

From: [REDACTED]@naturalengland.org.uk>
Sent: 24 September 2024 10:57
To: [REDACTED]
Subject: RE: Betteshanger

You don't often get email from [REDACTED]@naturalengland.org.uk. [Learn why this is important](#)

Hi [REDACTED] and [REDACTED]

I'm just wondering what the situation is with this proposal? Have the conditions been agreed? As time is limited it would be good to ensure that we are effective in establishing whether translocation at this site is feasible or not. The more seasons that can be included within a trial, the greater confidence that can be gained from the results.

Many Thanks
[REDACTED]

From: [REDACTED]
Sent: 11 March 2024 12:19
To: [REDACTED]@nexusplanning.co.uk>; [REDACTED]@dover.gov.uk>
Subject: RE: Betteshanger

Hi [REDACTED] that would be great, thank you! [REDACTED]

From: [REDACTED]@nexusplanning.co.uk>
Sent: Monday, March 11, 2024 10:55 AM
To: [REDACTED]@naturalengland.org.uk>; [REDACTED]@dover.gov.uk>
Subject: RE: Betteshanger

Hi [REDACTED]

We have yet to undertake the detailed drafting of conditions, but would be very happy to share those relevant with you (when available) to seek / ensure agreement

Thanks

[REDACTED]

[REDACTED]
Associate Director

M + [REDACTED]
E [REDACTED]@nexusplanning.co.uk





From: [REDACTED] <[\[REDACTED\]@naturalengland.org.uk](mailto:[REDACTED]@naturalengland.org.uk)>
Sent: Monday, March 11, 2024 10:34 AM
To: [REDACTED] <[\[REDACTED\]@doover.gov.uk](mailto:[REDACTED]@doover.gov.uk)>; [REDACTED] <[\[REDACTED\]@nexusplanning.co.uk](mailto:[REDACTED]@nexusplanning.co.uk)>
Subject: Betteshanger

Hi [REDACTED] and [REDACTED]
I saw that this has been approved. Are you able to share the condition relevant to our discussions.
Many Thanks
[REDACTED]

[REDACTED]
Manager – Species
Science Directorate | Chief Scientist Directorate | Natural England
Mobile: [REDACTED]

For Internal Natural England Customers:

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deth

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[REDACTED]

From: [REDACTED]@akdc.co.uk>
Sent: 24 September 2024 19:21
To: [REDACTED]
Cc: [REDACTED]
Subject: Re: [EXTERNAL] Re: Betteshanger Hotel S.106

Hi [REDACTED]

Yes, I can confirm that I'm happy for you to complete the agreements.

Many thanks

[REDACTED]

[REDACTED]

Email: [REDACTED]@akdc.co.uk
Tel: [REDACTED]

On Tue, 24 Sept 2024, 17:34 [REDACTED]@dover.gov.uk> wrote:

Hi both,

I can confirm that the deeds have been sealed by the Council. I would be grateful if you would please confirm that I may complete.

Kind regards

[REDACTED]



Principal Solicitor - Planning

Dover District Council
Council Offices, White Cliffs Business Park, Whitfield, Dover CT16 3PJ
Tel: [REDACTED]

Mob: [REDACTED]
Email: [REDACTED]@DOVER.GOV.UK
Web: <http://dover.gov.uk>

Please consider the Environment before printing this email

From: [REDACTED]@akdc.co.uk>
Sent: 23 September 2024 13:24
To: [REDACTED]@DOVER.GOV.UK>
Cc: [REDACTED]@knightsplc.com>
Subject: Re: [EXTERNAL] Re: Betteshanger Hotel S.106

Hi [REDACTED]

Please see attached the drawing (ending 100) which I will be substituting into the engrossment and updating the single reference in Schedule 6 as discussed.

I've also attached the earlier version which shows the same junction improvement scheme (no. 22-034-003) for ease of reference.

Many thanks

[REDACTED]

[REDACTED]

Email: [REDACTED]@akdc.co.uk
Tel: [REDACTED]



On Mon, 23 Sept 2024 at 13:02, [REDACTED]@akdc.co.uk> wrote:

Hi [REDACTED]

Thank you for the tracked changes and clean versions of the agreement.

I am happy with the changes and will arrange for the appended plans to be inserted and have the engrossment in triplicate executed by my clients (properly witnessed this time!).

I hope to have the agreements returned to DDC's offices tomorrow morning if possible.

Many thanks

[REDACTED]

[REDACTED]

Email: [REDACTED]@akdc.co.uk

Tel: [REDACTED]



On Mon, 23 Sept 2024 at 12:34, [REDACTED]@dover.gov.uk> wrote:

Hi both,

Please find attached a tracked changes and clean version of the agreement.

████ as we have just discussed, if you are happy with the amends then please do produce engrossments (in triplicate) and have them executed by your clients.

I also attach a scanned copy of the relevant extract from the previously executed deed showing that witness attestation blocks were not completed.

Kind regards

████



████
Principal Solicitor - Planning

Dover District Council
Council Offices, White Cliffs Business Park, Whitfield, Dover CT16 3PJ
Tel: █████

Mob: █████
Email: █████@DOVER.GOV.UK
Web: <http://dover.gov.uk>


Please consider the Environment before printing this email

From: █████@knightsplc.com>
Sent: 20 September 2024 13:11
To: █████@akdc.co.uk>; █████@DOVER.GOV.UK>
Subject: RE: [EXTERNAL] Re: Betteshanger Hotel S.106

Hi both

For ease, I have produced the attached comparison between the most recent draft of the s.106 9(hat I had seen) and the engrossment version. █████ I will give you call to quickly run through.

Thanks

Knights | One team with you >>> 

Partner

M

E

[@knightsplc.com](mailto: @knightsplc.com)

Knights
[400 Dashwood Lang Road](https://www.knightsplc.com) Bourne
Business Park
Weybridge, KT15 2HJ
W www.knightsplc.com
T 0344 371 2562

From: [@akdc.co.uk](mailto: @akdc.co.uk)>
Sent: 20 September 2024 12:22
To: [@dover.gov.uk](mailto: @dover.gov.uk)>
Cc: [@knightsplc.com](mailto: @knightsplc.com)>
Subject: [EXTERNAL] Re: Betteshanger Hotel S.106

Message originated from outside Knights

Hi

and I are just carry out a final check, but I think the definition below works as a substitute for the current Habitat Compensation Measures definition in the Hotel S.106:

Habitat Measures	Compensation	the various biodiversity work and measures to be introduced to the Site and the Off-Site Enhancement Area as shown on the Habitat Compensation Measures Plan)
-----------------------------	---------------------	---

I believe the Lizard Orchid Licence and Lizard Orchid Strategy definitions need to be removed from Page 13 and 14 of Schedule 1, along with the reference to Lizard Orchid Strategy in the 'Strategies and Measures' definition on Page 15.

The Lizard Orchid Strategy obligations at Schedule 1, Clause 12 (page 23) should also be deleted as Lizard Orchids are absent from the Hotel site.

Thanks

[REDACTED]

[REDACTED]

Email: [REDACTED]@akdc.co.uk

Tel: [REDACTED]



ALEX KALORKOTI
DEVELOPMENT CONSULTANCY

On Fri, 20 Sept 2024 at 11:35, [REDACTED]@dover.gov.uk> wrote:

Hi [REDACTED]

Thank you for your assistance.

As discussed on the phone, the plan is suitable and I have incorporated it into the agreement at a new appendix 'E'. I attach the latest version of the agreement.

I will message [REDACTED] now to let him know that the agreements are ready for collection.

Kind regards



Principal Solicitor - Planning

Dover District Council
Council Offices, White Cliffs Business Park, Whitfield, Dover CT16 3PJ
Tel: [REDACTED]

Mob: [REDACTED]
Email: [REDACTED]@DOVER.GOV.UK
Web: <http://dover.gov.uk>

Please consider the Environment before printing this email

From: [REDACTED]@akdc.co.uk>
Sent: 20 September 2024 10:52
To: [REDACTED]@DOVER.GOV.UK>
Subject: Re: Betteshanger Hotel S.106

Hi [REDACTED]

Please see attached - I think this plan should work, but the S.106 text will need to refer to the blue line rather than black for the wider country park.

Many thanks

[REDACTED]

Email: [REDACTED]@akdc.co.uk
Tel: [REDACTED]



On Fri, 20 Sept 2024 at 10:09, [REDACTED] <[\[REDACTED\]@akdc.co.uk](mailto:[REDACTED]@akdc.co.uk)> wrote:

Hi [REDACTED]

As discussed, please see page 3 of the attached for Site and Wider Country Park definitions which may work without a further appended plan.

Thanks

[REDACTED]

[REDACTED]

Email: [REDACTED] <[\[REDACTED\]@akdc.co.uk](mailto:[REDACTED]@akdc.co.uk)>
Tel: [REDACTED]



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[REDACTED]

From: [REDACTED]
Sent: 25 September 2024 16:41
To: [REDACTED]
Subject: Betteshanger hotel decision

Hi all

Just to let you know the second of the two Betteshanger decisions was issued at lunchtime today. There is now a 6 week period in which the decisions could be potentially challenged.

Any queries, please let me know.

Kind regards,

[REDACTED]



[REDACTED]
Planning & Development Manager
Dover District Council
Council Offices, White Cliffs Business Park, Whitfield, Dover CT16 3PJ
Email: [REDACTED]@dover.gov.uk
Web: <http://dover.gov.uk>

My working days are Tuesday to Friday

Scott

From: DDC Development Management
Sent: 26 September 2024 09:32
To: [REDACTED]
Subject: FW: Planning - Contact the Council -

Hi [REDACTED]

Please help?

Kind regards

[REDACTED]
Support Officer
Development Management
Dover District Council
Council Offices, White Cliffs Business Park, Whitfield, Dover CT16 3PJ

Tel: [REDACTED]
Fax: 01304 872351
Email: [REDACTED]@DOVER.GOV.UK
Web: <http://dover.gov.uk>

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From: no-reply@dover.gov.uk <no-reply@dover.gov.uk>
Sent: 26 September 2024 08:06
To: DDC Development Management <DevelopmentManagement@DOVER.GOV.UK>
Subject: Planning - Contact the Council -

The following details were submitted online using the contact the council online form and relate to: **Planning**

Page: About your enquiry

- What does your enquiry relate to Planning
- Planning
 - Your message I am very concerned that the hotel and surf lagoon agreed to on the Betteshanger Park land recently by the council will not adhere to the many clauses concerning the flora and fauna and other requirements within the agreed planning permission. As Dover council have a history of not protecting this land as they failed in their promise to make the land a protected area of beauty I would like to know who specifically is responsible for checking that each clause (& inspecting that they have been adhered to). I await this information. Thank you.

Page: About you

- First name [REDACTED]
- Last name [REDACTED]
- Your email address [REDACTED]
- Contact phone number [REDACTED]
- Your address including postcode [REDACTED]

Jadu reference number 1133418

Date and time submitted 26/09/2024 08:05:31

Logged by: WEB

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From: [REDACTED]@leighday.co.uk>
Sent: 03 October 2024 14:07
To: DDC Development Management; [REDACTED]; DDC Development Management;
Cc: [REDACTED]
Subject: Grant of planning permission for the erection of a surfing lagoon and pools (DOV/22/01158) and a 120-bed hotel (C1) building with associated facilities (DOV/23/01095)
Attachments: 2nd PAP letter, LD to Dover DC (03.10.2024).pdf

Dear Dover District Council

Please find attached a letter sent in accordance with the Pre-action Protocol for Judicial Review. This letter requires your urgent attention.

Many thanks

[REDACTED]
Senior Associate Solicitor

[REDACTED]
leighday.co.uk

LEIGH DAY

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CT16 3PJ

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developmentcontrol@dover.gov.uk;

[\[REDACTED\]@DOVER.GOV.UK](mailto:[REDACTED]@DOVER.GOV.UK);

[\[REDACTED\]@dover.gov.uk](mailto:[REDACTED]@dover.gov.uk)

EMAIL: [\[REDACTED\]@leighday.co.uk](mailto:[REDACTED]@leighday.co.uk);

[\[REDACTED\]@leighday.co.uk](mailto:[REDACTED]@leighday.co.uk);

[\[REDACTED\]@leighday.co.uk](mailto:[REDACTED]@leighday.co.uk)

TELEPHONE: [REDACTED]

YOUR REF: DOV/22/01158;

DOV/23/01095

OUR REF: [REDACTED]/[REDACTED]/01184482/1

DATED: 3 October 2024

SENT BY SPECIAL DELIVERY TO:

Betteshanger Property Limited
c/o Quinn Estates Ltd
The Cow Shed
Highland Court Farm
Bridge
Canterbury
CT4 5HW

Betteshanger Country Park
c/o [REDACTED]
Highland Court Farm
Coldharbour Lane

Seahive
c/o Icen Projects
Da Vinci House
44 Saffron Hill

Dear Dover Council

Grant of planning permission for the erection of a surfing lagoon and pools (DOV/22/01158) and a 120-bed hotel (C1) building with associated facilities (DOV/23/01095)

1. We write on behalf of the Friends of Betteshanger ("the **Claimant**") in accordance with the Judicial Review Pre-Action Protocol.

2. The Claimant proposes to challenge the decision, taken by Dover District Council (“the **Council**”), to issue planning permission for the development of land at Betteshanger Country Park (“the **Country Park**”), Sandwich Road, Sholden to provide a surfing lagoon and pools (DOV/22/01158) and a hotel (C1) building with associated facilities (DOV/23/01095).
3. This letter sets out the factual (to the extent currently known to the Claimant) and legal basis on which any claim would likely be pursued. Please be clear in your response in identifying any areas of factual and/or legal dispute and the basis for them so that the issues in dispute can be identified and if possible narrowed.
4. This letter follows an earlier pre-action protocol letter, sent by the Claimant to your client on 1 May 2024 prior to your client’s decision to issue planning permission for the development at Betteshanger Country Park. Following receipt of that letter, your client declined to submit a substantive response to the Claimant’s proposed grounds 1-2. Instead, you committed to undertake a fresh screening exercise in relation to the development at the Country Park.
5. Our client is not satisfied with the lawfulness of the planning permissions issued by your client following that fresh screening exercise. Our client therefore requests a full response to the proposed grounds of challenge set out below.
6. We are aware that litigation is a remedy of last resort and write in the hope that this matter can be resolved without recourse to legal proceedings. We therefore outline at the end of this letter the steps which we ask you to take in order to avoid recourse to the Court. If the Claimant receives an unsatisfactory response to this letter, it proposes to make an application for judicial review without further notice to you.

The Claimant

7. The proposed claimant is the Friends of Betteshanger. Friends of Betteshanger is a group of local people that came together in 2020 to try and protect their local wildlife from the threat of development.

The Defendant

8. The proposed defendant is Dover District Council.

Matters under challenge

9. The Council’s decision to issue planning permission, on 25 September 2024 and 17 September 2024 respectively, for:
 - a. the erection of a 120-bed hotel building with associated spa facilities, gym, restaurant/bar, access, landscaping and parking in Betteshanger

Country Park, Sandwich Road, Sholden (DOV/23/01095) (“the Hotel”);
and

- b. the erection of a surfing lagoon and pools, hub building, 15 overnight holiday pods, learning hive, yoga studio, fitness/health and wellbeing facilities, bike/pumptrack and associated roads, paths, car and cycle parking, together with landscaping and necessary access works and associated site infrastructure at Betteshanger Country Park, Sandwich Road, Sholden (DOV/22/01158) (“the Surfing Lagoon”).

Details of Interested Parties

10. This letter has been served by post on the following parties, identified by you as interested parties in your pre-action response dated 16 September 2024:

Betteshanger Property Limited
c/o Quinn Estates Ltd
The Cow Shed
Highland Court Farm
Bridge
Canterbury
CT4 5HW

Betteshanger Country Park
c/o [REDACTED]
Highland Court Farm
Coldharbour Lane
[REDACTED]@akdc.co.uk

Seahive
c/o Iceni Projects
Da Vinci House
44 Saffron Hill

Factual Background

The Country Park

11. The applications for the Hotel and Surf Lagoon development relate to adjoining parcels of land within Betteshanger Country Park (“the **Country Park**”). The Country Park is privately owned by Betteshanger Property Limited (“**BPL**”), which acquired the site in 2019.
12. The Country Park is situated in the countryside approximately 2.4km from the nearest settlement of Deal/Sholden. It is designated as an open space.
13. The Country Park is a popular site that was visited by 240,000 visitors in 2023. It is partly developed, hosting a visitor centre, the Kent Mining Museum, a

café/restaurant, an events space and a children's play area. This existing development is concentrated around the access roadway into the Country Park (the A258), with the remainder of the Park being largely undeveloped and vegetated.

14. The Country Park has been classified as a 'natural/semi-natural' green space by the Council in recent assessments of open space within the district. The Council's draft Local Plan explains that the purpose of this type of open space is '*Wildlife conservation, biodiversity and environmental education and awareness*'. The Country Park is home to a number of protected species, including a population of lizard orchids¹ that is of regional to national importance.

The Planning Applications

15. Planning applications for the Surfing Lagoon and the current Hotel development came forward in 2022 and 2023 respectively. The two proposals relate to adjacent sites within the Country Park that focus around the existing development at the Park. BPL will retain ownership of both sites. The land which is the subject of the Surfing Lagoon application will be leased to The SEAHIVE ("**SEAHIVE**").
16. In terms of the timing of the two planning applications, applications for the proposed Surfing Lagoon and Hotel were originally submitted alongside one another on 30 August 2022. The applicant for the Surf Lagoon was SEAHIVE, and the applicant for the Hotel was Betteshanger Country Park ("**BCP**"). Both applicants used the same agent (Alexander Hamilton at Icen Projects) to submit the applications.
17. The Council's Planning Committee resolved to refuse planning permission for a separate application for a hotel submitted in 2022 (DOV/22/01152) on 13 July 2023 on the grounds that (i) the proposed hotel development would lead to an unacceptable loss of open space, and (ii) the proposed development would result in significant disturbance to habitat that supports a population of Turtle Doves, contrary to local and national policy.
18. Following this, BPL withdrew its application for planning permission for the Hotel. A modified application for planning permission was submitted on 1 September 2023, accompanied by a planning statement also prepared by Icen Projects. Changes were made to the original hotel design in an effort to overcome the objections raised by the Planning Committee.

The First EIA Screening Opinions

19. The applicants for the first Hotel development and the Surfing Lagoon development requested that the Council screen the proposed developments for EIA. The two screening requests were both submitted on 25 August 2022, and had

¹ Protected under schedule 8 of the Wildlife and Countryside Act 1981.

been prepared by the same environmental consultants (Entran Ltd). Both requests acknowledged that the proposals fell within the relevant thresholds of Schedule 2 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (“the **EIA Regulations**”) but concluded that there were no likely significant environmental effects that would require the carrying out of an environmental impact assessment (“**EIA**”).

20. Both Screening Opinions agreed with the developers that the (first) Hotel and Surfing Lagoon proposals were not likely to have significant environmental effects. Notably, in both Screening Opinions the Council saw fit to consider whether the two proposals were in reality a single project that had been divided into two separate developments. Applying the criteria set out in *R (Wingfield) v Canterbury City Council* [2020] JPL 154, the Council concluded that the proposals were distinct developments which could be treated as freestanding projects for the purpose of the EIA Regulations.
21. At no point did the Council carry out any screening exercise for the amended Hotel proposals (DOV/23/01095).

Natural England’s Consultation Responses

22. As indicated above, during the course of the Council’s consideration of the Surf Lagoon and Hotel applications, NE submitted four consultation responses in which it set out concerns regarding the impact on domestic protected species.
23. On 20 March 2023, NE wrote to the Council expressing concerns that the application documents for the Surf Lagoon gave rise to uncertainty about the impact of the proposal on the Lizard Orchid, a plant species protected under Schedule 8 of the WCA 1981.
24. On 20 September 2023, NE wrote again to the Council in the following terms:
- (a) NE reasserted its concerns regarding the Lizard Orchid. NE expressed its opinion that the developer’s proposal to mitigate any impact on Lizard Orchids by translocation “*remains unprecedented in scale with uncertain outcomes*”, partly due to a lack of research.
 - (b) NE raised concerns regarding the impact of the Surf Lagoon on the Fiery Clearwing Moth, a species also protected under Schedule 5 of the WCA 1981. NE opined that the Country Park was an important site for the Fiery Clearwing Moth, and that the mitigation proposed by the applicant – also involving translocation – was inappropriate and experimental.
 - (c) NE explained that due to the potential impacts on species protected under the WCA 1981, SEAHIVE would need to obtain a licence from NE before any development could commence. NE set out that, currently, the Council could not be confident that NE would likely grant such a licence to SEAHIVE should such an application be forthcoming. NE’s view was that it would be

difficult for the proposals to meet the third of the relevant licensing tests – namely that the grant of the licence would not be detrimental to the survival of any population of the species of animal or plant to which the licence relates.

25. On 1 November 2023, NE wrote again to the Council expressing its concerns that the third licensing test would not be met by the Applicant due to the impact of the proposals on the Lizard Orchid and the Fiery Clearwing Moth, and the uncertainty surrounding whether the mitigation proposed by the applicant would be sufficient.
26. NE's final letter to the Council on 6 February 2024 reasserted its concern that the Council was proposing to grant planning permission for development for which NE may not be able to issue a licence. NE repeated that it had concerns regarding the impact of the development proposals on Lizard Orchids and Fiery Clearwing Moths. Regarding Lizard Orchids, NE stated that the 7-year research period proposed by the applicant, during which time it would assess whether the proposed translocation would be successful on the Surf Lagoon site, would enable NE to make an informed decision on any licence application. NE made clear, however, that at this stage, this did not mean that a licence would likely be issued – if the research did not demonstrate that the translocation methods were successful, NE would remain unable to issue a licence.

Resolutions to Grant Planning Permission

27. The two planning applications at issue went before the Council's Planning Committee on 7 March 2024. The Officer Reports for the two developments recommended that planning permission be granted subject to conditions.
28. The Reports referenced the Screening Opinions that had been issued by the Council in July 2023 in their "Planning History" sections, noting that the opinions had concluded that the Surf Lagoon and the first Hotel Development did not require EIA. The Reports went on to address certain other environmental issues, including the question whether the developers were likely to obtain protected species licences from Natural England.
29. The Officer Reports for both development proposals identify one of the main issues in the consideration of the applications as being 'Open Space', and presumably the loss of it. The Reports considered the question whether the proposed development complied with the open space policies included in the Council's adopted Core Strategy and draft Local Plan, in particular policy DM25 and draft policy PM5. The reports concluded that the development would comply with those policies. Much of the reasoning in the Officer Reports relies upon a district-wide surplus in natural and semi-natural green space identified in assessments prepared by the Council during the course of preparing its new local plan (see paragraphs 2.55 to 2.67 of the Surf Lagoon OR and 2.44 to 2.56 of the Hotel OR).

30. The Council's Planning Committee resolved to grant planning permission for the Hotel and Surf Lagoon developments, subject to conditions.

The Claimant's First Pre-Action Letter and the Defendant's Response

31. On 1 May 2024 the Claimant sent a pre-action letter to the Council proposing to challenge the resolutions to grant planning permission on three grounds. The Claimant pointed to flaws in the Council's screening opinions, arguing in particular that:
- a. The Council's failure to consider the potential cumulative impacts of the Hotel and Surf Lagoon proposals was unreasonable; and
 - b. The Council's failure to reconsider the potential for the development to have significant impacts on protected species such as the Lizard Orchid and Fiery Clearwing Moth was unlawful due to the developers' reliance upon untested mitigation and compensation measures.
32. The Council did not respond to the Claimant until 12 June 2024, at which time the Council agreed to carry out a fresh screening exercise in respect of both schemes.

The Re-Screening Exercise

33. Following the Council's decision to re-screen both proposed developments under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017, the Claimant sent to the Council a document setting out its members' views on the potential for the proposed developments to significantly impact on the environment. The submission was provided to the Council on 2 August 2024. The Claimant requested that the Council confirm receipt of its submission. No confirmation of receipt was provided to the Claimant.
34. On 4 September 2024 the Council issued the fresh screening decisions in respect of both the Surf Lagoon and Hotel developments. Both screening opinions were negative. In terms of the discussion of cumulative impacts in the screening opinions, both opinions rely primarily on the reasoning that is said to be included in the Officer Reports for the Hotel and Surf Lagoon proposals.
35. Neither screening opinion expressly considers the potential impacts of the Hotel and Surf Lagoon on specific protected species, such as the Lizard Orchid and Fiery Clearwing Moth. Neither screening opinion identifies or explains the effectiveness of the ecological and other measures relied upon by the developers to mitigate the environmental impacts of the proposed development. Neither screening opinion makes any reference to the EIA submission provided to the Council by the Claimant.

Legal Framework

Interpretation of Planning Policy

36. Decisions whether to grant planning permission must be taken in accordance with the development plan, unless material considerations indicate otherwise: s.38(6) of the Planning and Compulsory Purchase Act 2004.
37. Part of the Council's adopted development plan includes its Core Strategy. Policy DM25 of the Core Strategy provides as follows:

"Policy DM 25

Open Space

Proposals for development that would result in the loss of open space will not be permitted unless:

- i. there is no identified qualitative or quantitative deficiency in public open space in terms of outdoor sports sites, children's play space or informal open space; or*
 - ii. where there is such a deficiency the site is incapable of contributing to making it good; or*
 - iii. where there is such a deficiency the site is capable of contributing to making it good, a replacement area with at least the same qualities and equivalent community benefit, including ease of access, can be made available; or*
 - iv. in the case of a school site the development is for educational purposes; or*
 - v. in the case of small-scale development it is ancillary to the enjoyment of the open space; and*
 - vi. in all cases except point 2, the site has no overriding visual amenity interest, environmental role, cultural importance or nature conservation value.*
- (Underlining added)

38. The Council is also in the process of preparing a new local plan (the Dover District Local Plan to 2040), for which the examining Inspectors' report was published on 20 September 2024. The policies included in the draft local plan are material considerations in the determination of planning applications by the Council.
39. Policy PM5 of the draft Local Plan, entitled 'Protection of Open Space, Sports Facilities and Local Green Space', also seeks to protect open spaces within the district. Policy PM5 provides that proposals involving the whole or partial loss of open space will not be supported unless "*a robust assessment...has identified a surplus in the catchment area to meet both current and future needs*" (underlining added).
40. The correct interpretation of planning policy is a matter of law. A failure to properly understand and apply relevant policy will constitute a failure to have regard to a material consideration, or alternatively will amount to having regard to an immaterial consideration, and will render a decision unlawful (*Tesco Stores v Dundee* [2012] PTSR 983 at [17] to [22]).

Environmental Impact Assessment

41. The EIA Regulations make provision for the carrying out of EIA by developers for “*EIA development*”, i.e. development which falls within the scope of either Schedule 1 of the Regulations, or within Schedule 2 and the development is likely to have significant environmental effects (reg.2).
42. EIA is a process consisting of (inter alia) the preparation of an environmental statement which includes the relevant information listed in Schedule 4 to the EIA Regulations (reg.4). Where EIA is necessary, a decision-maker determining a planning application must take into consideration all the environmental information generated by the EIA, reach a reasoned conclusion on the significant environmental effects of the development, integrate that conclusion into his/her decision whether to grant planning permission, and consider whether it is appropriate to put in place any monitoring measures (reg.26).
43. Regulation 3 of the EIA Regulations prohibits a local planning authority from granting planning permission for EIA development unless an EIA has been carried out in respect of that development.
44. Under regulation 6, a developer may request that the relevant local planning authority adopt a screening opinion in respect of a development proposal. A screening opinion sets out the local planning authority’s view whether that development is EIA development.

EIA and Remedial Measures

45. Regulation 5 provides for the matters that must be included in a screening opinion. Under regulation 5(5)(b), if an LPA adopts a screening opinion in which it determines that proposed development is not EIA development, it must “*state any features of the proposed development and measures envisaged to avoid, or prevent what might otherwise have been, significant adverse effects on the environment*”. In other words, the local planning authority must clearly identify any mitigation or compensation relied upon for the conclusion that the development in question does not require EIA.
46. At the screening stage, a local planning authority is not therefore precluded from taking into account potential remedial measures. However, the courts have made clear the following:
- a. A screening authority must have regard to the precautionary principle and the degree of uncertainty as to environmental impact at the date of the decision (*R (Loader) v SSCLG* [2013] PTSR 406 at [43]).
 - b. A screening authority cannot rely on conditions and undertakings as a surrogate for the EIA process (*R (Jones) v Mansfield DC* [2004] Env LR 21 at [38]).
 - c. A screening authority must ensure that it has sufficient evidence of both the potential adverse environmental impacts of a proposal, and the

availability and effectiveness of proposed remedial measures, in order to make an informed judgment that a development is not likely to have significant effects on the environment (*R (Swire) v Secretary of State for Housing, Communities and Local Government* [2020] Env LR 29).

- d. The EIA Regulations expressly envisage that mitigation measures will where appropriate be included in an environmental statement. Application of the precautionary principle, which underlies the EIA Directive, implies that cases of material doubt should generally be resolved in favour of EIA. The uncertainties associated with remedial measures may make it impossible reasonably to conclude that there is no likelihood of significant environmental effect (*Champion v North Norfolk District Council* [2015] 1 WLR 3710).

47. As the High Court explained in *R (Lebus) v South Cambridgeshire DC* [2003] Env LR 17, the underlying purpose of the EIA Regulations is to ensure that the potentially significant impacts of a development are described together with any remedial measures. The public is thereby engaged in the process of assessing the efficacy of any mitigation measures. It is not appropriate for a person charged with making a screening opinion to start from the premise that, although there may be significant environmental impacts, these can be made insignificant through the implementation of conditions. In that case, the appropriate course is to require an environmental statement setting out the significant impacts and the measures which it is said will reduce their significance ([45] to [46]).

EIA and Cumulative Impacts

48. The Schedule 3 criteria, which a planning authority must consider when carrying out a screening exercise, include the cumulation of the environmental impacts of the development with other existing and/or approved development.

