

Appeals Decisions

Site visit made on 20 January 2021

by Grahame Kean B.A. (Hons), Solicitor HCA

an Inspector appointed by the Secretary of State

Decision date: 22 March 2022

Land on the Riverside Area off Unicumes Lane, Maidstone, Kent

Appeal A Ref: APP/U2235/C/19/3233145	(Plot 12)
Appeal B Ref: APP/U2235/C/19/3232568	(Plot 13)
Appeal C Ref: APP/U2235/C/19/3233892	(Plot 15)
Appeal D Ref: APP/U2235/C/19/3233258	(Plot 16)
Appeal E Ref: APP/U2235/C/19/3233260	(Plot 16)
Appeal F Ref: APP/U2235/C/19/3233967	(Plot 17)
Appeal G Ref: APP/U2235/C/19/3233069	(Plot 19)
Appeal H Ref: APP/U2235/C/19/3233070	(Plot 20)
Appeal I Ref: APP/U2235/C/19/3233968	(Plot 24)
Appeal J Ref: APP/U2235/C/19/3234682	(Plot 26)
Appeal K Ref: APP/U2235/C/19/3234685	(Plot 26)
Appeal L Ref: APP/U2235/C/19/3234687	(Plot 27)
Appeal M Ref: APP/U2235/C/19/3234689	(Plot 27)
Appeal N Ref: APP/U2235/C/19/3233837	(Plot 27)
Appeal O Ref: APP/U2235/C/19/3233749	(Plot 28)
Appeal P Ref: APP/U2235/C/19/3233750	(Plot 28)
Appeal Q Ref: APP/U2235/C/19/3233751	(Plot 28)
Appeal R Ref: APP/U2235/C/19/3237877	(Plot 29)
Appeal S Ref: APP/U2235/C/19/3237878	(Plot 29)
Appeal T Ref: APP/U2235/C/19/3237880	(Plot 29)
Appeal U Ref: APP/U2235/C/19/3233632	(Plot 30)
Appeal V Ref: APP/U2235/C/19/3233835	(Plot 30)
Appeal W Ref: APP/U2235/C/19/3233631	(Plot 30)
Appeal X Ref: APP/U2235/C/19/3231798	(Plot 30)

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeals are made by the below-named against thirteen enforcement notices issued by Maidstone Borough Council.
 - The notices were issued on 20 June 2019.
 - The breach of planning control as alleged in each notice is: "without planning permission operational development integral to the unauthorised change of use of the Land from agricultural to a leisure use including the erection of [matters specified in relation to each notice in the table below]".
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- The requirements of each notice are:
 1. Dismantle and remove from the Land all structures erected on the land (to include the [matters specified in relation to each notice in the table below]).
 2. Remove from the Land all resultant materials, debris and rubbish arising from compliance with step 1) above.
- The period for compliance with the requirements is: one (1) month from the date each notice takes effect.
- Each appeal is proceeding on the grounds specified in relation to the named appellant in the table below, as set out in section 174(2) of the Town and Country Planning Act 1990 as amended (the Act). Where an appeal on ground (a) arises but the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.

Plot	Additional matters included in the allegation	Appellant and Grounds of appeal
12	a storage building, decking, mooring facilities and garden structures.	3233145 Appeal A: Bernadette Smith (c)
13	a storage building, small animal hutch, mooring facilities and garden structure.	3232568 Appeal B: Mrs Sharon Shell (b)(c)
15	a storage building, small animal hutch, mooring facilities and garden structures.	3233892 Appeal C: Mr Paul Powlesland (b)(c)(f)
16	a storage building.	3233258 Appeal D: Mr Donald Thompson (a)(b)
		3233260 Appeal E: Mrs Sally Thompson (b)
17	storage buildings, a raised platform, external lighting, mooring facilities and garden structures.	3233967 Appeal F: Julie Christine Valance (c)
19	garden structures.	3233069 Appeal G: Mr Paul Phillips (c)
20	garden structures.	3233070 Appeal H: Mr Paul Phillips (c)
24	a storage building, mooring facilities and garden structures.	3233968 Appeal I: Julie Christine Valance (c)
26	a storage buildings [sic], mooring facilities and garden structures.	3234682 Appeal J: Mr L Turner (c)
		3234685 Appeal K: Miss D Chadwick (c)
27	a storage buildings [sic], mooring	3234687

	facilities and garden structures.	Appeal L: Mr L Turner (c) 3234689 Appeal M: Miss D Chadwick (c) 3233837 Appeal N: Mr Marcial Doporto of Diego Doporto Ltd (c)(e)(f)(g)
28	mooring facilities and garden structures.	3233749 Appeal O: Christopher Jack (a)(b)(c)(f)(g) 3233750 Appeal P: Ruby Jack (b)(c)(f)(g) 3233751 Appeal Q: Ian Parkhouse (b)(c)(f)(g)
29	storage building and garden structures.	3237877 Appeal R: Christopher Jack (b)(c)(f)(g) 3237878 Appeal S: Ruby Jack (b)(c)(f)(g) 3237880 Appeal T: Ian Parkhouse (a)(b)(c)(f)(g)
30	storage buildings, decking, raised platform, mooring facilities and garden structures. (step 1 repeats "structures" after "garden structures")	3233632 Appeal U: Mr John Mendoza (b)(c)(d)(e)(f)(g) 3233835 Appeal V: Mr Marcial Doporto on behalf of Diego Doporto Limited (a)(c)(e)(f)(g) 3233631 Appeal W: Mr Paul Mendoza (b)(c)(d)(e)(f)(g) 3231798 Appeal X: Helen Kirk (b)(e)(f)

Summary Decisions

Appeal D

1. The appeal succeeds in part and permission for that part is granted, but otherwise the appeal fails, and the enforcement notice as corrected and varied is upheld as set out below in the Formal Decision.

Appeals A,B,C,E,F,G,H,I,J,K,L,M,N,O,P,Q,R,S,T,U,V,W and X

2. The appeals are dismissed and the enforcement notices are upheld with corrections and variations.

Preliminary matters

3. Diego Doporto Limited (Doporto), the appellant in Appeals N and V requested a hearing, whereas the Council was content for the written representations method to prevail. The Secretary of State has continuously reviewed the mode of determination deployed for these appeals. Further comments were requested in relation to clarification over the requirements of the notice, and the planning unit which I have fully considered. I am satisfied that all relevant matters have been taken into account and a decision can be made on the appeals without the necessity for a hearing.
4. An appeal Ref APP/U2235/C/19/3233632 was made by a Mr John Mendoza, ostensibly in respect of Plot 29, but he later stated (on 26 June 2020) that he rents land within Plot 30 and "will run a parallel appeal on Plot 30" and that he adopts as his own, the statement of case (SoC) made by Doporto in Appeal V. Apparently Mr John Mendoza's newly acquired portion of land had not been registered and he proposed, which was accepted by the Planning Inspectorate that his land and appeal be included within Plot 30.
5. His brother Mr Paul Mendoza made an appeal (Appeal W) in respect of Plot 30, in which he also states he has a partial interest. These papers include a SoC from him in terms identical to that made by Mr John Mendoza (both dated 26 June 2020), also adopting Doporto's statement. However it mistakenly references a different appeal against a previous enforcement notice withdrawn by the Council.
6. Both the Mendoza statements comprise a short passage (with photographs attached) pertaining to mooring arrangements in the Medway navigation. For the avoidance of doubt I have considered these statements.

Background, description of the area and planning history

7. 31 plots of varying size, adjacent to one another form a long narrow strip of river frontage of some 2.85ha south-west of Maidstone. Access is via Unicomes Lane, a narrow, rough surfaced private track passing under a railway line. A hard-surfaced public footpath, the Medway Valley Walk (the footpath), runs along the towpath adjacent to the river and bisects each plot. Public use of the footpath for leisure or recreational purposes is not related to the individual leisure/garden use made of the appellants' plots, however landward access to the plots is gained from it.
8. The enforcement notices relate to 13 of the plots, tending to increase in size towards the southern part of the strip until. Plot 30 covers a fairly large area of riverbank including land on the other side of the footpath.
9. The Council's summation of the planning history is rather brief and formulaic, as set out in each of its statements. It does not vary from one Plot to another, save for identifying the enforcement notice applicable to the current appealed notice. However, historically the wider riverside site in this location was unmanaged scrubland between the raised Medway Valley railway line and the river edge. Over time a significant change has occurred with the clearance of scrub and vegetation, mooring of boats, creation of enclosures, and the erection or siting of structures and works on the plots.

10. In 1998 an application Ref MA/97/1228, to form a river park alongside the River Medway was withdrawn. A riverside environment and recreation enhancement scheme MA/06/0788, was refused on appeal in 2008. Embankment stabilization works were approved in 2006-7.
11. An extract from a report annotated with a heading "*River Medway Towpath: Maidstone Sustainable Access to Education and Employment LEP Scheme*" notes the "recent" establishment of "leisure plots" on land the subject of the appeals, including erection of fences confining the width of the public footpath to between 2.5 to 3m, thus enabling access to leisure plots with vehicles (sic). Construction of sheds and mooring of boats is also noted. The extract would appear to be from the report in October 2016 to the Strategic Planning, Sustainability and Transport Committee. I have no evidence that the way is subject to mechanically propelled vehicles (MPV).
12. The report itself relates to the then proposed conversion of the public footpath to a cycle track. It had no recorded width on the Definitive Map and Statement (DMS) although historic OS maps showed its width as some 3m. It also notes that in 2011 the County Council could only afford to repair it to a width of 1.5m, believing that did not reflect the full extent of public rights. The reason for the project was to accommodate increasing use by cyclists, and to provide a sustainable all-weather surface including ecological restoration.
13. The project included planting of riverbank trees and plants to prevent erosion. Some owners have worked with local authorities to carry out planting on their plots. This activity is not the target of the present enforcement action.

Matters concerning the notices

Do the notices specify the precise boundaries of the land?

14. It is argued in some appeals that the notice fails to comply with the Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002 (2002 Regulations), Regulation 4(c) which requires notices to specify '*the precise boundaries of the land to which the notice relates, whether by plan or otherwise*'. I have considered the matter in relation to each notice and appeal since apart from identifying the relevant plot number, the relevant wording and plan in each is the same.
15. Each notice clearly states that the land is shown on the attached plan only "*in its approximate location*". The Council states that the site plans served with the notice were to scale, and the plots were hand measured with reference to static markers, such as roadways identified on the maps. These hand measured plots are also cross referenced with Land Registry maps for accuracy. All but one of the enforcement notices served in relation to plots identified on the same plan are the subject of appeals.
16. On my site visit which was well accompanied, no one had any difficulty in identifying the boundaries of their own plot, of which the Council officer was also aware, although in a few cases there may have been no physical demarcation and they may not have been apparent to the uninitiated observer. I have no reason to doubt that the notices were served on the appellants and others as a result of due investigation including Land Registry searches.

17. Subject to further consideration of the notice relating to Plot 29, I agree with the Council that the notices specify clearly and unambiguously the land to which the notices relate, and it is clear that those served understand the extent of their own land to which the notices respectively relate.

