

***PRINCES PARADE, SEABROOK/HYTHE, KENT***

**Application proposing the stopping-up and diversion of part of the highway known as  
Princes Parade, Hythe, Kent: made by Folkestone & Hythe District Council to the  
Secretary of State for Transport**

**Town and Country Planning Act 1990, ss. 247 & 252**

**Ref: NATTRAN/SE/S247/3254**

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**SAVE PRINCES PARADE: STATEMENT OF CASE**

**Public Local Inquiry commencing 19 October 2021 t/e 5 days**

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**INTRODUCTION**

1. This is the Statement of Case of Save Princes Parade (“SPP”), in response to the application made on 7 March 2018 by Folkestone & Hythe District Council (“the Council”) to the Secretary of State for Transport (“S of S”) for an Order authorizing the stopping-up and diversion of 871 m of the “all purpose” highway known as Princes Parade, Hythe in Kent (the Council refer to it as in “Folkestone”, the part proposed to be stopped-up and diverted is, perhaps, in Seabrook - albeit nothing turns on that).

2. The Council's application to the S of S describes the development which it contends necessitates the "closure/diversion" as:

*"By relocating the road to the rear of the site, we can generate a vehicle free link from the proposed leisure centre and housing development to the beach and existing promenade."*

3. Whilst the Council appears to be the registered freehold proprietor of the site of the Royal Military Canal and land adjoining at Hythe [Title no. K640682], together with Land at Princes Parade, Hythe [Title no. TT67389] – the latter title registered in 2017, Kent County Council ("Kent CC") is the local highway authority in whom the surface of the Princes Parade carriageway and footway are presently vested.
4. SPP is a non-political group or association of local people formed in 2012 to campaign to protect Princes Parade and the adjacent land on either side of the Royal Military Canal as public open space, saving it from being developed on. It has a fluctuating membership body which currently stands at 670 people.
5. SPP – together with various statutory consultees and individuals – has previously (May/June 2018) submitted a considerable and significant body of objections to the S of S in response to the draft published Order (c. 439). In response to Buckles' May 2021 Response to Statutory Consultation on behalf of the Council, SPP submitted a further Comments document maintaining a number of objections under identified topics on behalf of 623 members.
6. In light of the above the S of S resolved to hold a Public Local Inquiry to be conducted by the appointed Inspector, Mr Owen Woodward BA (Hons) MA MRTPI, so that he may be fully appraised of the merits and demerits of the proposed Order which the S of S has a discretion to confirm, vary or decline to make:

*“[s. 247 (1)] 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 [TCPA 1990] ...”*

## **PURPOSE OF THIS STATEMENT OF CASE**

7. SPP has previously submitted a considerable body of material in support of its case that the overall balance of the public interest lies in not interfering with the established right of way. Hence it submits that the S of S should exercise his statutory discretion by declining to allow part of Princes Parade to be closed as a highway – and diverted to run instead behind the proposed housing estate and leisure centre which the Council wishes to construct – and alongside the Royal Military Canal.
8. The aim of this document is to avoid undue repetition and identify the relevant factors which SPP contend the S of S is obliged to weigh in the balance before he can come to his decision on where the public interest truly lies.
9. SPP both understands and accepts that it is not the role of the S of S to reconsider whether or not the Council should have granted itself planning permission for its proposed development.

## **EXTINGUISHMENT AND DIVERSION OF HIGHWAYS: FRAMEWORK**

10. “Once a highway always a highway” is a well-established legal maxim.<sup>1</sup> However, under various statutory powers – including TCPA 1990 s. 247 – a highway may be stopped-up (the extinguishment of public rights of way over it) and/or diverted (the dedication of a new highway in substitution for that which has been stopped-up)

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<sup>1</sup> Dawes v. Hawkins (1860) 141 E.R. 1399, Byles J.

pursuant to a discretionary power vested in the S of S if he is satisfied that the balance of the public interest justifies his making such an Order.

