APP/Q1445/A/09/2102048/NWF

SITE AT LAND AT BRIGHTON MARINA, BRIGHTON, BN2 5UT

CLOSING SUBMISSIONS
on behalf of the Local Planning Authority

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1. INTRODUCTION

1.1. "Brighton", observed Henry Pulling, the retiring narrator and hero of Graham Greene's 'Travels with my Aunt', "was the first real journey I undertook in my aunt's company and proved to be a bizarre foretaste of much that was to follow'. The map for our travels – and these submissions – was drawn by the Inspector at the Pre-Inquiry Meeting ('PIM'), and the Local Planning Authority ('LPA') has endeavoured to stick to it, subject to the need to consider specifically the all pervading topic of financial viability. Four main issues were distilled from the remaining reasons for refusal ('RRs'), as follows:

(1) APPEARANCE/ VISUAL IMPACT ISSUES – including the design, height, siting and layout of the development, the effect on the rest of the Marina, and the effect on the surrounding area, including Kemp Town conservation area and the South Downs AONB

(2) INFRASTRUCTURE ISSUES – whether the demands that occupiers of the development would make on existing infrastructure are to be adequately mitigated, with particular regard to education, outdoor amenity and recreation space

(3) THE SIZE AND QUALITY OF LIVING CONDITIONS FOR OCCUPIERS OF THE CLIFF BUILDING

(4) HOUSING ISSUES – whether the mix of housing types (especially the preponderance of small units) meets current needs, and the appropriateness of affordable housing provision.

1.2. Having examined all these individual issues, there follow submissions on viability, the section 106 undertaking, the nature of the decision in the context of the development plan, and then a short concluding review.

2. APPEARANCE/ VISUAL IMPACT

(1) *Design, siting, height and layout of development*

2.1. The Council does not take issue with the quality of the proposed architecture as such. However, high quality architecture – even 'elegant and convincing'[1] architecture – is not synonymous with high quality design. This is recognised in national planning policy; Planning

[1] XX (KL) 3.11.2009

Policy Statement 1 ('PPS 1') states that *"Although visual appearance and the architecture of individual buildings are clearly factors in achieving* [the objective of sustainable development], *securing high quality and inclusive design goes far beyond aesthetic considerations."*[2].

2.2. It is the Council's case that the design of the proposed scheme is unacceptable, not because the aesthetics of the proposed six individual buildings are displeasing, but because the proposal does little, if anything, to overcome the fundamental urban design flaws which currently impair the appearance and functioning of the Appeal Site. In this respect the scheme fails to exhibit important hallmarks of good design set out in PPS 1 and reiterated in PAN04:

> *"Good design should contribute positively to making places better for people. Design which is inappropriate in its context, or which fails to take the opportunities available for improving the character and quality of an area and the way it functions, should not be accepted."*[3]

2.3. **What are the urban design flaws of the Site**? There is much common ground between the Appellants and the City Council as to the fundamental problems of urban structure currently displayed at the Appeal Site. In particular, both parties recognise that:

(i) As a result of the lack of coherence and structure to the building layout, **public spaces are fragmented and disconnected**.

2 PPS 1, para 35

3 PPS 1, para 34; CD8/12 para 14

Allies alludeds to the fragmentation in his proof of evidence[4] and accepted as much in XX[5]. Likewise SPG20 records that *"There is little coordination and integration of buildings and spaces. Spaces are largely accidental consequences of independent development of different areas rather than as coherent components of a unified concept"*[6]

(ii) Moreover, the site suffers from **poor legibility**, particularly for those on foot. SPG20 recognises that "*orientation into and around the Marina is ...made difficult and dissuades potential visitors from entering the site and pedestrian movement within it."*[7] Similarly Allies indicates that the illegibility of the public realm is such that it cannot be met by signage and lighting alone, but requires *"a more fundamental reappraisal and the introduction of a clear urban structure that provides a simple pattern of circulation that is easy for visitors, and residents, to use"*[8]

(iii) There is a distinct **lack of enclosure** within the Appeal Site. The authors of SPG20 indicate that *"the 'street pattern' is weak or*

4 BA Proof, para 1.7.6 and 3.2.9
5 XX (ME) 19.11.2009
6 CD8/9.1 NB. Reid's firm, Capita Lovejoy was one of the professional contributors to SPG20: XX (ME) 04.12.2009
7 CD8/9.1 p65
8 Allies Proof para 6.3.5

non-existent. There is limited plot definition. Key frontages and spaces are underused. Routes and spaces are poorly defined."[9]

(iv) **Insufficient active frontages** ensure that the public spaces found in western end of the Marina are inhospitable, lifeless places. This is identified in SPG20[10], PAN04[11], and recognised by the Appellants.[12]

(v) At the western end of the Marina, **the car is dominant over the pedestrian**. This is particularly true of the existing roundabout which, as the primary entry point for vehicular access to the site, is especially daunting for pedestrians.[13] Allies summarises the current roundabout as follows: *"...the space of arrival at the marina is defined by a roundabout that is impossible for a pedestrian to cross and which therefore acts as a barrier to movement at this crucial location within the site"*. [14]

(vi) Finally, whether or not they retain an aesthetic – or athletic - quality[15], the **vehicular ramps**, together with the multi-storey car park, contribute both to the fragmentation of the public realm and the dominance of the car. PAN04 reflects this, noting that

9 CD8/9.1 p33
10 CD8/9.1 p41
11 CD8/12, para 13.7
12 CD2/7.3, p22 fig 3.3
13 CD8/9.1, p68 *"Pedestrian routes between the various components of the Marina are indirect, poorly defined and often conflict with vehicles. Routes around the main access roundabout....are particularly grim."*
14 Allies Proof para 6.6.4
15 Allies describes them as "ugly to look at and tortuous to use" .Proof, para 3.1.3

"[t]he vehicular ramps into the Marina are a significant constraint to future development given that they are a substantial barrier to movement across the Marina, particularly to pedestrians and cyclists, and given their overall visual and physical dominance."[16] During XX Allies accepted[17] that the access ramps, together with the car park, create a deep division in the site.[18] He also went on to accept that replacement of the ramps, as illustrated in the SPG20 Framework plan[19], would help reduce vehicular dominance and assist the enhancement of the public realm.

2.4. There is, therefore, a great deal of agreement between the parties as to the urban design challenges which need to be addressed.

2.5. **Are these urban design flaws satisfactorily addressed in the proposal?** The policy matrix against which the proposal is to be tested assumes high quality, innovative design as a prerequisite. The South East Plan ('SEP') Policy CC6, for instance, 'actively promotes' sustainable communities through *"innovative design processes to create a high quality built environment which promotes a sense of place."* Local Plan ('LP') Policy QD1 requires that buildings demonstrate *"a high standard of design and make a positive*

16 CD8/12, para 8.3

17 XX(ME) 19.11.2008

18 CD2/7.2 also notes that the Marina's *"identity has been formed by its low-density access road dominated layout with a primary east-west route bisecting it along its length...This experience of entry provides the visitor with a perception of being in a world dominated by highways and cars."* (p21, para 3.1.1)

19 CD8/9.2 p65

contribution to the visual quality of the environment." Moreover, LP Policy QD4 indicates that 'high quality design' is necessary *"in order to preserve or enhance strategic views, important vistas, the skyline and the setting of landmark buildings"*. The short point is that achieving high quality design is the beginning not the end of ensuring compliance with the Development Plan, and therefore proposals purporting to achieve such high standards of design should be the norm, not the exception. Therefore Coleman's repeated reliance upon excellent design should not be treated as a bonus and should not be allowed to found any special pleading in relation to impacts upon the sensitive elements of landscape and townscape.

2.6. The City Council contends that the Appeal scheme fails to meet the design standards required by the Development Plan (and *a fortiori* the standards required to support Coleman's conclusions). The proposal exhibits the selfsame, fundamental weaknesses currently in evidence at the Marina. In certain instances - in particular the retention of the access ramps and near replication of the existing building layout - the Appellants have made no attempt to deal with acknowledged urban design flaws and do not offer a robust justification for their failure to do so. However, even where the Appellants have *purported* to address these issues, they have been unsuccessful.

2.7. The Appellants' failure to overcome the inherent design weakness of the current site and meet the requisite standards for design is revealed

when the scheme is appraised against the Building For Life ('BFL') criteria. Roake's evidence is that the Appeal Scheme fails outright in respect of 7 of the 20 BFL criteria, and achieves half-marks on 4 of the criteria. With an overall score of 11 the scheme's design quality falls into the 'average' classification on the BFL spectrum. Allies also produced a BFL appraisal, scoring the scheme at 18 out of 20. This step had not been taken prior to Roake's consideration of the scheme, notwithstanding the reference to BFL as relevant guidance in PPS 3.[20] In any event, it is submitted that greater weight should be attached to Roake's BFL assessment for the following reasons:

(i) First, Allies provided evidence for his score retrospectively, on the day before he gave evidence, and only after his lack of evidence base had been criticised by Roake.[21] This is contrary to the methodology set out by CABE, which indicates that the score for each criterion should be supported by evidence.[22]

(ii) Second, even in X, Allies admitted that his score might have been overoptimistic.[23]

(iii) Third, and most significantly, Allies appears to have taken a relativist, rather than objective, approach to the BFL assessment. He excludes from his assessment consideration of

20 CD4/2. Planning Policy Statement 3: Housingp9, fn15

21 Despite some remarks by Reid in his rebuttal proof about a handful of the criteria, none of the Appellants' witnesses attempted an overall, justified appraisal at that stage

22 CD13/5 Building for Life: Evaluating Housing Proposals Step by Step.

23 Allies in X(ME) (18.11.2009)

constraints which the scheme has not fully overcome[24] and gives credit to the scheme for improving on the existing conditions[25]. It is clear that Allies was wrong to employ such an approach. The BFL criteria are expressed in absolute terms and should be applied accordingly. Indeed, in response to questions from the Inspector, Allies accepted as much[26]. Given that the urban design of the current Marina is extremely poor, the effect of erroneously employing a relativist approach is that the scheme scores far more highly than would have been the case had the exercise been done properly.

2.8. The Commission for Architecture and the Built Environment ('CABE') were also critical of the scheme's response to the urban design challenges presented by the Marina. Having previously highlighted the

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[24] In his rebuttal Allies alleges that Roake is wrong to criticise the scheme, in relation to Criterion 11– "does the building layout take priority over the streets and car parking, so that the highways do not dominate?", for retaining the existing access ramps and multi-storey car park. (Allies Rebuttal, para 1.3). However, an objective approach undoubtedly requires that both elements are taken into account in the score as they are the primary cause of the dominance of the streets and car parking over the building layout (both in the current Marina and proposed scheme). Moreover, it is evident why an objective approach is appropriate. If a relativist approach were to be taken, assessors would be able to externalise any existing feature from the marking consideration by labelling it as a constraint and thus flawed schemes which fail to engage with or address existing constraints could conceivably score very high marks. If, in the proposed scheme, the building layout does not take priority over the streets and car parking, the scheme must score 0 regardless of the constraints. It would be intellectually dishonest to score the scheme at 1 or even 0.5

[25] Allies Rebuttal, para 1.4 *"What these zero scores imply is that we have made no improvement at all to the current situation..."*. This is wrong. Zero scores do not imply that no improvement has been made. Rather they indicate that the scheme does not meet the requisite criteria. The score is silent as to whether improvements have been made or not.

[26] INS Q (20.11.2009). The Inspector asked whether the BFL assessment has regard to what was there previously. Allies accepted that *"It doesn't"* before adding the caveat that some of the criteria require the assessor to "*take into account what already exists*". An example of this is, of course, Criterion 7 – "Does the scheme exploit existing buildings, landscape and topography?".

centrality of public realm to the success of the scheme[27], in their final design review CABE made a number of criticisms of the scheme and concluded that *"the proposals for the public realm are not yet as convincing as those for the buildings..."*.[28] It is the Appellants' case that CABE were not critical of the scheme's fundamentals and that most of their criticisms – criticisms which (save for one) Allies accepted and even agreed with[29]– are matters of detailed design which can be dealt with by condition. However, examination of CABE's specific criticisms undermines this assertion: addressing these criticisms would require amendments, in some cases substantial amendments, to the proposed scheme.

2.9. The appeal scheme's response to each of the acknowledged urban design issues will now be examined:

(i) **Fragmented and disconnected Public Realm.** Roake in X indicated that the 'heart of the problem' with the appeal scheme is that it *"simply does not address the public realm in the way it should be addressed. It takes six disparate sites and places buildings on them....The ramps are not touched. The car park is*

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27 Coleman's Appendices pp57-58, CABE Letter 29.02.08. *"Ultimately, the use, form and appearance of each of the new buildings at ground level will be crucial in determining what it feels like to be a pedestrian in this area"*

28 Coleman's Appendices pp60-62, CABE Letter 29.02.08

29 XX(ME) Allies 19.11.2009. Allies disagreed with CABE's criticism that the relationship between Harbour Square and the colonnade was weak, but noted that he "Understands the points they made" in relation the remaining criticisms. He later agreed they were 'valid' points but would be dealt with either in the detailed design or by future development.

not touched.""[30]. The necessary corollary of the appeal scheme preserving the siting and layout of the existing public space layout is that the public realm would remain physically fragmented. In particular, the 'deep division'[31] created by the access ramps and car park would remain. Moreover, failure to address the fragmented layout severely limits the extent to which the appeal scheme can reconnect theses spaces for pedestrians. Indeed, whilst CABE congratulated the Appellants for improving public routes within the site, it must be remembered that they were doing so on the reluctant premise that the access ramps had to be retained for the foreseeable future.[32]

(ii) **Poor legibility**. Improving legibility within the Marina is a requirement of the Brighton Marina Masterplan Planning Advice Note ('PAN 04')[33], which is, in turn, articulating one of the objectives of LP Policy QD2[34]. There are two areas in particular where the appeal scheme fails to achieve true legibility: the Cliff Building arrival space and Harbour Square. In relation to the former, CABE indicated that a 'revised approach' was necessary which would have to *"consider how the uses, landscape and*

30 Roake X, 03.11.2009 Despite this assertion KL did not seek to challenge Roake on the siting or layout of the public realm. That the siting and layout of public realm would be little altered by the appeal scheme is illustrated effectively in appendix 6 to Roake's proof.

31 As accepted by Allies in XX(ME) 19.11.2009

32 Coleman's Appendices pp60-62, CABE Letter 03.11.08

33 CD8/12, para 10.6

34 The supporting text to QD2 notes that *"The site layout should be influenced by pedestrian circulation..."*

built form framing this space are configured to....make it a comfortable environment and intuitive route for residents and people passing through it".[35] Uses and the built form are fundamental planning issues which cannot be revisited at the detailed design stage. CABE also noted that the squareabout is a limited response to the challenges of creating a legible space in 'the heart of the Marina' and believed that there remained scope "*further* [to] *develop the design of Harbour Square as part of the wider pedestrian-focused public space network, by extending it to encompass* [the] *currently indistinct spaces on its periphery."* Such development of the design could not come forward as part of the detailed design process as reserved matters, but would be entirely reliant on future development in and around Harbour Square. As Allies accepted in XX, such opportunities lie outside the control of the Appellants.[36]

(iii) **Lack of Enclosure.** PAN 04 establishes as a 'public realm objective' the requirement for enclosure[37], which elsewhere it describes as *"an appropriate building height and/or landscaping around the edge of the space."*[38] CABE and Roake[39] both criticised the lack of enclosure around Harbour Square, a supposedly *'significant new public space at the heart of the*

35 Coleman's Appendices pp60-62, CABE Letter 03.11.08
36 XX(ME) 19.11.2009
37 CD8/12 p24
38 CD8/12 p19
39 Roake proof para 2.11

marina'[40]. Allies agreed with their criticisms, and sought to rely on the future evolution of the Marina to provide the necessary enclosure[41]. However neither the LPA nor the Appellants have control over the relevant sites and there is no guarantee that any such enclosure would be achieved. Indeed, it is clear that although Allies had previously acknowledged and accepted CABE's criticisms regarding the lack of enclosure to Harbour Square, he has been unable to amend the appeal scheme to overcome their concerns.[42] In the 'Response to Planning Application Consultation'[43] the Appellants allude to CABE's concerns, but their responses are minimal and of limited effect: extending the paving, more tree planting and undefined 'other activities' to the east and west.[44] The diagrammatic response was also misleading, including the outline of an undefined building (not part of the appeal scheme) to the north–east of the square on an area of land which is outside the Appellants' control.[45] Moreover, even the Appellants' masterplan ('the Brave New World') illustrates only a limited amount of future enclosure to this area: the proposals are limited to the building of a 5 storey structure on the private residents' car park to the north

40 CD2/7.1.6.2

41 In particular Allies suggested that the inclusion of the Petrol Filing Station was not an ideal use to frame the heart of the Marina and 'may move again.' XX(ME) Allies 19.11.2009. The D&S

42 The lack of enclosure was indentified in CABE's letter of 29.02.2008. Coleman Appendices p57 & 58

43 CD2/7.3, p71

44 *Ibid.* In XX(ME) 19.11.2009 Allies accepted that he did not know what the 'other activities' were, but presumed they were Landscaping.

45 XX(ME) 19.11.2008.

east and a future extension to the hotel over the screened loading bay. [46]

(iv) **Inactive Frontages**. The requirement for active frontage permeates both SPG20[47] and PAN04, the latter referring to it as a *'key priority'*[48]. However, much of the public space in the appeal site is characterised by little or no active frontage. Roake produced a plan outlining the existing and proposed active frontages.[49] There are only three areas of dispute between the parties: the ASDA frontage, south of the multi-storey carpark and the entrance to the MacDonald's drive-thru. The distinct lack of active frontage to Park Square was not challenged, nor was the extremely limited active frontage on the east side of the Quay building.