The notice in relation to Plot 29

18. The original form for Appeals O, P and Q submitted for Plot 28 appears to have been intended to cover Plot 29, so separate appeal reference numbers were set up for the appeals R, S and T against the enforcement notice for Plot 29.
19. Examination of the enforcement notice and its covering letter proffered by both appellants and Council in respect of Plot 29, reveals that there is clearly a mis-recital in section 2 entitled "Land to which the notice relates" in that it refers to Plot 28, although the covering letter identified Plot 29 as the subject of the notice, and the annex to the notice shows that it was served on various owners and occupiers of Plot 29, not Plot 28. This error has not been picked up by any of the appellants or the Council. Each SoC and associated documents are submitted on the assumption that there is a valid notice in respect of Plot 29.
20. There can be no reasonable doubt that the Council intended to issue and serve on interested parties an enforcement notice relating to Plot 29. The attached plan, in common with those attached to the other notices, identifies by number and bold separating lines, each of the individual plots along the riverbank.
21. I have considered this matter carefully. Had any of the appellants not known or were in any doubt about the matter one would have expected their confusion to appear. It will be recalled that Appeal U was made ostensibly in relation to Plot 29 by Mr John Mendoza but which has been treated as for Plot 30. The Council was in any case unaware of any material interest he had in Plot 29 but to the extent that it matters, and as with the other Appeals R, S and T the mis-recital was not picked up.
22. Thus, although the plan does not specially mark out from other plots the particular plot to which the notice refers and therefore the crucial identifier in the notice itself is the description of the Plot number in section 2, it is an obvious error on the face of the notice. As such it can be corrected so that it is wholly consistent with the rest of the notice.
23. I have had regard to the now well-established principles to be applied in consideration of the validity or nullity of an enforcement notice, recently distilled into the principles enunciated in *Oates v SSCLG* [2018] EWCA 2229. In *Coventry Scaffolding Co (London) v Parker (John Brian)* [1987] J.P.L. 127 an enforcement notice was served not specifying on which land the allegedly unauthorised use had taken place. It was held that in the circumstances of that case, the omission to refer to the correct number was not a material or fundamental error or omission so as to render the enforcement notice a nullity, because the appellants were fully aware (and had been made fully aware by the enforcing authority) of the land to which it related. The submission was incorrect that one might only have regard to the contents of the notice within its four corners to decide whether it was a nullity or not:

"What had to be decided in each instance was whether, in the light of the surrounding circumstances, the recipient of the notice was sufficiently and

clearly apprised of the effect of the notice, and of what he had to do pursuant to it to render it just or unjust to hold him to it."

24. The court also referred to passages in *Eldon Garages Ltd. v. Kingston upon-Hull Corporation* [1974] 1 W.L.R. 276 that:

"plainly showed that...the court could, and in appropriate circumstances should, look beyond the terms of the notice itself, ask itself what the notice conveyed to the actual recipient, and (to go back to Lord Denning in the Miller-Mead case) consider what the justice of the case required".

25. The recent case law on construction of a planning permission by reference to a covering letter is somewhat wide of the mark in the present context but as I say I have considered this matter carefully. There is nothing I can see that prevents me from taking into account the circumstances surrounding the notice itself in order to ascertain whether its recipient was sufficiently and clearly apprised of its effect, and what he had to do pursuant to it so as to decide whether it is just or unjust to hold him to it.
26. I find that the notice is not hopelessly ambiguous, no one has been misled by it and the mis-recital is capable of correction without causing injustice to any party. I will exercise the powers in s176(1)(a) to that effect.

The planning unit – general principles

27. When considering whether a material change of use has occurred the former use of a site is compared against the current use of the site. The concept of a planning unit may assist to define the area to be assessed. What is the correct planning unit is a matter of fact and degree and of planning judgement.
28. The planning unit is usually the unit of occupation, unless a smaller area can be identified which, as a matter of fact and degree, is physically separate and distinct, and/or occupied for different and unrelated purposes. The concept of physical and functional separation is key. In *Burdle v Secretary of State for the Environment* [1972] 3 All E.R. 240 three broad categories of distinction were considered:
- A single planning unit where the unit of occupation has one primary use and any other activities are incidental or ancillary;
 - A single planning unit that is in a mixed use because the land is put to two or more activities and it is not possible to say that one is incidental to another; and
 - The unit of occupation comprises two or more physically separate areas which are occupied for different and unrelated purposes. Each area that has a different primary use ought to be considered as a separate planning unit.
29. Whilst one might assume the unit of occupation is the appropriate planning unit, unless a smaller unit is the site of activities amounting to a separate use physically and functionally, the area to be looked at is the whole of the land used for a particular purpose, including any part put to incidental use. Equally it may be appropriate to select an area greater than is comprised within an individual ownership or occupation. An enforcement notice need not encompass

all land comprised within a single planning unit but an ancillary use has to be carried out in the same planning unit as the primary use.¹

The planning unit – application of principles

30. The riverbed is land outside the area covered by each of the enforcement notices issued in relation to the several plots. Vessels, some of which are named and others are not, are now moored above the riverbed alongside most plots in the river and all appear to have some sort of mooring facility on the adjacent riverbank, although the degree of sophistication varies from a simple pole anchored to the ground to more sophisticated apparatus, for example pontoons and landing stages.
31. The Environment Agency (EA) regulates mooring activities in the river and the Council does not allege that the mooring of boats is unlawful or that this is relevant to the current enforcement action. However it clearly wishes to reserve its position over further action against the use of the riverbed for mooring purposes, as it does against other plots not served with an enforcement notice. I regard the riverbed use for mooring as a primary use in its own right, however there is nothing improper about the requirements of the notices that have been issued in seeking the removal of the mooring facilities on the riverbank so far as they are evident within the appeal sites themselves. They happen to facilitate the mooring of the boats but equally the use of the riverbank on which they are sited is such that the facilities are permanently sited structures that remain on the land whether the boats to which they are normally moored are there or not.
32. Nevertheless the planning unit to be considered here should take account of the connection between the land used for mooring boats and the riverbed on which the boats are moored, as well as the overall use of the land. I note also that there is no independent access to any plot apart from the common access which all plots enjoy via the public path which runs through them.
33. As discussed below the Council contends that given the planning history of the site and other plots, on the balance of probabilities, the wider use of the site for leisure purposes represents a material change of use. That would suggest the view is taken that the plots should be regarded as being within a single unit. I agree but moreover the appropriate unit to consider in my opinion is larger and should comprise all 31 plots including the extent of the riverbed that belongs to the riparian owner(s)².
34. I have considered the submissions made against that position. However the question whether the notices identify with sufficient precision the interests in the land has been separately considered. Secondly, it is not proposed to enlarge the area of the land subject to any notice.

¹ See *Westminster Council v British Waterways Board* [1985] AC 676 per Lord Bridge: "The concept of a single planning unit used for one main purpose to which other uses carried on within the unit are ancillary is a familiar one in planning law. But it is a misapplication of this concept to treat the use or uses of a single planning unit as ancillary to activities carried on outside the unit altogether."

² 'Land' is defined in s336(1) of the 1990 Act as any corporeal hereditament, including a building. The bed and banks of a river constitute a corporeal hereditament but the flow of water does not. With subdivision of the riverbank each riparian owner will normally own the riverbed up to the mid-point of the river.

35. Thirdly, whilst the Council has underenforced in terms of the alleged material change of use, it is incorrect to state that such use is not properly an allegation of breach of planning control. It is important to distinguish between the two: if for example, there were no or no full compliance with the requirements, the deemed permission may never be reached and there would be nothing to prevent subsequent and separate enforcement action against the use. I agree that generally it would not be appropriate to extend the scope of any notice by enlarging the requirements. Nevertheless I have a duty to get the notices in order by amending them if necessary to reflect the actual uses obtaining when they were issued. This is why it is appropriate to make clear that the nature of the mooring use carried on since subdivision of the riverbank has taken on a different character from that expected in the ordinary course of navigation, and therefore it seems to me, so has the nature of the mooring facilities.
36. Clarification that the leisure use includes these activities would not cause injustice to any appellant. I reiterate that contrary to the suggestions made, the effect of the notices is not to grant planning permission for any leisure use on the riverbank unless there is full compliance with their requirements.
37. In this connection I have also considered the argument made by some appellants that because the target of the notices is operational development only, not the use of land, the planning unit is not relevant to the determination of the appeals. However the incidents of the use must be appreciated for a view to be taken on the planning merits of allowing or refusing permission for their retention, whether or not the notices require the use to cease. Therefore for the reasons stated and as a matter of fact and degree I determine that the planning unit is this stretch of the riverbank and riverbed "ad medium fluvium" (up to the mid-point of the river).

The allegations of breach of planning control

38. It should be noted that the notices do not require the cessation of the alleged unauthorised material change of use but instead the removal of "operational development" integral thereto, to which extent they "under-enforce". If the requirements are complied with, s177(11) deems planning permission to be granted for that which could have been enforced against but was not.
39. The aim of the Council to remove the structures is parasitic upon the allegation of a material change in the use of the land. Of the panoply of structures on the riverbank within the appeal plots, I recognise that it is argued in some cases what has been erected is in effect a building. However I have not been persuaded on the evidence in any of those cases that those structures, although having a permanent appearance, are of such a size or have a degree of affixation to the ground that they cannot be easily removed. To the contrary it is urged on me that many of the structures are "only" temporary in nature. Therefore, without the material change of use having occurred, there would be no basis on which the structures could be sought to be removed. This is the subject of enquiry under grounds (b) and (c).
40. The use of the land for the mooring of boats, incidental to navigational use of the river, may not normally involve development. However the moorings on the plots are established and regularly in the same place; a degree of permanence has been established by the use of the land as home moorings for the boats.

41. For other structures it can be difficult to distinguish between those used for purposes ancillary to the mooring such as storage of boat related equipment, as opposed to say storage of items purposed to an individual leisure plot use. In my view the leisure use that is being made of the plots, for example by sitting out in garden-type furniture, also includes the use of the riverbank to provide a secure mooring facility for a boat or boats that are kept alongside the appellants' individual plots. Thus the current use of the plots is a single composite use comprising these activities. The allegation should therefore refer to a material change of use to a mixed use for leisure/garden use and siting of home mooring facilities.
42. It is important to get the allegation right, subject to there being no injustice so that the breach is correct against which to assess the appeal, not least on ground (a) as the terms of the deemed planning application derive from the allegation. The use of the riverbed for home mooring within the planning unit is not a target of the notice although the Council is targeting the mooring facilities in their own right. I am satisfied that the notice may be corrected to reflect the actual uses obtaining within the plots when the notice was issued, without causing injustice to any party.
43. I will also correct the notice to reflect the pre-existing use of the land as a natural riverbank prior to the alleged material change of use, for which I have detailed my reasons in the section on ground (c) below.

"Operational development" as referred to in the notice

44. The notice should not be misread as alleging operational development per se. It cites "operational development *integral to...*" (my emphasis), thus clarifying that the nominal target of the notice is an alleged material change of use in the land, integral to which is "operational development" required to be removed in accordance with well-established principles that permit its removal if they were erected or brought on to the land to facilitate the change of use. I have corrected the wording in the notice to make the position clearer.
45. It is also important in light of the submissions made, to clarify the principles that derive from the cases of *Murfitt v Secretary of State for Environment* [1980] 40 P & CR 254; *Somak Travel Limited v Secretary of State for Environment* [1988] 55 P & CR 250 and *Bowring v Secretary of State for Communities and Local Government* [2013] EWHC 1115 (Admin) but which find their basis in the statutory provisions enabling a notice to require steps to be taken to restore the land to its condition prior to the breach occurring, as Lindblom LJ pointed out in *Kestrel Hydro v Secretary of State for Communities and Local Government, Spelthorne Borough Council* [2016] EWCA Civ 784).
46. Thus an enforcement notice alleging a breach of planning control by the making of a material change of use, may also include operational development that falls outside the scope of planning control (*Somak*), or is immune from enforcement action by virtue of the four year rule (*Murfitt*). This is so provided firstly, the operational development was carried out as part and parcel of, or as an integral part of, the use complained of; and secondly that the operational development was not undertaken for a different and lawful use and could be used for that lawful use if the unauthorised use were to cease.