11. SPP adopt the decision-making framework suggested by Stephen Sauvain QC:<sup>2</sup>

*“The essential pre-condition to the making of an order under s.247 is a conflict or potential conflict, between a planning permission and the continued existence along its present line of a public right of way [vehicular in the present case]. The process leading to the confirmation or non-confirmation of the order is the means of balancing the respective public interests which are in conflict.*

*... the first precondition for the exercise of the power under s.247 is the existence of a planning permission ... The second pre-condition is that the extinguishment or diversion should be necessary to enable the development to be carried out. [the so-called “necessity test”] ...*

12. On 18 July 2019 the Council granted itself conditional planning permission (hybrid planning application ref: Y17/1042/SH) for development described as:

Outline: (with all matters reserved, including access and layout) for up to 150 dwellings, up to 1,270 sq. m. of commercial use including hotel, retail, and/or restaurant/café use; hard & soft landscaped open spaces, children’s play facilities and surface parking for vehicles & bicycles, alterations to existing vehicular and pedestrian access and highway layout around the site, site levelling and groundworks, and all necessary supporting infrastructure and services.

Full/detailed: a 2,961 sq. m. leisure centre, including associated parking, open spaces and children’s play facility.

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<sup>2</sup> Highway Law 5<sup>th</sup> Edn. 2013 Sweet & Maxwell pp. 365-371

13. Because the proposed extinguishment and diversion rely upon a hybrid planning permission which involves both a full (or detailed) element, together with the major part being left only in outline, this creates an additional complication. The red Application Site line boundary, together with black hatched line delineating the “Detailed” and Outline” respective areas, are shown at Fig. 1 Environmental Statement, Technical Annex 1 Scoping.<sup>3</sup>
14. In relation to reserved matters, access means:<sup>4</sup>
- “the accessibility to and within the site, for vehicles, cycles and pedestrians in terms of the positioning and treatment of access and circulation routes and how these fit into the surrounding access network; where “site” means the site or part of the site in respect of which outline planning permission is granted or, as the case may be, in respect of which an application for such permission has been made.”*
15. Whilst an indicative drawing (e.g. the illustrative masterplan)<sup>5</sup> depicts the proposed new highway as diverted this is: (a) merely illustrative showing how the application site could be developed, and (b) liable to change at reserved matters approval. This proposition can be tested by reference to what is depicted as public open space at the western end of the site now having to be taken-up by a drainage lagoon due to revised drainage arrangements.
16. When the planning application was first submitted it was proposed to drain the site to the sea. The drainage scheme was changed, possibly because Lord Radnor owns the beach, so that it drained to the Royal Military Canal. This was when the drainage lagoon was introduced. This revised drainage arrangement was subsequently approved. However, a recent Lloyd Bore document related to Ecology states that the drainage scheme for the site has changed, and it is now the intention to drain the site to the sea

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<sup>3</sup> Peter Radmell Associates, Aug. 2017

<sup>4</sup> Development Management Procedure Order 2015, art 2(1)

<sup>5</sup> Figure 2 Peter Radmall Associates op cit.

rather than the Royal Military Canal. Hence, it is presently unclear whether the Council still intend to go ahead with the lagoon.

17. Assuming the Council is able to surmount the necessity test and satisfy the S of S that the whole of that part of Princes Parade has to be extinguished and then diverted to allow the permitted development to go ahead that is not the end of the S of S's role as he has to weigh and balance the competing public interests.

18. SPP adopt the approach Sauvain expresses as to the exercise of discretion:<sup>6</sup>

*"It does not, however, matter that the section [s. 247] does not set out any further criteria (nor even an overall test of expediency) it is clearly a discretionary power which entitles the Secretary of State to balance the overall public interest in interfering with an established public right of way.<sup>7</sup> In considering what factors have to be balanced against each other to come to a decision on that public interest, it is important to distinguish between the matters relevant to the application for planning permission that has brought about the need for the diversion of the highway and the factors which will be relevant to the extinguishment or diversion of the highway."*

19. In Vasiliou v. Secretary of State for Transport and Another<sup>8</sup> the Court of Appeal sought to address the relationship between the planning and highway issues to be balanced when considering and determining a s. 247 application. In that case the Secretary of State's decision to make an order under s. 247 - contrary to the recommendation of his Inspector - was quashed. The Court of Appeal holding that the Secretary of State was both entitled to, and should have, taken into account the adverse effects his order would have on the trade of an owner of a business being carried on from land adjoining the highway.

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<sup>6</sup> Op cit.

