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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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**STATEMENT OF CASE**

**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/H5960/W/18/3209376

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

**15 April 2024**

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## 1. INTRODUCTION

- 1.1 This statement of case has been prepared on behalf of the London Borough of Richmond Upon Thames (“the Council”) in relation to a planning enforcement appeal submitted under Section 174 of the Town and Country Planning Act 1990 for land at Petersham Nurseries, Petersham Road, Petersham, Richmond TW10 7AB (“the Site”).
- 1.2 The café/restaurant at Petersham Nurseries is operating in breach of conditions imposed on their operative planning permission (08/4312/FUL) which limit its hours and its area of use. A copy of the decision notice including these conditions (NS04 and NS05) is attached in Appendix 1.
- 1.3 A detailed description of the site, the breach, relevant planning history and planning policies relevant to determine the appeal as per Section 38 (6) of the Planning and Compulsory Purchase Act 2004 are set out in the report presented the Council’s Planning Committee on 13<sup>th</sup> September 2023 and is attached in Appendix 7. This report should be read in conjunction with this statement of case.
- 1.4 In summary, planning permission was granted on 3<sup>rd</sup> August 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) (ref. 08/4312/FUL)*. This permission was subject to conditions including:

### ***NS04 Hours of Use – Cafe / Restaurant***

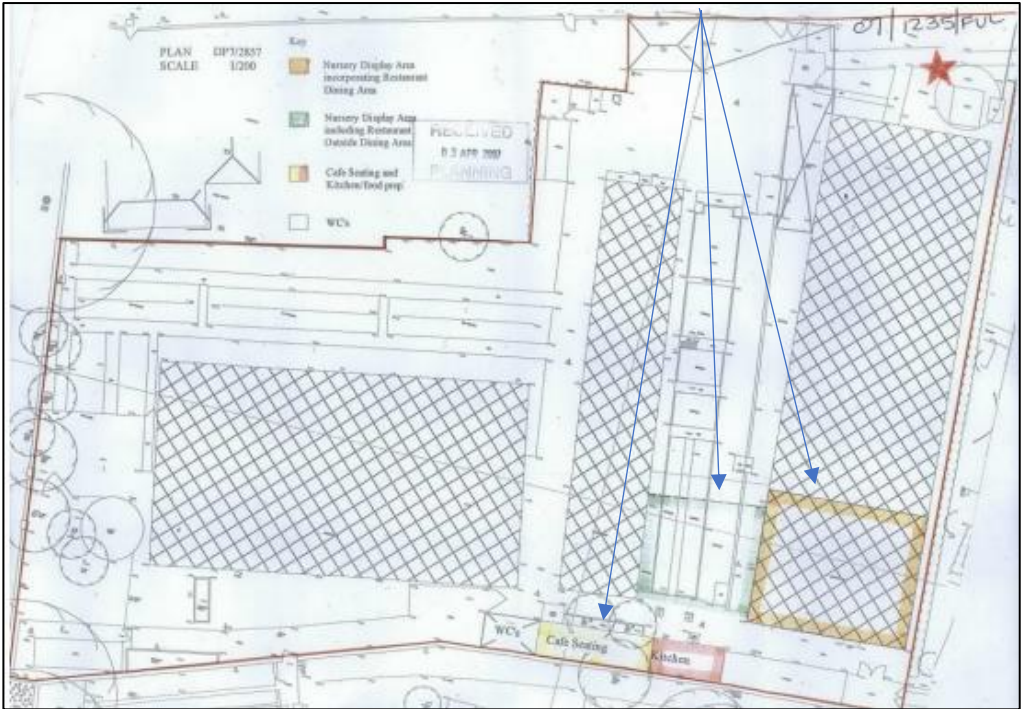
*This condition limits the sale of food for consumption on or off the premises to between Tue-Sun 1000 – 1630 hrs, and 1100 – 1630 hrs on Sundays.*

### ***NS05 – Cafe / Restaurant Areas***

*This condition confines the cafe / restaurant solely to the areas identified on dwg DP7/2857 of planning permission 07/1235/FUL.*

*Reasons: To safeguard the MOL, conservation area, amenities of nearby residents and the area generally.*

Fig 1: Drawing DP7/2857 showing the areas permitted for café/restaurant use highlighted in orange, green and yellow in the south-east corner of the site (08/4312/FUL).



