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**Town and Country Planning Act 1990 (as amended)**

**Planning and Compulsory Purchase Act 2004**

**The Town and Country Planning (Inquiries Procedure) (England) Rules 2000**

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**PROOF OF EVIDENCE**

**by Mr Edward Appah, BA (Hons), MA, MRTPI**

**on behalf of London Borough of Richmond Upon Thames**

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**Site:** Land at Petersham Nurseries, Petersham Road, Petersham, Richmond TW10 7AB

**Planning Inspectorate reference:** APP/L5810/C/24/3339372

**LPA Reference:** 18/0025/EN/BCN

**4 June 2024**

1. I, Edward Appah, work for the London Borough of Richmond Upon Thames and London Borough of Wandsworth as part of the shared staffing arrangement as a Senior Planning Enforcement Officer. I started as a planning enforcement officer in December 2014 and became a senior planning enforcement officer in May 2018. In total, I have over nine years' experience investigating breaches of planning control for Local Planning Authorities. I also write committee reports and delegated reports to obtain authority to serve notices, defend the Council's decisions to take enforcement action on appeal and represent the Council during criminal proceedings.
2. I hold a Bachelor of Arts (Hons) degree in Geography from University of Ghana and MA in Town and Regional Planning from the University of Sheffield. I am a chartered member of the RTPI. I am also a member of the National Association of Planning Enforcement (NAPE).
3. The evidence which I have prepared and provide for this appeal in this proof of evidence is true and I confirm that the opinions expressed are my true and professional opinions.
4. I have visited the appeal site and surrounding areas on four occasions, 25th January 2024, 16th April 2024, 26th April 2024 and 16th May 2024. Two of the visits took place during the day and two took place in the evening. Copies of my site visit photographs are attached to this proof as Appendix 20.
5. A list of Appendices is set out at the end of this proof. I use but do not repeat the Appendices attached to the Council's Statement of Case (Appendices 1 – 19). I also rely on further Appendices which are attached to this proof. These are numbered sequentially from the Appendices to the Council's Statement of Case (and so start at Appendix 20).

## **Contents**

1. Investigations
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## Investigations

- 1.1 This section of the proof of evidence concerns the history of the Council's investigation from the time the matter was reported, and steps officers have taken to resolve the breach through negotiation.
- 1.2 According to the Council's records, it was first reported to the Council on 18 January 2018 that conditions (NS04 and NS05) attached to a planning permission (our ref: 08/4312/FUL) at the appeal site were not being adhered to. The complaints were raised through forms completed on the Council's website and through email. The complainants raised concerns about noise nuisance and disturbance, impact of the alleged breach on MOL, light pollution and traffic issues. A copy of the complaints is attached to this proof as Appendix 21. The enforcement investigation reference number is 18/0025/EN/BCN.
- 1.3 A review of the planning history of the appeal site shows that planning permission (our ref: 08/4312/FUL) was granted on 29 July 2009 for "*continuation of planning permission granted 11 December 2007 (07/1235/FUL), to allow permanent mixed use as garden centre (Class A1) and café/restaurant (Class A3)*". The following conditions were attached to the permission:

***"U27543 NS04 Hours of Use – Café/Restaurant***

*There shall be no sale of food for consumption on or off the premises during the following times: Tuesday to Sunday – before 1000hrs and after 1630hrs and on Sundays – before 1100hrs and after 1630hrs. The A3 premises shall not be open on Mondays. A notice to this effect shall be displayed at all times on the premises so as to be visible from outside.*

*REASON: To safeguard the MOL, conservation area, amenities of nearby residential properties and the area generally.*

**U27544 NS05 Café/Restaurant areas**

The café/restaurant areas shall be confined solely to the areas identified for these purposes on Approved Drawing Number DP7/2857 for Permission 07/1235/FUL.

*REASON: To safeguard the MOL, conservation area, amenities of nearby residential properties and the area generally."*

A copy of the planning permission is attached to the Council's statement of case as Appendix 1.

- 1.4 The café/restaurant operating beyond the approved hours and expansion of the A3 use area beyond what is shown on the approved drawing number DP7/2857 constitute a breach of these conditions. In all, eight different complaints regarding the breach of these conditions have been reported to the Council since 2018 according to the Council's records. Location of these properties in relation to the appeal site, nature and year of the complaints are provided on the plan attached to this proof as Appendix 22.
- 1.5 An application to vary condition NS04 (hours of use) of consent 08/4312/FUL to include opening between 1900-2300 hours on Saturdays was refused permission on 29 March 2012 (ref: 12/0067/VRC). The reasons for refusal are: "the proposal would result in the expansion of an inappropriate use to the detriment of the character of Metropolitan Open Land and would result in an adverse effect on the amenities of neighbouring residential occupiers and the area generally. As such the proposal would be contrary to policy CP10 of the London Borough of Richmond upon Thames Local Development Framework Core Strategy adopted April 2009 and DMOS1, DMTC5 and DMDC5 of the Council's Development Management Plan adopted November 2011". A copy of this decision notice is attached to the Council's statement of case as Appendix 2.
- 1.6 Another planning application for the variation of condition NS04 of planning permission 08/4312/FUL for permanent mixed use as garden centre (Class A1)

and café/restaurant (Class A3), to allow for the sale of food for consumption on the premises, between the hours of 09.00 and 18.00 on Mondays, Tuesdays and Wednesdays, 09.00 and 23.00 on Thursdays, Fridays and Saturdays and 11.00 and 18.00 on Sundays was refused planning permission on 18 January 2018 (ref: 14/0345/VRC). The reasons for refusal were: “the proposal would result in the expansion of an inappropriate use to the detriment of the character and function of Metropolitan Open Land and would, by reason of an increased level of pedestrian and vehicular activity around the site, result in an adverse effect on the amenities of neighbouring residential occupiers and the area generally. As such the proposal would be contrary to the National Planning Policy Framework and the Local Plan, including policy CP10 of the Local Development Framework Core Strategy adopted April 2009, policies DMOS1, DMTC5 and DMDC5 of the Development Management Plan adopted November 2011 and policies LP8, LP10 and LP13 of the Publication Local Plan”.

Informatives attached to this decision asked the applicant to enter into formal pre-application discussions with the Council to assist in the preparation of a new planning application. Copy of the decision notice is attached to the Council’s statement of case as Appendix 3.

- 1.7 On the 7 March 2018, an agent representing the owners, Mr Philip Villars, wrote to Mr Rob Angus, head of development management (Richmond), requesting a list of documents from the Council after meeting with officers to discuss the informatives. Mr Angus responded to the email on 8 March 2018 informing Mr Villars that he would discuss the matter with his officers.
- 1.8 On the 19 April 2018, Mr Villars wrote to Mr Angus to request another meeting to agree a course of action to deal with the evening use and areas of use. Mr Villars also confirmed in this email that he was planning to apply for planning permission or a section 73 application rather than a CLEUD. The meeting date was confirmed as 1 May 2018. A copy of the agenda has been attached to this proof as Appendix 23. At the meeting between Mr Villars, Mr Angus and Nicki Dale (South Area Team Manager for Richmond Council), the Council reiterated its position that the operating hours and extent of the café/restaurant use is in

breach of conditions NS04 and NS05. Mr Villars informed officers that planning application would be submitted for consideration to vary conditions NS04 and NS05.

