown on the order plan (CD64) if there was any proposal to change the route of the new road.[33] As the Council's experts confirm in their written and oral evidence, the detailed design being worked-up by the design team conforms with the design code and drawings referenced in condition 6. This is apparent from the drawings before the inquiry (CD68, CD88-90, ID4). There is no uncertainty at all about the position of the

[32] Although that description is not accepted by the Council.
[33] Accepted by Mr Morgan in XX.

new road. It will be where the route of the diverted highway is shown on the order plan (CD64).[34]

59. Mr Woodhead was asked in XX about the difference between the dashed black line on CD78 and the red line on CD69-71 in relation to whether part of the road was within the detailed planning permission. Mr Woodhead explained that condition 4 on the planning permission (CD2) identified the drawings which showed what had been granted detailed planning permission, which included the new road. He also explained that not every element of a development would be identified in the description in the planning permission and that it was necessary to look to condition 4 and CD69-71 to see what was comprised in the detailed planning permission. He made the point that the leisure centre development had to and did include the access and car parking and that there was no doubt that part of the new road had been approved in detail.

60. This analysis is obviously correct. Indeed, Mr Morgan confirmed in XIC and XX that the detailed permission does include part of the new road, as he had stated in his proof. To understand what is included in the detailed permission you look to the drawings for that element, as listed in condition 4. Those are clear and unequivocal, as Mr Woodhead described. Looking not at those drawings (CD69-71), but instead at drawings listed in condition 6 as related to the outline planning permission, is the very opposite of what must be done to ascertain what is included in the detailed planning permission.

61. Mr Morgan accepted in XX that the parameter plans were not part of the detailed planning permission, that when you ask what was permitted by the detailed permission you look at the drawings listed in condition 4, and that those drawings show the new road within the red line area of the detailed permission. In any event, Mr Morgan also said in XX that the whole alignment of the road is fixed by the parameter plans under condition 6,[35] and that he was not suggesting that there was a real prospect of the new road being located anywhere else. It is clear that there is no uncertainty about the alignment of the new road, even in relation to the outline planning permission. The

[34] Accepted by Mr Morgan in XX.
[35] See eg CD79 and CD81, and the PDAS (CD7) at pp92, 98.

location of the new road is known and fixed by both elements of the planning permission.

62. This is in any event a sterile point. It makes no difference whether or not all the new road is included in the outline planning permission. There is no uncertainty whatsoever about the position of the new road.[36] Where the new road is going to be constructed is shown on the current drawings (CD68 and CD88-90) and, most importantly, is shown on the order plan (CD64).

Matters raised by objectors

63. I deal here with matters raised by objectors, primarily by reference to the key issues identified by the Inspector at the PIM and in opening the inquiry.

Seafront parking

64. The campaign group's case is that the replacement parking provision will be considerably less convenient than what is being lost for those accessing the seafront.[37] This was based on a series of false assumptions: (1) that all users would "be required to walk through or between blocks of housing and other development with all their possessions", (2) that people would have to pass through two splash walls, and (3) users of the leisure centre and residential and commercial development would be competing for the public parking spaces.[38] None of this is right, as was made clear by Mr Fitch in his oral evidence.[39]

[36] Mr Morgan was asked a number of questions in XIC by reference to the illustrative masterplan (CD87) but that is not one of the plans with which compliance is secured by condition 6 as was accepted by Mr Morgan in XX (it is not in section 5 of the PDAS either).
[37] ID3, para 9.
[38] ID3, paras 9-10.
[39] Mr Fitch explained in XIC and XX that the residential and commercial uses will provide their own parking to KCC standards, including visitor parking, so there will not be competition for the re-provided car parking spaces.

65. Mr Morgan considered convenience in his proof only in terms of the number and location of parking spaces.[40] He accepted in XX, however, that it was relevant also to consider how easy to use the spaces are, and how safe the spaces are to use, and that it was necessary to consider all factors bearing on convenience, not just how close to the seafront the spaces are.

66. The places available to park will be different as a consequence of the order. The on-road parking on part of Princes Parade will be removed. The parking there currently is not particularly easy to use or safe. It will be replaced with parking places which will be safer and of a better quality. There will be no shortage in terms of the number of parking places. They will be provided throughout the development. Mr Wickenden conceded in XIC that the parking provision is "widespread"[41] and that the parking facilities for those visiting the RMC would be better.[42]

67. The ability to park on a highway is in any event at most an incidental aspect of the exercise of a highway right.[43] Parking on the highway is not an absolute right and is subject both to reasonable limits and to management, such as happened with the introduction of the pay and display parking on Princes Parade.

68. Mr Morgan accepted in XX that he was not contending that parking spaces had to be re-provided like-for-like, and that it is the actual use of the parking spaces which is what matters, because it would be pointless and not an efficient or proper use of land to re-provide parking spaces which are not often used. This was not, however, the approach that he took in his written or indeed oral evidence.

69. Even if the focus for parking is simply the stretch in front of the site (excluding the leisure centre and Battery Point car parks), 143 spaces will be provided, compared to the 100 which were surveyed as in use in the parking survey, which was carried out on a sunny summer holiday Saturday prior to the introduction of the pay and display

[40] See para 28.
[41] Mr Morgan also accepted in XX that parking for all users of this part of Princes Parade would be spread out across the whole site.
[42] This includes for disabled persons, given the 7 new disabled parking bays in the western car park and the 43 accessible bays on the new road (plus the disabled bays in the Sea Point and leisure centre car parks).
[43] It was said by Mr Moys in the questions he put to Mr Fitch that parking is an incident of the vehicular highway right.

parking charges. The introduction of pay and display parking charges has significantly reduced the use of the parking on-street on Princes Parade.[44] The parking survey is conservative as a result and will over-state the actual on-street parking used on Princes Parade. It is telling that the campaign group failed to provide any kind of objective or numerical evidence on current actual parking use, let alone a survey. There is no evidence to contradict the parking survey in the TA.

70. If the Sea Point car park is included, there would be 166 spaces to replace 105 which were in use when surveyed. As Mr Fitch said, this is more than enough replacement parking. In addition, of the 143 spaces, some 50 of them will be accessible, where there are none currently.

71. Even if, irrationally, the actual use of the existing parking spaces was ignored, and just the number of spaces was compared, and on the narrowest possible basis of comparison,[45] there will be 143 spaces,[46] including 50 bays suitable for use by disabled people,[47] to replace 172 existing on-street spaces, none of which are disabled spaces. This is not a significant loss, being only 29 spaces or around 17%.

72. Mr Morgan said in XIC that he fully recognised that the existing on-street parking spaces were not ideal and said that the western car park is "quite clearly" an improvement over the existing parking. There will be 69 spaces in the western car park, plus 31 spaces which will remain on-street in front of the site. Numerically this adds up to the 100 spaces which were the maximum in use on the day of the parking survey,[48] before the introduction of the pay and display charges, and so provides the most that is needed in numerical terms without more. In quality terms, the 31 on-street spaces are the same and the new 69 spaces in the western car park are, Mr Morgan accepts, a clear improvement.

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[44] Accepted by Mr Morgan in XX. See for example the 2021 statements of case submitted by Cllr Anita Jones, Elizabeth Farr, David and Anita Ellerby, Marilyn Wheeler, and others. Mark Brophy said in his 2021 objection (PI052) that there is "ample parking currently available even on busy days" and that "at present, there is no difficulty parking".

[45] And ignoring the leisure centre and Sea Point car parking entirely.

