



c/o The Barn, 36 High Street,  
Persnore, Worcestershire, WR10 1DP  
[www.elflaw.org](http://www.elflaw.org)

FAO [REDACTED]  
Director of Environment and Place  
Council Offices,  
White Cliffs Business Park,  
Whitfield,  
Dover  
CT16 3PJ

24 February 2025

BY EMAIL ONLY [REDACTED] [@dover.gov.uk](mailto:[REDACTED]@dover.gov.uk)

**JUDICIAL REVIEW PRE-ACTION  
PROTOCOL LETTER. THIS REQUIRES  
YOUR URGENT ATTENTION**

Dear [REDACTED],

**24/00293- Erection of a drive thru restaurant, car parking, car charging bays, substation, landscaping and associated works, including Customer Order Displays (COD) and a height restrictor**

1. We are writing from the Environmental Law Foundation, a legal charity that assists communities with environmental problems. We are instructed by Ms Julia Stavrietsky on behalf of the Castle Conservation Area Group Dover. This is a pre-action letter sent in accordance with the Practice Direction- Pre-Action Conduct and Protocols.
2. In overview, the decision to grant permission is unlawful on the basis that
  - a. Dover District Council (“the Council”) failed to comply with the statutory duties in sections 66 and 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 (“the Listed Buildings Act”) and failed to comply with paragraph 212 of the National Planning Policy Framework (“NPPF”)
  - b. The Council failed to take into account, as it was not reported to committee members, objections from the Kent County Council (“KCC”) Conservation Officer and Historic Buildings & Place (“HB&P”), in breach of the duty to take into account a material consideration, the duty to take into account the product of consultation and the duty to have special regard to the effect of the

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proposal on listed buildings and conservation areas under s66 and 72 of the Listed Buildings Act and the NPPF.

3. On the basis of the above, we trust that you will agree the decision should be quashed.

### **Parties to proposed claim**

4. The proposed claimant in any judicial review proceedings will be Ms Julia Stavrietsky of 7 Castle Hill Road, Dover CT16 1QG (“the Claimant”).
5. The proposed defendant is Dover District Council, of Council Offices, White Cliffs Business Park, Whitfield, Dover CT16 3PJ (“the Council”).
6. We consider that the applicants for permission, McDonald’s Restaurants Limited and Citycourt Development Limited, would be interested parties in the proceedings. The agent for the applicants is Mr Benjmain Fox of Planware Ltd, St Andrews Castle, 33 St Andrews Street South, Bury St Edmunds, IP33 3PH. If you consider anyone else to be an interested party, please provide their details in your response.

### **Details of decision under challenge**

7. The decision by the Council dated 30 January 2025 under reference 24/00293 (“the Decision”) by which permission was granted for ‘Erection of a drive thru restaurant, car parking, car charging bays, substation, landscaping and associated works, including Customer Order Displays (COD) and a height restrictor’ (“the Development”) at Land at the Corner of Townwall Street and Woolcomber Street, Dover, CT16 1QF (“the Site”).

### **Factual background**

8. The Development consists of a single storey McDonald’s fast-food restaurant with drive thru facilities, car parking, car charging bays, substation, landscaping and associated works, including Customer Order Displays and a height restrictor.
9. Dover Castle Conservation Area (“the Conservation Area”) lies to the north and east of the Site. To the northeast of the Site is the scheduled monument of Dover Castle and to the north is the scheduled monument of St James’s Church. St James’s Church is also a grade II listed building.
10. The application for the Development was accompanied by an Archaeology and Heritage Assessment (“the Heritage Assessment”).
11. Historic England were also consulted on the application and stated in their consultation response dated 22 April 2024 that the Development would harm the significance of St James’s Church because the McDonald’s would directly compete

with views towards the monument and from the monument and remove what little is left of the monument's setting. Historic England identified that the harm caused to the scheduled monument was towards the upper end of the less than substantial scale. Historic England then referred to the requirement in paragraph 205 of the 2023 NPPF to give great weight to an asset's conservation, whether the harm is substantial or less than substantial harm.

12. Following amendments made to the scheme, Historic England stated as follows in their second consultation response dated 20 November 2024:

***'Historic England Advice***

*We noted in our previous response that we have concerns about the location of the proposed development in regard to its proximity to St James' Church, which is a scheduled monument of national importance.*

*We advised your council seek amendments to the scheme as the proposals fail to satisfy the stages outlined in the NPPF, to minimise harm before seeking justifications.*

***Amendments***

*The submitted amendments do not address any of our previous concerns, as such we wish to reiterate our strong concerns about the harm to the heritage significance of the surrounding scheduled monuments.*

***St James' Church***

*Not only are we concerned that the development would be incongruous to the setting of the church, we are concerned that this choice of development would hurt the significance of the church from development within its setting.*

*In its current form we believe the development constitute (sic) considerable harm to the monument from development within its setting. It particularly would harm views and the experiential appreciation by members of the public.*