- 1.9 On the 22 August 2018, Mr Craig Raybould (Planning Enforcement Team Manager) wrote to Mr Villars to check on the progress of the application and informed him that information he requested (planning history of the site) would be provided. Mr Raybould also informed Mr Villars that another complaint had been received and enforcement action would be considered if no action is taken. Our records show that the complaint Mr Raybould was referring to was received on 12 July 2018 from the resident of Rose Bank concerning the extent and operating hours of the café/restaurant use and how it is impacting on their living conditions through very loud noise, disruption, waste and traffic on Church Lane. A copy of the complaint document can be found in Appendix 21 of this proof. On the 27 August 2018, Mr Villars wrote to confirm that the application would be submitted on receipt of the requested information. Mr Villars also asked for further information about the complaint.
- 1.10 On the 13 September 2018, Ms Hayley Martin, the planning enforcement officer at the time, wrote to Mr Villars to ask for timeframe for submission of the application. Ms Martin also informed Mr Villars that the requested information was submitted to him by Jim Thomson and clarified that the complaint concerned noise and disturbance to neighbouring properties.
- 1.11 On the 27 September 2018, Helen McManus, an Associate at Indigo Planning, wrote to inform Ms Martin that they are finalising the application and timeframe for submission would be provided at a later date.
- 1.12 On the 9 October 2018, Helen McManus wrote in response to an email from Ms Martin on 2 October 2018 to request for additional information from the Council in relation to internal advice. She also confirmed that the application would be submitted within two weeks from the date the information is provided.

1.13 On the 29 October 2018, Ms Martin wrote to inform Helen McManus that there is no additional information on file and requested that she is informed of the date the application would be submitted.

1.14 On the 21 January 2019, Ms Martin wrote to inform Helen McManus that she will hold enforcement action in abeyance if pre-application advice is sought by 22 January 2019.

1.15 On the 22 January 2019, Helen McManus wrote to inform Ms Martin that pre-application advice (“pre-app”) had been submitted and relevant fee had been paid.

A copy of the email correspondences referred to above is attached to this proof as Appendix 24. Final decision was not issued on this pre-app.

1.16 On 13 May 2021, a Planning Contravention Notice (“PCN”) was served on the owner and manager of the appeal site by Mr Christopher Neelands, planning enforcement officer at the time, to obtain additional information concerning the alleged breach of conditions NS04 and NS05. Information from the completed PCN submitted by Paula Foulser (general manager of the appeal site) and Mr Francesco Boglione (freeholder of the appeal site) show that the café/restaurant is operating in breach of conditions NS04 and NS05. It was indicated in the completed PCN by the freeholder and general manager that a certificate of lawfulness application would be submitted to confirm that breach of conditions NS04 and NS05 had become lawful with time. Copies of the completed PCN have been provided with this proof as Appendix 25.

1.17 On the 2 September 2021, a Lawful Development Certificate application (“LDC”) our ref: 21/3108/ES191 was submitted for consideration seeking to demonstrate that the breach of conditions has taken place continuously over a period in excess of the last 10 years in the following manner:



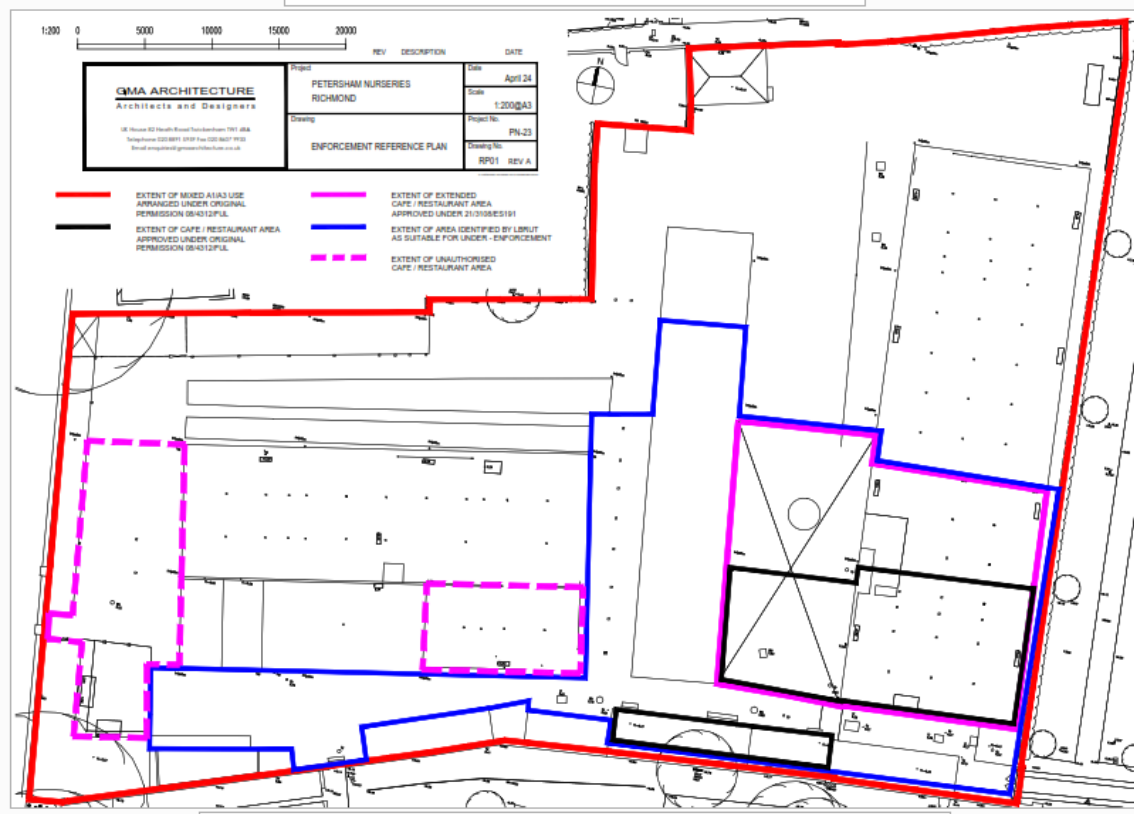
- a. *The l/restaurant has been in operation selling food and beverages to visiting customers between 10am-6pm Tuesday to Sunday excluding Mondays (but including Bank Holidays). Evening openings for the sale of food and beverages have occurred up to 11pm three events per week between Wednesday – Saturday. The evening openings have been seasonal. The operation has exceeded the hours specified in condition NS04 of LPA ref: 08/4312/FUL;*
- b. *The areas used for the preparation, sale and consumption of food and beverages have operated within the area outlined in red shown on drawing reference 02-277-03-RP02. The operation has exceeded the areas specified in condition NS05 of LPA ref: 08/4312/FUL;.*
- c. *The business has been carried out by Petersham Nurseries Ltd, notwithstanding that the land has remained in the ownership of Francesco Boglione.*

