

**FOLKESTONE & HYTHE DISTRICT COUNCIL**

**May 2021**

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**RESPONSE TO STATUTORY  
CONSULTATION**

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**relating to**  
**application under section 247 of the Town and Country Planning Act 1990**  
**for the stopping up and diversion of the highway known as Princes Parade Hythe Kent**  
**(Application reference NATTRAN/SE/S247/3254)**

Ref: BDL/FOL0025/0001

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## TABLE OF CONTENTS

1.	INTRODUCTION .....	3
2.	PURPOSE OF THIS REPORT .....	3
3.	NO FURTHER PUBLIC REPRESENTATIONS.....	4
4.	PLANNING BACKGROUND AND DESCRIPTION OF THE DEVELOPMENT.....	4
5.	LEGAL TESTS OF SECTION 247 .....	5
	A. NECESSITY TEST.....	6
	B. MERITS TEST.....	7
6.	COUNCIL'S CASE FOR THE ORDER .....	8
7.	PUBLIC OBJECTIONS AND THE COUNCIL'S RESPONSE .....	11
	RESPONSE THEME A - SUPPORT PROPOSAL.....	12
	RESPONSE THEME B - UNNECESSARY.....	12
	RESPONSE THEME C - LOSS OF SEAFRONT PARKING.....	13
	RESPONSE THEME D - LOSS OF SEAFRONT VISUAL HIGHWAY AMENITY.....	14
	RESPONSE THEME E - LOSS OF ACCESSIBILITY TO THE SEAFRONT FOR PEOPLE WITH A DISABILITY.....	15
	RESPONSE THEME F - IMPACT ON SETTING OF RMC.....	15
	RESPONSE THEME G - ENVIRONMENTAL AND WILDLIFE IMPACTS.....	16
	RESPONSE THEME H - NOISE AND AIR POLLUTION TO WALKERS OF RMC.....	17
	RESPONSE THEME I - TRAFFIC IMPACT TO THE HIGHWAY NETWORK.....	18
	RESPONSE THEME J - JOINT LOCAL INQUIRY.....	18
8.	HUMAN RIGHTS AND EQUALITY IMPACT ASSESSMENT .....	19
9.	CONCLUSION .....	19
10.	INVITATION TO PUBLIC OBJECTORS .....	19
	Appendix 1 – Illustrative Masterplan .....	21
	Appendix 2 - Parking capacity and survey tables.....	22

## **1. INTRODUCTION**

- 1.1 This report has been prepared by Buckles Solicitors on behalf of Folkestone and Hythe District Council (“the Council”) in its capacity as promotor and landowner of the development situated at Princes Parade Promenade, Princes Parade, Hythe, Kent (“the development” as illustrated on the masterplan at Appendix 1 and as described in Section 4 below).
- 1.2 The Council has made an application to the Secretary of State for the Department for Transport (SoS(T)) under sections 247 and 253 of the Town and Country Planning Act 1990 (“the 1990 Act”) for the stopping up and diversion of part of the highway known as Princes Parade, Hythe (“the S247 Application”).
- 1.3 The S247 Application was made in anticipation of planning permission for the development being granted by the Council, in its capacity as local planning authority, pursuant to planning application reference Y17/1042/SH (“the planning application”).
- 1.4 The National Transport Casework Team, on behalf of the SoS(T), undertook its statutory consultation of the S247 Application which commenced on 10<sup>th</sup> May 2018 and closed 7<sup>th</sup> June 2018 under reference NATTRAN/SE/S247/3254 (“the statutory consultation”).
- 1.5 Public objections to the S247 Application were received by the Casework Team during the period of statutory consultation (“the Public Objections” and “Public Objectors” shall be construed accordingly).
- 1.6 Planning permission Y17/1042/SH for the development was granted by the Council in its capacity as local planning authority on 18<sup>th</sup> July 2019 (“the planning permission”).

## **2. PURPOSE OF THIS REPORT**

- 2.1 In accordance with section 252 of the 1990 Act where the Public Objections are not withdrawn the SoS(T) will before making a decision on the S247 Application hold a local inquiry unless he/she is satisfied that in the special circumstances of the case the holding of such an inquiry is unnecessary.
- 2.2 The Department for Transport published guidance indicates that an inquiry may be dispensed with, in such special circumstances, where sufficient information is obtained from the applicant and the objectors on the issues in dispute<sup>1</sup>. Additionally, the published guidance first requires applicants to attempt to resolve or narrow such issues.
- 2.3 Accordingly, and following the recent grant of planning permission for the development, the Council wishes to constructively engage with the Public Objectors in a genuine attempt to clarify their grounds of objection and where possible agree for their full or partial withdrawal.

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<sup>1</sup> DfT Guidance title ‘Stopping up and diversion of highways application guidance’ published 14<sup>th</sup> June 2011 and last updated 16<sup>th</sup> February 2015.

- 2.4 The purpose of this report is therefore to set out in detail the Council's case and its response to the Public Objections, and then invite the Public Objectors to engage with the Council on the narrowing or removal of their respective concerns.
- 2.5 This report will be provided to the Public Objectors, and details on how each Public Objector can respond with their comments, whether to maintain, narrow or withdraw their concerns, is detailed at Section 10 of this report.

