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
OPENING STATEMENT

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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 the 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 the highway 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.

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 consequences of the order and do not fall for consideration in this inquiry. It is the planning permission, and not the order, which authorises the construction of the new road. 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.

3. The realignment of Princes Parade was included in the planning application and the grant of planning permission deals with the "planning ramifications" of that.[1] The

[1] See *Vasiliou* at p513.

location of the new road is governed by the planning permission. The order simply diverts the highway right over the new road. The inquiry is not to consider whether the new road should be constructed on a different route or in a different location.

4. 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. Part of the route of the new road is fixed by the detailed planning permission and condition 4. 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). It would be pointless to seek the order to divert the highway over the new road as shown on the order plan if there was any proposal to change the route of the new road. As the Council's experts confirm in their proofs of evidence, the detailed design being worked-up by the design team conforms with the design code and drawings referenced in condition 6.

5. 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 in opening is probably by using the words of the Court of Appeal in the *Vasiliou* case (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 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."

6. 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" (para 49(4)).

7. The position was correctly stated in the Inspector's 'Post Meeting Note' dated 23 September 2021 (PPIQ006), following the pre-inquiry meeting, 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).

8. 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 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).

9. 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".

10. Despite this, large parts of the campaign group's evidence – which have not been withdrawn or amended – do suggest alternative development proposals, do challenge engineering or construction aspects of the new road, and do challenge elements of the planning permission.[2]

11. The campaign group said in its statement of case (para 24) that, in the *Southwark LBC* case, Lord Briggs said there were "two elements of a highway". This is not what was said. Lord Briggs in fact said:

> "32 There is in my view no single meaning of highway at common law. The word is sometime used as a reference to its physical elements. Sometimes it is used as a label for the incorporeal rights of the public in

[2] As was identified in para 22 of the Council's costs application dated 11.10.21.

> relation to the locus in quo. Sometimes, as here, it is used as the label for a species of real property. When used within a statutory formula, as here, the word necessarily takes its meaning from the context in which it is used."

12. Far from saying that there are two elements of a highway, Lord Briggs was making clear that a reference to 'highway' can mean *either* the "physical elements" *or* the right. It is clear from the statutory context, and the case law, that s247 of the 1990 Act refers to highway in the sense of the rights of the public and *not* in relation to the "physical elements" of a road. This is now accepted by the campaign group in its email of 12 October 2021, where it expressly recognises that the focus of s247 is the right.

13. 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 the development to be carried out in accordance with the planning permission which was granted in July 2019.

14. 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,[3] 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).[4]

15. 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.[5]

16. 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 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

[3] See eg CD67 (page 2) and the proofs of Mr Joyce (para 7) and Mr Morgan (paras 14 and 19).
[4] See SPPCG's statement of case at para 11.
[5] See the High Court in *Network Rail* at paras 52 and 55.

development proceeding without the highway being stopped up. 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.

17. 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).[6] 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).[7] The *Calder* case makes clear that it is not appropriate under s247 to postulate other development where the necessity arises from the permitted development.

18. As to the merits test, the Secretary of State will need to decide whether, on its merits, the order should be made. This should involve consideration of the direct consequences of the order.[8] 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.

19. 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. The road over which people exercise their vehicular highway right will be different. It will be a better, safer road.

[6] See also the High Court in *Network Rail* at para 49(1).
[7] See also the High Court in *Network Rail* at para 53.
[8] See eg *Vasiliou* at pp512, 515-516.

20. The places available to park will be different. 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. The ability to park on a highway and to enjoy the view from a highway are in any event at most incidental aspects of the exercise of a highway right. 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. 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.

21. 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. Moreover, the majority 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. No accesses to premises are affected by the order.

22. 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.

23. Another direct consequence of the order will be to divert the highway right from the existing stretch of Princes Parade on to the new road, which 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.

24. In relation to the main issues identified by the Inspector in relation to the merits test,[9] 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.

25. 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.

26. It is worth remembering that these main issues 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. This is not a case like *Vasiliou* where a matter was not addressed in the planning decision.

[9] Namely: seafront parking; seafront highway amenity; disabled access to the seafront; the setting of the RMC, including noise and air pollution; biodiversity; and, traffic, including the flow of traffic.

27. 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.

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

29. In light of the very limited adverse direct consequences of the order, it is legitimate to ask why there is such opposition to the order. This is probably for a variety of reasons. Some people seem so opposed to the development that they would try to take advantage of every opportunity to cause problems for it. It is clear from many of the objections that people are strongly opposed to the development. But that battle 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.

30. Some people appear not to understand what is proposed. Many of the objections proceed on the basis that the road is going to be cut off completely or that parking is not going to be replaced. Some people appear not to understand the proper remit of the inquiry. Others appear wilfully to disregard the remit of the inquiry, despite it being made clear in the Buckles report of May 2021 and by the Inspector before, at and following the pre-inquiry meeting. Where objectors persist in pursuing objections which the Inspector has previously indicated to be irrelevant, or which are contrary to

well-established case law, there is at least a remedy available to address the waste of time and resources which that causes.

31. The great majority of objections relate to matters which the Inspector ruled at the pre-inquiry meeting 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 retains Princes Parade. Beyond that, those 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 are misconceived – such as arguments that the new road will be less safe than the existing road.

32. 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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