*We consider that due weight has not been given to reduce the impact of the proposal on heritage, and there is scope for avoiding or minimising that harm, as required by the National Planning Policy Framework (NPPF)...*

***Recommendation***

*Historic England has concerns regarding the application on heritage grounds. We are concerned that none of our previous recommendations have been addressed by amendments to the scheme. We maintain our previous position that the proposed development does not represent a scheme which is has (sic) sufficiently minimised harm to designated heritage.'*

13. KCC Heritage Conservation were consulted on the application and provided a consultation response on 10 May 2024. Following amendments made to the scheme, KCC Heritage Conservation stated as follows in their second consultation response dated 18 November 2024:

*'Our advice primarily relates to the scheme's impact on buried archaeology. However, as per our previous advice, we note the application site's proximity to the ruins of St James's Church (a scheduled monument and listed building) and its position at the foot of the cliffs below Dover Castle (a scheduled monument which includes various individually listed building (sic))... Your*

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*council's conservation officer, along with Historic England, would be best-placed to advise you on aspects relating to impact of the proposals on the setting of designated heritage assets. We remain unconvinced that the building illustrated in the recently submitted photo visuals represents an appropriately high-quality "bespoke approach" that was advised was required at the pre-application stage. We also remains (sic) very concerned about the proximity of the proposed restaurant to the "tidy ruin" of St James's Church... We remain very concerned about the location of the proposed building and its proximity to St James's church which is a scheduled monument and listed building. We think this proximity will cause harm to the setting of the church. This harm relates not only to the visual impact of the new restaurant but from additional, noise, smells and potentially littering. In respect of noise, smells and potentially littering. In respect of noise, smells and littering we note the newly submitted visuals show outdoor dining/seating across the paved area between the restaurant building and the ruined church. We think the closeness of the fast-food restaurant, including outdoor seating and dining area could impact people's quiet enjoyment of the "tidy ruin" and is at odds with the place's role as a place of commemoration and as a monument to the wartime experience of the people of Dover. Because of the sensitive historic and townscape location of the proposed development we strongly recommend that the views of your council's Conservation Officer are sought on the scheme. You may also wish to seek further advice from Historic England on the application.'*

14. The KCC Conservation Officer also recommended conditions regarding archaeology, should permission be granted.
15. On 31 May 2024, English Heritage (responsible for the management and conservation of Dover Castle) provided a consultation response, stating that the proposal would result in minor harm to the setting of the Shoulder of Mutton Battery.
16. Historic Buildings & Places ("HB&P") were not consulted on the application but commented on the proposal as follows on 17 June 2024:

*'it (the development) is harmful to the setting of James's Church and its significance as a town memorial to the shelling and destruction of Dover during the last war. The decision to locate the restaurant building adjacent to the church is poorly conceived and lacks consideration of the adjacent heritage assets. The restaurant is partly located on the site of the former grave yard to St James's Church <https://maps.nls.uk/view/103683245>. While deconsecrated, the historic curtilage of the graveyard has been somewhat protected and demarcated by the existing carpark that was built in the 1973 (sic). It is understood that while the grave yard was cleared, some of the graves remain below ground, which appears to be confirmed by the Heritage Statement, p 25. Given the historic grave yard use, this part of the site has never been development, it would be highly inappropriate to build restaurant in this area.'*

17. HB&P in its objection then referred to paragraph 205 of the 2023 NPPF and the requirement to give great weight to an asset's conservation before recommending refusal. Following amendments made to the scheme, HB&P on 26 November 2024 confirmed in a representation that it maintained its objection.
18. Finally, Dover District Council Heritage ("DDC Heritage") were consulted on the application. There is no date on the consultation provided, but the consultation is dated 16 December 2024 on the planning register. DDC Heritage agreed with the Heritage Assessment that any harm to the Conservation Area was negligible and localised to a discrete part of the Conservation Area and that the Development would not cause harm to the Conservation Area. In respect of St James's Church, DDC Heritage concluded as follows:

*'The scale and form of the proposed new building would in my view cause some degree of harm to the setting of the Church. This, in addition to the harm noted above in respect of building on a plot the historically was intentionally open and that had an important function related to the original use of the listed building as a church, would result in less than substantial harm to the significance of St James's. It is considered that the harm is within the mid-range of less than substantial and in this respect my view differs from the conclusion in the submitted Archaeology and Heritage Assessment which has identified the harm as being at the lower end of the scale.'*

19. The Officer Report summarised the consultation responses above as follows:

*'KCC Archaeology- Recommends a condition to secure a programme of Archaeological work.'*

*'Historic England- Raised concerns regarding preservation of heritage assets including the scheduled monument of St James' Church and the proximity of the proposed building to the monument. Identify less than substantial harm to St James' Church. Consider that due weight has not been given to minimising harm to St James's through relocation of the proposed building and the lack of any defined heritage benefits presented in the proposal. Comment that there may be some harm to Dover Castle but insufficient information has been presented.'*