- 1.5 Petersham Nurseries has paid little regard to these planning conditions and has flagrantly breached them on numerous occasions with the café / restaurant opening frequently into the evening and taking up a significant portion of the floor area of the premises. In 2012 it sought permission to extend the hours of operation to 1900 to 2300 hrs on Saturdays. This was considered by the Council's Planning Committee and refused permission on 1<sup>st</sup> June 2012 (12/0067/VRC) due the expansion of inappropriate use detrimental to the character of the Metropolitan Open Land (MOL) and its adverse effect on the amenities of neighbouring residents. A copy of the decision notice is attached as Appendix 2.
  
- 1.6 A second application was made in 2014 seeking to extend the hours of operation to between 900 and 1800 hrs Mon to Weds, 0900 to 2300 hrs Thurs to Sat and 1100 to 1800 hrs on Sundays. This was refused by the Planning Committee on 17<sup>th</sup> January 2018 (ref. 14/0345/VRC) owing to the expansion of an inappropriate use harmful to the character and function of MOL and by reason of increased level of pedestrian and vehicular activity, harmful to the amenities of neighbouring residents and the area generally. A copy of the decision notice is attached as Appendix 3.

1.7 In 2021, an application was made for a Lawful Development Certificate (ref: 21/3108/ES191). The applicant sought to establish that a breach of condition had been occurring for sufficient time as to gain immunity from enforcement. The terms *sought* in the certificate were that:

1. *The café / restaurant had been in operation selling food and beverages to visiting customers between 1000 to 2300 hrs Tues to Sundays (excl. Mondays but incl. bank holidays). The operation has exceeded the hours specified in condition NS04;*

2. *The areas used for the preparation, sale and consumption of food and beverages have operated in within the hatched area shown on dwg 292-03-AOU 01. The operation has exceeded the areas specified in condition NS05.*

1.8 The evidence provided by the applicant was insufficient to demonstrate that a continuous breach had subsisted for 10 years to the full extent of the terms sought by the certificate. The legislation does however allow the LPA to unilaterally modify the description of development and grant a certificate to the extent it does consider lawful. In this vein, the LPA granted a certificate of lawfulness on 4<sup>th</sup> September 2023 for the following:

1. *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.*

2. *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.*

1.9 A copy of the decision notice and officer's report are attached as Appendix 4 and Appendix 5 respectively.

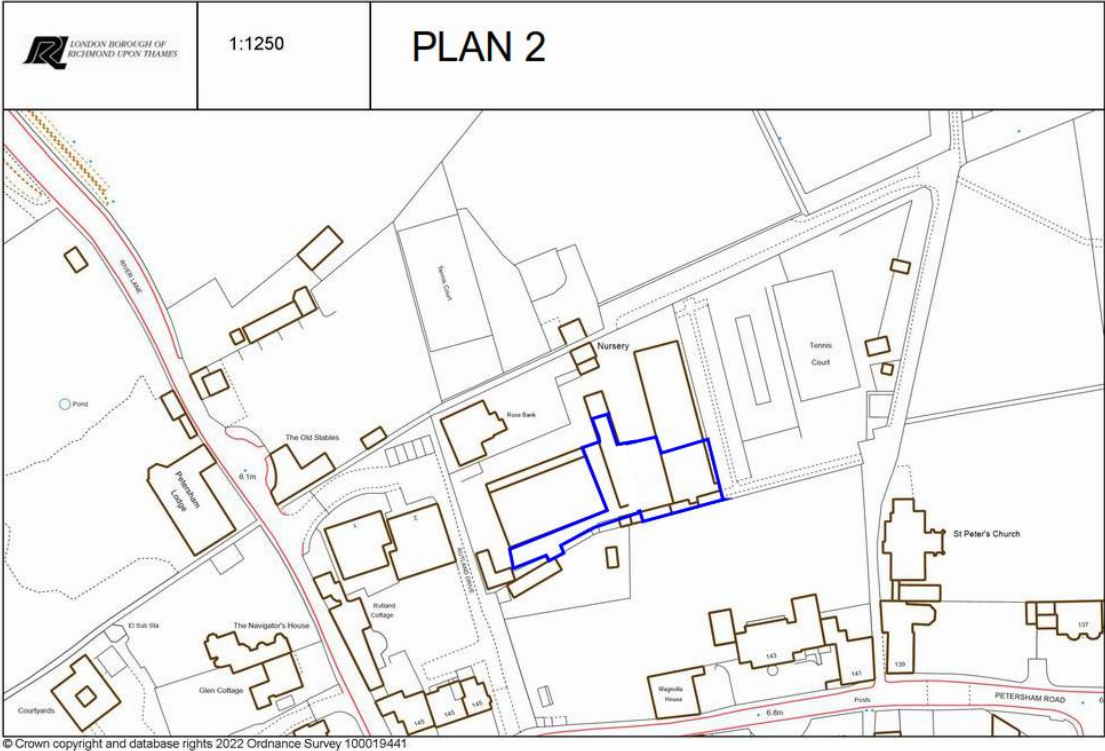
Fig 2. Plan 02-277-03 RP02 is included below with areas 1 and 2 highlighted in blue.