49. The question what cumulative environmental impacts must be considered by a local planning authority, both at the screening stage and at the point at which an EIA is carried out, has been considered in various authorities from which the following relevant principles can be derived:

- (a) It is unlawful to “salami-slice” what is in substance and reality a single project into a series of smaller projects (deliberately otherwise), each falling below the threshold criteria requiring EIA (*R (Clarke-Holland) v Secretary of State for the Home Department* [2024] ACD 20 at §72).
- (b) Even where two development proposals are properly distinct, they may have cumulative impacts. The existence and nature of cumulative environmental effects will be a question of fact and judgment in each case (*Clarke-Holland* at §72).
- (c) Overlapping environmental effects may exist where there are independent projects nearby to one another, in which case an assessment of cumulative

effects will be required (*R (Wingfield) v Canterbury City Council* [2020] JPL 154 at §70).

Grounds of Challenge

Ground 1: Misinterpretation of Planning Policy

50. The Officer Reports underlying the grants of planning permission for the Hotel and Surf Lagoon are based on a misinterpretation of policy DM25 of the adopted Core Strategy and policy PM5 of the draft Local Plan.

51. The starting point under Policy DM25 is that the Council will resist development proposals resulting in a loss of open space. Paragraphs i. to vi. then identify limited circumstances in which the Council will depart from that starting point. Criterion vi. makes clear, however, that unless a site falls within the scope of policy DM25ii. – i.e. is incapable of making good an identified deficiency in open space provision – planning permission will only be granted for development that would lead to a loss of open space if the open space in question has “*no overriding visual amenity interest, environmental role, cultural importance, or nature conservation role*”.

52. In the present case, the Council has not suggested that policy DM25ii. applies to the Country Park. Criterion vi. clearly did apply to the application of policy DM25. Notwithstanding this, neither of the Officer Reports prepared in connection with the Surf Lagoon and Hotel Developments considers DM25vi., or assesses the development proposals against its requirements. No consideration is given to whether the Country Park has an overriding environmental or nature conservation role. This is particularly surprising given that, in the evidence base underlying the Council’s emerging local plan, the Country Park is identified as a natural/semi-natural greenspace that has been designated for its role in wildlife conservation, supporting biodiversity, and environmental education and awareness. The Council’s failure to apply criterion vi. represents a clear failure to correctly understand the requirements of policy DM25.

53. In terms of policy PM5, the Officer Reports again clearly fail to correctly interpret and apply the draft policy:

- a. Officers fail to require the developer to carry out any assessment of open space within the *catchment area* of the Country Park, as is required by policy PM5;
- b. The reports rely upon district-level assessments prepared in connection with the draft Local Plan and do not address catchment-level requirements for open space, as is required by policy PM5; and
- c. The reports fail to explain why the Hotel and Surf Lagoon proposals are considered to comply with policy PM5, in circumstances where the refusal of the first hotel application stated that development within the Country Park was contrary to policy PM5.

54. This failure to correctly interpret and apply policies DM25 and PM5 represents a failure by the Council to take into account both statutory and obviously material considerations, and thereby renders the grant of planning permission for the Hotel and Surf Lagoon unlawful.

Ground 2: EIA and Cumulative Impacts

55. The Council's decision to grant planning permission for the Hotel and Surf Lagoon in reliance upon the screening opinions issued on 4 September 2024 was unlawful. The opinions again fail adequately to address the cumulative impacts of the two development proposals, as is required by schedule 3 of the EIA Regulations.

56. The two new screening opinions issued on 4 September 2024 state that the most significant potential cumulative impacts of the Hotel and Surf Lagoon proposals are ecological, landscape and visual, and traffic. The screening opinions assert that “[t]he culminative [sic] characteristics of developments have been assessed in the Officers’ Report, as appropriate, where it is considered (taking into account measures of mitigation or compensation) that they are unlikely to result in significant environmental effects”.² The assessment of cumulative impacts in the screening opinions therefore largely relies upon and adopts the reasoning that is said to be included in the Officer Reports for the key impacts identified.

57. While the Officer Reports do assess the cumulative landscape impacts of the proposed Hotel and Surf Lagoon, the assertion that they also address the cumulative ecological or air quality impacts of the proposed development is simply not accurate.

58. On the contrary, the Officer Reports give no consideration to the potential for the proposed developments to impact cumulatively on key protected species such as Lizard Orchids, Fiery Clearwing Moths, and other invertebrates, or habitats such as open mosaic habitats. Nor is any consideration given in the reports to the cumulative impact of the proposed developments on air quality. This is unsurprising, given that many of the environmental assessments on which the Officer Reports were based related to only one of the two development proposals, and did not consider the cumulative impacts of the proposals.³

59. In short, the Council in its re-screening exercise has again failed to assess the cumulative impacts of the proposed development on the environmental characteristics that it has itself identified as being most vulnerable to the impacts of the proposed development. The decision to issue planning permission on the

² See pages 3-4 of the Hotel Screening Opinion and page 4 of the Surf Lagoon Screening Opinion.

³ See, for example, the separate Air Quality Assessments submitted in respect of each development proposal; the ‘Assessment of Scarce Moth Species’ prepared in relation to the Surf Lagoon development in August 2023; and the Ecological Appraisals submitted in respect of the development proposals.

basis of these fresh screening opinions was therefore unlawful, as the Claimant highlighted in its pre-action letter dated 1 May.

Ground 3: EIA Mitigation

60. Regulation 5(5)(b) of the EIA Regulations requires local planning authorities to state in their screening opinions what remedial measures it considers will avoid or prevent what would otherwise have been significant impacts on the environment. In addition to this, there is a wealth of case law which sets out that local planning authorities carrying out screening exercises must ensure that they have sufficient information on proposed remedial measures to make an informed judgment as to their likely effectiveness. This is mandated by, inter alia, the precautionary principle.
61. Notwithstanding this, and notwithstanding that the Claimant's pre-action letter and EIA submission identified these principles clearly, the Council's new screening opinions refer only generally to the existence of remedial measures proposed in connection with the Hotel and Surf Lagoon. Again, the screening opinions largely refer back to the analysis that is said to have been included in the Officer Reports.
62. As with the assessment of cumulative impacts, the Officer Reports do not address the environmental mitigation proposed in connection with the development to the standard required by the EIA Regulations. On the contrary, the Officer Reports expressly recognise that many of the mitigation measures proposed by the applicant are either wholly untested, or have been subject to comment by the Council's own expert advisers – Natural England and the SNEO – which has given rise to serious doubts as to the potential for those measures to be effective.
63. This is particularly true of the impact of the proposed development on protected species, such as the Lizard Orchid and the Fiery Clearwing Moth.⁴ It is also the case for other environmental impacts for which mitigation has not been fully addressed by the developers, including the identified high risk that land contamination at the Country Park could cause catastrophic damage to the proposed buildings and infrastructure at the site, and an “*acute risk to human health*”.⁵
64. In light of the material doubt as to the effectiveness of the environmental mitigation proposed by the developers in the present case, the reliance in the Officer Reports upon planning conditions and obligations to avoid carrying out an EIA is unacceptable. Such reliance frustrates the purpose of the EIA regulations, prevents the public from being engaged in the process of assessing the efficacy of any mitigation measures (*Lebus and Jones*), and contravenes the precautionary

⁴ See paragraphs 2.133ff and 2.151ff of the Surf Lagoon OR, paragraphs 2.153ff of the Hotel OR, Natural England's consultation responses, and the SNEO's Consultation Responses.

⁵ See page 44 of the ‘*Phase 1 Land Contamination Assessment*’ for the Surf Lagoon prepared by Ecologia, dated 18 August 2022, and page 34 of the ‘*Phase 1 Land Contamination Assessment*’ for the Hotel, also prepared by Ecologia and dated 21 August 2023.

principle, which requires any material uncertainty to be resolved in favour of carrying out an EIA (*Champion*).

65. The Council's decision to issue a negative screening opinion for the proposed developments, notwithstanding these material uncertainties, was unlawful, as was its decision to issue planning permission based on those screening opinions.

66. For the reasons set out above, the Council's decision to issue planning permission for the proposed developments was unlawful and should be quashed.

Details of information sought

67. Please identify (and if they are not in the public domain provide copies of) any documents meeting the below descriptions and post-dating the Officer Reports:

- a. Any further advice that was sought and/or received by the Council from its ecology officers and/or advisers;
- b. Any further advice that was sought and/or received by the Council from Natural England;
- c. Any further information provided to the Council by the Interested Parties in connection with the re-screening exercise;
- d. Any further information taken into consideration by the Council in carrying out the re-screening exercise;
- e. Any delegated report and/or officer's report prepared by the Council in connection with the decisions to issue planning permission for the Hotel and Surf Lagoon.

Action that the Council is expected to take

68. We request that the Council agrees that the grant of planning permission to the Hotel and Surf Lagoon developments was unlawful. We request that the Council consent to the quashing of the planning permissions.

ADR Proposals

69. The Claimant does not have any specific proposals for alternative dispute resolution, as it considers that the actions set out above at paragraph [xx] are the only way to satisfactorily resolve the present dispute and avoid litigation. The Claimant does remain open to engaging in ADR should the Council have any proposals. The Claimant does however note that its previous efforts to assist the Council in conducting lawful re-screening exercises (by way of the EIA submission) were not responded to by the Council.

Aarhus Convention Claim

70. This is an Aarhus Convention Claim within the meaning of CPR r 46.24. Accordingly, the Claimant proceeds on the basis of benefitting from the costs

protection regime at CPR r 46.24 to 46.28, and its adverse costs would be limited to £10,000 . If you disagree, please fully explain why.

Legal Advisers

71. The contact details for the Claimant's legal advisers are: Leigh Day, Panagram, 27 Goswell Road, EC1M 7AJ. Please send any correspondence by email to Ricardo [REDACTED] ([REDACTED]@leighday.co.uk), [REDACTED] ([REDACTED]@leighday.co.uk) and [REDACTED] ([REDACTED]@leighday.co.uk).

Timeframe for Response

72. We request a substantive response within 14 days, i.e. by 17 October 2024, along with the requested documentation. Please forward any response to [REDACTED] ([REDACTED]@leighday.co.uk), [REDACTED] ([REDACTED]@leighday.co.uk), [REDACTED] ([REDACTED]@leighday.co.uk), and [REDACTED] ([REDACTED]@leighday.co.uk).

Yours faithfully



Leigh Day

[REDACTED]

From: [REDACTED]
Sent: 10 October 2024 15:49
To: [REDACTED]
Subject: FW: Grant of planning permission for the erection of a surfing lagoon and pools (DOV/22/01158) and a 120-bed hotel (C1) building with associated facilities (DOV/23/01095)
Attachments: 2nd PAP letter, LD to Dover DC (03.10.2024).pdf

Kind regards,

[REDACTED]



[REDACTED]
Planning & Development Manager

Dover District Council

Council Offices, White Cliffs Business Park, Whitfield, Dover CT16 3PJ

Email: [REDACTED]@dover.gov.uk

Web: <http://dover.gov.uk>

My working days are Tuesday to Friday

From: [REDACTED]@leighday.co.uk>
Sent: 03 October 2024 14:07
To: DDC Development Management <DevelopmentManagement@DOVER.GOV.UK>; [REDACTED]@DOVER.GOV.UK>; DDC Development Management <DevelopmentManagement@DOVER.GOV.UK>; [REDACTED]@DOVER.GOV.UK>; [REDACTED]@dover.gov.uk>
Cc: [REDACTED]@leighday.co.uk>; [REDACTED]@leighday.co.uk>; [REDACTED]
Subject: Grant of planning permission for the erection of a surfing lagoon and pools (DOV/22/01158) and a 120-bed hotel (C1) building with associated facilities (DOV/23/01095)

Dear Dover District Council

Please find attached a letter sent in accordance with the Pre-action Protocol for Judicial Review. This letter requires your urgent attention.

Many thanks

[REDACTED]

[REDACTED]
Senior Associate Solicitor

[REDACTED]
leighday.co.uk

Panagram, 27 Goswell Road, London, EC1M 7AJ



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PLEASE THINK ABOUT THE ENVIRONMENT BEFORE PRINTING THIS EMAIL

BY EMAIL ONLY TO:

Dover District Council
White Cliffs Business Park
Dover
CT16 3PJ

DevelopmentManagement@DOVER.GOV.UK;

[\[REDACTED\]@DOVER.GOV.UK](mailto:[REDACTED]@DOVER.GOV.UK);

developmentcontrol@dover.gov.uk;

[\[REDACTED\]@DOVER.GOV.UK](mailto:[REDACTED]@DOVER.GOV.UK);

[\[REDACTED\]@dover.gov.uk](mailto:[REDACTED]@dover.gov.uk)

EMAIL: [\[REDACTED\]@leighday.co.uk](mailto:[REDACTED]@leighday.co.uk);

[\[REDACTED\]@leighday.co.uk](mailto:[REDACTED]@leighday.co.uk);

[\[REDACTED\]@leighday.co.uk](mailto:[REDACTED]@leighday.co.uk)

TELEPHONE: [REDACTED]

YOUR REF: DOV/22/01158;

DOV/23/01095

OUR REF: [REDACTED]/[REDACTED]/01184482/1

DATED: 3 October 2024

SENT BY SPECIAL DELIVERY TO:

Betteshanger Property Limited
c/o Quinn Estates Ltd
The Cow Shed
Highland Court Farm
Bridge
Canterbury
CT4 5HW

Betteshanger Country Park
c/o [REDACTED]
Highland Court Farm
Coldharbour Lane

Seahive
c/o Icen Projects
Da Vinci House
44 Saffron Hill

Dear Dover Council

Grant of planning permission for the erection of a surfing lagoon and pools (DOV/22/01158) and a 120-bed hotel (C1) building with associated facilities (DOV/23/01095)

1. We write on behalf of the Friends of Betteshanger ("the **Claimant**") in accordance with the Judicial Review Pre-Action Protocol.

2. The Claimant proposes to challenge the decision, taken by Dover District Council (“the **Council**”), to issue planning permission for the development of land at Betteshanger Country Park (“the **Country Park**”), Sandwich Road, Sholden to provide a surfing lagoon and pools (DOV/22/01158) and a hotel (C1) building with associated facilities (DOV/23/01095).
3. This letter sets out the factual (to the extent currently known to the Claimant) and legal basis on which any claim would likely be pursued. Please be clear in your response in identifying any areas of factual and/or legal dispute and the basis for them so that the issues in dispute can be identified and if possible narrowed.
4. This letter follows an earlier pre-action protocol letter, sent by the Claimant to your client on 1 May 2024 prior to your client’s decision to issue planning permission for the development at Betteshanger Country Park. Following receipt of that letter, your client declined to submit a substantive response to the Claimant’s proposed grounds 1-2. Instead, you committed to undertake a fresh screening exercise in relation to the development at the Country Park.
5. Our client is not satisfied with the lawfulness of the planning permissions issued by your client following that fresh screening exercise. Our client therefore requests a full response to the proposed grounds of challenge set out below.
6. We are aware that litigation is a remedy of last resort and write in the hope that this matter can be resolved without recourse to legal proceedings. We therefore outline at the end of this letter the steps which we ask you to take in order to avoid recourse to the Court. If the Claimant receives an unsatisfactory response to this letter, it proposes to make an application for judicial review without further notice to you.

The Claimant

7. The proposed claimant is the Friends of Betteshanger. Friends of Betteshanger is a group of local people that came together in 2020 to try and protect their local wildlife from the threat of development.

The Defendant

8. The proposed defendant is Dover District Council.

Matters under challenge

9. The Council’s decision to issue planning permission, on 25 September 2024 and 17 September 2024 respectively, for:
 - a. the erection of a 120-bed hotel building with associated spa facilities, gym, restaurant/bar, access, landscaping and parking in Betteshanger

Country Park, Sandwich Road, Sholden (DOV/23/01095) (“the Hotel”); and

- b. the erection of a surfing lagoon and pools, hub building, 15 overnight holiday pods, learning hive, yoga studio, fitness/health and wellbeing facilities, bike/pumptrack and associated roads, paths, car and cycle parking, together with landscaping and necessary access works and associated site infrastructure at Betteshanger Country Park, Sandwich Road, Sholden (DOV/22/01158) (“the Surfing Lagoon”).

Details of Interested Parties

10. This letter has been served by post on the following parties, identified by you as interested parties in your pre-action response dated 16 September 2024:

Betteshanger Property Limited
c/o Quinn Estates Ltd
The Cow Shed
Highland Court Farm
Bridge
Canterbury
CT4 5HW

Betteshanger Country Park
c/o [REDACTED]
Highland Court Farm
Coldharbour Lane
[REDACTED]@akdc.co.uk

Seahive
c/o Iceni Projects
Da Vinci House
44 Saffron Hill

Factual Background

The Country Park

11. The applications for the Hotel and Surf Lagoon development relate to adjoining parcels of land within Betteshanger Country Park (“the **Country Park**”). The Country Park is privately owned by Betteshanger Property Limited (“**BPL**”), which acquired the site in 2019.
12. The Country Park is situated in the countryside approximately 2.4km from the nearest settlement of Deal/Sholden. It is designated as an open space.
13. The Country Park is a popular site that was visited by 240,000 visitors in 2023. It is partly developed, hosting a visitor centre, the Kent Mining Museum, a

café/restaurant, an events space and a children's play area. This existing development is concentrated around the access roadway into the Country Park (the A258), with the remainder of the Park being largely undeveloped and vegetated.

14. The Country Park has been classified as a 'natural/semi-natural' green space by the Council in recent assessments of open space within the district. The Council's draft Local Plan explains that the purpose of this type of open space is '*Wildlife conservation, biodiversity and environmental education and awareness*'. The Country Park is home to a number of protected species, including a population of lizard orchids¹ that is of regional to national importance.

The Planning Applications

15. Planning applications for the Surfing Lagoon and the current Hotel development came forward in 2022 and 2023 respectively. The two proposals relate to adjacent sites within the Country Park that focus around the existing development at the Park. BPL will retain ownership of both sites. The land which is the subject of the Surfing Lagoon application will be leased to The SEAHIVE ("**SEAHIVE**").
16. In terms of the timing of the two planning applications, applications for the proposed Surfing Lagoon and Hotel were originally submitted alongside one another on 30 August 2022. The applicant for the Surf Lagoon was SEAHIVE, and the applicant for the Hotel was Betteshanger Country Park ("**BCP**"). Both applicants used the same agent (Alexander Hamilton at Icen Projects) to submit the applications.
17. The Council's Planning Committee resolved to refuse planning permission for a separate application for a hotel submitted in 2022 (DOV/22/01152) on 13 July 2023 on the grounds that (i) the proposed hotel development would lead to an unacceptable loss of open space, and (ii) the proposed development would result in significant disturbance to habitat that supports a population of Turtle Doves, contrary to local and national policy.
18. Following this, BPL withdrew its application for planning permission for the Hotel. A modified application for planning permission was submitted on 1 September 2023, accompanied by a planning statement also prepared by Icen Projects. Changes were made to the original hotel design in an effort to overcome the objections raised by the Planning Committee.

The First EIA Screening Opinions

19. The applicants for the first Hotel development and the Surfing Lagoon development requested that the Council screen the proposed developments for EIA. The two screening requests were both submitted on 25 August 2022, and had

¹ Protected under schedule 8 of the Wildlife and Countryside Act 1981.

been prepared by the same environmental consultants (Entran Ltd). Both requests acknowledged that the proposals fell within the relevant thresholds of Schedule 2 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (“the **EIA Regulations**”) but concluded that there were no likely significant environmental effects that would require the carrying out of an environmental impact assessment (“**EIA**”).

20. Both Screening Opinions agreed with the developers that the (first) Hotel and Surfing Lagoon proposals were not likely to have significant environmental effects. Notably, in both Screening Opinions the Council saw fit to consider whether the two proposals were in reality a single project that had been divided into two separate developments. Applying the criteria set out in *R (Wingfield) v Canterbury City Council* [2020] JPL 154, the Council concluded that the proposals were distinct developments which could be treated as freestanding projects for the purpose of the EIA Regulations.
21. At no point did the Council carry out any screening exercise for the amended Hotel proposals (DOV/23/01095).

Natural England’s Consultation Responses

22. As indicated above, during the course of the Council’s consideration of the Surf Lagoon and Hotel applications, NE submitted four consultation responses in which it set out concerns regarding the impact on domestic protected species.
23. On 20 March 2023, NE wrote to the Council expressing concerns that the application documents for the Surf Lagoon gave rise to uncertainty about the impact of the proposal on the Lizard Orchid, a plant species protected under Schedule 8 of the WCA 1981.
24. On 20 September 2023, NE wrote again to the Council in the following terms:
- (a) NE reasserted its concerns regarding the Lizard Orchid. NE expressed its opinion that the developer’s proposal to mitigate any impact on Lizard Orchids by translocation “*remains unprecedented in scale with uncertain outcomes*”, partly due to a lack of research.
 - (b) NE raised concerns regarding the impact of the Surf Lagoon on the Fiery Clearwing Moth, a species also protected under Schedule 5 of the WCA 1981. NE opined that the Country Park was an important site for the Fiery Clearwing Moth, and that the mitigation proposed by the applicant – also involving translocation – was inappropriate and experimental.
 - (c) NE explained that due to the potential impacts on species protected under the WCA 1981, SEAHIVE would need to obtain a licence from NE before any development could commence. NE set out that, currently, the Council could not be confident that NE would likely grant such a licence to SEAHIVE should such an application be forthcoming. NE’s view was that it would be

difficult for the proposals to meet the third of the relevant licensing tests – namely that the grant of the licence would not be detrimental to the survival of any population of the species of animal or plant to which the licence relates.

25. On 1 November 2023, NE wrote again to the Council expressing its concerns that the third licensing test would not be met by the Applicant due to the impact of the proposals on the Lizard Orchid and the Fiery Clearwing Moth, and the uncertainty surrounding whether the mitigation proposed by the applicant would be sufficient.
26. NE's final letter to the Council on 6 February 2024 reasserted its concern that the Council was proposing to grant planning permission for development for which NE may not be able to issue a licence. NE repeated that it had concerns regarding the impact of the development proposals on Lizard Orchids and Fiery Clearwing Moths. Regarding Lizard Orchids, NE stated that the 7-year research period proposed by the applicant, during which time it would assess whether the proposed translocation would be successful on the Surf Lagoon site, would enable NE to make an informed decision on any licence application. NE made clear, however, that at this stage, this did not mean that a licence would likely be issued – if the research did not demonstrate that the translocation methods were successful, NE would remain unable to issue a licence.

Resolutions to Grant Planning Permission

27. The two planning applications at issue went before the Council's Planning Committee on 7 March 2024. The Officer Reports for the two developments recommended that planning permission be granted subject to conditions.
28. The Reports referenced the Screening Opinions that had been issued by the Council in July 2023 in their "Planning History" sections, noting that the opinions had concluded that the Surf Lagoon and the first Hotel Development did not require EIA. The Reports went on to address certain other environmental issues, including the question whether the developers were likely to obtain protected species licences from Natural England.
29. The Officer Reports for both development proposals identify one of the main issues in the consideration of the applications as being 'Open Space', and presumably the loss of it. The Reports considered the question whether the proposed development complied with the open space policies included in the Council's adopted Core Strategy and draft Local Plan, in particular policy DM25 and draft policy PM5. The reports concluded that the development would comply with those policies. Much of the reasoning in the Officer Reports relies upon a district-wide surplus in natural and semi-natural green space identified in assessments prepared by the Council during the course of preparing its new local plan (see paragraphs 2.55 to 2.67 of the Surf Lagoon OR and 2.44 to 2.56 of the Hotel OR).

30. The Council's Planning Committee resolved to grant planning permission for the Hotel and Surf Lagoon developments, subject to conditions.

The Claimant's First Pre-Action Letter and the Defendant's Response

31. On 1 May 2024 the Claimant sent a pre-action letter to the Council proposing to challenge the resolutions to grant planning permission on three grounds. The Claimant pointed to flaws in the Council's screening opinions, arguing in particular that:
- a. The Council's failure to consider the potential cumulative impacts of the Hotel and Surf Lagoon proposals was unreasonable; and
 - b. The Council's failure to reconsider the potential for the development to have significant impacts on protected species such as the Lizard Orchid and Fiery Clearwing Moth was unlawful due to the developers' reliance upon untested mitigation and compensation measures.
32. The Council did not respond to the Claimant until 12 June 2024, at which time the Council agreed to carry out a fresh screening exercise in respect of both schemes.

The Re-Screening Exercise

33. Following the Council's decision to re-screen both proposed developments under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017, the Claimant sent to the Council a document setting out its members' views on the potential for the proposed developments to significantly impact on the environment. The submission was provided to the Council on 2 August 2024. The Claimant requested that the Council confirm receipt of its submission. No confirmation of receipt was provided to the Claimant.
34. On 4 September 2024 the Council issued the fresh screening decisions in respect of both the Surf Lagoon and Hotel developments. Both screening opinions were negative. In terms of the discussion of cumulative impacts in the screening opinions, both opinions rely primarily on the reasoning that is said to be included in the Officer Reports for the Hotel and Surf Lagoon proposals.
35. Neither screening opinion expressly considers the potential impacts of the Hotel and Surf Lagoon on specific protected species, such as the Lizard Orchid and Fiery Clearwing Moth. Neither screening opinion identifies or explains the effectiveness of the ecological and other measures relied upon by the developers to mitigate the environmental impacts of the proposed development. Neither screening opinion makes any reference to the EIA submission provided to the Council by the Claimant.

Legal Framework

Interpretation of Planning Policy

36. Decisions whether to grant planning permission must be taken in accordance with the development plan, unless material considerations indicate otherwise: s.38(6) of the Planning and Compulsory Purchase Act 2004.
37. Part of the Council's adopted development plan includes its Core Strategy. Policy DM25 of the Core Strategy provides as follows:

"Policy DM 25

Open Space

Proposals for development that would result in the loss of open space will not be permitted unless:

- i. there is no identified qualitative or quantitative deficiency in public open space in terms of outdoor sports sites, children's play space or informal open space; or*
 - ii. where there is such a deficiency the site is incapable of contributing to making it good; or*
 - iii. where there is such a deficiency the site is capable of contributing to making it good, a replacement area with at least the same qualities and equivalent community benefit, including ease of access, can be made available; or*
 - iv. in the case of a school site the development is for educational purposes; or*
 - v. in the case of small-scale development it is ancillary to the enjoyment of the open space; and*
 - vi. in all cases except point 2, the site has no overriding visual amenity interest, environmental role, cultural importance or nature conservation value.*
- (Underlining added)

38. The Council is also in the process of preparing a new local plan (the Dover District Local Plan to 2040), for which the examining Inspectors' report was published on 20 September 2024. The policies included in the draft local plan are material considerations in the determination of planning applications by the Council.
39. Policy PM5 of the draft Local Plan, entitled 'Protection of Open Space, Sports Facilities and Local Green Space', also seeks to protect open spaces within the district. Policy PM5 provides that proposals involving the whole or partial loss of open space will not be supported unless "*a robust assessment...has identified a surplus in the catchment area to meet both current and future needs*" (underlining added).
40. The correct interpretation of planning policy is a matter of law. A failure to properly understand and apply relevant policy will constitute a failure to have regard to a material consideration, or alternatively will amount to having regard to an immaterial consideration, and will render a decision unlawful (*Tesco Stores v Dundee* [2012] PTSR 983 at [17] to [22]).

Environmental Impact Assessment

41. The EIA Regulations make provision for the carrying out of EIA by developers for “*EIA development*”, i.e. development which falls within the scope of either Schedule 1 of the Regulations, or within Schedule 2 and the development is likely to have significant environmental effects (reg.2).
42. EIA is a process consisting of (inter alia) the preparation of an environmental statement which includes the relevant information listed in Schedule 4 to the EIA Regulations (reg.4). Where EIA is necessary, a decision-maker determining a planning application must take into consideration all the environmental information generated by the EIA, reach a reasoned conclusion on the significant environmental effects of the development, integrate that conclusion into his/her decision whether to grant planning permission, and consider whether it is appropriate to put in place any monitoring measures (reg.26).
43. Regulation 3 of the EIA Regulations prohibits a local planning authority from granting planning permission for EIA development unless an EIA has been carried out in respect of that development.
44. Under regulation 6, a developer may request that the relevant local planning authority adopt a screening opinion in respect of a development proposal. A screening opinion sets out the local planning authority’s view whether that development is EIA development.

EIA and Remedial Measures

45. Regulation 5 provides for the matters that must be included in a screening opinion. Under regulation 5(5)(b), if an LPA adopts a screening opinion in which it determines that proposed development is not EIA development, it must “*state any features of the proposed development and measures envisaged to avoid, or prevent what might otherwise have been, significant adverse effects on the environment*”. In other words, the local planning authority must clearly identify any mitigation or compensation relied upon for the conclusion that the development in question does not require EIA.
46. At the screening stage, a local planning authority is not therefore precluded from taking into account potential remedial measures. However, the courts have made clear the following:
- a. A screening authority must have regard to the precautionary principle and the degree of uncertainty as to environmental impact at the date of the decision (*R (Loader) v SSCLG* [2013] PTSR 406 at [43]).
 - b. A screening authority cannot rely on conditions and undertakings as a surrogate for the EIA process (*R (Jones) v Mansfield DC* [2004] Env LR 21 at [38]).
 - c. A screening authority must ensure that it has sufficient evidence of both the potential adverse environmental impacts of a proposal, and the

availability and effectiveness of proposed remedial measures, in order to make an informed judgment that a development is not likely to have significant effects on the environment (*R (Swire) v Secretary of State for Housing, Communities and Local Government* [2020] Env LR 29).

- d. The EIA Regulations expressly envisage that mitigation measures will where appropriate be included in an environmental statement. Application of the precautionary principle, which underlies the EIA Directive, implies that cases of material doubt should generally be resolved in favour of EIA. The uncertainties associated with remedial measures may make it impossible reasonably to conclude that there is no likelihood of significant environmental effect (*Champion v North Norfolk District Council* [2015] 1 WLR 3710).

47. As the High Court explained in *R (Lebus) v South Cambridgeshire DC* [2003] Env LR 17, the underlying purpose of the EIA Regulations is to ensure that the potentially significant impacts of a development are described together with any remedial measures. The public is thereby engaged in the process of assessing the efficacy of any mitigation measures. It is not appropriate for a person charged with making a screening opinion to start from the premise that, although there may be significant environmental impacts, these can be made insignificant through the implementation of conditions. In that case, the appropriate course is to require an environmental statement setting out the significant impacts and the measures which it is said will reduce their significance ([45] to [46]).

EIA and Cumulative Impacts

48. The Schedule 3 criteria, which a planning authority must consider when carrying out a screening exercise, include the cumulation of the environmental impacts of the development with other existing and/or approved development.