<sup>7</sup> See KC Holdings (Rhyll) Ltd v. Secretary of State for Wales and Colwyn Bay BC [1990] JPL 353; Vasiliou v. Secretary of State [1991] 2 All ER 77

<sup>8</sup> Op cit.

20. In his judgment in Vasiliou Nicholls LJ emphasised: (i) the difference in the functions of determining an application for planning permission with that of deciding whether or not to authorise a proposed stopping-up and diversion of the highway; (ii) where an overlap exists between the matters considered at the planning stage and in the application for a stopping-up or diversion order, the perspectives of the determining bodies are different and, therefore, different conclusions could be reached on the question of the public interest; & (iii) there is, inherently, an inevitable element of overlap in the two decisions and in the considerations that had to be taken into account – albeit from different perspectives.
21. As to (ii) above, SPP contend that it is open to the Inspector and S of S to consider the evidence afresh and come to a different conclusion on the public interest. SPP submit it is an important and relevant fact that the Council, as both landowner, applicant and promoter as well as the local planning authority, granted itself planning permission for its own proposed development. It inevitably had a pre-disposition in favour of its own scheme. If that were not so, it would not have promoted it going to the time, trouble and expense of applying to itself for planning permission.

## **RELEVANT FACTORS**

22. Princes Parade was opened by the Prince of Wales in 1881. It has been a highway providing an attractive seaside route - and straight road link - between Sandgate/Seabrook and Hythe for a long period of time. It is a known, existing, long-standing public right of way. The benefit to the public of their existing rights which would be taken away were the Order confirmed is matter of and for evidence. It will be for the Inspector - who has read the objections – to weigh such evidence as is put before him on behalf of SPP (and others) at the Inquiry when reporting and recommending to the S of S.

23. As to the envisaged diversion and creation of the alternative highway to serve the Council's proposed new up to 150 dwellings housing estate, hotel, restaurant, leisure centre and provide them direct access to the beach and sea without having to cross a highway carrying vehicular traffic, SPP case is as follows.
24. In London Borough of Southwark & Anor. v. Transport for London<sup>9</sup> Lord Briggs referred to the two elements of a highway: (i) the public right of passage in or on vehicles (including parking) over the way; and (ii) the physical elements e.g. carriageway, footways (paths), service margins, and connections to the existing highway network and so forth.
25. In this case the Council seek to provide an alternative to that which already exists – the diversion element of the proposed Order. Appended to this document at Appendix 1 is Tibbalds' figure 5.21 Sections illustrating the character of the proposed new highway. Appendix II is a scale drawing of a cross-section of the Eastern Character Area depicting the precise relationship between the Royal Military Canal bank and path and the proposed new road, together with retaining wall [Jim Martin BSc Dip Proj Man FRICS].
26. SPP contend that this necessarily brings into the equation both elements of a highway as identified above. For example, to consider and assess the impact and effect of constructing the new proposed diverted highway next to the Royal Military Canal upon the setting of what is a scheduled ancient monument of national significance, including noise, air and light pollution, together with loss of tranquillity and impact upon biodiversity, inevitably means that some of the physical characteristics of what is being proposed are brought into account. For instance, the width and height of the proposed carriageway, together with its proposed "street furniture" and indicative traffic flows are matters SPP contend are relevant to the so-called "merits test". Additionally, far

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<sup>9</sup> [2018] UKSC 63



less convenient parking arrangements than presently exist – and particularly so for people with disabilities.

27. Road safety is, plainly, an important matter for the S of S to consider and take into account. SPP contend that where, as in this case, the s. 247 power is being relied upon to divert a highway then the suitability and convenience of the alternative route proposed to be provided by the diversion are plainly relevant matters the S of S is required to take into account.

28. In R. v. Secretary of State for the Environment, Transport and the Regions ex p. Batchelor Enterprises Ltd.<sup>10</sup> Sullivan J held that the Secretary of State was entitled to consider the highway safety aspects of the proposed order notwithstanding the fact that they were, or should have been, considered at the planning application stage. That decision was affirmed by the Court of Appeal:<sup>11</sup>

*“Road safety is a matter of central importance to the exercise of the Secretary of State’s functions under section 247 and he must, in my judgment, be able to take it into account when considering such an application, irrespective of the views taken by the local highway authority or the local planning authority. The minister is, after all, dealing with the consequences of his making the stopping-up order, not the consequences of the grant of planning permission. There may be some overlap between the matters relevant to planning control and those relevant to the section 247 orders but that is legitimate as was recognised in Vasilou.”*

29. SPP contend that there is sufficient space on the application site for Princes Parade to be left on its present alignment and the various elements of the scheme still incorporated, in that way one of the most damaging aspects of the scheme would be removed, and the development would have fewer environmental consequences.