- 1.10 Owing to the continued breaching of condition NS04 and the café/restaurant use operating outside of the areas permitted under NS05 and Plan 02-277-03 RP02, a report was presented to the Council’s Planning Committee on 13<sup>th</sup> September 2023 proposing issue of an enforcement notice. The report is attached in Appendix 7.
  
- 1.11 The report presented three options to the Planning Committee:
  - (i) Issue an enforcement notice requiring compliance with condition NS04 and NS05 (except for the times and areas where the certificate of lawfulness confirmed immunity);
  - (ii) “Under-enforce” – only taking action against the elements breach considered most harmful in planning terms;
  - (iii) Take no action at all.
  
- 1.12 The committee resolved to “under-enforce” serve an enforcement notice under option (ii). This was considered a compromise that sought to allow the café/restaurant use to continue beyond the times and areas imposed by condition and the certificate of lawfulness and to the maximum extent possible without causing serious harm. An enforcement notice issued on this basis, dated on 15<sup>th</sup> January 2024, and required:

- a) Permanently restrict the sale of food for consumption on or off the premises to the following: Tues to Sun 1000 to 1700, and bank holidays 1100 to 1700.
- b) Permanently restrict the café/restaurant uses to within the blue line, as shown on the attached Plan 2.

Fig3: 'Plan 2' attached to the enforcement notice.



1.13 The reasons cited for issuing the enforcement notice are:

*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 under Approved Drawing Number DP7/2857 (in breach of condition NS05 café/restaurant areas) 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).*

Notwithstanding this, a minor extension of the hours to those stipulated in paragraph 5(a) below and a confined area for café/restaurant use stipulated in paragraph 5(b) below, which despite being of a greater extent than the approved Planning Permission, would be of a lesser extent than currently in operation and would address the harm caused thus allowing for the continued use of the café/restaurant in an amended form that would achieve compliance with the policies cited above. For these reasons the requirements cited below effectively ‘under-enforces’ the hours and area specified in paragraphs 5(a) and 5(b).

- 1.14 A copy of the notice is attached in Appendix 8. The enforcement notice forms the basis of this appeal.

**THE COUNCIL’S CASE**

- 2. **The Appeal Under Ground ‘a’**  
*That planning permission should be granted for the breach alleged in the notice.*
- 2.1 The appellant is seeking planning permission for an extension of the hours of operation to allow up to three evenings per week between Wednesday to Saturday and to operate the café-restaurant in the areas shown in pink/purple in the map below, in addition to the extended areas permitted in the enforcement notice.

Fig 4. Map showing areas for café/restaurant use is sought (in addition to those permitted by the enforcement notice delineated in blue).





- 2.2 The key issue is therefore whether the hours and areas of café/restaurant use sought by the appellant would cause unacceptable harm or not. It is the Council's case that it does and its reasoning is set out below. This should be read in conjunction with the enforcement report presented to the Planning Committee on 13<sup>th</sup> September 2023 (Appendix 7).