For obvious reasons the major point of contention was in relation to the ASDA frontage which faces the under ramps area. The Appellants acknowledge that the current ASDA has an inactive frontage along its south wall[50], and this reflects the onsite reality. There is no reason to believe that this will change in relation to the appeal scheme: Allies was not clear about the scope of the exit on that elevation and Roake considered it obviously that it would only be an emergency access/exit. The

46 CD2/7.1, para 6.1.4, p81. The limited extent of this enclosure can be seen in the figures on p82 of the DAS Vol 1.
47 CD8/9.1 pp 40,51 and 54
48 CD8/12, para 13.7
49 CD13/13
50 CD2/7.3 III p22 fig 3.3

Appellants sought to argue that, in any event, the under ramps area would be overlooked by the dwellings in the Cliff Building. However, the plan they produced , purportedly illustrating the extent of overlooking, is not agreed. Firstly, it is believed that the lower ramp height is inaccurate.[51] Secondly, it takes no account of the various fences and nets which would be necessary for the multi-use games area to function and would inhibit clear views.

(v) **Vehicles dominate pedestrians – Harbour Square**. The importance of Harbour Square to the Appellants' design proposal can hardly be overstated. This importance derives both from its position - Allies refers to it as the 'heart' of the Marina[52] and indicates that it lies at a *"crucial location within the site"*[53] – and also from crucial, early decisions taken by the Appellants. The decision not to remove the ramps or the multi-storey car park, combined with retention of the existing building layout, ensures that the junction has to perform the function of distributing vehicular traffic generated by the development, as well as that which will continue to serve the remainder of the Marina.[54] However, the specific design objectives of SPG20[55], as well as the general principles of PPS1 and By Design on which it draws, pull in a different direction.

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52 Allies' proof paras 6.5.1(iv), 6.6.3 and 6.7.1

53 Allies' proof para 6.6.4

54 2735 p/h vehicles at peak: TA p110, Table 7.2

55 CD8/9.2 p38 *"To provide alternative vehicular circulation routes to include: a reconfiguration of the multi-storey access and circulation and to devise a new access route to the leisure buildings, which may also provide access to future development areas"*

The redesigned Harbour Square appears to be the lynchpin on which the Appellants found their assertion that the appeal scheme transforms *"the fragmentary, disconnected public spaces of the existing marina into an effective and coherent piece of city"*[56]. In their oral evidence, the Appellants' witnesses confirmed as much. Frisby said that *"the traditional signalised scheme would not solve pedestrian problems. The existing barrier would remain"*[57] and Allies agreed that traffic signals would be *"less than ideal"* and a *"compromise"*.[58]

The Appellants' case for the operation of Harbour Square as a 'shared space' is at once inconsistent and unsubstantiated. Firstly, they do not appear to have a clear vision of how the space is to operate. Thus the Design and Access Statement (DAS) asserts that *"people may move freely through it, following desire routes to the Marina, shops in Merchants Quay, or the Transport Interchange"*[59], but the Traffic Assessment ('TA') explains that *"pedestrians do not have priority"* and have to *"negotiate"* their movement through the space.[60]. Whilst the DAS claims that the *"<u>shared surface</u> of the square copes with traffic routes and ...pedestrian movements"*[61], the TA states, in terms,

56 Allies' proof para 3.2.9
57 XX(ME) 04.12.2009
58 XX(ME) 19.11.2009
59 CD2/7.1, p181
60 CD2/13, Appendix 15
61 CD2/7.3, p60

that *"Harbour Square is not a shared surface"*[62]. (Emphasis added) The oral evidence was equally schizophrenic. Allies accepted that Harbour Square would not operate as shared space during peak periods, but believed that it would do so off-peak.[63]. Frisby indicated, on the other hand that pedestrians would be able to use the shared space at all times of the day.[64]

In fact, Frisby's bold proposition that Harbour Square would work as a shared space[65] is entirely unsubstantiated. During XX and RX he claimed to base his professional judgement on a combination of the VISSIM modelling[66] (before appearing to distance himself when reminded of its conclusions)[67], previous examples of shared space and discussions with colleagues.[68] Both precedent and VISSIM modelling, however, flatly contradict his assertions and his colleagues appear to disagree with him. As to precedents, the only comparable space[69] on which the Appellants rely is the Laweiplein roundabout in Holland.[70] Yet, as Frisby readily conceded in XX, Laweiplein is more akin to a

62 CD2/13, Appendix 15

63 XX (ME) 19.11.2009. The vision of Harbour Square operating as shared space only at certain times of the day was also identified in the DAS vol 3 at p75 *"during lighter periods of traffic flow (i.e during weekdays and winter months), pedestrians will feel comfortable crossing the slow-moving traffic to follow desired routes to the Marina and Transport Interchange"* and by Reid in his rebuttal at para 2.7

64 XX (ME) 04.12.2009

65 RX (KL) 04.12.2009. DF confirmed that the safety and performance Harbour Square was acceptable in his opinion

66 The Appellants' Planning Statement (CD2/11; para 4.53) explicitly relies on the VISSIM modelling to conclude that the *"shared-space 'square-about' in Harbour Square safely allows both traffic and pedestrian movement"*

67 Frisby appeared to be taken by surprise by the production of the VISSIM report and was, perhaps, consistent with the failure of the Appellants to print the written report in TA, Appendix 14.

68 RX(KL) 04.12.2009

69 That is the only shared space with both a gyratory and significant volumes of traffic.

70 CD2/13, Appendix 15, pp2-6

'traditional roundabout'[71]*,* on which pedestrians use the formal crossings and do not cross the circulating carriageway.[72] None of the other examples which he suggested during his evidence involved gyratories. Moreover, the underlying principle of Laweiplein's design is segregation, the antithesis of the design intentions of shared space.[73] Finally, Frisby's fellow engineers at Colin Buchanan, who carried out the Stage 1 Safety Audit, reported concerns that the *"high volumes and multiple lanes of traffic will make pedestrian priority difficult to achieve, could hinder the passage of pedestrians around the area, and increase the potential for pedestrian conflict and collisions"* and recommended that an alternative access to ASDA be provided which would not require traffic to negotiate Harbour Square.[74]

Most damning of all, however, is the VISSIM report drafted by another colleague and approved by Frisby himself.[75] This document concluded that:

- Harbour Square would have to operate at over 18 KpH to avoid gridlock;[76]

71 XX(ME) 04.12.2009

72 VISSIM (CD12/13.2) para 2.1.10 and fig 2.5.

73 This proposition was accepted by Frisby XX(ME) 04.12.2009

74 CD12/13 Appendix 15; an interesting echo of the original version of the fly-through showing a bus ploughing into a cyclist. Neither Allies nor Frisby was able to shed any light on the changes in the second edition, nor what had become of the first, which had, apparently, disappeared into a 'Bermuda Triangle.'

75 In XX(ME) 04.12.2009 Frisby confirmed he approved the VISSIM, despite it being in draft form.

76 CD12/13.2, para 5.2.1

- it is *"therefore not able to offer suitable conditions for a shared space on the circulating carriageway"*;[77]
- *"the only location where a shared space can take place is on the approaches to the square"*;[78]
- *"if pedestrians are expected to enter the central island, it will only be possible through a formal crossing arrangement."*[79]

Allies and Reid did not know whether any highways testing of the Square's operation during off peak periods had been undertaken to support their beliefs that the squareabout would operate as a shared space at such times. In XX Frisby confirmed that it had not.[80] In the absence of such work there is simply no evidence for concluding that Harbour Square could function as shared space at any time of the day, week or year. Harbour Square is a compromise and not a good one; it is, in fact, nothing more than a fudge and an insidious one at that. Whilst the TA enthuses that the removal of formal crossings in March 2008 *"presents the square as true shared space,"*[81] Allies had to accept (even on his untested and unproven assumptions that it could operate as shared space off-peak) that it would never be suitable for use by visually impaired people, or indeed, anybody who is not completely confident on foot. The TA, whilst

77 *Ibid.* Para 5.2.2
78 *Ibid*, para 5.2.3
79 *Ibid*, para 11.1.3
80 XX(ME) 04.12.2009
81 CD12/13 Appendix 15, p13

eventually plumping for kerbs around the edge in response to comments by the Access Officer, simply fails to engage with the practical difficulties for disabled people of crossing a dual carriageway gyratory anywhere apart from the pedestrian crossings on the outer arms. This is the opposite of 'inclusive design'[82] which should characterise 21st century development. It perpetuates a situation where the able bodied have more choice open to them than others. The disabled, apparently, are to be presented with Harbour Square as part of the planning permission and have the opportunity to 'tweak' the design so that they might feel that they have the opportunity to 'buy in' to the process. Far from being the 'high quality design' rightly sought by the LP and lauded by Coleman, the scheme at this pivotal point reveals that it is defeated by the premise on which the whole proposal is predicated: retention of the ramps as the principal means of access. The result is not an exemplar of 21st Century design; it is an uneasy attempt to juggle a partial answer to a bad design legacy. The attempt demonstrably fails.

Though doubtless not treated to the full explanation which the public inquiry has rightly afforded, CABE recognised Harbour Square for what it was. They indicated their concern that that the design of the square could *"exacerbate, rather than diminish, the dominance of the car over pedestrians by encouraging higher*

[82] CD4/1.1, para 32

traffic speeds than anticipated"[83] and concluded that they had no confidence that *"pedestrians will be comfortable using it as the 'shared space' promoted by the design team"*.

(vi) **Vehicular Ramps.** The decision to retain the vehicular ramps in their current form underlies many of the weaknesses in the design of the appeal scheme. The ramps cause fragmentation of the public realm, ensuring both that the road network remains dominant and that substantial numbers of vehicles are delivered to the heart of the marina. They constrain the options for amending the building layout, and, according to CABE, *'have a negative impact on the quality of the pedestrian environment.'*[84]. Indeed, due to the proximity of the Cliff building to the ramps, there is a strong argument that they would become even more dominant.

SPG20 explicitly calls for the ramps' removal[85], and whilst PAN 04 recognises that *"this <u>may</u> not happen in the short to medium term,"* removal remains *"an aspiration of the LPA for the longer term future of the Masterplan area."*.[86] To that end, it is a requirement of the PAN that "*developers of major schemes... demonstrate that they have given the removal of the ramps due*

83 Coleman Appendices, pp60-62
84 Coleman Appendices, pp60-62
85 CD8/9.2, p28
86 CD8/12, para 10.1

consideration".[87] Contrary to the case being advanced by KL, it is evident from PAN04 that the burden lies on the Appellants (and not the LPA) to demonstrate that removal of the ramps has been tested.

It is patent from both the written and oral evidence that the Appellants have not met this requirement. Whilst they claim in the DAS that it would be neither 'economically' nor 'operationally' viable to remove the ramps[88], they offer no robust evidence to substantiate these claims. The only evidence base to which they point – a supposed technical note[89] – is merely a minute of a consultation meeting held by the Council *prior to* the adoption of PAN04 and one which was held over a year after the design decision to retain the ramps was made. The Appellants' contradictory oral evidence only serves to cast further doubt on their assertion that removal of the ramps has been given due consideration. Allies accepted in XX that removal of the ramps had neither been costed nor given serious consideration by the Appellants; he agreed that the REID work[90] and his Brief assumed their retention[91], and that removal of the ramps was beyond his remit. [92] Frisby's evidence on the same matter told

87 CD8/12, para 8.3

88 CD2/7.2, p51

89 In XX(ME) 19.11.2009 Allies accepted that the minutes at Frisby Appendix K did not constitute a technical note.

90 Allies Main Proof, Appx.2

91 Explore Brief

92 XX (ME) Allies 19.11.2009. He also agreed that the question of removing the ramps 'fell before the first hurdle'

quite a different story. In X he volunteered that a costing exercise had been undertaken by structural engineers[93] who had concluded that the removal and replacement the ramps would cost £15,000,000. In XX, however, Frisby conceded that, as he had never read the structural engineers' report and, as it has not been placed before the Inquiry[94], he was unable to comment on whether it was based on the full or partial removal of the ramps, whether it assessed different design options or whether it took account of the potential for extra development options which might be opened up as a consequence of removal. [95]

The Appellants' case on this matter is unclear and unconvincing. On the one hand the Appellants suggest that removal of the ramps is self-evidently impracticable, such that no serious consideration is necessary[96]. On the other hand, they assert that the cost of removal is prohibitive – but, despite repeated requests by the LPA, fail to produce any costing evidence whatsoever.

93 In XX(ME) 04.12.2009 Frisby claimed that the structural engineers report was received 'around the same time of the [Transport] workshop'. The Transport workshop was held on 22 June 2007, well after Allies was instructed.

94 This is despite repeated requests from the LPA for its production prior to the exchange of evidence. CD13/21

95 XX (ME) 04.12.2009

96 See XX (ME) Allies and also X (KL) Frisby in which Frisby, who later accepted he was not a structural engineering expert, purported to give evidence on the difficulties of replacing the ramp structure.

Moreover, even if the Secretary of State finds that the Appellants have demonstrated they have given removal of the ramps 'due consideration', development of the appeal scheme would make it extremely unlikely that the long term objective of removal could be achieved. The increase in vehicular load, the addition of 500 residential units in close proximity, and the recreational provision under the ramps all mean that, in operational and/or logistical terms their removal is made more difficult.[97] More decisively, however, the appeal scheme would significantly reduce the financial capacity of the site making it much less likely that any future scheme would be able to fund removal of the ramps.[98]

(2) *The effect of the development on strategic views*

2.10. The proposed development would have a detrimental impact on views of strategic importance, in particular views into and out of the Sussex Downs Area of Outstanding Natural Beauty and the SSSI Black Rock Cliffs and of the Kemp Town Conservation Area. Impacts on strategic views in general will be considered in this section, before concentrating on the effect of the development on the Kemp Town Conservation Area in the next.

97 XX(ME) Allies 04.12.2009.

98 XX(INS) Goodwin

2.11. The preservation of strategic views is central to the Development Plan. LP policy QD4 is explicit in its protection of strategic views and expressed in absolute terms:

> *"Development that has a detrimental impact on [strategic views, important vistas, the skyline and the setting of landmark buildings] and impairs a view, even briefly, due to its appearance, by wholly obscuring it or being out of context with it, will not be permitted"* (Emphasis added).

2.12. QD4 goes onto to specify that, amongst others, the following views are of 'strategic importance':

> "
> *a. views of the sea from a distance and from within the built up areas;*
> *b. views along the seafront and coastline;*
> *c. views across, to and from, the Downs;*
> *d. .....*
> *e. views into and from within conservation areas;*
> *f. .....*
> *g. .....*
> *h. and initial views of Brighton & Hove from access points by all modes of transport."*

2.13. Policy NC8 provides further specific protection in respect of the AONB. Development 'within the setting of' the AONB[99] will not be permitted if it would *"detract from views into, or out of the AONB".* Moreover, as the AONB will become a National Park on 31 March 2010, added emphasis should be placed on the protection of such views. In fact any development which affects views from or of the future National Park

[99] It is clear from the supporting text to Policy NC8 that, for the purposes of the policy, the 'setting' of the AONB should be interpreted broadly, to include developments beyond the AONB's formal boundaries.

must be examined in the context of section 11A of the National Parks and Access to the Countryside Act 1949 which requires that when the Secretary of State is performing "any functions in relation to, *or so as to affect*, land in a National Park" he is under a duty to have regard to the purpose "of conserving and enhancing the natural beauty, wildlife and cultural heritage of areas designated as National Parks."

2.14. The Development has a detrimental impact on a number of the strategic views specified QD4, in certain instances wholly obscuring them. Moreover, it detracts from views into and out of the AONB/future National Park. In particular the development would:

(1)'Obliterate' views of the SSSI cliffs from the west.

Views of the cliffs – which fall within category (b)[100] of QD4 and will form the boundary of the future National Park - are entirely obscured from a number of vantage points and significantly impaired in others. In the TVIA commentary to View M33, Coleman admits that views of the purely natural landscape, which at this point are dominated by the Cliffs, are *"obliterate*[d]"[101] by the development. As Coleman conceded in XX, this is a particularly significant view because PAN04 identifies it as a 'Key local view' which developers *"must ensure that they protect and/or enhance"*[102]. However, in views further away from the Marina, the Cliffs are also obscured. In view C40, the TVIA accepts the *"adverse loss of*

100 XX(ME) Coleman 01.12.2009

101 CD2.10.3 p182. In XX Coleman noted that the words "views of the natural landscape" were missed out after the word "obliterates".

102 CD8/12, p29, fig. 16

cliff views.[103]*"* In view T30[104], the commentary notes that the listed Regency terrace is separated from the cliffs in the distance: in fact, views of the cliffs are wholly obscured. View C4 is taken from the end of the Palace Pier and is identified in the Gillespie Tall Buildings Study as a viewpoint of strategic importance. The TVIA accepts that the *"loss of the view of the cliff is a substantial consequence of the development and causes an impact of 'moderate' and 'adverse'"*[105].

(2) Severely reduces views from the west through the site of the seascape beyond.

Views of the sea fall into categories (a) and (b) of QD4.[106] C5, C6, C7, T30 and M33 are particularly affected by loss of views which currently permeate the Marina and reveal the sea beyond.[107] Whilst view T30 illustrates that there is a gap in the eastward view of the appeal scheme, in XX Coleman accepted that the remaining view of the sea was 'vestigial'[108] and English Heritage conclude that the development *"essentially remov*[es] *the existing visual sea connection."*[109]

103 CD2/10.3, p200

104 CD2/10.3p170. In XX Coleman accepted that the effect of the development in View T30 was to create visual separation between the assembly of two nationally important assets: Regency Terrace and the future National Park.

105 CD2/10.3p66. There is a breakdown of logic in this analysis. If the loss of the cliff is substantial, it is unclear why the impact rated (before taking into account the supposed mitigation of that which is being added) as merely moderate. The TVIA provides no explanation of this apparent discrepancy.

106 XX(ME) Coleman 01.12.2009

107 Allen Appendices, Appendix 9.

108 XX(ME) Coleman 01.12.2009.

109 Coleman Appendicies, p63

(3) Blocks views of Brighton Bay/Palace Pier from the east.