1.18 The Council concluded after careful evaluation of the information provided by the Appellant that there was insufficient evidence to demonstrate that a continuous breach had subsisted for 10 years to the full extent of the terms sought by the certificate. As the legislation allows the Council to modify the description of development and grant a certificate to the extent it does consider lawful, a certificate of lawfulness was issued on 4 September 2023 for the following:

- a. *The café/restaurant has been in operation selling food and beverages to visiting customers between 1000 to 1700 Tue to Sunday (excl. Mondays) in exceedance of the hours specified in NS04.*
- b. *The areas used for the preparation of, sale and consumption of food and beverages have operated in exceedance of the areas specified in condition NS05 to the extent that they have also operated in the areas identified as 1 and 2 within the statements of truth insofar as they correlate with the red line delineated on the updated Reference Plan 02-277-03 RP02 received October 2022.*

c. *The business has been carried out by Petersham Nurseries Ltd, notwithstanding that the land has remained in the ownership of Francesco Boglione.”*

Figure 1: Map showing areas for café/restaurant use permitted by the enforcement notice (delineated in blue).



1.19 On the 13 September 2023, a report was presented to the Council’s Planning Committee proposing to issue of an enforcement notice. Officers presented three options for remedying the breach to the Planning Committee. They are;

i. Issue an enforcement notice requiring strict adherence to conditions NS04 and NS05 imposed under 08/4312/FUL (except where the Certificate of Lawfulness granted under reference 21/3108/ES191 confirms immunity from enforcement).

This would have the effect of requiring full compliance with the conditions-imposed on planning permission 08/4312/FUL. This action is considered disproportionate to the breach of planning control, as a reduction in the hours of use and the café/restaurants areas would remedy the harm which has been identified, rather than a restoration to the approved hours.

- ii. Under-enforce i.e. only taking enforcement action against the elements of the breach which are considered harmful in planning terms. This would require partial compliance with the planning conditions imposed on planning permission 08/4312/FUL to an extent which would mitigate and remedy any caused by the breach of planning control. This would include allowing a small extension to the café/restaurant operating hours (Tuesday to Sunday 10am to 5pm and 11am to 5pm Bank Holidays) and an increase in the area the café/restaurant operates to the rear of the site and part of the central greenhouse.
- iii. Take no further action. This would allow the breach to continue unabated, despite the policy contraventions established within the report, which include harm to residential amenity and inappropriate development within Metropolitan Open Land. Allowing these breaches to continue unabated would be an ineffective form of enforcement and regulation and could lead to the breaches become immune from further enforcement action.

1.20 Elected members resolved to take enforcement action and to “under-enforce” under option (ii). The Appellant initially sought LDC for all the areas shown in blue, pink and dotted pink in figure 1 above, however that was not approved. The Appellant is seeking consent for an identical café/restaurant use area under this appeal as applied for under the LDC. It is noteworthy to mention that café/restaurant area allowed under option (ii), shown in blue in figure 1 above, is greater than what was certified by the Council through the LDC application (shown in pink in figure 1 above) and was very much a compromise on the part of the Council, seeking to allow the café/restaurant to operate in its maximum capacity whilst protecting the amenity of local residents and the character and openness of the MOL. A copy of the report is attached to the Council’s statement of case as Appendix 7.

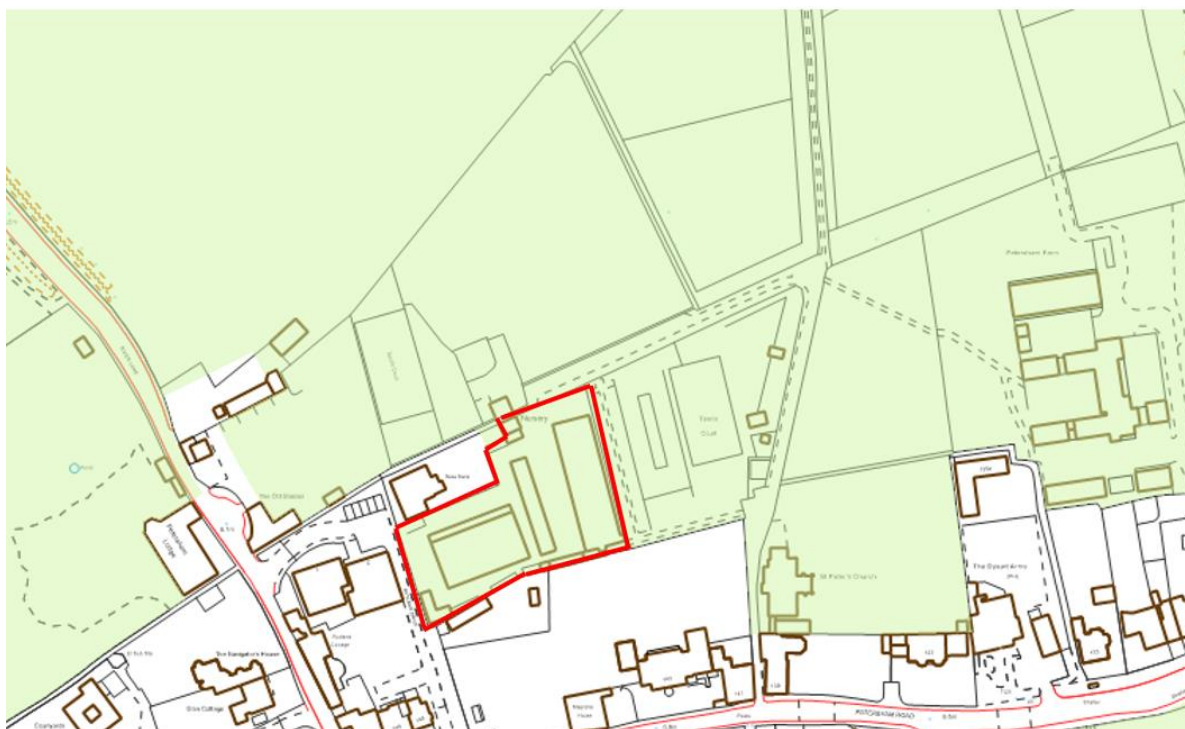
1.21 On the 15 January 2024, an enforcement notice was served which is the subject of this appeal. A copy of the enforcement notice is attached to the Council’s statement of case as Appendix 8.

## 2. Grounds of Appeal

**Ground 'a' – That planning permission should be granted for what is alleged in the notice.**

- 2.1 The Council's case under ground 'a' has already been set out in the statement of case, final comments and officer report to committee to obtain authority to serve the notice. My evidence will consider the impact of the breach of conditions NS04 and NS05 (extended café/restaurant operating hours and area) in the context of national, regional and local development plan policies that seek to protect the MOL against inappropriate development, impact on heritage assets and the impact on the amenities of the neighbouring properties. I will also consider the premises licence consent before carrying out an assessment of the overall planning balance, weighing the identified harms against any benefits associated with the development.
- 2.2 On the designation of the appeal site within MOL, the Appellant claims that it does not meet the policy criteria set out in policy G3 of the London Plan (page 57 of the LVAIS, 20 May 2024). The Council strongly refutes this claim. I agree with the view of the Council's Planning Policy team that MOL in the borough is based on well-established boundaries. Given the permanence of boundaries, they need to be reviewed through the plan-making process as set out in paragraph 145 of the NPPF. While the Council does not hold substantial information on the original designation, it has undertaken a comprehensive review as part of the emerging Local Plan which concludes that the parcel (number 8 which includes Petersham) fulfils its role for MOL purposes, meeting criteria 1, 2, 3 and 4 of policy G3 of the London Plan (2021). Extracts from the Council's MOL review is attached to this proof as Appendix 26. It is pertinent to note that the designation of the appeal site has not been raised as an issue at the Regulation 19 stage of the Local Plan.