### **3. NO FURTHER PUBLIC REPRESENTATIONS**

- 3.1 This report has been formally published for public information purposes only. It is not a further public consultation document on the S247 Application. In accordance with the statutory provisions, the Council and the SoS(T) cannot accept new objectors, or new grounds of objections from existing objectors, outside the period of statutory consultation. Any comments from new objectors or new grounds of objection will not be accepted.
- 3.2 This report relates only to the S247 Application. Any comments pertaining solely to the merits and decision to grant the planning permission for the development will also not be accepted.

### **4. PLANNING BACKGROUND AND DESCRIPTION OF THE DEVELOPMENT**

- 4.1 Planning permission, for which necessitates the S247 Application, was granted by the Council in its capacity as local planning authority on 18<sup>th</sup> July 2019.
- 4.2 The planning permission authorises a mixed-use development comprised of:
- A. an outline application for up to 150 residential dwellings; up to 1,270sqm of commercial uses including hotel use, retail uses, and/or restaurant/café use; hard and soft landscaped open spaces including children's play facilities; surface parking for vehicles and bicycles; alterations to existing vehicular and pedestrian access and highway layout; site levelling and groundworks; and all necessary supporting infrastructure and services; and
  - B. a full application for a 2,961sqm leisure centre including associated parking; open spaces; and children's play facility.
- 4.3 Specific to the S247 Application, the development increases the public open space area of the promenade through the realignment of Princes Parade to the north side of the development adjacent to the Royal Military Canal (RMC).
- 4.4 A copy of the planning permission can be found on the Council's web site at <https://www.folkestone-hythe.gov.uk/moderngov/mgAi.aspx?ID=11784>
- 4.5 Planning obligations were also secured under the planning permission in accordance with a legal agreement under section 106 of the 1990 Act. These include the provision of 30% of the residential units in the development as affordable housing and the contribution payment of £151,000 towards the cost of improving the Oaklands Health Centre.

## 5. LEGAL TESTS OF SECTION 247

- 5.1 The legal tests and required considerations of the S247 Application for the SoS(T) are contained within section 247(1) of the 1990 Act. Such section provides that:

*“The Secretary of State may by order authorise the stopping up or diversion of any highway outside Greater London if he is satisfied that it is necessary to do so in order to enable development to be carried out—*

*(a) in accordance with planning permission granted under Part III or section 293A, or*

*(b) by a government department”.* [emphasis added]

- 5.2 As highlighted in the above quote, the courts have identified two separate and distinct legal tests for determination by the SoS(T) before exercising his/her powers for the stopping up or diversion of any highway pursuant to a planning permission. These two legal tests were recently called by the High Court in the *Network Rail case*<sup>2</sup>:

A. the necessity test; and

B. the merits test.

- 5.3 Each of these legal tests will be explained further below. However, it is important to first appreciate and understand two general issues relevant to both legal tests.

- 5.4 Firstly, when the SoS(T) is determining an application under section 247 he/she must consider both the ‘necessity test’ and the ‘merits test’ separately alongside each other. In other words, one is not conditional upon, or influenced by, the other one first being satisfied<sup>3</sup>.

- 5.5 Secondly, and crucially, an application under section 247 is a standalone statutory procedure and power distinct and separate to that of the grant of planning permission under Part III of the 1990 Act. They are mutually exclusive procedures and each decision is unfettered within their specific statutory functions and role. In other words, the section 247 procedure is not a re-opening of the planning merits but similarly the planning decision doesn’t pre-empt the section 247 merits.

### A. The Necessity Test

- 5.6 The ‘necessity test’ in simple terms requires the SoS(T) to answer the following question:

**Is it necessary to stop up and/or divert a highway to enable the carrying out of the development authorised by planning permission?**

- 5.7 This test was the primary issue in the recent *Network Rail case*. The facts of which in brief concerned the interpretation of a Grampian planning condition restricting the development

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<sup>2</sup>In the first instance before the High Court in *Network Rail Infrastructure Ltd, R (On the Application Of) v The Secretary of State for the Environment, Food And Rural Affairs* [2017] EWHC 2259 (Admin)

In the second instance on appeal before the Court of Appeal in *Network Rail Infrastructure Ltd, R (On the Application Of) v Secretary of State for Environment, Food And Rural Affairs* [2018] EWCA Civ 2069.

<sup>3</sup> *Ibid.*

on terms related to the possible outcomes of a mandatory application for the stopping up of an off-site footpath railway crossing. The Grampian condition was imposed as the new development would intensify public use of the crossing and increase the associated safety risks.

5.8 The Court of Appeal in the *Network Rail case* confirmed that the requirement of "necessity" under section 247 (or the similar section 257 as was the case) may be satisfied by the existence of either of the following obstacles arising from the permitted development:

5.8.1 a physical obstacle - some practical impediment to the development proceeding. By example, a highway running across a development site that would make it impossible for the proposed development to be carried out and completed without it being stopped-up or diverted; or

5.8.2 a legal obstacle - a "Grampian" or negative planning condition or planning obligation preventing the development being carried out, in whole or in part, until an order stopping-up and/or diverting a highway had been made and confirmed, and the highway had then been stopped-up and/or diverted.

5.9 Both the High Court and the Court of Appeal found that the subject Grampian condition in the *Network Rail case* was, when read in the context of the permission, a legal obstacle which satisfied the 'necessity test'.