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

- 2.3 The site is located within designated Metropolitan Open Land ("MOL"). MOL is afforded the same status and level of protection as Green Belt Land (NPPF 2023, paragraph 142 and London Plan 2021 policy G3). The Government attaches great importance to Green Belts [MOL]. The fundamental aim of Green Belt [MOL] policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence, as such it is a policy to restrain development.
- 2.4 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). On this point, it is relevant that the underlying development at this 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. Further information can be found in the officer report for the temporary mixed use and permanent mixed use of the site attached to this statement as Appendix 16 and 17. Any extension of this use is an extension to inappropriate development, even if not in itself development, and needs to be considered in this context when evaluating the harm caused by the increase in hours.
- 2.5 Paragraph 153 of the NPPF states 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.
- 2.6 Paragraph 154 of the NPPF regards the construction of new buildings in the Green Belt [MOL] as inappropriate, unless they meet one of the exception tests to inappropriate development outlined including, but not limited to, the provision of appropriate facilities

(in connection with the existing use of land or a change of use) for outdoor sports [...] as long as the facilities preserve the openness of the Green Belt [MOL], and the erection of replacement buildings which are not materially larger than replacement buildings.

2.7 The NPPF states at para 155 that, “certain other forms of development are also not inappropriate in the Green Belt provided they preserve its openness and do not conflict with the purposes of including land within it” and then goes on to list examples of changes of use that may be suitable, but does not include café/restaurant use. Nevertheless, planning 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. It was considered that the additional activity created by the mixed-use and inclusion of a café/restaurant could be adequately controlled by conditions; including conditions NS04 (to limit the hours of operation); and NS05 (to limit the area of the café/restaurant use to a small portion of the site confined to the south-west corner). The conditions imposed were considered sufficient to ensure the character and function of the MOL were not harmed. The detailed assessment of impact of the mixed-use of the MOL is contained in the officer reports for 07/1235/FUL and 08/4312/FUL and are attached as Appendix 16 and 17.

2.8 On the openness of the MOL, paragraph: 001 Reference ID: 64-001-20190722 of the Planning Practice Guidance (“PPG”) states that assessing the impact of a proposal on ‘openness’ requires a judgement based on the circumstances of the case. Examples are provided of matters which may need to be taken into account when undertaking this assessment, which include, but are not limited to:

- openness is capable of having both spatial and visual aspects – in other words, **the visual impact of the proposal may be relevant, as could its volume.**
- the duration of the development, and its remediability – taking into account any provisions to return land to its original state or to an equivalent (or improved) state of openness; and
- **the degree of activity likely to be generated, such as traffic generation.**

2.9 The Inspector in appeal ref: APP/K3415/W/20/3264866, confirms that “a *fundamental aim of the Green Belt (MOL) policy, as set out in the Framework, is to keep land permanently*

open. **Openness can be considered as meaning an absence of built or urbanising development**". A copy of the appeal decision is provided in Appendix 6.

2.10 In the case of *R. (on the application of Samuel Smith Old Brewery) v North Yorkshire CC (2020)* it was stated that in applying the concept of openness, the decision maker should refer back to the underlying aims of including land within the Green Belt [MOL]. Paragraph 143 of the NPPF sets out that the Green Belt [MOL in this case] serves five purposes:

- a) to check the unrestricted sprawl of large built-up areas;
- b) to prevent neighbouring towns merging into one another;
- c) to assist in safeguarding the countryside from encroachment;
- d) to preserve the setting and special character of historic towns; and
- e) to assist in urban regeneration, by encouraging the recycling of derelict and other urban land.

2.11 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". As a point of fact, the expansion of the café/restaurant use in breach of condition and beyond that permissible under the enforcement notice is inappropriate development and no very special circumstances have been demonstrated that outweigh the harm caused.

2.12 With specific regard to this part of Petersham, the adopted Ham & Petersham Neighbourhood Plan explains that this area has a semi-rural character with substantial areas of open and undeveloped land. This is a distinctive and valued feature of the area, providing relative isolation from more urban areas of London. It makes clear that "[...] any new development will be expected to have regard to the character of the area in which it is located".

2.13 The appeal site is located in an area that is defined by its setting on a bend in the River Thames and a broad belt of open land. The area 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 19th century making it distinctive for its historic buildings, brick boundary walls and sharp bend. The area is quiet and isolated in terms of transport.

Petersham Road is the only main road which runs through the area, linking Richmond to Kingston. Other roads in Petersham are primarily narrow residential roads, used for local access only. However, there are numerous footpaths and alleyways to Richmond and Kingston. This results in a semi-rural feel and tranquil environment. 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. There are limited vehicular movements in this part of Petersham. It is acknowledged that the lawful mixed-use of the site does generate a degree of motorised transport due to its retail function, servicing requirements and bulky/heavy nature of the goods they sell. The retail element is long established and due regard to this was given in the granting of planning permission for the mixed-use of the land in 2009. What is not common however is large scale commercial activities taking place in this area in the evening.