47. Curiously, “operational development” as a phrase does not appear in the 1990 Act but given the careful drafting of the definitions of “development” and “operation(s)” it should really only refer to that which is development normally requiring planning permission by reason of it comprising a building, engineering, mining or other operation, as defined. Nevertheless I am aware³ the phrase is used in this context to include the removal of works which have that quality of being “integral” and so forth, to the change of use, whether or not operational development *stricto sensu*.
48. It is clear that the difference is understood. See for example the Council’s statement at paragraph 6.2: *“the notice is not directed simply at operational development but at items that are integral to the unauthorised use of the land.”* And in its final comments (FC) Doporto opines that *“only ‘structures’ or ‘buildings’ within the meaning of s55 of the Act”* may be required to be removed (my emphasis). Since neither “structure” nor “structures” appear in s55 (save for a recondite reference to fish farming) it is right to infer a comma placed after “structures” in the FC, ie clearly referring to the way the word was used in drafting the allegation: structures that may fall short of the definition of development in s55, and “only” in this context clearly refers to the fact that only associated works are targeted, as opposed to the alleged use itself.
49. The landowners should have the best knowledge of what was the previous condition of the land.⁴ As it causes no injustice to the parties, I will amend the notices to clarify the wider meaning in this context, so that the alleged breach includes works associated with the unauthorised change of use.
50. The notices may be said to cause some uncertainty by using the word “including” in the allegation and “to include” in the requirements. The list of works alleged to facilitate the use is preceded by the word “including” but the requirements are specific enough in enjoining the removal of all structures that are on the land (that are used in a way integral to the change of use). The list is specific in that sense and it is clear what is alleged, and what is required.
51. Established case law on the use of “including” in planning enforcement notices turns largely on the context and wording used. “Including” is not inherently objectionable in such notices. It cannot in my view be argued coherently in this case that the notices by definition do not provide an ascertainable list of works enforced against; that is precisely what they do by using the phrase *“all structures erected on the land”* (emphasis supplied). Given this antecedent requirement it is nothing to the point that the notices then go on to enumerate some specific works. The Council’s general intention is clear, to suffer a leisure use that is compatible with the pre-existing open character of the land by requiring that each developer removes all structures on the land.

Clarification of the notice in respect of fences, gates and other means of enclosure

52. In a pre-application enquiry in January 2020, where an alternative approach was sought to the management of the land and moorings on the wider

³ (see eg paras 46 and 47 of the Kestrel judgment at first instance [2015] EWHC 1654 (Admin) where operational development is used for the subject matter in Somak, internal works falling outside the scope of planning control. And para 49 where the phrase is used next to “the removal of works in accordance with the Murfitt line of cases.
⁴ Ormston v Horsham RDC [1965] 17 P&CR 105, where the developer knew what the site was like before he began the development and could restore it accordingly.

riverside site to overcome the Council's concerns, the Council's reply⁵ which was fairly detailed, included an assessment of the planning history of the site. Noting that much was made of the permitted development rights available to the individual plot holders which has resulted in (what the Council saw as) the current cluttered appearance and adverse impact on the character of the locality) this officer recognised and pointed out to the landowners:

"Obviously you are aware of the recent Article 4 Direction which now restricts the erection of fencing but I am also sure that you will be aware of the implications of Article 3 of the GPDO 2015 (as amended) which effectively removes the permitted rights exercisable under the GPDO if the development or use is unlawful"

53. This point was not followed through in the Council's statement. Under the misapprehension that erection of the same or similar fencing might be achieved through the exercise of permitted development rights, it stated:

"It is also noted that fences, gates and other means of enclosure are not required for removal as part of the notice, and as they are separately defined do not fall within the descriptions laid out in the notice itself."

54. However the Council officer who looked at this previously was in my view correct, as I will explain with reference to the Article 4 Direction.
55. The land is affected by an Article 4 Direction made on 4 December 2018 and confirmed on 31 October 2019. It removes permitted development rights on all land within the areas covered by the enforcement notices in these appeals, the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure. This is development which but for the Direction would have had the benefit of planning permission granted within Class A of Part 2 of Schedule 2 to Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended). It does not apply to development permitted within any other Class of Part 2, Schedule 2. Permission once granted cannot be undermined by a later change in the status of the land (save possibly where there is express retroactive legislation or the like which does not obtain here).
56. Therefore, until 31 October 2019 any gates, fences and the like that were erected on plots under permitted development rights then existing, will be unaffected by the direction.
57. However, the principle of excluding permitted development rights where the "host" development is unlawful is well-established, both in case law and in earlier Orders. The planning permission which is granted by Article 3(1) of the GPDO for the classes of development in Schedule 2 is expressly said to be "subject to the provisions of this Order". Therefore the grant is subject to Article 3(5) which provides that the "*permission granted by Schedule 2 does not apply*" in the circumstances set out in sub-paragraphs (a) or (b):
- (a) in the case of permission granted in connection with an existing building, the building operations involved in the construction of that building are unlawful;*

⁵ On 8 May 2020 (Appendix 5).

(b) in the case of permission granted in connection with an existing use, that use is unlawful.

58. The two sub-paragraphs are not expressed to be mutually exclusive and Article 3(5) continues to operate for so long as enforcement action may still be taken in respect of an alleged breach of planning control.
59. The upshot is that existing building operations or uses have to be lawful in order for permitted development rights to be enjoyed. The notice alleges that some development has taken place that is integral to the alleged unauthorised material change of use. If the notice is upheld on that basis any gate, fence, wall or other means of enclosure erected in a way that is integral or part and parcel of that unauthorised change of use will not benefit from permitted development rights.
60. It has been held⁶ that where a notice alleged a material change of use of land to a residential garden use and the structures included a fence, removal of the fence could not be inferred from the requirement to restore the land to open pasture. If there are inconsistencies in the notices or lack of clarity, particularly if the means of enclosure bear upon the planning merits of the appeals, they need to be resolved, if possible, without causing injustice to any party. As exemplified in *Oates*, so long as the notice is not a nullity a correction may be made that will put the notice on a proper footing, including broadening its scope, or removing vague requirements.
61. In its Facts and Grounds and then in its SoC on ground (f) (but it is a point that arises for clarification in the notice itself) Doporto argues that the fences, gates and means of enclosure are permitted development and it is on that basis that it is argued that the notices should be amended to clarify that they are not "structures" or "garden structures" that are required to be removed. I disagree. In my opinion the term "garden structures" would ordinarily include and can reasonably be taken here to include fences and other domestic-style gates and enclosures. Although it would be incorrect to suppose that no material change of use could have taken place without some physical manifestation of the subdivision of the plots, such structures are part and parcel of the change in the use of the land to individual leisure/garden plots (emphasis supplied).
62. Thus the notices do not define "structures" with specific reference to particular things but give examples. On its plain and reasonable reading, the use of the phrase "all structures erected on the land" includes the fences, gates and means of enclosure that amount to works associated with the change of use. I agree that clarity should be provided in the notices to that effect.
63. In *Dacorum* the Inspector should have considered whether the notice could be varied to provide for the removal of the fencing. This is an aspect of the instant notices that requires careful consideration because the Council, as it would appear from its statement, was prepared to relinquish control over the fencing, however it is clear that this was on the misunderstanding that the fencing was protected from enforcement action as permitted development.
64. I deal later with the issue of the planning merits and any harm caused by the structures including the fencing; however for present purposes, and as I

⁶ *Dacorum BC v SSETR & Walsh* [2000] QBD.

observed on my site inspection, the fencing and other boundary treatments around the plots are generally prominent and their erection appears to have gone hand in hand with the material change of use that has occurred. In such a case the allegation should clarify that "all structures" includes fencing. I will exercise powers of correction accordingly.

Appeals N, U, V, W and X on ground (e) - that copies of the enforcement notice were not served as required by section 172

Appeal N (Plot 27) on ground (e)

65. Doporto, in Appeals N and V in its SoC prepared for Plots 27 and 30, "reserves its position in relation to a Ground E appeal pending clarification on the extent of the land to which the notices relate". This is only elaborated upon to the extent that, in its final comments as to both plots it repeats its case attacking the validity of the notice on grounds that it failed to comply with the 2002 Regulations. I have dealt with that particular issue above.

Appeals U, V, W and X (Plot 30) on ground (e)

66. Mr John Mendoza's appeal U has been considered above and his initial assessment that he owned Plot 29 was contradicted by the owners of that plot, and it became clear his appeal, against a notice served on him which he stated related to Plot 30, was for land of his somewhere within Plot 30 and accepted as such. Since he also states on ground (e) that he has "*considered the map which appears to be correct for the avoidance of doubt*" I do not find that his grounds disclose an arguable case.
67. The appeal form for Appeal W (Mr Paul Mendoza) states "*my notice was issued to a different vessel. This was inconvenient but I do have the original notice now in my possession.*"
68. In the appeal form on Appeal X, Ms Kirk states that she had not been served with any papers. She relies on the contents of the form and has not submitted a SoC. However in its own SoC the Council states that the notice was erected on the land and submits photographs of copies fixed to a tree and a fence post.
69. There was no Land Registry confirmation of Mr Mendoza's and Ms Kirk's interests in Plot 30 and the notice was served on the wider plot in the same ownership. Doporto, in Appeal V, the owner of the whole plot has appealed the notice and submitted a SoC, as has Mr Mendoza.

The appeals on ground (e): considerations

70. The Council states all means available to it have been explored to effect correct service, including information obtained from Land Registry office copy entries and throughout the investigation.
71. Each appellant was clearly aware of the notice as their respective appeals were submitted in time. If the notices were not served as specified in s172, this can be disregarded if no substantial prejudice has been caused to anyone's interests. For example if an appellant or other person has sent written representations it is likely that he or she has been given adequate notice. It is not suggested that the appellants are in doubt as to what complaint the Council is making and what they are required to do.

72. As I find no evidence of “substantial prejudice” the appeals on ground (e) must fail.

Appeals A,B,C,D,E,F,G,H,I,J,K,L,M,N,O,P,Q,R,S,T,U,V,W and X on grounds (b) and (c)

Matters relative to the link between ground (b) and (c)

73. Ground (b) is that the matters alleged to have occurred as described in the notice have not occurred as a matter of fact. Ground (c) is that the matters alleged in the notice, if they did occur, do not constitute a breach of planning control. For both grounds the onus of proof is on the appellant and the test of the evidence is on the balance of probability.
74. The Council has treated the cases on ground (c) as a hidden ground (b) and addressed them as such. Therefore where an appeal is not expressly made on this ground, I have considered ground (b) in respect of those appeals. The essential question is whether a material change in use of the land occurred.
75. Doporto, the appellant in Appeals N and V (Plots 27 and 30) are professionally represented. Whilst they emphasise that they do not represent other appellants and have only informally advised some appellants, I have considered their full SoC in relation to other plots insofar as similar arguments are or might have been raised on their behalf, as well as individual cases of the other appellants.
76. Doporto makes no appeal on Ground (b) “*on the basis that the Council has ‘regularised’ the current leisure use of the land pursuant to s173(11) of the Act*”. This is incorrect as I have already pointed out. Permission would be granted for the alleged use of the land under s.173(11) of the Act if, and only if the requirements of the notice are satisfied.
77. In my consideration of the appeals on these grounds I have also taken account of the findings of fact on each plot described in relation to ground (a).

Reasons

78. The notices allege that the appeal sites are in agricultural use but the Council did not supply evidence of actual agricultural use prior to the alleged material change of use. Plot 30 for example is large, subdivided into tenancies and some activities that I saw could be characterised as hobby farming or similar, mainly carried on in the upper reaches of the riverbank across from the path.
79. The appellant in Appeal W adopts Doporto’s statement of case as his own yet he also appeals on ground (b). His own statement is inherently contradictory. He discloses that he only controls the last 15 metres of Plot 30 which he rents from Doporto, that he has built no structures on the land, nor carried out landscaping or gardening, has no mooring structures, and the gang plank for the boat merely rests on the land. Currently he says he is not using the land for any purpose, agricultural or leisure. He considers the erection of temporary buildings to store agricultural tools to be permitted development.
80. His statement attaches by way of general illustration images of two mooring arrangements on the navigation: posts and swivels with outriggers or as he refers to them, “somewhat unsightly” posts with or without rings. The former are said to be driven into the bank and are temporary, as for any other

mooring pin used to moor vessels, and ensure the “safety of other river uses in the least visually-harmful way”. He adds that there has been no change of use of the land as it has been used for leisure purposes in excess of 10 years but contrarily also states there is no current use for the land he controls.