Figure 2: Map showing the appeal site is located in MOL (pale green colour indicates MOL).



**The effect of the breach of conditions on the MOL and character of the area**

- 2.3 Paragraph 152 of the NPPF states that inappropriate development is, by definition, harmful to the Green Belt [MOL] and should not be approved except in Very Special Circumstances (“VSC”).
- 2.4 Paragraph 153 of the NPPF requires that local planning authorities should ensure that **substantial weight is given to any harm to the Green Belt [MOL]** when making planning decisions and confirms that VSC will not exist unless the potential harm to the Green Belt [MOL] by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations.
- 2.5 Paragraph 155 lists a number of developments which are not in appropriate in the MOL, but this does not include garden centre or café/restaurant use.
- 2.6 Policy LP13 states that “the borough’s Green Belt and Metropolitan Open Land will be protected and retained in predominately open use. It makes clear that

inappropriate development will be refused unless 'very special circumstances' can be demonstrated that clearly outweigh the harm to the Green Belt or Metropolitan Open Land (VSC would be considered in the planning balance).

- 2.7 The underlying development at the appeal site (mixed use as a garden centre and café/restaurant) is 'inappropriate development' – the fact that it benefits from planning permission and is lawful does not change this underlying point. Any extension of this use is an extension to inappropriate development, even if an extension of hours and area within the planning unit is not in itself development, it needs to be considered in this context when evaluating the harm caused by the breach of conditions NS04 and NS05. It is worth noting that permission was granted for the mixed retail and cafe/restaurant use in 2009 (08/4312/FUL) owing to the long-established retail use of the site as a garden centre and the associated vehicular movements. However, conditions (NS04 and NS05) were imposed which were considered to be sufficient to ensure the character and function of the MOL were not harmed. This view of the Council is supported by a recent appeal decision in Richmond (Pontoon and land adjacent to Richmond Bridge Pier, Riverside, Richmond, TW9 1TH, ref: APP/L5810/C/23/3333609) where the Inspector concluded that a restaurant use is an "*inappropriate development and harmful to the MOL by definition and by reason of encroachment*" (paragraph 78 of the decision letter). A copy of the appeal decision is attached to this proof as Appendix 27.
- 2.8 The aim of MOL is to prevent urban sprawl by keeping land permanently open as set out in paragraph 142 of the NPPF. The land of which the appeal site forms part has been designated as part of the MOL to prevent urban sprawl and keep it open. One of the strategic objectives of the Local Plan is to "maintain and enhance the borough's attractive villages, including the unique, distinctive and recognisable local characters of the different village areas and their sub-areas" (para 2.3.1).
- 2.9 The appeal site is located in an area which was formerly agricultural land until population growth and post-war housing policies initiated more extensive residential development from the 1930s-1960s. Parts of Petersham have

remained largely unchanged since the 19<sup>th</sup> century making it distinctive for its historic buildings, brick boundary walls and sharp bend. The area around the appeal site is quiet. Other roads in Petersham are primarily narrow residential roads, used for local access only. The area benefits from numerous footpaths and alleyways to Richmond and Kingston. This results in a semi-rural character and tranquil environment (paras 2.2.2, 2.3.2, 7.2.1 and 7.2.2 of Ham and Petersham Neighbourhood Plan). The appeal site is adjacent to an open area consisting of large meadow to the north and together with it is part of the MOL. The main activities in the area during the day comprises people walking through the alleyways and footpaths to or from Richmond and those visiting the nursery. Vehicular access to the nursery is via a narrow road, Church Lane as can be seen in figure 3. Church Lane is adopted and maintained by the council as Public Right of Way (PROW) 122. The site can also be accessed by car via River Lane followed by walking through the historic alleyway which leads to the Nurseries as can be seen in figure 4. There are limited vehicular movements in this part of Petersham.

*Figure 3: Vehicular access via Church Lane towards the entrance of the appeal site when no cars are parked in the area.*



Figure 4: River Lane –mainly used by residents in the area and historic alleyway from River Lane leading to the appeal site.



2.10 River Lane and in particular Church Lane are mainly quiet and clear of vehicular activities in the evening. In contrast, there are high levels of activities in the area when the café/restaurant is open in the evening in breach of conditions NS04 and NS05. The activities include increased vehicular movements, staff and patrons comings and goings, external lights around the perimeter of the site and vehicle headlights associated with the breach of conditions. These activities impact on the openness of the MOL through the degree of activity generated, such as traffic generation (which is recognised as having an impact on openness in national policy: paragraph: 001 Reference ID: 64-001-20190722 of the Planning Practice Guidance (“PPG”). A number of these activities can be seen in figures 5 (parking) and 6 (external perimeter lights and car headlights). They show the extent of the commercial activities in this quiet area of Petersham which would otherwise be devoid of such activities. These activities have changed the character of the area and openness of the MOL. This view of the Council that parking of cars on Church Lane affects the openness of the MOL is supported by an appeal decision at land adjacent to Coral Bazaar, Chequers Lane, Walton on the Hill, Surrey KT20 7SU (ref: APP/L3625/C/16/3157470) where the Inspector concluded that “[...] *any parking of vehicles on the land would, in my view, have a detrimental impact on the openness of this part of the Metropolitan Green Belt*” (para 33 and repeated in paras 34 and 57). A copy of the appeal decision is provided as Appendix 28 of this proof.



*Figure 5: Section of Church Lane is completely transformed into car park when the appeal site is in use. This impact on the openness of the MOL as can be seen in the appeal decision at Appendix 28 of this proof.*