2.14 MOL plays an important strategic role for the borough and London's green infrastructure. They are designated due to the strategic significant role they play in providing opportunities for recreation and biodiversity London-wide. Its aim is to prevent urban sprawl by keeping land open as set out in paragraph 142 of the NPPF. The appeal site has been designated as part of the MOL to prevent urban sprawl and keep it in open use. 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).

2.15 The current extension of the area in use as cafe/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 and amenities of the neighbouring residential properties. The breach of conditions also results in cafe/restaurant use extending into the evening and night-time. The current activities which take place at the appeal site include an extensive cafe/restaurant, that is by omission 'a destination in its own right'. The restaurant itself is a popular and busy commercial enterprise that also hosts weddings and other events. These activities generate journeys to and from the site by waiting staff, cleaning staff, cooking staff, hosting staff and guests travelling by foot, cars or taxis and delivery vehicles arriving and leaving, vehicle engines running and vehicle headlights at night. From the venue itself, the activities includes light from the site, the chatter of patrons and staff arriving and leaving, the provision of entertainment, music, speeches and noise from restaurant guests and from the events and weddings that are

hosted here. Photographs showing the operation of the café/restaurant from the Petersham Nurseries website and social media are shown as an example of this in Appendix 18. The Council will show that the additional level of activity generated through extended hours into the evening 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. It is therefore 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.

2.16 The Appellant asserts that policy LP13 goes beyond policy G3 of the London Plan and the NPPF (which do not refer to character). The Council disagrees with this statement and maintains that Local Plan policy LP13 is consistent with policy G3 of the London Plan and with the NPPF. The additional reference to character does not make it inconsistent. Moreover, the courts have made it very clear that openness is a multi-layered concept. Character is plainly part of that and even if it were not, impacts on character of an area are material planning considerations. The fact that the area is MOL cannot change that.

2.17 This view is supported by an appeal decision ref: APP/L3245/W/22/3304958 (a copy is attached as Appendix 14). The Inspector concluded in paragraphs 6 and 7 of the appeal decision that:

*“Policy LP60 of the Kirklees Local Plan (2019) (the KLP) similarly supports the re-use of buildings and the requirement that buildings are of permanent and substantial construction. The policy also requires proposals to meet a number of design criteria, some of which could affect openness including a requirement that schemes do not introduce incongruous domestic or urban characteristics into the landscape, through the treatment of outside areas such as means of access and car parking, curtilages and other enclosures and ancillary or curtilage buildings.*

*The justification to the policy guides that proposals which intensify use or extend an existing footprint to the extent that openness is compromised will not normally be permitted. A detrimental effect on openness and tranquillity, including through the intensification of use of access roads and other outside space, will also not normally be permitted. **I accept there is no specific reference to such features in paragraph 150***

**of the Framework. Nevertheless, as a matter of logic they may affect openness in practice”.**

- 2.18 As a result, the Council maintains that the appeal site operating in breach of conditions NS04 and NS05 and the area permissible by the enforcement notice harms both the character of the area and openness of the MOL.

**Impact on heritage assets**

- 2.19 The proposed change to conditions NS04 and NS05 do not give rise to any heritage harm (para 205-208 of the NPPF).

**Amenity impact**

- 2.20 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.
- 2.21 A number of residential properties are located in close proximity to the appeal site and are impacted by the extended hours of operation and extent of café/restaurant use. The location of these properties in relation to the appeal site are set out in Appendix 9.
- 2.22 A detailed assessment on the amenity impact is set out in the officer's report to the Planning Committee attached to this statement as Appendix 7. Activities which take place at the appeal site in connection with the breach of conditions NS04 and NS05 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, vehicle light, light from the site, music, entertainment, speeches, singing, dancing, chatter and laughter.
- 2.23 Due to the semi-rural character of the area and its tranquillity, although closing car doors, engines running and chatter may not be considered to result in a significant adverse impact in many other locations, such sounds are highly noticeable and intrusive in this

area. 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 within the London-wide and borough-wide context. 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 neighbouring residents. It is relevant to note that the Council's Noise Nuisance team have received five nuisance complaints since 2020. 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.

