



Appeal Decisions

by **Grahame J Kean BA (Hons) Solicitor, MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 2 February 2026

Appeal A Ref: APP/Z2260/C/23/3328989

Appeal B Ref: APP/Z2260/C/23/3328990

5 Beach Mews, Broadstairs, Thanet, Kent, CT10 1JQ

- The appeals are made under section 174 of the Town and Country Planning Act 1990 (as amended).
 - The appeals are made against an enforcement notice issued by Thanet District Council.
 - Appeal A is made by Mr Anthony O'Connell.
 - Appeal B is made by Ms Tracy Farmer.
 - The notice was issued on 2 August 2023.
 - The breach of planning control as alleged in the notice is: without planning permission the change of use from local green space to private residential terraced garden.
 - The requirements of the notice are:
 - 1) Return the land to its previous use as local green space, in respect of size and location and former land levels.
 - 2) Relocation of the boundary fence to separate the local green space from the lawful boundary of the rear/side residential garden of 5 Beach Mews Broadstairs and removal of fencing enclosing the area of local green space.
 - 3) The area of land must have turf laid and a programme of watering carried out for the next 3 months.
 - The period for compliance with the requirements is: 9 months from the date this notice takes effect.
 - The appeals are proceeding on the grounds set out in section 174(2)(b), (f), (g) of the Town and Country Planning Act 1990 (as amended).
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Appeal A

Appeal B

Formal Decision

1. It is directed that the enforcement notice is corrected and varied as follows:
 - Delete the allegation of the breach of planning control, and replace with:

without planning permission the material change of use of the land shown hatched red on the plan dated 24/723 attached to this notice to use for residential purposes.
 - Delete the requirements of the notice and replace with:
 - 1) *Maintain the height of the fencing to no more than exists at the northern, western and southern perimeters of the appeal site (including the low timber rail fencing at the front of the site fencing).*
 - 2) *Reduce the height of that part of the internal fencing to no more than 1m high, relative at each point to the internal ground level, where it separates the front and rear sections of the appeal site.*
2. Subject to the corrections and variations, the enforcement notice is upheld.

Procedural matter

3. In light of the information given by both parties including the good photographic evidence, it has not been necessary to conduct a site visit to determine these appeals.

Whether land can be designated as LGS and used residentially at the same time.

4. A development plan policy that seeks to prevent development on land is distinguishable from the actual use on the ground. One can see from the face of the notice that it purports to enforce a return to “*use as local green space*”. Apart from the fact that Local Green Space (LGS) is not a land use in itself, and is capable of encompassing a variety of uses, as discussed below, the Council does not require the residential use of the land to cease.
5. The use of land designated as LGS may take many forms. LGS could include anything from boating ponds and war memorials to allotments and green spaces created as part of new residential development.
6. A notice alleging a material change of use need not recite the previous use but it is usually preferable to do so to clarify why the Council considers there has been a material change. From the way the notice is worded, the Council’s intention is clearly that the land should be used consistently with its LGS designation.
7. By s173(11) of the Act

“Where—

(a)an enforcement notice in respect of any breach of planning control could have required any buildings or works to be removed or any activity to cease, but does not do so; and

(b)all the requirements of the notice have been complied with,

then, so far as the notice did not so require, planning permission shall be treated as having been granted by virtue of section 73A in respect of development consisting of the construction of the buildings or works or, as the case may be, the carrying out of the activities.”

8. Consequently, if the notice is upheld and the requirements are complied with, the effect of s173(11) of the Act is that, here, planning permission is granted for the residential use.

Other issues with the notice

9. There are other issues with the notice including that it does not precisely define what the appellants are expected to do in relation to the “Land” which is not accurately defined in relation to the alleged breach. However, I have a duty to get the notice into good order if possible and I can correct it if no injustice is caused to either party.
10. Firstly, the allegation refers to a change of use, not a material change of use which is clearly the target of the notice, therefore it should be amended to that effect.
11. The appeal site was part of a large area known as Culmer’s Amenity Land. The LGS designation is reflected in the current Broadstairs & St Peter’s Neighbourhood

Development Plan 2023-40 (NDP) which usefully contains a description of the land at p55:

“An informal recreation green space, next to allotments, edged with mature trees, surrounding a path with 8 benches. It is a frequently used route, linking the Vere Road coach park to Albion Street. A public right of way runs north/south across the land.”