81. Under ground (c) he denies that the use of the land has changed, or that the works alleged amount to development requiring planning permission. It is asserted that the land has been used for leisure and mooring purposes for several decades, over which time no agricultural use has been made of it.
82. Doporto states the wider site is currently used for purposes in connection with the mooring of boats on the western bank of the river, including parking, gardening and growing / rearing animals, some within structures and other related activities. The evidence is not that the farming takes place as a trade or business, and where there is such activity on the plots it is more akin to hobby farming. There are no permitted development rights for hobby farming as such and I consider that such activities are subsumed within the leisure use. The notices do not seek to restrict, nor may they, a genuine agricultural use.
83. Doporto states that the nature of the wider riverside area has changed significantly since a 2006 application for permission was refused on appeal for changes to the riverbank to stabilise it, provide a parking area including a canoe storage area and the mooring of leisure craft. The changes were allegedly made through measures not requiring planning permission or carried out by the highway authority such as pathway improvements. Therefore little weight is placed on this appeal decision⁷.
84. However the appeal decision dealt with the same stretch of riverbank as is presently under consideration. It is to my mind a highly relevant consideration. In the previous appeal decision the site visit was made on 3 April 2008 and noted at paragraph 10: “*this section of the river has natural banks with no moorings*”. Although it is also pointed out that boats moored along parts of the riverbank were a normal feature of riverside activity, it was likely that the pre-existing use of the land at most included temporary or ad hoc moorings utilised in the ordinary course of navigation.
85. Doporto’s reference to the 2006 appeal is potentially misleading; the appeal decision was issued in 2008 and the Inspector’s findings in relation to the character of the wider area are based on evidence heard and a site inspection made in April 2008.
86. The appendices to Doporto’s statement contain the application site plan showing the proposed enhancement scheme, dated January 2006. Figure 3 within the drawing sheet contained several site photographs from which the natural and relatively undisturbed state of the riverbank can be appreciated.
87. Furthermore, Doporto’s own statement contains details that assist in assessing the way in which the character of the wider land and the appeal plot has changed over time. The 2008 appeal decision that upheld the refusal of the enhancement scheme (intended to enhance access to the river for boating and cycling and would improve ecology and the local environment) highlighted the effect on the character and appearance and nature conservation interest of the

⁷ Ref APP/U2235/A/07/2050921/NWF dated 22 April 2008.

area, and navigation safety on the River Medway. The April 2006 planning statement⁸, prepared by professionally qualified chartered surveyors and planning consultants, describes the land:

"The site forms part of the river Medway corridor...Across the river the eastern bank is heavily wooded and the land rises. On the western side the land is flatter and more open with a scrubland character up to the railway, which is fenced and partly on embankment. Beyond this the land rises gently up to the urban area...The public right of way is well used by anglers and walkers, both for recreation and for access between Fant and Tovil...Vegetation alongside the path is often very close to the path and blocks views of the river, creating a tunnel effect. The vegetation comprising mainly small trees and bushes interspersed with primarily ruderal vegetation, has a scrubby and unmanaged character, which detracts from the riverside environment and reduces its enjoyment."

88. It was further stated:

"The footpath extends along the riverbank to the south of Unicomes Lane where the character becomes more wooded, with larger trees and is more rural rather than urban fringe...There is an existing hard surface at the entrance to Unicomes Lane and an existing concrete wharf just downstream of this point."

89. The appellant in the previous appeal saw that scheme as low key, aimed at only recreational craft, with no buildings or structures on the land. More recently the owner(s) have subdivided the site into the several plots that now exist, each privately owned. Mooring facilities are now installed along this part of the riverbank, with associated works including buildings, hard and soft landscaping, and means of enclosure.
90. The plots are used as individual leisure plots incorporating permanent boat mooring facilities. I disagree that each mooring has a distinct identity and character. It is true that each plot on the riverbank is fenced off and has its own structures of varying size and appearance. However as has been noted the boundaries between them are not always apparent and the overall appearance is of a sizeable stretch of land that is covered with a miscellany of domestic structures and paraphernalia. I should also emphasise that there is no planning merits assessment in this matter; whether an individual plot be neater and tidier in appearance, or more unkempt and of lesser environmental quality, yet in either case its essential character and that of the wider planning unit has changed from the erstwhile appearance of this stretch of natural riverbank.
91. This navigable section of the River Medway may have included intermittent and temporary moorings as were ancillary in nature to the use of the river for navigation. It would not, prior to the subdivision of the plots have amounted to what is now a prevalent home mooring use whereby facilities have been intentionally established for that purpose by the current riparian owners.
92. Thus each plot owner has their own section of the riverbed from which to home moor their vessel. The impact on the character of the wider planning unit is quite apparent in that there has been a demonstrable change in the definable character of the natural riverbank. This change, which has incorporated the

⁸ Site plan, Appendix 4, Doporto's statement.

fencing off of individual plots and the proliferation of structures of all kinds, gives to each the character of a domesticated leisure or garden-type use. Although the nature of the wider riverside area has evolved since the 2006 application, it has been a gradual evolution due to the enhancement scheme related to the footpath and enhanced planting, improvement of visibility and so forth, but those enhancements still preserved the essential character of the plots as a natural riverbank. This then, I find to be the pre-existing use of the land prior to the definable change in character that has occurred upon the later subdivision of the plots and the various incidents of their current occupation and use.

Whether development is integral to and part and parcel of the change of use

93. As to the fences, a case is made in Doporto's statement on the basis that they were erected before the Article 4 Direction came into force. However, as I have referred to above, the key issue is whether they were erected as part and parcel or integral to the material change of use of the land, which as I have determined, took place before the Direction was confirmed on 31 October 2019. And, whilst it is asserted that the erection of fences and means of enclosure on the land would have constituted permitted development⁹, Article 3(5) has prevented any gate, fence, wall or other means of enclosure erected in a way that is integral or part and parcel of that unauthorised change of use having the benefit of permitted development rights.
94. The erection of gates and fences is clearly a concomitant feature of the change of use to an individual leisure plot and as such cannot benefit from permitted development rights, irrespective of the existence of the Article 4 Direction. Such rights to erect gates, walls and fences etc have been lost under Article 3(5) whilst any prospective erection of fences now would be unlawful due to restrictions placed on the whole land by the Article 4 Direction.
95. It is also claimed that "some or all" of the structures to which the notices relate are insufficiently permanent to render them building operations under s55 of the Act and that the moorings are not permanent in that their installation would not have amounted to development within the meaning of s55.
96. However, the examples of such structures (decking areas for parking, small sheds and storage units, garden furniture, clothes lines across poles pushed into the ground, coldframe greenhouses, planters and the like), are in fact all items that go towards the characterisation of the change in use that has occurred to one for leisure/garden purposes.
97. For example, the appellant in plot 13 states, which is undisputed that her shed which she emphasises is small, has been there for 7 years. There is no ground (d) appeal, and in any event no evidence persuading me that the structure is a building. The appellant in plot 15 asserts that the breach of control alleged has not occurred as a matter of fact. I disagree and have outlined what was present in situ when the notice was served. On that basis the matters alleged in the notice were clearly taking place. Within the papers for the appeals related to Plots 19 and 20 there is a letter from an objector who points out that in April 2016 there was only one vessel moored and some only of the fencing

⁹ Ie under Schedule 2, Part 2, Class A of the Town and Country Planning (General Permitted Development)(England) Order 2015 (the GPDO)

erected. In all there were no structures or works on the land for which evidence has been provided that is sufficiently persuasive to lead me to believe that they are other than integral to or part and parcel of the present unauthorised use of land.

98. Also as to the mooring facilities, I note the simpler structures are claimed not to have the necessary degree of permanence but again, that is not relevant to the issue. The test is comprehensively set out by Lindblom LJ in *Kestrel*:

*"What then is the principle? It is that an enforcement notice directed at a breach of planning control by the making of an unauthorized material change of use may lawfully require the land or building in question to be restored to its condition before that change of use took place, by the removal of associated works as well as the cessation of the use itself – provided that the works concerned are integral to or part and parcel of the unauthorized use. It does not apply to works previously undertaken for some other, lawful use of the land in question, and capable of being employed for that or some other lawful use once the unlawful use has ceased. But it can extend to unauthorized changes of use where the associated works, if viewed on their own, would have become immune from enforcement under the four-year rule in section 171B(1) (as in *Murfitt*) or would be outside the scope of planning control (as in *Somak Travel Ltd.*). In every case in which it may potentially apply, therefore, it will generate questions of fact and degree for the decision-maker. Whether it does apply in a particular case will depend on the particular circumstances of that case."* (Judgment, paragraph 28).

99. In the absence of a ground (d) appeal there is no basis on which to find that any of the items put forward fall into the category of works excluded from the principle set out by the Lord Justice.

Conclusion

100. Although the intensity of use differs from plot to plot, in each case it is clear that a leisure/garden use including the permanent siting of home mooring facilities, is being made of the land that materially differs in character from the pre-existing use of the land as a natural riverbank in this location.

101. The appeals on grounds (b) and (c) therefore fail.

Appeals U and W on ground (d)

102. The appeals made on this ground are that, at the date when the notices were issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters. The time limits in respect of a material change of use are set out in s171B(1) as "after the end of the period of 10 years beginning with the date on which operations are substantially completed". The enforcement notices were issued in June 2019, so it is for the appellants to show that the use had subsisted for ten years prior to that date. The onus is on appellants to demonstrate the case on the balance of probability, using evidence that is precise and unambiguous.

103. Appeals on ground (d) are made in respect of Plot 30 by the brothers Mendoza. Mr P Mendoza in his appeal form states he can prove that the leisure activities have been carried out for ten years prior to the enforcement notice

issue, promising further evidence in due course. In his own SoC however he does not elaborate or provide further information on this ground. It will be recalled that he expressly adopts Doporto's SoC as his own, however Doporto makes no ground (d) appeal.

104. For both appeals it is considered that the whole of this area was used for leisure purposes for in excess of a 10 year period prior to the issuing of the notice, however there is no supporting evidence that substantiates this claim. It would appear that the case here rests largely if not exclusively on the use that has been made of the footpath which runs through the appeal sites. In its natural state the riverbank may well have been used intermittently for fishing, picnicking and so forth but these are incidental activities.
105. I have previously described the nature of the public footpath that bisects the plots, but such use is clearly unrelated to the use that is now being made of the individual leisure/garden and home mooring plots. I agree with the Council that members of the public would have no right or permission to explore any of the plots outside the narrow extent of the public right of way which does not characterise the main uses made of the plots.

Other matters

106. The appellant for Plot 12 asserts that the land has been used for leisure and mooring for over 40 years but is not specific about dates or level of use. There may have been an historical use as a wharf on parts of the land but this was abandoned. Had a ground (d) appeal been made it would therefore have failed.
107. The appellants for Plot 16 state that when served with the enforcement notice there was no vessel moored on the site but claim they had "over the past decade" used the site for mooring their Dutch leisure barge. They make reference to a historic use of a brick and stone-built wharf which was for different purposes and since abandoned. No further details are supplied, and the level and periods of use is unclear. I find that any ground (d) appeal would have failed due to the lack of precise and unambiguous evidence as to the nature and continuous use alleged to have occurred.

Conclusion on ground (d)

108. On the wider area, I find it likely in any case, that moorings and structures associated with the leisure/garden use were not in situ by June 2009 at such a level to have changed its essentially open and natural character.
109. As to the individual appeals, there is no evidence supplied that persuades me on the balance of probability that the alleged breaches of planning control in each case subsisted for a continuous period of ten years prior to the issue of the enforcement notices, and consequently the appeals on this ground must fail.

Appeals D, O, R, and V on ground (a)

Main issue

110. The main issue as to whether planning permission should be granted for the development alleged to constitute the breach of planning control, as corrected, appears essentially from the single substantive reason for issuing the notices,

as stated therein: *"the operational development and the material change of use of the land to a leisure use amounts to unacceptable harm to an area of countryside falling within the Medway Valley Landscape of Local Value"* contrary to policies of the Maidstone Local Plan 2017 (MLP).

111. It is noted that the Council asserts harm is caused by the material change of use but does not require it to cease. I suspect infelicitous drafting is the culprit; the Council is tolerably clear elsewhere in its submissions that it is content to permit the use to subsist if all the associated structures are removed. At any rate the main focus of the planning merits is on landscape and visual impacts although wildlife and biodiversity matters are also relevant.

