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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

FINAL COMMENTS

**by Mr Edward Appah, BA (Hons), MA, MRTPI
on behalf of London Borough of Richmond Upon Thames**

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

3 May 2024

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1. INTRODUCTION

- 1.1 These are the Council's final comments in relation to points raised in the Appellant's statement of case. The Council maintains that the appeal should be dismissed on all grounds for the reasons set out in its statement of case and planning enforcement committee report.

2. The Council's comments on grounds of appeal

2. The Appeal Under Ground 'a'

That planning permission should be granted for the breach alleged in the notice.

- 2.1 Below are the Council's comments on the Appellant's statement of case.

Impact on Metropolitan Open Land (MOL) and character of the area

- 2.2 The Appellant claims in paragraph 5.73 and 5.95 of their statement of case that "*we do not consider that the proposed development comprises inappropriate development within the MOL as it complies with the exceptions set out within paragraph 155 of the NPPF*".
- 2.3 The Council rejects this view and as set out in previous committee reports and more recently in the enforcement committee report, the use of the site as mixed used garden centre and café/restaurant is an inappropriate development in the MOL. However, permission was granted in 2007 for the mixed use of the site as a garden centre and café/restaurant having regard to very special circumstances and, in particular, because of the long-established use of the site as garden centre. The Council is of the view that mixed use garden centre and café/restaurant do not form part of the exceptions outlined in paragraph 154 of the NPPF nor do they form part of the developments outlined in paragraph 155 of the NPPF which are also not inappropriate in the Green Belt (MOL) provided they preserve its openness and do not conflict with the purposes of including land within it. Therefore, garden centre and café/restaurant use are inappropriate development in the MOL. This view of the Council has been set out in planning officers' committee reports since 2007 when the first permission was granted for the mixed use of the appeal site (paragraph 20 of the committee report for application ref: 07/1235/FUL, para 12 of application ref: 12/0067/VRC, paragraph 34 of application ref: 14/0345/VRC and para 9.14 of the enforcement committee report). In this case the Appellant seeks an extension of the hours/areas over and above the existing level of consented development.

Any harm arising from these increases must be understood in context, i.e. it is an extension of development which is inappropriate development.

- 2.4 On the impact of the breach of conditions on the openness of the MOL, the Appellant claims in paragraph 5.92 of their statement that “*the proposed development is not anticipated to result in any adverse impacts on the character of openness of the MOL in terms of noise, traffic, or lighting impacts*”. The Council maintains that the breach affects the visual openness of the MOL through increase in vehicular movements in the area, staff, patrons and customers comings and goings, car headlights and external lights at the site.
- 2.5 The Appellant has raised concerns about the validity of the designation of the appeal site within the MOL. Validity or inclusion of the appeal site within the MOL is not a matter that this appeal can resolve. It is a separate planning policy issue.

Very special circumstances (“VSC”)

- 2.6 The Appellant claims in paragraph 5.136 of their state of case that “*should the Inspector consider that the proposed development comprises inappropriate development in the MOL, then we contend that there are Very Special Circumstances which outweigh any perceived harm*”.
- 2.7 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*”.
- 2.8 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) and more recently as part of the committee report to take enforcement action in September 2023 (para 9.59 - 9.67).
- 2.9 The benefits identified by the Appellant do not amount to very special circumstances. Consent should not be granted for the extended operating hours and area of the café/restaurant due to the harm they cause to the MOL, and residential amenity as set out in the Council’s statement of case.

Amenity impact

- 2.10 The Appellant asserts under paragraph 5.124 of their statement that “*the ongoing management of the restaurant and evening operations are considered to successfully mitigate against any perceived harm to residential amenity, as per the requirements of Local Plan Policy LP8*”. The Council disagrees with this assertion and as outlined in its statement of case, the breach of conditions NS04 and NS05 causes significant harm to the amenity of the neighbouring properties and 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.
- 2.11 In order to understand the harm that the breach of planning control cause to the amenity of the neighbouring properties; one must appreciate neighbouring residents’ experience of periods of respite from the use when the approved hours were imposed and adhered to by the Appellant. For example, neighbouring properties are used to quiet evening/night-time when the garden centre and café/restaurant is closed. Operating three evening events per week at the appeal site would affect the respite period of the occupants through staff and patrons comings and goings, chatter, speeches, music and vehicular movements late into the night. These respite periods have become predictable and valued greatly by residents. As a result, any increase in the operating hours beyond what was approved and increase the area for A3 use interrupts the predictable respite periods thereby worsening the impact upon neighbouring properties amenity in terms of noise and disturbance.
- 2.12 Residents of the neighbouring properties (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. The view of these residents’ matter because they have seen the change in nuisance levels over the years as longstanding residents of the area. They have outlined their concerns in their comments to the Inspectorate. Other residents including the Ham and Petersham Association and Amenities Group have also written to the Inspectorate in support of the Council’s case.
- 2.13 In addition, the Council’s Noise Nuisance team have received five nuisance complaints concerning evening activities at the appeal site since 2020. Further complaints regarding noise were included in the third-party observations made on the LDC application. The complaints came from residents of the following neighbouring properties: Rose Bank, 1 Rutland Drive, 2 Rutland Drive, Petersham Lodge, 145a Petersham Road and the Old Stables.