Blockage of views to Brighton Bay and the Palace Pier is most keenly felt in views C9 and C10. In XX Coleman accepted that these views fell within categories (a), (b), (c), (f), and (h) of QD4. In view C9, the TVIA admits that the development would *"shield the viewer from the distant signals of Brighton such as the Palace Pier and other distant landmarks"* and accepts the *"adverse effect of blocking distant views towards Brighton and Shoreham."*[110] Likewise in XX, Coleman accepted that the landmark parts of the Pier would not be visible from View C10 and, moreover, that the coastal path, from which the view is taken, was of the highest level of sensitivity.[111]

(4) Inhibits views *of the* South Downs AONB/future National Park

As well as being protected by policy NC8 in their own right, views into the AONB/future national park also fall into category (c) of QD4. Where views of the cliffs are obscured, so too are views of the South Downs beyond the cliffs. Despite views *into the* the AONB/future National Park being explicitly protected by Policies NC8 and QD4, these losses attract little consideration in the TVIA.

(5) Has a detrimental effect on views out of the AONB/Future National Park.

As Allen explained, the development would detrimentally affect views from within AONB/future National Park because it would introduce

110 CD2/10.3, p86

111 XX(ME) Coleman 01.12.2009.

further urbanisation. This would begin to change the character of the AONB.[112] Allen's assessment draws on, and accords with, the conclusions of the South Downs Integrated Landscape Character Analysis ('SDILCA')[113], which recommended *inter alia* that opportunities should be sought to *"reduce the visual impact of existing visual intrusive elements on the Downs. These include* [amongst other features] *the prominent urban fringes to Brighton*."[114] The SDILCA is unquestionably a robust document: in XX Coleman conceded that the SDILCA been examined at a least 2 public inquiries, had on both occasions been accepted by the Secretary of State and had formed the basis for the extended boundary of the future National Park. Despite this, he admitted that he had not taken the SDILCA into account when producing either his TVIA or proof.

2.15. It is clear both from an objective reading of the TVIA and from Coleman's answers in XX, that many strategic views would be lost or impaired as a result of the appeal scheme. It is the Council's case that the appeal scheme is therefore contrary to the Development Plan, in particular LP Policy QD4.

2.16. The Appellants appear to advance three primary arguments against the proposition that the appeal scheme would have a detrimental effect on views of strategic importance. First, it is said that the site specific

112 XX(KL) Allen 05.11.2009
113 Relevant extracts in Allen's appendices, Appendix 7
114 Allen Proof, para 2.16

policies for the Marina, SPG20 and PAN 04, are such that losses of views of the cliff, sea and hinterland are inevitable. [115] Second, Coleman argued, both in the TVIA and in XX that the design of the appeal site is of such high quality that it mitigates any view which is lost. Third, it appears to be said that, by a combination of PAN04 and the Gillespie Study, the LPA have defined certain strategic views which should be protected and that *a fortiori* other views are of little or no relevance. However, none of these arguments withstands scrutiny.

2.17. Dealing with the first contention, it appears to be said by the Appellants that losses of such views are a necessary corollary of designating the Marina as a node for tall buildings and highlighting the opportunity to 'bookend' the city in SPG 15 (and the Gillespie Study), together with the encouragement for higher density development and the introduction of landmark buildings within SPG20.

2.18. This assertion is misconceived. The policies do not promulgate that losses of strategic views, including those of the sea, cliffs and hinterland, are the necessary *quid pro quo* for development on the Marina. Indeed, in each of the site-specific local guidance documents, emphasis is placed on the need to protect views of strategic importance. In SPG15 it is noted that,

[115] This argument was hinted at by Coleman in his rebuttal, where at paragraph 2.1.5 he noted *"It is our belief that the very particular and limited nature of adverse effects on the coastal cityscape referred to in the TVIA are far outweighed by the regeneration credentials of the scheme, and by the policy framework already set up by the City Council"* (emphasis added)

> *"The Marina is a node with particular sensitivities of building due to the relative proximity to Kemp Town.....Tall buildings in this node will need to have regard to..... their overall composition when viewed along the coast."*[116]

2.19. Encouragement of landmark buildings in SPG20 is tempered by the caveat that *'disruption of key views'* should be avoided.[117] In particular, proposals for the ASDA site are required to *"take into consideration views of the Black Rock geological site"*[118] .

2.20. PAN04 is particularly clear about the need for development to respect strategic views. Where buildings of six storeys or taller are proposed, PAN04 lists 9 criteria derived from SPG15 and CABE's 'Guidance on Tall Buildings', which need to be satisfied. These include to:

> *"(iii) ensure that the building design allows for visual permeability through the development out to sea, the harbour area and views of the protected Black Rock Cliffs*
>
> *And*
>
> *"(vii) avoid harm to important views and....not detract from views from the AONB, the setting of the Kemp Town Conservation Area or listed buildings."* (emphases added)

116 CD8/8 SPG15, para 8.3.2
117 CD8/9.1 SPG20 vol 1 p73
118 CD8/9.2 SPG20 vol 2,

In a section entitled 'height constraints', it reiterates the importance of maintaining views of strategic importance, in particular of the cliff and sea:

> *"The LPA considers that new development in close proximity to the Black Rock cliffs must generally conform to or be lower than the existing cliff height, to ensure that strategic views of the sea and cliff and the setting of the Kemptown Conservation Area are preserved. Developers must demonstrate an understanding of Marina context by ensuring visual permeability through the development out to the sea and harbour area and back towards the SSSI cliffs."* (Emphases added)

2.21. Considering these documents in their chronological context, the stress placed in PAN04 on preservation of strategic views is telling. Unlike SPG20 or SPG15, PAN04 was the subject of consultation, and subsequently approved, after the Brighton Marina Outer Harbour ('Brunswick') Scheme had been granted planning permission.[119] Indeed, the Brunswick planning permission is acknowledged in the PAN as one of a number of circumstances which prompted production of the document. [120] As such the LPA and its consultees would clearly have been influenced by the design of the Brunswick scheme. This is evident in the guidance found within the PAN. There are no references to 'bookending' the city; this omission is understandable in the light of the permission granted for the 40-storey Brunswick tower. And whilst references to creating 'landmark buildings' are to be found within PAN04, it is no longer an objective, as in SPG20, *"to define the place*

[119] Brunswick was granted planning permission in June 2006. CD8/12 was approved in March 2008

[120] CD8/12, para 2.0 and para 7.1

from afar as [a]*... landmark place"*[121]; of the eleven key sites identified in PAN04 for potential development, only one is identified as having potential for a landmark building. That one - the 'Spending Beach' site - is the location of the Brunswick development.[122]

2.22. In contrast, the inner harbour area is subject to a particular concern for visual permeability. On the 'Superstore Site', where the Cliff Building is located, PAN04 specifies that *"Development should secure visibility of the SSSI cliffs, which are of geological and scientific interest"*.[123] At the 'Leisure Area', where Marina Point is proposed, the PAN not only indicates that the cliff views should be preserved, but also *"visual permeability through the development out to sea and to the harbour area"*.[124] Finally, on the 'Western Gateway' ,site of the Sea Wall building, PAN04 specifies that the

> *"Design of gateway development should allow <u>visual permeability</u> to prevent detrimental impact on strategic views to the east and west",*

and that,

> *"Proposals should also be sensitive to the site's proximity to Kemp Town and East Cliff Conservation Areas and the preservation of strategic views"*

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121 CD8/9.2 SPG20, p42
122 CD8/12, p34, para 15.10
123 CD8/12, p31, para 15.5
124 CD8/12, p31, para 15.4

2.23. During the pre-application correspondence, the Appellants were alerted to the fact that PAN04 was being produced as a result of, amongst other matters, the Brunswick planning permission and were told that its production was designed to ensure that a "*comprehensive joined-up approach"* was taken to development at the Marina.[125] Yet the increased emphasis placed on visual permeability and preservation of strategic views in PAN04 is entirely omitted from the Appellants' analysis of the guidance. In particular, reference to these objectives is conspicuous by its absence in the 'Statement of Conformity to Planning Advice Note 04'[126] and in the TVIA[127], as well as the written evidence of the Appellant.

2.24. Coleman relied upon what he regarded as the policy matrix in his support of his conclusions in the TVIA. He accepted as much in response to a direct question from the Inspector and further agreed that, had he not taken the policy framework into account, his conclusions might have been different.[128] Moreover, (and perhaps unsurprisingly) his interpretation of the policy matrix appears to partake of the misconceptions in the Appellants' case generally. This conclusion can be inferred from a number of sources. First, neither in his proof of evidence nor the TVIA does Coleman grapple with the

125 CD13/27, p2 (Letter from Maria Seale to Pauline Stocker 10 March 2008.)

126 CD2/7.1 p231

127 CD2/10.3 p40

128 INS Q (01.12.2009). Although Coleman does not admit taking into account the policy matrix in the TVIA methodology section (p4), he was candid about it inoral evidence. Asked by the Inspector whether taking into account the policy matrix was a normal way of approaching assessments, Coleman responded that *"The policy context is very important, otherwise it is divorces the assessment from the facts available."*

sections in SPG 15 and SPG 20 cited above which require developers to protect important views. More significantly, in both documents he omits to consider any of the design guidance promulgated in PAN04, including the passages requiring visual permeability. Secondly, in XX, Coleman explained that the TVIA *"deals with the views in the context of policy* [which] *leads to intensive development of the marina....Intensive development* [ensures that] *obfuscation of the cliffs is almost inevitable."* He went on to assert that the relevant SPGs did not require views of the cliffs from the east to be *'absolutely preserved.'*

2.25. There are two points to make in relation to this approach. The first is that whilst planning guidance inevitably informs the background context in which a visual assessment is undertaken, taking into account specific policy considerations in the assessment itself confuses the assessment of impacts with questions of balance and justification which are for the decision maker. It is difficult to see, for instance, how the visual experience of individuals, or the impact on a given landscape, is altered depending on whether the planning context is encouraging of development in a given location or not. The proper approach is to assess the visual impact of the development and then consider whether the results of that assessment demonstrate compliance with the planning matrix (or can otherwise be justified). In short, planning policies are not a variable which should be taken into account when establishing the visual impact. The second point is that the Appellants' partial interpretation of relevant planning policy - which

sees obscuration of strategic views as a necessary corollary of planning policy – is demonstrably false. The extent to which this misinterpretation of policy had infected Coleman's analysis was revealed in re-examination: in his overall analysis he commented that *"when one is putting in a new quarter of the city [one] expects to have to go around it to see what [one] saw before."*[129] This is emphatically not the vision that SPG15, SPG20 and, in particular, PAN 04 espouse.

2.26. The second primary argument advanced by the Appellants, and specifically Coleman, is that any loss of strategically important views is mitigated by the high quality of design which he believes is exhibited in the appeal scheme. Coleman freely acknowledges that he has taken such an approach, indicating in his written evidence that his assessment *"has an overall flavour of positivity because both the idea and design have considerable merit."*[130]. The *'flavour of positivity'* is reflected in his conclusions on the TVIA, in relation to which he states *"[t]he loss of some coastal views were believed to be adequately replaced by the fine urban planning, high quality of architecture and the regeneration credentials of the scheme."*[131]

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129 RX (KL) Coleman 01.12.2009

130 RC Proof, para 4.2; TVIA (CD/??) para 2.1.5

131 RC Proof para 4.9; See also para 8.8.12 *"As a high quality addition, the visual experience will be a delight when seen from view points of a strategic nature. In one case, the development obscures views of seascape. In another it obscures part of the cliff face. However, its regeneration credentials and design quality more than mitigate this loss."*

2.27. Approaching a visual impact assessment from a standpoint of positivity because of one's personal belief[132] that the design of the scheme is of high quality is flawed in a number of respects. Most significantly, as PPS 1 recognises, "*good design is indivisible from good planning"*.[133] PPS 1 goes on to state that good design is characterised by 5 principal indicia, including that it should:

> *"*
> *- be integrated into the existing urban form and the natural and built environments*
> *...* [*and*]
> *- consider the direct and indirect impacts on the natural environment"*

2.28. The contextual approach is thus enshrined in national policy. Before a judgment can be made that a proposal is 'good' (let alone 'outstanding') the scheme must be objectively tested against these indicia. To justify prominence/dominance on the basis of the scheme's "outstanding" design is to beg the questions posed by PPS 1 and to drive a wedge between the 'indivisible' pair of good planning and good design.

2.29. The proposition that assessing the quality of design includes consideration of impact on existing environments – and in particular the impact on existing views - finds further support in policy QD4 of the LP. As one of five policies specifically related to design[134] it requires that

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132 Coleman volunteered that he was explicit about his standpoint in the TVIA (which he was), but acknowledged that not everyone would share that standpoint. XX(ME) 18.11.2009

133 CD4/1.1, PPS1, para 33

134 Policies QD1, QD2, QD3, QD4 and QD5 all deal with different aspects of design.

> *"[i]n order to preserve or enhance strategic views, important vistas, the skyline and setting of landmark buildings, all new development should display a high quality of design. Development that has a detrimental impact on any of these factors and impairs a view, even briefly, due to its appearance, by wholly obscuring it or being out of context with it, will not be permitted."*

2.30. The phrase 'high quality of design' in QD4 plainly does not just mean that what is built must be aesthetically pleasing in the abstract, but rather that, in order to be considered high quality design, the development must be integrated into, and consider the impact upon, the natural environment. In the local context this means ensuring that strategic views are to be preserved or enhanced, not replaced (regardless of the quality of replacement architecture)

2.31. The conclusion that a development is of good design should, therefore, be the product of, amongst other things, a robust TVIA. It should not be a preconceived standpoint from which one approaches the TVIA. Simply put, Coleman's approach puts the cart before the horse.

(3) *The effect of the development on views into and out of the Kemp Town Conservation Area*

2.32. Section 72 Planning (Listed Buildings and Conservation Areas) Act 1990 places a duty on those exercising powers under the Planning Acts to pay "special attention...to the desirability of preserving and

enhancing the character or appearance of [the Conservation] area" This duty is extended, as matter of policy, in PPG15, to cover the settings of conservation areas and views into and out of such areas.[135]

2.33. Conservation areas are also protected within the LP. Policy HE6 states that *"proposals...affecting the setting of a conservation area should preserve or enhance the character or appearance of the area."* It goes on to specify that *"proposals that are likely to have an adverse impact on the character or appearance of a conservation area will not be permitted."* As indicated previously, views into and out of the Conservation Area are specifically protected by LP Policy QD4.

2.34. The significance of the Kemp Town Conservation Area is beyond doubt. English Heritage ('EH') refer to the Kemp Town Terraces as "*one of the best set pieces in Brighton. Perhaps after Regents Park, London and Bath, Brighton and Hove's terraces rank alongside Edinburgh and Cheltenham as the best of the Regency period in Britain".* They conclude that the Conservation *Area "arguably represent[s] town planning at its most handsome."*[136] Coleman, if anything, attaches greater significance to Kemp Town, stating that in his view the *"Kemp Town listed building group [is] one of the UK's most important Regency townscapes, equal even to the Royal Crescent in Bath, which is part of a World Heritage Site."*[137] He indicates that the *"heritage assets require the highest level of protection and*

[135] CD4/11, para 4.14
[136] CD13/19, EH Letter 15 January 2008
[137] Coleman Proof para 10.1

preservation" [138]; a proposition with which the City Council wholeheartedly agrees.

2.35. Views into and out of the Conservation Area, including views from within the Conservation Area of the Cliff and the Downs beyond, form part of its setting. As Froneman explained in his written evidence and in X, the Kemp Town estate was originally conceived as a development separate from Brighton with its setting consisting of undeveloped downlands to the North, East and West and the sea to the south. The Conservation and Enhancement Plan takes the same view of the history. Coleman disagreed to some extent, saying that Kemp Town was developed at a time of City expansion, but offered no further evidence, contemporaneous or otherwise, in support of his reservations. The original conception of Kemp Town can be appreciated from the 1831 plate on the front cover of the Kemp Town Conservation Area Study and Enhancement Plan as well as the 1841 plates included later in the same document and in the TVIA. As the easterly views constitute the only remaining part of the area's once undeveloped landward setting, they contribute greatly to the character of the Conservation Area. Coleman acknowledged that the views of the *"coast and sea"* together with *"the more open grain of the Black Rock leading to the open countryside to the east"* form part of the Conservation Area's setting.[139] Whilst in his written evidence Coleman sought to play down the importance of these views by arguing that they

[138] Coleman Proof para 14.10
[139] Coleman proof, para 8.13.2

form part of the 'wider' rather than 'immediate setting', in XX he accepted that there is no legal or policy basis for the distinction.[140] He also acknowledged in XX that neither PPG nor PPS 15 propounds a restrictive approach to deciding what are the settings of heritage assets. The question is one for the decision maker. Significantly, English Heritage ('EH') clearly regard the eastward coastline as part of the setting for historic building purposes.

2.36. The importance of the undeveloped easterly views is accentuated by the fact that they influenced the design and layout of Kemp Town.[141] The opening of the development to the south and, in particular, the construction of the esplanade allowed for far reaching views to the east and west. Indeed, formalised viewing places – which remain to this day - were included within the design of the esplanade. Plainly they invited people to pause and look both out to sea and along the coast east and west – as they still do. This 'perambulation' along the front was – and is – of the essence of Kemp Town. EH recognised this function of the esplanade in a letter dated 15 January 2008 (a letter which, for unexplained reasons, was omitted from the sequence of correspondence within Coleman's appendices).