Plots not enforced against or not subject to appeal on ground (a)

112. Doporto and others argue that the land use at Plots 31 and 21 are significant for a ground (a) appeal, given that no enforcement action has been taken against those plots. Action has not been taken against several of the 31 plots that form this stretch of the riverbank and riverbed. The reason is unclear but it would not be appropriate to jump to conclusions, eg to assume that the Council is or is not contemplating taking action in regard to these plots.
113. I have to say at the outset that I agree with the Council that the overall picture of the 31 plots taken together is one of incongruity with the natural riverbank setting, caused by clutter, an array of outbuildings, moorings, rubbish, division of plots, multiple cars parked at various places within plots and domestic paraphernalia littering the place. However there is no need to pass comment on individual plots not served with a notice.

Reasons

114. Since I have determined that the planning unit is the stretch of riverbank and riverbed used for mooring now severed into 31 plots, it is necessary to consider the effect on the wider land of the material change in use compared with the pre-existing use, but it is also important and indeed I have a duty, to consider individually each appeal. I will indicate where there is no ground (a) appeal.
115. Some appeal plots are neater and tidier than others. That does not mean to say that, if perhaps they exhibit a lesser degradation of the environment such that their appearance might be seen as appropriate for example in the far reaches of a suburban garden that backs onto a river, they do not undermine the natural setting of the riverscape or cause harm to the pre-existing use of the land through conflict with key development plan policies.

Landscape and visual impacts

116. A key policy is MLP Policy SS1(10) which sets out that the green and blue network of multi-functional open spaces, rivers and water courses and landscapes of local value will be conserved and enhanced. The supporting text states that these green / blue corridors are to be preserved without change whilst paragraph 4.20 accepts that change can be accommodated *"provided that the function of the corridors is not compromised"*.

117. The appendices to Doporto's statements on landscape and visual matters have been considered¹⁰, in which it is accepted that historically the wider riverside site comprised unmanaged scrubland between the raised railway line and river edge. Doporto's case relates to Plot 30 and only mentions Plot 27 out of an abundance of caution as it considers it has sold the land to the instigators of Appeals L and M. As it is the most detailed case I deal with it first, but also consider the points raised in the context of the other appeals and the wider planning unit, as indeed the statement itself does, albeit that it disagrees with my appraisal of what should constitute that planning unit.
118. There is no issue as far as I am concerned with the general assessment of the site as of medium landscape quality, enclosed and to a large degree separate from the more open landscape away from the river, subject also to influences from the adjoining railway line, recreational use of the river and the Medway Valley Walk (although it is uncertain what is meant by "*the permitted features and uses within it*"). I also agree the site is of high landscape value, due to the leisure use of the river and in particular the popular Medway Valley Walk which passes through the site.
119. However I find Doporto's agent's and the consultant's use and application of the term "baseline" confusing and in error. The agent asserts that the wider riverside site underwent relatively significant change in recent years "*through management and use of the land which has created the baseline position..This has included the clearance of scrub and vegetation, formalisation of the Medway Valley Path, mooring of boats, the creation of enclosures etc.*"¹¹. He further describes the baseline position as that which "*could (and is likely to) exist if the notices are upheld and complied with (and the requirements of the notice are clarified.*" The agent also refers to his consultant's Landscape and Visual Assessment (LVA) which, according to the agent "*considers the degree of change when the baseline situation is accounted for*".
120. It becomes clear on perusal that this appraisal assumes that the appropriate comparison is between the development already in place and a "*visualisation of what the views would look like without the additional features*". It is necessary to quote this passage of the LVA in full:
- "8.8 In most cases there is an element of visualisation in the assessment of landscape and visual effects, in terms of envisaging what a proposed development may look like, where it may be visible from and what effects it may have, but in this case the development is already in place, so it is quite straightforward to ascertain how the development appears in the landscape and what the resulting harm is, and any visualisation needed is of what the views would look like without the additional features, in order to determine the effects. It is also important to compare that change against the baseline situation, i.e. what the site would be like without the above development."*
121. The fundamental error in this approach is to assume that much if not all of the development already in place is permitted development whereas as I have explained above it is not. It is not the "baseline". The baseline is the pre-

¹⁰ June 2020 - Appendix A Figures Figure 1 Location Plan, Figure 2 Aerial Photograph and Photograph Viewpoints, Appendix B Photographs, Appendix C, Methodology, Appendix D Plot Locations.

¹¹ Section 5.3 of the appeal statement.

existing use of the land prior to the material change of use. Conveniently Doporto sets out what is considered to be a fall-back position:

- *clearance of vegetation, scrub and trees said not to be development under s55 of the Act;*
- *erection of gates, walls and fences said to be permitted development;*
- *stationing of boats on the river, outside the boundaries of the land to which the notice relates, said not to involve operational development;*
- *the intensification of the lawful leisure use of the land (such as for walking, cycling, fishing, picnicking) said not to comprise a material change of use of land; and*
- *the stationing of temporary structures, vehicles or other such chattels in connection with the use of the land (not explained fully but presumably since this is said to be either permitted development or no development).*

122. I accept with regard to the first item, that clearance of vegetation to improve visibility and so forth is not in itself development and not the target of the notice. But as I have found already, such activities, coupled with an increased public use of the footpath/cyclepath, and even possible access to the land prior to subdivision, whether by permission of the then landowner or not, cannot be evidenced to any more than a normal use of the public right of way and an occasional use of the riverbank on which and from which picnicking or fishing might have occurred. All this was part of the pre-existing use. Stationing of boats on the riverbed was not clearly in evidence as part of such use. Nor were the erection of gates, walls and fences, temporary structures, vehicles or other "chattels" in evidence to any significant degree prior to subdivision and I have explained the position regarding associated works.

123. Therefore the baseline as advanced by Doporto is misconceived. Furthermore the concept appears to be confabulated with an assessment of minor additional development proposed, above that which already prevails in situ. This is not the appropriate approach which should focus rather on the difference between what constitutes the development comprised in the breach of planning control, and the pre-existing use of the land.

124. The Maidstone Landscape Character Assessment defines this area as the Medway Valley Walk with the Condition assessment of the landscape as Very Good with few detracting features, unified pattern of elements, strong visual unity, strong ecological integrity and very strong functional integrity. It also confirms that the Sensitivity Maidstone Borough Council Assessment is High, with a strong sense of place, moderate visibility, dominant landform and historic continuity.

125. I agree with the Council that it is the subdivision of the land into several individually owned plots (and the consequent activities and works thereon) which has led to a significant change in the character and appearance of the area. The Council describes Plot 30 which is occupied by several sub-tenants or occupants, as containing an array of detritus materials and other paraphernalia. Some of the images supplied and my own site inspection

confirms this is the case. Overall the development detracts considerably from the predominantly natural appearance of the riverbank and its setting, causing significant harm by virtue of its incongruous and alien character.

126. In Paragraph 10 of the 2008 appeal decision the Inspector notes a significant difference between the wider land and the urbanised banks running therefrom to the town centre, and that:

"the northern part of the site shares much of the character and appearance of the southern area in the ALLI [Area of Local Landscape Importance] with its steep wooded bank on the eastern side."

127. It is not disputed that this riverside area in Fant does not fall within the listed areas considered acceptable for small scale and short-term mooring facilities. In any event I do not consider what has occurred within the planning unit to be either small scale or short-term. Individual plots may have less obtrusive mooring facilities than others but they all have in common that they are there to accommodate home mooring of boats which has led to the whole stretch of the riverbed to be populated more rather than less continuously. As discussed the mooring, ie the placement of boats in the river is not the subject of this enforcement notice, but the mooring facilities in many cases, including at Plot 30 are very prominent. Taken together the facilities extend over the length of the planning unit and in my view have a cumulative adverse impact on the riverside setting, quite differently from what one might reasonably expect to see on a use incidental to the navigation.

128. It is noteworthy that the previous Inspector considered that concerns about "tidying up" of natural vegetation and plant growth could be limited by preventing fencing at the moorings, but that:

"even a simple access from the land would jar in this natural setting."
(Paragraph 12).

129. Policy DM26 states *"the impact including cumulative impact, shall preserve landscape quality, ecology and uses of the river and valley in the locality"* and *"proposals create no operational problems for other river users and fishermen"*.

130. In a pre-application enquiry made in January 2020, an alternative approach was sought to the management of the land and moorings on the wider riverside site to overcome the Council's concerns, using another plot as an example. On 8 May 2020 the Council's reply included an assessment of the planning history of the site. It was noted much was made of the permitted development rights available to the individual plot holders which has resulted in the current cluttered appearance and adverse impact on the character of the locality. The officer continued:

"Obviously you are aware of the recent Article 4 Direction which now restricts the erection of fencing but I am also sure that you will be aware of the implications of Article 3 of the GPDO 2015 (as amended) which effectively removes the permitted rights exercisable under the GPDO if the development or use is unlawful."

131. The officer was told much had changed since the 2008 appeal decision, including the upgrading of the towpath, and loss of tree cover which creates

the enclosure and the ability of individual plot owners to utilise their permitted development rights. Whilst noting the tarmacadam footpath laid by on the PROW, the officer replied – and I agree with this assessment – that had not changed the character of the site, the principles of the Medway Valley Walk remained intact and whilst there was a loss of some tree cover, much still existed and likewise the enclosure created by the valley sides. What was incongruous was the clutter, array of outbuildings, moorings and platforms, piles of rubbish, division of plots, multiple cars parked at various plots etc which have fundamentally changed the character of this highly sensitive site.

132. Efforts have been made by some owners to enhance wildlife but this is not true for every plot. Unfortunately and as detailed below, I cannot be confident that the cumulative impact of development in this area, if allowed to sprawl uncontrolled, would not cause harm to its surroundings and natural habitats.
133. The requirements do not in fact include the removal of existing vegetation. The mooring of boats may be characteristic of parts of the Medway Valley but not generally. The use of the land and the associated works including those in connection with the home mooring of boats for leisure use, is incompatible with the historic use and landscape of the Medway along this stretch of the riverside. Doporto emphasises the temporary nature of structures on the land. I have no reason to suppose they cannot easily be removed, but they have a degree of permanence about them that militates against their perception as merely temporary (and therefore impliedly acceptable in appearance).
134. As to the possible intensification of the lawful leisure use of the land for walking, cycling, fishing, picnicking and the like, subject to compliance with any regulatory requirements these activities are in any event within the Council's contemplation of possible a future leisure or recreational use that is on open and unenclosed land. However the character of land reasonably used as such would be very different from the current use of the plots.
135. I have considered whether the development can be controlled by conditions; for example and as suggested, to require the implementation and management of a detailed landscaping strategy, to secure a net benefit in landscape terms, particularly once the material fall-back position above is taken into account. However that would not redress the harm caused by the proliferation of man-made structures of all kinds associated with the unlawful development.

Wildlife and biodiversity matters

136. The Council is also concerned that the development would cause significant harm to natural habitats, making reference to the previous appeal decision which it said addressed the issues of nature conservation, biodiversity and ecological interests. I agree these matters are worthy of protection in accordance with the Council's policies, however it has not explained its case other than with this reference. In fact the decision dismissed the appeal on grounds other than nature conservation related matters, noting however that the absence of surveys would have been contrary to a structure plan policy no longer in force.
137. I recognise the efforts that some plot owners have made to enhance biodiversity, just to take an example, on Plot 17, laying out a wildlife pond for

frogs, snakes and lizards. However although well-intentioned and no doubt effective to an extent, these are piecemeal initiatives; it is relevant that the wider area has not been specifically surveyed for such purposes for some time.