12. LGS policy has a place in local planning but it may not always be appropriately used. As a designation in the development plan, like green belt land, it is primarily a policy related designation restricting development. Land uses can vary in such designated areas, e.g. woodland, recreation and so forth as indeed appears from the above description. In the case of the appeal site the land appears to have been open land covered with scrub. Whether open space would have better reflected the pre-existing use in the allegation of breach of planning control is less relevant, it is not a statutory requirement and in any case, there is no universal definition of open space or green space. Open space is defined in the 1990 Act as including land laid out as a public garden or used for the purposes of public recreation but I do not consider it necessary to define precisely in the notice the pre-existing use since the thrust of the allegation is clearly a material change to residential use.
13. Secondly, the Council attached two plans to the notice, one dated 31/07/23 showing the land, ie the appeal site and the second dated 24/07/23 showing a hatched area presumably intended to be specific target of enforcement action. However, the notice refers to the “land” as “5 Beach Mews”, ie the whole plot “shown edged red on the attached plan” without making it clear which plan is meant by this wording, since both plans have red edging. The wording of the notice does not refer to the “hatched area” whatsoever, nor does either plan contain within it any legend or key explaining the edging or hatching.
14. The ambiguity is compounded by the fact that steps required also refer to the “land” which, as stated must logically refer to the whole plot, thus requiring the whole plot including the house to be returned as “local green space” which is clearly nonsensical. For clarification the notice should be amended to refer to the residential use of the red hatched area by reference to the specific plan.
15. Having regard to the cases made by both parties, I am satisfied that no injustice would be caused by making these amendments and will correct the notice accordingly under powers in s176 of the 1990 Act.

Background

16. Culmer's Amenity Land is identified via paragraph 4.70 of the 2020 adopted local plan which “designates 19 Local Green Spaces which are protected under policy SP30 [sic]”. Unfortunately, the text appears inaccurate in that Policy SP30 appears to relate to biodiversity and geodiversity assets rather than Policy SP33 - Local Green Space which appears more relevant. It is Policy SP33 that states:

“The sites identified on the Policies Map as Local Green Space, and identified in paragraph 4.70, will be protected from development in accordance with the requirements of the National Planning Policy Framework.”
17. The original landowner of the site, CT10 Charities (CT10) sold a single parcel of land to a developer, for development that included the now developed mews

properties and the appeal site. The land holdings of CT10 were allotments and amenity land, partly leased to Broadstairs and St. Peter's Town Council (TC) to be retained as open green space as identified in the development plan for the area.

18. However, the land sold to the developer, on 27 April 2018 was described as *"disused and unsuitable for the intended purpose"* which I understand to mean it was regarded by CT10 as unsuitable for either allotment or amenity use irrespective of its designation in the development plan or any draft thereof.
19. I have also been informed that in January 2018 the TC discussed the role of CT10, and a councillor who was also a charity trustee described how a LGS designation could restrict the charity's work, guidance from the Charities Commission being that this should take precedence over her role as councillor.
20. The developer, Cutler Homes Ltd sold the land to Alexandra Road ACP Limited (ARACP) who acquired it on 17 May 2019. ARACP (Mr Dave Symondson) tried to gain planning permission to build an extra dwelling on the site but that was refused by the Council.¹ Drawing 19.1432.BB.PL001 shows that it covers the appeal site. The application form of 30 April 2019 stated that the existing use of the site was vacant, its last use was *"non statutory allotments"* ending on 30 September 2013.
21. It is understood that the lease to the TC of land to be used as open space, was operative from some time in 2013. I do not know whether the appeal site was included, but the clear implication from CT10's statement is that the appeal site had ceased to be used as allotments or open space. Apparently, there was a dispute over land ownership in that CT10 had advised that it owned the appeal site but from the Council's enquiries of the Land Registry, the applicant owned the site.
22. At the time ARACP tried to put an extra dwelling on the site, the land had no designation in the local plan. The draft Thanet Local Plan was submitted for independent examination in October 2018 and not adopted until 9 July 2020.
23. ARACP sold plot No 5 to the appellants and clearly the appellants were sold the additional area of land, the appeal site as a garden area. The appellants were not then informed that permission might be required to use the site residentially, by ARACP, the Council or anyone connected with the developers or builders.
24. Since the appellants acquired the land, it has been subsumed into the curtilage of the main dwelling. Their purchase of Plot 5 was completed on 22 May 2020. The enforcement notice was not served on the appellants until August 2023. In *Sumption v Greenwich LBC* [2008] 1 P. & C.R. 20 it was said that:

"In an urban environment, land attached to a dwelling house which is able and intended to be used in conjunction with the house (whether or not formally described as its garden) is likely to be within its curtilage. Over the years, land may have been acquired which extends a garden. One has to ask oneself whether there is a minimum period over which it has to be held and perhaps used before it can properly be said to form part of the curtilage (paragraph 24)."
25. As the appeal site was effectively part of the garden of No 5 from the date when the appellants took possession, I have no doubt that well before the notice was

¹ ARACP was incorporated on 3 April 2019, the directors were Richard Anthony Symonds, Adrian David Symondson and Toni Louise Baldey (disqualified from being a director in October 2025). Astute Capital Partners Ltd were the funders and wholly owned ARACP. Mr Dave Symondson made the application. On the proposed site plan one can clearly see it covers the red hatched area now owned by the appellants (Drawing 9.1432.BB.PL003_Proposed Site Plan).

issued in 2023, it could properly be said to have been included within the curtilage of the main dwelling.

26. I have considered s55(2)(d) of the Act by which “*the use of any buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such, shall not be taken for the purposes of this Act to involve development of the land.*” There is slight authority for the proposition that on a strict reading of s55(2)(d) the use of land that has become curtilage after a certain time is not development and therefore does not require planning permission. However, the better view seems to be that this does not exclude the application of relevant immunity periods to recently incorporated residential land.

Planning history

27. In 2015 planning permission ref OL/TH/14/0639 (OP) was granted to construct a small terrace of residential properties including No 5. A reserved matters (RM) approval followed, ref R/TH/18/0757, then a full permission for 5 x 3 storey 4-bed dwellings, ref F/TH/19/0629, varied to allow parking alterations, ref F/TH/20/0198.
28. The permission that was implemented, F/TH/19/0629, dated 9 October 2019 included Drawing 19.1432.PC01 Rev B showing the red hatched area (on the enforcement plan) to be used as a site office, and a 2m high boundary fence. The timber hoarding to the site boundary was approved (application R/TH/18/0757 refers), but it was not as suggested across a small side section of No. 5, rather it was the entire length of the side boundary. This was in place as part of the construction management plan and was not articulated in the same way as the 1.8m replacement fencing was subsequently installed as a boundary to the side and rear. Moreover, the replacement fencing did not extend to the front part of the appeal site where a low open railed timber fence delineates the boundary to No 5.

Action attempted by the Council against the developer(s)

29. The developer made temporary use of the appeal site as a compound under permitted development rights subject to conditions to remove the compound, all associated works and reinstate the land and “*as soon as reasonably practicable, [reinstate it] to its condition before that development was carried out.*”²
30. The Council was aware of works in 2020 to enclose the appeal site, along with the alterations to land levels and landscaping that formalised the garden area. The work included, at the front of the site an extended wrap-around area now evident as part of a formalised front garden but which is open due to the low fencing.
31. The building contractor was under the control of Future Homes (South East) Limited (Future Homes). There had already been a breach of the approved construction management plan when in July 2019³ the Council warned that a breach of condition notice might be served. The appellants’ purchase of Plot 5 was completed on 22 May 2020. However, clearly the Council’s initial target for remedial action was the developer for, in August 2020, it emailed Future Homes saying the fencing had no permission, extended over protected LGS, and as the

² Condition A.2 (a) any building, structure, works, plant or machinery permitted by Class A is removed, and (b) any adjoining land on which development permitted by Class A has been carried out is, as soon as reasonably practicable, reinstated to its condition before that development was carried out.

