



Pre-Inquiry Note

by **D Hartley BA (Hons), MTP, MBA, MRTPI**

an Inspector appointed by the Secretary of State

Appeal Ref: APP/L5810/C/24/3339372

Land at Petersham Nurseries, Petersham Road, Petersham, Richmond TW10 7AB

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Francesco Boglione of Petersham Nurseries Limited against an enforcement notice issued by the Council of the London Borough of Richmond-upon-Thames.
- The enforcement notice, numbered 18/0025/EN/BCN, was issued on 15 January 2024.
- The breach of planning control alleged in the notice is failure to comply with condition Nos U27543NS04 and U27544NS05 of a planning permission Ref 08/4312/FUL granted on 29 July 2009.
- The development to which the permission relates is continuation of planning permission granted on 11 December 2007 (07/1235/FUL) to allow permanent mixed use as garden centre (Class A1) and café/restaurant (Class A3). The conditions in question are No U27543NS04 which states that: '*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 11.00hrs and after 16.30hrs. 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*', and No U27544NS05 which states that: '*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*'.
- The notice alleges that the conditions have not been complied with in that the café/restaurant is operating outside of the permitted hours (in breach of condition NS04 hours of use) and the extent of the café/restaurant area has increased in size beyond that permitted under approved drawing number DP7/2857 (in breach of condition NS05 café/restaurant areas).
- The requirements of the notice are: a) permanently restrict the sale of food for consumption on or off the premises to the following: Tuesday to Sunday 10am to 5pm, and Bank Holidays 11am to 5pm and b) permanently restrict the café/restaurant uses areas to within the blue line, as shown on the attached Plan 2.
- The period for compliance with the requirements is 2 months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.

The following pre-Inquiry note is sent now to try to streamline the 'Ministerial Measures' s.174 Inquiry process and to give an early indication as to what the Inspector would like to be addressed in the main parties' statements of case

and, importantly, the required statement of common ground (SofCG). In respect of the latter, it is important that discussions take place now between the two main parties. The appellant will be required to take the lead on this and submit an agreed/signed version to PINS by no later than **15 April 2024**. This will pre-date the Case Management Conference (CMC) which is scheduled to take place at **10am on 23 April 2024** (separate correspondence to be issued about this in due course from the case officer). It is needed to assist me in understanding points in dispute. It is therefore critical that there is close cooperation about the preparation of the SofCG and that there is no slippage. In the absence of receipt of a SofCG and/or the cooperation of one or more of the parties, it is necessary that I remind all that there could be award of costs implications.

I will consider the statements of case and the SofCG prior to holding the CMC. However, I have taken an initial look at the enforcement notice as well as the appellant's grounds of appeal which includes extensive planning history and the LPA's enforcement committee report. Based on this information, I would like the following to be addressed: -

- The Notice - for the avoidance of doubt, I would like confirmation from the main parties that the notice is in order. The enforcement committee report appears to question whether the café/restaurant use has become a 'dominant' use. It is not clear whether the LPA is suggesting that the restaurant/café use may have become a primary use in a separate planning unit. My understanding is that the planning permission authorised a mixed use within one planning unit. It is important that I emphasise now that the notice does not allege an unauthorised material change of use. A breach of condition enforcement notice has been issued. Therefore, in this regard the appeal must be considered on the basis that LPA consider that a mixed retail and restaurant/café use was occurring when the notice was issued. If the LPA does not agree with this, then a breach of planning condition notice would not be the right mechanism for dealing with this matter. The SofCG needs to address this matter.
- Receipt of an agreed plan which shows (on one plan) i) what was originally approved in respect of the extent of the café/restaurant area, ii) what has lawfully been approved as a change, and then iii) the extent of the alleged unauthorised café/restaurant area when the notice was issued. The Plan should also include the extent of the area to which the mixed A1/A3 use was approved. This plan should be appended to the SofCG as an 'agreed plan'. Please annotate the plan with different colours and include relevant application ref numbers (where applicable).
- I also require a separate plan showing areas where customers can or do park vehicles and what vehicular and pedestrian route(s) they routinely take to reach the café/restaurant (particularly in the evening). I find that having such a plan will make matters easier for me to understand/follow, to aid discussion at the Inquiry and for the purposes of a site visit(s).
- The notice alleges that harm has been caused to Metropolitan Open Land (MOL). I am aware that MOL has the same status and level of protection as Green Belt. Policy LP13 of the Council's Local Plan 2018 requires an assessment of proposals against the 'character' and 'openness' of the

MOL. Policy G3 of the London Plan 2023 requires MOL to be protected from inappropriate development in accordance with national planning policy tests. I would like the main parties to address whether the Green Belt chapter of the NPPF 2023 requires 'character' to be considered as part of an assessment of openness. In other words, is policy G3 consistent with policy LP13. Furthermore, and, for the avoidance of doubt, I would like the main parties to confirm whether they agree or disagree that the concerns relating to the alleged breaches of planning control relate in fact to a general 'character' effect matter or whether it is in fact a MOL effect matter. It will be necessary to confirm (or otherwise) in the SofCG whether in view of the fact that a mixed retail and café/restaurant use has been approved, and the notice not being directed at an unauthorised material change of use, I am not being asked to consider whether the breach of planning control amounts to inappropriate development in the Green Belt, but rather whether the alleged intensification of the restaurant/café use and the alleged breach of hours has caused harm (or any further harm) to the MOL OR (as the case may be) to the general character of the area relative to the lawful position.