[46] 31 on-street, 69 in the western car park, and 43 on the new road.

[47] 43 on the new road and 7 in the western car park.

[48] The parking survey in CD18 shows that 100 parked cars was the maximum at 2pm. At 11am it was 32 and at midday it was 68, so 100 is clearly the maximum used – before the introduction of the pay and display charges – on a hot and sunny Saturday during the school holidays.

73. This is plainly adequate re-provision, without even taking account of the 43 new accessible bays or the relocated Sea Point car park. Mr Morgan argued that 11 of the 43 new accessible bays were at risk of not being provided due to them not being shown on the PDAS drawings. Even if those 11 spaces are completely discounted – which they should not be, as they are what is currently proposed as part of the detailed design – that would make no difference at all to the adequacy of car parking.

74. In terms of the safety and convenience of the parking shown on Mr Fitch's Appendix B: the green parking will be the same as the existing and therefore no worse than currently; the purple western car park will be much better parking and will be on the same side of the road as the footway so it will be possible to cross at the raised table at the start of the new promenade, just east of the car park; the red relocated Sea Point car park (and the leisure centre car park) is adjacent to the new promenade; and the blue 43 accessible bays on the new road will allow people to exit their vehicles onto the footway, which is then linked to the promenade via a number of designed pedestrian routes,[49] with pedestrian crossings on the new road, and separated 'green' pedestrian corridors, with seating provided,[50] down to the promenade (with gaps through the new splash wall).

75. The majority of these 43 bays are within 100m of the promenade, and all are within 125m.[51] The distances set out in Mr Fitch's Table 6.2 are for distances without a rest, whereas there will be seating provided on the pedestrian routes in the development, allowing for resting.[52]

76. Mr Morgan accepted that, as a generality, a disabled person would be unlikely to climb over the existing splash wall but would use one of the gaps in the splash wall to get through. It is important to remember that the gaps in the splash wall are quite far apart currently – between 180m and 300m – and in circumstances where there are no opportunities to rest on the existing Princes Parade if you have parked and are walking

[49] See CD79 and CD87.
[50] Fitch XIC.
[51] Fitch XIC.
[52] Fitch, 6.4.8, 7.11.2. This was accepted by Mr Wickenden in XIC. It was also ultimately accepted by Mr Morgan in XX, who confirmed he was not contending that any of the parking spaces failed to comply with the maximum distances in Mr Fitch's Table 6.2, as they were distances "without a rest".

to a gap.[53] As Mr Fitch explained, parking spaces near the gaps will fill up first so that, on a busy day, people unable to climb over the existing splash wall – where the road is markedly lower than the promenade – would have to walk distances greater than in the new development and without any opportunities to rest. Mr Morgan accepted that unless a disabled person was able to park near a gap they would have to walk a considerable distance to a gap.

77. Mr Morgan accepted that the new development would have to comply with Part M of the Building Regulations, including in relation to footway widths, crossing points and dropped kerbs. He also accepted that the development would be designed to provide walking routes which were clear and linked the parking places with the pedestrian routes to the promenade.

78. As Mr Fitch explained in his oral evidence, the new parking will be much safer than the current situation of getting out into the carriageway and then walking along the carriageway, or crossing the road, to a gap in the sea wall. After the scheme, as Mr Fitch put it in XX, there will be plenty of spaces to park which are safe and convenient for both the beach and the RMC.

79. Mr Morgan confirmed in XX that his proof at paragraph 21 sets out what he regards as convenient seafront parking, namely parking on Princes Parade and in the Sea Point canoe centre car park. Using the Sea Point car park involves crossing the road to get to the seafront, as Mr Morgan accepted. He also accepted that the replacement Sea Point car park will be no further to the seafront than the existing car park, and will no longer involve crossing a road, that the new western car park will be closer to the seafront than the existing Sea Point car park, and that some of the 43 new bays on the new road will be as close to the seafront as the existing Sea Point car park. It is simply not credible for Mr Morgan to say in his proof that the Sea Point canoe centre car park provides easy and convenient seafront parking currently, but at the same time contend that the new parking to be provided is unacceptably inconvenient.

[53] Fitch XIC.

80. It is also the case that after the order is implemented there would still be 173 parking spaces available on Princes Parade as they exist at the moment.[54] As Mr Morgan accepted, 173 spaces will remain for people who want to park and look at the sea.

81. Mr Morgan insisted that the leisure centre car parking had to be ignored but could provide no justified basis for this. He initially referred to condition 33, but then accepted in XX that the condition does not prevent the use of the leisure centre car park by the public, nor require the public to be banned from using the car park. He then contended that the leisure centre operator would want to exclude the public and prevent the public from using empty and unused spaces in the leisure centre car park. This makes no sense. It would be in the interests of the operator to allow use by the public to generate revenue, rather than leave unused spaces standing empty. He ultimately accepted that parking spaces in the leisure centre car park could be available for public use, if the operator allowed it. It is simply not credible to suggest that the operator would take active steps to reduce the income it earns from the leisure centre car park.

82. As Mr Fitch made clear in his oral evidence,[55] the parking at the leisure centre is not necessary as replacement parking for that lost on Princes Parade, but it would be available for the public to use. Moreover, the leisure centre car parking has been designed to provide for peak leisure centre use. This peak use will not be at weekends when the seafront would be most in use, so there would be available parking spaces at the leisure centre for use when the seafront is busiest, in addition to the replacement parking provided.

83. As Mr Fitch's table 6.1 shows, there will be a significant increase in publicly-accessible car parking along this part of Princes Parade, including a ten fold increase in accessible spaces. Mr Morgan's refusal to even agree the figures involved did him no credit.

84. As Mr Morgan did accept in XX, KCC was satisfied about the level of parking to be provided,[56] and indeed said that it was sufficient[57] - and that was before the introduction

[54] 142 on Princes Parade west of the site and 31 on Princes Parade in front of the site.
[55] In response to a question from the Inspector.
[56] Which did not include the additional 11 spaces (of the 43) on the new road which Mr Morgan contested.
[57] See CD3 at 8.171.

of the pay and display charges. The contention that the re-provided parking is in any way inadequate not only flies in the face of the evidence before the inquiry but is also contradicted by the highway authority's formal position. In light of this, there would be no rational basis for concluding that the parking position is in any way inadequate. That is plainly not the case.

Seafront highway amenity

85. The Buckles report said that it was accepted that the closure and diversion of part of Princes Parade may cause the loss for some people of the enjoyment of driving along the seafront and parking there (CD66, para 7.20). It went on, however, to explain that when judged in context the loss of amenity would not be significant.

86. The ability to enjoy the view from a highway is at most an incidental aspect of the exercise of a highway right. Mr Wickenden accepted that a highway does not come with a right to a view and that providing visual amenity is not a core function of a highway. Enjoying the view whilst driving also has obvious highway safety risks, especially given the nature of Princes Parade, with speeding vehicles and people having to get out of their cars into the carriageway.

87. Mr Wickenden confirmed in XX that his concern was only about visual amenity for motor vehicles. He agreed that drivers should be concentrating on the road rather than enjoying sea views, and that the issue was therefore primarily one for passengers, although some vehicles would not have passengers. He accepted that some vehicles would simply be travelling from A to B and so the view would not be a consideration for them.

88. Mr Wickenden accepted that the Secretary of State will need to consider amenity for all users and in the round – not just visual amenity – and accepted that the amenity of the users of motor vehicles should not be prioritised over the amenity of pedestrians and cyclists. He also accepted that it was necessary to take into account the improvements in visual amenity for pedestrians and cyclists from diverting the vehicles away from the seafront.