*'English Heritage- Made comments that the development will have an impact on the setting of Dover Castle and Shoulder Mutton Battery, and the submitted Archaeology and Heritage Assessment does not adequately assess the harm in respect of the latter: Consider the harm to be minor...'*

*'DDC Heritage Team- Consider the harm on the Dover Castle Conservation Area to be negligible as localised to a discrete area. The harm to the setting of St James's Church is considered to be in the mid-range of less than substantial. No harm to other neighbouring listed buildings.'*

20. The Officer Report does not separately summarise the HB&P representations. In a summary list of objections received, it is noted that an objection has been received stating that the proposal is contrary to sections 66 and 72 of the Listed Building Act.
21. The Officer Report addresses heritage at paragraphs 2.59-2.83. The statutory duties in sections 66 and 72 are referred to at paragraph 2.59. The Officer Report concludes at paragraph 2.66 that any harm to the Conservation Area would be negligible and localised. The Officer Report then discusses the impact on St James's Church and Dover Castle. The Officer Report acknowledges that the Development would cause harm to the setting of St James's Church at paragraph 2.70. The Officer Report then states as follows at paragraphs 2.71-2.75:

*‘2.71 As this is an urban environment it is not unexpected for modern development and historic buildings to co-exist alongside one another. In addition, the proposed building is set back from the built line of the west front of St James's Church and angled slightly to the south/west. The proposed building has been positioned on the site with the aim of minimising harm on the surrounding heritage assets as a whole- notably the Castle and the scheduled monument of St James. The increased distance of the building from one of the principal features of heritage interest of St. James Church, the west front, has the additional benefit of reducing the visual impact of the proposed building on the setting of the church. In addition, soft landscaping is proposed to the northern boundary of the site to act as a visual buffer between the proposed development and St James Church.*

*2.72 A further potential cause of some harm but also a public benefit is the increased activity within the area. While this would impact on the tranquillity of the site and its 20<sup>th</sup> Century function as a memorial and place of quiet contemplation, it could introduce enhanced natural surveillance of St James's and assist in the reduction of any potential anti-social behaviour.*

*2.73 DDC Heritage team, consider that the proposed development would result in less than substantial harm (mid-range of less than substantial) to the significance of the upstanding remains of St James's Church which are grade II listed.*

*2.74 St James's Church is also a scheduled monument (the designation covers the below ground archaeology and the upstanding remains). Historic England have raised concerns that the proposed development would be harmful to the setting of St James Church, leading to a detrimental effect on the significance of the scheduled monument, and that the scheme has not sought to minimise the harm nor provided heritage benefits that could be considered public benefits outweighing the harm. Historic England advise that the harm would be classed as less than substantial to the setting of the scheduled monument, at the higher end of less than substantial and recommended relocation of the proposed new building to the southern end of the application site.*

*2.75 Relocation of the building to the southern end of the site (adjacent to Townwall Street) would result in a greater visual relationship with the Castle. In addition, by*

*separating the proposed new building from existing built form, it is considered that the proposed new building would be isolated and gain more visual prominence. For the reasons noted in paragraph 2.71 it is considered that on balance the proposed location causes the least harm to the scheduled monuments adjacent to the site.'*

22. The Officer Report then concludes on heritage as follows at paragraph 2.82:

*'2.82 To conclude, it is considered that the proposal provides significant socio-economic benefits (identified above), which are considered to amount to very significant public benefits in favour of the proposal. In coming to this conclusion significant weight has been attributed to these benefits with consideration of the advantage for the local economy, employment opportunities and wider town centre regeneration. In addition to this environmental benefits are also identified. As such, in applying the test of Paragraph 208 of the NPPF, the very substantial public benefits identified are considered to outweigh the less than substantial harm to heritage assets, even though this harm is considered to be at the mid to higher end of less than substantial. Consequently, it is acknowledged that this is a balanced conclusion.'*

23. The Officer Report finally concludes on the overall planning balance as follows:

*'3.2 It is considered that the scheme does result in some harm to the setting of heritage assets, in particular the scheduled monument of St James. However, it is considered that this harm is less than substantial. The applicant has demonstrated that they have minimised the overall harm to heritage assets particularly the setting of the scheduled monument of Dover Castle and the Dover Castle Conservation area, by the proposed layout and siting of the building. Harm has been minimised to the St James Church through the appropriate and good design of the building and proposed landscaping...*

*3.4 Notwithstanding that the scheme will result in harm to heritage assets, which is considered to be less than substantial, for the reasons set out above, it is considered that on balance this harm will be outweighed by the significant economic, social and environmental public benefits that will arise. In coming to this conclusion the socio-economic benefits of the scheme have been considered to attract substantial weight in the planning balance.'*