49. The question what cumulative environmental impacts must be considered by a local planning authority, both at the screening stage and at the point at which an EIA is carried out, has been considered in various authorities from which the following relevant principles can be derived:

- (a) It is unlawful to “salami-slice” what is in substance and reality a single project into a series of smaller projects (deliberately otherwise), each falling below the threshold criteria requiring EIA (*R (Clarke-Holland) v Secretary of State for the Home Department* [2024] ACD 20 at §72).
- (b) Even where two development proposals are properly distinct, they may have cumulative impacts. The existence and nature of cumulative environmental effects will be a question of fact and judgment in each case (*Clarke-Holland* at §72).
- (c) Overlapping environmental effects may exist where there are independent projects nearby to one another, in which case an assessment of cumulative

effects will be required (*R (Wingfield) v Canterbury City Council* [2020] JPL 154 at §70).

Grounds of Challenge

Ground 1: Misinterpretation of Planning Policy

50. The Officer Reports underlying the grants of planning permission for the Hotel and Surf Lagoon are based on a misinterpretation of policy DM25 of the adopted Core Strategy and policy PM5 of the draft Local Plan.

51. The starting point under Policy DM25 is that the Council will resist development proposals resulting in a loss of open space. Paragraphs i. to vi. then identify limited circumstances in which the Council will depart from that starting point. Criterion vi. makes clear, however, that unless a site falls within the scope of policy DM25ii. – i.e. is incapable of making good an identified deficiency in open space provision – planning permission will only be granted for development that would lead to a loss of open space if the open space in question has “*no overriding visual amenity interest, environmental role, cultural importance, or nature conservation role*”.

52. In the present case, the Council has not suggested that policy DM25ii. applies to the Country Park. Criterion vi. clearly did apply to the application of policy DM25. Notwithstanding this, neither of the Officer Reports prepared in connection with the Surf Lagoon and Hotel Developments considers DM25vi., or assesses the development proposals against its requirements. No consideration is given to whether the Country Park has an overriding environmental or nature conservation role. This is particularly surprising given that, in the evidence base underlying the Council’s emerging local plan, the Country Park is identified as a natural/semi-natural greenspace that has been designated for its role in wildlife conservation, supporting biodiversity, and environmental education and awareness. The Council’s failure to apply criterion vi. represents a clear failure to correctly understand the requirements of policy DM25.

53. In terms of policy PM5, the Officer Reports again clearly fail to correctly interpret and apply the draft policy:

- a. Officers fail to require the developer to carry out any assessment of open space within the *catchment area* of the Country Park, as is required by policy PM5;
- b. The reports rely upon district-level assessments prepared in connection with the draft Local Plan and do not address catchment-level requirements for open space, as is required by policy PM5; and
- c. The reports fail to explain why the Hotel and Surf Lagoon proposals are considered to comply with policy PM5, in circumstances where the refusal of the first hotel application stated that development within the Country Park was contrary to policy PM5.

54. This failure to correctly interpret and apply policies DM25 and PM5 represents a failure by the Council to take into account both statutory and obviously material considerations, and thereby renders the grant of planning permission for the Hotel and Surf Lagoon unlawful.

Ground 2: EIA and Cumulative Impacts

55. The Council's decision to grant planning permission for the Hotel and Surf Lagoon in reliance upon the screening opinions issued on 4 September 2024 was unlawful. The opinions again fail adequately to address the cumulative impacts of the two development proposals, as is required by schedule 3 of the EIA Regulations.

56. The two new screening opinions issued on 4 September 2024 state that the most significant potential cumulative impacts of the Hotel and Surf Lagoon proposals are ecological, landscape and visual, and traffic. The screening opinions assert that “[t]he culminative [sic] characteristics of developments have been assessed in the Officers’ Report, as appropriate, where it is considered (taking into account measures of mitigation or compensation) that they are unlikely to result in significant environmental effects”.² The assessment of cumulative impacts in the screening opinions therefore largely relies upon and adopts the reasoning that is said to be included in the Officer Reports for the key impacts identified.

57. While the Officer Reports do assess the cumulative landscape impacts of the proposed Hotel and Surf Lagoon, the assertion that they also address the cumulative ecological or air quality impacts of the proposed development is simply not accurate.

58. On the contrary, the Officer Reports give no consideration to the potential for the proposed developments to impact cumulatively on key protected species such as Lizard Orchids, Fiery Clearwing Moths, and other invertebrates, or habitats such as open mosaic habitats. Nor is any consideration given in the reports to the cumulative impact of the proposed developments on air quality. This is unsurprising, given that many of the environmental assessments on which the Officer Reports were based related to only one of the two development proposals, and did not consider the cumulative impacts of the proposals.³

59. In short, the Council in its re-screening exercise has again failed to assess the cumulative impacts of the proposed development on the environmental characteristics that it has itself identified as being most vulnerable to the impacts of the proposed development. The decision to issue planning permission on the

² See pages 3-4 of the Hotel Screening Opinion and page 4 of the Surf Lagoon Screening Opinion.

³ See, for example, the separate Air Quality Assessments submitted in respect of each development proposal; the ‘Assessment of Scarce Moth Species’ prepared in relation to the Surf Lagoon development in August 2023; and the Ecological Appraisals submitted in respect of the development proposals.

basis of these fresh screening opinions was therefore unlawful, as the Claimant highlighted in its pre-action letter dated 1 May.

Ground 3: EIA Mitigation

60. Regulation 5(5)(b) of the EIA Regulations requires local planning authorities to state in their screening opinions what remedial measures it considers will avoid or prevent what would otherwise have been significant impacts on the environment. In addition to this, there is a wealth of case law which sets out that local planning authorities carrying out screening exercises must ensure that they have sufficient information on proposed remedial measures to make an informed judgment as to their likely effectiveness. This is mandated by, inter alia, the precautionary principle.
61. Notwithstanding this, and notwithstanding that the Claimant's pre-action letter and EIA submission identified these principles clearly, the Council's new screening opinions refer only generally to the existence of remedial measures proposed in connection with the Hotel and Surf Lagoon. Again, the screening opinions largely refer back to the analysis that is said to have been included in the Officer Reports.
62. As with the assessment of cumulative impacts, the Officer Reports do not address the environmental mitigation proposed in connection with the development to the standard required by the EIA Regulations. On the contrary, the Officer Reports expressly recognise that many of the mitigation measures proposed by the applicant are either wholly untested, or have been subject to comment by the Council's own expert advisers – Natural England and the SNEO – which has given rise to serious doubts as to the potential for those measures to be effective.
63. This is particularly true of the impact of the proposed development on protected species, such as the Lizard Orchid and the Fiery Clearwing Moth.⁴ It is also the case for other environmental impacts for which mitigation has not been fully addressed by the developers, including the identified high risk that land contamination at the Country Park could cause catastrophic damage to the proposed buildings and infrastructure at the site, and an “*acute risk to human health*”.⁵
64. In light of the material doubt as to the effectiveness of the environmental mitigation proposed by the developers in the present case, the reliance in the Officer Reports upon planning conditions and obligations to avoid carrying out an EIA is unacceptable. Such reliance frustrates the purpose of the EIA regulations, prevents the public from being engaged in the process of assessing the efficacy of any mitigation measures (*Lebus and Jones*), and contravenes the precautionary

⁴ See paragraphs 2.133ff and 2.151ff of the Surf Lagoon OR, paragraphs 2.153ff of the Hotel OR, Natural England's consultation responses, and the SNEO's Consultation Responses.

⁵ See page 44 of the ‘*Phase 1 Land Contamination Assessment*’ for the Surf Lagoon prepared by Ecologia, dated 18 August 2022, and page 34 of the ‘*Phase 1 Land Contamination Assessment*’ for the Hotel, also prepared by Ecologia and dated 21 August 2023.

principle, which requires any material uncertainty to be resolved in favour of carrying out an EIA (*Champion*).

65. The Council's decision to issue a negative screening opinion for the proposed developments, notwithstanding these material uncertainties, was unlawful, as was its decision to issue planning permission based on those screening opinions.

66. For the reasons set out above, the Council's decision to issue planning permission for the proposed developments was unlawful and should be quashed.

Details of information sought

67. Please identify (and if they are not in the public domain provide copies of) any documents meeting the below descriptions and post-dating the Officer Reports:

- a. Any further advice that was sought and/or received by the Council from its ecology officers and/or advisers;
- b. Any further advice that was sought and/or received by the Council from Natural England;
- c. Any further information provided to the Council by the Interested Parties in connection with the re-screening exercise;
- d. Any further information taken into consideration by the Council in carrying out the re-screening exercise;
- e. Any delegated report and/or officer's report prepared by the Council in connection with the decisions to issue planning permission for the Hotel and Surf Lagoon.

Action that the Council is expected to take

68. We request that the Council agrees that the grant of planning permission to the Hotel and Surf Lagoon developments was unlawful. We request that the Council consent to the quashing of the planning permissions.

ADR Proposals

69. The Claimant does not have any specific proposals for alternative dispute resolution, as it considers that the actions set out above at paragraph [xx] are the only way to satisfactorily resolve the present dispute and avoid litigation. The Claimant does remain open to engaging in ADR should the Council have any proposals. The Claimant does however note that its previous efforts to assist the Council in conducting lawful re-screening exercises (by way of the EIA submission) were not responded to by the Council.

Aarhus Convention Claim

70. This is an Aarhus Convention Claim within the meaning of CPR r 46.24. Accordingly, the Claimant proceeds on the basis of benefitting from the costs

protection regime at CPR r 46.24 to 46.28, and its adverse costs would be limited to £10,000 . If you disagree, please fully explain why.

Legal Advisers

71. The contact details for the Claimant's legal advisers are: Leigh Day, Panagram, 27 Goswell Road, EC1M 7AJ. Please send any correspondence by email to [REDACTED] [REDACTED] (@leighday.co.uk), [REDACTED] (@leighday.co.uk) and [REDACTED] (@leighday.co.uk).

Timeframe for Response

72. We request a substantive response within 14 days, i.e. by 17 October 2024, along with the requested documentation. Please forward any response to [REDACTED] (@leighday.co.uk), [REDACTED] [REDACTED] (@leighday.co.uk), [REDACTED] [REDACTED] (@leighday.co.uk), and [REDACTED] (@leighday.co.uk).

Yours faithfully



Leigh Day

[REDACTED]

From: [REDACTED]
Sent: 10 October 2024 16:40
To: [REDACTED]
Subject: RE: Betteshanger
Attachments: 2nd PAP letter, LD to Dover DC (03.10.2024).pdf; Friends of Betteshanger - EIA Screening Submission to DCC (02-08-2024) FINAL .pdf; 707644 - DDC letter out_PAP response_12.06.24.pdf; PAP Friends of Betteshanger (01-05-2024) FINAL (as sent).pdf

Hi [REDACTED]

Please find attached:

1st PAP letter (dated 01.05.2024)
DDCs response to the 1st PAP letter (dated 12.06.2024)
FoB's letter re: EIA screening (dated 02.08.2024)
2nd PAP letter (dated 03.10.2024)

Kind regards

[REDACTED]



[REDACTED]
Principal Solicitor - Planning

Dover District Council
Council Offices, White Cliffs Business Park, Whitfield, Dover CT16 3PJ
Tel: [REDACTED]
Mob: [REDACTED]
Email: [REDACTED]@DOVER.GOV.UK
Web: <http://dover.gov.uk>

Please consider the Environment before printing this email

From: [REDACTED]@nexusplanning.co.uk>
Sent: 10 October 2024 15:08
To: [REDACTED]@dover.gov.uk>; [REDACTED]@DOVER.GOV.UK>
Subject: Betteshanger

Hi [REDACTED] / [REDACTED]

Do you have any details / papers you could share ahead of tomorrow's con?

Thanks

[REDACTED]

[REDACTED]
Associate Director

t: [REDACTED]
m: [REDACTED]
e: [REDACTED]@nexusplanning.co.uk
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BY EMAIL ONLY TO:

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██████████@DOVER.GOV.UK;

developmentcontrol@dover.gov.uk;

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██████████@dover.gov.uk

EMAIL: ██████████@leighday.co.uk;

██████████@leighday.co.uk;

██████████@leighday.co.uk

TELEPHONE: 020 7650 1232

YOUR REF: DOV/22/01158;
DOV/23/01095

OUR REF: RGA/JEK/01184482/1

DATED: 3 October 2024

SENT BY SPECIAL DELIVERY TO:

Betteshanger Property Limited
c/o Quinn Estates Ltd
The Cow Shed
Highland Court Farm
Bridge
Canterbury
CT4 5HW

Betteshanger Country Park
c/o Mr ██████████
Highland Court Farm
Coldharbour Lane

Seahive
c/o Icen Projects
Da Vinci House
44 Saffron Hill

Dear Dover Council

Grant of planning permission for the erection of a surfing lagoon and pools (DOV/22/01158) and a 120-bed hotel (C1) building with associated facilities (DOV/23/01095)

1. We write on behalf of the Friends of Betteshanger ("the **Claimant**") in accordance with the Judicial Review Pre-Action Protocol.

2. The Claimant proposes to challenge the decision, taken by Dover District Council (“the **Council**”), to issue planning permission for the development of land at Betteshanger Country Park (“the **Country Park**”), Sandwich Road, Sholden to provide a surfing lagoon and pools (DOV/22/01158) and a hotel (C1) building with associated facilities (DOV/23/01095).
3. This letter sets out the factual (to the extent currently known to the Claimant) and legal basis on which any claim would likely be pursued. Please be clear in your response in identifying any areas of factual and/or legal dispute and the basis for them so that the issues in dispute can be identified and if possible narrowed.
4. This letter follows an earlier pre-action protocol letter, sent by the Claimant to your client on 1 May 2024 prior to your client’s decision to issue planning permission for the development at Betteshanger Country Park. Following receipt of that letter, your client declined to submit a substantive response to the Claimant’s proposed grounds 1-2. Instead, you committed to undertake a fresh screening exercise in relation to the development at the Country Park.
5. Our client is not satisfied with the lawfulness of the planning permissions issued by your client following that fresh screening exercise. Our client therefore requests a full response to the proposed grounds of challenge set out below.
6. We are aware that litigation is a remedy of last resort and write in the hope that this matter can be resolved without recourse to legal proceedings. We therefore outline at the end of this letter the steps which we ask you to take in order to avoid recourse to the Court. If the Claimant receives an unsatisfactory response to this letter, it proposes to make an application for judicial review without further notice to you.

The Claimant

7. The proposed claimant is the Friends of Betteshanger. Friends of Betteshanger is a group of local people that came together in 2020 to try and protect their local wildlife from the threat of development.

The Defendant

8. The proposed defendant is Dover District Council.

Matters under challenge

9. The Council’s decision to issue planning permission, on 25 September 2024 and 17 September 2024 respectively, for:
 - a. the erection of a 120-bed hotel building with associated spa facilities, gym, restaurant/bar, access, landscaping and parking in Betteshanger

Country Park, Sandwich Road, Sholden (DOV/23/01095) (“the Hotel”); and

- b. the erection of a surfing lagoon and pools, hub building, 15 overnight holiday pods, learning hive, yoga studio, fitness/health and wellbeing facilities, bike/pumptrack and associated roads, paths, car and cycle parking, together with landscaping and necessary access works and associated site infrastructure at Betteshanger Country Park, Sandwich Road, Sholden (DOV/22/01158) (“the Surfing Lagoon”).

Details of Interested Parties

10. This letter has been served by post on the following parties, identified by you as interested parties in your pre-action response dated 16 September 2024:

Betteshanger Property Limited
c/o Quinn Estates Ltd
The Cow Shed
Highland Court Farm
Bridge
Canterbury
CT4 5HW

Betteshanger Country Park
c/o [REDACTED]
Highland Court Farm
Coldharbour Lane
[REDACTED]@akdc.co.uk

Seahive
c/o Iceni Projects
Da Vinci House
44 Saffron Hill

Factual Background

The Country Park

11. The applications for the Hotel and Surf Lagoon development relate to adjoining parcels of land within Betteshanger Country Park (“the **Country Park**”). The Country Park is privately owned by Betteshanger Property Limited (“**BPL**”), which acquired the site in 2019.
12. The Country Park is situated in the countryside approximately 2.4km from the nearest settlement of Deal/Sholden. It is designated as an open space.
13. The Country Park is a popular site that was visited by 240,000 visitors in 2023. It is partly developed, hosting a visitor centre, the Kent Mining Museum, a

café/restaurant, an events space and a children's play area. This existing development is concentrated around the access roadway into the Country Park (the A258), with the remainder of the Park being largely undeveloped and vegetated.

14. The Country Park has been classified as a 'natural/semi-natural' green space by the Council in recent assessments of open space within the district. The Council's draft Local Plan explains that the purpose of this type of open space is '*Wildlife conservation, biodiversity and environmental education and awareness*'. The Country Park is home to a number of protected species, including a population of lizard orchids¹ that is of regional to national importance.

The Planning Applications

15. Planning applications for the Surfing Lagoon and the current Hotel development came forward in 2022 and 2023 respectively. The two proposals relate to adjacent sites within the Country Park that focus around the existing development at the Park. BPL will retain ownership of both sites. The land which is the subject of the Surfing Lagoon application will be leased to The SEAHIVE ("**SEAHIVE**").
16. In terms of the timing of the two planning applications, applications for the proposed Surfing Lagoon and Hotel were originally submitted alongside one another on 30 August 2022. The applicant for the Surf Lagoon was SEAHIVE, and the applicant for the Hotel was Betteshanger Country Park ("**BCP**"). Both applicants used the same agent (Alexander Hamilton at Icen Projects) to submit the applications.
17. The Council's Planning Committee resolved to refuse planning permission for a separate application for a hotel submitted in 2022 (DOV/22/01152) on 13 July 2023 on the grounds that (i) the proposed hotel development would lead to an unacceptable loss of open space, and (ii) the proposed development would result in significant disturbance to habitat that supports a population of Turtle Doves, contrary to local and national policy.
18. Following this, BPL withdrew its application for planning permission for the Hotel. A modified application for planning permission was submitted on 1 September 2023, accompanied by a planning statement also prepared by Icen Projects. Changes were made to the original hotel design in an effort to overcome the objections raised by the Planning Committee.

The First EIA Screening Opinions

19. The applicants for the first Hotel development and the Surfing Lagoon development requested that the Council screen the proposed developments for EIA. The two screening requests were both submitted on 25 August 2022, and had

¹ Protected under schedule 8 of the Wildlife and Countryside Act 1981.

been prepared by the same environmental consultants (Entran Ltd). Both requests acknowledged that the proposals fell within the relevant thresholds of Schedule 2 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (“the **EIA Regulations**”) but concluded that there were no likely significant environmental effects that would require the carrying out of an environmental impact assessment (“**EIA**”).

20. Both Screening Opinions agreed with the developers that the (first) Hotel and Surfing Lagoon proposals were not likely to have significant environmental effects. Notably, in both Screening Opinions the Council saw fit to consider whether the two proposals were in reality a single project that had been divided into two separate developments. Applying the criteria set out in *R (Wingfield) v Canterbury City Council* [2020] JPL 154, the Council concluded that the proposals were distinct developments which could be treated as freestanding projects for the purpose of the EIA Regulations.
21. At no point did the Council carry out any screening exercise for the amended Hotel proposals (DOV/23/01095).

Natural England’s Consultation Responses

22. As indicated above, during the course of the Council’s consideration of the Surf Lagoon and Hotel applications, NE submitted four consultation responses in which it set out concerns regarding the impact on domestic protected species.
23. On 20 March 2023, NE wrote to the Council expressing concerns that the application documents for the Surf Lagoon gave rise to uncertainty about the impact of the proposal on the Lizard Orchid, a plant species protected under Schedule 8 of the WCA 1981.
24. On 20 September 2023, NE wrote again to the Council in the following terms:
- (a) NE reasserted its concerns regarding the Lizard Orchid. NE expressed its opinion that the developer’s proposal to mitigate any impact on Lizard Orchids by translocation “*remains unprecedented in scale with uncertain outcomes*”, partly due to a lack of research.
 - (b) NE raised concerns regarding the impact of the Surf Lagoon on the Fiery Clearwing Moth, a species also protected under Schedule 5 of the WCA 1981. NE opined that the Country Park was an important site for the Fiery Clearwing Moth, and that the mitigation proposed by the applicant – also involving translocation – was inappropriate and experimental.
 - (c) NE explained that due to the potential impacts on species protected under the WCA 1981, SEAHIVE would need to obtain a licence from NE before any development could commence. NE set out that, currently, the Council could not be confident that NE would likely grant such a licence to SEAHIVE should such an application be forthcoming. NE’s view was that it would be

difficult for the proposals to meet the third of the relevant licensing tests – namely that the grant of the licence would not be detrimental to the survival of any population of the species of animal or plant to which the licence relates.

25. On 1 November 2023, NE wrote again to the Council expressing its concerns that the third licensing test would not be met by the Applicant due to the impact of the proposals on the Lizard Orchid and the Fiery Clearwing Moth, and the uncertainty surrounding whether the mitigation proposed by the applicant would be sufficient.
26. NE's final letter to the Council on 6 February 2024 reasserted its concern that the Council was proposing to grant planning permission for development for which NE may not be able to issue a licence. NE repeated that it had concerns regarding the impact of the development proposals on Lizard Orchids and Fiery Clearwing Moths. Regarding Lizard Orchids, NE stated that the 7-year research period proposed by the applicant, during which time it would assess whether the proposed translocation would be successful on the Surf Lagoon site, would enable NE to make an informed decision on any licence application. NE made clear, however, that at this stage, this did not mean that a licence would likely be issued – if the research did not demonstrate that the translocation methods were successful, NE would remain unable to issue a licence.

Resolutions to Grant Planning Permission

27. The two planning applications at issue went before the Council's Planning Committee on 7 March 2024. The Officer Reports for the two developments recommended that planning permission be granted subject to conditions.
28. The Reports referenced the Screening Opinions that had been issued by the Council in July 2023 in their "Planning History" sections, noting that the opinions had concluded that the Surf Lagoon and the first Hotel Development did not require EIA. The Reports went on to address certain other environmental issues, including the question whether the developers were likely to obtain protected species licences from Natural England.
29. The Officer Reports for both development proposals identify one of the main issues in the consideration of the applications as being 'Open Space', and presumably the loss of it. The Reports considered the question whether the proposed development complied with the open space policies included in the Council's adopted Core Strategy and draft Local Plan, in particular policy DM25 and draft policy PM5. The reports concluded that the development would comply with those policies. Much of the reasoning in the Officer Reports relies upon a district-wide surplus in natural and semi-natural green space identified in assessments prepared by the Council during the course of preparing its new local plan (see paragraphs 2.55 to 2.67 of the Surf Lagoon OR and 2.44 to 2.56 of the Hotel OR).

30. The Council's Planning Committee resolved to grant planning permission for the Hotel and Surf Lagoon developments, subject to conditions.

The Claimant's First Pre-Action Letter and the Defendant's Response

31. On 1 May 2024 the Claimant sent a pre-action letter to the Council proposing to challenge the resolutions to grant planning permission on three grounds. The Claimant pointed to flaws in the Council's screening opinions, arguing in particular that:
- a. The Council's failure to consider the potential cumulative impacts of the Hotel and Surf Lagoon proposals was unreasonable; and
 - b. The Council's failure to reconsider the potential for the development to have significant impacts on protected species such as the Lizard Orchid and Fiery Clearwing Moth was unlawful due to the developers' reliance upon untested mitigation and compensation measures.
32. The Council did not respond to the Claimant until 12 June 2024, at which time the Council agreed to carry out a fresh screening exercise in respect of both schemes.

The Re-Screening Exercise

33. Following the Council's decision to re-screen both proposed developments under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017, the Claimant sent to the Council a document setting out its members' views on the potential for the proposed developments to significantly impact on the environment. The submission was provided to the Council on 2 August 2024. The Claimant requested that the Council confirm receipt of its submission. No confirmation of receipt was provided to the Claimant.
34. On 4 September 2024 the Council issued the fresh screening decisions in respect of both the Surf Lagoon and Hotel developments. Both screening opinions were negative. In terms of the discussion of cumulative impacts in the screening opinions, both opinions rely primarily on the reasoning that is said to be included in the Officer Reports for the Hotel and Surf Lagoon proposals.
35. Neither screening opinion expressly considers the potential impacts of the Hotel and Surf Lagoon on specific protected species, such as the Lizard Orchid and Fiery Clearwing Moth. Neither screening opinion identifies or explains the effectiveness of the ecological and other measures relied upon by the developers to mitigate the environmental impacts of the proposed development. Neither screening opinion makes any reference to the EIA submission provided to the Council by the Claimant.

Legal Framework

Interpretation of Planning Policy

36. Decisions whether to grant planning permission must be taken in accordance with the development plan, unless material considerations indicate otherwise: s.38(6) of the Planning and Compulsory Purchase Act 2004.
37. Part of the Council's adopted development plan includes its Core Strategy. Policy DM25 of the Core Strategy provides as follows:

"Policy DM 25

Open Space

Proposals for development that would result in the loss of open space will not be permitted unless:

- i. there is no identified qualitative or quantitative deficiency in public open space in terms of outdoor sports sites, children's play space or informal open space; or*
 - ii. where there is such a deficiency the site is incapable of contributing to making it good; or*
 - iii. where there is such a deficiency the site is capable of contributing to making it good, a replacement area with at least the same qualities and equivalent community benefit, including ease of access, can be made available; or*
 - iv. in the case of a school site the development is for educational purposes; or*
 - v. in the case of small-scale development it is ancillary to the enjoyment of the open space; and*
 - vi. in all cases except point 2, the site has no overriding visual amenity interest, environmental role, cultural importance or nature conservation value.*
- (Underlining added)

38. The Council is also in the process of preparing a new local plan (the Dover District Local Plan to 2040), for which the examining Inspectors' report was published on 20 September 2024. The policies included in the draft local plan are material considerations in the determination of planning applications by the Council.
39. Policy PM5 of the draft Local Plan, entitled 'Protection of Open Space, Sports Facilities and Local Green Space', also seeks to protect open spaces within the district. Policy PM5 provides that proposals involving the whole or partial loss of open space will not be supported unless "*a robust assessment...has identified a surplus in the catchment area to meet both current and future needs*" (underlining added).
40. The correct interpretation of planning policy is a matter of law. A failure to properly understand and apply relevant policy will constitute a failure to have regard to a material consideration, or alternatively will amount to having regard to an immaterial consideration, and will render a decision unlawful (*Tesco Stores v Dundee* [2012] PTSR 983 at [17] to [22]).

Environmental Impact Assessment

41. The EIA Regulations make provision for the carrying out of EIA by developers for “*EIA development*”, i.e. development which falls within the scope of either Schedule 1 of the Regulations, or within Schedule 2 and the development is likely to have significant environmental effects (reg.2).
42. EIA is a process consisting of (inter alia) the preparation of an environmental statement which includes the relevant information listed in Schedule 4 to the EIA Regulations (reg.4). Where EIA is necessary, a decision-maker determining a planning application must take into consideration all the environmental information generated by the EIA, reach a reasoned conclusion on the significant environmental effects of the development, integrate that conclusion into his/her decision whether to grant planning permission, and consider whether it is appropriate to put in place any monitoring measures (reg.26).
43. Regulation 3 of the EIA Regulations prohibits a local planning authority from granting planning permission for EIA development unless an EIA has been carried out in respect of that development.
44. Under regulation 6, a developer may request that the relevant local planning authority adopt a screening opinion in respect of a development proposal. A screening opinion sets out the local planning authority’s view whether that development is EIA development.

EIA and Remedial Measures

45. Regulation 5 provides for the matters that must be included in a screening opinion. Under regulation 5(5)(b), if an LPA adopts a screening opinion in which it determines that proposed development is not EIA development, it must “*state any features of the proposed development and measures envisaged to avoid, or prevent what might otherwise have been, significant adverse effects on the environment*”. In other words, the local planning authority must clearly identify any mitigation or compensation relied upon for the conclusion that the development in question does not require EIA.
46. At the screening stage, a local planning authority is not therefore precluded from taking into account potential remedial measures. However, the courts have made clear the following:
- a. A screening authority must have regard to the precautionary principle and the degree of uncertainty as to environmental impact at the date of the decision (*R (Loader) v SSCLG* [2013] PTSR 406 at [43]).
 - b. A screening authority cannot rely on conditions and undertakings as a surrogate for the EIA process (*R (Jones) v Mansfield DC* [2004] Env LR 21 at [38]).
 - c. A screening authority must ensure that it has sufficient evidence of both the potential adverse environmental impacts of a proposal, and the

availability and effectiveness of proposed remedial measures, in order to make an informed judgment that a development is not likely to have significant effects on the environment (*R (Swire) v Secretary of State for Housing, Communities and Local Government* [2020] Env LR 29).

- d. The EIA Regulations expressly envisage that mitigation measures will where appropriate be included in an environmental statement. Application of the precautionary principle, which underlies the EIA Directive, implies that cases of material doubt should generally be resolved in favour of EIA. The uncertainties associated with remedial measures may make it impossible reasonably to conclude that there is no likelihood of significant environmental effect (*Champion v North Norfolk District Council* [2015] 1 WLR 3710).

47. As the High Court explained in *R (Lebus) v South Cambridgeshire DC* [2003] Env LR 17, the underlying purpose of the EIA Regulations is to ensure that the potentially significant impacts of a development are described together with any remedial measures. The public is thereby engaged in the process of assessing the efficacy of any mitigation measures. It is not appropriate for a person charged with making a screening opinion to start from the premise that, although there may be significant environmental impacts, these can be made insignificant through the implementation of conditions. In that case, the appropriate course is to require an environmental statement setting out the significant impacts and the measures which it is said will reduce their significance ([45] to [46]).

EIA and Cumulative Impacts

48. The Schedule 3 criteria, which a planning authority must consider when carrying out a screening exercise, include the cumulation of the environmental impacts of the development with other existing and/or approved development.