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<sup>10</sup> [2001] EWHC Admin 383

<sup>11</sup> [2001] EWCA Civ 1293, per Keene LJ, para. 9

Additionally, it would still be possible to improve the Princes Parade promenade by turning it into a shared vehicular/pedestrian route with linear parking and a reduced speed limit.

30. Because Kent CC is the local highway authority - rather than the Council – SPP envisage that it is only Kent CC who may construct the proposed new (aka “diverted”) highway – Highways Act 1980, section 24 - as the Court of Appeal’s decision in O’Connor v. Wiltshire County Council made clear.<sup>12</sup>

## CONCLUSION

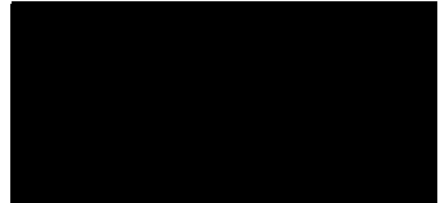
31. The legal consequence of the Council’s grant to itself of hybrid conditional planning permission Y17/1042/SH pursuant to TCPA 1990, s. 70 is that it confers a right, but a right which only authorises and controls what happens on the land when it is exercised. Implementation constitutes starting to use the rights contained in that planning permission.
32. The Secretary of State’s jurisdiction under s. 247 involves, inter alia, a weighing-up and balancing of competing public interests. The adverse consequences of authorizing the stopping-up, together with the diversion of a considerable section of the length of the Princes Parade, from its present seaside location to divert it around the back of a proposed housing estate – next to the Royal Military Canal – are significant, important and several.
33. One legal consequence which would flow were the S o S persuaded to make the Order would be the immediate extinguishment of the public vehicular right of way over Princess Parade. That being so, the S of S would need, SPP contend, to be confident

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<sup>12</sup> [2007] EWCA Civ 426

that Kent CC would, as local highway authority, actually then construct the new diverted Princes Parade as envisaged by the hybrid planning permission.

34. SPP anticipates inviting the Inspector to conclude, on the basis of the evidence that they will be providing to the Inquiry, together with the submissions which will be made on their behalf, when weighed in the balance, are sufficient to persuade him to recommend to the Secretary of State that, in the public interest, he should not confirm the Order.



CLIVE MOYS

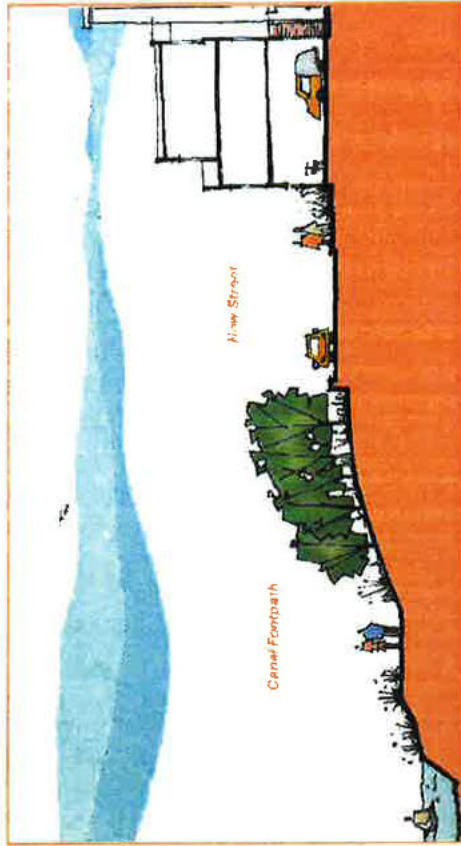
Counsel for Save Princes Parade, instructed under Public Access

Radcliffe Chambers  
11 New Square  
Lincoln's Inn  
London WC2A 3QB.