> *"The esplanade in front of the flanking terraces was part of the design, but was constructed later as part of the layout with a formalised tunnel entrance to the gardens from the then beach. This esplanade, besides being a viewing place, provided the ability to access the crescent as a formalised perambulation, approaching from the east and west grand terraces, so that the views out were to the pier and sea to the west and <u>to the cliffs</u>*

[140] XX(ME) Coleman 01.12.2009
[141] IF PoE, para 5.2(c)

and sea eastward, together with oblique views of the terraces."[142] *(emphasis added)*

2.37. In the same letter EH explained the significance of the easterly views.

> *"English Heritage consider that the significant views are not only of the terraces from the sea and the esplanade in front of the Crescent, but also relate to the perambulation of the facade via the entry and exit points of the esplanade. While former views are the most significant, it is also the kinetic views.....along the terrace that deserve to be considered in relation to the proposed development."*[143]

2.38. EH did not resile from these observations in their further correspondence relating to the amended scheme.[144] Moreover, their continuing concerns about the appeal scheme are directly related to the adverse effect which it would have on the easterly views. In their letter of 24 October 2008 they noted that *"there remains some adverse impact upon the experience of the West-East perambulation in front of the Kemp Town set piece terraces."* They were especially, though not solely, concerned about the effect of Marina Point on these views and recommended that the proposal *"only be accepted if there is a clear and demonstrable public benefit"*[145]

2.39. Coleman responded to these concerns, in part, by arguing that any direct connection between Kemp Town and the cliffs, sea and the

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142 CD13/19, EH Letter 15 January 2008

143 *ibid*

144 Indeed in their final letter dated 24.10.2008 (Coleman Appendices pp63 & 64) they state *"We previously set out the significance of the Grade I listed Kemp Town Terraces in our letters 15 January 08 and recently in June. The background to our assessment is set out in earlier letter, so I do not repeat this but ask you to refer to that letter. We consider that there remains adverse impact upon the setting of the terraces as part of the perambulation we identified."*

145 Coleman, appendices pp63 &64. See also, in connection with viability, section 7 of these submissions.

Downs to the east has *"long been lost by the subsequent development east of the Kemp Town group."*[146] It is presumably for this reason that he is able to countenance the fact that *"the scheme does stand in front of the cliff, the Downs above them and the seascape across the Marina"* and tolerate the impact of the scheme which, in his own words, *"...means that views will change and the perception of the cliffs to the immediate east of Kemp Town will be substantially reduced"*[147]

2.40. Whilst both Froneman and EH agree that there has been development to the east of Kemp Town (including the Marina site), neither accepts that the original views – and therefore the direct relationship with the cliffs, sea and Downs – have been lost. EH note, again in the apparently overlooked letter, that

> *"....<u>the existing views are not unlike those seen when the terraces were built</u>. The existing 'corridor' views along the esplanade and the flanking Arundel and Chichester terraces are currently to the sea horizon to the east (applicants' view T30), and to the sea and piers westward, although some interventions appear seen just above the cliff in the photograph T30."*[148] (emphasis added)

2.41. Froneman explained the continuing relationship in X by reference to the TVIA, and specifically view C6. This view is of particular significance because it is taken from one of the formalised viewing points on the esplanade, as it happens, at the boundary of the Kemp

[146] Coleman, rebuttal para 2.1.2
[147] *Ibid, para* 2.1.1
[148] CD13/19; EH Letter 15 January 2008

Town Conservation area. In the existing view, the cliffs, the Downs and the sea can all be appreciated, together with oblique views of the Kemp Town terraces. It is apparent that the development which has been constructed east of Kemp Town does not obscure or impair this view[149], and that it is substantially the same prospect as that which Thomas Kemp would have had in mind when designing the esplanade and viewing places. In the TVIA, Coleman acknowledges the loss of views of the cliff (though not the Downs or sea), and adopts his familiar standpoint relying, at least in part, on the "*high quality* [of] *design in each element*"[150] to justify his Substantial-Beneficial rating. However, as he conceded in XX, nowhere in his written material does he take account of the historical relationship between the esplanade and undeveloped easterly views, despite EH's correspondence on this matter.

2.42. It is also significant that when discussing the impact of the appeal scheme on easterly views in his proof of evidence, Coleman does not specifically consider what is lost in the views.[151] He admitted this fact in XX, before justifying his omission on the basis that the policy matrix 'almost inevitably' gives rise to the loss of cliff views. [152] As previously

149 The existing view is perhaps better seen in the previous iterations of the TVIACD12/9.1 & 9.2 The relationship between Kemp Town and the undeveloped natural landscape to the east can, of course, be appreciated best when one is on site. Nevertheless, views T30, C39 and C40 also demonstrate the substantially undeveloped nature of these easterly views.

150 CD2/10.3, p74

151 Coleman, proof, para 10.8. Coleman discusses two issues in relation to the *"effect of the appeal scheme on the moving sequence of views passing from west to east across the south face of the Chichester and Arundel Terraces"* neither of which touch upon what is lost in those views

152 XX(ME) Coleman 01.12.2009. To be fair to Coleman he provides the same reasoning in the TVIA (p32). Having acknowledged that *"the current open views across the undeveloped Marina towards the diminishing coastal cliffs will dramatically change...."* he states that this *"is axiomatic to the nature of the project"*. It is only axiomatic to the nature of the project, of course, if one interprets the relevant

discussed in relation to strategic views, this is a wholly misconceived interpretation of the LP, as well as the relevant SPDs and site-specific guidance. This flawed interpretation is compounded when one considers the significance that these documents specifically accord to the preservation and enhancement of the Conservation Area.

2.43. The extent of Coleman's misinterpretation of the policy matrix is well illustrated in his written evidence. Having accepted that existing views of the cliff would be substantially reduced by the appeal scheme, he argues that *"[t]his fact was anticipated by SPG15, para 8.3, where certain special characteristics are listed as important. The visibility of the cliff was not one of them"*[153]. This statement betrays a complete misreading of SPG15. The first point to make is that, as Coleman accepted in XX, the classification of the Marina as a node for tall buildings does not mean that tall buildings can be placed in any location, or be of any form or height. As SPG15 explains ,*"[a]reas within these nodes...have varying degrees of suitability for taller development. Not all sites within a node...will necessarily be suited to a tall building"*[154] and later reiterates that *"they are....limited by factors such as topography, proximity to conservation settings, and intact residential areas, and other geographical and planning constraints. They offer the opportunity to develop comprehensive planning/design frameworks, which determine the type, location and form of future tall*

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planning policy as requiring the density, scale, height, massing, form and disposition of the buildings that the Appellants propose.

153 Coleman rebuttal, para 2.1.1

154 CD8/8 SPG15, para 8.1.2

buildings within each area"[155]*.* SPG15 does not, therefore, allow a 'free-for-all', in which any adverse impact of the tall building(s) can be ignored. Regard must be had, when deciding the height, location and form of the buildings, to the sensitivities of the individual site.

2.44. Secondly, it is clear that, far from countenancing the blocking of cliff views, SPG15 specifically requires developers to take account both of the proximity of the Marina to Kemp Town and of the views along the coast:

> *"The Marina is a node with particular sensitivities of building due to the relative proximity to Kemp Town....Tall buildings in this node will need to have regard to their... overall composition when viewed along the coast."*[156]

2.45. It is simply wrong to conclude, as Coleman does, that SPG15[157] 'anticipates' the loss of cliff views from Kemp Town. Moreover, as discussed above, the site specific guidance, and in particular PAN04, places great emphasis on ensuring visual permeability across the site and the retention of cliff views from the east. PAN04 also takes account of the Marina's proximity to Kemp Town, specifying in a section entitled 'Conservation constraints' that *"Proposed developments should ensure*

155 CD8/8 SPG15, para 8.2.1

156 CD8/8 SPG15, para 8.3.2

157 It is worth noting that SPG 15 and the supporting Tall Buildings study was criticised, presumably without prompting, by English Heritage in their letter of 15 Jan 08: *""How taller buildings and structures in this highly significant part of the seafront are to be considered is in part set out in City Tall Buildings SPD 15 and the supporting Study. We believe however, that there is a gap in the guidance, regarding the form of skyline or silhouette that is desirable and how the potential cumulative effect of proposals on the sea front should be considered."*

the preservation and/or enhancement of the setting of historic buildings and conservation areas nearby." Indeed, the need to preserve and/or enhance the setting of the conservation area permeates the document: in section 15.2 it notes that tall buildings will need to *"avoid harm to important views and does not detract from...the setting of the Kemp Town Conservation Area or listed buildings."*; in the same section, it goes on to note that "*[t]he LPA considers that new development in close proximity to the Black Rock cliffs must generally conform to or be lower than the existing cliff height, to ensure that strategic views of the sea and cliff and the setting of the KempTown Conservation Area are preserved"*[158]*;* and, in relation to development on both the Western Gateway and Black Rock sites, it specifies that *"proposals should...be sensitive to the site's proximity to Kemp Town and East Cliff Conservation Areas and the preservation of strategic views"*[159];

2.46. It can therefore be concluded that:

(1) all parties agree that the Kemp Town Conservation Area is of the upmost importance and therefore deserves the 'highest level of protection';

(2) all parties agree that the easterly views of the cliffs, the Downs and the sea form part of the Conservation area's setting;

158 CD8/12, para 15.12 Emphasis added

159 CD8/12, para 15.13 and 15.15 respectively

(3) english Heritage consider the easterly views to be of historical significance and believe that they deserve to be considered in relation to this appeal scheme;

(4) whilst there has been development to the east of Kemp Town it has not substantially affected the original views, which constitute the only reminder of the Conservation Area's once undeveloped setting;

(5) all parties agree that the development will obscure much of the natural landscape in these easterly views.

(6) the Appellants' failure to consider the obscuration of such views –or at least their belief that such obscuration is acceptable - is founded on a wholly misconceived reading of the relevant policy matrix.

2.47. In the light of these findings, it follows that the setting of the Kemp Town Conservation Area, as well as the setting of views into and out of it, far from being preserved or enhanced, would be seriously compromised. Clearly these effects amount to harm to important heritage assets. Coleman's justification of them by reference to the design qualities of the Appeal Scheme is as unconvincing in this context as it is in relation to other important strategic views; in this instance, it can only be concluded that the significance of the 'perambulation' was underestimated or, possibly, wholly disregarded.

3. INFRASTRUCTURE

(1) *Outdoor amenity and recreation space*

3.2. This topic falls to be considered in two parts: on-site physical provision and off-site contribution by way of commuted payment. There are linkages, especially with regard to on-site provision, with Issue (1) and RR.1 (design of public realm) as well as Issue (3) and RR.2 (living conditions).

3.3. The statutory starting point is L.Plan Policy HO6.[160] It is convenient to consider this alongside Policy H05 for context. HO5 (which is not in dispute) requires the provision of *"private useable amenity space in new residential development when appropriate to the scale and character of the development"*. Paragraph 4.43[161] states that front and back gardens and balconies are to be taken into account. In the Appeal Scheme, no flats have private gardens, though the majority have balconies and/or access to terraces. Reid agreed in principle that absence of private gardens would mean that such communal space as is provided on site would be likely to be important to future residents.

3.4. HO6 is comprised of several parts. Firstly, in the light of XX of Goodwin, it is important to note the language of the first section: *"will*

[160] CD 8/1 p.118

[161] In respect of which, as with all former reasoned justification, there is agreement that whilst not saved under Planning and Compulsory Purchase Act 2004 ("PACPA"), it is a material consideration and aids construction and application of the saved policies.

not be permitted unless the requirement for outdoor space generated ... is suitably provided in accordance with" the 2.4ha/1000 population standard (Emphasis added). Of course, as the succeeding paragraphs and Circular 05/05 make clear, a range of other matters may come into the frame, but the policy is clear and demanding as to the standard required for residential development, provision to be split *"appropriately"* between children's equipped play space (i.e., LAPs, LEAPs and NEAP), casual/informal play space and youth outdoor sports facilities. Proper flexibility comes in the second paragraph, recognising that where it is impracticable or otherwise inappropriate for all or part of *"the ... requirements"* to be met on site, contributions to *"their"* provision on a suitable alternative site *"may be acceptable"*. Reid rightly accepted that *"the requirements"* and *"their"* relate to the requirement calculated in accordance with the 2.4ha/1000 standard. Clearly there is an element of judgment, firstly as to whether on site provision is practicable or appropriate and then a discretion, if that hurdle is crossed, as to whether it is acceptable to proceed by way of contribution for other site(s). The policy states that provision in accordance with it *"will be in addition to incidental and amenity areas"*. Supporting paragraphs[162] continue that provision will be *"required ... in accordance with the standard set out in this Policy",* the *'interlinked'* draft Spg9 *'Provision of Outdoor Recreation Space'* and a Developer Contributions DPD, which has not yet been finished. The text also notes that *"the cumulative effect of a series of developments without*

[162] Paras 4.45-46

such open space provision on site would ... exacerbate any existing deficiencies".[163]

3.5. By way of baseline, there are acknowledged deficiencies of children's and young persons' playspace both city wide and at the Marina.[164] PAN04, as Reid rightly observed, regards provision of open space as one critical capacity indicator for the site.[165] On either party's population figures, a sizeable increase would occur as a result of the introduction of 1301 units of accommodation: general figures are in a range of 1950-2080 and the competing numbers for nursery/school age children are 169 and 348. The Council's figures are derived from draft SPG9 which, despite its informal status, was the subject of public consultation and is specifically referred to and relied on in the former reasoned justification to the L.Plan. Gavin[166] instead used a multiplier of 1.5, which does not match the 1.6 assumption in PAN04 and was *"influenced"*, as Reid explained,[167] by the factors relied upon by the Appellants to produce a lower child yield from the City Council in connection with education contributions. To the extent that these factors are based on existing demographics at the Marina, it should be noted that, as PAN04 recognises and encourages, future patterns will be different, with greater emphasis on family occupation (although less in the Appeal Scheme than the aspirations of the PAN in this regard because of the proposed mix of units). Conversely, to the extent that

163 Para 4.44.
164 CD9/14, Open Space, Sport and Recreation Study, para 6.21, 6.29; CD8/12 para 12.3
165 Reid proof para 2.13. See also CD8/12 para 8.4
166 Rebuttal para 2.34
167 XX (ME)

existing patterns of under occupation are projected forward by the Appellants in connection with their calculations for social infrastructure contributions, it should be remembered that these assumptions are just that – they cannot be ensured by means of planning condition. In any event, if the Appellants wish to depart from the *"very well established"*[168] NPFA 6 acre/2.4ha standard, it really is incumbent on them to demonstrate that their proposed provision on and off-site will have the capacity to cope satisfactorily with the needs of the development – that is, people who would live there (along with any extra visitors who might be attracted to the Marina and use the open space areas whilst there). Since there had been no attempt at such a capacity analysis, in respect of either on or off-site facilities, there is, as Reid had to agree, no transparent evidential basis for assessing either.[169] Therefore questions of the Appellants' alternative population/child yield figures are academic as is the RX point that the Marina would, with the scheme, fall into areas lying within 720m of a children's play facility.[170] The real question is whether the proposed provision would be adequate for the new residents – children and adults.

<u>Quantity of Onsite Open space</u>

168 Reid (Gavin) X, XX
169 Reid (Gavin) XX (ME)
170 For the purposes of CD9/14 (PPG17 Study) p.78.

3.6. The amount of on-site outdoor amenity and recreational space proposed is insufficient for the numbers of inhabitants proposed and would exacerbate the existing deficiency. The provision of a meagre 9% of that which is required by the draft SPG9 is unacceptably low and, therefore contrary to HO6.

3.7. It has always been accepted by the Council that it is impracticable to provide 'all' of the HO6 open-space requirements on-site. However, the fact that a developer has demonstrated that full provision cannot be made on-site, does not mean that he is then free to choose within policy how much on-site provision to provide and how much to make up by way of off-site contributions. So whilst, as Goodwin acknowledged in XX[171], it would be possible in principle to comply with policy HO6 by providing all open-space provision offsite, the fact that there would be none onsite would have to be justified by the developer. Applying that logic to the appeal scheme, whilst the Council accept that the Appellants cannot provide 100% of the HO6 open space requirement onsite, it is for the Appellants to justify why they cannot provide more than 9%.[172]

3.8. The Appellants have failed to provide any such justification. In fact they have not even attempted to do so.[173] Instead they have attempted to rationalise the amount of on-site provision by reference to at least two

[171] XX(KL) 11.11.2009

[172] This was explained by Goodwin in RX as follows: *"Applicants should be able to <u>demonstrate</u> that it is not practical and/or appropriate to provide onsite provision. I haven't seen anything from them that not possible to provide anymore within the appeal site."* RX Goodwin 12.11.2009

[173] The Officer's report for the 12 December 2008 Committee (CD/??) notes *"In total, the applicants would be providing 10% of the required open space and recreation provision on site <u>but the applicants state</u> that it is not practical to provide anymore."* (<u>emphasis added)</u>

alternative standards, neither of which forms part of the development plan.

3.9. The Appellants' first attempt to apply a standard outside the Development Plan is found within Allies' proof of evidence. He seeks to apply the recommendation within the 'Open Space, Sport and Recreation Study'[174] ('PPG17 Study') that *"approximately 20% of the site be earmarked for on site space, sport and recreation facilities."*[175] In doing so he failed to acknowledge that the PPG17 Study was produced by consultants, has not been through a process of consultation, has not been adopted by the Council and specifies, on its title page, that 'THIS DOES NOT CONSTITUTE COUNCIL POLICY'[176]. Nevertheless, even if one considers it appropriate to apply the '20% standard', Allies has to fudge the figures in order to 'demonstrate' that the appeal scheme meets that standard. He claims that 39.3% of the site is allocated for open space which *"compares favourably with the 20% requirement"*[177]. However Allies is comparing oranges with apples. The worked example contained within the PPG17 Study illustrates that the 20% standard applies to the cumulative total of 6 typologies of open space:[178] Parks and Gardens[179]; Amenity Green Space[180]; Natural and semi-Natural Green Space[181]; Provision for

174 CD9/14
175 Allies Proof, para 8.3.8
176 CD9/14, 4 pages before page (i)
177 Allies proof, para 8.47
178 CD 9/14,
179 "*Includes urban parks, formal gardens and country parks"* CD9/14, Appendix A, pA2
180 *"Most commonly but not exclusively found in housing areas. Includes informal recreation green spaces and village greens"* CD9/14, Appendix A, pA2

children and young people[182]; Outdoor sports facilities[183]; and Allotments[184]. Allies, on the other hand, applies an "alternative methodology"[185] whereby private amenity space, communal open space, outdoor recreation space and public realm are all counted towards the 20% standard.