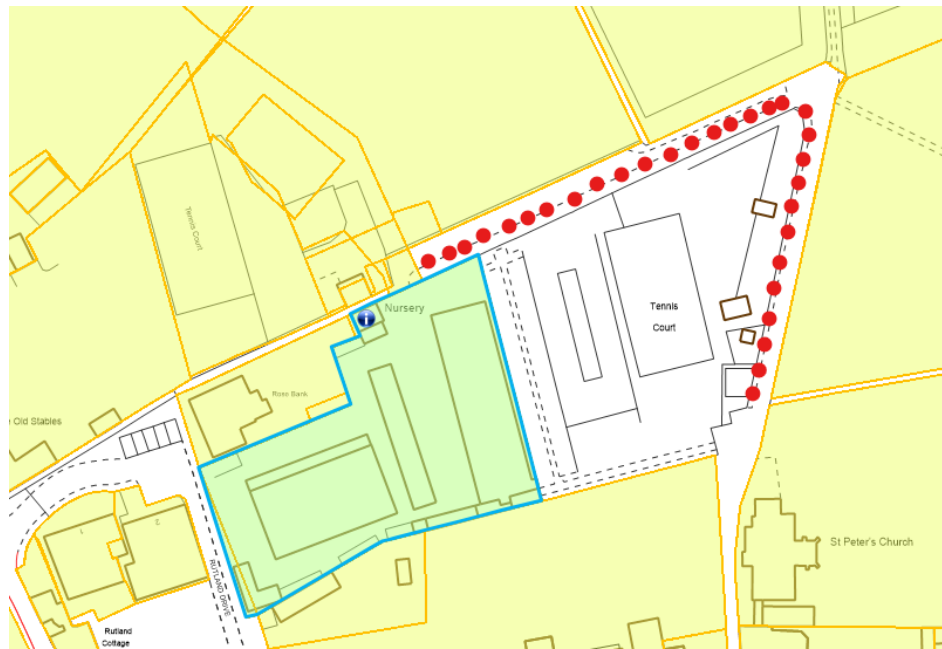
2.11 I observed during my visits to the area that the current extension of the area in use as café/restaurant and extension of the operating hours in breach of conditions NS04 and NS05 results in significant harm to the character of the area and openness of the MOL through vehicular movements, staff and patrons coming and going. The level of activities in the area when the café/restaurant is open in the evening can be seen when you compare the photographs in figures 3 and 6. They show the scale of the commercial activities in this quiet semi-rural area of Petersham. Detail assessment has been set out in the Council's statement of case and in the officer report to the Planning Committee to obtain authority to serve the notice.

Figure 6: External perimeter lights and car headlights on Church Lane during an evening event (photographs provided by neighbouring resident).



2.12 The additional level of activity generated through the extended hours and through the increased footprint of the café/restaurant has an urbanising effect on this otherwise tranquil semi-rural setting to the detriment of the character and openness of the MOL. I consider that they are contrary to the objectives of the NPPF, policy G3 of the London Plan, policy LP13 of the Local Plan, policy 35 of the draft publication version, Reg 19, Local Plan and Ham & Petersham Neighbourhood Plan. The Inspector appointed by the Secretary of State has reached similar conclusion in his decision for an appeal case at Pontoon and land adjacent to Richmond Bridge Pier, Riverside, Richmond TW9 1TH (ref: APP/L5810/C/23/3333609). He concluded that restaurant use is an *“inappropriate development and harmful to the MOL by definition and by reason of encroachment. They also fail to preserve the setting and special character of a historic town, a further purpose of including land in MOL. This is a matter to be afforded substantial weight”*. A copy of the appeal decision is attached to this proof as Appendix 27.

Figure 7: Location of car park and external perimeter lights at the appeal site shown in red dots



### **Impact on Heritage Assets**

2.13 This section addresses briefly the heritage assets in recognition that the Inspector is under a statutory obligation to have regard to them in his decision making. The Council, however, does not take a point on heritage. The appeal site is located within Petersham conservation area. The Council's Conservation and Design team have reviewed information contained in this section and have confirmed that the breach of conditions NS04 and NS05 do not affect either the significance of the conservation area or listed buildings in the area. The significance of Petersham conservation area is derived from its distinctive and well-defined historic settlement with Petersham village at its core. It is located between Richmond Park and the River Thames, on the route between Richmond and Kingston. The character of this area is dominated by large, detached mansions of two to three storeys boldly addressing the road and set in individual large well-planted grounds with mature trees and generous spaces between buildings. There are important views between the village and the surrounding green space of riverside meadows, parkland and Richmond Hill, a setting which contributes to its exceptional rural character. There is no specific reference to Petersham Nurseries in the Petersham Conservation Area Statement; however, there is reference to River Lane that leads to the riverbank,

described as a quiet retreat from Petersham Road, and the surviving historic alleyways, which further contribute to the distinctive village character of this area, one of which leads to the entrance of Petersham Nurseries.

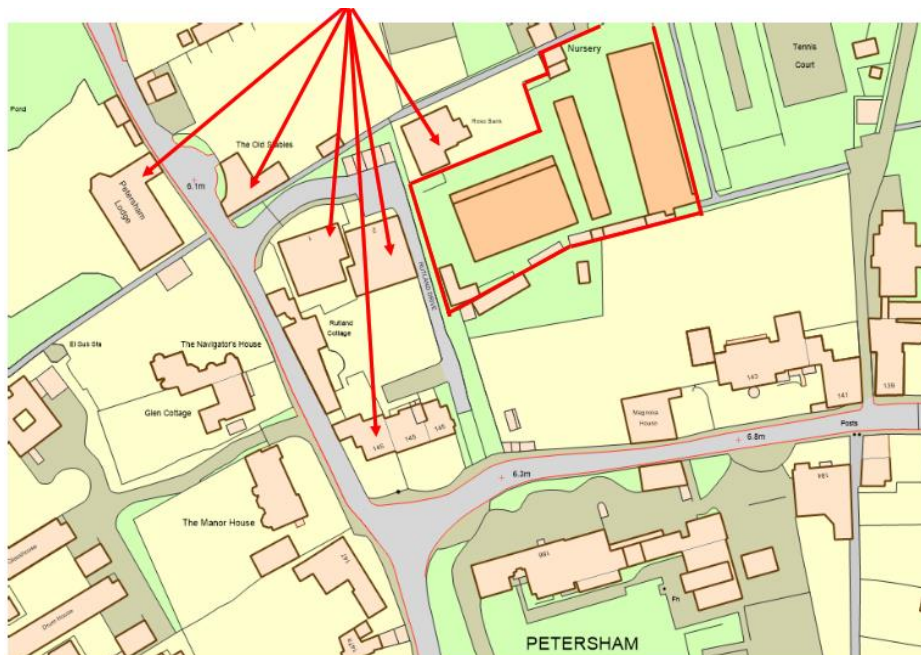
- 2.14 A number of listed buildings and Buildings of Townscape Merit are located in the area. Particular reference is made of St Peter's Church at the request of the Inspector at the CMC. St Peter's Church is a Grade II\* listed building and forms the historic parish church for ancient village of Petersham before the construction of All Saints Church to the south in the early 20<sup>th</sup> century. Part of the chancel dates to 1505 reflecting the early origins of the village with some evidence of 13<sup>th</sup> century. The building has since been enlarged many times over the centuries to reflect the subsequent growth of the parish. Despite this, it remains fairly modest in its form and constructed mainly of brick with a fine battlemented tower with octagonal bell cupola which forms an important feature local view, particularly looking up and down the lane leading from Petersham Road towards the church. It is early age and fine detailing and form which contribute to its architectural and historic interest. It also forms a key building in the early development of the village, forming the centre of the historic village prior to its expansion southwards down Petersham Road.
- 2.15 It is best appreciated in its immediate setting of the church yard which forms a secluded and important open space with many mature trees which frame views of the church from many points. Many monuments/tombs in the churchyard are also separately listed and therefore form an important group of listed structures. This includes the war memorial to the north of the church which forms a focal point in the churchyard. The wider setting is form of the historic settlement of Petersham which feature several listed buildings such as 143 Petersham Road to the east and Buildings of Townscape Merit. The open spaces of Petersham Meadows also form part of the wider landscape setting of the church to the north which form a rural backdrop to the church and add to the tranquil setting of the church.
- 2.16 The Conservation and Design team are of the view that considering the impact of a development on the significance of a heritage asset is different to considering impact on character and openness of MOL. In terms of the impact

of the breach of conditions NS04 and NS05 on the significance of the Petersham Conservation Area, St Peter's church and other relevant listed buildings in the area, I accept the view of Conservation and Design team that they have no impact on the significance of the individual heritage assets which is derived primarily from the physical form of the area. Officers have reached similar views when previous application was considered by the Council (ref: 14/0345/VRC) and as part of the committee report to obtain authority to serve the notice (paragraphs 9.23 – 9.28).