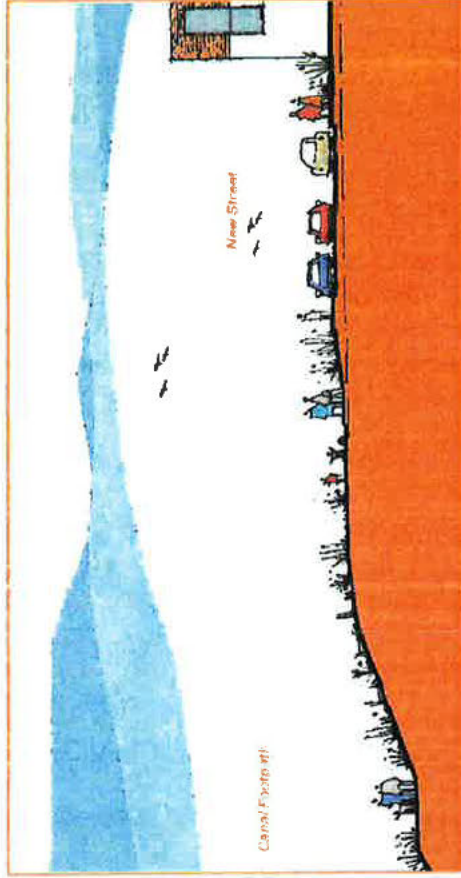
28<sup>th</sup> September 2021

# Appendix I

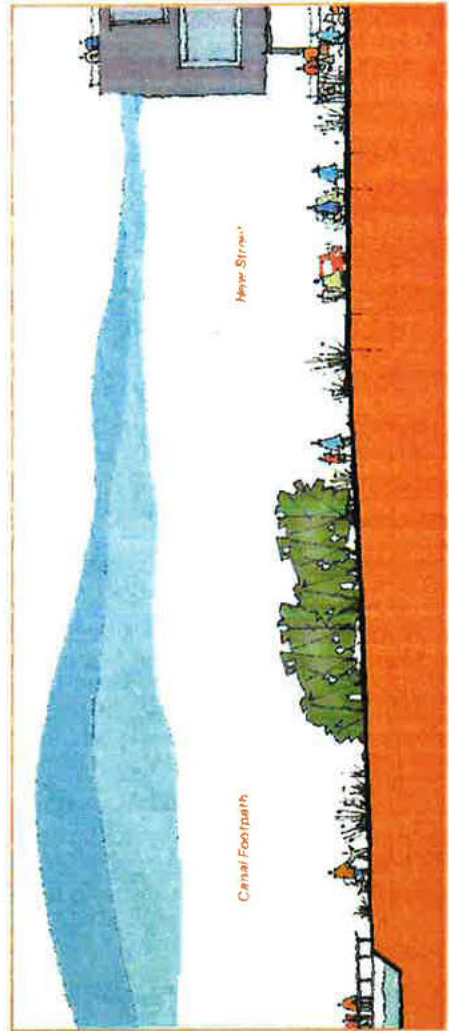
Eastern character area



Western character area



Central open space



Western open space

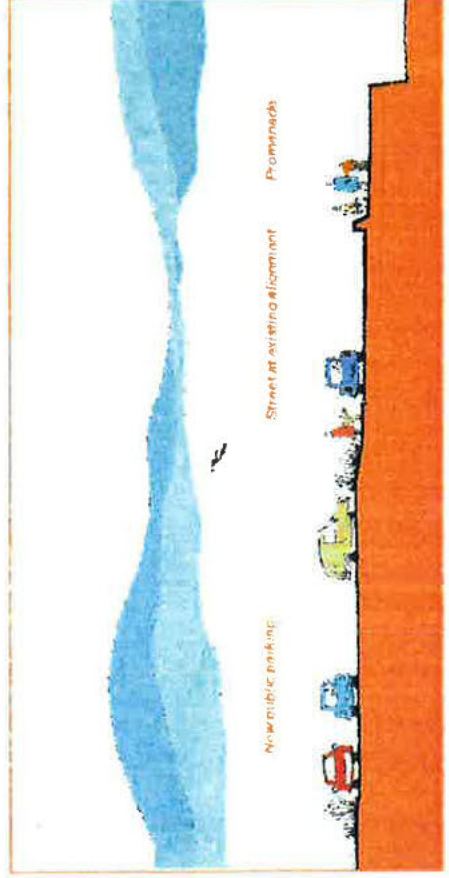