89. About 60% of Princes Parade will remain undiverted, and so the amenity of that length will not be affected by the order. There will also be an improvement in the amenity of the seafront for that 40% from which the traffic is diverted, and the pedestrians and cyclists who will use it,[58] which more than compensates for any loss to drivers. In XX, Mr Wickenden said that he liked the amenity presented by the new promenade, including the segregated cycle route, and said it was a good thing.

Disabled access to the seafront

90. No case on disabled access to the seafront was made by objectors save in relation to parking which has been considered above. As explained in the proof of Mr Fitch[59] (and in the EqIA, CD120), disabled access to (and along) the seafront will be better as a result of the order allowing the creation of the new widened promenade. This is not now disputed. All elements of the development will comply with Part M of the Building Regulations, as Mr Fitch explained in XIC.

91. For the RMC, disabled parking for and access to the RMC will also be better as a result of the scheme. There will be ramps for disabled access to the RMC path from the western park, the central park and the eastern end of the site. Overall, as the Council's equality impact assessment for the order (CD120) concludes, there will be an improvement in accessibility, including for disabled persons.

Setting of the RMC, including noise and air pollution

Heritage

92. The campaign group's case is that there would be an "additional detrimental impact upon the setting of the Royal Military Canal" from the use of the new road by the

[58] See PDAS, CD7, p95, fig 5.14.
[59] See Fitch, section 6.4, and paras 8.1.2(b), 8.1.3(c) and 9.1.11.

diverted vehicles.[60] There is no basis for this whatsoever. Mr Joyce confirmed in XX that he had mentioned in his proof of evidence all that he thought was significant in terms of heritage impact, but his proof did not mention the impact of vehicles or traffic at all. He accepted in XX that the only references in his proof were to the construction and physical presence of the road.

93. DfT[61] undertook publicity for the s247 application in accordance with the statutory requirements but Historic England (HE) did not object to the order. They have not objected to the order in the more than three years since then either. When approached by an objector about this inquiry, the email from HE of 15 October 2021 (before the inquiry opened) referred to their concerns about the development but said nothing about the order.[62] The email referred back to HE's earlier representations on the planning application and at pre-application stage, making clear that HE has nothing different to say from that which they said before.

94. Once the planning application had been made, HE did not identify the realignment of the road as a harmful element of the proposal, in any of their voluminous representations on the development. As Mr McKay explained in his oral evidence, in light of what HE had said at the pre-application stage, if HE did in fact have concerns about the realignment, they would have set them out, loudly and clearly. Despite having many opportunities to do so, they did not. It is plain that HE's view of the road realignment had not changed from their pre-application comments and that they did not regard the realignment as a harmful element of the proposal.

95. Mr Joyce accepted that, in order to consider the effect on the setting of the RMC, it was necessary to understand how the RMC was originally intended to function, including the relationship between the RMC and the beach across the site. He also accepted that HE provides authoritative advice and that the Inspector should give great weight to HE's analysis of the setting of the RMC and what would affect that. Mr Joyce entirely failed to refer to HE's series of letter of advice on the development, despite saying that

[60] ID3, para 13.
[61] Despite what some objectors seemed to think, it was not for the Council to carry out the publicity for the application for the s247 order.
[62] ID6/7.

he agreed with the content of them and was not seeking to say that they were wrong or incomplete.

96. The letters[63] from HE make clear that it is the largely undeveloped nature of the land between the RMC and the beach which contributes to the RMC's setting and understanding its function, with the open seaward setting across the site making the contribution to the understanding and appreciation of the RMC. The HE letters show that it is the construction of the buildings which would divorce the RMC from the shore and placing the RMC between two developed areas which undermines the appreciation of the RMC's role as a barrier. It is the development of the open land of the site between the RMC and the beach with buildings which has the impact, by reducing the openness to the south of the RMC, and which compromises the experience of the setting of the RMC.

97. In light of this analysis by HE,[64] it is entirely unsurprising that the pre-application letter of 22 September 2016 considers two options for the alignment of the road (existing and as now proposed) and suggests that there would be benefits if the road was to be moved so that it created a form of buffer between the RMC and the start of the new buildings, allowing the buildings to be set back from the seaward side of the RMC by the width of the new road corridor (CD7, p236). Even Mr Joyce accepted in XX that the positioning of the new road in this location would have a mitigating effect which was a benefit because it was developing the site in the least harmful way.

98. Mr Joyce accepted in XX that it was the built development, and not the order, which caused the harm to the setting of the RMC. He said later in XX that the construction of the buildings had an "enormous impact" on the setting of the RMC.[65] It is clear that, in truth and as would be expected, Mr Joyce recognises that the order will not have direct impacts on the setting of the RMC when judged in the context of the built development approved under the planning permission.

[63] See CD40, CD41, and CD7 at p230 and p235 – letters dated 13.4.18, 26.10.17, 25.5.17, 22.9.16.
[64] Which was shared by the planning officers – see eg CD3, 8.76-8.78, 8.87-8.88, 8.90.
[65] For an independent appraisal of the impact of the development on the setting of the RMC, see the 2020 local plan inspector's report (CD110, paras 22-24).

99. Both Mr Joyce and Mr Morgan said in their oral evidence that the order would cause substantial harm to the setting of the RMC, using that phrase as defined in the NPPF. As the PPG makes clear,[66] substantial harm is a high test. The courts have held that, to attain that level, you need an impact which would have such a serious impact on the significance of the heritage asset that its significance was either vitiated altogether or very much reduced – where very much if not all of the significance of the heritage asset was drained away.[67] It is absurd to suggest that the impact of the diverted traffic on the RMC reaches that level. It shows how over-blown the campaign group's evidence is.

100. Mr Joyce contended that the impact on the setting of the RMC was the most important heritage impact of the order and said that it was something about which he cared strongly and passionately. Despite what is said, he did not mention the impact on the setting of the RMC at all when he submitted his objection in June 2018 (obj 222). This shows how over-blown the evidence he now presents is. If he genuinely thought there was going to be an adverse impact on the setting of the RMC – let alone one of the scale he now contends – he would at least have mentioned it amongst the points of objection he raised in June 2018.

101. Mr Joyce agreed in XX that it was possible to calibrate the approach that he had taken to all his evidence by reference to the substantial harm threshold he had adopted in his oral evidence, so it is clear that the evidence he gives about the impact on Princes Parade is similarly over-blown. That is in any event clear simply from reading the words he wrote in paragraph 9 of his proof of evidence. It is patently not the case that the order will lead to all the significance of Princes Parade being "lost" so that "it will no longer be possible to understand its original intent". Princes Parade is an undesignated heritage asset of only local interest. Nonetheless, the order will help return this part of Princes Parade back much closer to its original intent than the current, modern road for motor vehicles which exists. This is considered further below.

102. Mr Morgan also agreed in XX that it was possible to judge the approach he had taken generally to considering the harms described in his proof by reference to how he had

[66] PPG 18a-018.
[67] See *Bedford BC v SSCLG & Nuon* [2013] EWHC 2847 (Admin) at paras 24-25.

used the substantial harm benchmark. It is clear that Mr Morgan's proof very greatly over-states the adverse impacts of the order, but that is confirmed by this acceptance.

Noise, tranquillity and air pollution

103. As the Buckles report made clear, it is accepted by the Council that the realignment of the road as part of the development will contribute part of the environmental impact of the development.[68] However, as the Buckles report also made clear, the direct environmental impacts of the order will not be significant when they are properly considered in context.