24. Between the publication of the Officer Report and the committee meeting, the most recent version of the NPPF was published. The Officer provided information at the committee meeting ("the Addendum") on the new paragraph 97 contained in the NPPF and then concluded as follows:

*'In summary, the principle of development at this edge of centre town centre location was considered acceptable, and the proposal would make significant positive contributions to the vitality and viability of the town centre. Substantial weight could be given to the re-use of a brownfield site which was identified in the Local Plan as an opportunity area. Whilst it was considered that the scheme would result in less*

*than substantial harm to the setting of heritage assets, the application had demonstrated that such harm would be minimised through the design, layout and siting of the proposed building and appropriate landscaping. Moreover, it was Officers' view that the development could be achieved without adversely affecting the amenity of existing residents or the safety and operation of the highway network. Notwithstanding that the scheme would result in less than substantial harm to heritage assets, this harm would be outweighed by the significant public benefits of the proposal.'*

## **Grounds of Challenge**

25. The Claimant advances 2 grounds of challenge.

### **Ground 1: The Council failed to comply with the statutory duties in sections 66 and 72 of the Listed Buildings Act and failed to comply with paragraph 212 NPPF**

#### *Legal Principles:*

26. Section 66 of the Listed Buildings Act provides as follows: *'In considering whether to grant planning permission... for development which affects a listed building or its setting, the local planning authority... shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.'* Section 72 of the Listed Buildings Act provides that in the exercise of planning powers *'with respect to any buildings or other land in a conservation area... special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area.'*
27. Paragraph 212 NPPF (formerly paragraph 205 in the 2023 NPPF) states that when considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset, the greater the weight should be). Paragraph 215 NPPF (formerly paragraph 208 in the 2023 NPPF) then provides that where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use.
28. The National Planning Practice Guidance ("PPG") on the Historic Environment states that in order to assess the significance of heritage assets in most cases the local planning authority *'is likely to need expert advice in addition to the information provided by the applicant, historic environment record, similar sources of information and inspection of the asset itself. Advice may be sought from appropriately qualified staff and experienced in-house experts or professional consultants, complemented as appropriate by consultation with [National Amenity Societies and other statutory consultees](#) and other national and local organisations with relevant expertise.'*
29. Section 66 imposes a duty on a local planning authority to give any harm to a listed building 'considerable importance and weight'; the decision-maker is not free to give the harm whatever weight they see fit ([East Northamptonshire DC & Barnwell Manor](#))

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Wind Energy Ltd v Secretary of State [2015] 1 WLR 45, [22-29]). This principle was reinforced by the judgment of Lindblom J (as he then was) in R (Forge Field Society) v Sevenoaks DC [2015] JPL 22 at [46]-[47]:

*'46. As the Court of Appeal has made absolutely clear in its recent decision in Barnwell, the duties in ss.66 and 72 of the Listed Buildings Act do not allow a local planning authority to treat the desirability of preserving the settings of listed buildings and the character and appearance of conservation areas as mere material considerations to which it can simply attach such weight as it sees fit. If there was any doubt about this before the decision in Barnwell it has now been firmly dispelled. When an authority finds that a proposed development would harm the setting of a listed building or the character or appearance of a conservation area, it must give that harm considerable importance and weight...*

*a finding of harm to the setting of a listed building or to a conservation area gives rise to a strong presumption against planning permission being granted. The presumption is a statutory one. It is not irrebuttable. It can be outweighed by material considerations powerful enough to do so. But an authority can only properly strike the balance between harm to a heritage asset on the one hand and planning benefits on the other if it is conscious of the statutory presumption in favour of preservation and if it demonstrably applies that presumption to the proposal it is considering.'*

30. In Jones v Mordue [2016] 1 WLR 2682 Sales LJ (as he then was) held at [28] that generally a decision-maker who works through the relevant paragraphs in the NPPF will have complied with the duty in section 66 of the Listed Buildings Act.
31. Finally, in R (Liverpool Open and Green Spaces CIC) v Liverpool City Council [2019] EWHC 55 (Admin), a decision to grant planning permission was quashed where the report repeated *'four times a mantra-like formulation of the balancing exercise which contains no reference to any weighting and each time it is repeated, places emphasis on paragraph 134 of the NPPF, dealing with cases of "less than substantial harm", without mentioning paragraph 132 containing the words "great weight" and "clear and convincing justification."*<sup>1</sup> The judgment of Kerr J in R (Liverpool open and Green Spaces CIC) was subsequently followed in R (oao Kinsey) v Lewisham LBC [2021] EWHC 1286 (Admin) (see [85]-[87]).

### *Application of Legal Principles*

32. The Council failed to comply with the statutory duties in the Listed Buildings Act, as the less than substantial heritage harm identified in the Officer Report was not given considerable importance and weight. The Officer Report refers to the statutory duties in the Listed Buildings Act, but there is no indication anywhere in the report that the

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<sup>1</sup> [79].

less than substantial heritage harm was given considerable importance and weight as required.