49. The question what cumulative environmental impacts must be considered by a local planning authority, both at the screening stage and at the point at which an EIA is carried out, has been considered in various authorities from which the following relevant principles can be derived:

- (a) It is unlawful to “salami-slice” what is in substance and reality a single project into a series of smaller projects (deliberately otherwise), each falling below the threshold criteria requiring EIA (*R (Clarke-Holland) v Secretary of State for the Home Department* [2024] ACD 20 at §72).
- (b) Even where two development proposals are properly distinct, they may have cumulative impacts. The existence and nature of cumulative environmental effects will be a question of fact and judgment in each case (*Clarke-Holland* at §72).
- (c) Overlapping environmental effects may exist where there are independent projects nearby to one another, in which case an assessment of cumulative

effects will be required (*R (Wingfield) v Canterbury City Council* [2020] JPL 154 at §70).

Grounds of Challenge

Ground 1: Misinterpretation of Planning Policy

50. The Officer Reports underlying the grants of planning permission for the Hotel and Surf Lagoon are based on a misinterpretation of policy DM25 of the adopted Core Strategy and policy PM5 of the draft Local Plan.

51. The starting point under Policy DM25 is that the Council will resist development proposals resulting in a loss of open space. Paragraphs i. to vi. then identify limited circumstances in which the Council will depart from that starting point. Criterion vi. makes clear, however, that unless a site falls within the scope of policy DM25ii. – i.e. is incapable of making good an identified deficiency in open space provision – planning permission will only be granted for development that would lead to a loss of open space if the open space in question has “*no overriding visual amenity interest, environmental role, cultural importance, or nature conservation role*”.

52. In the present case, the Council has not suggested that policy DM25ii. applies to the Country Park. Criterion vi. clearly did apply to the application of policy DM25. Notwithstanding this, neither of the Officer Reports prepared in connection with the Surf Lagoon and Hotel Developments considers DM25vi., or assesses the development proposals against its requirements. No consideration is given to whether the Country Park has an overriding environmental or nature conservation role. This is particularly surprising given that, in the evidence base underlying the Council’s emerging local plan, the Country Park is identified as a natural/semi-natural greenspace that has been designated for its role in wildlife conservation, supporting biodiversity, and environmental education and awareness. The Council’s failure to apply criterion vi. represents a clear failure to correctly understand the requirements of policy DM25.

53. In terms of policy PM5, the Officer Reports again clearly fail to correctly interpret and apply the draft policy:

- a. Officers fail to require the developer to carry out any assessment of open space within the *catchment area* of the Country Park, as is required by policy PM5;
- b. The reports rely upon district-level assessments prepared in connection with the draft Local Plan and do not address catchment-level requirements for open space, as is required by policy PM5; and
- c. The reports fail to explain why the Hotel and Surf Lagoon proposals are considered to comply with policy PM5, in circumstances where the refusal of the first hotel application stated that development within the Country Park was contrary to policy PM5.

54. This failure to correctly interpret and apply policies DM25 and PM5 represents a failure by the Council to take into account both statutory and obviously material considerations, and thereby renders the grant of planning permission for the Hotel and Surf Lagoon unlawful.

Ground 2: EIA and Cumulative Impacts

55. The Council's decision to grant planning permission for the Hotel and Surf Lagoon in reliance upon the screening opinions issued on 4 September 2024 was unlawful. The opinions again fail adequately to address the cumulative impacts of the two development proposals, as is required by schedule 3 of the EIA Regulations.

56. The two new screening opinions issued on 4 September 2024 state that the most significant potential cumulative impacts of the Hotel and Surf Lagoon proposals are ecological, landscape and visual, and traffic. The screening opinions assert that “[t]he culminative [sic] characteristics of developments have been assessed in the Officers’ Report, as appropriate, where it is considered (taking into account measures of mitigation or compensation) that they are unlikely to result in significant environmental effects”.² The assessment of cumulative impacts in the screening opinions therefore largely relies upon and adopts the reasoning that is said to be included in the Officer Reports for the key impacts identified.

57. While the Officer Reports do assess the cumulative landscape impacts of the proposed Hotel and Surf Lagoon, the assertion that they also address the cumulative ecological or air quality impacts of the proposed development is simply not accurate.

58. On the contrary, the Officer Reports give no consideration to the potential for the proposed developments to impact cumulatively on key protected species such as Lizard Orchids, Fiery Clearwing Moths, and other invertebrates, or habitats such as open mosaic habitats. Nor is any consideration given in the reports to the cumulative impact of the proposed developments on air quality. This is unsurprising, given that many of the environmental assessments on which the Officer Reports were based related to only one of the two development proposals, and did not consider the cumulative impacts of the proposals.³

59. In short, the Council in its re-screening exercise has again failed to assess the cumulative impacts of the proposed development on the environmental characteristics that it has itself identified as being most vulnerable to the impacts of the proposed development. The decision to issue planning permission on the

² See pages 3-4 of the Hotel Screening Opinion and page 4 of the Surf Lagoon Screening Opinion.

³ See, for example, the separate Air Quality Assessments submitted in respect of each development proposal; the ‘Assessment of Scarce Moth Species’ prepared in relation to the Surf Lagoon development in August 2023; and the Ecological Appraisals submitted in respect of the development proposals.

basis of these fresh screening opinions was therefore unlawful, as the Claimant highlighted in its pre-action letter dated 1 May.

Ground 3: EIA Mitigation

60. Regulation 5(5)(b) of the EIA Regulations requires local planning authorities to state in their screening opinions what remedial measures it considers will avoid or prevent what would otherwise have been significant impacts on the environment. In addition to this, there is a wealth of case law which sets out that local planning authorities carrying out screening exercises must ensure that they have sufficient information on proposed remedial measures to make an informed judgment as to their likely effectiveness. This is mandated by, inter alia, the precautionary principle.
61. Notwithstanding this, and notwithstanding that the Claimant's pre-action letter and EIA submission identified these principles clearly, the Council's new screening opinions refer only generally to the existence of remedial measures proposed in connection with the Hotel and Surf Lagoon. Again, the screening opinions largely refer back to the analysis that is said to have been included in the Officer Reports.
62. As with the assessment of cumulative impacts, the Officer Reports do not address the environmental mitigation proposed in connection with the development to the standard required by the EIA Regulations. On the contrary, the Officer Reports expressly recognise that many of the mitigation measures proposed by the applicant are either wholly untested, or have been subject to comment by the Council's own expert advisers – Natural England and the SNEO – which has given rise to serious doubts as to the potential for those measures to be effective.
63. This is particularly true of the impact of the proposed development on protected species, such as the Lizard Orchid and the Fiery Clearwing Moth.⁴ It is also the case for other environmental impacts for which mitigation has not been fully addressed by the developers, including the identified high risk that land contamination at the Country Park could cause catastrophic damage to the proposed buildings and infrastructure at the site, and an “*acute risk to human health*”.⁵
64. In light of the material doubt as to the effectiveness of the environmental mitigation proposed by the developers in the present case, the reliance in the Officer Reports upon planning conditions and obligations to avoid carrying out an EIA is unacceptable. Such reliance frustrates the purpose of the EIA regulations, prevents the public from being engaged in the process of assessing the efficacy of any mitigation measures (*Lebus* and *Jones*), and contravenes the precautionary

⁴ See paragraphs 2.133ff and 2.151ff of the Surf Lagoon OR, paragraphs 2.153ff of the Hotel OR, Natural England's consultation responses, and the SNEO's Consultation Responses.

⁵ See page 44 of the ‘*Phase 1 Land Contamination Assessment*’ for the Surf Lagoon prepared by Ecologia, dated 18 August 2022, and page 34 of the ‘*Phase 1 Land Contamination Assessment*’ for the Hotel, also prepared by Ecologia and dated 21 August 2023.

principle, which requires any material uncertainty to be resolved in favour of carrying out an EIA (*Champion*).

65. The Council's decision to issue a negative screening opinion for the proposed developments, notwithstanding these material uncertainties, was unlawful, as was its decision to issue planning permission based on those screening opinions.

66. For the reasons set out above, the Council's decision to issue planning permission for the proposed developments was unlawful and should be quashed.

Details of information sought

67. Please identify (and if they are not in the public domain provide copies of) any documents meeting the below descriptions and post-dating the Officer Reports:

- a. Any further advice that was sought and/or received by the Council from its ecology officers and/or advisers;
- b. Any further advice that was sought and/or received by the Council from Natural England;
- c. Any further information provided to the Council by the Interested Parties in connection with the re-screening exercise;
- d. Any further information taken into consideration by the Council in carrying out the re-screening exercise;
- e. Any delegated report and/or officer's report prepared by the Council in connection with the decisions to issue planning permission for the Hotel and Surf Lagoon.

Action that the Council is expected to take

68. We request that the Council agrees that the grant of planning permission to the Hotel and Surf Lagoon developments was unlawful. We request that the Council consent to the quashing of the planning permissions.

ADR Proposals

69. The Claimant does not have any specific proposals for alternative dispute resolution, as it considers that the actions set out above at paragraph [xx] are the only way to satisfactorily resolve the present dispute and avoid litigation. The Claimant does remain open to engaging in ADR should the Council have any proposals. The Claimant does however note that its previous efforts to assist the Council in conducting lawful re-screening exercises (by way of the EIA submission) were not responded to by the Council.

Aarhus Convention Claim

70. This is an Aarhus Convention Claim within the meaning of CPR r 46.24. Accordingly, the Claimant proceeds on the basis of benefitting from the costs

protection regime at CPR r 46.24 to 46.28, and its adverse costs would be limited to £10,000 . If you disagree, please fully explain why.

Legal Advisers

71. The contact details for the Claimant's legal advisers are: Leigh Day, Panagram, 27 Goswell Road, EC1M 7AJ. Please send any correspondence by email to Ricardo [REDACTED] ([REDACTED]@leighday.co.uk), [REDACTED] ([REDACTED]@leighday.co.uk) and [REDACTED] ([REDACTED]@leighday.co.uk).

Timeframe for Response

72. We request a substantive response within 14 days, i.e. by 17 October 2024, along with the requested documentation. Please forward any response to [REDACTED] ([REDACTED]@leighday.co.uk), [REDACTED] ([REDACTED]@leighday.co.uk), [REDACTED] ([REDACTED]@leighday.co.uk), and [REDACTED] ([REDACTED]@leighday.co.uk).

Yours faithfully



Leigh Day

Friends of Betteshanger
Submissions to Dover District Council on the EIA Screening Opinion

2 August 2024

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Introduction

We are writing on behalf of Friends of Betteshanger concerning the screening opinion being undertaken by Dover District Council (“DDC”) for two applications: DOV/22/01158 and DOV 23/01095. We request that the points raised in this document are considered as part of the assessment for EIA. They relate to:

- **DOV/22/01158: Surf lagoon, plus cafe/restaurant/bar, lounge, shop, hiring and changing facilities and multi-use space, 15 overnight and holiday pods, learning hive, well-being facilities, bike/pump track and associated roads, paths and cycle parking, together with landscaping and necessary access works and associated site infrastructure. (Re-consultation: additional/revised information including repositioned holiday lodge; revised parking arrangement; updated ecological appraisal; updated flood risk assessment and drainage strategy; habitat regulations assessment; transport response; and visitor management and turtle dove strategy.**
- **DOV/23/01095: Erection of a 120 bed hotel (C1) building with associated spa facilities, gym, restaurant/bar access, landscape and parking.**

The Council’s previous screening opinions dated 4 July 2023 accepted that the two development proposals fell within the scope of Schedule 2, paragraph 12(c) (‘holiday villages and hotel complexes’) and 12(d) (‘theme parks’) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (“the EIA Regulations”). We agree with that conclusion.

The two development proposals have an area greater than 0.5 Hectares; the surf lagoon covers an area of 9.6 Hectares¹; the hotel covers an area of 2.6 Hectares² so the development exceeds the threshold for a schedule 2 development.

DDC agreed in a pre-action response³ to re-screen this development.

As an overall comment, Friends of Betteshanger is very concerned by the amount of inadequate quality and quantity of environmental information which is currently available to the decision maker. These gaps are identified below and, together with the likely significant effects of the developments, demonstrate the need for a thorough EIA to be carried out.

EIA Screening Principles

The Precautionary Principle

In deciding whether an EIA is needed DDC will need to have regard to the precautionary principle and to the degree of uncertainty as to environmental impacts at the date of the decision. Depending on the information available, the decision-maker may or may not be able to make a judgment as to the likelihood of significant effects on the environment. There may be cases where the uncertainties are such that a negative screening decision cannot be taken (*R (Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869).

This was confirmed in *R (on the application of Swire) v Secretary of State for Housing Communities and Local Government* [2020] EWHC (Admin), where the court confirmed that screening authorities should

1 Iceni Planning Statement (22/01158) (1/9/23) page 8

2 Iceni Planning Statement (23/01095) (2/9/22) page 5

3 Letter dated 12 June 2024

take a precautionary approach and not base their decisions on assumptions that unidentified remediation measures will be successful.

In *R (Champion) v North Norfolk District Council* [2015] UKSC 52, the Supreme Court similarly concluded that if there is material doubt about the effectiveness of any proposed mitigation, then a decision should be made that the application in question involves EIA development and that an environmental statement should be submitted.

Any conclusion as to significant effects on the environment must be supported by adequate and up-to-date information and this relates to many areas like air quality, water treatment, biodiversity, the cumulative effects of planning consents in the area and much else discussed below.

Likely Significant Effects

An EIA must be carried out where a development proposal is likely to have significant effects on the environment. In assessing whether likely significant effects arise, the decision-maker must consider whether there is a real risk or serious possibility of significant effects arising (*R (Bateman) v South Cambridgeshire District Council* [2011] EWCA Civ 157).

The Scope of Development

The identity of a project for the purposes of EIA is not necessarily circumscribed by the ambit of the specific application for planning permission which is under consideration. The objectives of the Directive and the Regulations cannot be circumvented (deliberately or otherwise) by dividing what is in reality a single project into separate parts and treating each of them as a “project” – a process referred to in shorthand as “salami-slicing” (*R (Ashchurch Rural Parish Council) v Tewkesbury BC* [2023] PTSR 1377 at [78]).

R Wingfield v Canterbury CC [2019] EWHC 1975 identified a non-exhaustive list of matters that can be relevant in deciding whether two schemes comprise a single EIA project:

1. Common ownership;
2. Simultaneous determination of planning applications;
3. Functional interdependence, where one part of a development could not function without another; and,
4. Whether each development is a stand-alone project that is justified on its own merits and would be pursued independently of another development.

Cumulative Impacts

Where it is legitimate for two development proposals to be brought forward separately, it is nonetheless important to assess their cumulative impacts. Overlapping environmental effects may exist where there are independent projects nearby to one another, in which case an assessment of cumulative effects will be required (*R (Wingfield) v Canterbury City Council* [2020] JPL 154 at §70).

Applying the principles to the development proposals at Betteshanger Couty Park (BCP)

Scope of Development for EIA Purposes: The two applications form part of a single development.

Although nominally distinct, the two applications, 22/01158 and 23/01095 are clearly part of a single project and part of a single 'theme park' concept and the developer has stated that the planned activities, the surf lagoon and hotel are all necessary to make sufficient profit to keep the park open.

There is a single concept and an integrated set of activities to create a park where visitors can be kept occupied with restaurants, bars, special events like music concerts, motorcycle racing, the mining museum, gyms, spas, surf lagoon, hotel, military assault course, etc. BCP is hard to access from Deal and Sandwich, in open country, between the towns of Deal and Sandwich only accessible on the highly congested A258. Hence, the developer's 'theme park' project that requires that BCP has facilities available on site.

In addition to the above, the factors listed in *Wingfield* clearly point towards the two development proposals in fact being a single project:

Common Ownership

The land parcels where the surf lagoon (DOV/22/01158) and hotel (DOV/23/01095) are proposed to be built were acquired by Quinn Estates in December 2019 using the vehicle, Betteshanger Property Limited (BPL). BPL operate the park through a subsidiary, BCP who have made the application for the hotel. The application for the surf lagoon is the SEAHIVE who will lease the land for the surf lagoon from BCP so it is clear that there is a single owner. The business plan for the park relies on income streams from rents to BCP from the hotel and surf lagoon and the claim made in the BCP Financial Summary⁴ is that these will cross subsidise running events and wildlife management in the park.

Simultaneous Determination of Planning Applications

The planning applications for the surf lagoon and hotel were determined at the same planning committee meeting on 7 March 2024.

Functional interdependence

The surf lagoon and hotel will share much of the infrastructure such as a single Wastewater Treatment Strategy. For example, see section 9.5 of the Flood and Risk Assessment Drainage Strategy for 22/01158 (dated 13/1/23) and 23/01095 (dated 1/9/23) which states for each: "it is concluded that connecting to the existing or replacement wastewater treatment plant to the east of the visitor center, within the Country Park, is likely to present the most viable solution". Similarly, the Officer's Reports for both applications state: "For foul sewerage from the [hotel/development], the approach presented by the 'Flood Risk Assessment and Drainage Strategy' is that it will feed into the existing or upgraded wastewater treatment plant within the Country Park. Any upgrade would be within the confines of the existing arrangement." Both reports recommend a planning condition to ensure details of adequate wastewater treatment facilities are submitted and approved before development commences, although the report for the surf lagoon application also suggests that further environmental consents or permits may be needed although defers to the EA in this respect.⁵

⁴ Azets BCP Financial Summary (23/01095) (6/10/23)

⁵ Officer's Report (22/01158) page 73.

In addition, the projects are also financially interdependent and for the reasons set out below, the hotel and surf lagoon proposals are clearly **not** stand-alone projects that are justified on their own merits.

The two applications are two components of a ‘masterplan’ for making BCP a success as an ongoing concern. The Planning Statement⁶ for the hotel states: *“The application proposal is a critical component of a Wider Masterplan for Betteshanger Country Park to elevate the societal level value of the asset through extending its appeal as an attraction beyond the immediate local community to attract visitors from further afield”*.

This is also made clear in the ‘Financial Summary’ (dated September 2023) compiled by Azets⁷ for the developer which states that the purpose of the developments was to continue the project initiated by South East England Development Agency (SEEDA) and provide a secure future for BCP. This is detailed in the History section of the report.

The Financial Summary⁸ states the purpose of the two planning applications together is:

“To ensure the long-term financial viability, Betteshanger Country Park requires investments in infrastructure, facilities and sustainability initiatives. Prioritising capital projects can enhance visitor experiences and attract a broader audience. Betteshanger Country Park would exhibit promising financial viability through its diverse revenue stream and potential growth opportunities if there were successful in securing planning permission for the development of the surf lagoon and hotel.

By leveraging the opportunity, Betteshanger Country Park can transform their operations through the strategic investment and prudent cost management which is vital for securing the park’s continued success and contribution to the community”.

The Financial Summary⁹ makes it clear that both applications needed to be agreed for the park to be financially viable (according to the developer) and unless both were agreed the park would probably be closed:

“If both of the proposed developments were undertaken then the park is projected to just make enough to carry on and start to repay some of the debt”.

It is clear then that neither application could function independently of the other.

The applications form part of a project to develop the park as a ‘theme park’ attracting visitors by providing a variety of different activities, from events like motorcycle racing, music concerts, military style assault course, film shows to the fitness centre, hotel and surf lagoon etc. These are all part of the same offer and mutually supportive; people staying in the hotel will be attracted by the surf lagoon etc. and vice versa, i.e. visitors to the surf lagoon will be able to stay in the hotel.

The Country Park is in open country and hard to access from Deal and Sandwich on the already congested A258 and the development will provide all facilities on site.

6 Icen Planning Statement (23/01095) (1/9/23) para 1.6, page 2

7 Azets BCP Financial Summary (cited above)

8 Financial Summary (cited above) page 12

9 Financial Summary (cited above) page 11

The planning statement for the hotel development¹⁰ adds: *“In addition, alongside this application is a sister application for a surf lagoon and pools, associated hub and holiday pods, yoga and health and wellness centre.”*

The planning statement for the surf lagoon¹¹ (dated August 2022) states:

“Whilst Betteshanger Country Park has been brought forward partly in accordance with SEEDA’s Masterplan, the economic regeneration of the site has not materialised as envisaged and the economic benefits of the public (and private) investment in infrastructure has yet to be realised.

However, through the tourism and leisure development proposed through this scheme, together with the sister application for a hotel and spa and recent facilities that have opened up, an alternative economic regeneration can be unlocked that is arguably of greater societal value than the economic regeneration project envisaged by SEEDA”.

This demonstrates the economic interdependence between the two applications.

Other Factors

The Applications were submitted simultaneously: The application for the hotel DOV/23/01095 was submitted on 1st September 2023, separately to the surf lagoon proposal, but this application was a version, with minor changes, of an application made on 22/01152, which was rejected by the DDC planning committee in July 13th 2023¹², on the grounds that (1) the proposed development would lead to an unacceptable loss of open space and (2) the proposed development would result in a significant disturbance to habitat that supports a population of turtle doves, contrary to local and national policy.

Use of the same consultants: The planning statements for the applications DOV/22/01152 and DOV/22/01158 were submitted by Icen Projects on 25th August 2022. In addition: both had screening requests prepared by the same environmental consultants; both used the same Water Management System consultants, Herrington; both used the same geological consultants, Ecologia; both used the same Ecological consultants, Aspect; both were discussed together at the two briefing meetings for planning committee members, one with Quinn Estates and one with Friends of Betteshanger, held by DDC; and both were determined at a specially convened planning committee meeting on March 7th 2024.

Description of the project as a single project by DDC’s CEO: The purchase of BCP for £621.977.00 (ex. VAT) by BPL on 2nd December 2019¹³ was supported by DDC whose CEO issued a press statement, also on 2 December 2019¹⁴ stated:

‘Dover District Council has welcomed today’s announcement that the future of Betteshanger Country Park has been secured. Nadeem Aziz, Chief Executive of Dover District Council said “We’ve been involved with the Betteshanger project from the start, So we’re delighted that its future has been secured with new owners and that the Country Park will be fully operational.

“We always recognised that the regeneration of the Betteshanger site had huge potential for tourism, community and sporting hub, and we’re pleased that the new owners have committed to finishing the exciting new visitor center and Kent Mining Museum.

10 Planning statement hotel (23/01095), para 2.6

11 Planning statement surf lagoon (22/01158), para 3.18

12 Minutes – planning committee (13/7/23)

13 Deeds of Sale for BCP 2019

14 Press Release from DDC dated 2/12/19, see: [DDC Welcomes Betteshanger Parks Announcement \(dover.gov.uk\)](https://www.dover.gov.uk/news/2019/12/02/ddc-welcomes-betteshanger-parks-announcement)

“We look forward to working with Quinn Estates to realise the full potential of Betteshanger Country Park”.

Hence the two applications meet the criteria of being a single development and treating them as two separate developments would be ‘salami slicing’.

Cumulative Likely Significant Effects

Even if the applications were considered as independent, standalone projects, there are significant cumulative environmental effects that must be assessed as part of this screening exercise. A full EIA should be carried out as a result.

The LPA must use the criteria in Schedule 3 of the Regulations to determine whether proposals are EIA development. Schedule 3 refers to a number of potential impacts that we will discuss in the following sections:

Sensitive Sites

Under the category of ‘location of development’ the environmental sensitivity of the geographical area likely to be affected by development must be considered.

Government Guidance on Environmental Impact Assessment (the Guidance)¹⁵ defines ‘Sensitive Areas’ as follows:

- Sites of Special Scientific Interest and European sites;
- National Parks, the Broads and Areas of Outstanding Natural Beauty;
- World Heritage Sites and scheduled monuments.

This reflects the statutory definition of ‘sensitive areas’ set out at regulation 2(1) of the EIA Regulations.

However, the Guidance also says that, as a matter of policy:

In certain cases, local designations which are not included in the definition of “sensitive areas”, but which are nonetheless environmentally sensitive, may also be relevant in determining whether an assessment is required.

BCP has the following local designations and our view is that these are relevant in determining whether an EIA is required:

- a) BCP (formerly Fowlmead) is designated as a Regionally Important Geological Site (RIGS)¹⁶ and has features that should trigger a survey and assessment according to DDC Local requirements Biodiversity and Geological Conservation
- b) It is designated as a Country Park
- c) It has been designated an Asset of Community Value by Dover District Council¹⁷.
- d) BCP is also in close proximity to a number of designated European sites and there is a likely risk that the development will have a significant effect on these sites, in particular Thanet Coast and Sandwich Bay SPA and Ramsar and Sandwich Bay SAC, within 1 kilometre of BCP plus the Sandwich Bay and Hacklinge Marshes SSSI. The HRA commissioned by DDC¹⁸ as part

15 Available online: [Environmental Impact Assessment - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

16 See geoconservationkent.org.uk: [Betteshanger Sustainable Parks with Relic Cliff - Joomla!](http://geoconservationkent.org.uk) (geoconservationkent.org.uk)

17 See Asset of Community Value at dover.gov.uk: [Assets of Community Value in Dover District](http://dover.gov.uk)

18 Habitats Regulation Assessment – Regulation 19 evidence base at doverdistrictlocalplan.co.uk: [Regulation 19 Evidence Base \(doverdistrictlocalplan.co.uk\)](http://doverdistrictlocalplan.co.uk)

the regulation 19 evidence base of the emerging Local Plan states that there will be likely significant effects without appropriate mitigation.

- e) It sits within an Impact Risk Zone (IRZ), in relation to Sandwich Bay to Hacklinge Marshes SSSI. IRZs were developed by Natural England as a tool to help assess the risk of developments adversely affecting SSSIs.
- f) It is part of the Lower Stour Wetlands Biodiversity Opportunity Area¹⁹.
- g) It has been designated as part of the Kent Downs and Stour Valley Important Invertebrate Area by Buglife²⁰.
- h) It is sited in the Lydden Turtle Dove friendly zone as designated by the RSPB²¹.
- i) It supports a number of priority habitats including Open Mosaic Habitat, Ponds, Reedbed and Woodland.

Further reasons why BCP should be treated as a ‘sensitive area’:

- a) The Dover solicitor, in the planning committee meeting on March 7th 2024²² to decide the two Betteshanger Park applications, said the following: *“The site is recognised as being of significant ecological importance, analogous or actually of much greater importance than that which would be required to designate it as a Local Nature Reserve”*.
- b) The EIA screening opinion from DDC states: *“The Site’s open and undeveloped nature, designated as open space, increases its environmental sensitivity to the Proposed Development.”*
- c) Natural England²³ considers the Park’s population of Lizard Orchids is of national importance. A request that it should be considered for SSSI status has also been sent to Natural England. The site also supports other protected species such as Water Voles, Fiery Clearwing and Sussex Emerald Moths, Reptiles, Turtle Doves, Beavers, Bats and other Red listed birds.
- d) The Dover SNEO²⁴ considers that BCP would qualify as a Local Wildlife Site for its invertebrate interest.
- e) There is a 2004 section 106 agreement²⁵ which required the designation of the site as a Local Nature Reserve (LNR). This agreement ‘runs with the land’ and the developer has agreed to the stipulations of the section 106 agreement of 2004 by the act of acquiring the site.
- f) It is listed as Protected Open Space in the Dover Local Plan²⁶

The Secretary of State’s view is that in general, EIA will be needed in three main types of cases

- Major development of more than local significance
- Development in particularly environmentally sensitive and vulnerable locations and;
- Development with unusually complex and potentially hazardous environmental effects.

Taking these points in turn; the location of the surf lagoon development at the eastern boundary, rather than its catchment area, the centre of the South East region, will result in additional car miles travelled and increased CO2 and NO2 emissions and additional global warming effects.

19 See Kent Biodiversity Strategy 2020-2045 [Kent Biodiversity Strategy | Kent Nature](#)

20 [Important Invertebrate Areas - Buglife](#)

21 [Home - Operation Turtle Dove](#)

22 Transcript of planning meeting held on 7/3/23

23 Natural England (22/01158) (23/2/23)

24 (12/2/24)

25 This relates to application 02/00905

26 Regulation 19 evidence base: [Open Space and Sport Topic Paper Sept 2022 \(doverdistrictlocalplan.co.uk\)](#)

The large water usage will put additional stress on a region of water stress. The large electricity requirements will contribute to global warming.

As detailed throughout the development will have hugely significant effects on a sensitive environmental location for example on its ecology. The site is of high biodiversity interest supporting species of national and regional importance.

The development is on made ground, containing heavy metals and other toxic materials. The ground where the developments are proposed has not been completely surveyed²⁷. The site has no mains sewer connection and the waste and foul water, including chlorinated water will need to be treated and disposed of into local watercourses.

These watercourses form part of the Stour basin. Further development will result 11.7 hectares of impermeable surface which will create millions of litres of run-off in heavy rainfall events which will need to be disposed of at a much reduced rate²⁸. The combination of made ground containing toxins and the need to treat, store and dispose of wastewater creates a complex and potentially hazardous environmental effect. There are risks during construction from excavating the made ground and these could result in risks to human health as described in the report by Ecologia that requires ground workers to wear PPE²⁹.

Cumulative Impacts with other existing development and/or approved Development.

Under 'Type and Characteristics of the Potential Impact', DDC stated³⁰ in their screening opinions dated 4th July 2023:

The cumulative effects of the Proposed Development and other existing and/or approved development, on likely matters of transport, air quality and noise, are not expected to be significant.

We disagree.

The application submitted by the SeaHive (22/01152) and that of BCP for the 120 bed hotel (23/01095) will have significant cumulative effects.

Increased number of visitors

The threshold for visitor numbers for an EIA is 250,000. The current number of visitors to the park is estimated at 240,000. Add to this number, projected visitors for the hotel of 117,384³¹ and the surf lagoon of 203,000³² and the 250,000 threshold is exceeded by a wide margin.

There will be significant impacts on what is already a very congested local road network. According to Stuart O'Leary's³³ estimate (Head of BCP), there will be an 'escalation of up to and more than 500,000 customers per year, all from as far as London'.

There have been a wide range of estimates given depending on context including a claim by the developer that as many as 700,000 visitors a year will come³⁴. No convincing calculations have been

27 Ecologia (22/1158) Land Contamination Assessment (2/12/22) also (23/01095) (1/9/23)

28 Herrington (22/01158) Flood Risk Assessment and Drainage Strategy (2/9/22) also (23/01095) (1/9/23)

29 Ecologia report (cited above)

30 DDC Screening Option (4/7/23)

31 Aspect Ecology Technical Briefing Note (23/01095) (6/10/23) point 4 Information to Inform a Habitats Regulation Assessment. It is noted with concern that no projected visitor numbers are provided in the Planning Statement for the Hotel development.

32 Planning statement (22/01158), para 4.21

33 In Kent online 22/7/22

34 Kentonline 10/10/23

provided to support these estimates. In fact, because visitor numbers depend on individual decisions it is not possible to make an accurate estimate. What is certain is that the visitor numbers provided in the planning statements for hotel and surf lagoon are needed for the park to break even and for the park to remain open. Hence, the precautionary principle should be applied and the largest number provided by the developer taken.