104. The campaign group's case is that the effect of the order "will be to introduce significant disturbance from vehicle noise, fumes and headlights which will have a considerable detrimental impact on the public who enjoy a public right of way and walk, run, fish and engage in other recreational activities in what is, presently, a peaceful highly valued green corridor without having to see hear or smell vehicular traffic".[69] This is misconceived. The order will not "introduce" those things. The planning permission, which authorises the construction of the new road and its use, at least for development traffic, has already established that vehicles can be "introduced" in this location.

105. Moreover, this argument is based on the false proposition that the diverted traffic would be experienced in a "peaceful", traffic-free "green corridor". That would not be the case. The diversion of traffic on to the new road pursuant to the order would take place in the context where the development, including the new road, has been constructed, and the new road is used by development traffic. The current tranquillity of the site will no longer exist once the leisure centre, apartment blocks, housing, commercial development and the new road are constructed on it. The direct consequences of the order in terms of adding the diverted traffic to the new road would be far less when judged properly against the appropriate baseline, rather than wrongly ignoring all that has already been approved by the planning permission.

[68] As Mr Fitch explained in response to a question from the Inspector, the changes to road drainage introduced by the realignment of the road as part of the development would be genuine betterment, as there are no interceptors on Princes Parade currently.
[69] ID3, para 14.

106. In the event, no real evidence on noise and tranquillity was advanced at the inquiry by the campaign group. Mr Wickenden accepted in XX that he was not giving evidence on noise, given the changes made to his proof in XIC. Mr Morgan also accepted in XX that he was not giving evidence on noise or tranquillity.

107. Chris Farrell has no expertise in noise and did not include an expert declaration or statement of truth on her proof of evidence. Her evidence was not subject to cross-examination and should not therefore be given more than limited weight, especially where she said in her 5 June 2018 objection that she objected to the new road in the strongest possible terms. It is clear that her objection was to the construction of the new road in this location, rather than what could genuinely be a direct consequence of the order. The EHO considered noise, reviewed the road plans including the realigned road, and expressed no concerns about noise for existing residents.[70]

108. Much was made in cross-examination of the need to re-plant the eastern most part of the embankment following re-compaction. That would only apply to perhaps a fifth of the embankment (c 200m), as Mr McKay explained, from the leisure centre round to the new canoe centre building. It would be at the eastern end which is already most developed, and which has the separate planning permission for the new canoe centre and the detailed permission for the leisure centre and its two car parks. These developments, together with the new road and its streetlights, would form the backdrop against which vehicles and their headlights would be seen, if the planting was not yet effective. A significant proportion of the traffic on the road – a third in the evening peak[71] – would also result from the development and not be diverted traffic at all. There would be very few HGVs using the new road, because the HGV ban on Princes Parade on either side of the new road would remain.[72] Even if the screening on this eastern fifth of the embankment was not effective for some years, the impact on the setting and tranquillity of the RMC of the diverted vehicles and their headlights would not be significant when experienced in this context.

[70] CD3, 5.16, 21.11.17 comments.
[71] Fitch 5.1.3.
[72] Accepted by Mr Joyce in XX, who also accepted Mr Fitch's evidence that HGVs make up 0.01-0.02% of traffic on Princes Parade, mostly associated with the petrol filling station.

109. As to whether the alleged effect of the order on tranquillity would affect the setting of the RMC as a heritage asset, Mr McKay dealt with this in his proof.[73] Tranquillity is not an attribute of significance for the setting of the RMC in heritage terms.[74] Nor is darkness.[75] Mr McKay explained in RX that, if there is a change of experience for people at the RMC due to the order, it would not diminish the setting of the RMC in heritage terms. In any event, he explained in XX that his view was that the position of people on the RMC footpath, effectively down in a trench, would remain and would lead to a sense of seclusion being retained. He also explained in XX that the effect of traffic using the new road on people using the RMC footpath would be very limited.[76] He said that he did not think that there would be much effect on the amenity of the RMC from the additional traffic diverted by the order.

110. It is important to remember that the order will not create traffic, just divert it. If there is an adverse impact from traffic noise, that will be removed from the seafront. Mr Wickenden accepted that, if there was an impact from traffic diverted further north on the new road, that impact would be removed from the seafront, as the order only moved traffic and did not create it. He also accepted that any impact would come not just from diverted vehicles and that any impact from diverted vehicles would be on top of the impact from development traffic.

111. Mr Woodhead explained in XX that there would not be a disbenefit in noise terms from moving traffic from one location to another. Drawing on Mr Fitch's oral evidence about traffic noise, Mr Woodhead explained in RX that slowing the diverted traffic from over 40mph on the existing road to 30mph on the new road would mean that the traffic generated considerably less noise at the lower speed on the new road. By diverting the traffic on to the new, slower road, the overall vehicle noise would be considerably reduced. The noise removed from the seafront will be greater than the noise introduced on the new road as a result of the order.

[73] McKay, 8.32-8.42.
[74] McKay, 8.32. Mr Joyce described the site as "killing fields" and said that, if used as intended, the site would be chaotic and not quiet and tranquil.
[75] See the HE 22.9.16 letter at CD7, p236.
[76] Mr Whybrow said in XIC that the RMC path was the least used of all the paths on the site.

Biodiversity

112. The campaign group's case now focuses, as it should, on the issue of whether the diversion of traffic on to the new road would affect biodiversity.[77] That said, Mr Whybrow confirmed in XX that, when he wrote his proof of evidence, he thought that the inquiry could consider the impacts of the construction of the new road and all the use of it. He also confirmed in XX that his proof of evidence had covered all the ecological matters that he thought were significant. Despite that, the proof of evidence did not mention traffic or vehicles or headlights.

113. What Mr Whybrow complained about, even in his oral evidence, were not consequences of the order. This is perhaps not surprising when, in his May 2018 objection, he only mentioned impacts on the wildlife as a potentiality (obj 123). He accepted in XX that the order was not the cause of any loss of habitat and did not cause traffic to be introduced on the new road. In his oral evidence Mr Whybrow was also complaining about impacts that were dependent upon taking the site as it currently stands. He accepted in XX that that was wrong. Even then, Mr Andrews explained in XIC that the level of activity which already happens on and next to the RMC – such as canoeing and dog walking – means that it is already a busy site in terms of what disturbs and indeed alarms wildlife, which would have a much greater impact than the flow of any traffic on the new road.

114. Mr Whybrow ultimately accepted at the end of his XX that he could not point to any ecological impact that would be a direct consequence of the order. It is clear that the direct consequences of the order will not lead to any significant effect on biodiversity.

115. Whilst there has been reference to the effect of headlights on biodiversity, Mr Andrews was clear in his oral evidence that it is widely accepted that there are no such effects.[78] Even if there were, the effect of the vehicles diverted by the order would have to be considered in the context of what the planning permission has authorised – the backdrop

[77] ID3, para 16.
[78] Mr Andrews addressed the point about ecological impacts from headlights at length in his XIC.

of the lit buildings[79] and car parks, the new road with streetlighting, and the fact that in the evening peak a third of the traffic using the road would be development traffic. Diverting traffic from Princes Parade on top of this baseline would have little or no effect.