33. Rather, the Officer Report and the Addendum both specifically state that the socio-economic benefits of the scheme are given 'substantial' and 'significant' weight without any weighting being given to the identified less than substantial heritage harm. As in R (Liverpool Open and Green Spaces CIC), there is no reference anywhere to paragraph 212 NPPF<sup>2</sup>, which states that great weight should be given to an asset's conservation. Instead, the Officer Report refers only to 'less than substantial harm'. The only possible conclusion is that the required weight was not given to the identified heritage harm and that the Officer Report unlawfully carried out an unweighted balancing exercise. The effect was to play down the exercised required in the NPPF and *'to tilt the balance towards emphasising the absence of substantial harm and the public benefits to be weighed on the other side of the balance'* (R (Liverpool Open And Green Spaces CIC), [81]).
34. For the reasons given above, the Council also failed to comply with the requirement in paragraph 212 NPPF to give 'great weight' to the conservation of St James's Church as a scheduled monument. This requirement is separate to the statutory requirement to give any harm to St James's Church as a listed building considerable importance and weight, and the Decision should therefore also be quashed on this basis. It cannot be said that it is highly likely that the outcome would have been the same if the planning balance had been undertaken with the required weight given to the identified heritage harm.

**Ground 2: The Council failed to take into account, as it was not reported to committee members, objections from the KCC Conservation Officer and HB&P, in breach of the duty to take into account a material consideration, the duty to take into account the product of consultation and the duty to have special regard to the effect of the proposal on listed buildings and conservation areas under sections 66 and 72 of the Listed Buildings Act and the NPPF**

### *Legal Principles*

35. In R (LOGS CIC) v Liverpool City Council [2020] EWCA Civ 861, Lindblom LJ emphasised that the NPPF and the PPG expect the local planning authority to have proper expert advice on heritage issues; omitting to take into account a conservation response was to *'disregard national policy and guidance relevant to the s66(1) duty'* (at [76], [81]); the failure to report the conservation officer's firm objection in that case was a failure to take into account an obviously material consideration (at [77], [78]).
36. The judgment of Lindblom LJ was cited in Kinsey at [62] as follows:

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<sup>2</sup> Apart from paragraph 205 NPPF 2023 being included in a list of paragraphs at the beginning of the Officer Report.

*'In my judgment, many of Lindblom LJ's observations are apt here, despite the factual distinctions between the two cases. The SCO (Senior Conservation Officer) is employed by the Council for her professional conservation expertise, and the purpose of the consultation was to draw upon her expertise, to assist the Council in discharging its duties under the Listed Buildings and Conservation Areas Act 1990 and the Framework. Thus, that advice ought to have been available to Members when they were deciding the application, in accordance with paragraph 129 of the Framework and the passages in the PPG referred to by Lindblom LJ. The SCO's advice on justification, applying paragraph 194 of the Framework, and her formal objection to the proposal, were considerations which Members ought to have taken into account, in a fair and balanced decision-making process, but they did not do so, because they were not informed of the existence of the SCO's comments.'*

### *Application of Legal Principles*

37. As in Kinsey, the Officer Report was materially misleading in that it did not record the comments of the KCC Conservation Office in respect of heritage. The KCC Conservation Officer made extensive comments about heritage, noting that they were very concerned about the proximity of the Development to St James's Church and that this proximity would cause harm to the setting of St James's Church.
38. Despite this, these comments were not referred to at all in the Officer Report, with the Officer Report recording only that '*KCC Archaeology*' recommended a condition to secure a programme of archaeological work. This omission of the KCC Conservation Officer's comments was a material and misleading omission. The KCC Conservation Officer had been consulted primarily on archaeology, and the KCC Conservation Officer advised that the Council should seek further advice from Historic England and its own conservation officer on heritage. Nonetheless, it was highly significant and relevant that a qualified conservation officer at the county level considered that the Development would cause harm to the setting of St James's Church. This was obviously material information that should have been reported to committee members, and its omission was materially misleading.
39. Further, the Officer Report failed entirely to record that HB&P objected to the proposal. HB&P were in fact not mentioned once in the Officer Report. HB&P are required to be consulted on applications for listed building consent (see the Arrangements for handling heritage applications Direction 2021- the PPG at paragraph 058 explains that HB&P is the working name for the Ancient Monuments Society). Although there was not therefore a statutory requirement for HB&P to be consulted, their view on the application's impact on a listed building was obviously material given their role as a consultee on listed building consent applications. The PPG explicitly refers to National Amenity Societies (one of which is HB&P) when discussing what expert advice local planning authorities should seek and rely on. Despite this, HB&P's comments were not referred to at all in the Officer Report. This had the effect of downplaying the extent to which the unanimous opinion from

heritage professionals was that the application had not minimised the harm to designated heritage assets. As with the KCC Conservation Officer's comments, the failure to notify members specifically of HB&P's objection was materially misleading.