138. The previous appeal decision points up the acknowledged presence of habitats for reptiles and water voles, and potential for use by bats, all sufficient to require surveys to be carried out before planning permission is granted not afterward. These are issues relevant today and such characteristics intrinsic to the area along the riverbank should be protected. Doporto in its final comments dismissed the Council's concerns as not evidencing actual harm to wildlife and biodiversity matters and refers to any "residual concerns" being able to be resolved by conditions, although none are drafted or specifically suggested.
139. MLP Policies DM3 and DM26 require development where appropriate to enhance the natural environment through measures to protect features of biological interest, support opportunities to create priority habitats, and create, enhance and restore other habitats. Cumulative impacts of development should preserve ecology and uses of the river and valley in the locality. That cannot be done effectively in my view without a proper prior assessment on the planning unit as a whole, and evidence is lacking in this respect. I cannot therefore be confident that the development would take appropriate measures as envisaged and to that extent it would fail to comply with MLP Policies DM3 and DM26.

Matters relating to other individual plots

Plot 12 (no ground (a))

140. Photographs annotated taken at time of service of the enforcement notice show a shed with metal doors on the hinterland, along the path there is wooden fencing adorned with coloured lights, and an iron gate to the mooring area which contains outdoor furniture in the form of a parasol and chairs, and a wrought iron bench. The mooring facility consists of a plank with a metal rail on one side, a lifebelt and a few more coloured lights. A Dutch barge is moored beside the land. It is not disputed that the storage shed which is used for boat and garden equipment, has no permanent foundations.

Plot 13 (no ground (a))

141. Photographs of the plot taken when the notice was issued show a storage shed, small animal hutch, mooring facilities and garden structures. The shed is next to the hutch at the back of the plot on the other side of the path, behind a wooden paling fence with gaps. To the front is a round wrought iron-type table and two outdoor chairs next to a tree with a bird box. On the front part of the plot next to water's edge are shown a tall weathervane and what appears to be a portable generator. Although no pontoons, decking or landing stages are seen, a gang plank is used and what appear to be rigid poles set into the ground close to the river. The appellant's shed houses ropes and safety equipment to facilitate the home mooring. I do not regard the land as having been left in its natural state as suggested.

Plot 15 (no ground (a))

142. The appellant was not present when I visited the site, however I was able to see most of it from the footpath. Its general appearance was not different from

that in the photographs taken of the plot on the day of service of the notice. There was a wooden plank acting as a mooring facility, leading to a boat moored alongside the plot. There were several timber sheds, one of substantial size, ancillary structures, a pallet, plastic receptacle, timber fencing, outdoor rotary dryer, apparently discarded plastic buckets, plastic bags, plastic bottle, timber waste, incinerator bin with lid, wooden animal hutches, disused tyres and various other items scattered around the site. Clearly in my view the site has been used for purposes that include leisure and to facilitate mooring boats.

143. S.M. supplied on behalf of the appellant an image of the gangplank from the land to the barge, in fact a connecting metal gangway from the open hatch of the boat to dry land, where it rests on a small wooden support and abuts the timber plank described earlier. Whilst neither the gangway nor the plank appears fixed to the ground the boat is shown moored to the land by means of metal posts driven into the ground and longer posts, probably with a swivel mechanism reaching out to the boat.
144. The image is part of a suite of photographs from S.M to support her need for access at Rijo-A-Dam, Unicumes Lane. These show her in a wheelchair on the public footpath, her foot, the land before access of the gangplank was installed. This shows much denser vegetation along the bank and a boat moored by means of a rope and or chain mooring secured on the land and two timbers forming an access from the boat to the bank. A further image shows the bank in front of the moored boat, now cleared of vegetation. Of this image it is said that the land was [still] difficult to traverse in a wheelchair and especially when the land became muddy.
145. Another image is supplied of the undercarriage of the walkway apparently constructed by means of a hammer and an electrically powered machine said to be with leeway for hedgehogs and moles to traverse the land. Another shows the turning point for a wheelchair which is a large L-shaped platform on the plot constructed from fairly deep timbers, on which is seen a wheelchair and a three-seater wooden bench. As I saw this platform it continued inland at width of a metre or so to a timber post and wire gate affording access to the public footpath.

Plot 16

146. This plot is relatively free from structures, however there is a storage structure and fencing. The storage structure is some 8ft x 5ft and 6.5ft in height with no apparent foundations, painted blue/green and largely screened by trees. It is seen as essential to maintain the site in line with planning policies for conservation and enhancement of the networks of open spaces, and to store mowers and tree maintenance equipment.
147. Of all the plots, Plot 16 is in my view in a relatively unspoilt natural state that is in keeping with the pre-existing use. The plot is relatively long compared with others around it and configured such that the curve of the path through it means that through views are limited; the particular choice of post and wire fencing is not unacceptably at odds with this part of the riverbank. The solitary shed is in a large plot, painted in recessive tones and somewhat screened by vegetation further up the bank. It does not unacceptably conflict with the Council's planning policies cited in the reasons for issuing the notice.

148. I might add here that the fencing that encloses each plot but which also serves to enclose the public path to a certain width, has been erected by the owners who have de facto confined the width of the footpath. It is understood to have no recorded width. However whilst its true width may not have been fully bottomed out by the Council or by the County Council which latter body has responsibility for maintaining the DMS, no concerns have been raised on that score. I have no reason to believe that the extent of public rights of passage, including any residual rights if any pertaining to its being a "towpath", exceed what has been marked out by the fencing on this plot. Of course the situation would need to be re-assessed as at the date of an eventual permission granted subsequently for this or any other plot.
149. I will grant permission for this structure and the fencing but in light of the statements as to the use of the land for what amounts to a leisure home mooring use, I will uphold the notice as it relates to mooring facilities. As with the other plot owners, it will be for the Council to determine what action it wishes to take as regards the use of the riverbed, and for the owners to seek permission to retain such use and/or any works associated with that use.

Plots 17 and 24 (no ground (a))

150. Photographs of Plot 17 taken at time of service of the enforcement notice show timber and wire fencing around a tall entrance gate of timber, swing seat with canopy, plastic chairs, planters, a large green container, garden furniture, wooden structures or platforms, multi-coloured lighting poles at the edge of the river, and a parking space beyond the footpath with more timber fencing. The boat "Eve" is home moored here.
151. Images of Plot 24 show swivel type mooring facilities of steel tubes with timber platforms, and wooden trellis fencing. On my site visit I saw the fencing still in place, additional steel and canvas chairs and a table, a wheelbarrow, the long pole type moorings, the storage container, and a large tub with plants. The boat "The Unicorn" is home moored here.
152. Thus both plots are used for home mooring of boats. Issue is taken with the notice restricting rights to moor these boats but the notice does not do this per se. As corrected it does seek to prevent the riverbank (rather than the riverbed) being used to site facilities for home mooring.
153. The old stone wharf visible above the water line is now decayed and smaller than when it was used to load stone from a nearby quarry. It means that for home mooring purposes a gang plank platform has been erected on this plot to span the stone with vertical poles. Although considered minimal equipment, in my view its permanence for such purposes adds to the adverse effect on the natural setting of the riverbank.
154. Chestnut fencing showcase traditional Kentish coppice craft, they are relatively low key in isolation but they are part of the general enclosure which with its elaborately constructed wooden arched entrance to the plot is entirely out of keeping with the wider character of the area. Without the fences it is said local people, walking or cycling would present a security issue, and this is true of all the plots but this can only be a concern where the present uses continue unabated.

155. The lighting at the top of the poles may be for security, but these structures at the river edge present an incongruous and alien appearance that protrudes from the vegetation. I do not agree that that the storage boxes and other structures are unobtrusive, or that the boats whose home moorings have been occasioned by the use of the riverbank, are an intrinsic part of the landscape on this particular stretch of the river.
156. The images of the river in spate, which is known to flood frequently, and attendant difficulties with mooring boats permanently on this stretch of the river, highlight in my view that the present ad hoc arrangements are no substitute for a properly evaluated proposal that gives full consideration to how, if at all, permanent mooring facilities could be established in this location.

Plots 19 and 20 (no ground (a))

157. Photographs taken at time of service of the enforcement notice show that both plots have been fenced off from the public footpath with gates and timber and wire fencing attached to which is timber shelving on which sit garden plants. There is also a wooden table and benches, a tall arched structure constructed of timber, a timber latticed structure and quite a large metal garden ornament on a stone plinth.
158. The only representation made by the appellant for these plots is that the land has always been used for leisure purposes of walking, cycling, fishing etc. This may well be so but as explained above such uses fall naturally as incidental to the relatively undisturbed use that may have been made of the riverbank in this location. The domesticated use made of these plots has a different quality of use entirely.

Plots 26 and 27 (no ground (a))

159. The long barge, "Good Vibrations" is moored alongside these Plots 26 and 27. Doporto's general submissions made for Plots 27 and 30 are considered in detail above.
160. The Council refers in its statement to various developments evidenced at the time of service of the notice which included a small shed, a shed/outside toilet, a small jetty and vehicle hardstanding/parking. Photographs taken at time of service of the enforcement notice show fencing comprising timber slats and posts, and on Plot 27 a scaffolding like structure together with what appears to be a barbeque, and garden tools. On my site inspection the scaffolding type structure was seen to be part of the mooring facility and both plots appeared in use as leisure or garden plots. Indeed the submitted photographs from the appellants reflect the domesticated character of the plots which has a harmful effect compared to its erstwhile character and appearance.
161. The appellants purchased both plots, state they have not changed its layout, keep a vegetable patch, have planted trees and left the land for wildlife to flourish. Letters in support note their efforts to enhance wildlife and to environmental improvements generally. Although it would appear the latter relates more to the conditions as to use of the pathway itself, overall the plots are seen as a tranquil setting of natural vegetation. As stated, the public right of way/riverside walk is not a main leisure use of the site but an incidental

feature, the public may not access plots outside the path which does not characterise the main use of the appeal sites.

162. They submit photographs of mooring facilities elsewhere on this stretch of river that they contend are more visually offensive than their facilities but I do not find that a compelling reason to accept what is in situ. Whilst much of the site has dense vegetation and a well-cared for vegetable patch, its appearance is marred by the presence of scaffolding-like structures associated with the mooring of the vessel. In addition they park a car on their land, and curiously they *"do feel that there is too much vehicular activity in certain places."* The parking area is said to have removable hardstanding which I could not verify on inspection but it was composed of timber planks several of which were rotting away. The presence of vehicles on this and other plots together with hardstanding structures spoil the character and appearance of the area in my opinion.
163. They maintain there is no change of use from agriculture to a leisure use but elsewhere state that on purchasing the land they cleared it of rubbish and feel it has been enhanced and "made safe for leisure use", referring to the public right of way as "a restricted byway [sic] leading to the river used by the allotment owners, ourselves and general public for parking". They are willing to work with the Council to resolve the enforcement action but maintain there was no change of use from agriculture to leisure. There is no evidence that the way is a restricted byway.
164. Although in this case the emphasis is on cruising away from the plot, it is the place to which the barge returns and in that sense it is clearly a home mooring base. The appellants do not use the barge as their residence and no other place to which it might return after cruising is mentioned.
165. There is an observation from one local resident that, if the renting and selling off of plots along the river way is to be sanctioned, the owners of these plots should be the "ambassadors" as to how the plots should be maintained. I fundamentally disagree. The scale and cumulative impact of the uses made of the plots, including these plots, greatly harms the visual amenity of the rural character of this part of the riverscape.
166. It is Plot 16 that alone provides an acceptable example of low key activity consistent with local landscape character and appearance.

Plot 28

167. The appellants in these appeals (O, P and Q, but also in fact R, S and T) acknowledge they have only had ownership of the land for what is now some 4-5 years. I have considered the detailed assessment supplied, of structures in relation to the surrounding landscape and other built structures, and planned management and planting of the land to protect and enhance the natural environment. Much of this planned work, if not all of it, would not require planning permission but such is not the subject matter of the enforcement notice in relation to this plot.
168. The Council's SoC for these plots is poorly drafted, eg it refers to Plots 19/20, misdescribes ground (c) and fails to articulate clearly the factual position on the ground.