Air Quality Impacts

Given the location of the site relatively distant from the nearest railway stations (Deal and Sandwich), neither at walking distance from the park, many of the visitors coming 'from as far as London'³⁵ will be coming by car. The most direct routes from London and west Kent into the Deal area would use the M20 or M2 and then either the A258 or A256 or various cut-throughs using country lanes which are already 'rat runs'.

The park is situated on the A258 between Deal and Sandwich and all traffic to the park will need to use this road for at least part of their journey. Due to a large number of developments particularly in North Deal and Sholden and also some in Sandwich, this road is already congested. Congestion and idling traffic has significant impacts on air quality. This congestion, and the associated air quality impacts, will worsen with a number of developments either with planning permission agreed such as the Greenways development (application 20/00419 for 210 houses) or included in the new local plan that will further increase traffic. If the traffic generated by the surf lagoon/hotel development is added it will have a severe effect on local quality of life. In addition, people travelling to the park through narrow country lanes and villages will lead to further issues of congestion.

The continuous increases in planning agreements for new housing many on the A258 between Deal and Sandwich, in particular in Sholden and Mongeham, in close vicinity of BCP, will result in elevated CO₂ and NO₂ levels, added to by the up to 700,000 visitors predicted for the park. The levels of NO₂ recorded at the Manor Roundabout, which is on the northern exit from Deal on the A258 exceeded the Air Quality Standard (AQS) of 40ug/m³ for NO₂ every month for whole of 2022 with a mean adjusted average throughout the year of 37.4 ug/m³. An Air Quality study in 2021³⁶, submitted for the Draft Dover District Local Plan, predicts an exceedance of NO₂ to 40.2 ug/m³ at this site. Since the area has not been declared an Air Quality Management Area, there is a lack of detailed statistics covering the A258 and North Deal/Sholden. It is clear that the trend is upwards and more data needs to be gathered. Decreasing air quality, which is responsible for between 28,000 and 36,000 deaths per year, will present a public health issue and is a significant environmental effect.

Both Greenways (210 houses) and the current application for BCP are 'windfall developments', in that they were not considered or included in the emerging Local Plan and are recently agreed developments. The local plan gives a minimum number for developments and additional developments will need to be added. Not only those recently given planning consent in North Deal but also including the large expansion of Whitfield for housing and the thousands of new houses proposed and currently under construction in nearby Thanet. The cumulative impacts of traffic and pollution on the towns of Walmer, Deal and Sandwich, and the immediate surrounding areas will be hugely significant for air quality levels in the area.

In order to complete a screening opinion DDC will require up to date material concerning a traffic assessment, given the new developments with planning agreements near London Road in Sholden and

35 Kentonline (cited above)

36 Dover District Council Air Quality Inputs, dispersion Modelling Assessment. Bureau Verita UK Ltd. Jan 2021.

generally in the area. This is necessary to properly understand and scrutinise the air quality impacts of the developments.

Landscape and Visual Impact.

The Planning Officer's report³⁷ for the hotel says the following:

"2.114 With the adverse landscape and visual effects identified, the development is considered contrary to Core Strategy Policy DM16, the aims of Policy DM15 in protecting the character / quality of the countryside and draft Local Plan Policies E4 and NE2. This matter is considered further in the planning balance at the end of this report."

And:

"2.102 The Planning Committee resolved in considering the previous application that the hotel development would harm the character and appearance of the Country Park. This is a consideration in the determination of this application."

The site is on elevated ground and will be visible throughout the area. BCP is in a rural area designated as a 'dark skies' area. However, the surf lagoon will be lit by 24 x 12 metre lighting towers³⁸ and these will be visible from surrounding areas and will impact the Park's wildlife especially bats, invertebrates, birds and mammals.

In order to complete the screening opinion DDC will need to assess the impact on landscape especially as the proposed developments are contrary to the Dover Core Strategy³⁹ and Local Plan policies.

Ecology and Nature Conservation

This section considers the cumulative effects of the proposed development on biodiversity as it relates to the following sites:

Development sites:

- BCP applications 22/01158 and 23/01095 for the Hotel and surf lagoon; and
- The Greenways development (20/00419). This is directly related to the development proposals at BCP because biodiversity mitigation schemes for Greenways are to be implemented at BCP.

N.B. Both these sites are part of the now defunct Betteshanger Colliery that closed down in 1989. The Greenways development is on the old pit head area and is now being developed for housing whereas the proposed Country Park developments are on the old spoil tip.

Protected affected sites including:

- The Thanet Coast and Sandwich Bay RAMSAR site
- Sandwich Bay and Hackling Marshes SSSI
- The Thanet Coast and Sandwich Bay SPA
- The Sandwich Bay SAC

37 Planning officers report for (23/01095)

38 LVIA Seahive Addendum (22/1158) (9/3/23)

39 Dover Core Strategy at doverdistrictlocalplan.org

Cumulative impact on protected species:

Impact on Open Mosaic Habitat on Previously Developed land and invertebrate communities. OMH is a priority habitat under section 41 of NERC 2006 and a target habitat under the Kent Biodiversity Strategy 2020-2045. Buglife has included BCP in the Kent Downs and Stour Valley Important Invertebrate Area (IIA) because of the importance of its invertebrate population.

Their website ⁴⁰states:

“Important Invertebrate Areas (IIAs) are places that are home to nationally or internationally significant invertebrate populations and their habitats. ”

This is what the Dover Natural Senior Environment Officer says in her submission⁴¹ relating to 22/01158 the surf lagoon:

“2.1.1. The proposed development will result in the loss of 2.75ha of open mosaic habitat on previously developed land (OMH), a habitat of principal importance for biodiversity (priority habitat) that supports an important invertebrate assemblage. Almost 2ha of the OMH habitat to be lost is assessed as being in good or moderate condition

2.1.2. The OMH within the Country Park is assessed in the submitted ecological reports as of district to county importance. In my view, it is of at least county importance. With respect to the invertebrates within the Country Park, it is concluded in the submitted ecological reports that the site is of county importance, and this was prior to the confirmation of additional invertebrate species including the protected fiery clearwing and Sussex emerald moths, which could further elevate this level of importance. On this basis, the Country Park could be considered as of Local Wildlife Site quality.

2.1.3. Without an adequate and achievable compensation strategy, the loss of habitat from the proposed development site will constitute significant ecological harm to priority habitat and an important invertebrate assemblage.

2.1.4. I have doubts that the applicant’s approach to mitigation, as outlined in the Outline Habitat Compensation Strategy, will adequately compensate for these impacts.”

It should be noted that the Greenways site (20/00419) also had important areas of OMH with a significant assemblage of invertebrates of county importance (see Update Ecological Appraisal Part 2. Application 22/01158). Mitigation for the loss of OMH supporting invertebrates on the Greenways site is being provided at BCP. The cumulative harmful effects on OMH and invertebrates across the two Betteshanger Sites (the Greenways site and the Country Park) will be significant.

It should be noted that since the invertebrate surveys were carried out by the developer Fiery Clearwing moths a schedule 5 species under the Wildlife and Countryside Act 1981 have been recorded on both the Hotel and surf lagoon sites⁴².

Mitigation for the impact on this species will require a license from Natural England.

The cumulative impact on Open Mosaic Habitat found on the two Betteshanger sites (Green ways and the Country Park) and its invertebrate assemblages will result in a significant impact on biodiversity. This cumulative impact needs to be assessed as part of the EIA screening.

⁴⁰ See buglife.org.uk

⁴¹ SNEO (22/01158) (12/2/24)

⁴² Natural England (22/1158) (4/7/23)

Impact on Birds including Turtle Doves.

Turtle Doves will be impacted by both the Greenways development (20/00419) and the Country Park developments (22/01158 and 23/01095). It should be noted that BCP is within the Lydden Turtle Dove Friendly Zone designated under the RSPB's Operation Turtle Dove, which aims to save this species by creating breeding and feeding habitat.

Aspect Ecology's bird survey on the Greenways site (20/00419)⁴³ recorded 4 Turtle Dove territories – one of these territories was removed as part of the Greenways development during the nesting season last year. Mitigation areas have been set up at BCP with the aim of maintaining and expanding Turtle Dove numbers at the Park⁴⁴). However, the mitigation areas are both adjacent to the proposed Hotel and surf lagoon and thus will be subject to greatly increased disturbance.

Two territories have also been recorded at the Park making the two sites together of significant importance for this species. The RSPB and other experts are of the opinion that the proposed developments jeopardise the mitigation scheme and are likely to prevent the maintenance and expansion of Turtle Dove numbers at the Park. This concern appears to be justified as the latest monitoring report by Adonis Blue Environmental Consultants shows that numbers of Turtle Doves at the Park have declined with only one territory being recorded in 2023⁴⁵.

This is what the Dover Senior Natural Environment Officer says in her submission⁴⁶

"2.5. Turtle doves Proposed mitigation: implementation of Visitor Management and Turtle Dove Strategy

2.5.1. The turtle dove is a species of principal importance for biodiversity (priority species) that is the UK's fastest declining bird species in the country and listed as Vulnerable on the IUCN Red List 2.5.2. The proposed development will bring the developed areas of the Country Park in closer proximity to previously agreed mitigation measures for turtle doves. There is potential for disturbance to the existing turtle dove population and the expected turtle dove population (under the previously agreed mitigation for 20/00419) as a result of the expected increase in visitors to the Country Park.

2.5.3. The turtle dove population within the Country Park is assessed in the submitted ecological reports as of local to district importance.

2.5.4. Without an adequate and acceptable mitigation and compensation strategy, which also addresses the potential for the proposed development to affect the efficacy of the previously agreed mitigation, the impact to the turtle dove population within the Country Park will constitute significant ecological harm to a priority species.

2.5.5. I am concerned that the applicant's approach to mitigation, as outlined in the Visitor Management and Turtle Dove Strategy, will not do enough to safeguard and enhance the turtle dove population of the Country Park.

2.5.6. There is a risk that there will be no expansion of turtle dove territories within the Country Park to compensate for the impacts at the Betteshanger Sustainable Park development site under

43 Aspect Ecology's bird survey for application (20/00419). Betteshanger pit head site, also known as Betteshanger Sustainable Park and bought by Quinn Estates in 2019 along with BCP.

44 Application (20/00419) planning condition 54

45 See also Ecological Monitoring Report (20/00419) (29/4/24)

46 SNEO submission (22/01158) (17/2/24)

application 20/00419. There is a risk that the 'predicted baseline' (an increase in existing territories as a result of the previously approved 20/00419 compensation measures) will not be achieved.

2.5.7. The submitted proposals focus on an aim to maintain the 'predicted baseline' to overcome the potential harm to turtle doves. In my view, a further aim should be to increase turtle dove territories from the predicted baseline, taking into account the Country Park and the offsite mitigation areas. This would ensure accordance with the NPPF to "pursue opportunities for securing measurable net gains for biodiversity" and the NERC Act Biodiversity Duty to "conserve and enhance" biodiversity."

See also RSPB submission.⁴⁷

Besides Turtle Doves there will be a negative cumulative impact on other bird species present on the Greenways and Country Park sites. On the Greenways site 19 Red listed species were recorded by the East Kent wildlife Group and on the Country Park Red listed species include skylarks (their nesting sites will be removed under the Seahive proposals) Cuckoo, Linnet, Mistle Thrush, Yellow Hammer and Starling.

The Cumulative impact on Red listed bird species, especially Turtle Dove, present on the two Betteshanger sites (Greenways and the Country Park) will result in significant harm to Turtle Doves and other Red listed bird species. This impact needs to be assessed as part of the EIA screening.

Lizard Orchids and other notable plants.

The population of Lizard Orchids at BCP is the second most important in the UK second only to the colony at Sandwich Bay. Natural England consider it of National importance⁴⁸. Lizard Orchids are a schedule 8 species under the Wildlife and Countryside Act and at BCP it is one of over 20 plants on the Kent Rare Plant Register. Under the Seahive proposals 10-15% of the Lizard Orchid population would be lost.

This is what Natural England states in their submission dated 17th February 2023 (22/01158):

"We recognize that the developer has put forward a package of mitigation and compensation measures and we have provided comments on these in the attached document. We note that the applicant's consultants have stated that it is considered unlikely that the proposals will result in significant harm to biodiversity. However, as set out in the attached document (Lizard Orchid Info note 16th Feb 2023) we consider that the measures that have been put forward would nevertheless result in a negative impact on this population.

This is because:

- 1. Avoidance of harm to lizard orchid has not been addressed.*
- 2. We consider the mitigation measures for the translocation of lizard orchids are unproven, uncertain and at an unprecedented scale.*
- 3. The development proposal is located in the highest value areas of priority Open Mosaic Habitat.*
- 4. Despite the mitigation and compensation measures proposed there will be significant harm to biodiversity."*

On 20th March 2023 (22/01158)⁴⁹ Natural England are still saying:

⁴⁷ RSPB submission (22/01158) (1/2/24)

⁴⁸ Natural England (22/01158) (23/2/23)

⁴⁹ Natural England (22/01158) (20/3/23)

“In summary, we remain concerned that this proposal as currently put forward will not result in the conservation or enhancement of biodiversity.”

On 4th July 2023 Natural England stated⁵⁰:

“In summary the soil tests confirm our concerns regarding the uncertainty in the translocation proposal.”

Despite these concerns expressed by Natural England the DDC Screening Opinion dated 4th July 2023 states⁵¹:

“ii. there are unlikely to be significant environmental effects on ecology and biodiversity when following the approach of the Framework and where there are significant opportunities and possibility to effectivity reduce such impacts;”

R (on the application of Swire) v S of S (2020) would appear to be relevant here. The High Court considered what the correct approach to EIA screening should be when there is uncertainty about the environmental impact of a proposed development. The Court quashed the screening and confirmed that screening authorities should take a precautionary approach and should not base their decisions on the assumption that unidentified remedial measures will be successful.

The cumulative impact on Lizard Orchids constitutes significant harm to biodiversity and as a Schedule 8 species under the Wildlife and Countryside Act 1981 a license will be required from Natural England to implement the proposed mitigation/compensation. Natural England has not said that a license is likely to be granted and is awaiting the results of research trials which may take a number of years. This impact needs to be assessed as part of the EIA screening.

Other notable Plants.

Grass Poly. This rare schedule 8 plant found only in a handful of sites grows on both the Greenways site and the Country Park. In the Country Park it grows in a ditch parallel to the Visitor Center. On the Greenways site a large number of plants were recorded by one of the Kent Plant Recorders for the BSBI on one of the development platforms. These have since been removed and mitigation has been provided. However, it has not been shown that the mitigation has succeeded in producing a self-sustaining population elsewhere on the site or at BCP.

Penny Royal. This is a Schedule 8 species and was recorded by the Kent Plant recorders on the Greenways site but no mitigation has been carried out despite this being part of a condition attached to the planning permission.

The cumulative impact on Grass Poly and Penny Royal constitutes significant harm to a protected species. It should therefore be considered as part of an EIA screening.

Reptiles.

BCP been a receptor site for Reptiles translocated from elsewhere. When the Park was first set up under planning application 02/00905 reptiles were translocated from the pit head area to various sites in the Country Park. The proposed Hotel site was one such area. Under the current proposed development no mitigation is proposed for the loss of reptiles from the Hotel site.

⁵⁰ Natural England (22/01158) (4/7/23)

⁵¹ DDC Screening Opinion dated (22/01158) (4/7/23)

In 2016 over 1000 Common Lizards were translocated from the Discovery Park in Sandwich to BCP under application 14/00058 condition 55, for their long -term protection and in accordance with a proposed long term management strategy. The receptor site at the Park is now adjacent to the proposed surf lagoon site and Lizards have been recorded in good numbers on the proposed surf lagoon site. It is proposed to translocate them again disrupting their feeding and breeding.

We consider that this cumulative effect constitutes significant harm to a species that receives protection under the Wildlife and Countryside Act and as such should be a consideration under EIA assessment.

Water Voles.

Water Voles are present on the Hotel site and will be displaced as a result of the Hotel application. This will require a mitigation license from Natural England. They are an endangered species under schedule 5 of the Wildlife and Countryside Act. Indeed, the Peoples Trust for Endangered Species website⁵² says:

“Water voles have experienced one of the most rapid and serious declines of any British wild mammal ever.”

We consider that, despite the proposed mitigation, the cumulative effect on Water Voles constitutes significant harm to a protected species and therefore should be considered as part of EIA screening.

Bats.

At least 7 different species of bat have been recorded across the two Betteshanger sites (the Greenways development and the Country Park) What is the cumulative impact going to be on Bats as a result of the three planning applications for the Betteshanger sites?

As a European Protected Species (EPS) the cumulative impact on Bats from both Betteshanger sites should be assessed as part of the EIA screening.

Beavers.

Beavers have been recorded on the edge of the proposed Hotel site. They are a EPS yet no survey for beavers has been carried out at the Country Park. They are also present in the RAMSAR site which is part of the Greenways development.

What is the cumulative effect going to be on the local Beaver population? As an EPS the impact on Beavers should be assessed as part of an EIA screening.

Badgers.

Badgers are protected under the Badger Act. Setts and Badger pathways on both the Greenways site and the Hotel site on the Country Park will be disrupted.

What is the cumulative impact going to be on the local Badger population? As a protected species this should be a consideration as part of EIA screening.

Conclusion.

The cumulative harmful effect on biodiversity as described above, of the Betteshanger Park developments (22/01158 and 23/01095) together with the Greenways housing development (20/00419) needs to be assessed as part of a Screening Opinion for an EIA.

⁵² [Water voles - People's Trust for Endangered Species \(ptes.org\)](https://www.ptes.org/)

Cumulative effect on Protected habitats.

The cumulative effects of the proposed developments at BCP (applications 2/01158 and 23/01095) taken together with the Greenways development (20/00419) and other developments in the local area, have not been assessed for their impact on the integrity of the following protected sites:

- Thanet Coast and Sandwich Bay SPA and RAMSAR
- Sandwich Bay SAC
- Sandwich Bay to Hacklinge Marshes SSSI

The Habitat Regulation Assessment⁵³ commissioned by DDC summarises the Potential Likely Significant Effects (LSE) on the Thanet Coast and Sandwich Bay SPA and Ramsar and Sandwich Bay SAC without appropriate mitigation as follows:

Potential Likely Significant Effects	Thanet Coast and Sandwich Bay SPA & Ramsar	Sandwich Bay SPA
Physical damage & loss	Yes	
Non-physical disturbance	Yes	
Air pollution	Yes	Yes
Recreation	Yes	Yes
Water quality	Yes	Yes

It should be noted that the integrity of the SPA appears to have already been breached as some of the species for which the SPA is designated such as Turnstones and Little Terns, have suffered breeding failures and declines. In a leaflet produced by KCC entitled: Information for Visitors. Sandwich and Pegwell Bay⁵⁴ it states:

*Breeding birds include ringed plover, oystercatcher and little tern (a species specially protected by law under the Wildlife and Countryside Act 1981) **although the latter has not nested successfully for a number of years now.***

*Thanet Coast and Sandwich Bay qualifies as a Ramsar site, a wetland of international importance, as it supports on average 1% of the ruddy turnstone population over winter⁵⁵. **However in the last few years the population here has almost halved** and recreational disturbance, particularly dogs off leads, is likely to be a significant factor in this decline.*

The leaflet goes on to say:

Wild birds are being threatened by human activities such as:

- Dogs playing off the lead on the salt marsh or mudflats
- People, particularly in groups, digging for bait
- Well-meaning individuals—photographers, bird-watchers, nature-lovers and picnickers, just lingering too long or walking through sensitive sites, particularly across the inter-tidal area

⁵³Habitat Regulation Assessment (cited above)

⁵⁴Information provided for Visitors to Sandwich and Pegwell Bay

⁵⁵JNCC jncc.gov.uk

- Watercraft - motorboats, yachts, canoes & kayaks and kite-surfers close to feeding or roosting birds.
- Clearly objects in the air have a large potential for causing disturbance, and kites and 'drones' should never be flown across the bay.

It seems extremely unlikely that, given the local scale of development and the increase in population, that the Thanet Coast and Sandwich Bay SPA Strategic Monitoring and Mitigation Strategy⁵⁶ (SAMM) for delivering, warden-ing and monitoring is going to be effective in protecting the integrity of the sites especially given the above evidence of negative impacts from human disturbance that are already evident.

Besides the recreational impact on biodiversity the cumulative impact on water, physical damage and loss and air pollution also needs to be assessed.

Conclusion.

The cumulative impact of the Betteshanger Park developments (22/01158 and 23/01095, Greenways (20/00419) plus the developments at Sholden and the local area on the integrity of the protected habitats listed above should be assessed as part of a Screening Opinion for EIA.

The use of natural resources, in particular land, soil, water and biodiversity

The use of natural resources in the proposed development will be hugely significant including the impact on existing biodiversity as shown above, and water supplies:

Water consumption

The construction of the wave lagoon, hub building, access works and infrastructure etc. will require many thousands of tons of concrete, which in turn will also require many thousands of litres of water. The water will be supplied Southern Water and in the East Kent region, water is source from aquifers not reservoirs. Southern Water predict a shortfall of 300 million litres per day by 2040, rising to 500 million litres by 2075 on current trends⁵⁷. The proposed solution by Southern Water is to reduce consumption so household water use will need to fall from 132 litres per day to just over 100 litres per day. The surf lagoon will greatly add to water stress.

"By 2040 if we do nothing, we could face a 300 million liters per day water shortfall in water supplies by 2075, this shortfall could increase to over 500 million liters per day.

This is because more water will be needed as population grows and less will be available as the climate changes"

The Kent Environment Strategy⁵⁸ identifies Kent as one of the driest regions in England and Wales. According to plans submitted with the application, the surf lagoon will hold around 30 million litres of water, in an area of the country already water stressed. The water evaporation rate from the large surface area of the surf lagoon, particularly during the summer months, will necessitate replenishing the water levels at regular intervals. For reasons of human health the water will need to be changed at regular intervals.

⁵⁶Sandwich Bay SPA Strategic Monitoring and Mitigation Strategy

⁵⁷ Southern Water Water Resources Management Plan: investors.southernwater.co.uk/our-story/water-resources-management-plan (see section 'Securing a resilient future for water in the South East')

⁵⁸ Kent Environment Strategy, Kent County council (2016)

In order to complete their screening, DDC will need the developer to supply complete figures for water usage. None have been provided in the preliminary studies provided so far by the developers consultants Herrington⁵⁹.

Dover is located in the Environment Agency's Stour Catchment Abstraction Management Strategy⁶⁰, which identifies all the groundwater sources as over abstracted.

Dover District Council's Water Cycle Study⁶¹ (September 2022) states: *"Pressure on water resources is increasing as a result of population growth, an increase in household demand for water and the effects of climate change and rising temperature."*

Groundwater supplies 80% of the district's drinking water. Groundwater also provides important base-flow to the river systems. The groundwater quality across the catchment is at poor status, but the water is treated so there is no risk to drinking water supply.

The Stour Abstraction Licensing Strategy (ALS) calculated resource availability at four different flows, Q95 (lowest), Q70, Q50 and Q30 (highest). It was found that sections of the Dover district have no additional water available for licensing even at highest flow, while at lowest flow the majority of the district has no additional water available for licensing. Under the Q50 and Q70 flows, the only additional water available for licensing is close to Sandwich and is largely 'restricted'."

With hotter, drier summers forecast as a consequence of climate change, safeguarding and securing adequate water supplies for domestic and agriculture use should be a main priority.

Pollution and nuisances

The Entran, request for an EIA screening⁶², states that:

"Following mitigation of these risks within the detailed design stage of the development, including a CEMP, surface water drainage strategy, remediation strategy, Health Safety and environmental practices and preparation of piling risk assessments, significant effects regarding contaminated land are considered unlikely."

This statement is incorrect. The Land Contamination Assessment, produced by Ecolgia⁶³, Phase 1 that accompanies the planning application for the surf lagoon comments that:

"The extensive surface water network lies within short distance of site and no controlled surface water drainage currently in place. Surface water network dominantly lies downslope of Site. Elevated heavy metal leachate concentrations recorded during recent ground investigation works. Medium Pollution of sensitive water resources poses a moderate risk. A low to medium risk to human health and groundwater (principal aquifer at depth) have been identified due to deep made ground works (up to 13.6m) beneath the site.' Moderate risk from hazardous ground gas has been identified... A moderate risk to the surrounding surface water network has been identified with leachable heavy metals."

59 Herrington (cited above). Herrington has produced a number of reports available but none provide plans for any WWTP, nor figures of expected volumes that will need treatment, nor any description of the current WWTP in use and whether it is even possible to scale it up to cope with a massive increase in visitor numbers. It is not reasonable to create a planning condition on the assurances of the developer with no facts provided to allow an evaluation of the implications of impact of processing and disposing of the waste, foul and rainwater into the Stour Inland Basin.

60Environment Agency's Stour Catchment Abstraction Management Strategy gov.uk/government/publications/stour-catchment-flood-management-plan

61 Dover District Council's Water Cycle Study

62 Entran (22/01158) (25/8/22)

63 Ecolgia (cited above)

There is a high risk for potential catastrophic damage to the foundations of the proposed development. The high organic matter present in the colliery spoil, poses a high risk of catastrophic damage to the proposed buildings and an acute risk to human health.

Further Phase 2 ground investigation and contaminated land assessment should be undertaken (particularly across the south of the Site) to fully qualify risks and refine outline Conceptual Site Model (CSM) including further ground gas and groundwater monitoring and assessment. If piling foundation methodology is to be undertaken, a Piling Risk Assessment is likely to be required to assess and mitigate potential risks from explosive ground gases during drilling and qualitatively assess potential risks from elevated heavy metal leachates to controlled waters from creation of preferential pathways."

The substrate for the surf lagoon and hotel is made ground, that is to say randomly dumped materials, a mixture of shale from mine workings with other more toxic materials, dumped over the years. There are no accurate records of what was dumped and the only way to establish what is present is to sink boreholes. The site has not been properly surveyed, in particular there is no survey of the hotel site. Preliminary research indicates heavy metals, much organic waste and sulphur compounds which can corrode foundations and unlined water tanks and pipes, creating a potential health hazard for the public. As far as sulphate and organic compounds are concerned, the Ecologia⁶⁴ report states that there is **'potential for catastrophic damage to proposed foundations'** with **'acute risk for human health'**. Ecologia in their report state that as only a part the site has been surveyed and further studies are needed. The DDC planning report⁶⁵ suggests that surveys and decisions regarding the effects of toxic matter in the substrate can be left as a planning condition. This would be the height of irresponsibility and **further information on potential health risks need to be required for the EIA screening.**

Further risks will take place in construction with the excavation of the site and Ecologia⁶⁶ state that *'appropriate PPE for ground workers to mitigate potential risks from dermal contact, ingestion and inhalation of contaminate materials/soils.'*

The park was established for 'low intensity recreational uses'⁶⁷ and shrubs and trees were planted to consolidate the subsoil. The development of a 'theme park' with intensive usage with music concerts, motorcycle racing, military assault course etc. with many additional users disturbing the subsoil has the potential of releasing toxins into the atmosphere, an especially pressing issue with surf lagoon users who will be wearing swimming wear and potentially coming into close with potential toxic materials.

There is also the risk of pollution to the surrounding Protected Sites (Thanet Coast and Sandwich Bay SPA and Ramsar and Sandwich Bay SAC). Note particularly the problems of water quality in the Stour drainage basin as there is a potential risk from waste and soil water from the surf lagoon and hotel's wastewater management system. There are insufficient details about how the water will be treated given in the various Herrington⁶⁸ reports on flood risks and water management. However, it is clear that wastewater will eventually be discharged into the streams feeding into the Stour basin and is potentially likely to have a significant impact on the above European sites. The wastewater from the surf lagoon will contain Chlorine which cannot be remove in aerobic WWTP. There will also be large volumes of rainwater from the 9.1 hectares covered by the surf lagoon and the 2.6 hectares from the hotel. This will result in millions of litres of run off in periods of heavy rain. No plans have been provided

64Entran, request for an EIA screening, dated 25th August, 2022

65DDC Planning Report

66Ecologia (cited above) page 36

67 See Local Plan 2002 Policy AS2

68 Herrington (cited above)

for water storage tanks or SuDs (which would be doubtful on the site due to potential leaching of heavy metals and toxic materials in the made ground constituting the park's substrate.

According to Herrington⁶⁹, a 6-hour event of heavy rainfall could result in an estimated 8.15 million litres of rainfall. The site is unsuitable for SuDs so this water would need to be disposed of either through natural absorption into areas around the surf lagoon an hotel, likely to cause temporary flooding or disposed of into local streams that are part of the Stour Inland Drainage Basin. Guidelines for greenfield run-off rate is 2-7 litres per hectare. The creation of an impermeable area of 11.7 hectares and the need to dispose of run-off could have a variety of significant environmental impacts.

The report submitted by Herrington⁷⁰ gives no details about the capacity or condition of the current WWTP, neither does it supply information concerning how much capacity will be needed for the 320,000 visitors estimated to be visitors to the 120-bed hotel, surf lagoon, spa, holiday pods, restaurants, cafes, music concerts, etc. To complete a screening, DDC will need to know these figures, especially since the waste and foul water will, after processing, be dumped into streams which are part of the Stour Inland Drainage system, and which connect to a number of European sites in the area.

Significant environmental impact of the individual planning applications

Notwithstanding all of the points raised above, specific impacts are particularly significant for the individual applications. These are set out below.

23/01095: The proposed Hotel application

1. The loss of open space was one of the reasons given for refusing the original Hotel application⁷¹ (22/01152) (see below). These reasons apply equally to the new application 23/01095.

BCP is an area of open space that provides great value and amenity, reflected in it being designated an Asset of Community Value as furthering the social wellbeing or social interests of the local community. The proposed hotel development would result in the loss of part of the designated open space and an incompatible change in the character and appearance of the Country Park due to its scale, intensity of use, level of activity and visitor numbers, and restrictive management measures.

These impacts would harm the amenity and wellbeing enjoyed by users of the Country Park and would be contrary to Policies CP7, DM15 and DM16 of the Dover District Core Strategy (2010); Policies SP2, SP14, E4, PM5, PM6 and NE2 of the Dover District Local Plan (submission draft October 2022); and chapters 8, 12 and 15 of the National Planning Policy Framework (2021).