- Reference is made in the notice to an emerging development plan. It is understood that this has been submitted for Examination. The SofCG should agree all relevant plans and policies (including weight to be afforded to such relevant emerging and adopted policies) including those in the Ham and Petersham Neighbourhood Plan.
- The LPA's enforcement committee report seems to suggest that the breach of conditions would not cause harm to the significance of the Conservation Area or to the setting of any nearby listed buildings. The SofCG should provide agreement or otherwise in respect of these matters. Given my statutory duty to consider the effect of the breach of planning control on the character or appearance of the Conservation Area and setting of listed buildings, please provide a summary of the significance of the Conservation Area and nearby listed buildings (including the extent of their settings) and the effect(s) of the breach of conditions in terms of any common ground position (or not as the case may be). This could be appended to the SofCG.
- The notice refers to harm to the living conditions of neighbouring residents. It would be helpful to understand which residents would be allegedly harmed (and why) perhaps with the inclusion of a location plan which identifies specific properties. The notice seems to allege harm in terms of '*pedestrian, vehicular, and commercial activity*'. Through the SofCG process the main parties should seek to agree what harm is specifically alleged in the context of the lawful position and, importantly, in the context of the requirements of the notice. The enforcement committee report refers to seating areas positioned '*directly adjacent to residential boundaries*' and an increase in the number of covers. It is not entirely clear if the alleged harm relates to noise and disturbance during evening hours from vehicular movements, pedestrian activity and comings and goings. It is also not clear whether the alleged harm relates to light pollution from car headlights and/or from the building being used in the evening hours when it is dark. The LPA should make its living conditions

effect position clear now through discussion with the appellant, in the interests of certainty, and as part of the SofCG. This has the potential to save considerable time and expense in the Inquiry process.

- The SofCG should provide agreement (or otherwise) in respect of the number of covers for the restaurant/café that were in place when the notice was issued. The SofCG should then provide agreement (or otherwise) in respect of number of covers that would reasonably be capable of being accommodated in respect of the requirements of the notice and/or the existing lawful position. If there is disagreement about this matter, the SofCG should precisely indicate the positions of the main parties.
- The appellant has included information relating to a premises license in September 2022. It would be useful to know whether this permits the alleged breach of planning condition hours on the specified days (and all year round) and whether it permits restaurant/café areas as per the alleged breach of planning control. It would also be useful to know whether the LPA were consulted in respect of the premises license and what was said. It would also be useful to know if the premises license considered the same living conditions matters as outlined in the notice. Importantly, I would like the main parties to agree (or not) whether the license is a material planning consideration and whether the living conditions to be considered as part of this appeal have different considerations, noting that the licensing control regime is not the same as the planning enforcement control regime.
- The notice under-enforces in the sense that it permits extended hours over and above what has been permitted. If the notice was to be upheld, then section 173(11) of the Act would grant planning permission for hours of use and the café/restaurant areas as per requirements 5a) and b). The ground (a) appeal evidence should therefore consider this 'fallback' position. For the avoidance of doubt, the SofCG and statements of case should explicitly state what café/restaurant hours/days were in operation when the notice was issued and what is being sought in terms of the ground (a) appeal.
- Ground (d) appeal – it would be useful to append evidence to the statements of case/proofs in respect of the ground (d) appeal. It would then be helpful to provide succinct summaries of the respective cases in this regard with an easy-to-follow list/chronology of events/dates/times. In respect of the ground (d) appeal, the main parties will be aware of the need to demonstrate that the breaches of planning control have continued for ten years. The main parties will also be aware that in considering a ground (d) appeal, the question to be asked is whether enforcement action could have been taken against a breach of the condition during a period of compliant activity. In addition, the main parties will be aware that if the imposed conditions have been complied with within a given period the 'immunity' clock would start again on any new and different breach of the condition.

- Ground (f) appeal – the appellant’s grounds made under the ground (f) appeal relate to the steps in the notice being excessive owing to the likely success of the ground (d) appeal and/or fallback considerations in respect of the ground (a) appeal. These are not valid ground (f) appeal claims. Indeed, if the ground (d) appeal succeeded there would be no need to consider the ground (a) appeal. If the ground (a) appeal succeeded, then the notice would be quashed and there would be no need to consider the ground (f) appeal. The appellant should now consider whether it would be prudent to withdraw the ground (f) appeal and communicate this to the LPA and PINS.
- Without prejudice suggested ground (a) appeal conditions – the main parties should discuss without prejudice conditions and try to append them to the SofCG. This is a breach of condition notice and so therefore only the conditions which are the subject of the appeal can be considered as part of the assessment of the ground (a) appeal. In other words, and, for the avoidance of doubt, it will not be open to me to review any of the other conditions imposed on the original planning permission; doing so would widen the scope of the notice. It would be possible, however, to impose new conditions but only in so far that they were directly related to the two conditions which are alleged to have been breached. The appellant should discuss this matter with the LPA particularly if any associated conditions were to be considered necessary (e.g., to address or control the effects of any alleged actual or potential harm).
- Finally, as part of the discussions about the SofCG, I require the main parties to discuss having a common core document list which can be displayed electronically. I shall raise this again at the CMC, but it will be necessary to have core documents displayed on-line and prior to the Inquiry I will need to be provided with a link.
- I will also require **hard copies** of the SofCG, statements of case and proofs of evidence (including appendices). Both electronic and hard copy documents should be sent to the case officer in accordance with communicated deadlines.

I hope that this note is helpful at this early stage. The comments made in this note are without prejudice to the determination of the s.174 appeal. We will discuss matters further at the CMC on 23 April 2024 (10 am) and following receipt of the SofCG and the statements of case. Thank you.

D Hartley
 Inspector
 7 March 2024