116. As to ecological impacts of the development, the ecological method statement (EMS) for phase 1 of the development pursuant to conditions 15-17 – which includes construction of the road – has been approved by the local planning authority, with no objections from Natural England, the EA or KCC Ecology (CD93-94).[80] A number of conditions control the ecological impacts of the development.[81] Mr Whybrow said in his oral evidence that the only objection to ecological surveys and mitigation that he was maintaining related to the wintering birds survey. He accepted in XX, however, that KCC had never said that such a survey was required and that they later said that the surveys provided gave a good understanding of the species present (CD45).[82]

117. Drainage is not relevant, as the Inspector confirmed in the PIM note, but it is not an issue in any event. The EA had no objection to drainage discharging to the RMC, but much preferred drainage to the beach (CD56). What is now proposed represents the EA's preferred option.[83] Whilst the drainage scheme has not yet been submitted for approval under the conditions, it has been agreed in discussions with the EA and with KCC.[84] Mr Andrews made clear in his oral evidence that there was no reason to think that the current proposals would not be approved in light of this. In short, the EA has no objection whichever approach is taken, but the drainage scheme now proposed represents its overwhelming preference (CD56).

[79] Matthew Jones explained the adverse effects that lighting within the buildings would have. He was, however, hopelessly confused about what the effects of the order were, thinking that it included the construction of the new road including the streetlights.
[80] Objectors to the development (Hilary St Clare and Cllr Jim Martin) spoke at the planning committee meeting at which the EMS was approved.
[81] CD2, conditions 15, 16, 17, 18, 26, 47, 50.
[82] Also explained in Andrews XIC. See also CD23 and the breeding bird report in CD13.
[83] CD94, 5.5-5.12.
[84] Fitch XIC and Andrews XIC.

Traffic, including the flow of traffic and highway safety

118. The order will not lead to the re-routing of any traffic. People who use Princes Parade to get from A to B will use the diverted highway right over the new road to get from A to B. The new road will not be materially less convenient for that purpose than the existing road. There will be no adverse traffic impact as a result of the order, including for the A259.

119. This position is not seriously disputed by the campaign group. In opening, it said that how convenient the new highway right would be was "unknown".[85] In his XIC, Mr Wickenden said that he could "just speculate" about re-routing due to calming because it was down to the "subtleties of choice" and "human nature", and said that it was "a difficult thing to prove".[86] That being its position, the campaign group cannot credibly advance a case that there would be re-routing of traffic.

120. In XX, Mr Wickenden said that the main factor which led to his position on redistribution of traffic was the element of inconvenience arising from the proposed traffic calming. He accepted that traffic calming on the existing Princes Parade would have the same effect and that a shared surface – which some objectors propose – would have a much greater effect.

121. Mr Wickenden clarified that the traffic he had in mind for dispersion was through-traffic which currently chooses Princes Parade over the A259, but which would in the future choose the A259 over the new road, despite 60% of Princes Parade remaining unchanged and despite the A259 having traffic lights, a roundabout and other problems. He accepted that this traffic would have to consider the new road worse than the A259, despite currently choosing to use Princes Parade rather than the A259.

122. Mr Wickenden accepted in XX that, on the existing Princes Parade, vehicles can have to slow or wait to allow vehicles to pass due to poor on-street parking, due to people getting in or out of parked vehicles, due to vehicles with doors open, or due to vehicles

[85] ID3, para 17.
[86] Cllr Love said in response to a question from the Inspector that displacement is not an exact science and it would depend on what people thought was more or less convenient.

parallel parking. He agreed that the existing Princes Parade does not offer a clear run through for vehicles.

123. There is lots of evidence from objectors about how bad conditions on the A259 are.[87] In his XIC, Mr Wickenden said that the A259 "throttles down quite alarmingly".[88] He also explained that traffic signals – such as those on the A259 – make a journey less attractive for drivers.

124. Against that, it is possible to consider the route of the diverted highway shown on the order plan (CD64) and the current drawings for the new road (CD88-90). Even accounting for the traffic calming on the new road, the additional journey time is very small, just 20 seconds.[89] The new road will be wider than Princes Parade and will not have any on-street parking. Mr Wickenden accepted that the new road would not present interruptions to traffic flows and would only have the designed traffic calming. When all this is considered, it is simply not credible that a material amount of traffic would choose to divert from the new road on to the A259.

125. The height of the campaign group's case was that it was "plausible" that traffic would not be "inclined" to use the new road, but that was based on the false premise that traffic speeds would be in the "teens to 20s".[90] Mr Fitch explained in his oral evidence that that was not going to be the case and that the new road, including the corners, and the traffic calming was designed to allow vehicles to travel at 30mph.[91]

126. The "risk of vehicle displacement"[92] mentioned by the campaign group is less than a risk. It is a false spectre. This is covered by Mr Fitch in his proof but in XX he explained clearly that for people prepared to drive on Princes Parade today there is no reason why they would change their route once the new road was in place. It will still be the shortest route and on a better quality road. The traffic flows on the new road

[87] See eg the 2021 statement of case by Cllr Anita Jones.
[88] In her oral presentation, Theresa Cole said that she deliberately avoids using the A259 due to the heavy traffic on it.
[89] Fitch, 6.5.11, 6.5.19, 7.11.1, 7.11.7, 9.1.12, 9.1.20.
[90] ID3, para 18.
[91] Fitch XIC.
[92] ID3, para 19.

will not be large compared to the capacity of the new road design.[93] Mr Fitch explained that the new road will allow people to travel without stopping and so it would be perceived as being the better and faster route compared to the A259 where vehicles do often have to halt.

127. The re-routing scenario described by Cllr Love is simply not credible. This has been addressed in Mr Fitch's response to Cllr Love's oral evidence (ID13). The fact that drivers would have to undertake the u-turns and complicated manoeuvres he described as an alternative to using the new road makes clear that there is no prospect of them doing so. Cllr Love was also wrong in thinking that the new road would be simply a housing estate road. It is being designed to the standards for a local distributor road,[94] which is the "strategic road link" Cllr Love said the road should be. It is not surprising that the officer's committee report did not expressly address Cllr Love's arguments when they are so misconceived.[95]

128. Cllr Love accepted that KCC Highways staff were experts, that he was not questioning their expertise or integrity, that they considered the realignment of the road as part of the planning application, that they did not consider that there would be traffic re-routing, and that he accepted that was both their professional judgement and the formal position of KCC as highway authority. He also accepted in XX that the planning officers and the councillors on the planning committee had local knowledge and had not agreed with him either. Cllr Love also said in XX that he recognised the view expressed by Mr Fitch in XIC that, even if the claimed two-thirds level of re-routing was right, it would not affect the performance of the junctions which Cllr Love had referred to.

129. Mr Fitch had explained in XIC that at no point had KCC suggested that there might be re-routing of traffic and that there would be no need to re-route as the new road would be better than Princes Parade, without the need to stop due to parking on the road as with Princes Parade, and where the change in length was minimal. Mr Fitch had also explained that, even if Cllr Love's two-thirds re-routing were accepted, the amount of

[93] Fitch XIC.
[94] Fitch, 4.4.6, 6.5.2.
[95] Cllr Love said in response to a question from the Inspector that he did not profess to be a traffic expert.

diverted traffic would not be significant, would be well within the capacity of the local junctions, and would have only a minimal effect on the local road network.

130. Mr Wickenden said in XIC that there was capacity on the local roads. He accepted that 2023 was the best year to have modelled for the purposes of considering the order, as the new road is due to be open by 2023.[96] He accepted in XX that the order would not create traffic, just divert it, and would not lead to a change in the traffic mix. He also agreed that traffic growth had been factored into the TA modelling (CD18), that any traffic growth after 2023 would not be caused by the order, that in 2023 the diverted highway would become part of the baseline, and that if later development caused a traffic problem it would be for that development to provide mitigation of the problem. He also said that longer-term planning for traffic should be part of the local plan process anyway.