5.10 Additionally, and as importantly, when considering the 'necessity test' and whether there exists any physical or legal obstacle to the implementation and completion of the associated planning permission, the High Court in the *Calder case*<sup>4</sup> confirmed that it is not for the SoS(T) to postulate other development if he/she is satisfied of the necessity of the stopping up and/or diversion to allow the permitted development to be carried out.

#### B. The Merits Test

5.11 The 'merits test' in simple terms is the discretionary power of the SoS(T) to not make an order under section 247 stopping up and/or diverting a highway notwithstanding whether the 'necessity test' is satisfied. It requires the SoS(T) to answer the following question:

**Are the disadvantages and losses, if any, flowing directly from a stopping up and/or diversion order of such significance that he/she ought to refuse to make the closure or diversion order?**

5.12 The Court of Appeal decision in the *Vasiliou case*<sup>5</sup> is the leading case on the 'merits test'. Such case concerned a proposed stopping up of highway application under section 209 of the Town and Country Planning Act 1971 (the predecessor to section 247 of the 1990 Act). If the highway was stopped up it would have converted the remaining highway to a cul-de-sac. The claimant operated a restaurant and contended that the resulted cul-de-sac of the highway, for which his business would be situated within, would reduce local footfall and adversely affect the viability and profit of his business.

5.13 The Court of Appeal found that such issue, a relevant material consideration on the decision to grant the planning permission, was also a relevant consideration under the 'merits test' and

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<sup>4</sup> *Calder v Secretary of State for the Environment* [1995] E.G.C.S. 43.

<sup>5</sup> *Vasiliou v Secretary of State for Transport* (1991) 61 P&CR 507.

therefore required re-determination by the SoS(T). In particular, the Court of Appeal provided the following guidance on the requirements and limits of the ‘merits test’:

5.13.1 matter of judgement - the ‘merits test’ will be a matter for the SoS(T)’s judgment. This is similar to the planning permission being the planning judgement of the decision maker (ie. the LPA or SoS(MHCLG)), and highlights the potential for differing opinions on overlapping matter between these decision makers.

5.13.2 Presumption in favour of stopping up/diversion – the pre-requisite of a section 247 application is the grant of planning permission. The SoS(T) is not asked nor permitted to re-examine the planning merits of the permission.

As such, the SoS(T) must approach the exercise of his discretion on a presumption in favour of the development being allowed to proceed. It is on that basis that he/she must determine whether the disadvantages and losses, if any, flowing directly from a closure or diversion order are of such significance that he/she ought to refuse to make the closure or diversion order.

5.13.3 Relevant direct significant disadvantages or losses – when considering the significance of the loss and inconvenience which will be suffered as a direct consequence of stopping up or diversion of part of the highway, the SoS(T) is at liberty to take into account all reasonable losses arising:

- A. to members of the public generally (ie. safety, inconvenience etc); and
- B. to properties (and the owners/occupiers) adjoining or near the highway which sustain losses over and above that which will be sustained by the public generally.

The ‘significance’ of any loss or disadvantage should not be interpreted within the context and weighting of any planning policy meaning. It should be given its ordinary and general meaning, and which is a matter of ultimate judgement of the SoS(T).

Additionally, any mitigation measures specific to such loss secured by the planning permission (ie. via condition or planning obligation) will be relevant but if important to the identified disadvantage or losses may be addressed specifically in the SoS(T) confirmed order.

5.13.4 Relevant direct benefits - in reaching his/her decision the SoS(T) should also take into account any advantages to the public generally and to adjacent or nearby properties flowing directly from a closure or diversion order (for example, the new road layout may have highway safety or private access advantages); and

5.13.5 Significance and importance of the Planning Permission – the SoS(T) will need to take into account the importance, from the planning point of view, of the permitted development. In determining the significance and importance of the planning permission the Court of Appeal in the *Vasiliou case* noted:

“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”. [emphasis added]

- 5.14 Noting that many of the above matters referred to as relevant to the ‘merits test’ may have been considered at the time of the planning application, the Court of Appeal in the *Vasiliou case* recognised that each separate statutory procedure will inevitably give rise to factual and legal areas of overlap.

## **6. COUNCIL’S CASE FOR THE ORDER**

- 6.1 The Council contends that the legal tests are satisfied and the SoS(T) should make the requested order extinguishing and diverting the highway pursuant to the S247 Application. Such order to take effect upon the opening of the realigned route of Princes Parade to the public.
- 6.2 Each of the legal tests are examined below. The Council’s reply in reference to the Public Objections are set out in Section 7 of this report.

### A. The Necessity Test

- 6.3 The Council contends that it is necessary to stop up and divert that part of Princes Parade within the development so as to enable the carrying out of the development authorised by the planning permission. The Council further contends that the necessity for the stopping up and diversion of the highway arises from both the physical and legal obstacles caused to its ability to carry out the development in accordance with the planning permission.
- 6.4 The design and layout of the development authorised by the planning permission includes the realignment of Princes Parade. The current line of the road will be constructed as part of the improved promenade and public realm works of the development. Such design and layout, with the realigned road, enables not only the carrying out of the improvements to the promenade but also the carrying out of the remainder of the development designed within the scope and benefits of the road realignment. This includes the positioning of the buildings, the location of carparks and the vehicular accesses to the new residential dwellings, retail facilities, public open space facilities and the leisure centre.