3.10. The Appellants sought to explain the calculations set out in Allies' proof by producing a table[186] which contrasts the open space assessment under draft SPG 9 – 'Area Analysis 1' with, amongst other things, the analysis carried out by Allies – 'Area Analysis 4'. This table only serves to illustrate the extent to which, in arriving at the 39% figure, Allies drew on spaces which fell outside any of the seven PPG17 Study typologies. It includes, for instance, the 2635m² of space under the ramps (west), which is the land surrounding, but not including, the climbing wall area, 1468m² of the existing west breakwater, 1009m² of cascading staircase, and a 134m² slither of land between Harbour Square and the Petrol Filing Station. These are only a few examples of the many areas Allies included within the 39% figure which would fall outside the PPG17 Study typologies.

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181 "*Includes publically accessible woodlands, urban forestry, scrub, grasslands..., wetlands, open and running water and wastelands."* CD9/14, Appendix A, pA2

182 Provision for Children defined as *"Areas designed primarily for play and social interaction involving children ;* Provision for Young People defined as *"Areas designed primarily for play and social interaction involving young people, typically teenagers."* CD9/14, Appendix A, pA2

183 *"Natural or artificial surfaces either publically or privately owned for sport and recreation."* CD9/14, Appendix A, pA2

184 *"Opportunities for those who wish to do so to grow their own produce."* Appendix A, pA3

185 Allies Proof, para 8.4

186 CD12/27

3.11. Many of the areas included within the 39% also fall well outside the typology of open space that HO6 is designed to provide. The text of HO6 makes plain that the open space required will *"be in addition to incidental amenity and landscaped areas".* Thus much of the 21,039m² of public realm included in the 39% figure – such as the 1165m² of Harbour Square North side –is, on any view, outwith the terms of HO6. Likewise, HO5 specifically provides for private amenity space and thus, logically, none of the 10,220m² of private terraces and balconies- which Allies' included in his 39% - can be included for HO6 purposes.

3.12. The second attempt to justify the amount of open space onsite came, in X of Reid (who was standing in for the indisposed Gavin). Reid had obviously applied his own scrutiny to the PPG17 Study and discovered that it recommended a level of Child and Young Person's provision significantly lower than that of draft SPG9.[187] Thus, five weeks into the Inquiry, this reduction became the new 'direction of travel'. However, the flaws in this argument are plain. The PPG17 Study adopts an entirely different methodology from draft SPG9: whilst the latter initially divides the open space requirement into just 2 typologies – "Children's play space" and "Adult/Youth Outdoor Sports Facilities", the PPG17 Study, as discussed above, utilises 6 different typologies of open space. Thus the authors of the PPG17 Study recommended a standard for Children and Young people of 0.055 hectares per 1,000 population is *in the context* of the provision of the five other types of

[187] Whereas draft SPG9 specified 0.7 hectares per 1,000, the PPG17 Study recommends a mere 0.055 hectares per 1,000

open space, including 2.8 hectares of Natural and semi-Natural Green Space, 0.92 hectares of Parks and Gardens and 0.582 hectares of Amenity Greenspace.[188] The authors of the PPG17 study were clearly of the view that this level of dedicated children's provision is acceptable *if* children have the panoply of alternatives available. In any event, in relation to Children and Young person's open space, the PPG17 Study does not represent the direction of travel. Policies CP12 and CP13 of the draft Core Strategy increase the recommended standard to 0.081 hectares per 1,000 population, whilst adopting PPG17's methodology and the remaining recommendations.

3.13. The fact that the Appellants are attempting (last minute) *ex post facto* justifications for the lack of onsite open space provision is, in itself, revealing. It supports the contention that the Appellants' approach to the provision of onsite open space was not design-led, but residual. Allies, in his written evidence, inadvertently let the cat out of the bag by saying that *"the total area we have available to build on within the six development sites is only 4.3 hectares, of which 3.9 hectares <u>are already allocated</u> within the appeal scheme*"[189] Although not happy with the term 'residual', in XX Allies could not escape the necessary implications of his own words. Whilst he was anxious to record the fact that the importance of open space was acknowledged at the beginning of the project, he reluctantly agreed that the fundamental questions of

188 CD12/27, p xiii The worked example at p187 demonstrates that each of the 6 typologies are to be considered in conjunction with one another, and not isolated as Reid wishes. Each typology must be provided for, either by way of onsite provision or off-site contribution.

189 Allies proof, para 8.3.7. (<u>emphasis added)</u> In XX Allies confirmed that the 3.9 hectares referred to ground floor development.

allocation of open space were not design led, but decided upon by his clients.[190]

3.14. Allies also claims in his proof that, assuming BHCC's calculations of occupancy[191], the appeal scheme would generate 2805 residents, *"which would require a total area in excess of 6.7 hectares"*[192]. He remonstrates that it would be 'impossible' to achieve 'anything like' the amount of open space required. However, the 6.7 hectares requirement is not the product of the BHCC calculations of occupancy alone: draft SPG9 merely provides the multiplier[193]. The multiplicand – that is the number of dwellings - is the sole province of the developer. Thus had the Appellants taken into account the vast under-provision of open space at the design stage, they could have reduced the open space requirement simply by reducing the number of dwellings. The fact they did not suggests that the number of dwellings was pretty well fixed prior to the consideration of the onsite open-space provision.

3.15. Moreover in his rebuttal, Allies readily accepted that the potential locations for open space were narrowly defined by his clients. He explained that,

> *"[t]he palette which we, as architects and masterplanners, had to work with, was narrowly defined by the six individual site*

190 XX(ME) 19.11.2009. To be fair to Allies he had to agree to this proposition. It is plain from the fact that he was given six building sites on which to build and told to retain the ramps and the multi-storey car park that the existing public realm provided the only location for HO6 open space provision.

191 CD8/7, p9

192 Allies proof, para 8.3.7

193 The multiplier varies according to the number of bedrooms in a dwelling.

ownerships – upon which we could propose new structures – and the wider area contained within the red line planning boundary, where we could bring forward improvements to the public realm."[194] (Emphasis added)

3.16. The area available for HO6 open space was further reduced by the clients' brief, which presupposed retention of both the ramps and multi-storey car park. Allies accepted in XX that there is no evidence before the Inquiry to demonstrate that the client's decision to retain these monolithic structures was design-led. The significance of their retention in relation to on site open space is that it further limited potential locations for that space: not only was Allies confined to siting the open space outside of the six ownership sites, large sections of the remaining area within the red line planning boundary were also off-limits.

3.17. It is quite clear, therefore, that the density calculations, the floor space allocations and certain fundamental urban design decisions were all made before the Appellants considered how much open space to provide onsite. The product of this residual approach is a level of on-site open space provision which is contrary to HO6.

Quality of Outdoor and recreation space

3.18. A consequence of the Appellant's 'residual approach' to the quantity of onsite open space is the distinct compromise of its quality. As

[194] Allies proof, para 1.7

discussed above, Allies was limited as to where he could locate the onsite open space and thus had to do the best he could with the left over areas. Inevitably the locations he found were severely constrained and often incongruous to the activities proposed. It is these constraints and incongruities that form the basis of the very many practical criticisms Allen made of the quality of open space provision. Thus, contrary to the case advanced by the Appellants, the failings of the open space provision as currently detailed are not superficial issues which can be addressed at the detailed design stage; they are symptoms of the Appellants' fundamental failure to take a design-led approach to open space provision.

3.19. The criticisms of the open space provisions advanced by Allen and, to a large degree, not challenged in XX, are as follows:

(1) Cliff Park LEAP/Geo Learn Space. There are three principal difficulties with this space. The most significant issue is the proximity of the Equipped Play area to the residential dwellings in the Cliff Site. Draft SPG9 recognises the importance of providing 'buffer zones' *"in order to protect the amenities of the surrounding properties"*[195]. In relation to LEAPs, draft SPG9 adopts the NPFA minimum recommendation of 20 meters from the edge of the activity area to the nearest building.[196] At its nearest point the Cliff Site building is a mere 4 meters away from the Cliff

195 CD8/7, p6

196 *Ibid.* P4

Park LEAP.[197] In XX KL attempted to downplay the significance of buffer zones, insisting that they were only one characteristic of a LEAP and indicating that FiT recognised that 'buffer zones' may have to be reduced in high density developments. However, they are sufficiently important that both local and national guidance have made recommendations as to a minimum. Moreover, FiT guidance is clear that where the buffer zone is reduced '*Design...is of key importance"*[198] . In the current instance a significant proportion of the 'buffer zone' is a footpath which lies 1 metre away from the nearest terrace/balcony. As Allen explained in X, the practical reality is that, as there is no fencing around the LEAP, the footpath will act not as a buffer zone, but as an extension to the children's play area.

The second concern is with regard to the location and accessibility of the Cliff Park. This was illustrated in XX of Allies where he agreed that it might take a resident of Cliff Building more than 10 minutes to get from their flat to the Cliff Park[199], a journey which in some cases would involve taking two separate lifts, walking along the RTS route and ascending the steps, or a further lift, to get to Cliff Park itself. Ironically, because of the design of the Cliff building, those flats closest to Cliff park – and thus worst affected by the lack of buffer zone - are likely to have one of the longest and most tortuous journeys.

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197 Whilst NPFAs successor, FiT, recommends a 10m buffer zone, this is from the boundary of the nearest propert. CD12/7 para 6.2.5

198 *Ibid.*

199 XX(ME) 19.11.2009

Finally, it is still unclear how the LEAP in the Cliff Park would function simultaneously as an equipped play area for children and an educational area for up to 50 people at a time to view the cliff. The proposed activities are simply incompatible and Reid's response – that the viewings will not occur on a daily basis[200] – does not resolve the conflict.

(2) Cliff Park NEAP. Many of the concerns expressed in relation to the Cliff Park LEAP are equally applicable to the NEAP. In particular, accessibility is just as difficult and the lack of buffer zones is, if anything, more pronounced. The recommended buffer zones for NEAPs are greater than for LEAPs because the former are designed for older children and for more boisterous playing[201]. FiT recommend a minimum buffer zone for NEAPs of 30 meters (to the boundary of the nearest property) and, by contrast with the LEAPs, do not countenance the possibility of its reduction on high density sites. As can be seen from the (soon to be) agreed plans, the distance from the nearest property to the NEAP is only 4.5 meters. Here the buffer zone is actually a footpath, which lies a mere 0.8m from the nearest property.

(3) 'Up the Vents'. The location of the climbing facilities under the inbound ramp is entirely inappropriate. As Allen explained in X, the proximity of the climbing walls to the carriageway and the limited and uneven floor

[200] XX(ME) 03.12.2009

[201] CD12/7, para 6.2.13 *"It is designed to provide a stimulating and challenging play experience that may include equipment and other features providing opportunities for balancing, rocking, climbing, overhead activity, sliding, swinging, jumping, crawling, rotating....."*

space are sufficient alone to render this a poor location for climbing. It is made even less attractive, however, by the fact that a number of the climbing walls would be air vents which would not only pump out 'used' air from ASDA, but also prevent the climbing wall from having a stable platform at the summit of the climb.

(4) **'Under the ramps'**. This area is in many ways a microcosm of the problems inherent in the appeal scheme. The Appellants only have to contend with the difficulties this location presents because of their decision (on unjustified economic, and not design, grounds) to retain the ramps. And they only have to locate open space in this area because of their approach to onsite open space provision which left them needing to squeeze as much open space as possible out of the residual land available. The result is an area of unmitigated compromise.

The visual fly-through, and many of the sketches in the DAS give a false impression of the space available under the ramps, particularly the lower outbound ramp. Comparisons are made with Westway, London, but the comparison itself is false. Westway is situated under the A40 Flyover which is far higher than even the higher inbound ramp.[202] In reality however, the almost agreed drawings demonstrate, the following: in the location of the 5 aside football pitch, the lower ramp – which would cover at least half of the pitch – is between 2.38m and 2.49m high; at the proposed site of the urban sports area, the lower ramps are between 2.49m and 2.59m high; and where the propose the Parkour area the

[202] As can be appreciated from the photograph on p121 of the DAS Vol II (CD2/7.3)

ramp is between 2.6m and 2.72m high. In each case the lack of head clearance would severely inhibit the proposed activity.

- **5-aside Football** - Allen explained in X that, according to the Architect's General metric handbook, the minimum indoor height for football is 6.7m. Outdoors a rebound wall of 1.2m is required together with netting or fencing up to 5m. None of this is achievable in the space provided by the Appellants. On a practical level, the dangers and limitations are obvious. Moreover, whilst Reid suggested that we should not be too concerned about the quality of the space because it was meant to be a 'kick about area', it is unclear why the future residents of the Marina should be subject to a 5 a side football pitch so compromised it is only suitable for informal 'kickabout'. Indeed, it is clear from correspondence with the Sussex Police that the Appellants had previously represented the 5 aside pitch as being a formal facility, which needed to be booked and for which a nominal charge was levied.[203]

- **Basketball** – Despite the DAS showing people playing basketball in this area with plenty of room to spare[204], a full size basketball net and backboard simply would not fit under the lower ramp. Reid's answer – to place it off centre under the higher ramp – would not only prevent a proper game

[203] CD2/7.2
[204] (CD2/7.1)DAS Vol I, p55

being played but also fails to overcome the inherent difficulty that basketball is a game where balls are regularly (and purposefully) thrown over a height of 2.5m

- **Parkour** – The limited size of the area proposed, and particularly the lack of head clearance is inimical to 'free-running and jumping' philosophy of Parkour.

SPG9 specifies that *"all outdoor recreational areas should be on land suitable for the purpose....and appropriately located"*[205]. The open spaces under the ramp fail in both regards.

(5) LAPS. The Sea Wall and Quayside LAPS are also inappropriate due to their location. According to FiT, LAPs should be *"a doorstep play area by any other name"* and should be designed *"to allow for ease of informal observation."*[206] Neither the Sea Wall nor the Quayside LAP satisfies these criteria. In fact Reid agreed in XX[207] that the Sea Wall and Quayside LAP would be a destinations and would require parents to accompany children. Situated on roofs at the Marina, there would obviously need to be attenuation from wind and the position about this is unclear from the two Breeze reports. In the first[208] he had not tested these areas, but thought that, with mitigation they would be acceptable.

205 CD8/7, p5
206 CD12/1/7, para 6.2.1
207 XX(MW) 03.12.2009
208 Gavin Appx 13 para 6.13.3

In the second,[209] he had tested and pronounced them *"tolerable"* and *"acceptable"*, for *"the average person"* but gave no details about mitigation assumptions.

3.20. The Appellants have placed great emphasis on the fact that Sport England ("SE") have not maintained their original objection to the scheme. However, correspondence between the Appellants and SE, which was revealed to the Inquiry during Allen's XX casts considerable doubt over whether SE's decision to withdraw their original objections was made on a fully informed basis. In their original response[210], SE indicated a particular concern with the under ramp area and on that basis felt unable to support the application. In order to overcome their concerns, the Appellants wrote to SE setting out their rationale for locating 'the sports area' under the ramps.[211] This included an appendix which purported to show proposed sports facilities under the ramp. [212] The sketched images show an apparently full sized basketball court and five-a-side pitch, while the accompanying text suggests that the pitches are to be used in a variety of ways, which include "*formal events and competitions"*. We now know – in the light of Reid's own evidence – that this is an idealised view of what is actually proposed. Of more concern, however, is the fact that these sketches give a false impression of the height of the ramps; an impression which is not

[209] Gavin Rebuttal, Appx 2, p.6, 7, 8, 12, 18, 32
[210] CD12/13
[211] *Ibid.*
[212] *Ibid.* Appendix 3

corrected in the text and is compounded by the direct comparison made to Westway. It is true that, as KL pointed out through Allen, SE had access to the DAS. However the DAS would not necessarily have redressed any misconceptions established by the written correspondence because, as already observed, it gives a false impression of the height of the ramps.[213]

3.21. The supporting text to LP policy HO6 indicates that *"[i]t is imperative that provision is taken into account at the initial design stages of a scheme so that it is suitable. ie appropriately located, accessed,....adequately buffered and designed"*. The appeal scheme, having failed to heed this imperative, fails to provide 'suitable' onsite open space provision in each of these respects..

3.22. Even assuming that all the proposed on site areas are regarded as suitable and appropriate, there remains more than a 90% shortfall in provision measured in terms of H06/d.SPG9.[214]

3.23. Applying the methodology of d.SPG9, that shortfall translates into a sum of some £1.8m.[215] Initially the Appellants offered £745,000 or £845,000[216] (including £100,000 for a sports co-ordinator). Faced with objections from Sport England ("SE") the figure was increased by the

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213 CD2/7.1, p193- 195. The pictures on p194-195 are particularly misleading/idealised. CD2/7.3, p55. The sketched diagrams give a false impression of height of the lower ramps.

214 Reid (Gavin) XX (ME)

215 Goodwin Appx G (2) and (3), the mathematics of which were agreed by Reid (Gavin): 2 bases – with all LAPs and with all but Sea Wall and Quayside LAPs.

216 There was a discrepancy in paperwork which neither Reid nor LPA can explain, but it is academic in view of the later offer: Reid (Gavin) XX (ME).

Appellants at the end of October 2008 to £1.04m, whereupon SE withdrew their resistance. This process was described by Reid as *"brinkmanship"*.[217] He readily agreed that brinkmanship is not one of the policy tests for planning obligations set out in Annex B to Circular 05/2005.[218] When asked where in the evidence, there was any transparent assessment of this offer relative to needs and/or existing capacity, he was unable to point to anything other than the District Valuer's ("DV") report. That answer is, of course, a reference to the ubiquitous viability argument, which is fully considered at Section ...