131. Mr Woodhead was asked in XX about construction traffic for the development and he explained in detail why it would not affect traffic using the new road, especially in light of the CEMP under condition 26. He was clear that the construction of the development would not cause any displacement of traffic from the new road. Construction traffic is in any event a consequence of the planning permission and not a direct consequence of the order.

132. Cllr Prater[97] purported to give evidence on behalf of Sandgate PC, but went well beyond the scope of the PC's resolution.[98] Despite holding all the various positions Cllr Prater told the inquiry about, he had not objected to the order at any stage in any of those capacities or as a citizen. Cllr Prater could only speak on behalf of the PC within the ambit of the PC's resolution. The report to the Secretary of State needs to distinguish between the PC's actual objection, as set out in its resolution, and what Cllr Prater said to the inquiry. Very little of what he said was within the scope of the PC's resolution objecting to the order.

[96] Mr Woodhead explained in XIC that the construction of the new road was scheduled for Q2 to Q4 2022.
[9797] Who declined to be cross-examined.
[98] As set out in the email objection dated 23.5.18.

133. In reality, the PC merely objected to the stopping up of Princes Parade on the basis that it would disrupt an important route between Sandgate and Hythe. It is the case, however, that the route is being diverted over the new road, and not just stopped up. The disruption to the route caused by stopping up, to which the PC objected, will not happen as a matter of fact.

Highway safety

134. As far as highway safety is concerned, it is undeniable that the new road would be a safer road on which the highway right would be exercised. The new road has been subject to a road safety audit and designer's response, which KCC found to be acceptable.[99] For the point raised about the eastern bend on the new road, an independent road restraint risk assessment process will be undertaken, which KCC considered acceptable.

135. Mr Wickenden accepted in XX that KCC would be consulted on the discharge of the conditions relevant to highways[100] and explained that they would also undertake a technical audit, in addition to the planning process, as the road was to be maintainable at public expense by KCC. He agreed that KCC would not approve a deficient road design, nor deficient construction, and that KCC had not raised any concerns in relation to the order. Mr Wickenden had also explained in XIC that, with the 30mph limit, he was not concerned about the alignment of the new road. He said in XX that this 30mph speed limit was a significant change from 40mph[101] and that his concerns had been removed by information he had had since he wrote his proof.

136. Mr Wickenden accepted in XX that KCC had not raised any highway safety concerns about the new road and that they would have raised them if they had them. He said that there was nothing outstanding as far as KCC was concerned which would be a matter

[99] See CD27, CD28 and CD48. Mr Fitch confirmed in XX that the diversion of traffic on to the new road does not affect the risk or whether restraint would be required.
[100] See CD2, conditions 7, 21, 22, 23, 24, 25, 31, 41.
[101] Although Mr Wickenden had said that he had seen CD18 and CD27 before writing his proof, he had missed the references to the 30mph limit. He also said that he had not read CD3, CD10 or CD28 before writing his proof. It is clear that he had made little effort to consider the traffic and highways position before writing his proof.

for the Inspector to worry about. It is clear that there is no highway safety issue with the new road.

137. By contrast, there is a highway safety issue with the existing Princes Parade. The 85th percentile speed recorded during the survey was around 48mph, where the limit is 40mph.[102] The Hythe Civic Society has said that the current traffic speed along Princes Parade is too high and needs to be reduced.[103] The carriageway is only 5.5m wide, given the parking. People parking on Princes Parade have to exit their vehicles into the carriageway.[104] There are no pedestrian crossing points on this stretch of Princes Parade. The accident data from 2015 to 2020 shows a pattern of accidents involving pedestrians and parked cars.[105] Mr Fitch explained in his oral evidence that regard had to be had to accidents in front of the golf course, as well as the site, as the road is the same and it is the nature of the accident which tells you about the safety of the road. He explained that the volume of accidents did not diminish the serious nature of them, especially the two accidents both involving two pedestrians, and that it was necessary to look at the reasons why the accidents had occurred. He considered that there was a pattern of accidents of pedestrians being hit when crossing the road and of parked cars being hit. The issues which contributed to these accidents will not exist for the new road.[106]

Other matters

138. Various other matters have been raised by objectors, including some of the campaign group's witnesses in their proofs. Where there is any prospect of them being of relevance – even where the relevance is not accepted by the Council – they have been addressed in the proofs of evidence of the Council's witnesses and in their oral examination-in-chief. This includes, for example, in the objections from Hythe Civic

[102] Fitch 4.3.2, 8.1.2(e).
[103] See the statement dated 5.10.21 from Crispin Davies, chairman of the Hythe Civic Society (obj 226). See also eg the comment by Chris Turnbull dated 24.5.21 (obj 159) in response to the Buckles report who says that "there is no doubt that Princes Parade needs traffic calming measures now".
[104] Fitch 4.3.1, 6.2.18(e) & (g), 6.2.19, 6.4.3, 6.4.5, 9.1.9.
[105] Fitch 7.3.2-7.3.5.
[106] Fitch 9.1.14.

Society and the headteacher of Seabrook Primary School.[107] There are no other matters raised by objectors which are capable of qualifying as material disadvantages or losses flowing directly from the order.

Summary

139. The direct adverse consequences of the stopping up and diversion order will be nil or not significant. There will be some loss of parking directly on the seafront, but much will remain and there will also be replacement parking, which is better quality and safer, and which is overall no less convenient for people to use when accessing the seafront. There will be some loss of the 'amenity' of driving along the seafront, but most of Princes Parade will remain to allow this, and it is at most an incidental aspect of exercising the highway right and brings highway safety risks. Disabled access to the seafront will be improved overall. Diverting the highway right over the new road will not cause any traffic problems.

140. The diversion of traffic on to the new road as a consequence of the order will not affect the setting of the canal in heritage terms, will not cause material effects in terms of noise or air pollution, and will not cause any significant impacts on biodiversity. This is clear from a proper consideration of what are the direct consequences of the order. It is also clear, however, because when these topics are addressed by objectors, almost universally they complain not about the direct consequences of the order but instead about the construction of the new road or about its presence. This is the case even with most of the points on these topics made in the campaign group's proofs of evidence and in the oral evidence presented at the inquiry in opposition to the order.

[107] The objection dated 5.10.21 from Liz Carter (PI218) was addressed by both Mr Fitch and Mr Woodhead in XIC. The objection is based on the road being closed temporarily during the redevelopment, a reduction in car parking, and an increase in traffic on the A259, all of which points are misconceived.

Direct benefits of the order

141. An important direct consequence of the order will be to allow the conversion of this part of Princes Parade from a road into the new, widened promenade to form a new, hard-surfaced recreational open space. The creation of this wider car-free promenade will transform the seafront in this location. It will be much better for pedestrians and cyclists than the existing Princes Parade and promenade. It will also be closer to the concept of the original Princes Parade of 1881, as a car-free leisure promenade. Objectors complain about the alleged impact on amenity from diverting the traffic on to the new road, but, if that's right, the seafront will be relieved of those adverse impacts on amenity due to the diversion. The order does not create new traffic, it simply diverts it away from the seafront.

142. The direct benefits of the order include in particular three main direct benefits, which are considered in turn below.

143. First, there will be the creation of the new, widened promenade as a public space. This is described by Mr Woodhead in his proof of evidence.[108] The seafront will be transformed into a car-free open space which will be a very significant improvement on the current environment.