- 6.5 It is therefore physically and practically impossible for the Council to carry out and complete all of the works authorised by the planning permission for the ‘whole’ of the development unless Princes Parade is realigned and the existing highway is stopped up.
- 6.6 Accordingly, without the order requested by the S247 Application there is a physical obstacle to the carrying out and completion of the development.
- 6.7 There are several planning conditions to the planning permission which prevent the carrying out of the whole or part of the development unless the SoS(T) makes an order in accordance with the S247 Application. In particular, planning condition [44] imposes a strict and absolute legal obstacle to the carrying out of the development without such order. It provides:
- “44. The development hereby permitted shall not be carried out except in complete accordance with the details shown on the submitted plans”.
- 6.8 Other relevant conditions of note are:
- 6.8.1 Condition 65 – both the promenade and the road re-alignment are works to be included within the phasing plan to be agreed prior to commencement of the development and implemented in accordance with it. As matter of construction programming such works will need to be completed earlier in the phase plan;
- 6.8.2 Condition 51 – prevents first occupation of the leisure centre until the realigned road, and thus the parking facilities accessed off it, are open; and
- 6.8.3 Condition 38 – prevents commencement of development in any phase or sub-phase until details of the realignment and phasing strategy for Princes Parade, dependent upon the order of SoS(T) for the S247 Application, is approved and can be implemented.
- 6.9 Accordingly, without the order requested by the S247 Application there is also a legal obstacle to the carrying out and completion of the development.

B. The Merits Test

- 6.10 The Council contends that there are no disadvantages or losses flowing directly from the S247 Application of such significance that the SoS(T) ought to refuse to make the stopping up and diversion order.
- 6.11 As discussed above, the SoS(T) must approach the exercise of his/her discretion under the ‘merits test’ on a presumption in favour of the development being allowed to proceed. Against such presumption, together with the direct benefits of the road closure and diversion and the significance and importance of the planning permission, the SoS(T) must weigh any significant disadvantages and losses flowing directly from a closure or diversion order.
- 6.12 The significance and importance of the planning permission and the direct benefits of the road closure and diversion, to be weighed with the presumption in favour of making the order, are explained in this Section below.

6.13 The disadvantages and losses contended by the Public Objectors are addressed in the Council's response to the Public Objections in Section 7 of this report, and not therefore repeated in this Section. However, for the purposes of detailing the Council's case, it is asserted by the Council that the disadvantage and losses contended by the Public Objectors either: (a) do not flow directly from the S247 Application; (b) are not disadvantages or losses; and/or (c) if they are disadvantages or losses flowing directly from the S247 Application then they are not of such significance to outweigh the presumption in favour of the order together with the direct benefits of the road closure and diversion and the significance and importance of the planning permission.

6.14 The significance and importance of the planning permission is a matter for the Council in its capacity as local planning authority. It is not an issue to be assessed by the SoS(T) or the Public Objectors as explained by the Court of Appeal in the *Vasiliou case*<sup>6</sup>. Accordingly, the planning significance and importance of the planning permission can be understood by reference to paragraphs 9.3-9.5 in the Officer's Committee Report for the planning permission which states:

*"9.3 ... The delivery of 150 homes on this site, 45 of which would be affordable, would contribute significantly to the Local Planning Authority meeting its housing need, within the Urban Area settlement boundary of Folkestone and Hythe.*

*9.4 The development would provide for economic benefits as set out in the report and application, both during construction and operational phases, with a variety of permanent jobs provided within the leisure centre, proposed hotel and restaurant uses. It is also considered the proposed development would help to contribute to the tourist economy, by providing a destination open space and play space, leisure centre and attractive public realm and seafront promenade within a popular beach side location, contributing positively to the character of Hythe.*

*9.5 The main purpose of the development is to provide a substantial and needed public benefit in the form of a new leisure centre to serve the residents of the district. The application demonstrates that the existing facility is in a poor state of repair with limited life expectancy and that there is already a deficit in water space within the district. Alongside the leisure centre, the application proposes the delivery of a substantial area of strategic open and play space, occupying almost 50% of the application site and maintaining and enhancing the visual connection between the sea and canal".*

6.15 The planning significance can further be understood at paragraph 8.262 of the Committee Report where it lists the following specific and important benefits of the development:

- a substantial area of strategic open space of significantly improved quality and accessibility than the site currently provides;
- remediation of the contaminated open space area which will facilitate improved accessibility to it;

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<sup>6</sup> Ibid paragraph 5.13.5 of this report.

- an enhanced seafront promenade provided an enhanced visual environment and car free space with improved connectivity between the public open space and the seafront, achieved by the repositioning of Princes Parade road to behind development;
- Provide means to consolidate and repair neglected but key parts of the site through vegetation clearance and stonework repair;
- Provide better public access and interpretation of the RMC and wider area, emphasising connections between the canal and the sea, delineating lines of fire and maintaining openness;
- Heritage trail between the RMC, Shorncliffe Battery and Martello Towers, interpretation boards and artwork, building on the findings of an archaeological study; and
- Environmental improvement scheme at the eastern end to mark the site of the former drawbridge and canal arm leading to it.