**Amenities impact**

2.17 Policy LP8 states that in considering proposals for development, the Council will seek to protect adjoining properties from unreasonable loss of privacy, pollution, visual intrusion, noise and disturbance. Policy LP10 seeks to ensure that the local environmental impacts of developments do not lead to detrimental effects on the amenity of existing occupiers of surrounding land. Similar requirements are also imposed under Policy 46 of the draft Publication Version Local Plan. Detail assessment of the amenity impacts have been set out in the officer's report to committee to obtain authority to serve the notice, the Council's statement of case and final comments.

*Figure 8: Location of noise complaint from neighbouring residential properties made on the LDC application (ref: 21/3108/ES191). It is relevant to note that no complaints have been received from adjoining properties at 141 – 143 Petersham Road because they belong to the Appellant.*



2.18 A number of residential properties are located in close proximity to the appeal site and are adversely impacted by the extended hours of operation and extent of café/restaurant use. In all, eight complaints have been raised with the Council since 2018 regarding noise and disturbance from the appeal site. Complaints regarding noise were also included in the third-party observations made on the LDC application. The complaints came from residents of the neighbouring residential properties: Rose Bank, 1 Rutland Drive, 2 Rutland Drive, Petersham Lodge, 145a Petersham Road and The Old Stables. The location of these properties in relation to the appeal site can be seen in figure 8 above. A copy of the map is attached to this proof as Appendix 29. Rose Bank is located to the north and shares boundary with the appeal site. It is the closest residential property to the appeal site and is in close proximity to the additional area of seating for which the Appellant seeks consent. In addition, Nos.1 & 2 Rutland Drive and 145a Petersham Road are located to the west of the appeal site. No. 2 Rutland Drive is less than 6m away from the boundary of the appeal site, while 145a Petersham Road is approx. 39m away. Petersham Lodge and the Old Stables are approx. 67m and 41m away respectively from the appeal site. Furthermore, the Council's Noise Nuisance team have received five noise complaints concerning noise from the appeal site since 2020. Details of the complaints are set out in Appendix 30 attached to this proof. These complaints to the Noise team are separate from the eight complaints which have been raised with the planning enforcement team. In terms of details of the complaints the Council had received so far, they relate to noise nuisance and disturbance from events held at the appeal site, increased vehicular movement in the area, staff and customers arriving and leaving the premises late at night as a result of the extended operation hours of the café/restaurant and area. In particular, residents of Rose Bank have provided detailed information on how they are unable to peacefully enjoy their home and garden especially in the summer due to excessive noise from the appeal site as can be seen in Appendix 11 of the Council's statement of case. They are being forced to close their windows during this period to reduce noise nuisance and disturbance to the property. It is pertinent to mention that according to the complaint forms these events were held in the evening in breach of condition NS04. Especially, the event held on Saturday, 13 October 2018 took place in the evening where it appears it was

still ongoing at 11:55pm and past midnight as can be seen in Appendix 21 attached to this proof.

*Figure 9: Appeal site set up for an event and patrons at events. These photographs taken from Petersham Nurseries' social media and website show the size of events that can be hosted at the appeal site.*



2.19 The various activities which take place at the appeal site in connection with the breach of conditions include hosting of weddings, parties, evening events and the associated commercial activity that inevitably go with them. These include food and drinks deliveries, arrival and departure of staff and patrons by cars, taxis and on foot; vehicle engine idling, music, entertainment, speeches, singing, dancing, chatter and laughter. Some of the activities can be seen in figure 9 above and in Appendix 18 attached to the Council's statement of case.

2.20 I observed during my visits that the south elevation windows at Rose Bank overlook the appeal site and any noise and disturbance from the appeal site would be heard within the property and in the garden. I also observed staff and patrons movements in the area, chatter, laughter, vehicular movements, engine running, slamming of car doors and car headlights. Noise and disturbance associated with these commercial activities are highly noticeable and intrusive

in this area due to its location in a quiet semi-rural area of the borough that makes Petersham so distinctive and special within the London-wide and borough-wide context. In addition, these activities are taking place on a regular basis in the evening which should be respite periods for the neighbouring residential properties. This further exacerbate the amenities impact and worsening their effect upon neighbouring properties amenity in terms of noise and disturbance.

2.21 In addition, a number of third-party representations have been sent to the Inspectorate by occupiers of the neighbouring residential properties which clearly outline the impact of the breach of conditions on their living conditions through noise and disturbance. The nearby residents who raised these issues as part of their representations to the Inspectorate are from Rose Bank, Petersham Lodge and 1 Rutland Drive. Especially, residents of Rose Bank and Petersham Lodge who have lived in the area for nearly forty and thirty years respectively have written to support the Council's case and outlined the impact of the breach of conditions on their living conditions.

2.22 Due to the semi-rural character of the area and its tranquillity, the comings and goings of staff and patrons, vehicular movements, closing car doors, engines running, music, speeches and chatter cumulatively result in a significant adverse impact on residents of nearby properties. The combination of these activities creates a bustling and busy commercial enterprise within a quiet, semi-rural area of the borough that makes Petersham so distinctive and special. These activities cause noise nuisance and general disturbance which is otherwise alien to this part of Petersham. This has a material negative affect on the living conditions of neighbouring residents. I am of the view that this is contrary to the objectives of policies LP8 and LP10 of the Local Plan and policies 46 and 53 of the draft Publication Version Local Plan.

### **Licence consent**

2.23 I have been writing planning comments on licensing applications for almost 10 years. In particular on commercial premises operating hours and have been reminded time and again by Licensing officers that planning, and licence



departments operate under different regimes, they are not bound by planning decisions.

2.24 I am aware that licence consent has been granted for the sale of alcohol at the appeal site beyond the approved planning operating hours. The consented operating hours are set out below:

- **Hours premises are open to the public**

Monday to Tuesday 09:00 to 17:00

Wednesday to Saturday 09:00 to 23:00

Sunday 11:00 to 17:00

- **Sale of Alcohol (for consumption on the premises)**

Sunday to Tuesday 11:00 to 17:00

Wednesday to Saturday 11:00 to 22:30 (11:00 to 17:00 in the restricted areas, see conditions below).