40. For the reasons given above (and as in R (LOGS CIC) v Liverpool City Council [2020] EWCA Civ 861) the failure to have regard to the comments of the KCC Conservation Officer and HB&P also means that the Council failed to comply with the duties in section 66 and 72 of the Listed Buildings Act and the NPPF.

### **Costs**

41. The definition of "environmental" under the Aarhus Convention "is arguably broad enough to catch most, if not all, planning matters": see Venn v SSCLG [2014] EWCA Civ 1539 at [11], applied in R (Dowley) v SSCLG [2016] EWHC 2618 (Admin) (where it was held that a challenge to a decision to enter land to carry out a survey was an Aarhus Claim).
42. As this challenge concerns planning/land use and is brought by a member of the public, we consider it to be an Aarhus Convention claim to which Aarhus cost capping applies. Please confirm your agreement to this.

### **What we request the Council to do**

43. The Council is requested to consent to judgment and agree that the decision be quashed. Please also confirm that the Council will accept service by email and provide an email address at which documents can be served.

### **ADR**

44. The Claimant does not consider that this issue is resolvable by ADR if the Council does not consent to judgment.

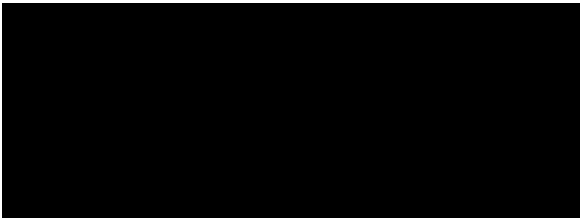
### **Legal advisers**

45. [REDACTED] of the Environmental Law Foundation, a charity, [REDACTED]@elflaw.org details as above.

### **Proposed reply date**

46. A response to this letter is requested by 4pm on 3 March 2025.

Yours sincerely,



**Environmental Law Foundation**

 [@elflaw.org](mailto:info17@elflaw.org)

Dear Sirs and Madams,

**Re. Prospective judicial review of the decision to grant planning permission for the development comprised in application reference 24/00293- Erection of a drive thru restaurant, car parking, car charging bays, substation, landscaping and associated works, including Customer Order Displays (COD) and a height restrictor**

We write in response to your pre-action protocol letter of 24 February 2025.

**(1) The Claimant**

Ms Julia Stavrietsky  
7 Castle Hill Road  
Dover CT16 1QG

**(2) The Respondent**

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

**(3) Interested Parties**

McDonald's Restaurants Limited and Citycourt Development Limited  
c/o Mr Benjamin Fox of Planware Ltd.  
St Andrews Castle  
33 St Andrews Street South  
Bury St Edmunds IP33 3PH

**(4) Reference Details**

24/00293

**(5) Details of the Decision**

The decision of the Council dated 30 January 2025 under reference 24/00293 to grant planning permission for the 'Erection of a drive thru restaurant, car parking, car charging bays, substation, landscaping and associated works, including Customer Order Displays (COD) and a height restrictor' at Land at the Corner of Townwall Street and Woolcomber Street, Dover, CT16 1QF.

**(6) Response to the proposed claim**

Having reflected on the contents of your pre-action protocol response, the Council accepts that it erred in law as it failed to adequately discharge the duties in sections 66 and 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 for the reasons given in your pre-action protocol letter.

It is willing to enter into a consent order quashing the decision on this basis and remitting the matter for redetermination. Whilst the Council will in line with the general practice agree to pay the costs incurred by your client in bringing this claim, given its early concession at the pre-action stage it would expect these costs to be low.

**(7) Address for service of court documents**

The Council is willing to accept electronic service to Daniel Thorman (Principal Solicitor – Planning) ([daniel.thorman@dover.gov.uk](mailto:daniel.thorman@dover.gov.uk)).

We await receipt of a draft consent order for execution.

Kind regards,

██████████



Claim No AC-2025-LON-000836

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**PLANNING COURT**

BETWEEN:

**THE KING**  
**(on the application of JULIA STAVRIETSKY)**

Claimant

- and -

**DOVER DISTRICT COUNCIL**

Defendant

- and -

**(1) MCDONALD'S RESTAURANTS LIMITED**  
**(2) CITYCOURT DEVELOPMENTS LIMITED**

Interested Parties

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~~XXXXX~~ **CONSENT ORDER**

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**UPON** the Claimant's application for judicial review of the Defendant's decision of 30 January 2025 granting planning permission, pursuant to reference 24/00293, in respect of the "Erection of a drive thru restaurant, car parking, car charging bays, substation, landscaping and associated works, including Customer Order Displays (COD) and a height restrictor" at "Land At The Corner Of Townhall Street And Woolcomber Street, Dover, CT16 1QF" ("the Defendant's decision").