3.24. There was also much reference to "discussion/consultation" with Leisure officers, who had pointed the Appellants in the direction of a range of projects within a 3km radius of the Marina.[219] What Reid was unable to explain (because he was not party to the formulation of the offer) or rationalise, however, was how the cut off points were decided. On Marine Parade, why just lights, and why only 13 of them? At Manor Road Gym, why not fund the court fully, instead of leaving provision dependent on the uncertainty of a Lottery bid? East Brighton Park, is relied on, at least in part, as a (relatively) close NEAP, but no contribution is proposed to upgrade that facility despite evidence of its poor state.[220] The connection between spending £120,000 at Rottingdean and HO6 requirements of the development is not entirely clear, nor is the cut off for proposed expenditure at City College

217 XX (ME)
218 CD6/3
219 Summarised in Goodwin Appx H.
220 Goodwin Appx H

explained where more money could secure better facilities of use to potential residents of the Scheme. The proposed *"endowment"* of £200,000 for the sports co-ordinator is not translated into a practical explanation of how many years' worth of enabling this sum would buy; Reid suggested[221] that it might represent about 6 years' salary, but he could not say. What is to happen when the money is all spent?

3.25. Overall, therefore, the departure from the well known d.SPG9 quantification/funding methodology is unjustified. The Appellants have failed to demonstrate that the HO6 objectives of meeting the outdoor recreation requirements of future residents on and/or off site would be met. This is a serious omission, because, in the words of PAN04, *"There is only so much development the Marina can take to meet the open space requirements of residents and visitors"*.[222]

Education

3.26. L.Plan Policy HO21 provides that developers of residential and mixed use schemes should *"demonstrate that a suitable range of community facilities will be provided to meet the realistic, assessed needs of residents, consistent with the scale and nature of the development"*. This policy is clearly consistent with Circular 05/05 Planning Obligations, and clearly applies to educational provision. Whilst it would be better if the Council's proposed SPD on developer

221 Insp X

222 CD8.12, para 8.4

contributions had been finalised, the fact that it has not, does not detract from the principle enshrined in the development plan.

3.27. The Appellants' offer is included within the unilateral undertaking ("UU"); it is not the product of a bilateral agreement with the LPA. Spry confirmed that the sum, £594,000, had not been calculated by reference to the Council's formula, nor the recent revised ES. In fact, the ES Chapter, which puts forward various arguments for departing from the Council's child yield assumptions, produces a much higher contribution figure than that sought by the Authority: £2,235,670 as against £1,549,389. The debate about the assumptions in the ES therefore had an air of unreality, since they have nothing to do with the formulation of the Appellants' offer. Spry made it clear that this was based upon *"a negotiation"* with officers and, essentially, boiled down to perceived parity with Brunswick.[223] Under XX, he had difficulty in justifying his client's offer in terms of the Circular test because the only basis for it was Brunswick. Whilst generally willing to answer questions under RX he flinched at test (ii) – Necessary to make the development acceptable in planning terms – until a wider, easier question was put, eliciting the answer that refusal of permission was not justified. Questioned further about the Brunswick basis by the Inspector, Spry was unable to help very much because he had not been involved in the negotiation. Brunswick, it should be remembered, was a separate scheme which was granted permission in 2006 and about which Spry only had the barest details – like the inquiry.

[223] XX (ME)

3.28. The UU figures was said to represent two new primary classrooms, but no costings were produced in evidence and information from a recent Cabinet report indicated that the reality might well be a great deal less.[224]

3.29. It was agreed that there is existing capacity in some primary and secondary schools, but the position relating to the life of the development is not certain. The same Cabinet report notes that by 2011, 135 further primary places will be required and that there is *"an immediate and ongoing need for additional school places in the city as a whole"*.[225] The fact that the immediate need is most acute in Hove does not detract from the generality of the point, as Goodwin made clear in XX.

3.30. The Council's request is logical because it could fund the provision of classrooms to serve all the children in the scheme as they move through their primary school. One – or even two – classrooms, as mentioned in the UU, to be useful, would need to be complemented by a much greater investment to ensure real expanded capacity.

4. THE SIZE AND QUALITY OF LIVING CONDITIONS FOR OCCUPIERS OF THE CLIFF SITE

[224] Gavin Rebuttal Appx 7, Appx 2.

[225] Op cit para 1.1

4.1. There are a number of factors which affect certain dwellings in the Cliff Site which would have a deleterious effect on living conditions for future residents. Those factors are: dwellings being of an inadequate size; receiving insufficient daylight and/or sunlight; and enjoying only single aspect views. A number of the dwellings suffer from two or more of these 'afflictions'. Moreover, the fact that the Appellant has failed to provide the appropriate quality and quantity of onsite open space will also have direct bearing on the living conditions of future residents which should be borne in mind when judging the adequacy of accommodation overall. Bean seemed unable or unwilling to recognise in XX that there might be connections between these points, basing his case on viability and standards.

4.2. The City Council produced a Housing Brief for the Marina which specified minimum sizes for AH units. 220 (43%) of the 520 units proposed fall below these minima. The City's minima are closely modelled on English Partnerships ("EP") size standards. Whilst only applicable to EP projects, they demonstrate the reasonableness of what was sought. As Goodwin pointed out, EP projects, by definition, tend to involve regeneration of difficult sites. It is accepted that the HCA size minima are met and that their Housing Quality Indicators are met (for the categories tested). Powell[226] explored with Bean the practical implications of the small sizes proposed. Open plan lounge/kitchens have their advantages but are not well suited to family

[226] Who XX'd Bean before ME

life. 46m^2 in a 1 bed flat (which may of course be occupied by two people) is very small, especially when combined with poor outlook and light, site specific and design points which were not tested under the relevant HQI indicators by Churchill Hui. To all these XX points, Bean had one answer: *"standards"*. At application stage, the reason given for not complying with the Housing Brief was viability.[227] Neither of these answers grapples with the practical implications of living in these small flats in this location.

4.3. Whilst an agreed statement has been presented on the daylighting matter[228], a number of concerns on behalf of the Council remain which need to be considered when coming to a full view as to what life would be like for residents of the Cliff Block. First, the Appellants have, for curious and circular reasons (lower standard applied because the rooms are 'habitable'), applied a lower than recommended standard to the combined kitchen/living room areas.[229] Second, in order to achieve even that standard, the Appellants have had to factor in certain interior assumptions such as light coloured interior finishes over which they will have no control. Finally, the applicable British Standard specifies three separate tests which should be applied to determine the acceptability of daylighting.[230] The Appellant has applied just one and, despite numerous attempts by Roake to elicit a rationale for this omission, the

227 CD3/1.1 Committee Report, p.99
228 CD12/35
229 CD12/35; Agreed Statement para 2
230 *Ibid*; Agreed Statement para 5

only response forthcoming – and the one found in the Agreed Statement – is that *"the Appellant has not considered it necessary."*

4.4. Clearly lack of daylight in dwellings can have an adverse effect on living conditions, especially when combined with other unsatisfactory elements such as having a single aspect and small units. There is no daylight/sunlight objection as such, but the Council's concerns with regard to daylighting will have to be considered 'in the round' by the Inspector when making a practical judgment on the acceptability or otherwise of living conditions..

4.5. The preponderance of single-aspect dwellings in the Cliff Site is also of concern to the Council, especially when the view consists of vehicular ramps or a sheer cliff face in close proximity. Those opposite the cliff would, additionally, receive no direct sunlight at any time of the year[231]. Whilst Littlefair attempts to justify this by reference to both a twenty-nine year old draft British Standard, and a thirty-three year old research article - from which he quotes selectively[232] - the reality is that an unlit, single aspect dwelling with a view of a 30 metre high cliff, 40 meters away is unattractive and, especially when combined with little indoor and outdoor space, fails to achieve the quality of design sought by the L Plan, let alone Coleman's claimed extremely high quality.

4.6. The impact of these compromised living conditions would be felt disproportionately by residents of the affordable housing ('AH'). This is

[231] BHCC/AR1.2, para 4.3.
[232] X(ME) Goodwin 10.11.2009

due to the fact that all of the AH provision is to be allocated to the Cliff Site. Despite this concentration in 1 of 5 potential sites, Bean was insistent that it was all allocated on an 'integrated basis'. However, of the eight reasons given in the Housing Statement[233], he acknowledged that two were viability arguments[234], three were based on anecdotal evidence[235] or evidence not put before the Inquiry[236], and one was no longer of relevance.[237] A further justification was premised on an attempt to avoid compliance with Code for Sustainable Homes Level 4[238], another matter which was overtaken by events. The final argument is an evasion: it is claimed, in short, that because Brunswick and the Brighton International Arena may provide other AH at the western end of the Marina, there is no need for the Appellants to worry about integrating AH in their own development.

4.7. The location of the AH within the Cliff site also casts doubt on whether the Appellants took a truly integrated approach to disposition. Despite Bean's protestations that the scheme is tenure blind, it is undeniably the case that the AH units suffer from the worst constraints of the Cliff Building. Each of the dwellings on the southern elevation, on each of the 8 levels, is a social rented home. It is thus only residents of AH dwellings that 'enjoy' views - in most cases single aspect views - of the

[233] CD2/12
[234] Reasons 1 and 3. See section 6.
[235] Reason 6 "*Many local authorities have abandoned pepper potting in favour of tenure blind developments"* and Reason 7 *"...there is anecdotal evidence that pepperpotting may have an adverse effect on the lives of some tenants..."*
[236] Reason 5: The suggestion that the RSLs have considered the distribution of affordable housing and approve because it assists them *"in providing better services, better affordability and cost in use for tenants..."*
[237] Reason 2: The desire to secure the NAHP bid for 2008-20011 and Reason 4
[238] Reason 4.

vehicular ramps. Residents of the southern elevation, that is AH residents, are also located furthest away from the Cliff Park and have no ready access to the LAPS within the Cliff Site courtyards.[239]

5. HOUSING

5.1. All are agreed that the Marina presents great opportunities. It is therefore important to make full use of those opportunities for major development to achieve national, regional and local policy objectives for making improvements. Brighton Marina redevelopment is an engine for change, not only in the physical environment, but also in the functioning of the Marina as a sustainable mixed community.[240] The meeting of housing needs should be assessed in this context. In the words of the Regional Spatial Strategy ("RSS"), it is *"more than just a numbers game".*[241] Brighton Marina does not currently exhibit the characteristics of a cohesive, mixed, sustainable residential community as envisaged by PPS3:

> *"a variety of housing, particularly with regard to tenure and price and a mix of different households, for example families with children, single person households and older people"*.[242]

[239] Indeed, it is unclear whether they will have access at all. Although the question was asked a number of times, none of the witnesses were able to give a clear answer as to who would be allowed access to these courtyards or on what basis. Even if residents are able to access the courtyards – which in itself raises fresh questions of capacity – they would have to cross the cascading street in order to do so, defeating the purpose of a LAP.

[240] See PPS3 (CD4/2), para 9, 13 and Spry XX (ME)

[241] CD7/1, para 7.12

[242] XX (ME)

5.2. There is, at present, no affordable housing ("AH") at all, and a preponderance of non *"family accommodation"*.[243] Spry and Bean seemed reluctant to accept this analysis, but neither of them had undertaken his own survey or assessment.[244]

5.3. Looking more widely, at the City overall, the Housing Needs Survey ("HNS"); within an overall recommended target of 45% for AH, suggests a split of 25% Social Rented ("SR") to 20% other – effectively, in current parlance *"Intermediate/shared ownership"* ("SO"). This equates to 55% SR: 44.5% SO, expressed as a total.[245] The emerging Core Strategy ("CS") proposes a *"required"* tenure split in the proportions 55% SR to 45% intermediate, guided, in the case of individual development sites by up to date assessments of local housing need and site/neighbourhood characteristics. Whilst the HNS is now somewhat dated (2005), PAN04 was approved in March 2008 and, as well as dealing with existing and proposed housing mix as noted above, states:

> *"A mix of unit sizes ranging from 1, 2, 3 and 4 plus bed properties will be expected within major developments in order to help create a genuinely mixed community."*

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243 CD8/12 (CD8/12), p.38. *"Housing and Social Infrastructure"*. See also CD9/12, Brighton and Hove Urban Characterisation Study (January 2009) p.28, *"Socio-economic characteristics. The accommodation and tenure within the neighbourhood is restricted to privately owned detached and semi-detached homes along the cliff top, and privately owned or rented apartment blocks in the Marina. This is reflected in the narrow range of demographic types attracted to the area.*

244 XX (ME)

245 CD9/2, p.13

5.4. Reference is then made to an update of the HNS and the Strategic Housing Market Assessment ("SHMA"). The text continues:

> *"Varied tenures will also be encouraged in accordance with the results of the HNS, as well as a greater proportion of social rented to shared ownership in the affordable housing element"*.[246]
>
> (emphasis added)

5.5. The site specific Housing brief prepared by the Housing Authority reflects that preferred AH tenure split seeking approximately 60% SR:40% Intermediate.[247] It is clear from the Appellants' Housing Statement that the suggestion to Goodwin in XX that this document was not a material consideration is new. They were keen to rely on it, subject to the usual caveat about viability.[248] Reference was also made in the Housing Statement and in evidence to the Brunswick tenure split, which like the Appellants' offer, favours SO over SR. As noted elsewhere in these submissions[249] the particular circumstances of that scheme's viability are not in evidence, but failure there to achieve the desired split simply strengthens the need to make use of the opportunity offered by the Appeal Site now.

5.6. PPS3 directs us to the RSS for regional guidance as to achieving a good mix in housing development and AH tenure split is now addressed in this most up to date part of the development plan. Policy H3 sets out a regional target of 35% AH overall, split as to 25% SR:

246 CD8/12, para 13.3
247 Goodwin Appx C
248 CD2/12, 1st page of text, 2nd page of text, 4th and 5th paragraphs.
249 Section 6

10% intermediate (i.e. 71%:29% expressed as a total percentage). Paragraph (ii) also provides:

> *"Where indicative targets for sub-regions are set out in the relevant sections of this RSS, these should take precedence over the regional target."*[250]

5.7. Sub regional policy SCT6 gives a general guideline to the effect that 40% of new housing should be AH, but is silent on tenure split. Therefore, as Bean agreed (subject to the usual viability caveat) the H3 proportions (71% SR: 29% intermediate) apply.[251]

5.8. To confine consideration of the question of meeting needs to overall numbers is, therefore, to over simplify. The RSS recognises as much; it looks for a greater subtlety of response which reflects *"the range of types, sizes and tenures both needed and in demand"*.[252] Therefore the general target for housing delivery must be read alongside strategic and local policy objectives for the creation of mixed and sustainable communities; how one meets the target is seen as an important *"output"* of the planning system. As Spry said, obviously the numbers are important too but the Appeal proposal would not start to produce housing until 2014 at the earliest, and Phase 1 (Cliff Building) would take some 3½ years to build. It is agreed that contribution to the 5 years' supply would at best be minimal.[253] Policy H4 specifically

250 CD7/1, pp 58-59
251 XX (ME)
252 CD7/1, para 7.12
253 Spry XX (ME), X (Insp)

enjoins local authorities to identify the likely profile of household types requiring market housing and the size and type of AH required. Supporting text *"Type and Size of New Housing"* (not just AH) observes:

> *"Although much has been made in recent years of the trend towards smaller households ... it is by no means the case that only small dwellings, such as one or two-bedroom houses and flats, will be needed in the future. An adequate range of larger properties, suitable for family occupation, will also be required – and with suitable attention to design and layout these can be provided at higher densities than hitherto."*[254]

5.9. In this respect, RSS echoes PPS3, which advises that developers of market housing should reflect demand and the profile of those requiring accommodation and that LPAs should *"ensure"* the achievement of a mix of households.[255]

5.10. The Appellants' market evidence in this regard consists of a short letter (not a reasoned report, let alone a witness) from agents who were asked, in the context of the appeal in October 2009, to comment on the scheme that was put to them. Spry was unable to expand on their instructions – it had *"not been his idea to get the letter"*.[256] Whilst Spry claimed that the mix of unit sizes proposed would be attractive to the people whom PAN04 aims to attract to the Marina (younger, permanently resident occupiers with families), the agents letter is quite

254 CD7/1, para 7.19
255 CD.4/2 paras 23-24
256 XX (ME)

clear about the market thrust of the Scheme: *"first time buyers, those relocating within the area from existing flatted developments or couples seeking to move down (empty nesters) thereby releasing a family home onto the market."*[257] Whilst Spry claimed that *"empty nesters"* coming to the Marina would help to stem the loss of larger family properties noted in the SHMA,[258] he could not point to any evidence to ensure that this would be so, either in the AH or market sectors. Unlike, for example, the scheme at King's Cross Triangle, there is no particular intermediate housing package aimed at teasing long established under occupying tenants out of their SR family properties. Nor is there any guarantee that providing one and two bed flats at the Marina would:

(a) attract owner occupiers away from 3+ bed family dwellings elsewhere in Brighton; or, if it did, that

(b) such properties would not be redeveloped/subdivided, especially given the supportive policy stance in RSS Policy H6.

5.11. Spry agreed that, as a matter of logic, providing more 3 (or larger) bed properties would increase opportunities for families to live at the Marina; whilst it is true, as he said, that a small family can live in a 2 bed flat, this would clearly not be *"the perceived main buyer profile"*, in the words of the agents, Lampons. (As an aside, it is interesting to

257 Spry Rebuttal, Appx 1

258 CD9/5 para 6.28

note the picture which Gavin/Spry paints of the new community, in the context of arguing for a lower than City average child yield for the purposes of the education contribution: *"the reality of the marina and its regeneration, which is allocation likely to have a lower proportion of dwelling units occupied by families with school age children* ... '*empty nesters' may downsize but still seek generous accommodation ... no grounds for believing current occupation patterns in the marina will be different from the past*.[259] Of course, if provision simply follows the market rather than planning objectives for change, then Gavin's self fulfilling prophecy might prove to be justified rather than the vision of PPS3/PAN04 realised).