144. In XX, Mr Woodhead explained that the order would allow the new widened promenade to be created, which would transform the promenade into a more usable and better open space and one which was far from the monotonous, hard character of the current promenade, but one which had huge amounts of visual interest and character as one moved along it.[109] He also explained that there would be a direct benefit from removing the traffic from the seafront, to create a traffic-free space that is safe for walking and contemplation.

145. Secondly, there will be a heritage gain.[110] As Mr Joyce agreed in XX, the original concept and function of Princes Parade was as a Victorian seaside promenade,

[108] See 5.6.26-5.6.31.
[109] See PDAS, CD7, p95, fig 5.14.
[110] See CD10, 13.6.

conceived as a leisure and tourist attraction.[111] He accepted that there were no motor cars in 1881, that motor cars were not common for decades after 1881, that Princes Parade would have been used by pedestrians and cyclists long before motor cars were common on Princes Parade, that it was not originally a road for motor vehicles and only became that when the tramway closed. It is important that, as Mr Joyce accepted, the function of Princes Parade changed when the tramway closed, away from its original function, to become a road for motor cars.

146. What the order will allow is the modern, vehicular road to be re-directed to the rear of the site, so as to remove motor vehicles from the seafront. Most of the stopped up carriageway will be incorporated into the widened promenade, to form a widened promenade with no cars, only pedestrians and cycles. Mr Joyce accepted in XX that the parade would remain as a straight, linear feature, and be returned to a leisure use as part of the widened promenade.[112] He agreed that this would be closer to the original function of the Victorian parade than the current modern carriageway for cars.[113]

147. Mr McKay explained in his proof that the effect of the order on Princes Parade as a heritage asset was a benefit.[114] In his XIC he described how the parade would remain as an impressive linear feature, with part pedestrianised, bringing it closer to its Victorian conception as a promenade, where Victorian tourists walked up and down, rather than the traffic-ridden and parked-up modern road it is today.

148. Far from affecting its nature as a linear feature,[115] Mr McKay explained in XX that the feature would remain with the new widened promenade, and the two parts would be perceived as a single impressively linear feature in distant and closer views, just that one part of it would not be used by vehicles. Mr McKay explained that there would be a very slight change in character to a very small extent, but that overall the change would be very positive because it would be closer to the Victorian use of the promenade.

[111] See eg CD103, 5.1.5, and figs 20, 22 and 23 (pp38, 40-41).
[112] See PDAS, CD7, pp 92, 93, 98.
[113] Mr Joyce also accepted in XX that the tram shelter would, as Mr McKay explained, remain close to the parade.
[114] McKay 8.47-8.49, 9.13.
[115] It is telling that when asked in XIC about the phrase "realignment will destroy its historic integrity" in para 7 of his proof, Mr Morgan did not talk about "historic integrity" at all but instead referred to its "integrity as a seafront drive" and its character now. The ability to drive on Princes Parade is in truth anti-historic and contrary to the parade's original historic character.

Far from creating the "mongrel" suggested in XX,[116] Mr McKay said that he was quite excited by the heritage gain this change would bring.

149. Thirdly, as has already been explained above, the new road would be a safer and better road for the highway right to be diverted on to than the existing road. Moving the right to a safer and physically better road would be a significant direct benefit of the order. This should weigh heavily in the balance.

Planning benefits and importance of the proposed development

150. As Mr Justice Holgate explained in the *Network Rail* case, the Secretary of State must take into account the planning benefits of, and the degree of importance attaching to, the development and it going ahead (CD107; paras 49(3)-(4)). This is to be taken from what has been stated by the Council.[117] The primary document which sets this out is the officer's report to committee (CD3).[118] In addition, the 2020 local plan also considers the need for and benefits of the proposed development.[119]

151. This has been explained in Mr Woodhead's proof of evidence.[120] This evidence has, rightly, not been challenged at the inquiry. It covers the need for the leisure centre, the benefits for tourism and the economy, the need for housing and affordable housing, and environmental improvements. It is clear that the Council considers that very great benefits are to be derived from this development. It is also clear that the Council regards this as a very important development. It is hard to envisage a development which would be more beneficial or important at a district level than this one. When weighing these

[116] Mr Morgan's suggestion that there would be a wall cutting off views along the widened promenade is clearly wrong, as can be seen from CD88. He was also wrong to suggest that the splash wall was a flood wall which had to be continuous (see eg CD3 at 8.176). He accepted in XX in any event that (1) such an impact (if it existed) would be a result of the development and not the order and (2) that the matter was controlled by the planning permission.
[117] In opening his XX of Mr Woodhead, Mr Moys said that the campaign group did not seek to challenge what had been said in Mr Woodhead's proof about that, as it was not within the jurisdiction of the inquiry.
[118] See CD3 in particular at paras 8.32-8.45, 8.93, 8.101-8.111, 8.138, 8.246-8.248, 8.254-8.256, 8.260-8.263, and 9.1-9.8.
[119] CD109, 5.126-5.144. Mr Morgan accepted in XX that the 2020 local plan inspector was no less independent of the Council than the 2004 local plan inspector, and that he was not suggesting that the judgement of the 2004 inspector should be preferred to that of the 2020 inspector.
[120] See 3.3.1-3.3.13 and 5.6.1-5.6.25.

matters in the overall balance of the merits test, it is necessary for the Secretary of State to recognise that the greatest weight must be given to them.

Overall balance on merits test

152. As set out by the Court of Appeal in *Vasiliou*, the question on the merits test is: whether the disadvantages and losses, if any, flowing directly from the order are of such significance that the Secretary of State ought to refuse to make the order. This approach effectively means that, before declining to make the order, the Secretary of State must regard the disadvantages of the order as being so great that, no matter what the benefits of the development in planning terms, the highway consequences are too severe to allow the order to be made. This case is very far from such a situation.

Costs response

153. Mr Moys stated by email on 26 October 2021 that the officers and committee members of Save Princes Parade are only Dr Jean Baker (chair) and Elaine Martin (treasurer and membership secretary).[121] There are apparently no other officers or committee members. These are the two people that both Mr Wickenden and Mr Morgan said they dealt with about the inquiry, the two people Mr Joyce said he was sure were committee members, and the two people identified by Mr Whybrow as committee members.

154. For the reasons given in the costs application dated 11 October 2021 at paragraph 28, whilst the costs application is made against Save Princes Parade, to assist enforcement of the award, the costs award should be made against Dr Baker and Mrs Martin as the officers and committee members of the unincorporated organisation. Legal proceedings cannot be taken against an unincorporated organisation as such, but instead

[121] The email read: "I write to confirm my Instructions on your questions below concerning my client, Save Princes Parade. Chair: Dr Jean Baker. Treasurer and Membership Secretary: Mrs Elaine Martin. Secretary: vacant, post the resignation of Dr Geoff Burrell. Committee members: two elderly members [Mrs Evelyn Markus and Mr Crispin Davis] have recently resigned – one due to ill-health, the other two slots were vacant. I understand that due to Covid the previous AGM, where voting-in occurs, did not happen. Hence, Mrs Martin taking on two offices/roles."

must be taken against the persons who actually operate the organisation. It is wrong of the campaign group to seek to draw a distinction in paragraph 40 of its costs response between the group and its officers and members. They are one and the same because an unincorporated association has no separate legal personality.