**AND UPON** the Claimant proposing two grounds of challenge in a judicial review pre-action protocol letter dated 24 February 2025;

**AND UPON** the Defendant agreeing to concede the claim in its response to the pre-action protocol letter, dated 7 March 2025;

**AND UPON** the parties having agreed that the Defendant's decision should be quashed for the reasons set out in the Schedule appended to this Order;

**AND UPON** the Court being satisfied that it is appropriate to quash the Defendant's decision for the reasons set out in the Schedule of Reasons.

**BY CONSENT, IT IS ORDERED THAT:**


1. The application for permission to apply for Judicial Review of the Defendant's decision of 30 January 2025 is granted.

2. The claim is allowed and the Defendant's Decision is quashed and remitted to the Defendant for redetermination.
3. The Defendant shall pay the Claimant's costs of the claim in the amount to be assessed by the Court if not agreed in advance within 21 days of the date of this Order.

We, the undersigned, consent for an order to be made out in the above terms.

  
**Richard Buxton Solicitors** (for the Claimant)

  
**Dover District Council** (the Defendant)

  
**Winckworth Sherwood LLP** (for the First Interested Party)

  
**Citycourt Developments Limited** (the Second Interested Party)

Approved by Tim Smith, sitting as Deputy High Court Judge  
2nd April 2025

BY THE COURT

**Prospective judicial review against the grant of planning permission for application reference DOV/24/00293**

**Summary note of advice on prospects**

1. I am asked for my views on the prospects of successfully defending a prospective challenge to the grant of planning permission reference DOV/24/00293. For the reasons given below, in my judgement the prospects of successfully defending this challenge are low. I consider that the Council should consent to judgment.

**Ground 1: The Council failed to comply with the statutory duties in sections 66 and 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 and failed to comply with paragraph 212 NPPF**

2. The sting of this ground is that, in breach of sections 66 and 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990, the Council failed to afford considerable importance and weight to the acknowledged harm to listed buildings and the conservation area. The need to do so is well established (see, notably: *Barnwell Manor Wind Energy Limited v East Northamptonshire District Council & Ors* [2014] EWCA Civ 137). The only issue is whether the Council did so here.
3. In defence, it would be said that the officer report correctly identified sections 66 and 72 of the Planning (Listed Building and Conservation Areas) Act 1990 and referred to relevant provisions of the National Planning Policy Framework and as a result there is a presumption, in the absence of any indication to the contrary, that the duties were discharged. Such a line of defence is well established, with the court putting it like this in *Kinsey v London Borough of Lewisham* [2021] EWHC 1286 (Admin), at paragraph 80.

*“Where the decision-maker refers to the statutory duty under the Listed Buildings and Conservation Areas Act 1990, the relevant parts of the Framework and any relevant policies in the development plan, there is an inference that he has complied with it, absent some positive indication to the contrary. The onus rests on the Claimant to demonstrate that there is a substantial doubt whether the decision-maker has done so”.*

4. The issue then collapses into whether there are indications in the decision giving rise to substantial doubt as to whether the duties were complied with.
5. I read the pre-action letter as relying principally on two such indications.

- (1) Failure to expressly refer to the need to give considerable importance and weight to the harm identified; and
  - (2) Failure in undertaking the balancing exercise to recognise that it is a weighted balancing exercise with a presumption against permission being granted.
6. In my judgement, reading the officer report straightforwardly and as a whole, these are fair criticisms which are quite likely to be accepted by the Court. I am concerned, in particular, by paragraphs 2.79 to 2.83 of the report, which, in drawing together the analysis, fail to mention the need to give considerable importance and weight to the harm identified. The analysis reads as a standard planning balance exercise of harm versus benefits, not the type of weighed exercise required under sections 66 or 72.
7. My concern is further reinforced by the relatively strict way that the courts approach compliance with sections 66 and 72. Looking at other cases, my judgement is that this case falls on the wrong side of the line, with the courts previously having been willing to quash decisions where claimants have been able to show that an apparently unweighted balancing exercise has been undertaken, as seems to be the case here.
8. Two recent examples will suffice.

- (1) In *Kinsey v London Borough of Lewisham* [2021] EWHC 1286 (Admin), two factors were relied on by the judge to find a breach of the same statutory provisions which are very similar to the factors being relied on by the claimant here.

*“In my judgement, a substantial doubt arises in this case, for the following reasons:*

- i) *The failure of the planning officer to advise Members to apply paragraph 194 of the Framework which provides:*

*‘194. Any harm to, or loss of, the significance of a designated heritage asset (from its alteration or destruction, or from development within its setting) should require clear and convincing justification...’*

- ii) *The failure of the planning officer to advise Members that they were required to apply a weighted or tilted balancing exercise, giving the assessed degree of harm to the heritage assets ‘considerable importance and weight’ as against the benefits of the proposed development”.*

(2) In *R (Liverpool Open and Green Spaces) v Liverpool City Council* [2019] EWHC 55 (Admin), the High Court emphasised the absence of any reference to a weighted balancing exercise in the officer report when quashing the decision.