5.12. There is, in fact, no policy rationale either for the overall number of 1300 units, nor for the proposed tenure split, nor for the proposed mix of sizes. As to the overall number the Strategic Housing Land Availability Assessment ("SHLAA") 2008 identified the site for 1000 units. The latest version of the CS and 2009 SHLAA reduces that to 650. Spry agreed that judging the right level of provision here involves questions of site capacity, having regard to its physical characteristics and context, such matters being important elements recognised by PPS3 and RSS. If the site cannot accommodate more than 1000 consistently with Policy and other material constraints, then that fact would amount to a local circumstance in principle capable of justifying reliance on windfall in the emerging CS.

[259] Gavin Rebuttal paras 2.58, 2.59, 2.65 and Spry XX (ME)

5.13. All three elements have, throughout the process, been justified on the basis of viability. This argument will been considered in the round.[260] Specifically with regard to tenure, however, the history is interesting. It will be remembered that Bean referred extensively to viability when dealing with questions of policy and principle, but was unable to answer questions on the details of Explore's contact or the DV's appraisal.[261] The position is, however, clear from the documents.

5.14. When discussions over AH commenced in May 2006, the contract price was £34m.[262] In December 2006, Explore proposed 35% SR:65% Intermediate and *"agreed to take on board as many of the issues raised ... subject to financial viability in preparation of formal proposals"*.[263] On 13th September 2007 the minimum contract price was reduced from £34m to £20m.[264] The planning application was submitted 4 days later with the split at 40% SR:60% Intermediate, a slight improvement though still not in line with PAN04 or the Housing Brief.

5.15. Meanwhile, negotiations had been underway with RSLs and sometime after the application a local authority partner RSL made an offer which resulted in a proposed 50:50 split. In the *"Housing Statement as at*

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260 Section 7

261 Curiously, he referred to Dennis' *"negotiations" with the DV, then thought that he had said the wrong thing and change it to* "discussions". Given that the exercise was intended as an independent appraisal, the concept of *"negotiations"* is surprising, but the word is used by the DV himself in the first paragraph of section 15 of his report.

262 Gavin Rebuttal Appx 3, para 3.20. NB. also the AH assumption of 28% in the brief of similar date; see below para 6.28

263 Housing Statement CD 2/12. 3rd page of text, 2nd para.

264 Gavin Rebuttal Appx 3, para 3.21

September 2008 for Explore Living" complied by Briscoe of CBRE,[265] it was stated on the Company's behalf:

> *"Since the original AH statement was submitted (September 2007), Explore Living has received written confirmation from the Council's Preferred Partner RSL that it will match the non-partner RSL's financial offer and tenure split at 50% SR and 50% SO Homebuy, subject to grant confirmation ... Explore Living is happy to proceed to contract with the Partner RSL ..."*

5.16. Discussions with housing officers continued without resolution and the DV was instructed in January/February 2008. In June 2008, the planning application was amended, with the result that the housing officers, Bean agreed, were happier. A meeting was held in July between Bean, Dennis and the DV. This was the only such meeting which Bean attended. The DV's report, is dated as at 17th July 2008.

5.17. In September 2008, the planning application was amended again, for the last time, back to the proportions first discussed against the background of a £34m contract price: 35% SR/65% Intermediate. In chief, Bean seemed to suggest that the revised split came about because *"he"* (the DV or Dennis) *"felt the scheme had to be changed to remain viable"*. Under XX, Bean attributed this change to the increase to Code for Sustainable Homes ("CSH") Level 4 and BREEAM Excellent, but, notwithstanding the fact that he had not heard of that development until July 2008, the documentary evidence is clear.

[265] Who was not a member of the Appellants extensive Inquiry team, apparently on grounds of economy: Bean XX (ME)

PAN04 (adopted March 2008) *"expects"* residential units to achieve a minimum rating of Level 4 CSH and BREEAM Excellent is expected for non residential development.[266] The Council's letter of 10th March 2008 is in the same terms. The DAS Vol 1 (June 2008), responding to the PAN, refers the reader to the Planning Statement and Chapter 14 of the Environmental Statement ("ES"). The June 2008 Planning Statement is not in evidence, but the ES (June 2008) stated:

> *"Explore Living are committed to achieving: a rating of at least Code Level 3 under CSH (<u>with Level 4 achieved in the 5</u> key areas of energy; water use, surface water run-off, materials and waste) a rating of 'Very Good' BREEAM for Retail, with an aspiration to achieve an 'Excellent' rating. A preliminary CSH assessment has already been undertaken, with a provision score achieving CSH 4..."*[267]

5.18. In the September 2008 Planning Statement, the position appears to be unchanged and there was no amendment to the ES:

> *"(xi) High environmental standards have been incorporated throughout the Proposed Development with 'Very Good' BREEAM ratings throughout the retail parts of the scheme.*
>
> *(xii) The CSH Level 4 will be achieved for the five Primary Categories of the Code (energy efficiency, CO_2 emissions, water, materials, surface water run-off and waste) with a minimum scope of Level '3' on the balance."*[268]

266 CD8/12 para 17.3
267 CD 2/10.1 ES Vol.1 Technical Studies, Part 21 paras 2.178 ff
268 CD2/11 para 5.82

5.19. The further materials put in by the Appellant after XX of Bean all postdate the meeting with the DV, so are irrelevant to the issue of why Explore made the June 50:50 amendment and then resiled from it. In Insp, X, Bean clarified that the change from 50:50 to 65:35 *"was suggested by the developer and accepted by the DV,"* although he was *"not totally clear about the change"*. The evidential position, then, is that, despite having made an amendment to the planning application in June 2008 - plainly in the knowledge of the Council's CSH/BREEAM expectations and seeking to address them - following *"negotiations"* between himself and the DV, Dennis decided to change the proportions. He has not explained why he changed his mind in the period between June and September, it was not because of CSH/BREEAM, because the position in the September revision remained exactly as it had been in June. Since so much stress has been placed on *"viability"* in connection with tenure split, but also dwelling mix, unit size, distribution, height and form of Marina Point and open space, this is a telling and highly material gap in the Appellant's case.

5.20. To conclude, whilst the Appeal Scheme would provide housing, it would not fully or even adequately achieve the objectives of national, regional or local policy for building sustainable mixed communities. The SHMA, to which Spry referred a great deal, notes the need for prioritisation in terms of the type of AH secured. The authors continue that this *"may mean securing social rented accommodation first since*

the vast majority of households who have been identified as in housing need require SR accommodation".[269] Elsewhere, having summarised their findings on mix of households and dwellings within the housing market, they suggest *"that it is ... only possible (and appropriate) for the City Council to address serious imbalances in the dwelling stock through influencing the provision of <u>new development</u>"*.[270] (Emphasis added). In other words, the *"blunt instrument"* approach, not tailored to needs but seeking the easiest return, is not in the public interest. The summary in this section of the SHMA repays careful study, especially as it is the most recent independent study of the topic. Whilst the overall number of those seeking 2 bed AH dwellings is higher than those in need of larger units, there is pressure on all sizes of AH dwellings, including larger ones, partly because of lower turnover of larger homes. Given that the greatest pressure is on larger (4 bed plus) AH dwellings, DTZ suggest that the Council might wish to *"prioritise"* their provision through new development.[271] The findings repeatedly note the preponderance of small dwelling completions in the City over recent years, the resulting imbalance and implications for larger dwellings and loss of families from Brighton. Given the significance of the Marina, failing to make the most of these opportunities for no clearly demonstrated reason would be wrong.

6. <u>VIABILITY</u>

269 CD9/5 paras 11.37 - 38
270 Op cit para 11.76
271 OP Cit paras 10.55 - 6

6.1. Viability is relevant in this appeal because the Appellants have invoked it at almost every turn. As Bean (the only Explore Living witness called) was keen to point out,[272] their consideration of all matters relating to housing tenure, mix, disposition and size of units was predicated on the Company's assessment of viability.[273] That concept gleamed like a golden thread running through the entire tapestry of the Appellants' case, thrown into relief at the most fundamental parts. It surfaced in Allies' evidence when explaining early *"Exploration and Testing"* leading to *"The Need to build tall"*[274]*.* The DAS seeking, to explain why the ramps were to be kept, claimed (amongst other arguments) that removal *"would render any development unviable*." Reid, when asked to identify whether there was any reasoned justification in evidence for the sum of money chosen by the Appellants by way of off-site open space payment, initially said *"No"*, but characteristically, and on this occasion revealingly, qualified his answer by referring to the DV's report and viability.[275] Even more basically, he describes the process of allocating areas for built development and open space as *"a fundamental point of overall site viability. You need to achieve critical mass"*. The Housing Statement (CD2/12) amply bore witness to the fact that Bean's concern with viability was not new.[276]

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272 When questioned about matters of policy and principle set out in development plan and national policy, he qualified every answer by reference to commercial viability: XX(ME).

273 Allies Proof paras 7.2.2 -3 established a financial model ... how this quantum of accommodation might be contained within [missing of bottom] we were to achieve these higher densities were would need to explore if, and where, taller buildings could and should be introduced.

274 CD PAN 03 para 8.3

275 XX (ME)

276 Tenure Split – 3rd page of text, top paragraph: *"had significantly more intermediate units than social rented ("SR") 65%-35% to maintain financial viability"*. Same page, second paragraph: *"... agreed to take on board as many of the issues raised by the Council's housing team, subject to financial viability*

Although Coleman did not put the matter in this way in evidence, it is clear from English Heritage's final letter[277] that viability was advanced by the Appellants in discussions with them. It is also clear from the

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in preparing its final proposals". 4th page of text, top paragraph: *"Discussions with the DV resulted in the tenure split being revisited by Explore Living and in the interests of protecting financial viability – it is considered prudent to revert to the previous tenure split of – 65% shared ownership ("SO"), 35% SR.*
Pepper potting: 5th page of text: "*The reasons for pepper potting within the Cliff site only and not through the rest of the residential phases of the development are:*

- *In order to deliver the Council's expectation of 40% affordable housing and protect the overall financial viability of the project"*

Second bullet agreed by Bean in XX(ME) to have been overtaken by events.

- *"The affordable housing ("AH") makes a significant contribution to the overall financial viability of the regeneration. The cash flow inputs ... deliver a major financial positive to scheme viability ... to ensure overall financial viability ...*
- *RSL has confirmed that the dwellings will need to comply with the Code for Sustainable Homes ("CSH") Level 3 ... should significant elements ... of the AH be delayed to the later phases of the residential development, it is almost certain that even higher CSH expectations may need to be provided. This would further damage the financial viability of the regeneration and the cascade mechanism proposed would necessitate a change of tenure or even reduce the AH provision to protect financial viability."*

7th page of text, paragraph below table: *"The distinction of the ... housing ... does ... meet the Council's aspirations as far as is practical and financially viable ... protection of the regeneration's financial viability, which is intrinsically linked to income from market sale units"*. (Emphasis added)
(See generally XX (ME) as to the extent to which other factors prayed in aid in connection with pepper potting are still relevant, properly evidenced, (as opposed to anecdotal) and the claimed *"happiness"* (Bean X) of the Registered Social Landlord ("RSL"). In X, dealing with distribution, Bean said that he *"accepted that a lot of SR is in its own block, but this was necessary ... in order to ensure funding ... no-one would guarantee funding beyond 2015/16, as to how much grant would be available, therefore it was important to get the bid in as soon as possible"*).
Unit Sizes: 8th page of text, 3rd paragraph: *"The BHCC size guidelines are not policy, which, when coupled with the proposed AH's full compliance with the Housing Corporation's ("HC") required standards and the negative impact on the viability of the regeneration of the cost of providing an extra 5 sq.m per 1 bed unit, has led to the decision to supply more 1 bed apartments to accepted national regulatory standards than less apartments to the BHCC aspired standard. The open book appraisal will also demonstrate the negative effect on the financial viability of providing what could be considered as an unnecessary extra 5 sq.m."*
Cascade: 9th page of text, 4th full paragraph: *"... In order to protect the financial viability and ensure the scheme can be delivered, it is standard practice to agree a 'cascade mechanism' within the s.106 Agreement."*
Delivery: 11th page of text, penultimate paragraph: *"... the regeneration's financial viability has been thoroughly tested ... significantly greater probability that this scheme will be delivered..."* (emphasis added)

[277] 24.10.08, Coleman Apps pp 63-64: *"Recommendation ... There remains some adverse impact upon the experience of the West-East perambulation in front of the Kemp Town set piece terraces. These arise from the height, form and location of the Marina Point building and are not likely to be resolved without significant revision to this element. As a building of the type proposed is stated by the applicants to be essential to the viability of the project we recommend that you should satisfy yourselves that this is indeed the case..."* (emphasis added). That advice has not changed now that the Secretary of State occupies the position of decision maker.

Committee Report that officers in general terms, accepted the financial viability case that was put to them.[278]

6.2. Bearing all these matters in mind, the way in which viability has been dealt with evidentially at the Inquiry is surprising and unsatisfactory. At the Pre-Inquiry Meeting ("PIM"), the Inspector asked whether there was

[278] CD3/1.1: pp.98-99 Section 5 Residential Use – Amended Scheme:
"Due to the recent decline in the housing market the amended scheme now proposes a split of 35% social rent and 65% shared ownership. Although Housing Strategy's preference would be for a 50@50 split, the District Valuer's report confirms that the viability of the scheme has been affected by the current economic climate and that the split now proposed is required if it is to be viable. Therefore, in these circumstances and given that there is no policy requirement which sets out the exact split of social rented and share ownership and the fact that the scheme is still providing 40% affordable housing, the split is considered acceptable.

With regard to the concentration of affordable housing within the Cliff site, Housing Strategy has commented that a more even distribution would be preferred throughout the development, rather than concentrating it all in one block and in what are considered to be poorer locations (lower floors), overlooking the access ramp. The applicants have responded that this concentration is necessary to protect the overall financial viability of the regeneration. The cash flow inputs from the RSL during the early stages of the residential development deliver a major financial benefit to the scheme's viability, by keeping peak debt at manageable levels, thereby reducing development interest at a crucial stage to ensure overall financial viability for the scheme.

The applicant also argues that in terms of the management and maintenance of the affordable units, it is more cost efficient for the units to be in one location. Although Housing Strategy continues to have reservations concerning the poorer locations (lower floors), overlooking the access ramp of the affordable housing, it accepts the applicants' viability arguments in this instance for concentrating the affordable housing within the Cliff site.

Finally, Housing Strategy is also concerned that a significant number (212 out of 520 i.e. 41%) of the new affordable homes fall below the council's minimum unit size requirements required to achieve homes of a good standard, flexible and adaptable and fit for purpose (based on English Partnership's Quality Standards), although they acknowledge the size of the units would meet the minimum size under the Housing Corporation's standards. The applicants have acknowledged that of the 520 units being proposed 204 of the one bed units (39%) could be increased by an additional 5m2 to meet the City standards. However the cost of increasing each unit would be in the region of £11,500, which equates to approximately £2.3 million and as such a change, has a significant impact on costs and therefore viability. This is accepted by Housing Strategy.

In conclusion, it is accepted that in this instance the applicants are unable to distribute the affordable housing more evenly through the site, in order to protect the overall financial viability of the project. This is supported by the District Valuer's report. Similarly, increasing the unit sizes to meet the council's local standards would have serious implications for the viability of the scheme. It should be noted that the unit sizes would meet the minimum size under the Housing Corporation Standards and as such would secure funding. These matters have to be weighed up against the overall positive benefits of the scheme to the marina and city as a whole, in providing much needed housing and the regeneration of the marina. Therefore, on balance, the affordable housing element of the scheme is considered acceptable.

to be evidence on viability the point was made that it would be helpful to receive such material prior to submission of proofs. Nothing appeared, despite requests. Nothing appeared in the Appellants' proofs of evidence. Goodwin dealt with the matter as best as he could in his proof, which provoked a written statement from Dennis, exhibiting the DV's report (though not its associated appraisals), appended to Gavin's *"Rebuttal"*. Roake commented[279] and eventually agreement was reached on the mathematics of projections of costs and values[280] based on Savills and BCIS – the two sources referred to by Dennis.

6.3. The following points should be noted:

(1) Although the DV's Report is dated 27.10.08, the Valuation Date is 17.07.08.[281] There is no attempt in the report to project forward the assessment of viability.

(2) The DV was given the version of the Appellants' contract with X Leisure which contained the September 2007 amendments. This set a minimum land price of £20m odd.[282]

(3) Dennis believes that *"costs and revenues will, in overall terms, move in parallel and that the scheme's costs and revenues will*

279 Despite objections from KL that he was not qualified to do so. Such objections were misplaced: see Roake Proof , para 1.1 – 1.3 setting out his considerable practical experience as a director of an experienced development company, elaborated on in X and Insp X.

280 CD 13/2(b) and CD 12/25

281 Gavin Rebuttal Appx 3, paras 3.20-3.21 and 3.15

282 Para 2

return." Roake agrees with Dennis as to *"the market's gradual return to more robust conditions"*[283] – that is, as to revenues.

(4) After delivery of the DV's report to the Local Planning Authority ("LPA") on 11.12.08, (one day before the Planning Committee meeting), a further contract amendment was made which, in the words of Dennis *"made the £20m land payment both a minimum and a maximum requirement"*.[284] (Emphasis added). There is no reference to this change in circumstances in the Committee Report, though the passage reproduced above[285] refers to *"the recent decline in the housing market"* as the explanation for the 35% SR/65% SO split instead of 50%/50% proposed in the June 2008 amendment to the planning application.