2.14 The Appellant claims in paragraph 5.116 of their statement that “*when considering disturbance from noise, it is a material consideration that the restaurant use is licensed under the Licensing Act 2003*”. The Council is of the view that licence consent can be taken into account by planning officers when determining planning applications, but it is not a mandatory consideration. Paragraph 14.65 of the Home Office Revised Guidance issued under section 182 of the Licensing Act 2003 dated December 2023 states that “**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**”. This view is also supported by caselaw (Gold Kebab Ltd v Secretary of State for Communities and Local Government [2015] All ER (D) 48 (Sep)). The Appellant was even reminded during the licensing application as can be seen in Appendix 12 of the Council’s statement of case that planning and licensing operate under separate regimes. Public nuisance consideration for the sale of alcohol is not the same as planning consideration for the extension of the café/restaurant area and operating hours. The Council imposed specific conditions (NS04 and NS05) when permission was granted for the mixed use of the appeal site in order to control amenity harm to the neighbouring properties.

Fallback position

2.15 The Appellant sets out in paragraph 5.28 of their statement that “*it is worth noting that the current permission for Petersham Nurseries allows for a Class E operation to take place across the whole site with no restriction on hours or areas of operation in planning terms (except those set by the conditions in LPA ref: 08/4312/FUL regarding café/restaurant operations). This would not necessarily need to be a retail use, as it would be possible for alternative occupation within any of the uses included within Class E – including gym, creche, day nursery, light industrial or offices (amongst others). None of these uses would be restricted by the condition relating to the café/restaurant operation and could, theoretically, even be able to open 24-hours a day*”.

2.16 This sets out a hypothetical situation. It is not considered to be a realistic fallback position to be considered under ground ‘a’. The Appellant has never expressed any intention of converting the Appeal Site into a gym or creche etc.

Socio-economic impact

- 2.17 The Appellant sets out in paragraph 5.41 of their statement that “*the social benefits of Petersham Nurseries would be safeguarded through the grant of planning permission to allow the extension of the restaurant opening hours and extended seating, which would allow the business to continue operating and contributing to the local community*”.
- 2.18 The Council supports creation of new jobs, diverse and strong local economy in the borough as set out in the Local Plan policy LP40. London Plan policy HC6 supports night-time economy “where appropriate”. Nonetheless, as outlined in the Council’s statement of case, the operation of a café/restaurant in the evening in this tranquil semi-rural area of the borough would be inappropriate due to noise nuisance and disturbance it causes in this tranquil location and harm it causes to the MOL. It is therefore contrary to the objectives of London Plan policy HC6.

Appeal under 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.

- 2.19 It is important to stress that under ground ‘d’ appeal, the onus is on the Appellant to demonstrate that at the time the enforcement notice was issued, it was too late to take enforcement action against the matters stated in the notice. In order to substantiate this claim, the Appellant must submit evidence to show on the balance of probabilities that the breach of conditions NS04 and NS05 has subsisted continuously for 10 or more years.
- 2.20 Evidence submitted in support of the LDC application (ref: 21/3108/ES191) shows that breach of conditions NS04 and NS05 has not become lawful with time when the notice was served.
- 2.21 The Council has already reviewed information submitted in support of the LDC application and have assessed the further evidence submitted as part of this appeal and concluded that it was not too late to take enforcement action when the notice was served. The question now is whether the additional information submitted as part of the appeal in conjunction with the existing LDC information would demonstrate that breach of conditions NS04 and NS05 had become lawful when the notice was served.

- 2.22 Further evidence has been submitted by the Appellant as part of this appeal to substantiate this claim. The new evidence consists of additional evening events identified after submission of the LDC application in 2021, openTable dinner reservations and other key dates. The additional evidence does not give specific location of the events at the appeal site nor provide specific time in the evening/night-time when sale of food for consumption on or off the premises took place. For example, invoice provided only show dates of the events and events sheets show arrival and departure time amongst other unrelated information. In the Council's view, the additional information submitted as part of the appeal and LDC application information still fails to demonstrate that the breach of conditions NS04 and NS05 had become lawful when the notice was served.

Appeal under ground "g"

The time given to comply with the notice is too short.

- 2.23 The Council maintains that the time-period set to comply with the enforcement notice is reasonable, practicable and sufficient. This was supported by elected members on the Planning Committee when authority was granted to serve the notice. Contrary to the Appellant's claim that the principle of proportionality has not been applied by the Council (paragraph 5.142 of the Appellant's statement of case), paragraph 12 of the officer report to committee to obtain authority to serve the notice considered proportionality and human rights. While it is acknowledged that the Inspector has powers to extend the compliance period, the Council is of the view that the Appellant's request to extend the compliance period to 6 months would result in the harm to the MOL and amenities of the neighbouring properties becoming unduly protracted. 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.

3. Conclusion

- 3.1 The café/restaurant operating outside of its permitted hours (in breach of condition NS04 - hours of use) and the increase in size of the café/restaurant area beyond that permitted (in breach of condition NS05) has led to pedestrian, vehicular and commercial activity which is harming the amenity and living conditions of neighbouring residents and has an urbanising effect detrimental to the character and function of the Metropolitan Open Land (MOL). This is contrary to the National Planning Policy Framework (2023), to policy G3 (MOL) of The London Plan (2021), to policies LP8 (Amenity and Living Conditions) and policy LP13 (Green Belt, MOL and Local Green Space) of the adopted Local Plan (2018),

and to policies 46 (Amenity and Living Conditions) and 35 (Green Belt, MOL and Local Green Space) of the draft publication version, Reg 19, Local Plan (2023).