6.16 It is noted from the above identified significance and importance of the planning permission that not only do the benefits arise from the development generally but importantly the enhanced car free seafront promenade is a direct benefit of the road closure and diversion order.

6.17 Accordingly, when the significance and importance of the planning permission, together with the direct benefits arising from the road closure and diversion order, are weighed with the presumption in favour of making the order then such merits clearly outweigh the significance of any disadvantages or losses (if any as explained in Section 7) that may arise from the order. Therefore, the Council contends that the S247 Application satisfies the 'merits test'.

## **7. PUBLIC OBJECTIONS AND THE COUNCIL'S RESPONSE**

7.1 The Public Objections are summarised in this report and the Council's response to the comments and concerns raised during the statutory consultation are set out in this Section.

7.2 At the time of the statutory consultation the planning permission for the development had not been issued. As a result of the outstanding planning decision, it is appreciated that a considerable number of the Public Objections included comments on the planning related merits of the whole development as opposed to only comments directly relevant to the S247 Application. Such comments included: the local need for the development; the financial viability and funding for the development; and the impact of the new buildings, the leisure centre and housing, on the local amenity and setting.

7.3 As explained in paragraph 5.13.3 of this report, only disadvantage and losses that may be suffered as a direct consequence of the road closure and diversion are relevant to the 'merits test'. Any comments on the broader impact of the development and its planning merits, which are facilitated indirectly by the road closure and diversion, are therefore not relevant to the S247 Application. Moreover, they cannot be considered by the SoS(T) in his/her decision and the merits on the planning permission cannot be reopened.

7.4 Accordingly, all comments by Public Objectors raising disadvantages and losses not directly arising from the S247 Application are not formally responded to in this report.

7.5 In considering the above limitations to the relevancy and applicability of public comments on the S247 Application the Council has identified 10 response themes within the Public Objections directly related to the proposed road closure and diversion. These are:

- (a) support for the S247 Application (raised by 4 respondents);
- (b) the road closure and diversion are unnecessary for the development (raised by 169 respondents);
- (c) loss of seafront parking (raised by 59 respondents);
- (d) loss of seafront highway amenity (raised by 148 respondents);
- (e) reduced accessibility to the seafront for people with disabilities (raised by 55 respondents);
- (f) adverse impact on the setting of the RMC (raised by 175 respondents);
- (g) adverse impact on the local environment and wildlife (raised by 122 respondents);
- (h) noise and air pollution to public amenity of the RMC (raised by 47 respondents);
- (i) adverse traffic impact (raised by 136 respondents); and
- (j) joint local inquiry for the determination of the planning application and the S247 application (raised by 69 respondents).

7.6 The Council's reply to each of the response themes are detailed below.

*Response Theme A – Support Proposal*

7.7 The Council is thankful to those members of the public that expressed support for the S247 Application.

*Response Theme B – Unnecessary*

7.8 This response theme is based on the contention of several objectors that the road does not need to be closed and diverted due to the buildings within the development being largely setback from the existing road and not constructed over it. Accordingly, the contention is that the existing road could be kept within the current design layout of the buildings and therefore it is unnecessary to close and divert the road.

7.9 While the general reasoning for this comment by Public Objectors is understandable, it does unfortunately not appreciate that the development concerns works beyond just the buildings. It is clear from the approved layout of the development pursuant to the planning permission, which includes (in addition to the building) the promenade improvements, new carparks and vehicle accesses, that in order to carry out the development as a whole it requires the road closure and diversion.

7.10 Accordingly, this response theme is an argument of alternative development to that of the planning permission and draws upon issues for both the 'necessity test' and the 'merits test'.

- 7.11 The Council has explained in paragraphs 6.3 to 6.9 above the grounds for which the S247 Application satisfies the ‘necessity test’. In summary, there are both legal obstacles and physical obstacles to the Council’s ability to implement the ‘whole’ of the development in accordance with the planning permission without the closure and diversion of the road.
- 7.12 As noted above in the *Calder case* at paragraph 5.10 above, it is not the role of the SoS(T) in the section 247 procedures to consider and assess alternative developments such as a design and layout (with associated new accesses, promenade improvements etc) which could retain the current road without the requested closure and diversion. He/she can only consider and assess the planning permission that has been granted and the necessity to stop up and divert the highway arising from such planning permission.
- 7.13 Likewise, and as noted in the *Vasiliou case* at paragraph 5.13.5 above, the SoS(T) cannot consider on the ‘merits test’ any alternative developments, nor go behind the planning permission, when weighing the significance and importance of the planning permission.
- 7.14 Accordingly, the Council contends that this response theme does not diminish the grounds for which the S247 Application satisfies the ‘necessity test’ and the ‘merits test’.

*Response Theme C - Loss of seafront parking*

- 7.15 This response theme is based on the contention of several objectors that the closure and diversion of the road will directly cause the loss of seafront parking, and draws upon issues for the ‘merits test’.
- 7.16 At Appendix 2 of this report are three tables showing the pre-development and post-development public parking facilities in the vicinity of the development site together with the results of a parking survey carried out by the Council’s transport consultant MLM Consulting Engineers Limited<sup>7</sup>.
- 7.17 It is accepted by the Council that the closure and diversion of part of Princes Parade as it passes through the development will cause the loss of existing seafront parking presently permitted within such part. However, as to the significance of such loss and disadvantage to the public the following facts should be appreciated:
- (i) Princes Parade adjacent to the golf course, which will remain seafront parking, has approximately 160 parking spaces of which the maximum peak usage is 120 cars parked at 2pm per the parking survey;
  - (ii) Approximately 26 parking spaces will remain on the seafront on the south-west corner of the realigned part of Princes Parade;

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<sup>7</sup> Full details contained within the Transport Assessment of MLM Consulting dated August 2017 and submitted with the planning application.