169. Nevertheless photographs of this plot taken when the notice was served indicate the presence of a large metal pole-like structure, tied to various wooden structures and what appear to be mooring facilities further down to the water's edge comprising tubular metal work painted green with ropes attached, and on the other side of the plot to the path, a conspicuous red timber garden-type gate with a large metalwork arched frame above it, various other timber structures beyond, enclosed by post and wire fencing along the path. Thus it is not just a case as argued, of a single mooring and a single structure on the land.
170. The appellants submit an appeal decision on the use of land by the Kennet and Avon Canal for mooring of residential boats not in the course of navigation which was allowed in 2007. This in support of their case that their mooring facilities are incidental to use of a boat moored there and that ancillary buildings on the riverbank used to store boating equipment for the home mooring of a boat was permitted as incidental to the wider canal use.
171. However, whether or not home moorings could be held incidental to the use of the whole canal which was there considered to be a single entity, in this case this particular stretch of river and riverbank have had a character and setting that had not included a constant mooring of a line of boats which now obtains, moreover individual boats do have a specifically reserved place pursuant to the ownership of individual plots and riverbed beyond. The upshot is an adverse impact on the character and appearance of this stretch of the riverbank.
172. The Council may have demonstrated a desire for new moorings in the area generally but not in this location. There is some evidence of a historical wharf along parts of the stretch of riverbank within the planning unit but that was for commercial or industrial uses that have long since been abandoned. I do not doubt that river traffic within the navigation is commonplace here, but that is not equivalent to the prevalence on this and other plots of home moorings which is admitted to take place in the case of the boat "Diogenes" for which the mooring facilities on dry land have been sited, as well as in part the storage building. This activity in my view undermines the essential nature of the pre-existing use as undeveloped open countryside; development and other human activity nearby have been considered but do not give a compelling reason to accept such development on this and the other plots.
173. The appellants have offered and would continue to welcome constructive dialogue with the Council to resolve matters. But for the fact that the structures now on the land are part and parcel of the unauthorised use it is correct that an agricultural use or a return to agricultural use might be accompanied by appropriate permitted development. For example the appellants state if they can't store agricultural tools and materials thereon they would *"be forced to consider having to use a motor vehicle to transport said tools and materials to the nearest public road to the site."* In a way this points up the dilemma whereby some users are more considerate and cautious, whilst others assert in error the right to bring an MPV up the public footpath, park it on their land, and thereby add to the degradation of the environment in this location.
174. With the conspicuous (or perhaps I should say the inconspicuous) exception of Plot 16, the solution must in my view be to uphold the requirements of the

notices so that all structures are removed, allowing time to negotiate with the Council in individual cases where it may appear to it that subsequent proposals would not unduly interfere with the visual amenities of the landscape in this vicinity.

175. It would be hoped that any future engagement could be in a spirit of collaboration as I have no doubt the appellants genuinely desire. However there remains my concern that suitable development could be achieved on this stretch of riverbank which has been sub-divided, without consideration being given to whether a comprehensive development is required or is possible. That in part is of course dependent on the attitude the Council takes towards the home moorings themselves, and the other plots not subject to the present enforcement action.

Human Rights and equality considerations

176. Some appellants contend that their human rights would be infringed were the notice to which they are subject be upheld. I have considered the Human Rights Act 1998 that enshrines in UK law relevant fundamental rights and freedoms in the European Convention on Human Rights. If the notices were upheld that may interfere with appellants' and occupiers' rights under Article 8 that states everyone has a right to respect for his home, and Article 1 of the First Protocol concerning enjoyment of possessions. Such rights are qualified. My view on the evidence is that any interference with those rights is necessary and proportionate when also taking into account the wider public interest of remedying the harm arising from the unauthorised development. Interference with rights of individual occupiers and appellants is necessary and proportionate to achieve such legitimate public purposes.
177. Also considered in these appeals is the Public Sector Equality Duty (PSED) contained in the Equality Act 2010 that sets out the need to eliminate unlawful discrimination and advance equality of opportunity and foster good relations between people who share a protected characteristic and people who do not share it. I am particularly mindful of the provision that some facilities sited on the plots may have made for specially abled people including widened pontoons and the like which I observed.
178. I appreciate the stress and anxiety that may be caused by being served with notices to dismantle such facilities and the fact that this may have a greater impact on persons with such protected characteristics. However, considering possible steps to address that inequality I find no alternatives that would be appropriate to the circumstances and have harmful impacts. Weighing all the relevant considerations in the balance, I consider that upholding each of the notices would be proportionate.

Conclusion on ground (a)

179. To summarise, I am satisfied that the subdivision of the riverbank into numerous small plots of land, now in the hands of numerous land-owners who, I have no reason to doubt with sincere motives, have embarked on their own activities within their fenced off plots, has led to a significantly adverse and harmful change in the appearance and character of the area.

180. Unfortunately it has been honestly but mistakenly assumed (see for example the assertion in Appeal B that “no change of use has occurred that is not allowed in our title deeds”) that the right to develop is more aligned with proprietary rights than is the case. I am not privy to the terms of the sale of each of these plots and it is not for me to pass judgement on the rights and wrongs of how that may have been effected, however there are planning consequences of development associated with the change of use that has undoubtedly occurred. Should the owners consider that their land is incapable of reasonably beneficial use consequent upon these Decisions, it is for them to take advice on the way forward and that is not a matter for me.
181. I find that the works alleged to be associated with the unauthorised material change of use cause unacceptable harm to an area of countryside within the Medway Valley Landscape of Local Value, contrary to MLP Policies SS1, SP17, DM3 and DM26.
182. Furthermore, for the purposes of Policy DM30 I am also concerned that the unauthorised developments would fail to enhance the local distinctiveness and character of the Medway Valley and its views of openness along the riverbank’s towpath and the public footpath.
183. In addition I consider the harm caused by the use of external lighting on individual plots where it occurs, for example in Plot 12 and Plot 17, to be unacceptable in this location and fail to comply with Policy DM7 in that it would be visually detrimental to its immediate or wider setting.
184. Therefore, save for Plot 16 (in part), for the reasons given above and considering all other matters raised the appeals on ground (a) fail.

Appeals C,N,O,P,Q,R,S,T,U,V,W and X on Ground (f)

185. An appeal on ground (f) is a claim that the requirements of the notice exceed what is necessary to remedy the breach of planning control or, as the case may be, to remedy any harm to amenity resulting from the breach.
186. It is clear from the requirements of the notices that their purpose is to remedy the harm to amenity resulting from the breach. Doporto in particular argues that the fences, gates and means of enclosure are permitted development, such that the notice should be amended to clarify that they are not ‘structures’ or ‘garden structures’ required to be removed.
187. The Council recognises in its statements that the requirements of the notices would not remedy the entirety of the breach but considers them “sufficient to reduce the intensity of the use to a level which would mitigate the harm caused by that use”. One might ask how can the land be used for the use alleged in the notice as corrected, without there being physical incidents of the use? However leisure activities are not prevented such as for example fishing, picnicking, exercise and other forms of open-air recreation which do not require the siting of structures on the land, as well as the siting of facilities only for occasional mooring in the course of navigation.
188. The appellant on Plot 12 is willing to remove the shed as a “compromise” but the Council says its retention should be applied for via planning permission. I do not read the offer as an appeal on ground (f), as it is unclear if she offers to

remove it in return for retention of other items, or vice versa. Properly read it is a freestanding offer. Had a ground (f) been considered and given the lack of a ground (a) appeal, there would be no opportunity to consider the planning merits of retaining the other structures, which would be necessary in assessing whether to allow their retention as an alternative remedy that would still achieve the aim of the notice to reduce the harm caused by existence of all the structures on site.

189. I am concerned that the way I have redefined the alleged breach of planning control better to align with what is going on within the plots, may, if the notices are complied with, establish the lawfulness of the mooring facilities for permanent home mooring purposes. The Council clearly intends to reserve its decision on this issue (which in retrospect may not seem to have been the wisest of moves) but at any rate it has not sought to take action against the mooring of the boats themselves and it is not for me to fetter its discretion in this matter beyond what is inevitable in my assessment of the appeals.
190. Clearly the effects including the cumulative effects of permanently sited facilities for home mooring have changed the character of this stretch of riverscape through the visual impacts of the continuous line of boats as well as the array of ad hoc equipment, jetties, pontoons, and associated structures that facilitate this use. Whilst I find the latter aspect of those impacts unacceptable, I must be careful not to permit the home mooring use itself and the requirements of the notices will be amended accordingly.
191. I have considered whether any lesser steps than those specified would achieve the aims of the Council in redressing the harm I have identified above in ground (a). However I agree with the Council that removal of the structures which are part and parcel of the unauthorised use is necessary to remedy the harm caused by the breach of planning control.
192. Once removed, permitted development rights for means of enclosure would no longer apply due to the Article 4 direction. I have assessed under the planning merits the effects including the cumulative effects of the gates and fencing on the visual amenity of the landscape, which (with the sole exception of Plot 16) are in my view significantly adverse and consequently harmful.
193. Advice was sought from the Council on an alternative scheme to redevelop the existing boat mooring facilities to overcome the Council's concerns. Plot 20 was used as an example. This cannot form part of a ground (f) appeal. As the officer's advice stated (8 May 2020) it is not accepted that the effect of the fall-back position of a complied-with notice is tantamount to allowing the proposals envisaged by that pre-application submission.
194. It would serve no good purpose to attempt, as suggested to reference each and every one of the structures targeted by the notices. By the nature of some of them at least, they may be there one day and the next day replaced by others. The essence of the required steps is a cleared site without inhibiting the exercise of open-air leisure/recreational activities in a natural riverbank setting.
195. As I have found, there were no structures or works on the land other than as are integral to or part and parcel of the present unauthorised use of land; it is therefore not relevant that any such works or structures might, prospectively

speaking, be used for a lawful use even if the unauthorised use were to cease. It is therefore appropriate for the notices to require their removal in order to remedy the breaches and restore the land to its condition prior to the breaches.

196. The appeals on ground (f) do not succeed.

Appeals N,O,P,Q,R,S,T,U,V,W on ground (g) (Plots 27, 28, 29 and 30)

197. In relation to Plots 27 and 30 Doporto, and by extension Mr Mendoza, submit the one-month time-limit for compliance is impractically short since, whilst to physically dismantle the structures might be possible in this timeframe, the users of the land would have no method by which to keep their boats at the riverbank and one month is too short a period to find alternative means of mooring. The time limit is considered particularly short if the notice has effect on those using their boats as their residential dwellings. A period of six months would be more reasonable.

198. I reject the argument that these occupiers would be faced with potential homelessness as a result of compliance. The requirements are limited in scope and nature, there is no evidence that persuades me that any appellant lives at the property or indeed so far as is relevant, on a boat moored alongside it without a permanent residence on dry land, and no compelling evidence that compliance would lead others to homelessness.

199. The appellants for Plots 28 and 29 do not propose an alternative period saying that "a number of months at least" would be more appropriate. No specific Covid related matters are advanced for any appellant in particular and any general case for an extension is not now appropriate.

200. Nevertheless in the circumstances of these appeals an opportunity should be given to appellants who seek to agree future retention of their structures, and the compliance period should be extended to four months for such purposes. However, given my decision as it relates to the wider planning unit as well as the individual plots, it is right to extend the compliance periods in like manner so I will do this also in respect of Appeals A,B,C,D,E,F,G,H,I,J,K,L, and M.

201. The appeals on ground (g) succeed. The notices, as well the notices not subject to an appeal on this ground, will be varied accordingly.

Conclusion

Appeal D

202. For the reasons given above I conclude that the appeal should succeed in part only, and I will grant planning permission for one part of the matter the subject of the enforcement notice, but otherwise I will uphold the notice with corrections and variations and refuse to grant planning permission on the other part. The requirements of the upheld notice will cease to have effect so far as inconsistent with the permission which I will grant, by virtue of s180 of the Act.

Appeals A,B,C,E,F,G,H,I,J,K,L,M,N,O,P,Q,R,S,T,U,V,W and X

203. For the reasons given above I conclude that the appeals should not succeed. I shall uphold the enforcement notice with corrections and a variation and

refuse to grant planning permission on the deemed applications where they have arisen for determination.