2. Recreational Disturbance. The hotel will lead to a large increase in the number of visitors coming to the Park, leading to 24 hour activity, light and noise would lead to a significant negative effect on the Park's wildlife, particularly Turtle Doves and other birds, invertebrates, bats, beavers and badgers. These impacts would also harm the amenity and wellbeing enjoyed by users of the Park.

3. Effect on Turtle Doves.

69 Herrington (cited above)

70 Herrington (cited above)

71 DDC planning meeting transcript (cited above)

This is what the RSPB⁷² say in their submission dated 30/10/23:

The plans have serious implications for Turtle Doves. Turtle Dove (Streptopelia turtur) is a RSPB priority species due to the significant population decline of this species both in the UK and across its breeding range. The Turtle Dove is the UK's fastest declining breeding bird and is threatened with global as well as national extinction (IUCN Red List of Endangered Species and UK Red List of Conservation Concern⁷³). Turtle Doves have declined by 98% between 1967 and 2018.

And:

It is the RSPB's considered view that the current surf lagoon and hotel plans will not enable the expansion or even the maintenance of the Turtle Dove population across the wider Country Park.

In their submission of 1st February 2024 which relates to both the Hotel and Surf Lagoon applications: they say:

Turtle dove mitigation proposals remain high risk and inaccurately include measures far off-site The RSPB remains unconvinced by the latest tweaks to the Turtle Dove mitigation proposals.

These concerns are shared by other experts such as the Kent Wildlife Trust⁷⁴ (submission dated 20/2/24 and CPRE Kent⁷⁵

4. Effect on Invertebrates.

The RSPB submission⁷⁶ provides a full account of the likely significant impact on Fiery Clearwing Moths (an endangered species of National importance) the Bright Wave and the Sussex Emerald moth (a protected species under the Wildlife and Countryside Act.

5. Effect on Water Voles.

The Hotel proposal would result in Water Voles being removed from their habitat. On their website the Peoples Trust for Endangered species⁷⁷ states:

"Water voles have experienced one of the most rapid and serious declines of any British wild mammal ever."

They are a protected species under the Wildlife and Countryside Act and a license will be required from Natural England to enable displacement. The surveys carried out by Aspect Ecology⁷⁸ (see Ecological Appraisals) failed to ascertain the size or importance of the population so impacts cannot be assessed with any accuracy.

6. Impact on Bats.

The Hotel development would have a likely significant impact on the important Bat population in this area of the Park particularly due to loss of foraging areas and light pollution. Bats are a European Protected Species.

72 RSPB (22/01158)

73 IUCN Red List of Endangered Species and UK Red List of Conservation Concern

74 Kent Wildlife Trust (22/01158) (20/2/24)

75 CPRE Kent (22/01158) (14/2/24)

76 RSPB (22/01158) (30/10/23)

77 Peoples Trust for Endangered species ptes.org/

78 Aspect Ecology (various) (22/01158), (23/010/95)

7.Effect on Beavers.

Even though Beavers are a European Protected Species and are known to use the area proposed for the Hotel no survey has been carried out to assess the likely impact.

8.Effect on Climate mitigation.

The Arboriculture report⁷⁹ for the proposed Hotel site shows that large numbers of trees and scrub would be removed to make way for the Hotel development. This reduces the sites ability to store carbon and mitigate climate change as well as impacting biodiversity.

9 Effect on Landscape.

The Planning Officer in his report to the Planning committee meeting of March 7th 2024⁸⁰ admits that the proposals are contrary to Dover policy on Landscape.

10. Pollution and ground contamination risks.

There need to be adequate investigation of toxins in made ground; insufficient investigations have been made so far, and potential contamination of soil, waste and rainwater which will be disposed of into the Stour Inland Basin. There will be particular risks in excavating this ground during the construction phase where dust will be created and the ground disturbed. There is a risk of damage to foundations and water pipes and storage tanks caused by sulphur compounds and organic acids present. Visitors to the hotel may come into dermal contact with the substrate,. The large number of additional visitors could disturb some of the toxins present.

There need to be adequate investigation of toxins in made ground and potential contamination of soil, waste and rainwater which will be disposed of into the Stour Inland Basin. See above, particularly, Pollution and Nuisances (p.20-22)

11. Loss of Open Space.

The same arguments apply to the surf lagoon as to the Hotel (see above under Proposed Hotel Loss of Open Space. See further details at p.22.

12. Traffic, Roads and Air Quality.

There will a large increase in road use, in area poorly provided for as far as dualled roads and the result will be 'rat runs', congestion and increased traffic on unlit, quiet country lanes. The hotel being built at such a hard to access site will result in significant effects on air quality and public health from increased traffic, congestion, car emissions. See further details provided above, pages 11-12.

13. Water Management and use

Both applications will share the same WWTP. The 120 bed hotel and associated spa etc. will create large volumes of soil, waste and rainwater. There is no mains sewerage and the processed waste and foul water will be disposed of in the Stour Inland Drainage Basin. See above for more details on water consumption and waste water management. The large use of water needs to be put into the context of an area of water stress, where water is extracted through aquifers and not rainwater harvested in reservoirs (p.19-21).

⁷⁹ Aspect Arboricultural Impact Assessment (22/01158) (2/9/22)

⁸⁰ Officer's Report (23/01095) (1/3/24)

22/01158: The Surf Lagoon

1. Recreational Disturbance.

A large increase in the number of visitors coming to the Park, leading to 24 hour activity, light and noise would lead to a significant negative effect on the Park's wildlife, particularly Turtle Doves and other birds, invertebrates, bats, beavers and badgers. These impacts would also harm the amenity and wellbeing enjoyed by users of the Park.

2. Impact on a Nationally important population of Lizard Orchids protected under schedule 8 of the Wildlife and Countryside Act. 10-15% would be removed under the surf lagoon proposals. Impact on a Nationally important population of Fiery Clearwing moths under the Hotel and surf lagoon proposals.

Concerning Lizard Orchids, Natural England⁸¹ stated the following:

We note that the applicant has stated that it is considered unlikely that the proposals will result in significant harm to biodiversity. However as set out in the attached document (Lizard Orchid Info Note Feb 2023) we consider that the measures that have been put forward would nevertheless result in a negative impact on this population.

This is what Natural England⁸² say regarding Lizard Orchids and Fiery Clearwing moths:

NE needs to be satisfied that the grant of a license is not detrimental to the survival of any population of the species of animal or plant to which the license relates. Currently translocation techniques proposed by the applicant don't have established research and methodologies associated with them that give us confidence that they will work.

And:

The suggested 7 year period during which there is an opportunity for the applicant to demonstrate whether proposed translocation techniques might be successful on this site, would enable NE to make informed evidence led decisions as to whether a license could be issued. This does not mean that NE will issue a license. If the research does not demonstrate to our satisfaction that the methods are successful we would remain unable to issue a license.

3. Effect on Turtle doves and Skylarks.

Impact on Turtle Doves – as above. See various RSPB comments.

Skylark nesting areas would be removed under the surf lagoon proposals. No mitigation is proposed. Skylarks are Red listed.

4. Effect on Sussex Emerald moths and other invertebrates with a conservation designation.

Although the Sussex Emerald has been recorded on the Betteshanger site this protected species under schedule 5 of the Wildlife and Countryside Act, has not been surveyed and therefore the impact of the proposed development is unknown. Over 20 invertebrates with a conservation designation will be significantly impacted by the surf lagoon proposals⁸³.

81 Natural England (22/01152) (17/2/23)

82 Natural England (22/01158) (6/2/24)

83 Buglife (22/01158) (30/11/23)

5. There will be a significant effect on Open Mosaic Habitat (a priority habitat) as over 2.4.5 ha will be removed

6. Effect on Reptiles particularly Common Lizards.

As mentioned above under application 14/00058⁸⁴ condition 55 over 1000 Common Lizards were translocated to an area adjacent to the proposed surf lagoon for their long-term protection. They will now have to be translocated again. We consider this to be a significant impact on a protected species.

All wildlife is likely to be significantly affected by a large increase in visitor numbers and the accompanying 24 hour activity, light and noise.

7. Effect on Landscape.

The surf lagoon in particular will be an intrusion into a largely rural landscape and both developments are contrary to Dover policy on Landscape grounds. Of particular significance are the lighting columns for the surf lagoon which will illuminate an area designated for its 'dark skies'⁸⁵ and have a negative impact on the Park's wildlife, especially bats, invertebrates birds and mammals.

8. Effect on Climate Mitigation.

Many trees and much scrub will be removed to make way for the surf lagoon (See arboricultural report 2/01158) This will have a negative impact on wildlife and also on the Park's ability to sequester carbon. The surf lagoon will use huge amounts of electricity adding to the schemes impact on climate change.

9. Water Management and use

Both applications will share the same WWTP and the surf lagoon will contain 30 million liters of chlorinated water that will need to be replaced from time to time and will be subject to evaporation. As above there are considerable problems with purifying chlorinated water and this can't be achieved with aerobic bacterial plant. There is no mains sewerage and the processed waste and foul water will be disposed of in the Stour Inland Drainage Basin. See above section on Water Consumption. The large use of water needs to be put into the context of an area of water stress, where water is extracted through aquifers and not rainwater harvested in reservoirs (p 19-21)

10. Pollution and ground contamination risks.

There need to be adequate investigation of toxins in made ground; insufficient investigations have been made so far, and there are risks of potential contamination of soil, waste and rainwater which will be disposed of into the Stour Inland Basin. There will be particular risks in excavating this ground during the construction phase where dust will be created and the ground disturbed. There is a risk of damage to foundations and water pipes and storage tanks caused by sulphur compounds and organic acids present. Visitors to the surf lagoon may come into dermal contact with the substrate wearing swimwear. The large number of additional visitors could disturb some of the toxins present. See above, particularly, Pollution and Nuisances (p20-22 of this submission).

11. Loss of Open Space.

⁸⁴ Planning Application (14/00058)

⁸⁵ Dark Skies [cpre.org.uk/what-we-care-about/nature-and-landscapes/dark-skies/englands-light-pollution-dark-skies-map/Dark skies](http://cpre.org.uk/what-we-care-about/nature-and-landscapes/dark-skies/englands-light-pollution-dark-skies-map/Dark%20skies)

The same arguments apply to the surf lagoon as to the Hotel (see above under Proposed Hotel Loss of Open Space. See further details at p.22.

12. Traffic, Roads and Air Quality.

There will a large increase in road use, in area poorly provided for as far as dualled roads and the result will be 'rat runs', congestion and increased traffic on unlit, quiet country lanes. The surf lagoon being built at such a hard to access site will result in significant effects on air quality and public health from increased traffic, congestion, car emissions. See further details provided above, pages 11-12.

Conclusion.

In order to complete a screening opinion for planning applications 22/01158 and 23/01095 we ask that Dover District Council considers all the points made in the above document.



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Dear Sir/Madam

Re: Forthcoming grant of planning permission for the erection of a surfing lagoon and pools (DOV/22/01158) and a 120-bed hotel (C1) building with associated facilities (DOV/23/01095)
Response to Letter Before Claim

We are in receipt of your pre-action protocol letter before claim ("the Letter") dated 1 May 2024 and respond as follows.

The claimant

1. We acknowledge para. 5 of the Letter. The proposed claimant in this matter is the Friends of Betteshanger ("FOB"). It is not clear whether FOB is an incorporated or non-incorporated entity. Please confirm.

From

2. This reply is sent by Dover District Council ("the Council"), the proposed defendant in this matter.

Reference details

3. The reference details for the planning applications are as follows, using the abbreviations set out in para. 7 of the Letter:
 1. **Surfing Lagoon:** DOV/22/01158.
 2. **Hotel:** DOV/23/01095.
4. Your reference is: RGA/JEK/01184482/1.

The details of the matter being challenged

5. FOB proposes to challenge the forthcoming decision of the Council to grant planning permission for the development set out in para. 7(a) and 7(b) of the Letter. The Council notes that as yet the permissions have not been granted and accordingly there is no decision that is amenable to judicial review at the present point in time. It is acknowledged that the Council's Planning Committee resolved to grant planning permission for the Surfing Lagoon and the Hotel on 7 March 2024, subject to the satisfactory execution of s.106 agreements.

Response to the proposed claim

Proposed Grounds 1 and 2

6. Proposed Grounds 1 and 2 allege that the Council's approach to screening the Surfing Lagoon and Hotel schemes was unlawful in the context of the EIA Regulations. Notwithstanding that we do not consider that the proposed grounds have any merit, the Council will undertake a fresh screening exercise in respect of both schemes. At this point that exercise has not been carried out and the outcome of that exercise cannot be pre-judged. We will write to you again when that exercise has been undertaken. If you wish to pursue Grounds 1 and/or 2 whether as originally pleaded or in a modified form we would ask you to provide sufficient details to us in the context of the pre-action protocol. We will accordingly respond in full, as appropriate, at that time.

Proposed Ground 3

7. The contention that officers materially misled the Council's Planning Committee in respect of the issue of whether the Country Park could be designated as a Local Nature Reserve ("LNR") is of no merit.

8. It is well known that where a claim for judicial review is based on alleged deficiencies in an officer's report to the planning committee it normally needs to be shown that the overall effect of the report significantly misleads the committee about material matters which remain uncorrected at the meeting of the planning committee before the relevant decision is taken: *Samuel Smiths Old Brewery (Tadcaster) v Selby District Council* (18 April 1997).

9. Officers advised the Committee that:

1. the Country Park had not in fact been designated as a LNR;
2. there was a divergence of views regarding the enforceability of the s.106 agreement and the ability of the Council to declare the land to be a LNR; and
3. that even if the Country Park were to already have been designated as a LNR, it would not make a difference to officers' recommendation because notwithstanding the status of the land, its significant ecological importance was fully considered and addressed in the context of the applications and the Officer's Report ("the OR").

10. All of those propositions are factually correct. As to (b) the divergence of views resulted from, *inter alia*, a lack of evidence as to whether the designation triggers set out in the s.106 agreement had been met. The Council has fully investigated this matter and has satisfied itself that it does not have sufficient evidence to establish that the designation triggers were ever met. This is a separate issue to the issue regarding the landowner's ability to revoke its consent, but for the avoidance of doubt it is factually correct that (as the OR records) there is also a divergence of views in respect of that matter.

11. In that context the Letter does not identify any material matters in respect of which the Planning Committee were misled. The suggestion that no consideration

was given to whether the Hotel and Surf Lagoon prejudiced the management of the Country Park for its statutory conservation purpose is misguided because the Country Park has not in fact been designated as a LNR, such that it was required to be managed for any such statutory purpose, and in any event, as set out above, the OR provided the Planning Committee with a comprehensive and robust assessment of all of the ecological implications of the development schemes in any event.

Details of other interested parties

Betteshanger Property Limited (company registration number 12220590)
c/o Quinn Estates Ltd
The Cow Shed
Highland Court Farm
Bridge
Canterbury
CT4 5HW

Betteshanger Country Park
C/O [REDACTED]
Highland Court Farm
Coldharbour Lane
[REDACTED]@akdc.co.uk

and

Seahive
C/O Iceni Projects
Da Vinci House
44 Saffron Hill

ADR proposals

12. The Council will, as you have requested in para. 74 of the Letter, carry out a further screening exercise in respect of the development proposals. For the avoidance of doubt the Council do not agree that the previous screening exercise was legally inadequate.

Response to requests for information and documents

13. We consider that all of the material that you seek in para. 71 of the Letter is already in the public domain. The further screening exercise undertaken by the Council will, when completed, be placed in the public domain, and we will write to you when this occurs.

Address for further correspondence and service of court documents

14. Further correspondence should be sent to the following e-mail addresses:
Developmentcontrol@dover.gov.uk

[REDACTED]@dover.gov.uk

[REDACTED]@dover.gov.uk

[REDACTED]@dover.gov.uk

15. Court documents should be served by post at the following address marked for the attention of Sarah Platts

Dover District Council
Council Offices
White Cliffs Business Park

Whitfield
Dover CT16 3PJ

Yours faithfully

P.P.



 (Head of Planning and Development)

LEIGH DAY

To: Dover Council

Council Offices, Whitfield
White Cliffs Business Park
Dover
CT16 3PJ

CC: Betteshanger Country Park

Sandwich Road
Deal
CT14 0BF

CC: SEAHIVE

Nucleus House 2nd Floor
2 Lower Mortlake Road
Richmond
TW9 2JA

DATED

1 May 2024

YOUR REF

DOV/22/01158;
DOV/23/01095

OUR REF

██████████/01184482/1

EMAIL

██████████@leighday.co.uk
██████████@leighday.co.uk;
██████████@leighday.co.uk;
██████████@leighday.co.uk

TELEPHONE

020 3780 0474

By email and post only:

developmentcontrol@dover.gov.uk;

██████████@icenciprojects.com

LETTER BEFORE CLAIM - URGENT

Dear Dover Council

Re: Forthcoming grant of planning permission for the erection of a surfing lagoon and pools (DOV/22/01158) and a 120-bed hotel (C1) building with associated facilities (DOV/23/01095)

1. We write on behalf of the Friends of Betteshanger ("the **Claimant**") in accordance with the Judicial Review Pre-Action Protocol.
2. The Claimant proposes to challenge the forthcoming decision, to be taken by Dover District Council ("the **Council**"), to issue planning permission for the development of land in Betteshanger Country Park, Sandwich Road, Sholden to provide a surfing lagoon and pools (DOV/22/01158) and a 120 bed hotel (C1) building with associated facilities (DOV/23/01095).
3. This letter sets out the factual (to the extent currently known to the Claimant) and legal basis on which any claim would likely be pursued. Please be clear in your response in

identifying any areas of factual and/or legal dispute and the basis for them so that the issues in dispute can be identified and if possible narrowed.

4. We are aware that litigation is a remedy of last resort and write in the hope that this matter can be resolved without recourse to legal proceedings. We therefore outline at the end of this letter the steps which we ask you to take in order to avoid recourse to the Court. If the Claimant receives an unsatisfactory response to this letter, it proposes to make an application for judicial review without further notice to you.

The Claimant

5. The proposed claimant is the Friends of Betteshanger. Friends of Betteshanger are a group of local people that got together in 2020 to try and protect their local wildlife from the threat of development.

The Defendant

6. The proposed defendant is Dover District Council.

Matter under challenge

7. The Council's forthcoming decision to issue planning permission, following a resolution of the Council's Planning Committee to grant permission on 7 March 2024 ("the Resolution"), for:
 - a. the erection of a 120-bed hotel building with associated spa facilities, gym, restaurant/bar, access, landscaping and parking in Betteshanger Country Park, Sandwich Road, Sholden (DOV/23/01095) ("the Hotel"); and
 - b. the erection of a surfing lagoon and pools, hub building, 15 overnight holiday pods, learning hive, yoga studio, fitness/health and wellbeing facilities, bike/pumptrack and associated roads, paths, car and cycle parking, together with landscaping and necessary access works and associated site infrastructure at Betteshanger Country Park, Sandwich Road, Sholden (DOV/22/01158) ("the Surfing Lagoon").

Details of Interested Parties

8. The applicant for the Surf Lagoon was SEAHIVE, and the applicant for the Hotel was Betteshanger Country Park ("BCP"). Both applicants used the same agent (Alexander Hamlet at Icen Projects) to submit the Planning Applications. This letter has been served on both applicants as an interested party in the proposed proceedings by post to the following addresses:

Betteshanger Country Park, Sandwich Road, Deal, CT14 0BF.

SEAHIVE, Nucleus House 2nd Floor, 2 Lower Mortlake Road, Richmond, TW9 2JA.

A copy of the letter has also been sent by email to the applicant's agent at Icenci Projects.

Factual Background

The Country Park

9. The applications for the Hotel and Surf Lagoon development relate to adjoining parcels of land within Betteshanger Country Park ("the Country Park"). The Country Park is privately owned by Betteshanger Property Limited ("BPL"), which acquired the site in 2019.
10. The Country Park is popular and was visited by 240,000 visitors in 2023. It is partly developed, hosting a visitor centre, the Kent Mining Museum, a café/restaurant, an events space and a children's play area. This development is concentrated around the access roadway into the Country Park (the A258), with the remainder of the Park being largely undeveloped and vegetated.

The 2004 Section 106 Agreement

11. Part of the planning history of the Country Park includes a planning permission granted in 2004 (DOV/02/00905) for the redevelopment of what was then the Betteshanger Colliery and Tip Site to (inter alia) erect Class B1, B2 and B8 units, create a community park and country park, and erect a visitor centre.
12. The Planning Committee were advised to resolve to authorise the Chief Planning and Building Control Officer and the Head of Legal to secure a section 106 agreement "*to the effect that...the site be designated as a Local Nature Reserve*". The designation of the site as a Local Nature Reserve ("LNR") was considered to be an "*essential pre-requisite*" to the grant of planning permission at the site, and was to be accompanied by a Nature Conservation Management Plan, approved by the Council prior to any substantial works being carried out (see condition xxii).
13. An agreement to that effect ("the 2004 Agreement") was reached on 13 August 2004.
14. Under the 2004 Agreement, both the Council and the landowner agreed that, "*[i]nsofar as it relates to the designation and management of the Nature Reserve Land as a Local Nature Reserve this agreement is made pursuant to [section 106] and is an agreement for the purposes of Section 16 of the National Parks and Access to the Countryside Act 1949*" (underlining added).
15. The "*Nature Reserve Land*" was defined by the 2004 Agreement as including land shown hatched in blue on a plan annexed to the agreement. That land included the

sites that are now proposed for development under the Hotel and Surf Lagoon applications.

16. Under the First Schedule to the 2004 Agreement, the landowner made the following covenants related to the Nature Reserve Land:

“5. That the Nature Reserve Land may be made the subject of a declaration as a local nature reserve by the Council and which shall be managed as such a nature reserve within the meaning of Section 15 of the National Parks and Access to the Countryside Act 1949 in accordance with a Nature Conservation Management Plan approved by English Nature.

6. That the Owner shall prepare a Nature Conservation Management Plan for the local nature reserve and submit it to English Nature for the approval of that Agency in liaison with the Council at a date no later than that of submission of a detailed planning application for the proposed Visitor Centre that shall be located on the Nature Reserve Land.

7. That the designation as a local nature reserve of the Nature Reserve Land shall continue in full force and effect for a term of 21 years and thereafter for as long a period as may be agreed between the Owner and the Council subject to English Nature or its successors recognising a continuing nature conservation value the protection of which is deemed to be in the public interest.

8. That management of the local nature reserve to be designated at the Nature Reserve Land shall be carried out by the Owner or such organisation capable of and qualified to carry out those functions as may be nominated for that purpose by the Owner and agreed in advance in writing by the Council.

9. That the Nature Reserve Land shall not be developed (whether or not such development is permitted by the Town and Country Planning (General Permitted Development Order) 1995 or any statutory modification or re-enactment thereof) without the approval in writing given by or on behalf of the Council such approval not to be unreasonably withheld provided that it shall not be unreasonable to withhold consent if such development would in the opinion of the Council (after consultation with English Nature) cause or give rise to unacceptable damage to the wildlife value of the said Land.”

17. In Schedule 3 to the 2004 Agreement, the Council covenanted as follows:

That within one month of the date upon which the Council notifies the Owner that it is satisfied that approved works within the Nature Reserve land have been completed the Council will commence appropriate proceedings for the designation of the Nature Reserve Land as a Local Nature Reserve within the meaning of the National Parks and Access to the Countryside Act 1949.

18. The planning permission (DOV/02/00905) appears to have been implemented sometime around 2004, and the Country Park opened to the public in May 2007.¹

The Planning Applications

19. Planning applications for the Surfing Lagoon and the current Hotel development came forward in 2022 and 2023 respectively. The two proposals relate to adjacent sites within the Country Park that focus around the existing development at the Park. BPL will retain ownership of both sites. The land which is the subject of the Surfing Lagoon application will be leased to The SEAHIVE (“SEAHIVE”).
20. In terms of the timing of the two planning applications, applications for the proposed Surfing Lagoon and Hotel were originally submitted alongside one another on 30 August 2022. The applicant for the Surf Lagoon was SEAHIVE, and the applicant for the Hotel was Betteshanger Country Park (“BCP”). Both applicants used the same agent (Alexander Hamilton at Iceni Projects) to submit the applications.
21. The Council’s Planning Committee resolved to refuse planning permission for the hotel application submitted in 2022 (DOV/22/01152) on 13 July 2023 on the grounds that (i) the proposed hotel development would lead to an unacceptable loss of open space, and (ii) the proposed development would result in significant disturbance to habitat that supports a population of Turtle Doves, contrary to local and national policy.
22. Following this, BPL withdrew its application for planning permission for the Hotel. A modified application for planning permission was submitted on 1 September 2023, accompanied by a planning statement also prepared by Iceni Projects. Changes were made to the original hotel design in an effort to overcome the objections raised by the Planning Committee.

The EIA Screening Opinions

23. The applicants for the first Hotel development and the Surfing Lagoon development requested that the Council screen the proposed developments for EIA. The two screening requests were both submitted on 25 August 2022, and had been prepared by the same environmental consultants (Entran Ltd). Both requests acknowledged that the proposals fell within the relevant thresholds of Schedule 2 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (“the EIA Regulations”) but concluded that there were no likely significant environmental effects that would require the carrying out of an environmental impact assessment (“EIA”).

¹ Dates are outlined in a document prepared by the Claimant entitled *Betteshanger Country Park: Section 106 obligations on Dover District Council to designate Betteshanger Country Park a Local Nature Reserve*.

24. Despite the close physical relationship between the two development sites, the screening requests contained only minimal cross-references. The requests asserted that no significant cumulative effects were expected from each development, but there was no description of the potential for the two proposals themselves to have overlapping or cumulative impacts.
25. Following the submission of the applicants' EIA screening requests, a local resident ("Ms Turner") sent the following correspondence to the Council commenting on the requests:
- (a) A planning objection drawing attention to the potential cumulative environmental effects the Hotel and Surf Lagoon proposals;
 - (b) A Stage 1 complaint to the Council, dated 5 June 2023, which again drew attention to the potentially significant cumulative effects of the development proposals; A Stage 2 complaint to the Council, dated 26 June 2023, which highlighted the lack of any assessment of the cumulative effects of the Hotel and Surf Lagoon developments in the applicants' EIA screening requests.
26. The Council did not issue its screening opinions until 3 and 4 July respectively ("the Screening Opinions"). At this stage the planning applications for the first Hotel and the Surfing Lagoon had already been submitted. The Council was therefore in possession of various documents additional to the screening requests themselves, describing the Surfing Lagoon development and the first Hotel proposal in greater detail. These included:
- (a) Planning Statements for the two developments, dated August 2022, describing the developments as "*sister applications*";
 - (b) A Statement of Community Involvement, dated September 2022, which showed that the two developments had been consulted on jointly by the applicants;
 - (c) A joint Habitats Regulations Assessment ("HRA") for the two proposals, dated January 2023, which identified that the proposals were together likely to have significant effects on European Protected Sites;
 - (d) Consultation responses from Natural England ("NE") (see further below) expressing concerns that the proposed Surf Lagoon would negatively impact on species protected under the Wildlife and Countryside Act 1981 ("WCA 1981");
 - (e) A consultation response from the Council's Senior Natural Environment Officer dated 8 November 2022 expressing concerns that the impact of the two proposals on Turtle Doves could not be addressed.
27. Both Screening Opinions agreed with the developers that the (first) Hotel and Surfing Lagoon proposals were not likely to have significant environmental effects. Notably, in both Screening Opinions the Council saw fit to consider whether the two proposals were in reality a single project that had been divided into two separate developments. Applying the criteria set out in *R (Wingfield) v Canterbury City Council* [2020] JPL 154,

the Council concluded that the proposals were distinct developments which could be treated as freestanding projects for the purpose of the EIA Regulations.

28. Despite the Council considering that the Hotel and Surf Lagoon proposals were sufficiently closely linked that they may have been “salami-sliced”, no consideration was given to the potential for the two developments to have overlapping or cumulative environmental effects. The Council’s assessment of the cumulative environmental effects of both development proposals simply provided as follows:

“The cumulative effects of the Proposed Development and other existing and/or approved development, on likely matters of transport, air quality and noise, are not expected to be significant.”

29. At no point did the Council carry out any screening exercise for the amended Hotel proposals (DOV/23/01095).

30. On 9 July 2023 Ms Turner emailed the Planning Casework Unit (“PCU”) requesting that the Secretary of State issue a screening direction for the first Hotel development and the Surf Lagoon development. Mike Hale, Team Leader at the PCU, responded on 21 August 2023 indicating that the Secretary of State would not screen the development proposals for EIA. Mr Hale stated that, as the first Hotel application had been withdrawn, there was no basis for the Secretary of State to screen the proposal. With respect to the Surf Lagoon development, Mr Hale stated that he did not consider there to be a need for the Secretary of State to exercise his power to screen the development proposals. It does not appear from the Secretary of State’s letter that any consideration was given to the amended Hotel proposal (DOV/23/01095), or to the potential for cumulative impacts between the Surf Lagoon and Hotel developments.

Natural England’s Consultation Responses

31. As indicated above, during the course of the Council’s consideration of the Surf Lagoon and Hotel applications, NE submitted four consultation responses in which it set out concerns regarding the impact on domestic protected species.

32. On 20 March 2023, NE wrote to the Council expressing concerns that the application documents for the Surf Lagoon gave rise to uncertainty about the impact of the proposal on the Lizard Orchid, a plant species protected under Schedule 8 of the WCA 1981.

33. On 20 September 2023, NE wrote again to the Council on the following terms:

(a) NE reasserted its concerns regarding the Lizard Orchid. NE expressed its opinion that the developer’s proposal to mitigate any impact on Lizard Orchids

by translocation “*remains unprecedented in scale with uncertain outcomes*”, partly due to a lack of research.

- (b) NE raised concerns regarding the impact of the Surf Lagoon on the Fiery Clearwing Moth, a species also protected under Schedule 5 of the WCA 1981. NE opined that the Country Park was an important site for the Fiery Clearwing Moth, and that the mitigation proposed by the applicant – also involving translocation – was inappropriate and experimental.
- (c) NE explained that due to the potential impacts on species protected under the WCA 1981, SEAHIVE would need to obtain a licence from NE before any development could commence. NE set out that currently, the Council could not be confident that NE would likely grant such a licence to SEAHIVE should such an application be forthcoming. NE’s view was that it would be difficult for the proposals to meet the third of the relevant licensing tests – namely that the grant of the licence would not be detrimental to the survival of any population of the species of animal or plant to which the licence relates.