- **Sale of Alcohol (for consumption off the premises)**

Sunday to Tuesday 11:00 to 17:00

Wednesday to Saturday 11:00 to 22:30:

**Non-Standard Timings:**

From the end of permitted hours on New Year's Eve to the start of permitted hours on New Year's Day.

On Christmas Eve the sale of alcohol to cease and the premises to close at 13:00 hours.

2.25 Paragraph 14.65 of the Home Office Revised Guidance issued under section 182 of the Licensing Act 2003 dated December 2023 states that "*the statement of licensing policy should indicate that planning permission, building control approval and licensing regimes will be properly separated to avoid duplication and inefficiency. **The planning and licensing regimes involve consideration***

***of different (albeit related) matters. Licensing committees are not bound by decisions made by a planning committee, and vice versa”.***

2.26 This view of the Council is supported by caselaw. In *Gold Kebab Ltd v Secretary of State for Communities and Local Government* [2015] All ER (D) 48 (Sep)) the claimants argued that license consent had been granted for the extended operating hours, therefore it was a material consideration when the determining planning application to extend the operating hours of the takeaway/restaurant. The Inspector was aware of the license consent when the appeal was determined but did not give significant weight to it. The appeal was dismissed. The judge held (at paragraph 18): “...*the planning and licensing regimes are separate. The legal considerations driving them are different, although there may be some overlap. The crucial point, however, is that the inspector in this case was quite obviously aware, given paragraph 7 of his letter which I have quoted earlier, of the attitude of the licensing authority. He clearly took that into account. His decision letter cannot be attacked on the basis that he has failed to take into account a material consideration.*” Copy of the judgement is attached to the Council’s statement of case as Appendix 10. While I am aware that licensing consent had been granted for extended operating hours at the appeal site, it is not automatic that planning permission would also be granted for similar operating hours.

2.27 Furthermore, the Appellant was reminded by the Licensing Sub-Committee in September 2022 that:

*“The Sub-Committee noted that many of the Other Parties were concerned about the applicant’s alleged planning breaches and whilst acknowledging the concerns raised the Sub-Committee noted, as advised by the Council’s Legal Advisor, that both the Home Office Guidance issued under section 182 of the Licensing Act 2003 (paragraph 14.64 and 14.65) and its Statement of Licensing Policy (Section 8) were very clear on which regimes were responsible for considering the different matters. The Sub-Committee noted that applications for licences may be made to the Licensing Authority before relevant planning permission has been sought or granted by the planning authority and **that where***

**a planning condition restricts usage of a premises to certain hours, and if these hours differ from those permitted on a premises licence then the premises user must comply with the more restricted of the two sets of hours. The Sub-Committee stresses to the applicant the need to obtain all other relevant necessary consents for their operation, including planning permission**".

2.28 Finally, paragraph 14.66 of the Home Office Revised Guidance issued under section 182 of the Licensing Act 2003 states that "*there are circumstances when, as a condition of planning permission, a terminal hour has been set for the use of premises for commercial purposes. **Where these hours are different to the licensing hours, the applicant must observe the earlier closing time.** Premises operating in breach of their planning permission would be liable to prosecution under planning law*".

#### **Supporting the night-time economy**

2.29 Policy HC6 of the London Plan (2021) states that in development plans, town centre strategies and planning decisions, boroughs should promote the night-time economy, where appropriate, particularly in the Central Activities Zone, strategic areas of night-time activity, and town centres where public transport such as the Night Tube and Night Buses are available. The appeal site is not located in central activities zone or town centre and the area benefits from limited public transport link to other parts of the borough and Kingston. Therefore, due to its location in a quiet semi-rural area within MOL, it is considered that the Appellant's proposal for the café/restaurant to operate in the evening in this area would be inappropriate due to noise nuisance and disturbance it causes in this tranquil location of the borough and the impacts it has on the openness of the MOL. It is therefore contrary to policy HC6. The Council has allowed the restaurant to expand in part in recognition of its economic benefits but have also sought to balance with impacts on MOL and nearby residential amenities.

### Third party comments

2.30 Information received from the Inspectorate so far show that a number of objections and support comments were received. Summary of concerns raised by those who object to the appeal are agreement with enforcement action being taken by the Council, traffic/parking, noise nuisance, loss of privacy, light pollution, safety on Church Lane and Petersham Road, impact on MOL and impact on setting of St Peter's Church, character and appearance of the conservation area and wildlife/biodiversity. The support comments relate to socio-economic benefits and no impact on amenity.

2.31 It is worth mentioning that the Council is not proposing to close the café/restaurant element of the business at the appeal site. The notice requires that the Appellant adheres to the approved operating hours and area of the café/restaurant. The lawful use of the site as mixed use garden centre and café/restaurant will continue to operate if the appeal is dismissed on all grounds, but in accordance with the requirements of the notice. The economic benefits of the scheme had been considered in previous applications (ref: 07/1235/FUL para 32 and ref:14/0345/VRC para 30) and reproduced in the enforcement committee report (para 9.7) in September 2023. It is pertinent to note that two directors of the business and planning agent of the Appellant presented similar socio-economic benefits and viability of the business in person (planning agent via video) to elected members at the Planning Committee in September 2023. The committee considered these benefits and concluded that they do not outweigh the harm the breach of planning control cause to the MOL and amenities of the neighbouring properties. This view is supported by the third-party representations which have been sent to the Inspectorate. It is important to mention that the enforcement notice under-enforces which allows the café/restaurant to operate in an extended area (delineated in blue on figure 1 above) and hours of operation was extended. This shows that the Council has sought to protect the openness of the MOL and amenities of nearby residential properties while helping the café/restaurant use at the appeal site in a balanced way.

2.32 On the impact of the scheme on the Petersham conservation area and setting of St Peter's Church, as described above, the evening opening hours of the café/restaurant and extension of the area do not affect the significance of the heritage assets.

### **Draft Local Views SPD**

2.33 The appeal site is located in the following protected views: Protected View (Indicative zone) – N\_View\_004 View from near Ham House to Orleans House; Protected View (Indicative zone) – N\_View\_005 View to Marble Hill House (north) and Protected View (Indicative zone) – N\_View\_006 View from Richmond Hill to Asgill House

Richmond Terrace and Richmond Hill is a protect view by an Act of parliament in 1902. From Richmond Terrace Walk (Grade II\*) you can view across the River Thames valley and multiple viewing points along the viewing terrace; encompassing:

a) (foreground) the Victorian Terrace Gardens linking with Buccleuch Gardens towards the river;

**b) (wider foreground) pastoral-looking Petersham Common and Meadow setting the foreground landscape to Petersham Lodge (Grade II) – gleaming white building against the green of the meadow and the darker backdrop of cedars and the horse chestnut avenue;**

c) (background) the River Thames from Twickenham Bridge, Corporation Island towards Teddington – ranging character from town centre to riparian landscape edge; and, d) (long-distant) views across to Windsor.

2.34 I am of the view that the breach of conditions NS04 and NS05 do not impact on the protected views and vistas in the area because it does not consist of the construction of new buildings.