- (iii) The peak parking demand along that part of Princes Parade within the development is 100 parking spaces per the parking survey. In mitigation and addition to the parking in (ii) above, there will be a 71 parking space carpark on the south-west corner of the development. This is situated immediately opposite the seafront. There will also be 32 on-street parking spaces along the realigned road opposite the RMC (which improves accessibility to it). Finally, the relocated Seapoint carpark will provide 23 parking spaces (which currently operates below 50% capacity per the parking survey).
- (iv) In total there will therefore be 353 public parking spaces within the development which will be easily and directly accessible to the seafront, the RMC and the enhanced promenade and open spaces.

7.18 Accordingly, the Council acknowledges that there will be a loss of seafront parking as a direct consequence of the road closure and diversion. However, the Council contends that such loss will not be significant given the above listed reasons. Therefore, this response theme does not diminish the Council's satisfaction of the 'merits test'.

*Response Theme D – Loss of seafront visual highway amenity*

7.19 This response theme is based on the contention of several objectors that the closure and diversion of the road will directly cause the loss of seafront visual amenity and enjoyment arising from both the passing along the existing road and parking upon it. It draws upon issues for the 'merits test'.

7.20 It is accepted by the Council that the closure and diversion of part of Princes Parade as it passes through the development may cause the loss for some people of the enjoyment of driving along the seafront, and parking thereon. However, as to the significance of such loss the following facts should be appreciated:

- (i) Only part of Princes Parade will be closed and diverted. The public will be able to enjoy the driving and parking against the seafront for the remainder of Princes Parade (for which there will be approximately 160 parking spaces);
- (ii) The realigned road will enhance visual amenity and enjoyment for public users of the road and the RMC;
- (iii) The realigned road will enable an enhanced promenade and associated visual amenity for non-car users. The development provides a balanced public amenity between car users and non-car users; and
- (iv) The purpose of a highway, and statutory duty upon a highway authority, is not to provide visual amenity to its users or an enduring legal right for parking but rather a safe means for passage.

7.21 Accordingly, the Council acknowledges that there may be a loss of seafront amenity for car users as a direct consequence of the road closure and diversion. However, the Council

contends that such loss will not be significant given the above listed reasons. Therefore, this response theme does not diminish the Council's satisfaction of the 'merits test'.

Response Theme E – Loss of accessibility to the seafront for people with disabilities

7.22 This response theme is based on the contention of several objectors that the closure and diversion of the road will directly cause the loss of accessibility to the seafront for people with disabilities. Specifically, the loss of accessibility due to the loss of disabled spaces for seafront parking. It draws upon issues for the 'merits test'.

7.23 It is accepted by the Council that the closure and diversion of part of Princes Parade as it passes through the development may cause the loss for some people with disabilities of their preferred parking location. However, as to the significance of such loss the following facts should be appreciated:

- (i) Only part of Princes Parade will be closed and diverted. The public will be able to continue to drive and park against the seafront for the remainder of Princes Parade (for which there will be approximately 160 parking spaces);
- (ii) The new public parking provisions will have 10 formal disabled parking spaces as per table in Appendix 5. This is an increase of 4 formal disabled parking spaces;
- (iii) The realigned road and new public parking provisions will provide closer disabled parking spaces for easier access to the RMC and the enhanced promenade and open spaces; and
- (iv) The Council has designed the development and the public parking spaces giving due regard to its public sector equality duty under the Equality Act 2010.

7.24 Accordingly, the Council acknowledges that there may be a loss of preferred parking locations on such part of Princes Parade within the development for people with a disability as a direct consequence of the road closure and diversion. However, the Council contends that such loss will not be significant given the above listed reasons. Therefore, this response theme does not diminish the Council's satisfaction of the 'merits test'.

Response Theme F – Impact on setting of RMC

7.25 This response theme is based on the contention of several objectors that the closure and diversion of the road will directly and adversely impact on the setting of the neighbouring RMC. It draws upon issues for the 'merits test'.

7.26 It is important to appreciate that any impact on the setting of the RMC is relevant to the 'merits test' only if it arises directly from the closure and diversion of the road (as opposed to arising from the development generally).