- 34. On 1 November 2023, NE wrote again to the Council expressing its concerns that the third licensing test would not be met by the Applicant due to the impact of the proposals on the Lizard Orchid and the Fiery Clearwing Moth, and the uncertainty surrounding whether the mitigation proposed by the applicant would be sufficient.
- 35. NE’s final letter to the Council on 6 February 2024 reasserted its concern that the Council was proposing to grant planning permission for development for which NE may not be able to issue a licence. NE stated that a 7-year research period proposed by the applicant, during which time it would assess whether the proposed translocation would be successful on the Surf Lagoon site, would enable NE to make an informed decision on any licence application. At this stage, however, this did not mean that a licence would likely be issued – if the research did not demonstrate that the translocation methods were successful, NE would remain unable to issue a licence.

Determination of the Planning Applications

- 36. The two planning applications at issue went before the Council’s Planning Committee on 7 March 2024.
- 37. The Officer Reports for the two developments recommended that planning permission be granted subject to conditions.
- 38. The Reports referenced the Screening Opinions that had been taken by the Council in July 2023 in the “Planning History” sections, noting that the opinions had concluded that the Surf Lagoon and the first Hotel Development were negative.
- 39. The Officer Reports said the following regarding the 2004 Agreement:

“1.13 Representations received question whether or not the Country Park should be designated a local nature reserve through obligations of the section 106 agreement of planning permission 02/00905. The Council has reviewed this matter, including seeking clarification from the owner of the Country Park as to its position on the possibility of granting the Council a legal interest in the land. The owner of the Country Park has made it clear it is not willing to discuss granting any such interest to the Council, nor does it agree for the land to be designated a local nature reserve. This is significant because, notwithstanding that the section 106 agreement of planning permission 02/00905 runs with the land and binds successors in title, the agreement as to the designation and management of the nature reserve land is revocable should the owner make such a decision³. Accordingly, the Council may not designate land in which it has no legal interest if no agreement exists between the landowner and the local authority to do so.

1.14 Other obligations of the 02/00905 section 106 agreement include that any development at the Country Park would need to be approved in writing by the Council (such as through the grant of planning permission) and that such approval to not be withheld (in the context of the section 106 agreement) providing such development would not cause or give rise to unacceptable damage to the wildlife value of the land. Matters of ecology are considered further in the assessment section of this report.”

40. Footnote 3 provided as follows: *“Section 19(3) of the National Parks and Access to the Countryside Act 1949 makes it clear that a local authority must de-declare land which is the subject of a nature reserve declaration when an agreement ceases to be in force. The Government guidance on setting up and managing a local nature reserve explains that a landowner may reclaim designated land and that the local authority must, in such circumstances, de-declare the land as an (sic) local nature reserve”.*

41. At the Planning Committee meeting, the Council's Principal Planning Solicitor is recorded as stating as follows:

“The Principal Planning Solicitor referred to a Section 106 agreement from 2004 between the South-East England Development Agency (SEEDA) and the Council which had made provision for the land at Betteshanger Country Park to be declared as a local nature reserve. For reasons which were unclear due to an unfortunate absence of supporting documentation, this had never been acted upon and the land had never been declared as a local nature reserve. Whilst there was a divergence of views regarding the enforceability of the agreement and the ability of the Council to now declare the land as a local nature reserve, the fact was that the land that was the subject of the two applications had not been declared as a local nature reserve and the current owner of the country park had indicated that they were not willing to grant the Council an interest in the land, nor agree to the land being designated as a local nature reserve.

Referring to the penultimate sentence of paragraph 1.13 of the report, the Principal Planning Solicitor advised Members to disregard the sentence which talked about the ability of an owner to withdraw their agreement. Counsel's advice had been sought on the matter and, at this time, it was not possible to say with certainty that the land could or could not be declared as a local nature reserve. In the current circumstances, the sentence could arguably be viewed as misleading. He stressed that it was important for Members to determine the application on the correct factual information, namely that the land was not a local nature reserve. He advised that local nature reserves were protected by local policies only, as opposed to national policies or the law. Whilst the existing Local Plan was silent on local nature reserves, the emerging Local Plan included provision for them. Having consulted colleagues, the advice was that, had the land already been designated as a local nature reserve, it was unlikely to have made a difference to the recommendation. The site was recognised as being of significant ecological importance, more so than would be required to meet the criteria for a local nature reserve designation. It was for Members to grapple with the ecological issues and proposed mitigation/compensation and form a judgement based on these matters. In summary, the Section 106 agreement and the potential for a future local nature reserve designation were not determinative in the decision the Committee was being asked to make."

42. The Council's Planning Committee resolved to grant planning permission for the Hotel and Surf Lagoon developments, subject to conditions.

Legal Framework

Environmental Impact Assessment

43. The EIA Regulations make provision for the carrying out of EIA by developers for "EIA development", i.e. development which falls within the scope of either Schedule 1 of the Regulations, or within Schedule 2 and the development is likely to have significant environmental effects (reg.2).
44. EIA is a process consisting of (inter alia) the preparation of an environmental statement which includes the relevant information listed in Schedule 4 to the EIA Regulations (reg.4). Where EIA is necessary, a decision-maker determining a planning application must take into consideration all the environmental information generated by the EIA, reach a reasoned conclusion on the significant environmental effects of the development, integrate that conclusion into his/her decision whether to grant planning permission, and consider whether it is appropriate to put in place any monitoring measures (reg.26).

45. Regulation 3 of the EIA Regulations prohibits a local planning authority from granting planning permission for EIA development unless an EIA has been carried out in respect of that development.
46. Under regulation 6, a developer may request that the relevant local planning authority adopt a screening opinion in respect of proposed development, setting out its view whether development is EIA development. A local planning authority carrying out a screening exercise must take into account the criteria set out in Schedule 3, which includes the cumulation of any environmental impacts with other existing development and/or approved development.
47. The question of what cumulative environmental impacts must be considered by a local planning authority, both at the screening stage and at the point at which an EIA is carried out, has been considered in various authorities from which the following relevant principles can be derived:
- (a) It is unlawful to “salami-slice” what is in substance and reality a single project into a series of smaller projects (deliberately otherwise), each falling below the threshold criteria requiring EIA (*R (Clarke-Holland) v Secretary of State for the Home Department* [2024] ACD 20 at §72).
 - (b) Even where two development proposals are properly distinct, they may have cumulative impacts. The existence and nature of cumulative environmental effects will be a question of fact and judgment in each case (*Clarke-Holland* at §72).
 - (c) Overlapping environmental effects may exist where there are independent projects nearby to one another, in which case an assessment of cumulative effects will be required (*R (Wingfield) v Canterbury City Council* [2020] JPL 154 at §70).
48. At the screening stage, a local planning authority must also ensure that it has sufficient evidence of the potential adverse environmental impacts of a proposal, and the availability and effectiveness of proposed remedial measures, in order to make an informed judgment that a development would not be likely to have significant effects on the environment (*R (Swire) v Secretary of State for Housing, Communities and Local Government* [2020] Env LR 29 (“*Swire 1*”)).
49. Where a local authority has adopted a screening opinion lawfully and there is a change in circumstances, a grant of planning permission will be rendered unlawful unless no reasonable planning officer, having reached the screening opinion that it did, would have thought that the changes could make the development EIA development (*R (Swire) v Ashford Borough Council* [2021] Env LR 29 (“*Swire 2*” at §82).

Section 106 Agreements

50. Agreements made under section 106 of the Town and Country Planning Act 1990 run with the land (see section 106(3) and *Tesco Stores Ltd v Secretary of State for the Environment* (1994) P&CR 219 at 234-235). This means that they bind not only the landowner who entered into the agreement, but also any successors in title.
51. When interpreting a section 106 agreement, a court will ask what a reasonable reader would understand the words to mean when reading the agreement in the context of the agreement and the consent as a whole. The interpretation of section 106 agreements is an objective exercise, in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other parts of the agreement which cast light on the relevant words, and common sense (*Norfolk Homes Limited v North Norfolk District Council* [2021] PTSR 863 at §67).

Local Nature Reserves

52. Local Authorities are empowered to provide, or secure the provision of, nature reserves on and land in their area where they consider that it would be expedient for the land to be managed as a nature reserve (s.21 NPACA 1949).
53. A local nature reserve is land that is (ss.15 and 21(4) NPACA 1949):
- (a) Managed solely for a conservation purpose; or
 - (b) Managed for a conservation and recreational purpose, if the management of the land for the recreational purpose does not compromise its management for the conservation purpose.
54. Local authorities may enter into agreements with the owners, lessees and occupiers of land securing the management of land as a nature reserve (ss.16 and 21(4) NPACA 1949).

Grounds of Challenge

Ground 1: Failure to assess cumulative impacts when screening the Proposals for EIA

55. The Council's failure to assess the cumulative impacts of the Hotel and Surf Lagoon proposals when screening the proposals under reg.6 of the EIA Regulations was legally flawed.
56. Schedule 3 of the EIA Regulations requires local planning authorities screening development for EIA to consider the cumulative impacts of development proposals with other existing and/or approved development. Where development proposals are

physically adjacent to one another and may have overlapping effects, an assessment of their cumulative impacts will be required (*Wingfield* at §70).

57. In the present case, the Hotel and Surf Lagoon proposals relate to physically adjacent parcels of land within the same Country Park. When screening the proposals, officers considered the two development proposals to be sufficiently closely linked that it was necessary to consider whether they were in fact a single development proposal.

58. Despite the Council's recognition of this close link between the proposals, no consideration was given in either Screening Opinion to the question of whether the proposals were, in combination, likely to have significant environmental effects. This is despite the fact that the Council had in its possession information to suggest that the proposals would, in fact, have significant cumulative environmental effects, including:

- (a) A joint HRA Report, produced by the applicants, which identified the proposals as having potentially significant impacts on European Protected Sites;
- (b) A consultation response from Natural England which raised concerns regarding the impact of the Surf Lagoon proposal on the Lizard Orchid;
- (c) A consultation response from the Council's Senior Natural Environment Officer raising concerns regarding the impact of the proposals on Turtle Doves, a red list species.

59. In those circumstances, it was plainly irrational for the Council to give no consideration at all to the potential for the two proposals to have likely significant cumulative effects on the environment at the screening stage.

Ground 2: Failure to reconsider screening opinion for the Surf Lagoon

60. The Council's failure to reconsider its negative screening decision for the Surf Lagoon was unlawful in light of the further material and representations received by the Council prior to the Planning Committee's resolution to grant planning permission.

61. The screening request sent to the Council by SEAHIVE gave no consideration to the potentially significant effects of the development on species such as the Lizard Orchid and the Fiery Clearwing Moth, or to any potential measures proposed for the mitigation of those effects. Nor did the Screening Opinion expressly refer to those matters.

62. Following the adoption of the Screening Opinion and before the resolution to grant planning permission, however, it became clear that those potential impacts were central to the Planning Committee's decision whether to grant planning permission. Three consultation responses submitted by NE made clear to the Council that there was a potentially significant impact on species protected under the WCA 1981, and that the mitigation measures proposed by the applicant were based on incomplete information.

63. In those circumstances, any reasonable planning officer would have recognised that:
- (a) There was a potential for the development to have significant effects on two protected species;
 - (b) The developer had not yet undertaken research to demonstrate the availability and effectiveness of mitigation measures, namely the proposed translocation;
 - (c) That information was required in order to lawfully determine whether or not likely significant effects on biodiversity necessitated the carrying out of EIA (see *Swire 1*).
64. In those circumstances, officers should have realised that there was a possibility that the Council's earlier Screening Opinion could have changed, and that any decision to grant planning permission for the Surf Lagoon would therefore be unlawful (*Swire 2* at §82).

Ground 3: Materially Misleading Advice given to Planning Committee regarding the status of the Country Park as a Local Nature Reserve

65. The advice given by officers as to whether the Country Park could be designated (or treated) as a LNR, and what the consequences of doing so would be, was materially misleading. That advice went uncorrected at the Planning Committee meeting.
66. In terms of the question whether the Country Park could be designated or treated as a LNR, the 2004 Agreement was clear on its face that it was an agreement for the purposes of section 16 of the NPACA 1949 (see para.13 above). In other words, the 2004 Agreement itself was an agreement to manage the Country Park as a local nature reserve. The landowner had also covenanted at Schedule 1(5) to permit the Council to declare the land as a LNR.
67. The 2004 Agreement was binding on BPL, as successor in title to the earlier freeholder of the Country Park. Under the First Schedule to the 2004 Agreement, BPL was therefore bound by the landowner covenant that the designation of the land as a LNR would last for a period of at least 21 years.
68. Notwithstanding this, statements were made both in the Officer Reports and by the Council's Principal Planning Solicitor, at the Planning Committee meeting drawing the Planning Committee's attention to BPL's apparent refusal to agree to designate the land as a LNR or to grant the Council an interest in the land to enable it to be so managed. These statements made by BPL were irrelevant. BPL, as a successor in title to the 2004 agreement, had already agreed to manage the Country Park as a local nature reserve for a period of 21 years. The suggestion that BPL could prevent the Council from declaring the Country Park as a LNR by breaching the 2004 Agreement, or that the failure of the Council to comply with the 2004 Agreement rendered it unenforceable, was therefore materially misleading.

69. The consequence of officers' failure to recognise that the Country Park could be declared as a LNR was that the Planning Committee failed to recognise that it was already subject to a s.16 agreement, and that it should be treated as LNR land determining the planning application. No weight was therefore given in the planning balance to whether the proposed Hotel and Surf Lagoon prejudiced the management of the Country Park for its statutory conservation purpose (s.15 NPACA).
70. For the reasons set out above, any decision by the Council to issue planning permission for the proposed developments would be unlawful.

Details of Information Sought

71. Please identify (and if they are not in the public domain provide copies of) any documents evidencing the Council's consideration of:
- (a) The cumulative environmental effects of the proposed development in the context of the EIA Regulations;
 - (b) The need to re-screen the Surf Lagoon and/or Hotel development under the EIA Regulations;
 - (c) The section 106 agreement and the designation of the Country Park as a LNR.
72. When you respond, please provide any relevant documentation under the Council's duty of candour.
73. If the Defendants fail to disclose a document now, which it later relies on in defence of this claim, then we reserve the right to bring this to the Court's attention when it comes to the matter of costs. Moreover, as a matter of law, a Claimant cannot be prejudiced at the permission stage due to an absence of documents, and the existence of such further material (which may be critical to the arguability of the claim) is capable of being a good reason in and of itself to grant permission (**R (Blue Sky Sports & Leisure Ltd v Coventry City Council** [2013] EWHC 3366 (Admin) at [25]). The Court must be supplied with all the information necessary, including through pre-action disclosure, in order to determine any permission stage on an accurate footing (**R (HM & others) v Secretary of State for the Home Department** [2022] EWHC 2729 (Admin) at [15-16,39]). This means candid disclosure of all relevant materials is required (**R (Police Superintendent's Association) v Police Remuneration Review Body** [2023] EWHC 1838 (Admin) at [15(5)]).

Action that the Council is expected to take

74. We request that the Council agrees that the issuing of planning permission following the Planning Committee's resolution to grant planning permission would be unlawful. We request that the Council agree to carry out of a legally adequate screening exercise for the development proposals followed by any necessary EIA.

ADR proposals

75. The Claimant does not have any specific proposals for alternative dispute resolution at this stage, as it considers that the actions set out above at paragraph 68 are the only way to satisfactorily resolve the present dispute and avoid litigation. The Claimant does however remain open to engaging in ADR should the Council have any proposals.

Aarhus Convention Claim

76. This is an Aarhus Convention Claim within the meaning of CPR r 46.24. Accordingly, the Claimant proceeds on the basis of benefitting from the costs protection regime at CPR r 46.24 to 46.28, and its adverse costs would be limited to £10,000. If you disagree, please fully explain why.

Legal Advisers

77. The contact details for the Claimant's legal advisers are Leigh Day, Panagram, 27 Goswell Road, London, EC1M 7AJ (reference: RGA/JEK/01184482/1).

Address for Service

78. Please can you confirm that: (i) you will accept electronic service; and, if so (ii) provide a single email address to enable us to effect valid service.

Address And Proposed Date For Reply

79. You are requested to respond by email to ensure we have your response in a timely manner. Please send your response to [REDACTED] ([REDACTED]@leighday.co.uk), [REDACTED] [REDACTED]@leighday.co.uk) and [REDACTED] [REDACTED] ([REDACTED]@leighday.co.uk) as soon as practicable, but at the very latest within 14 days of the date of this letter (i.e. by **4pm on 15 May 2024**).

Yours faithfully



Leigh Day

[REDACTED]

From: [REDACTED]@akdc.co.uk>
Sent: 15 October 2024 14:31
To: [REDACTED]
Subject: Betteshanger Country Park - JR Pre-Action Letter

Dear [REDACTED] and [REDACTED]

We note the pre-action letter received from Leigh Day, dated 3rd October 2024.

At this stage we consider that the grounds for challenge are for the Council to respond to and are in any case baseless, however if permission to proceed to a hearing is granted by the court in either case then we reserve the right to appoint a barrister and anticipate fully participating as an interested party.

Kind regards

[REDACTED]

Email: [REDACTED]@akdc.co.uk
Tel: [REDACTED]



[REDACTED]

From: [REDACTED]
Sent: 18 October 2024 14:56
To: [REDACTED]
Cc: [REDACTED]; DDC Development Management; [REDACTED]; DDC Development Management; [REDACTED]
Subject: RE: Grant of planning permission for the erection of a surfing lagoon and pools (DOV/22/01158) and a 120-bed hotel (C1) building with associated facilities (DOV/23/01095)
Attachments: DDC letter out to Leigh Day 18.10.24 - PAP response final.pdf; DDC file note on Hotel scheme post receipt of Inspectors' report.pdf

Dear [REDACTED]

Thank you for your email and for agreeing to the extension of time requested.

Please find attached the Council's response to your pre-action letter and a file note which is referred to in paragraph 56(e) of the Council's response.

Kind regards

[REDACTED]



[REDACTED]
Principal Solicitor - Planning
Dover District Council
Council Offices, White Cliffs Business Park, Whitfield, Dover CT16 3PJ
Tel: [REDACTED]
Mob: [REDACTED]
Email: [REDACTED]@DOVER.GOV.UK
Web: <http://dover.gov.uk>

Please consider the Environment before printing this email

From: [REDACTED]@leighday.co.uk>
Sent: 16 October 2024 11:16
To: [REDACTED]@DOVER.GOV.UK>; [REDACTED]@leighday.co.uk>
Cc: [REDACTED]@leighday.co.uk>; [REDACTED]@leighday.co.uk>; DDC Development Management <DevelopmentManagement@DOVER.GOV.UK>; [REDACTED]@DOVER.GOV.UK>; DDC Development Management <DevelopmentManagement@DOVER.GOV.UK>; [REDACTED]@dover.gov.uk>
Subject: RE: Grant of planning permission for the erection of a surfing lagoon and pools (DOV/22/01158) and a 120-bed hotel (C1) building with associated facilities (DOV/23/01095)

Dear [REDACTED]

Thank you for the below. We agree to the one-day extension of time for providing a response to our pre-action letter. Please provide the Council's response by 4pm on 18 October 2024.

Kind regards,

[REDACTED]
Associate Solicitor

Panagram, 27 Goswell Road, London, EC1M 7AJ



From: [REDACTED] <[REDACTED]@DOVER.GOV.UK>

Sent: Monday, October 14, 2024 11:05 AM

To: [REDACTED] <[REDACTED]@leighday.co.uk>

Cc: [REDACTED] <[REDACTED]@leighday.co.uk>; [REDACTED] <[REDACTED]@leighday.co.uk>; Car [REDACTED] <[REDACTED]@leighday.co.uk>; DDC Development Management <[REDACTED]@DOVER.GOV.UK>; [REDACTED] <[REDACTED]@DOVER.GOV.UK>; DDC Development Management <[REDACTED]@DOVER.GOV.UK>; [REDACTED] <[REDACTED]@dover.gov.uk>

Subject: [EXTERNAL] FW: Grant of planning permission for the erection of a surfing lagoon and pools (DOV/22/01158) and a 120-bed hotel (C1) building with associated facilities (DOV/23/01095)

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Dear [REDACTED]

Further to my email below I can confirm that the Council has instructed counsel and is preparing a response to your client's PAP letter in relation to this matter. Counsel has existing commitments which mean that providing a response by 17 October may be difficult. Accordingly, I would be grateful if you would please agree to a one-day extension of time for the provision of the response (i.e. to be provided by close of business on Friday 18 October).

Kind regards

[REDACTED]



Principal Solicitor - Planning

Dover District Council

Council Offices, White Cliffs Business Park, Whitfield, Dover CT16 3PJ

Tel: [REDACTED]

Mob: [REDACTED]

Email: [REDACTED] <[REDACTED]@DOVER.GOV.UK>

Web: <http://dover.gov.uk>

Please consider the Environment before printing this email

From: [REDACTED]
Sent: 03 October 2024 14:21
To:
Cc:
Subject: RE: Grant of planning permission for the erection of a surfing lagoon and pools (DOV/22/01158) and a 120-bed hotel (C1) building with associated facilities (DOV/23/01095)

Dear [REDACTED]

I confirm receipt by the Council of the PAP letter. I will take instructions and a response will be provided in accordance with the protocol.

Kind regards

[REDACTED]



[REDACTED]
Principal Solicitor - Planning

Dover District Council

Council Offices, White Cliffs Business Park, Whitfield, Dover CT16 3PJ

Tel: [REDACTED]

Mob: [REDACTED]

Email: [REDACTED]@DOVER.GOV.UK

Web: <http://dover.gov.uk>

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From: [REDACTED]@leighday.co.uk>
Sent: 03 October 2024 14:07
To: DDC Development Management <DevelopmentManagement@DOVER.GOV.UK>; [REDACTED]
[REDACTED]@DOVER.GOV.UK>; DDC Development Management <DevelopmentManagement@DOVER.GOV.UK>;
[REDACTED]@DOVER.GOV.UK>; [REDACTED]@dover.gov.uk>
Cc: [REDACTED]@leighday.co.uk>; [REDACTED]@leighday.co.uk>; [REDACTED]
[REDACTED]@leighday.co.uk>
Subject: Grant of planning permission for the erection of a surfing lagoon and pools (DOV/22/01158) and a 120-bed hotel (C1) building with associated facilities (DOV/23/01095)

Dear Dover District Council

Please find attached a letter sent in accordance with the Pre-action Protocol for Judicial Review. This letter requires your urgent attention.

Many thanks

[REDACTED]

[REDACTED]
Senior Associate Solicitor

[REDACTED]
leighday.co.uk

Panagram, 27 Goswell Road, London, EC1M 7AJ



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**Dover District Council
Legal Services
White Cliffs Business Park
Dover
Kent CT16 3PJ**

**Telephone: (01304) 821199
Website: www.dover.gov.uk**

Contact: [REDACTED]
Direct line: [REDACTED]
e-mail: [REDACTED]@dover.gov.uk
Our ref: L/[REDACTED]/PLAN007942
Your ref: [REDACTED]/01184482/1
Date: 18 October 2024

BY EMAIL ONLY TO:

Leigh Day
Panagram
27 Groswell Road
London
EC1M 7AJ

[REDACTED]@leighday.co.uk
[REDACTED]@leighday.co.uk
[REDACTED]@leighday.co.uk

Dear Friends of Betteshanger,

**Grant of planning permission for the erection of a surfing lagoon and pools
(DOV/22/01158) and a 120-bed hotel (C1) building with associated facilities
(DOV/23/01095)**

Response to pre-action letter

1. I write on behalf of Dover District Council in response to your pre-action letter dated 3rd October 2024.

Proposed Claimant

2. The Friends of Betteshanger ("the Claimant").

Proposed Defendant

3. Dover District Council ("the Council").

Proposed Interested Parties

4. Betteshanger Property Limited c/o Quinn Estates Ltd, The Cow Shed, Highland Court Farm, Bridge, Canterbury CT4 5HW.
5. Hammill Properties Limited of Highland Court Farm, Bridge, Canterbury, England, CT4 5HW.

6. TheSeahive Limited of Nucleus House, 2nd Floor, 2 Lower Mortlake Road, Richmond TW9 2JA.

Details of the matter being challenged

7. The determination of the Council to grant planning permission for separate proposals for a 120-bed hotel ("the Hotel") and a surfing lagoon ("the Lagoon"), along with associated buildings and infrastructure, on 25th September and 17th September respectively.
8. At paragraph 9, your letter describes itself as only challenging the decision to grant planning permission, but later appears to venture into challenging the lawfulness of the decision to issue revised screening opinions (see, for example, para 65). Should a claim be brought, the Council requests that you clarify the scope of your claim and the decisions you intend to challenge.

Response to proposed claim

9. For the reasons set out below, the Council does not accept that the grounds advanced in your pre-action letter disclose any arguable errors of law. The Council will contest any claim that is brought.

Facts and background

10. Relevant facts are dealt with in relation to each proposed ground below.

Proposed Ground 1: Misinterpretation of Planning Policy

11. Policy DM25 and emerging policy PM5 were expressly identified, articulated, and faithfully applied. Proposed Ground 1 is plainly an impermissible challenge to the application of the policy.
12. There is a critical difference between a challenge based on the misinterpretation of policy and a challenge based on the application of policy. A claimant must not dress up what is in reality a criticism of the application of policy as if it were a misinterpretation. A claimant fails to raise a genuine case of misinterpretation of policy unless he identifies (i) the policy wording said to have been misinterpreted, (ii) the interpretation of that language adopted by the decision-maker and (iii) how that interpretation departs from the correct interpretation of the policy wording in question. Failure to address these points indicates that the complaint is really concerned with the application, rather than misinterpretation, of policy (*Barker-Mills Estate Trust v Secretary of State* [2016] EWHC 3028 (Admin) per Holgate J. at paragraphs 83-84.
13. There was no obligation to set out each and every policy and criterion in that policy. The planning decision-maker is not writing an examination paper. Officer reports are read benevolently and as a whole, in a reasonably flexible way. Because they are written principally for parties well-aware of all of the issues involved and of

the arguments deployed, it is not necessary to rehearse in the officer report every argument relating to each matter (see *Seddon Properties v SSE* (1981) 42 P. & C.R. 26, per Forbes J. at page 28. The Court will start from the position that the planning decision-maker properly understood and took into account the relevant legal and policy framework, unless there are clear contra-indications sufficient to displace that presumption (see *Bennett v Secretary of State* [2023] EWHC 2542 (KB) per Jay J at paragraph 33). An adverse inference that the planning decision-maker misunderstood something or failed to have regard to it will only be drawn where all other known facts and circumstances point overwhelmingly to that conclusion (*South Bucks DC v Porter (No 2)* [2004] 1 WLR 1953 at paragraphs 34-35).

14. With the above principles in mind, it is clear this ground of challenge is entirely without merit. It depends on the kind of hypercritical, legalistic scrutiny which the courts have repeatedly deprecated (*St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, [2018] PTSR 746, at [6] – [7]). The reality is that the officer’s reports in relation to the impugned decisions (“ORs”) deal with open space issues in careful detail, and go on to apply those policies in an entirely conventional and, indeed, exemplary manner. There was no obligation to have expressly set out criterion (vi) of Policy DM25 nor for the ORs to have gone through each and every criterion one by one.
15. Open space is identified as a “main issue” in both applications.¹ Both reports expressly identify adopted policy DM25 and emerging policy PM5 and treat them as being central to determining the open space issue.² The core of the officer’s reasoning with regards to open space and these policies occurs under the section headed “Open Space”. The Officer sets out the terms and meaning of policies DM25 and PM5. The Officer notes they should be read alongside paragraphs 102 and 103 of the NPPF, which also seek to protect open space.
16. The officer then sets out the evidence base that will inform his recommendation. He first refers to the Council’s “Open space play and standards paper”, which identifies a “significant surplus” of semi/natural green space “across the district”. The Officer then refers to the Council’s “Open Space Assessment Report”, which similarly concludes that “the amount of such green space exceeds the quantity standard”.
17. The Officer then expressly notes that “whilst the Country Park is an important open space, the district does have a recognised surplus of semi/natural green space. As such, the proposed loss of open space is considered to comply with the tests of Core Strategy Policy DM25 and the Framework”. For completeness, the Officer also notes that “[given] the extent of the surplus of semi/natural green space, this position of policy compliance would remain the case if the proposed hotel scheme, which is

¹ See for example para 2.3 of the report relating to the lagoon application.

being considered under a different planning application (application reference 23/0105) was to be granted planning permission and delivered as well.”³

18. The Officer concludes by observing that a wider benefit of the schemes is that, by securing the financial viability of the Country Park, they ensure the district’s largest area of open space can remain open to the public, free of charge. This benefit was subsequently secured through covenants given in the respective section 106 agreements.
19. In light of the above, it is clear this ground of challenge depends on a fundamental misreading of the Officer’s clear, detailed, and articulate treatment of open space issues and the relevant open space policies. The Officer’s approach was methodical, embracing not just the relevant adopted and emerging policies, but national policy and the relevant open space evidence base also. To suggest that the officer has misunderstood these uncomplicated policies, despite reciting them and undertaking a meticulous discussion of them, is simply unarguable. Your letter rightly does not raise any challenge to the adequacy of the reasoning presented with regard to these policies. Such a criticism would indeed be hopeless, given the clarity, detail, and rigour of the reasoning. Fundamentally, the ORs did not identify any “overriding” matters of concern and as a result there could have been no conceivable basis for having applied criterion (vi) of Policy DM25 in any other manner than it was, in fact, applied. It is clear that permission was granted in this case because of the distinct lack of “overriding” concerns of any nature whatsoever.
20. The short answer to ground 1 of your pre-action letter’s challenge is that the Officer identified a surplus of open space in the district and therefore determined that the proposals were both compliant with DM25 and PM5, because they allow for loss of open space where such a surplus exists. Your suggestion that the officer has misunderstood the wording of PM5, which requires “a robust assessment” of the open space provision and requires a surplus in the “catchment area”, is a paradigm example of an impermissible critique of policy application. It is a matter of planning judgment for the decision-maker to determine how to apply those words, and the meaning the officer identifies is plainly rational.
21. Your letter fails to identify what you take the policy language to mean or how you think the Officer has departed from it, which falls foul of the *Barker-Mills* criteria. Proposed Ground 1 is therefore a naked and unarguable challenge to policy application.