³ Additional Information Appendix 2, complaints with regard to the amount of HGV/large vehicles accessing the site. July 2019.

development was nearly complete, requested its swift removal return of the land to its previous condition.

32. The Council received a reply from Future Homes (Kent) Ltd, a company that appears to have been set up by Richard Anthony Symonds in May 2019, which had changed its name from Future Astute Contractors Limited to Future Astute Homes Limited and then in May 2020 to Future Homes (Kent) Limited. Eventually a site meeting was scheduled with "*Ben Barnes (Future Homes) and Dave Symondson Astute Capital (Project Development Funding Company)*". It seems the Council was just diverted to Pegasus Group to deal with the matter, who were of course the agents and not responsible for the breach.
33. Seemingly, the Council was given the run around by the developers and builders and failed effectively to have them restore the appeal site as desired. Therefore, on 29 September 2021 it turned to the appellants and told them that the appeal site needed to be removed from the garden area. After several exchanges and delays, and being threatened with enforcement action, the appellants proposed a compromise to retain part of the appeal site in residential use and "gift" the remainder to the TC as open space.

The compromise offered by the appellants

34. Specifically, they proposed to return the front part of the area to its previous sloping levels, grass seed it, plant hedges/shrubs outside the fencing, remove the boundary fencing and gift it to the CT10 charity "*so all parties can be sure that it would remain open and maintained as LGS in perpetuity.*" I asked the Council whether it considered the need for a section 106 obligation to reinforce the arrangements, were they to be approved, which it had not but as noted below it refused the application anyway.
35. The permission would have been for a residential use over a smaller part of the appeal site and to return the use of the rest of the site to open space. On refusal, an appeal was made under s78 of the Act. No appeal against the enforcement notice on ground (a) was made initially, due to submitting the s78 appeal⁴.

Section 78 appeal on the compromise solution turned away

36. Unfortunately, the s78 appeal was turned away, apparently because the proposal was deemed to be similar to the development the subject of the notice. The appellants, through their agent, questioned this on 6 September 2023 in that the s78 appeal scheme was significantly different from the enforcement notice appeal; whilst it was the same site it only covered a proportion of it, the rest being offered to be returned to "LGS". On the same day the agent, having just heard that the s78 appeal had been turned away, therefore asked to pay the relevant fee and appeal the notice on ground (a).
37. Receiving no reply the agent emailed on 29 September 2023, and argued, unsuccessfully, that to allow the appeal to proceed would be in the interests of all to seek a timely solution. The request to accept the ground (a) appeal was on the day that period had just expired, having been notified also then that the s78 appeal could not proceed. Although there might have been room for argument as to whether the s78 scheme was a different proposition from the deemed application,

⁴ Ref APP/Z2260/W/23/3328991

and so not a "related" application, it is unfortunate that the appellants have been unable to obtain on either appeal, any determination on the planning merits.

Ground (b)

38. An appeal on this ground is that the matters alleged to constitute the breach of planning control have not occurred as a matter of fact. The standard of proof is on the balance of probability.
39. Fencing had been erected to enclose a larger area to the side of No.5, where land levels had been changed (but before the appellants acquired the plot) to create a landscaped garden, and that an area to the front of this had been reprofiled and fenced as a front curtilage.
40. The main point on this ground is that a fence between the appeal site and the original plot of No 5 separated it from the domestic use of No 5. Subdivision of the land in this way does not necessarily prove that there are in fact separate uses. The appeal site has clearly always been in use by the appellants as a private residential garden.
41. The notice was issued on 2 August 2023 at which time the evidence shows that it was more likely than not that the matters alleged in the notice to have taken place, were factually correct. The appeals on this ground therefore fail.