6.4. It is clear, therefore, that the Appellants negotiated the final land price against the background of a market at rock bottom. Whereas the September 2007 contract which the DV assessed allowed the benefit of market improvements to accrue to X Leisure (the £20m was a minimum, but not a maximum payment), the December 2008 amendment achieved the opposite result. As the market improves, there is the potential for greater profit to accrue to the Appellants. Of course, it has not been possible to explore the implications of this contractual position with Explore Living because Dennis was not called

283 CD12/15: Dennis (snappily entitled) *"Note in response to Mr Roake's response to Mr Dennis' note on viability and deliverability"*.

284 Gavin Rebuttal, Appx 3, para 3.23.

285 See fn 277

and Bean, despite his frequent references to viability, was not versed in either the contractual position or the DV's report, as became clear in XX. The implications of this contractual situation, which was not apparent until rebuttal stage, are therefore unquantified, but should be borne in mind both in relation to the viability claims made to the inquiry and as new material considerations which have come to light since the preparation and presentation of the Committee Report. As noted above, the DV's report does not seek to engage with questions of viability at the point of implementation in a recovering market.

6.5. Goodwin and Roake undertook a quantified commentary, on the basis of the material available at respective stages. In the absence of any information from the Appellants[286] Goodwin identified[287] that there was, in his opinion, likely to have been scope for the Appellants to improve their contractual position; we now know that this opinion was right,[288] although the form which the renegotiation took differed from that illustrated in his proof. His evidence was that the difference between the September 2008 tenure split amendment (35:65) and the June 2008 one (50:50) was some £4m. Roake's recasting[289] of Dennis' viability table demonstrates that using the two published sources to which Dennis refers (in his Appendix to Gavin's Rebuttal) and projecting forward to implementation date produces a net additional profit to the Developer of some £9m, allowing for the reduction in value

286 See para 6.22 above
287 Proof paras 5.62-5.72
288 See previous para.
289 CD 13/2(b)

attributable to a 50:50 rather than 35:65 tenure split. This calculation is independent of the benefits accruing from the December 2008 contract variation referred to above.[290] Roake was made available for XX on his opinion, expressed in X, that *"values will follow values"* and *"costs will follow costs"* – that is, agreeing with Dennis' quoted expert sources Dennis simply responded in writing.[291] The general economic/statistical factors which he prays in aid to argue against the source which he chose to cite (BCIS) will, of course, have been allowed for by BCIS ("the accepted method of forecasting trends"[292]). The points which he makes about contingency, risk and delay – while unquantified and not subjected to scrutiny, would, of course, be counterbalanced by the hitherto unacknowledged contractual enhancement of December 2008.

6.6. When considering viability generally, it is useful to have regard to the background as revealed in Allies' evidence[293] and such parts of his brief as were disclosed.

6.7. As noted above, Allies stated in his proof that the REID work *"established a financial model which he needed to translate into a fully worked up design."* The REID *"Proposals Document: April 2005"* worked on the following bases:

290 Para 6.23, 6.24
291 CD 12/15 – the aforementioned Note of snappy name.
292 Gavin Rebuttal, Appx 3, Dennis' statement at para 3.35
293 Reid Architecture feasibility study, Allies Appx 2 and CD 13/16.

(i) that the built form should be limited to the height of the cliff on what is now known as the Cliff Site, in response to SPG20[294] (not a limitation acknowledged or entirely followed by Allies);

(ii) that it would nevertheless be possible to site 30m buildings next to the cliffs, including at points where their heights are well below 30m;[295]

(iii) the proposals retained the ramps and multi-storey car park.

6.8. In December 2005, the Appellants entered into a conditional contract for the land at a price of £34m.[296] Allies and Morrison were instructed shortly afterwards to design and obtain *"approval of a scheme of 1382"* in an undisclosed mix, with reprovision of Asda and McDonalds on the 5 sites considered by REID (more or less the same as those in the Appeal, minus the replacement petrol filling station site). One *"critical assumption in the financial model"* (undisclosed) was said to be *"the belief that the package of benefits the scheme will provide ... will allow us to reduce the policy prescription of 40% AH to 28% ... this will be achieved by viability calculations..."*.[297] The Brief, as Allies agreed, assumed that the ramps would remain.

6.9. The measure of flexibility was allowed in relation to the number of residential units, to permit adjustment up or down without detriment to

294 P.9
295 P.22 and SOCG Fig. App. 1.1
296 Gavin Rebuttal Appx 3, Dennis Note para 3.20
297 CD 13/16 paras 7.1.5, 7.1.7

the client's position. Without sight of the specifications, costs plan, mix and full purchase contracts appended to the document but not disclosed to the inquiry, however, it is difficult to understand how this flexibility related to Allies' clear perception, expressed in the proof, that the REID quantum of accommodation had to be accommodated on the site.[298] The number of units in the final version of the Appeal Scheme was 1301, but a reduction of 80 units is a small proportion of such a high figure. What is clear is that the Appellants did their sums, entered into their contract and instructed their team on the bases:

(a) that the ramps would remain; and

(b) that viability arguments would be used to reduce AH significantly from the 40% target set in the then newly adopted L.Plan Policy HO2.

6.10. No witness from the Appellant company has spoken to either of these elements. Frisby referred to an undisclosed structural engineer's report apparently costing removal of the ramps at £15m; I say *"apparently"* because he had not read the report, so could not answer the most basic questions in XX as to its contents,[299] but the suggestion was that this report had informed the decision to retain the ramps in their current form. He, Frisby, had not been asked to consider other access options since there was capacity in highways terms. Moreover, the engineer's

[298] Allies proof para 7.2.2.3

[299] XX(ME). Did the engineers cost full or partial removal? Was there any appraisal of the development opportunities which removal would open up? Had he seen any considered response to the report by his client?

report was not obtained until sometime after June 2007, well into the life of the project, about 3 months before submission of the planning application. Bean was unable to comment on the 28% assumption or any other viability issues, notwithstanding his repeated reliance on the concept. On the face of things, it is strange that a contract should be negotiated apparently with the intention of subsequently using viability as the reason for departing from an important development plan target. (Circular 05/05 makes the point that one of the reasons for including such targets is so that developers can take them into account when ? planning developments). At some stage it was evidently decided not to dispute overall quantum of AH and to transfer the argument to other matters, but the underlying oddity remains unexplained. In particular, although Dennis claims in his Note that by the date of the application Explore had negotiated down the land value as low as possible,[300] there is no evidence from X-Leisure to support this, even in written form. In any event, as noted above, he did negotiate a significant (and at that stage confidential) improvement one day before consideration of the application by Committee.

6.11. It may be that the Appellants will seek to rely on the King's Cross Triangle decision[301] to argue that all these submissions on viability are irrelevant. If so, the differences between the two cases need to be borne in mind. The appeal site in that case was a small part of the massive King's Cross regeneration site which, because of the quirks of

300 Gavin Rebuttal Appx 3, para 4.3 bullet 3.

301 Spry Appendices Appx 2 and 3

local government boundaries was dealt with by a different Local Planning Authority from the rest of the site. A s.106 agreement had been negotiated on the main site, and been subject to judicial consideration in the course of a failed judicial review challenge to the planning permission. The objecting LPA's case at the Inquiry solely concerned the AH offer, (quantum, tenure split and affordability/recycling provisions of intermediate AH); it raised no environmental, design or other objections of landuse principle. The developers had not submitted a viability appraisal under the Greater London Authority or other model in support of their proposed mix. The supporting LPA had commissioned an appraisal, but not based on an open book principle of the kind undertaken here by the DV. They called detailed evidence to justify quantum, tenure and the affordability/recycling provisions of their package. The Inspector concluded that it was right to view the Appeal Site as part of the larger project and that there was no need for further viability evidence, doubting whether more *"could be achieved for a development of the scale and complexity involved without compromising either commercial sensitivity or the independence of the analysis"*. He also found that there were socio-economic and housing reasons for providing more intermediate housing, having regard to the circumstances of the surrounding area. There was no suggestion that viability considerations were relevant to the noise/environmental suitability objections raised by third parties.[302]

[302] See Inspector's report ("IR") paras 4.1-4.2, 5.5, 6.14, 6.15, 6.17 – 6.22, 6.30, 6.31, 8.6, 12.12, 12.17,

6.12. The position here is very different. Explore Living have, throughout the process, including the inquiry, relied on viability to counter the many objections to the scheme, including those concerning adequacy of the proposed s.106 contributions to open space and even fundamental questions of design (ramps, intensity of development and form of Marina Point tower), as well as the details of the housing elements of the scheme. As has been explained, the tentacles of the viability argument extend to each of the RRs.

6.13. To the extent that reliance has been placed on the Brunswick s.106 obligation, in relation to housing, open space and education, two matters can conveniently be dealt with here. Firstly, the contrast with King's Cross highlights the fact that Brunswick and the Appeal Scheme are two separate projects, both in terms of design and delivery. The details of that project are not before this inquiry and there is no evidential basis for concluding that Brunswick's circumstances and development economics are the same. Therefore there is no evidential basis for concluding that it is unreasonable for the Appeal Scheme's contributions to be calculated differently; as the Appellants were keen to point out in relation to on an off-site social infrastructure contributions, in each case there will be a negotiation with judgments made scheme specifically.[303] Secondly, to the extent that design and social infrastructure objectives are compromised in the Appeal Scheme

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303 12.27. The Secretary of State agreed with the Inspector's recommendation and reasoning. See e.g. XX of Goodwin, Reid (X, XX (ME)), Bean (XX/ME) Spry (XX/ME).

(for example, removal of the ramps with attendant consequences for pedestrian movement, achievement of PAN04 objectives for AH tenure mix, and retention of visual permeability), the opportunities for addressing these matters through later development are eroded, because of diminishing supplies of developable land to generate value and due to the physical implications of new buildings fixing future layout options. To compromise now on the basis of an alleged viability argument would have long term ramifications in relation to achievement of the objectives of what KL referred to in Opening as the *"mature policy matrix"*.

7. S.106 Undertaking

7.1. Since the obligation is to be given unilaterally, the LPA, ultimately, are put in the position of having to accept what is offered. There are several elements with which it profoundly disagrees. Two of these – open space and education contributions – have been extensively debated in the context of the RRs. Other points of contention have come to light more recently. (Certain remaining matters to be dealt with orally).

7.2. There is also the overriding question of the interests to be bound. This question, too, has arisen since the original decision and it was not made clear to officers at that stage that it was proposed to exclude the two principal leaseholders, Asda and McDonalds. The Legal Officers' and Development Control Manager's position is quite clear and accords with established principle, that is, that these interests should be bound.

7.3. PINS' Note *"Checklist for Planning Obligations"* sets out as a *"Golden Rule"* that a s.106 obligation should be *"legally robust"*. It is also made clear (*"content and compliance with s.106"*) that all landowners of any affected land should be included. Plainly this means that all legal interests should be bound in a s.106 obligation and, of course, the ability to bind the land, as opposed to just parties to a contract, is one of the defining features of s.106 TCPA, which has enabled it to become an important vehicle for securing planning benefits and mitigation in the public interest. If there is a break in the chain of interests bound, then there is a lack of control by the LPA, and a falling short of what s.106 should achieve. The Council has explained in its note *"Outstanding Items for s.106"* the reasons why this result is unacceptable.

7.4. Such a gap in control inevitably brings the risk of a situation being engineered whereby the Asda and McDonald sites could be freed from the covenants. Even if the risk is small, the consequences are potentially extremely serious, given the range of important matters covered by the obligation. Clearly the stance of the Appellants at the inquiry is that the obligations are required to enable the development to go ahead. Not all the matters would be capable of recompense by means of an award of damages, and the Council's powers of direct enforcement would not apply in the case of any land which had been freed from the obligation. No reason has been given for seeking to foist this risk upon the LPA unilaterally. The position is similar to that which arose in an appeal last year at Bracknell in respect of the TRL

Site, Crowthorne. There, the Appellant was a (very) long leaseholder and was disinclined to bind the freeholder (the Department of Transport). Various covenants and conditions were offered similar to clause 4.7, but the Inspector considered it unreasonable to place the Council in the position of having to assume the risk, notwithstanding that it was so slight.

8. NATURE OF THE COUNCIL'S DECISION

8.1. Clearly a project of this magnitude has to be considered against a range of development plan and other policies. Some matters are not in dispute between the LPA and the Appellants. There is no quarrel with the proposed landuse or with the proposition that the site requires major development. We part company as to the form of that redevelopment. The Marina is a very important site within the City and the form and quality of its redevelopment matter. That is why the Council have devoted considerable time and energy to the production of site specific policy. It is recognised by the Council that the proposal would contribute to the achievement of certain policy objectives; the position with regard to general housing targets has been considered above, and plainly the proposals would bring certain economic benefits. This recognition, however, does not mean that the Appeal scheme is in accordance with the development plan or national policy overall. National, regional and local policy for housing, brownfield land and

economic growth do not derogate from the principles of good site planning, which are required by the development plan of all proposals.

8.2. The Secretary of State recently reaffirmed this requirement in RSS. Core Objective (i) seeks *"a sustainable balance between planning for economic, environmental and social benefits"*; this principle perhaps, guides how all the other numbered objectives are to be pursued, and they are not arranged hierarchically.[304] The Spatial Strategy of the Plan is developed, firstly by a chapter of Cross Cutting Policies. CC1 *"Sustainable Development"* enshrining the principle of Core Objective (i) and PPS1. Thus, *"sustainable development priorities"* include *"sustainable levels of resource use"* which ensures that *"the physical and natural environment of the South east is conserved and enhanced"* and *"socially inclusive"* communities based on *"equal opportunity"*.[305] Striking the sustainability balance was pre-eminently a question for the Council's elected members (as it is now, ultimately, a question for the elected Secretary of State). A further important Cross Cutting Policy is CC6, again, seeking a local shared vision which *"respects, and where appropriate enhances, the character and distinctiveness of settlement and landscapes"*, reflecting Core Objectives, particularly number (xv) which seeks protection and, where possible, enhancement of the historic, built and natural environment both for its own sake and to underpin social and economic development. This intertwining of policy objectives reveals the limitations of Gummer's approach to the case.

304 CD7/1, pp.15-16

305 Op cit, p.31

Reaching a true judgment on sustainability requires consideration of all factors, including the environmental objections to the scheme.

8.3. Predictably, the Appellants have relied heavily on the officer's report to Committee which recommended in favour of a grant of planning permission. Time and again, we have heard (particularly in RX) that some aspect was agreed in consultation with 'The Council'. Ultimately, all the matters in issue between the LPA and the Appellants in this case are ones of planning judgment. Even the social infrastructure contributions are put forward on this basis since the Appellants seek to depart from the Authority's practice in relation to open space and education contributions. The Council - that is, the democratically elected members - reached different judgments on these questions, as they are entitled to do. In fact, the planning officers were not the only professionals to express a view on several of the points at issue. As noted above, CABE were not persuaded that the design of the scheme overall was right. Their expressions of concern related to layout and functioning of the public realm, including parts of the recreational provision. EH left to the decision maker (then the Planning Committee) the judgment of whether the harm done by Marina Point to the Kemp Town composition was justified by financial necessity; they were clearly not convinced on design grounds. The local decision makers concluded that it was not (and that was in ignorance of the final contract variation which was not disclosed to them by the then applicants). Natural England, whilst they withdrew their objections, nevertheless opined that

the Cliff Building is too close to the Black Rock cliffs.[306] The manner in which the consultant team gave their evidence also amply supported members' judgments.

8.4. The process of clarifying and amplifying the RRs was criticised, though only in part. Of course, there was no complaint about the withdrawal of RR6 (flood measures) or aspects of the amenity objection. The revised RRs, drafted with help from the professional team but approved by members, were faithful to the objections expressed in the originals, but were intended to bring matters up to date in the light of publication of the South East Plan, and to clarify the points of objection.[307] The quality of the Council's evidence in the face of the most rigorous testing has demonstrated that members' concerns about this scheme were justified.

9. CONCLUSION

9.1. Like Henry Pulling, we have, for the last 7 weeks, been on a journey of discovery which has, at times, been bizarre.[308] but always interesting. He tells us that his curious aunt *"had first come to Brighton when she was quite a young woman, full of expectations which I am afraid were partly fulfilled"*. As Greene recognised, Brighton is a distinctive place, a unique blend of exquisite regency architecture, popular seaside entertainment, splendid natural scenery, and a defining and egalitarian sense of quirkiness. The Marina is influenced by all of this and, to be

306 Gavin Appx 9
307 Goodwin X, XX
308 The "gay pink ruler" and hologram frisson standing out as particularly memorable incidents

true to the City, its redevelopment will have to respect, respond to and reconcile these strands. Reconciliation, however, is not the same as compromise - and Brighton has never been a place of compromise. The democratically elected members recognised that this Appeal scheme is shot through with compromise. They may have struggled to express this realisation in professional planning terms, but their decision to reject the proposal has been vindicated by the thorough exploration which has been undertaken at the inquiry. Of course, there are benefits to be had from any form of major development at the Marina, and the LPA has recognised that regeneration is needed, but, as the Government itself says,[309] the consequences of development, for good, but also for ill, endure for a long time. The public price of the development proposed by the Appellants is damage to the unique setting of the Marina, unsatisfactory conditions for those who would come to live in the scheme, especially in the AH units, and under-provision of the social infrastructure on and off site required to make the scheme work properly in the long term. This is too high a price to pay for the regeneration advantages; it is not environmentally or socially 'viable'. Nor is such compromise true to Brighton. There is widespread agreement that a visit to the Marina is not, at present, all that it should be. The Appeal Scheme, which leaves in place so much of what has proved disappointing about the Marina - and fixes it there the more firmly – in Greene's phrase, only "partly fulfils" the important

309 World Class Places Spry Appx 1 para 1.1 Quality of place does not just matter for the here and now. The built environment, both good and bad, endures. Some 90% of existing developments will still be with us in 30 years' time. Decisions made today will have repercussions down the decades.

expectations of policy, the hopeful expectations of CABE and the legitimate expectations of residents, present and future. Accordingly, we respectfully submit that the Appeal should be dismissed.

MORAG ELLIS QC.

ROBERT WILLIAMS

16.xii.2009