2.35 The Council published consultation draft Local Views SPD in 2022. The responses to the consultation have fed into the general consideration of the Local Plan, particularly to identify the list of new views that it is considered

appropriate to designate. There were an additional five new views added to the list in Policy 31 of the emerging Local Plan, since the draft SPD was published.

2.36 It is the Local Plan which has to formally designate a 'new' view (i.e. the name of that view and it being shown on the Policies Map), so the Council had to effectively put the draft Local Views SPD 'on hold' until the view of the Inspector is known as part of the Local Plan Examination process (they will confirm the designation of new views). Once that is clear, the Council would pick up the details again in the Local Views SPD (i.e. take it to adoption, or a further consultation if it is considered necessary, which will include revisiting/producing the detailed proformas for each view).

Responses to the consultation on the draft Local Views SPD are available on the Council's website.

### **Planning balance**

2.37 As the breach of conditions affects the MOL and is not in accordance with the adopted Local Plan policies and emerging policies, planning policy requires that balancing exercise be carried out to determine whether the harm to the MOL by reason of inappropriateness, and any other harm resulting from breach of conditions NS04 and NS05, is clearly outweighed by other considerations (para 153 of the NPPF, which is applied to MOL by Local Plan and London Plan policies).

2.38 The Council's statement of case, final comments and the enforcement committee report show that the breach of conditions being enforced against are extension of an inappropriate development for the purposes of Green Belt and MOL policy. I am of the view that the development is harmful in principle. This is contrary to of the Local Plan.

2.39 The Council has demonstrated that the breach of conditions NS04 and NS05 affects the openness of the MOL through activities it generates. The breach also negatively impacts on the living conditions of residents of nearby properties

which is contrary to the objectives of policy G3 of the London Plan and policies LP8, LP10 and LP13 of the Local Plan.

2.40 Paragraph 152 of the NPPF advises that inappropriate development is, by definition, harmful to the Green Belt [MOL] and should not be approved except in Very Special Circumstances (VSC).

2.41 Paragraph 153 of the NPPF states that “*when considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt (MOL). ‘Very special circumstances’ will not exist unless the potential harm to the Green Belt (MOL) by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations”.*

2.42 VSC had already been considered by elected members at the Planning Committee through at least one previous application (para 31 of officer committee report for application 14/0345/VRC, copy of this report is attached to this proof as Appendix 31) and more recently as part of the committee report to take enforcement action in September 2023 (para 9.59 – 9.67) where two directors of the company and planning agent representing the Appellant presented similar socio-economic benefits and viability issues to elected members. They took note of these benefits and resolved to take enforcement action because they do not outweigh the harm the breach of conditions causes to the MOL and living conditions of the nearby residential properties.

2.43 I concur with this view by elected members of the Planning Committee. Socio-economic benefits and viability issues presented by the Appellant as part of this appeal are considered to be modest and harm to the MOL and living conditions of the residents of the nearby properties are significant. I am of the view that they do not justify a departure from the national, regional or local development plan and planning permission should therefore be refused. The Inspector appointed by the Secretary of State has reached a similar conclusion in his decision for an appeal at Pontoon and land adjacent to Richmond Bridge Pier (ref: APP/L5810/C/23/3333609). He concluded that restaurant use is an

*“inappropriate development and harmful to the MOL by definition and by reason of encroachment. They also fail to preserve the setting and special character of a historic town, a further purpose of including land in MOL. This is a matter to be afforded substantial weight”*. On VSC, similar arguments were presented to the Inspector, but he concluded that the benefits do not individually, or collectively amount to VSC needed to outweigh the harm to the MOL. A copy of the appeal decision is attached to this proof as Appendix 27.

**Ground ‘d’ – That, at the time the enforcement notice was issued, it was too late to take enforcement action against the matters stated in the notice.**

2.44 The Appellant has written to inform the Council and Inspectorate on 3 May 2024 that they will no longer pursue ground (d) appeal. As a result, the Council will provide no further comments under ground ‘d’.

**Ground ‘g’ – That the time given to comply with the notice is too short.**

2.45 The Appellant suggests that the compliance period be extended to 6-months. The Council is of the view that the time-period set to comply with the enforcement notice is reasonable, practicable and sufficient. This view was supported by elected members on the Planning Committee who granted authority to serve the notice. The requirements of the notice do not include physical works, it only relates to changing the existing operations of the restaurant to accord with the requirements of the notice. It is acknowledged that this may have an impact on staff (in that there may be less work so as to reduce hours/ shifts) and the revenue generated by the café/restaurant but there is no detail or evidence in relation to this. The site is currently being operated in breach planning controls and the owners’ decision to not to comply with the planning conditions imposed by the Council. The proposed course of action is less than rectifying the whole of the breach. The Council is under enforcing. Any impact on staff and revenue results from the breach. Extending the compliance period to 6 months would result in the harm to the MOL and amenities of the neighbouring properties becoming unduly protracted. It is simply not necessary. The Council maintains that a two-month compliance period is practicable,



reasonable and proportionate to the degree of harm caused and is necessary to uphold the integrity of the planning system.

2.46 For the above reasons I respectfully invite the Inspector to dismiss the appeal on all grounds.

2.47 The Council has received copies of the Appellant's reports/surveys. The information submitted have been shared with relevant experts and their comments would be presented to the Inspector by 18 June 2024.

## **Appendices**

### **Appendix 1- 19 (attached to Council's statement of case)**

Appendix 1 – Decision notice 08/4312/FUL

Appendix 2 – Decision notice 12/0067/VRC

Appendix 3 – Decision notice 14/0345/VRC

Appendix 4 – Decision notice 21/3108/ES191

Appendix 5 – Officer report 21/3108/ES191

Appendix 6 – Appeal decision APP/K3415/W/20/3264866

Appendix 7 – Enforcement committee report 13/09/2023

Appendix 8 – Enforcement notice dated 15 January 2024

Appendix 9 – Location of neighbouring residential properties

Appendix 10 – Caselaw Gold Kebab v. SoS

Appendix 11 – LDC neighbour comments

Appendix 12 – Premises Licence

Appendix 13 – Heritage summary

Appendix 14 – Appeal Decision APP/Z4718/W/21/3279690

Appendix 15 – Regulation 19 comments

Appendix 16 – Officer committee report 07/1235/FUL

Appendix 17 – Officer committee report 08/4312/VRC

Appendix 18 – Images of Petersham Nurseries from online

Appendix 19 – Officer committee report 12/0067/VRC

### **Appendices 20 – 29 attached to this proof of evidence.**

Appendix 20 – Appeal site photos

Appendix 21 – Complaints

Appendix 22 – Complaint location

Appendix 23 – Petersham Nurseries Agenda 1.5.18

Appendix 24 – email correspondence with agent from 2018

Appendix 25 – Completed PCN

Appendix 26 – Extract from MOL review 2021

Appendix 27 – Appeal decision at Richmond Bridge Pier

Appendix 28 – Appeal decision on car park impact on openness

Appendix 29 – Location of neighbour noise complaint on LDC application

Appendix 30 – noise complaint email chain

Appendix 31 – officer report – 14.0345.VRC