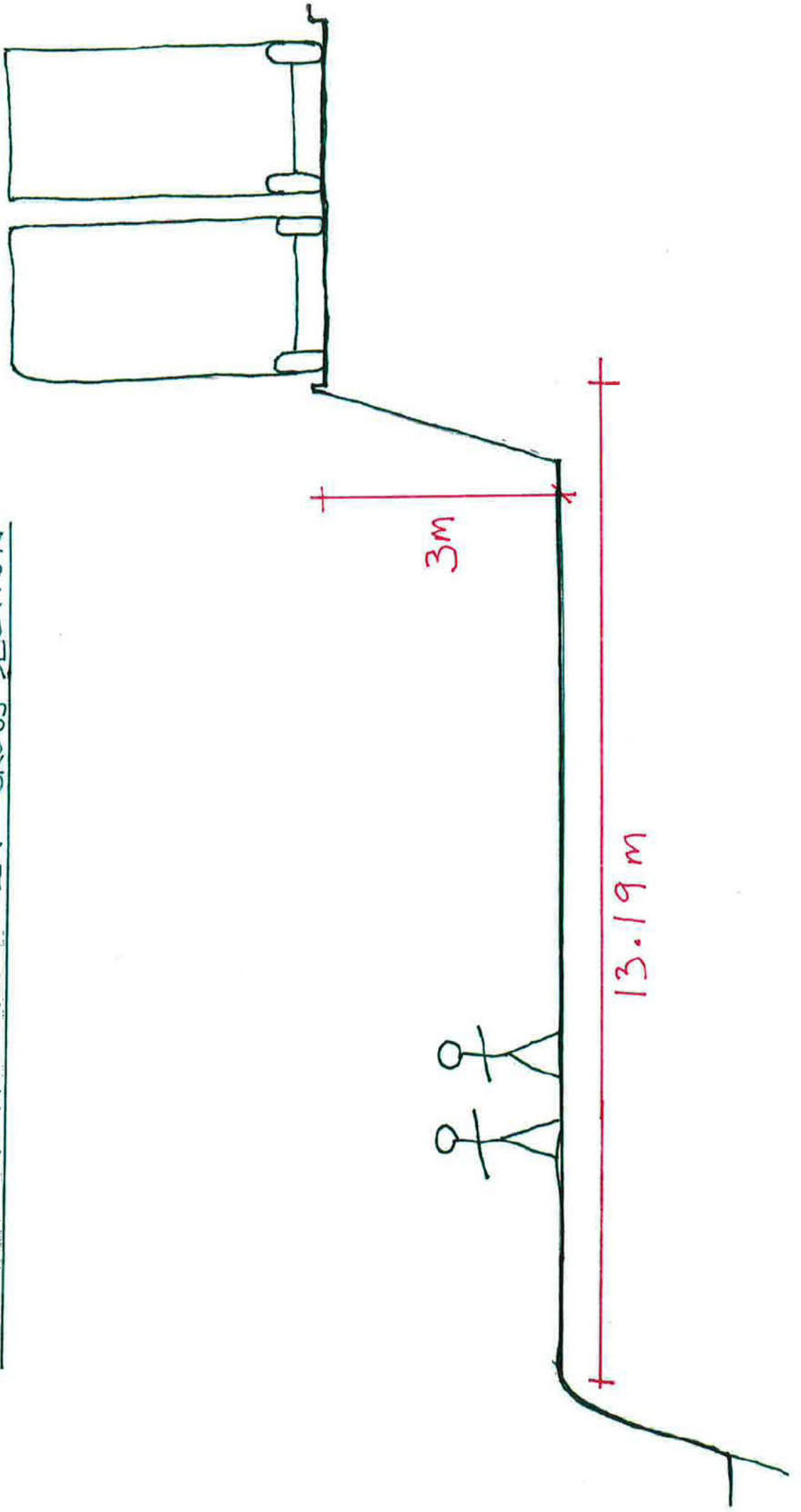


Figure 5.21: Sections illustrating the character of the new street

Appendix II

EASTERN CHARACTER AREA - CROSS SECTION



***PRINCES PARADE, SEABROOK/HYTHE, KENT***

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Mrs Elaine Martin

Save Princes Parade.org