Hidden ground (c)

42. In relation to ground (f) the appellants state that the fencing does not require planning permission. There is no appeal on ground (c) that the matters alleged to have taken place do not constitute a breach of planning control. Had the appeal included ground (c), I note that Schedule 2, Part 2, Class A of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (GPDO) limits the erection of a means of enclosure that is above 1m in height adjacent to a highway used by vehicular traffic. It appears to be undisputed that where the fence is some 1.8m in height adjacent to the Pathway, that part of the fencing would not benefit from permitted development rights.
43. Whether its removal would be excessive will be considered below on ground (f).

Ground (f)

44. The appeal on ground (f) is that the steps required to comply with the requirements of the notice are excessive, and lesser steps would overcome the objections. The purpose may be to remedy the breach of planning control that has occurred, or any injury to amenity which has been caused by the breach.
45. My powers are limited to consideration of whether in the circumstances, the requirements of the notice are excessive, without entering into matters that are purely a matter of judgement on the planning merits, although inevitably in some cases there may be a degree of overlap.
46. The notice does not require the residential use to cease, from which I deduce that the steps required to be taken are not to remedy the breach of planning control but to remedy the injury to amenity by requiring certain steps to be taken to make the character and appearance of the land more commensurate with the particular features it possessed pursuant to its designation as LGS.

47. The works have seen the enclosure of some of the formerly open land designated as LGS, with fencing staggered to accommodate the changing land levels, but with a more open aspect to the side garden to the front of No. 5. This maintains in effect the compromise position that was offered to the Council but which was rejected on the planning merits.
48. I should make a preliminary point about the timing of the LGS designation. The first edition of the Broadstairs & St Peter's Neighbourhood Plan was not formally made until 3 June 2021. Also, the Thanet Local Plan not adopted until 9 July 2020. In both cases, the relevant dates were after the appellants acquired the land.
49. Paragraphs 106, 107 and 108 of the National Planning Policy Framework clarify that a LGS designation can only be designated where in reasonably close proximity to the community it serves, is demonstrably special to a local community, holds local significance, is local in character and not an extensive tract of land. Planning Practice Guidance also states that designation does not impose new restrictions or obligations on landowners. It also emphasises that local planning authorities "*should contact landowners at an early stage about proposals to designate their land*" and "*Landowners will have opportunities to make representations in respect of proposals in a draft plan.*"⁵
50. However, it would appear that the appellants as new landowners were unaware of the draft designation or not given an opportunity to object to it, albeit not necessarily due to any deliberate action by the Council. However, the Council is now trying to enforce a return of the appeal site to coincide with its current LGS designation and in my view that is unrealistic. LGS is not a land use category in itself, or at least one that it is appropriate to deploy for assessing the materiality of a change in the primary use of land for enforcement purposes.
51. As to the nature of the LGS in general, public access was a determining factor in this designation, due to the thoroughfare connecting Alexandra Road, Vere Road and Bradstow Way. Release of the appeal site to the developer has not impeded use of the permissive path or nearby public path, but access to the appeal site has effectively been cut off due to the understandable need of the landowner to fence his property for security reasons.
52. Moreover, the "*loss of this community space*" as stated in the reasons for issuing the notice in the first place, could not be restored in any meaningful sense to include public access over it, once the appeal site had been sold off for development and resold to become private land.
53. This limits the degree to which the requirements can sensibly and realistically be focussed on the remainder of the positive features of the land as LGS, which I estimate to be principally its visually open aspect, without requiring the residential use itself to cease.
54. The Council says that the value of this LGS is in the whole. It refers to the area as a large area of the LGS but considering the Culmer's Amenity Land as a whole, the appeal site is clearly a small fraction of the whole area. Moreover, CT10 considered the site, including the appeal site, as unsuitable for the intended purpose, ie as open space. The reasons for issuing the notice include that the loss of the space "*puts pressure on the loss of existing trees and vegetation*" which

⁵ Paragraph: 019 Reference ID: 37-019-20140306; Paragraph: 020 Reference ID: 37-020-20140306

does not make a great deal of sense, because the land was scrub land and described also by the charity trustees who sold it off for development, as derelict.