7.27 Historic England were consulted on the planning application as to the impact of the development to the setting of the RMC. Their comments in a letter dated 26<sup>th</sup> October 2017 and the relevant extracts are set out below:

- (i) “The RMC is not a normal transport canal but rather was an important part of the country’s defences constructed in the early 19<sup>th</sup> century in response to a very real fear of invasion by Napoleon’s army ... It was built to delay the advance of a landing force while the British army mustered inland”;
- (ii) “Amongst the factors that are critical to the ability to appreciate the significance of the RMC at this eastern end is the largely undeveloped nature of the land between the canal and the beach. The construction of the sea wall and coast road has affected the form of the beach, while the former use as a refuse tip has altered the topography in some areas. Even so, with the beach and the canal close to each other, it is easy for people to understand how the RMC would have formed a substantial obstacle to the progress of an invading French army”; and
- (iii) “The impact of the proposed development would be to divorce the canal from the shore to a much greater degree than currently. Were the canal to become a linear feature between two substantially developed areas, appreciation of its historic role as a barrier would be undermined and with this the ability to understand its design as a fortification”. [emphasis added]

7.28 Noting the above comments of Historic England, and in particular given Princes Parade is already within the modern setting of the RMC (positioned between the canal and the beach), the Council contends that any impact to the setting of the RMC by the development is not a direct consequence of the road closure and diversion. Therefore, this response theme does not diminish the Council’s satisfaction of the ‘merits test’.

#### Response Theme G – Environmental and wildlife impacts

7.29 This response theme is based on the contention of several objectors that the closure and diversion of the road will directly cause an adverse environmental impact to the wildlife and flora of the development site. It draws upon issues for the ‘merits test’.

7.30 The environmental impact of the development as a whole is summarised at paragraph 8.200 of the Officer’s Committee Report on the planning application where it is stated:

*“The ES [Environmental Statement] identifies that the completed development would represent a fundamental change to the habitat status of the site, as well as introducing physical barriers to movement, lighting, human disturbance, traffic and predation by pets into the area. Without mitigation, the effects on the numbers of common toad and reptiles are anticipated to be minor to major adverse, and moderate to major adverse, respectively. The potential effect on foraging bats due to the introduction of lighting, without control, is predicted to be moderate adverse”.*



- 7.31 It is accepted by the Council that the closure and diversion of part of Princes Parade as it passes through the development will directly contribute in part to the identified environmental impacts for the development.
- 7.32 However, as noted in paragraph 5.13.3 above, when considering the significance of any disadvantage or loss in the context of the S247 Application the SoS(T) shall consider any mitigation measures secured by the planning permission. Accordingly, the following mitigation measures have been secured in relation to environmental impacts of the development:
- (i) Condition 17 – Pre-commencement approval of a site-wide lighting strategy;
  - (ii) Condition 32 – Pre-commencement Preliminary Ecological Appraisal;
  - (iii) Condition 33 – Prior to any habitat clearance the approval of a Habitat Creation Plan;
  - (iv) Condition 34 – Pre-commencement approval of a Construction Environment Management Plan;
  - (v) Condition 35- Pre-commencement approval of an Ecological Mitigation and Enhancement Plan;
  - (vi) Condition 36 – Pre-commencement approval of a Landscape and Ecological Management Plan; and
  - (vii) Condition 37 – approval of an Ecological Monitoring Plan.
- 7.33 In relation to the above mitigation measures secured by the planning permission it is noted at paragraph 8.211 of the Officer’s Committee Report that they have been assessed by KCC Ecology, Natural England and the Environment Agency and found to be broadly acceptable (NB. The badgers setts mitigation mentioned therein having been resolved).
- 7.34 Taking into consideration the above mitigation measures secured by the planning permission, the Council contends that there are no adverse environmental impacts, or at least no significant adverse environmental impacts, to wildlife and flora as a direct consequence of the road closure and diversion. Therefore, this response theme does not diminish the Council’s satisfaction of the ‘merits test’.

*Response Theme H – Noise and air pollution to walkers of RMC*

- 7.35 This response theme is based on the contention of several objectors that the closure and diversion of the road will directly cause adverse noise and air pollution to walkers of the RMC due to its closer proximity. It draws upon issues for the ‘merits test’.
- 7.36 Noting the level of traffic generation for the development and associated speed limiting traffic calming measures for the road diversion, the Council’s Environmental Health Officer in response to the planning application did not advise of any adverse air pollution levels arising from the development nor required a noise acoustic report<sup>8</sup>. Moreover, the Council contends that the diversion of the road will not directly increase existing traffic levels and associated noise and air pollution.
- 7.37 Accordingly, the Council contends that there are no adverse, or no significant adverse, noise and air pollution impact to walkers of the RMC as a direct consequence of the road closure

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<sup>8</sup> See paragraph 5.16 of the Officer’s Committee Report.

and diversion. Therefore, this response theme does not diminish the Council's satisfaction of the 'merits test'.

Response Theme I - Traffic impact to the highway network

7.38 This response theme is based on the contention of several objectors that the closure and diversion of the road will directly cause an adverse impact to the traffic network. Specifically, the objectors identify potential congestion on the A259 possibly due to traffic controls (eg. reduced speed limits) of Princes Parade resulting in the use of the road less appealing to motorists. It draws upon issues for the 'merits test'.