Formal Decisions

Appeal A Plot 12

204. It is directed that the enforcement notice be corrected as follows:

a) Delete the allegation of breach of planning control and replace with:

"Without planning permission the unauthorised material change of use of the Land from a natural riverbank to a use for individual leisure/garden purposes and siting of home mooring facilities together with other works associated therewith including the erection of a storage building, mooring facilities and garden structures including fencing, gates and other means of enclosure."

b) Insert a new requirement 1:

"Cease the unauthorised use save for leisure activities incidental to the normal use of the riverbank including in the ordinary course of navigation" and renumber requirements 1 and 2 as requirements 2 and 3;

c) Delete Requirement 2 and replace with:

"Dismantle and remove from the Land all structures erected thereon that are associated with the unauthorised material change of use."

d) Delete the period for compliance and replace with "4 months from the date this notice comes into effect".

205. Subject to these corrections and variation the appeal is dismissed and the enforcement notice is upheld.

Appeal B (Plot 13)

206. It is directed that the enforcement notice be corrected as follows:

a) Delete the allegation of breach of planning control and replace with:

"Without planning permission the unauthorised material change of use of the Land from a natural riverbank to a use for individual leisure/garden purposes and siting of home mooring facilities together with other works associated therewith including the erection of a storage building, small animal hutch, mooring facilities and garden structures including fencing, gates and other means of enclosure."

b) Insert a new requirement 1:

"Cease the unauthorised use save for leisure activities incidental to the normal use of the riverbank including in the ordinary course of navigation" and renumber requirements 1 and 2 as requirements 2 and 3;

- c) Delete Requirement 2 and replace with:

"Dismantle and remove from the Land all structures erected thereon that are associated with the unauthorised material change of use."

- d) Delete the period for compliance and replace with "4 months from the date this notice comes into effect".

207. Subject to these corrections and variation the appeal is dismissed and the enforcement notice is upheld.

Appeal C (Plot 15)

208. It is directed that the enforcement notice be corrected as follows:

- a) Delete the allegation of breach of planning control and replace with:

"Without planning permission the unauthorised material change of use of the Land from a natural riverbank to a use for individual leisure/garden purposes and siting of home mooring facilities together with other works associated therewith including the erection of a storage building, small animal hutch, mooring facilities and garden structures including fencing, gates and other means of enclosure."

- b) Insert a new requirement 1:

"Cease the unauthorised use save for leisure activities incidental to the normal use of the riverbank including in the ordinary course of navigation" and renumber requirements 1 and 2 as requirements 2 and 3;

- c) Delete Requirement 2 and replace with:

"Dismantle and remove from the Land all structures erected thereon that are associated with the unauthorised material change of use."

- d) Delete the period for compliance and replace with "4 months from the date this notice comes into effect".

209. Subject to these corrections and variation the appeal is dismissed and the enforcement notice is upheld.

Appeals D and E (Plot 16)

210. It is directed that the enforcement notice be corrected and varied as follows:

- a) Delete the allegation of breach of planning control and replace with:

"Without planning permission the unauthorised material change of use of the Land from a natural riverbank to a use for individual leisure/garden purposes and siting of home mooring facilities together with other works associated therewith including the erection of a storage building including fencing, gates and other means of enclosure."

- b) Insert a new requirement 1:

"Cease the unauthorised use save for leisure activities incidental to the normal use of the riverbank including in the ordinary course of navigation" and renumber requirements 1 and 2 as requirements 2 and 3;

c) Delete Requirement 2 and replace with:

"Dismantle and remove from the Land all structures erected thereon that are associated with the unauthorised material change of use."

d) Delete the period for compliance and replace with "4 months from the date this notice comes into effect".

211. Appeal D is allowed insofar as it relates to some of the existing fencing and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended, for the existing fencing and gate within the plot that borders the public path.

212. The appeals are otherwise dismissed and the enforcement notice is upheld as corrected and varied insofar as it relates to the land within Plot 16 and planning permission is refused in respect of Appeal D for the remaining part of the development on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal F (Plot 17)

213. It is directed that the enforcement notice be corrected as follows:

a) Delete the allegation of breach of planning control and replace with:

"Without planning permission the unauthorised material change of use of the Land from a natural riverbank to a use for individual leisure/garden purposes and siting of home mooring facilities together with other works associated therewith including the erection of storage buildings, a raised platform, external lighting, mooring facilities and garden structures including fencing, gates and other means of enclosure."

b) Insert a new requirement 1:

Cease the unauthorised use save for leisure activities incidental to the normal use of the riverbank including in the ordinary course of navigation" and renumber requirements 1 and 2 as requirements 2 and 3;

c) Delete Requirement 2 and replace with:

"Dismantle and remove from the Land all structures erected thereon that are associated with the unauthorised material change of use."

d) Delete the period for compliance and replace with "4 months from the date this notice comes into effect".

214. Subject to these corrections and variation the appeal is dismissed and the enforcement notice is upheld.

Appeal G (Plot 19)

215. It is directed that the enforcement notice be corrected as follows:

a) Delete the allegation of breach of planning control and replace with:

“Without planning permission the unauthorised material change of use of the Land from a natural riverbank to a use for individual leisure/garden purposes and siting of home mooring facilities together with other works associated therewith including the erection of garden structures including fencing, gates and other means of enclosure.”

b) Insert a new requirement 1:

“Cease the unauthorised use save for leisure activities incidental to the normal use of the riverbank including in the ordinary course of navigation” and renumber requirements 1 and 2 as requirements 2 and 3;

c) Delete Requirement 2 and replace with:

“Dismantle and remove from the Land all structures erected thereon that are associated with the unauthorised material change of use.”

d) Delete the period for compliance and replace with “4 months from the date this notice comes into effect”.

216. Subject to these corrections and variation the appeal is dismissed and the enforcement notice is upheld.

Appeal H (Plot 20)

217. It is directed that the enforcement notice be corrected as follows:

a) Delete the allegation of breach of planning control and replace with:

“Without planning permission the unauthorised material change of use of the Land from a natural riverbank to a use for individual leisure/garden purposes and siting of home mooring facilities together with other works associated therewith including the erection of garden structures including fencing, gates and other means of enclosure.”

b) Insert a new requirement 1:

“Cease the unauthorised use save for leisure activities incidental to the normal use of the riverbank including in the ordinary course of navigation” and renumber requirements 1 and 2 as requirements 2 and 3;

c) Delete Requirement 2 and replace with:

“Dismantle and remove from the Land all structures erected thereon that are associated with the unauthorised material change of use.”

d) Delete the period for compliance and replace with “4 months from the date this notice comes into effect”.

218. Subject to these corrections and variation the appeal is dismissed and the enforcement notice is upheld.

Appeal I (Plot 24)

219. It is directed that the enforcement notice be corrected as follows:

a) Delete the allegation of breach of planning control and replace with:

“Without planning permission the unauthorised material change of use of the Land from a natural riverbank to a use for individual leisure/garden purposes and siting of home mooring facilities together with other works associated therewith including the erection of a storage building, mooring facilities and garden structures including fencing, gates and other means of enclosure.”

b) Insert a new requirement 1:

“Cease the unauthorised use save for leisure activities incidental to the normal use of the riverbank including in the ordinary course of navigation” and renumber requirements 1 and 2 as requirements 2 and 3;

c) Delete Requirement 2 and replace with:

“Dismantle and remove from the Land all structures erected thereon that are associated with the unauthorised material change of use.”

d) Delete the period for compliance and replace with “4 months from the date this notice comes into effect”.

220. Subject to these corrections and variation the appeal is dismissed and the enforcement notice is upheld.

Appeals J and K (Plot 26)

221. It is directed that the enforcement notice be corrected as follows:

a) Delete the allegation of breach of planning control and replace with:

“Without planning permission the unauthorised material change of use of the Land from a natural riverbank to a use for individual leisure/garden purposes and siting of home mooring facilities together with other works associated therewith including the erection of storage buildings, mooring facilities and garden structures including fencing, gates and other means of enclosure.”

b) Insert a new requirement 1:

“Cease the unauthorised use save for leisure activities incidental to the normal use of the riverbank including in the ordinary course of navigation” and renumber requirements 1 and 2 as requirements 2 and 3;

c) Delete Requirement 2 and replace with:

"Dismantle and remove from the Land all structures erected thereon that are associated with the unauthorised material change of use."

- d) Delete the period for compliance and replace with "4 months from the date this notice comes into effect".

222. Subject to these corrections and variation the appeal is dismissed and the enforcement notice is upheld.

Appeals L, M and N (Plot 27)

223. It is directed that the enforcement notice be corrected as follows:

- a) Delete the allegation of breach of planning control and replace with:

"Without planning permission the unauthorised material change of use of the Land from a natural riverbank to a use for individual leisure/garden purposes and siting of home mooring facilities together with other works associated therewith including the erection of storage buildings, mooring facilities and garden structures including fencing, gates and other means of enclosure."

- b) Insert a new requirement 1:

"Cease the unauthorised use save for leisure activities incidental to the normal use of the riverbank including in the ordinary course of navigation" and renumber requirements 1 and 2 as requirements 2 and 3;

- c) Delete Requirement 2 and replace with:

"Dismantle and remove from the Land all structures erected thereon that are associated with the unauthorised material change of use."

- d) Delete the period for compliance and replace with "4 months from the date this notice comes into effect".

224. Subject to these corrections and variation the appeals are dismissed, and the enforcement notice is upheld.

Appeals O, P and Q (Plot 28)

225. It is directed that the enforcement notice be corrected as follows:

- a) Delete the allegation of breach of planning control and replace with:

"Without planning permission the unauthorised material change of use of the Land from a natural riverbank to a use for individual leisure/garden purposes and siting of home mooring facilities together with other works associated therewith including the erection of mooring facilities and garden structures including fencing, gates and other means of enclosure."

- b) Insert a new requirement 1:

"Cease the unauthorised use save for leisure activities incidental to the normal use of the riverbank including in the ordinary course of

navigation" and renumber requirements 1 and 2 as requirements 2 and 3;

c) Delete Requirement 2 and replace with:

"Dismantle and remove from the Land all structures erected thereon that are associated with the unauthorised material change of use."

d) Delete the period for compliance and replace with "4 months from the date this notice comes into effect".

226. Subject to these corrections and variation the appeals are dismissed, the enforcement notice is upheld, and in respect of Appeal O planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeals R, S, and T (Plot 29)

227. It is directed that the enforcement notice be corrected as follows:

a) Delete the allegation of breach of planning control and replace with:

"Without planning permission the unauthorised material change of use of the Land from a natural riverbank to a use for individual leisure/garden purposes and siting of home mooring facilities together with other works associated therewith including the erection of storage building and garden structures including fencing, gates and other means of enclosure."

b) Insert a new requirement 1:

"Cease the unauthorised use save for leisure activities incidental to the normal use of the riverbank including in the ordinary course of navigation" and renumber requirements 1 and 2 as requirements 2 and 3;

c) Delete Requirement 2 and replace with:

"Dismantle and remove from the Land all structures erected thereon that are associated with the unauthorised material change of use."

d) Delete the period for compliance and replace with "4 months from the date this notice comes into effect".

228. Subject to these corrections and variation the appeals are dismissed, the enforcement notice is upheld, and in respect of Appeal R planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeals U, V, W and X (Plot 30)

229. It is directed that the enforcement notice be corrected as follows:

a) Delete the allegation of breach of planning control and replace with:

"Without planning permission the unauthorised material change of use of the Land from a natural riverbank to a use for individual leisure/garden

purposes and siting of home mooring facilities together with other works associated therewith including the erection of storage buildings, decking, raised platform, mooring facilities and garden structures including fencing, gates and other means of enclosure.”

b) Insert a new requirement 1:

“Cease the unauthorised use save for leisure activities incidental to the normal use of the riverbank including in the ordinary course of navigation” and renumber requirements 1 and 2 as requirements 2 and 3;

c) Delete Requirement 2 and replace with:

“Dismantle and remove from the Land all structures erected thereon that are associated with the unauthorised material change of use.”

d) Delete the period for compliance and replace with “4 months from the date this notice comes into effect”.

230. Subject to these corrections and variation the appeals are dismissed, the enforcement notice is upheld, and in respect of Appeal V planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Grahame Kean

INSPECTOR