² Ibid., para 2.57-2.58.

³ The reverse is also said with regards to the wave pool scheme in the Hotel OR. In other words, even accounting for the combined loss of open space if both applications were granted, the District will still enjoy a surplus of the identified open space.

Proposed Ground 2: EIA and Cumulative Impacts

22. The approach taken to cumulative impacts in the screening opinions was entirely lawful. Read together with the officer's reports, whose reasoning they expressly incorporate, the opinions are an entirely sufficient assessment for the screening stage.
23. Schedule 3 to the EIA Regulations requires a screening opinion to "consider" the cumulative impacts a proposal may have in "cumulation with other existing development and/or approved development". A determination as to whether there are cumulative impacts is a matter of evaluative and technical judgment. The Courts have repeatedly affirmed that decision-makers are afforded an enhanced margin of appreciation in cases, such as the present, involving scientific, technical and predictive assessments (*R. (Mott) v Environment Agency* [2016] 1 W.L.R. 4338 at [69] and [70]); the bar is set "very high, particularly on technical issues" (*R (Swire) v Canterbury City Council* [2022] EWHC 390 (Admin), at [115].)
24. More generally, a screening decision "is necessarily based on less than complete information. It is not intended to involve a detailed assessment of factors relevant to the grant of planning permission, nor a full assessment of any identifiable environmental effects. There has to be a sensible limit to what a screening decision maker is expected to do..." (*R (Clarke-Holland & Ors) v SSHD* [2023] EWHC 3140, at para 72). The existence and nature of cumulative environmental effects will be a question of fact and judgment in each case (*Clarke-Holland*, at para 72(g)). Screening decisions are preliminary assessments intended to identify the relatively small number of EIA cases; they are not intended to achieve the same rigour and detail as an EIA.
25. Your position that the screening opinion has materially breached the requirements in Schedule 3 of the Regulations is without merit, for three reasons.
26. Firstly, the requirement is to have regard to existing or approved development. It is not a requirement to have regard to other *proposed* development.
27. At the time these screening opinions were written and published, neither proposal had received final approval. As your letter observes, the revised screening opinions were issued on 4th September 2024. The Committee considered the applications simultaneously on 7th March 2024, and the Council's decision to issue planning permission for the proposals occurred on 17th and 25th September.
28. The provisions of Schedule 3 relating to cumulative impacts do not target proposed developments. The cumulative impacts of two or more proposals only falls to be

assessed at the screening stage where, in law, they form a single project for EIA purposes which they do not.

29. That, indeed, is precisely the approach taken in the officer's reports, and the screening opinions which they inform. All four documents set out the correct legal framework for assessing whether two proposals are in reality one project. They then faithfully apply the relevant factors and reach a balanced, and undoubtedly rational, conclusion that they are distinct projects which can lawfully be screened separately. Your letter does not criticise this approach in itself (and indeed the application of the *Wingfield* factors was recently affirmed in *Clarke-Holland* (para 72)). This approach was taken because the cumulative impacts to be assessed were those of two proposals, not of a proposal and another existing or approved development.
30. Secondly, and even assuming Schedule 3 did require an assessment of the cumulative impact of proposals at the screening stage, the screening opinion did properly consider cumulative impacts. The conclusions reached in that regard are reviewable only on *Wednesbury* grounds, which have not been established at all in your letter.
31. Both screening opinions expressly assess, under the heading "Type and Characteristics of the Potential Impact", the cumulative effect of the proposals. Under the heading "Potentially significant environmental effects", both opinions expressly state that they are considering those cumulative effects in relation to, inter alia, ecology, landscape, and air quality.
32. Those assessments were all informed by the thorough and detailed ORs which consider those matters carefully. The ORs explore in substantial detail the lengthy environmental submissions from, inter alia, the Claimant, Natural England, the Council's Senior Natural Environment Officer ("SNEO"), and the RSPB.
33. Your letter does not explain what further detail these screening opinions could have contained. At paragraph 58 of your letter, you criticise the officer for relying on environmental assessments that analyse the separate impacts of the proposals, but that is simply how a cumulative impact assessment is conducted. An expert decision-maker considers the environmental impacts of each proposal and draws a judgment as to the effect they would have in concert. There is no requirement to recite a prescribed formula of words as some form of incantation nor to conduct a bespoke cumulative impact study; the screener is the expert decision-maker and is entitled to make their own judgment on what the cumulative impacts are and what evidence they require, subject to rationality.
34. Here, the judgment reached was that their cumulative effects are unlikely to be significant, across a wide range of possible impacts. The screening opinion took into account all the matters required of it by the prescriptive list of relevant factors in Schedule 3 of the Regulations. The bare criticism that more detail was required,

when all relevant data available at the time and all prescribed factors were considered, is nowhere near enough meet the very high bar required to vitiate this screening opinion.

35. A challenge to that evaluative judgment on rationality grounds is thus plainly unarguable. A challenge on the basis of an objective error of fact is unarguable, because your letter identifies no such error; there is no suggestion the screener misunderstood any objective evidence. And a general challenge that greater detail should have been provided is without merit, both because it wrongly treats the screening stage as an ersatz EIA, and because your letter does not particularise what cumulative impacts ought to have been assessed, and why those were likely to be significant environmental impacts that were not otherwise substantively addressed by the screening opinion.
36. The core of the challenge here seems to be that “the Officer Reports give no consideration to the potential for the proposed developments to impact cumulatively on key protected species such as Lizard Orchids, Fiery Clearwing Moths, and other invertebrates, or habitats such as open mosaic habitats”. But the screening opinions expressly explain that the “[cumulative] effects of the Proposed Development and existing, approved and/or other proposed development (including the Wave Pool Scheme), on likely matters of ecology (taking into account measures of avoidance, mitigation or then compensation, as presented in the Officers’ Report), ..., are not expected to be significant.”. The ORs themselves, of course, go into great detail about how that mitigation is to obviate harms to the identified protected species. Your suggestion that “no consideration” has been given is therefore quite wrong; the ground of challenge resting on that false premise is entirely unarguable. Plainly, the mitigation for protected species like the Fiery Clearwing Moths was not intended to be isolated to one site, but designed to protect any displaced moths in the area. That indeed would have been the only basis on which NE could grant the required licences.
37. Indeed, the environmental effects you particularise as not being cumulatively assessed are those whose cumulative effects are clear from individual assessments. Air quality, for example, is not considered by the screener to be a likely significant impact in either proposal because the Country Park is not in the vicinity of an Air Quality Management Area.⁴
38. Finally, in light of the above, it is clear that even if the Court accepted a technical breach of Schedule 3 had occurred, it would exercise its discretion to refuse relief. The making of a screening opinion other than in accordance with the regulations does not automatically render that opinion unlawful; the Court is entitled to refuse

⁴ See para 3.8 of the Lagoon OR

relief “if the applicant has been able in practice to enjoy the rights conferred by European legislation, and there has been no substantial prejudice” (*Champion v North Norfolk District Council* [2015] 1 WLR 3710, at para 54).

39. Your letter’s failure to identify any cumulative impacts which might have been captured by a full EIA constitutes a failure to particularise any actual prejudice resulting from the alleged procedural error. It is not explained at all in your letter why the general environmental concerns you raise (e.g. air quality or the various protected species) are impacts whose significance is likely to be affected by a cumulative analysis. A cumulative assessment would not plausibly displace that reasoning. Your letter fails to explain why that is not the case. Absent identified prejudice, the Court is likely to refuse relief, even if a procedural defect is established.

Proposed Ground 3: EIA Mitigation

40. The approach taken to mitigation in determining that these proposals were not EIA developments was entirely lawful.
41. To begin with, the question of whether a development is likely to occasion significant effects on the environment is a matter of “planning judgement” for the planning decision-maker, which can only be challenged on *Wednesbury* grounds (*Younger Homes (Northern) Ltd v First Secretary of State* [2003] EWHC 3058 (Admin), para 59). As the Court of Appeal explained in *Jones* at para 17:

“Whether a proposed development is likely to have significant effects on the environment involves an exercise of judgment or opinion. It is not a question of hard fact to which there can only be one possible correct answer in any given case. The use of the word “opinion” in regulation 2(2) is, therefore, entirely apt. In my view, that is in itself a sufficient reason for concluding that the role of the court should be limited to one of review on *Wednesbury* grounds.”

42. As Carnwath LJ went on to explain at para 61, determining whether an effect is significant “requires the exercise of judgment, on technical or other planning grounds, and consistency in the exercise of that judgment in different cases. That is a function for which the courts are ill-equipped...”
43. Resultingly, the Courts may only intervene in “limited circumstances” and should be “slow to interfere” (*R (Friends of Basildon Golf Course) v Basildon District Council* [2010] EWCA Civ 1432, paras 58, 61). It is not the case that an EIA “will always or routinely be necessary when protected species... are found on a site” (*Basildon*, 59).

44. It is settled law that a screening opinion may take into account mitigation in determining that a development is not likely to have significant effects (*Champion*, para 51). However, a decision-maker is not entitled to simply assume that uncertain mitigation will come good (*Bellway Urban Renewal Southern v Gillespie* [2003] EWCA Civ 400, 41). They should not use conditions as a “surrogate for the EIA process” (*Bellway*, at para 48).but they are entitled to make a negative screening opinion even where the identified mitigation is uncertain, or where surveys are yet to be undertaken (*Jones*, 39). Pill LJ put it this way at para 43 of *R (Loader) v SSCLG* [2012] EWCA Civ 869:

“The decision maker must have regard to the precautionary principle and to the degree of uncertainty, as to environmental impact, at the date of the decision. Depending on the information available, the decision maker may or may not be able to make a judgment as to the likelihood of significant effects on the environment. There may be cases where the uncertainties are such that a negative decision cannot be taken. Subject to that, proposals for ameliorative or remedial measures may be taken into account by the decision maker.”

45. It is “not necessary that all uncertainties be resolved or that a detailed and comprehensive assessment be made of impacts at the screening opinion stage”; the screening opinion should grapple with that uncertainty and come to a rational conclusion on likely significant effects in light of it (*Younger Homes*, para 60).

46. In light of those principles, the approach taken to mitigation in the screening opinions here was entirely lawful. Much of the mitigation proposed by the developer was uncontroversial and indeed supported by SNEO.⁵ With regards to the other mitigation proposals, the screening opinions squarely confront the fact that they are uncertain and grapple with both the SNEO and NE’s comments to that effect.⁶ The opinions consider, in line with the advice of the SNEO and NE, that several years of research will need to be conducted before those strategies can be confirmed as being effective at mitigating harm.⁷

47. It was for that reason that the proposals require, by legal condition, that not only is that research undertaken, but also that Natural England be satisfied with the results of that research and issue a licence, before development can proceed.⁸

⁵ See the tables of agreed mitigations under the SNEO’s recorded submissions in both ORs.

⁶ For example, para 2.143 – 2.149, or 3.29-3.33 of the Lagoon OR.

⁷ For example, 2.162 of the Hotel OR

⁸ See, inter alia, conditions 27-30 of the Lagoon permission

48. The opinions also consider the licensing decision that NE will have to undertake once that research has been conducted. The opinions determined, in line with the responses from NE (see paragraph 24(c) of your letter) that the obstacle to licensing was whether the protected species could be insulated from harm.
49. In other words, there was no real uncertainty as to whether this proposal would have significant effects on protected species. The proposal's conditions guaranteed that development would not proceed without confirmation from a statutory body that the mitigation strategy was effective at preventing significant environmental harm. As the quotations from NE in your letter make clear, they agreed it was possible that satisfactory mitigation could be devised, but wanted studies undertaken to confirm the efficacy of such a strategy. The nature and mechanics of that strategy are set out clearly in the ORs – indeed we note that your letter does not contend that you have failed to understand what is entailed in such a strategy – and as a result reg.5(5)(b) is complied with. The strategy of enabling investigations to be carried out for a fixed period of time and precluding the carrying out of development during that period, and until a further sign-off event takes place, is itself a “measure envisaged to avoid, or prevent what otherwise might have been, significant effects on the environment.”
50. There is no sense in which this approach strays unlawfully into treating conditions as a “surrogate for the EIA process”. The screening opinion does not simply assume a condition will come good and thereby solve all environmental issues. Rather, it observes that, by means of conditions, the project is placed within a framework for further study, further collaboration with the public statutory body and the LPA, and mandatory engagement with a dispositive ecological licensing regime, whereby development can only proceed if that framework results in a non-harmful ecological outcome. That is not an attempt to unlawfully “surrogate” the EIA process; to the contrary, it gives effect to the EIA objectives of preventing ecological harm and enabling public information on mitigation and environmental issues, in circumstances where mitigation techniques simply require further study before development can safely proceed.
51. In any event, even if it is established that the screening opinion considered mitigation unlawfully, the Court is very likely to refuse relief (*Champion*, 54). On these facts, the commissioning of an EIA would not have added any clarity to the mitigation measures proposed or added anything substantive to the information before the public, and your letter does not identify anything material that could be added.
52. Even if the screening opinion had been positive and an environmental statement

setting out proposed mitigation measures had been required, the reality is that such a statement would contain no more information than was already publicly available. The proposed remedial measures here are essentially the conducting of several years of research on the viability of measures like translocation or the sowing of dock seed for moth eggs, at which point Natural England can determine whether the results of that research give it the reassurance to determine there will be no significant harms and therefore issue a licence. Further study is required to identify whether mitigations like translocation are a workable solution before the development can proceed; that is all an environmental statement could say, even if the outcome of the screening opinion had identified this as EIA development.

53. The public was also already fully involved in deliberations over this site and raised substantial and sophisticated objections concerning ecological and environmental issues, which were considered by the planning decision-maker and lawfully weighed in the balance. Representations from a very large number of environmental groups were considered and taken into account. The Claimant themselves made significant and detailed submissions on these issues. Your letter does not make clear how, if at all, the public or the Claimant would have been able to make better or more detailed submissions if an EIA process was initiated. The Court is more likely to refuse relief in such a circumstance, because the objectives of the EIA regimes have essentially been met already (*Champion*, para 60). The EIA regime is not intended to be an obstacle course; its purposes have been fulfilled by the highly detailed and deliberative approach the Council has taken to screening (and indeed re-screening).

54. For those reasons, the commissioning of an ES and EIA in these circumstances would be entirely perfunctory. You do not particularise at all what further information, or what greater public understanding of the environmental implications of the proposal, would be achieved by undertaking these processes by means of EIA. This is the paradigm of a technical breach. The Court will very likely refuse relief at the permission stage on this basis. If this claim proceeds, it will be invited to do so at the permission stage (*Champion*, para 66).

Aarhus costs protection

55. The Council makes no concessions and reserves its position on the question of costs protection, including pending receipt of any schedule of financial resources as would be required by CPR Part 46.

Further documentation sought

56. As to the further information sought and responding below using the same reference sub-paragraph letters as in your letter before claim:

- a. No such further advice was sought or received.
- b. No such further advice was sought or received.
- c. No such further information was provided.
- d. No further information that you do not already hold (such as your submissions dated 2 August 2024) was taken into account.
- e. We attach a note produced by officers which confirmed that there was no need for the Planning Committee to re-determine the applications following receipt of the inspector's report in respect of the Council's emerging local plan.

Yours faithfully,

Dover District Council

Note following receipt of Inspectors' report for local plan - Betteshanger Hotel Scheme

This note is to consider whether or not any matters material to the consideration of planning application reference 23/01095 ("the Hotel Scheme") and resolution of the Planning Committee have arisen from the 'Report on the Examination of the Dover District Local Plan to 2040' (20 September 2024) by the Examination Inspectors.

The draft Local Plan was submitted by the Council for Examination on 31 March 2023; and Examination hearings were held between 15 November and 16 December 2023.

The Hotel Scheme was referred to the Planning Committee for consideration at its meeting on 7 March 2024. The Committee Report presented the draft Local Plan as a material consideration in the determination of the Hotel Scheme planning application, with weight to be afforded to its policies in accordance with paragraph 48 of the National Planning Policy Framework (December 2023). Relevant policies of the draft Local Plan (as a non-exclusive list) were set out in the Committee Report; and specific policies were considered in the 'planning assessment'.

The following draft policies were considered relevant to the consideration of the application;

- SP1: Planning for Climate Change
- SP2: Planning for Healthy and Inclusive Communities
- SP6: Economic Growth
- SP11: Infrastructure and Developer Contributions
- SP13: Protecting Designated Environmental Sites
- SP14: Enhancing Green Infrastructure and Biodiversity
- CC1: Reducing Carbon Emissions
- CC2: Sustainable Design and Construction
- CC4: Water Efficiency
- CC5: Flood Risk

- CC6: Surface Water Management
- CC8: Tree Planting and Protection
- PM1: Achieving High Quality Design, Place Making & Design Codes
- PM5: Protection of Open Space, Sports Facilities and Local Green Space
- E4: Tourist Accommodation and Attractions
- R2: Sequential Test and Impact Assessment
- TI1: Sustainable Transport and Travel
- TI2: Transport Statements, Assessments and Travel Plans
- TI3: Parking Provision on New Development
- NE1: Biodiversity Net Gain
- NE2: Landscape Character and the Kent Downs AONB
- NE3: Thanet Coast & Sandwich Bay SPA Mitigation and Monitoring Strategy
- NE4: Air Quality
- NE5: Water Supply and Quality

With regard to the Main Modifications of the Inspectors' Report, the following are considered relevant modifications in respect of this application:

- MM19 to Policy SP13: the biodiversity / ecological mitigation hierarchy is revised to be consistent with paragraph 186 of the NPPF. As the application was considered against paragraph 186, this modification does not impact the considerations of the application by the Planning Committee.
- MM124 to Policy CC1: there is no longer a requirement for non residential development to meet BREEAM Very Good. However, notwithstanding the modifications, the existing Development Plan contains a requirement to meet BREEAM Very Good standards within Policy CP5 of the Core Strategy. As such, it is still considered appropriate to retain the recommended condition considered by the Planning Committee.

- MM157 to Policy E4: that hotel development will be supported in locations including 'with an existing tourism facility'. It is considered that facilities at Betteshanger Country Park, including the Kent Mining Museum, comprise an existing tourism facility. The MM supports the positive resolution of the Planning Committee: the Hotel Scheme is compliant with Policy E4 in this regard;
- MM170 revises the contribution amounts required to mitigate impacts upon the Thanet Coast and Sandwich Bay SPA. The s.106 of the Hotel Scheme secures these revised amounts.
- MM140 revises draft policy PM5 to protect all open spaces, not just those within settlements. Whilst this now includes the development site, the report presented to the planning committee made clear that the site was protected open space by virtue of the existing development plan and the NPPF. Therefore, this does not affect the consideration of the issue of loss of open space.

Overall, it is considered that the publication of the Examination Inspectors' 'Report on the Examination of the Dover District Local Plan to 2040' does not substantively alter the resolution of the Planning Committee to grant permission for the Hotel Scheme.

[REDACTED]

From: [REDACTED]@naturalengland.org.uk>
Sent: 15 November 2024 18:27
To: [REDACTED]@nexusplanning.co.uk; [REDACTED]
Subject: FW: Betteshanger

You don't often get email from [REDACTED]@naturalengland.org.uk. [Learn why this is important](#)

Hi [REDACTED] and [REDACTED]

Please can you provide me with an update on this case? NE put a lot of time into this and if we are to progress to achieve a satisfactory outcome for all we need to be engaged with any potential mitigation proposals.

It would be great to hear from you.

Many Thanks

[REDACTED]

[REDACTED]
Principal Manager – Species Specialist Team
Science Directorate | Chief Scientist Directorate | Natural England
Mobile: [REDACTED]

From: [REDACTED]
Sent: 24 September 2024 10:57
To: [REDACTED]@nexusplanning.co.uk> [REDACTED]@doover.gov.uk>
Subject: RE: Betteshanger

Hi [REDACTED] and [REDACTED]

I'm just wondering what the situation is with this proposal? Have the conditions been agreed? As time is limited it would be good to ensure that we are effective in establishing whether translocation at this site is feasible or not. The more seasons that can be included within a trial, the greater confidence that can be gained from the results.

Many Thanks

[REDACTED]

From: [REDACTED]
Sent: 11 March 2024 12:19
To: [REDACTED]@nexusplanning.co.uk>; [REDACTED]@doover.gov.uk>
Subject: RE: Betteshanger

Hi [REDACTED] that would be great, thank you! [REDACTED]

From: [REDACTED]@nexusplanning.co.uk>
Sent: Monday, March 11, 2024 10:55 AM
To: [REDACTED]@naturalengland.org.uk>; [REDACTED]@doover.gov.uk>
Subject: RE: Betteshanger

Hi [REDACTED]

We have yet to undertake the detailed drafting of conditions, but would be very happy to share those relevant with you (when available) to seek / ensure agreement

Thanks

[REDACTED]

[REDACTED]
Associate Director

M + [REDACTED]
E [REDACTED] [@nexusplanning.co.uk](mailto:[REDACTED]@nexusplanning.co.uk)



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From: [REDACTED] [@naturalengland.org.uk](mailto:[REDACTED]@naturalengland.org.uk)>
Sent: Monday, March 11, 2024 10:34 AM
To: [REDACTED] [@dover.gov.uk](mailto:[REDACTED]@dover.gov.uk); [REDACTED] [@nexusplanning.co.uk](mailto:[REDACTED]@nexusplanning.co.uk)>
Subject: Betteshanger

Hi [REDACTED] and [REDACTED]
I saw that this has been approved. Are you able to share the condition relevant to our discussions.
Many Thanks
[REDACTED]

[REDACTED]
Manager – Species
Science Directorate | Chief Scientist Directorate | Natural England
Mobile: [REDACTED]

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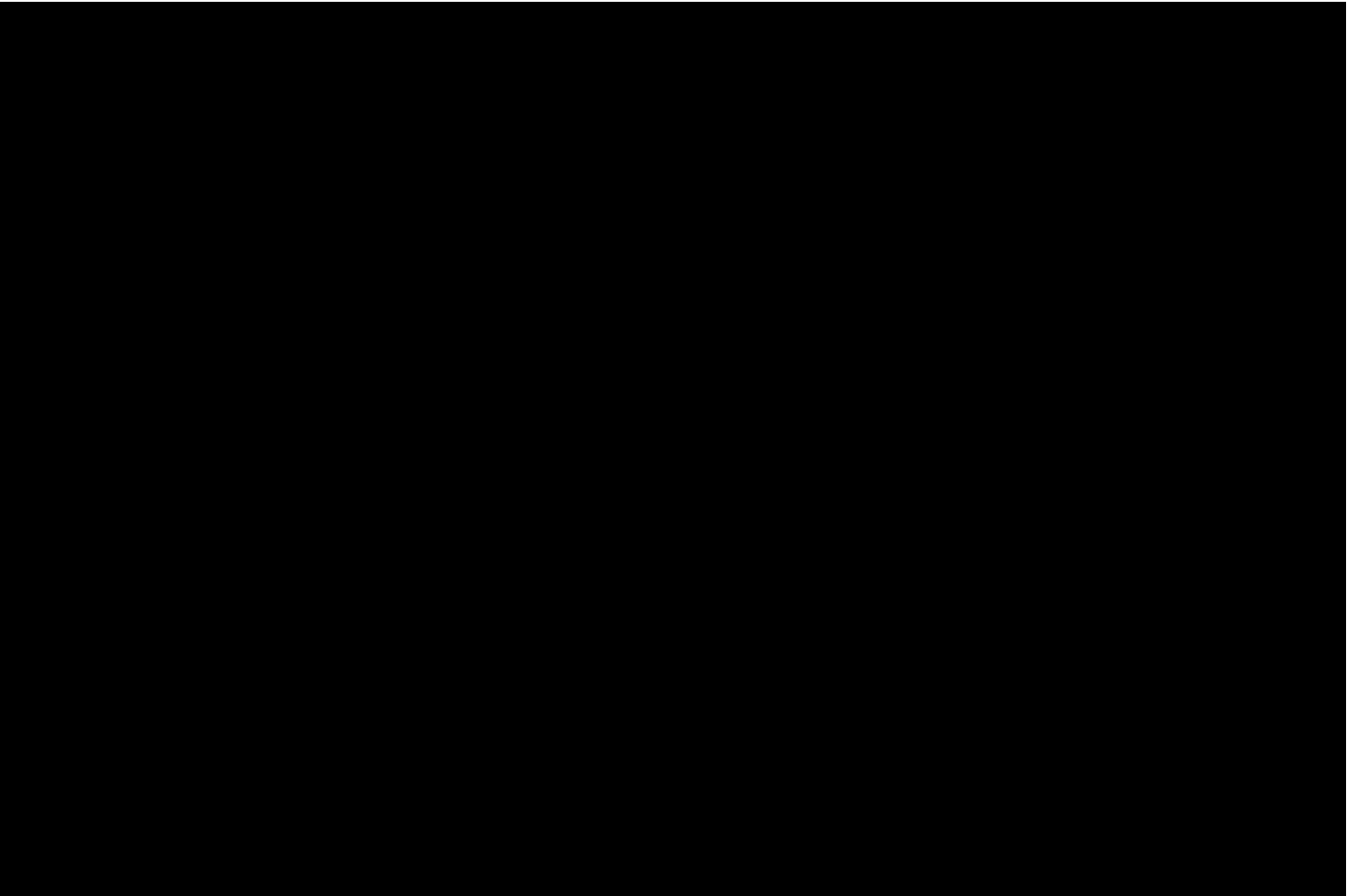
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From: [REDACTED]
Sent: 31 January 2025 14:17
To: [REDACTED]
Subject: RE: Nightingales at Betteshanger Country Park

Good afternoon

Thank you for your email.

The area of habitat in which you indicate that the nightingale territories were recorded is outside of the redline boundary of the Seahive development site, so there should be no direct impacts as a result of the development. Any vegetation clearance required for the development will be controlled by condition 34 of the planning permission, to ensure that nesting birds are protected from harm.

Condition 33 provides for an ecological construction management plan and includes a requirement for biodiversity protection zones to be identified and measures to avoid / minimise the potential for ecological impacts to be implemented. These measures are appropriate to ensure the protection of nightingales during construction. Habitat Compensation Measures are secured in the section 106 agreement. There is a list of requirements, but there is also provision to include "*such other measures as may subsequently be agreed in writing by the Council*". This will allow for nightingales to be specifically addressed in the scheme, ensuring that suitable habitat is available to them in the Country Park.

We won't be looking to amend the s106 agreement as you requested, for these reasons. Moreover, as the s106 agreement is a signed legal document, it is not something that the Local Planning Authority can independently amend now anyway.

Kind regards

Head of Planning and Development

Dover District Council

Council Offices, White Cliffs Business Park, Whitfield, Dover CT16 3PJ

Tel: [REDACTED]

Email: [REDACTED] [@dover.gov.uk](mailto:[REDACTED]@dover.gov.uk)

From: [REDACTED]

Sent: 15 January 2025 10:54

To: [REDACTED] [@DOVER.GOV.UK](mailto:[REDACTED]@DOVER.GOV.UK)>

Cc: [REDACTED] [@DOVER.GOV.UK](mailto:[REDACTED]@DOVER.GOV.UK)>; Cllr-[REDACTED] [@DOVER.GOV.UK](mailto:[REDACTED]@DOVER.GOV.UK)>;

Cllr-[REDACTED] [@DOVER.GOV.UK](mailto:[REDACTED]@DOVER.GOV.UK)>

Subject: Nightingales at Betteshanger Country Park

Dear [REDACTED]

The Friends of Betteshanger were excited to learn that Nightingales were recorded at Betteshanger Country Park by Adonis Environmental Consultants as part of the 2024 ecological monitoring for application 20/00419. Another important species to add to an amazing tally for the Park.

As you are probably aware Nightingales are a Red listed species having declined by 90% in the past 50 years. They are now confined to Kent and other areas in the south and east of the country. We are lucky to have them in the Dover district.

Our concern is that their chosen habitat at the Park, as identified by Adonis Consultants, will be disrupted by the building of the surf lagoon as they are site faithful returning to the same site year after year. (see attached map)

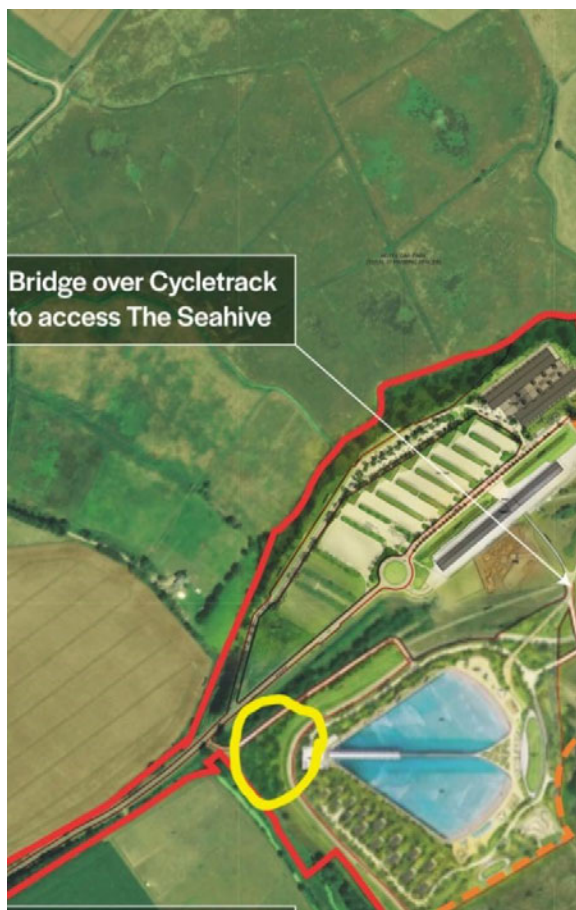
Under these circumstances would Dover District Council consider varying the S106 relating to the surf lagoon, in order to provide mitigation for the Nightingales? This would be an excellent way of showing that the Council was meeting its duty under the 2021 Environment Act to conserve and enhance biodiversity.

It is useful to note that the habitat enhancement which will be provided for Turtle Doves would also benefit Nightingales - both use dense scrub for nesting, for example.

We would be most grateful if you would consider this request and look forward to hearing from you.

Kind Regards

[REDACTED]
Friends of Betteshanger



Location of Nightingale habitat 2024

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