55. Furthermore, in terms of an open aspect to the site, as part of the single plot disposal to the initial developer, that plot stood, and stands, in a discrete corner of the wider expanse of amenity land where the views across it would have terminated and do still terminate, with the built development at Beach Mews.
56. As to the levels of the land these are in any case at present a series of changes from the adjoining amenity land where it is at more or less the same level, that step down in a west to east direction to the ground level where the mews development is constructed. Some form of gradation would have been necessary to maintain in any event and in my view the current position does not materially add to the sense of enclosure. Restoring the slope would in itself do nothing to ameliorate the open aspect to the land.
57. In addition, any restored slope would have to end a short distance from the built form to allow for the originally planned narrow side garden and in such a case some form of retaining structure would presumably need to be incorporated or re-incorporated in the remedial works which in my view would be costly, disproportionate, potentially insecure and therefore dangerous. Thus, it would be excessive to require restoration of the levels.
58. The perimeter fencing is a substantial structure in its own right. Indeed, given the necessity of providing security adjacent to this publicly accessible area, and the obvious presence of the significant amount of fencing that would have initially been erected (even higher than it now is) back in 2019 or 2020 when the contractors commenced development, it is difficult to understand how the perimeter fencing can be other than so fundamental to the change of use to private residential curtilage land that to require its removal goes beyond the statutory power as expressed in *Murfitt*⁶, a case cited by the Council.
59. The *Murfitt* principle does not extend to works that are more than merely ancillary or secondary and are instead fundamental to or causative of the change of use itself.⁷ It is not unreasonable to suppose that on its transfer to private individuals, securing its boundaries effectively against trespassers in this location would be a separate and fundamental issue before any use were contemplated or begun.
60. Nevertheless, on the basis that the fencing requirements are to be considered, the fencing is no higher than that which would be allowed as a separate development under permitted development legislation where not adjacent to a highway. Furthermore, in respect of the southern boundary which is so adjacent, the evidence is clear that officers had previously stated that the fence as constructed could be retained as it was consistent with the character of the area and for safety reasons that was sensible due to the drop in levels to the north.
61. Furthermore, the plot not unreasonably is said to be fenced for security reasons, whether or not it also facilitated the material change of use. This is particularly important here because there is unrestricted public access that obtains over the land immediately adjacent to the appeal site to the west.

⁶ *Murfitt v Secretary of State for the Environment* [1980] 40 P. & C.R. 254

⁷ *Caldwell & Timberstore Ltd v SSLUHC & Buckinghamshire Council* [2024] EWCA Civ 467

62. The now staggered fencing encloses part only of the appeal site and has already reduced the 2m high fence placed there by the contractors. Also, if the remedial measures pertaining to the fencing were modified only to the extent that the rear (southern) fencing remained for security reasons and as accepted by the Council officers in their correspondence, that would produce an anomaly in that - if the side (western perimeter) fencing were removed, a significant portion of the rear (southern) fence would be sticking out with no connecting structure.
63. I also find the requirements in relation to fencing uncertain. "*Relocation of the boundary fence*" does not indicate clearly what part is in question or to where it should be relocated. Merely relocating the perimeter fencing so as to separate the appeal site from the original narrow side garden at No 5 (if that is what is meant) would mean there would be a surplus of materials for the purpose since the area to be enclosed would be much smaller, and if so it is unclear whether the residue of waste material can be re-used or must be taken off the site. However, I think it more likely refers to the internal fencing erected to maintain (without effect, see ground (b)), some distinction between the appeal site and the originally planned garden area, but that has now been removed.
64. Secondly, "*removal of fencing enclosing the area of local green space*", must then refer to any fencing that encloses the appeal site, including that which has an enclosing effect, ie the portion of staggered close boarded fencing between the rear and front portions of the site.
65. I do consider in this instance that it would be a necessary step to reduce the height of this part of the internal fencing to no more than 1m high, relative to the internal ground level, so that a more open aspect to the site as a whole obtains from public views in front of the more formalised front garden bounded by the low timber posts and rails, through to the rear area. Reduction to this height would in my view not be an excessive requirement but would entail a modest adjustment to this part of the fencing separating the front and rear sections of the appeal site.
66. I also consider that the height of the fencing should be restricted to no more than exists at the northern, western and southern perimeters of the appeal site, including the low timber rail fencing at the front of the site.
67. The last known condition of the site immediately prior to the material change was the temporary use as a compound. After the tidying up of the former compound if the land was grassed over when the land was sold on to the appellants, I regard this as an incident of the material change to residential use which is not required to cease. In fact, some areas of the appeal site are already turfed. I am unpersuaded that to require the whole area to be turfed would not excessively undermine the reasonable residential use of the land and at the same time materially improve the open aspect or visual amenity of the land, consistent with its LGS designation.
68. Furthermore, "*a programme of watering*" requirement is vague as to how or how regularly the turf must be watered and on that account is bad for uncertainty.
69. I would add that open space held by public bodies is generally held on trusts for the benefit of the public, who may enjoy it as open space, whether or not access is granted to all or part of it. Nevertheless, the appeal site was obviously sold off for development and it is important to note that CT10 stated:

“On April 27th 2018 a section of land, disused and unsuitable for the intended purpose, was sold to Cutler Homes Ltd. Document Two, the drawing dated 10-03-17, shows the outline in red of the land sold. This drawing was intended to be used for the acquiring of planning approval by the Charity prior to the sale.” (My emphasis).

70. The Supreme Court in Day⁸ held that the simple transfer into private ownership of land subject to a statutory trust under s164 Public Health Act 1875 or s10 Open Spaces Act 1906 did not extinguish the trust and since the local authority had not complied with the disposal procedure, the land was still bound by the trusts. That side of things may not have been examined as originally was the case in Day, but I have been given no evidence of any covenants or restrictions on the use of the appeal site that would secure its long term use as public open space.
71. The interested persons' representations have been considered, including the comments from the owner of a nearby house, that this was clear land grab and destruction of vital local green space, but it was the charity who sold off the site which is in any case private charity land and ostensibly not subject to public trusts.
72. I have no reason to doubt that CT10 followed prescribed procedures in disposing of the land. The point however, is that if the public authorities, be they the TC or the Council, were concerned about the long term availability and maintenance of the wider amenity land, qua open and publicly accessible open space, of which the appeal site formed a very small part, one would expect that they would exercise one or more of a range of statutory powers they possess for such purposes.
73. As it is, however, the owner of Culmers Amenity Land uses this charity land legitimately as it sees fit, partly for allotments from which it derives income with which to carry on its own charitable duties, as a source of revenue to help those who are referred to it by statutory and non-statutory agencies, and partly for amenity land leased to the TC. A small part of the charity land in the corner of the wider site and next to established built development has now also been disposed of by the charity, no doubt in line with its fiduciary obligation to raise income for the Charity of Richard Culmer to assist the poor and needy of Broadstairs and St. Peter's. The Council may not agree with that but the reality of the change to privately owned land should be considered along with the policy designation.
74. Given these considerations and the reasons I have described above, including the fact that the residential use is not required to cease, it is excessive to maintain the requirements of the notice other than to restrict further increases in the height of the fencing and reduce the height of the internal fence between the front and rear parts of the appeal site.
75. The appeals on ground (f) therefore succeed to this extent.

Ground (g)

76. An appeal on this ground is that the period for compliance with the notice is too short. Due regard has been given to the Public Sector Equality Duty (PSED) contained in the Equality Act 2010, since there is the potential for this decision to

⁸ R (Day) v Shropshire [2023] UKSC 8. The decision of the court of appeal below was thus overturned, that where a council disposed of land subject to a public trust for recreation without complying with requirements, the donee would obtain title to the land without the burden of the trust unless the donee had had actual knowledge of the council's non-compliance. Although some respected commentators doubt the SC decision it is good law.

affect persons with a protected characteristic. However, in this case the period for compliance remains proportionate in equality terms and sufficient to allow for the necessary work to the reduction in height of the fence separating the front and rear sections of the appeal site. The appeals on this ground fail.

Conclusion

77. For the reasons given above, I conclude that the requirements of the notice are excessive. I shall correct and vary the enforcement notice prior to upholding it. The appeals on ground (f) succeed to that extent.

Grahame J Kean