155. Given how the campaign group has responded to the costs application in its response dated 28 October 2021, it is important to remember that the costs application relates only to conduct since the PIM on 21 September 2021, at a time when the group was represented by Mr Moys and advised by Mr Morgan, both of whom are very experienced. The campaign group's witnesses – who were identified at the PIM as witnesses to be called by the group – included not just Mr Morgan but also Mr Joyce and Mr Wickenden, all of whom are professionals, familiar with planning and development, as set out in their proofs of evidence. Even Mr Whybrow is a former county councillor and a current town councillor. It is plainly wrong for the campaign group to contend that it did not have a professional team representing it[122] and that its witnesses did not understand the "hard work and discipline" involved in public inquiries.[123]

156. Mr Wickenden said that before completing his proof he had read the Inspector's PIM Note and been advised on what to cover in his proof by Mr Moys. Mr Wickenden said that he had been told what he should and should not address in his proof of evidence by Mr Moys. Mr Joyce said that before completing his proof he had watched the video of the PIM, read the PIM Note, and been advised on the ambit of the group's case. Mr Morgan said that before completing his proof he had watched the video of the PIM and read the PIM Note. Mr Whybrow had been told of what was discussed at the PIM before he completed his proof. It appears more to be a case of defiance of the Inspector's rulings – later regretted and resiled from – rather than ignorance of the Inspector's rulings.

157. The campaign group's costs response suggests that timing was an issue, but it would have taken no time at all to ensure that its witnesses understood the scope of the inquiry

[122] See the campaign group's response to the costs application dated 28.10.21 at para 30.
[123] See the response at para 13.

clearly articulated by the Inspector at the PIM. It would have taken no time at all to have sent the group's witnesses a copy of the Buckles report of May 2021 which summarises the relevant case law, and to which the campaign group had responded (CD67), and a copy of the group's statement of case (and then the amended statement of case and email of 4 October 2021).

158. It would have been wholly unreasonable behaviour of the campaign group not to advise its witnesses in advance of completing their proofs of (1) what had been said by the Inspector about the scope of the inquiry and/or (2) what the proper ambit of the group's case was. Mr Wickenden at least said he was advised on this by Mr Moys. There can be no excuse for Mr Moys not understanding the scope of the inquiry, if that is what is being suggested.

159. It is no answer to the costs application to contend, as the campaign group's response does, that unreasonable behaviour should not be viewed as unreasonable because the group is comprised of local volunteers. The conduct on which the costs application was based was conduct on the part of the group's counsel and witnesses. Perhaps with the exception of Chris Farrell, these people were not merely local volunteers.

160. In any event, people conducting the case of a main party in an inquiry are not absolved from the need to behave reasonably because they are not being paid a fee or because they live locally. The PPG, which the campaign group quotes at paragraph 12 of its response, is clear that *all parties* are expected to behave reasonably. The group accepts in its response that it was a main party in this inquiry.

161. The costs application is for unnecessary expenditure in dealing with specific elements of the campaign group's case and evidence. The group cannot avoid responsibility for its unreasonable behaviour by suggesting that similar points may have been made in written objections.[124] The group as a main party had to behave reasonably, even if other objectors did not. It must take responsibility for the consequences of what it put in its statement of case and what its witnesses put in their proofs of evidence. That is down to no one else but the group. Those arguments and that evidence had to be addressed

[124] See the campaign group's response on costs at para 21.

in particular by the Council as they were raised by the other main party to the inquiry. It is in any event pure speculation that all the irrelevant points made by the campaign group were also made in the same way by other objectors. The campaign group has failed to identify any written objections which made the same points.

162. Moreover, the conduct complained of was conduct about which the campaign group was warned. The issue of the scope of the inquiry was raised and clarified at the PIM, a week before the statement of case was issued on 28 September 2021. Once the issue with the statement of case was raised by the Council, it took four days (1 to 4 October 2021) for the group to issue an amended statement of case. The group only did so after 5pm on the day before the proofs of evidence were due from the Council, and thus too late to avoid the wasted work in ensuring the Council's proofs responded to those now-withdrawn points.

163. As to the proofs themselves, not only was there the PIM a fortnight before proofs were published, and indeed the correspondence from DfT and the Inspector before the PIM, the campaign group was specifically warned about the scope of their proofs in emails on 1 and 4 October 2021, before the proofs were published. The limited scope of the inquiry had also been expressly recognised by the email from Mr Moys of 4 October 2021 and the amended statement of case, both before the campaign group's proofs were finalised.[125]

164. It is also relevant that, despite the campaign group being alerted to the issues with the scope of their proofs by the email on 7 October 2021 and by the costs application on 11 October 2021, the changes to the group's proofs were only made in oral evidence as the witnesses came to give evidence. As explained in paragraphs 25-26 of the Council's costs application, all the work to prepare to respond to the campaign group's proofs had to be done before the inquiry opened. Whilst there was a saving in inquiry time of not having to cross-examine the group's witnesses on the withdrawn evidence, the very late notification of the withdrawal of the evidence meant that not only did time have to be taken preparing the cross-examination on those matters which was unnecessary but also

[125] Of the campaign group's proofs, four of the five are dated, and all those dated are dated 5 October 2021.

inquiry time had to be taken whilst the Council's witnesses responded to the group's evidence in examination-in-chief.

165. In short, whilst it is right that the campaign group ultimately recognised it had raised irrelevant matters in its statement of case and proofs of evidence, the time taken for the group to amend its position failed to avoid much if any wasted expense. This in itself is further evidence of the unreasonable conduct of the campaign group.

166. It is also no answer to refer to points of overlap and the lack of a "bright line" defining the scope of the inquiry, because the Council's costs application is based on the campaign group's case and evidence disregarding what the Inspector had expressly said before and at the PIM, confirmed in the PIM Note. This costs application is not based on any grey area, or area of overlap, but on the campaign group persisting in making points which the Inspector had made clear were irrelevant. It is important to remember that the costs application is based on matters raised by the campaign group after the PIM which DfT and/or the Inspector had made clear by that stage were not relevant to the inquiry.

167. As was explained in the Council's costs application, and again in opening, large parts of the campaign group's written evidence suggested alternative development proposals, complained about construction impacts of the new road, and challenged elements of the planning permission. With very few exceptions, the points made in the campaign group's proofs were about the alleged impacts of the development, including the construction of the road, and not the order.

168. The Inspector was crystal clear at the PIM and in the PIM Note that such impacts were not relevant. It was not necessary to see the Council's proofs to understand the proper scope of the inquiry.[126] These points were never legitimate areas of overlap. By withdrawing these elements of the campaign group's statement of case and proofs of evidence, it has been recognised by the group that they are not even arguably relevant matters. They should never have been raised and, once they had been raised, they should have been withdrawn without delay.

[126] See para 29 of the campaign group's costs response.

169. Making these points involved ignoring or defying what had been stated by DfT and the Inspector, before, at and after the PIM. Defiance or ignorance of clear guidance provided by the Inspector precisely to guide what was not relevant to the inquiry is neither understandable nor reasonable. It is precisely the kind of behaviour which ought to be reflected in an award of costs.

Conclusion

170. Despite how it might have appeared during this inquiry, the fight against the development by the campaign group and others has been lost. The Secretary of State declined to call-in the application, the Council granted planning permission, the judicial review failed, and the 2020 local plan now allocates the site for development. This site is going to be developed. The only issue for this inquiry is whether or not to make the stopping up and diversion order.

171. Overall, to adopt the phrase used by the Court of Appeal in *Vasiliou*, it is clear that the few and limited disadvantages flowing directly from the order are not of such significance that the Secretary of State ought to refuse to make the order. The Inspector is invited to so recommend.

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