*“It is, however, striking that the section includes four times a mantra-like formulation of the balancing exercise which contains no reference to any weighing and each time it is repeated, places emphasis on paragraph 134 of the NPPF, dealing with cases of ‘less than substantial harm’, without mentioning paragraph 132 containing the words ‘great weight’ and ‘clear and convincing justification’”.*

That analysis was upheld in the Court of Appeal ([2020] EWCA Civ 861).

9. A similar approach would, in my view, be adopted here and would lead to the quashing of this decision.
10. I listened to the committee hearing dealing with the application to see if there were any comments made during that meeting which could assist with defending this ground. I did not identify any comments that would change the above analysis.
11. I note that separately reference is made under this ground to the failure to comply with paragraph 212 of the NPPF which refers to the need to give *“great weight to the asset’s conservation [ ... ] irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to significance”*. This adds little to the alleged breach of sections 66 and 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990. It follows from my analysis above that there is substantial doubt that great weight was given to the conservation of the asset. This would lead separately to a failure to take account of and apply the approach set out in paragraph 212 of the NPPF.

**Ground 2: The Council failed to take into account, as it was not reported to committee members, objections from the KCC Conservation Officer and HB&P, in breach of the duty to take into account a material consideration, the duty to take into account the product of consultation and the duty to have special regard to the effect of the proposal on listed buildings and conservation areas under sections 66 and 72 of the Listed Buildings Act and the NPPF**

12. This ground focuses on the treatment of two consultation responses.

(1) Response of KCC Conservation Officer;

(2) Response of Historic Buildings and Places.

13. This ground puts the point two ways, but they collapse into a single issue of whether the case officer report was materially misleading by failing to bring to the attention of members these responses and whether this impacted on the discharge of the duties under sections 66 and 72 of the Planning (Listed Building and Conservation Areas) Act 1990.
14. It is right that the case officer report does not refer expressly to the Historic Buildings and Places response. It does refer to the KCC Conservation Officer response but only in the following terms; and, importantly, without referring to the listed building concerns raised.

*“KCC Archaeology -Recommends a condition to secure a programme of Archaeological work”.*

15. The issue is whether this failure was materially misleading and affected the adequate discharge of the duties under sections 66 and 72 of the Planning (Listed Building and Conservation Areas) Act 1990.
16. In my judgment, it is quite likely that a court would find this to be materially misleading. These were important consultation responses. Members were entitled, in discharging the relevant statutory duties, to be made aware of the fact that two bodies with expertise in these matters had concerns of their own. The failure to bring these consultation responses to the attention of members mean that they were not made aware of important objections.
17. Courts have generally held that it is important for reports to accurately summarise responses from key consultees in the discharge of the duties under sections 66 and 72 of the Planning (Listed Building and Conservation Areas) Act 1990 (see, for instance: *R (Liverpool Open and Green Spaces) v Liverpool City Council* [2019] EWHC 55 (Admin)). When added to the other deficiencies identified above, the failure to do so in this case is, in my view, likely to add to the doubts that the court would have that these duties were adequately discharged in this case.

**Advice on next steps**

18. I am of the view that the prospects of successfully defending this claim are low and it is quite likely that if a claim is brought the Council will be unsuccessful and will be liable to pay not only its own costs of defending the claim, but the costs incurred by the claimant in bringing the claim up to the claimed cost cap of £35,000.

19. Given the low prospects of success, I would recommend that a concession be made now at the pre-action protocol stage.
20. The benefit of this approach is that it reduces the costs exposure of the Council moving forward in this matter through the entering of an early concession. There is little to be gained from spending time and exposing the Council to further costs by fighting this claim at the summary grounds stage as it is highly likely that permission would be granted. Any delay in conceding only increases overall costs exposure.
21. There is no strategic reason to seek to defend this claim. It does not raise any novel point of law likely to arise in the future. The law in this area is well settled and this case is an example of established law being applied to a particular set of facts. The error identified can be easily remedied in any future decision. This case should be seen as a lesson for all cases engaging the section 66 and 72 duties on the need for officers to ensure members are advised that however minimal the harm, it must be afforded considerable importance and weight. In future, officers should expressly refer to all relevant paragraphs in the NPPF and ensure that they are seen to be applying a weighted balancing exercise. Any heritage concerns raised by expert bodies or amenity groups should be fully reported and addressed in officer reports.
22. When the application comes to be redetermined, the case officer report should be rewritten in a way that ensures that the points raised in this claim are dealt with. The revised case officer report should ensure that the consultation response from KCC Conservation Officer and H&BP are set out in full on heritage matters and dealt with.

## **Conclusion**

23. Subject to the agreement of those instructing me and there being no concerns or questions with the above approach, I see no need to discuss this matter in consultation. If anything further arises, those instructing me should contact me in the usual way.