7.39 As part of the planning application the Council's transport consultants, MLM Consulting Engineers Ltd, submitting a transport assessment with traffic modelling. The results of that modelling, accepted by Kent County Council, are summarised in paragraph 8.167 of the Officer's Committee Report which stated:

*"The modelling undertaken has demonstrated that in a 2023 scenario, which accounts for traffic associated with the development as well as local traffic growth (incorporating the cumulative impact of Imperial Green, Shorncliffe Garrison and the Seapoint Canoe Centre), all junctions will operate within desired capacity parameters within the AM and PM network peak hours (0800 – 0900 and 1700 – 1800, respectively). The greatest increase in modelled traffic flows will occur at the Twiss Road / South Road junction, with 15.7% increase in traffic at PM peak (average 14.5% increase for AM and PM), whilst the longest predicted increased delay would be at the Seabrook Road / Princes Parade junction, at 3.38 seconds. As a result of this no off-site highway works are required by KCC Highways". [emphasis added]*

7.40 Accordingly, the Council contends that there will be no traffic impact, or no significant traffic impact, to Princes Parade or the surrounding highway network as a direct consequence of the road closure and diversion. Therefore, this response theme does not diminish the Council's satisfaction of the 'merits test'.

Response Theme J – Joint local inquiry

7.41 This response theme arises from a number of comments from Public Objectors requesting the SoS(T) decision on the S247 Application to be assessed and tested jointly with the planning application in the event it was called in by the Secretary of State for Housing Communities and Local Government (SoS(MHCLG)).

7.42 The SoS(MHCLG) has determined not to call in the planning application, following which the planning permission has been issued. Accordingly, the Council contends that the Public Objections are clearly set out and a local inquiry can be dispensed with by the SoS(T) in deciding the S247 Application.

## **8. HUMAN RIGHTS AND EQUALITY IMPACT ASSESSMENT**

- 8.1 All public authorities are bound by the Public Sector Equality Duty as set out in section 149 of the Equality Act 2010 ("PSED"). This includes giving due regard to the effect of any differential impacts on groups with protected characteristics.
- 8.2 Section 6 of the Human Rights Act 1998 prohibits a public authority from acting in a way which is incompatible with the rights and fundamental freedoms set out in specified provisions of the European Convention on Human Rights ("Convention Rights").
- 8.3 The Council has had regard to and complied with the PSED and the Convention rights including the advice in the guidance issued by the Equality and the Human Rights Commission to promote equality of opportunity<sup>9</sup>. Accordingly, the Council does not consider that the proposal would conflict with the PSED and Convention Rights.

## **9. CONCLUSION**

- 9.1 In conclusion the Council considers and submits that the S247 Application satisfies both the 'necessity test' and the 'merits test' and that the SoS(T) should make the order stopping up and diverting that part of Princes Parade that passes through the development.
- 9.2 Specifically, the required order satisfies the 'necessity test' as without it there are both physical and legal obstacles to the carrying out and completion of the development in accordance with the planning permission.
- 9.3 Likewise, the required order satisfies the 'merits test' whereby when the significance and importance of the planning permission, together with the direct benefits arising from the road closure and diversion order, are weighed with the presumption in favour of making the order then such merits clearly outweigh any disadvantages or losses contended by Public Objectors that may arise from the order.

## **10. INVITATION TO PUBLIC OBJECTORS**

- 10.1 Every Public Objector will be provided a copy of this report together with an extract of the Public Objection Summary relating to their specific objection to the S247 Application including a list of the response themes relevant to the objection.
- 10.2 The Council kindly invites every Public Objector to consider this Report, and then confirm to the address below, or in reply to the email received, whether they:
- (a) withdraw their objection; or
  - (b) withdraw any of the response themes relevant to their objection and listed in the Public Objection Summary.

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<sup>9</sup> Technical Guidance on the Public Sector Equality Duty: England - 2014

The period for responses to this Report by Public Objectors will close at 4pm on Monday 7 June 2021

- 10.3 Public Objectors are further kindly invited to provide any general comments clarifying their existing objection. However, new grounds of objection and/or comments on the Planning Permission will not be accepted as explained in Section 3 of this report.

**Buckles Solicitors  
May 2021**

## Appendix 1 – Illustrative Masterplan



## Appendix 2- Parking Capacity and Survey Tables

**Table 1 – Existing parking provision in vicinity of site.**

<b>Location</b>	<b>Type</b>	<b>Parking Spaces</b>
Battery Point Car Park	Pay and Display	Regular Bays: 27 Disabled Bay: 2 Kiosk Bay: 1
Sea Point Car Park	Pay and Display	Regular Bays: 21 Disabled Bays: 2
Princes Parade (Section that runs through site) On-Street	Pay and Display	Approximately 187
Princes Parade (Adjacent to Golf Course) On-Street	Pay and Display	Approximately 160
Twiss Fort Car Park	Pay and Display	Regular Bays: 20 Disabled Bays: 2

**Table 2 – Proposed parking provision in vicinity of site.**

<b>Location</b>	<b>Type</b>	<b>Parking Spaces</b>
Battery Point Car Park	Pay and Display	Regular Bays: 27 Disabled Bay: 2 Kiosk Bay: 1
New Sea Point Car Park	Pay and Display	Regular Bays: 21 Disabled Bays: 2
New carpark on the south-west corner of the development	Pay and Display	Regular Bays: 67 Disabled Bay: 4
Princes Parade (south-west corner that runs through site) On-Street	Pay and Display	Approximately 26
Princes Parade (realigned road opposite RMC)	Pay and Display	Regular Bays: 21
Princes Parade (Adjacent to Golf Course) On-Street	Pay and Display	Approximately 160
Twiss Fort Car Park	Pay and Display	Regular Bays: 20 Disabled Bays: 2

Table 3 – Traffic Survey.

Figure 2.1: Parking Survey Results