**Supporting the night-time economy**

2.24 The London Plan (2021) defines night-time economy as all economic activity taking place between the hours of 6pm and 6am and includes evening uses. Policy HC6 of the London Plan 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. However, the area benefits from limited public transport link to other parts of the borough and Kingston. Nonetheless, 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 would cause in this tranquil location of the borough. It is therefore contrary to policy HC6.

**Employment and Local Economy**

2.25 Policy LP40 of the Local Plan states that the Council will support a diverse and strong local economy in line with land in employment use should be retained in employment use for business, industrial or storage purposes. The lawful use of the appeal site remains unchanged. It therefore complies with policy LP40.

**Fallback positions**

2.26 The Appellant puts forward two 'fallback positions' which they assert are material to the ground 'a' appeal:

*Fallback 1: The site could operate as Class E across the whole site with no restriction of hours or areas of operation in planning terms (except those set by the conditions in LPA ref: 08/4312/FUL regarding café/restaurant operation).*

*Fallback 2: The CLEUD granted in 2023 (LPA ref: 21/3108/ES191) sets restrictions on areas and hours of operation for the café/restaurant use but does not limit the number of covers/tables/chairs. The café/restaurant operation could be intensified during the permitted hours. There is no restriction on the retail (Class E) operation in terms of areas or hours of operation (other than those set by condition regarding the café/restaurant operation).*

2.27 Fallback 1 sets out a hypothetical situation. It is not considered to be a realistic fallback position to be considered under ground 'a'.

2.28 Fallback 2 explains that the certificate of lawfulness limits the hours of operation and café restaurant area but does not limit the number of covers/tables/chairs. This is accurate as no specific evidence was provided in the application with regards to specific numbers of covers over the 10-year period. The evidence was provided in terms of areas of use. The Appellant states that the café restaurant use could be intensified within the permitted hours and area. This is of course true, however the Council will make the case that there is a finite amount of intensification that could reasonably take place with the limits imposed and this is a reasonable and enforceable means of controlling the impact of the use. No agreement has been reached between the Appellant and the Council on the maximum numbers covers the site could accommodate.

**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.*

3.1 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 under ground “d”. The Appellant claims that *“the evening openings and operational areas have been occurring on a continuous basis for more than 10 years and evidence will be supplied including, but not limited to, timestamped photographs, till receipts, staff timecards, officer reports from historic planning applications and press articles. Under oath, witnesses will supply firsthand evidence to support the ground (D) appeal”*. The Council has not yet seen the new information the Appellant seeks to rely on under this



ground. It is however highly relevant that the Appellant has already sought to make this case, under the lawful development certificate application 21/3108/ES191. Over the course of two years, this application was considered and the Council worked proactively with the appellant to garner information and evidence. They had opportunity over this lengthy period to provide sufficient information to evidence, on the balance of probability, a continuous breach over a period of 10 or more years and failed to do so. It was accepted that a small extension of time and area of operation had occurred for 10 or more years and a certificate of lawfulness was granted for that as explained in the introduction to this statement.

3.2 The Council's position on ground (d) appeal is reflected in the officer's report for the lawful development certificate application which is provided in Appendix 5. It will also examine any further evidence provided by the appellant in their statement of case and proofs of evidence.

3.4 Based on the information and evidence available to the Council, it rejects the Appellant's claim that at the time the enforcement notice was issued, it was too late to take enforcement action against the matters stated in the notice and would demonstrate that the breach as described in paragraph 3 of the notice has not become immune from planning enforcement action under Section 171b of the Town and Country Planning Act 1990 (as amended) when the notice was served. This view is also supported by submissions of neighbours commenting on the LDC application (our ref: 21/3108/ES191) as can be seen in Appendix 11.

#### **4. Appeal under ground "g"**

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

4.1 The Council maintains that the time-period set to comply with the enforcement notice is reasonable, practicable and sufficient. No physical works are required, it is only the existing operations of the restaurant that would need to be changed. It is accepted that this may have an impact on existing staff and the revenue generated by the café/restaurant, however this has squarely been borne out of the owner of the premises flagrantly breaches planning controls and their decision to pay no regard to planning conditions imposed to protect neighbours or MOL. It is also a fact that the owner has been aware that there is planning enforcement investigation regarding the extent of the café/restaurant since 2018. With this in mind, the owner has had significant time to put in place contingency measures to address operational changes to the café/restaurant and

to any affected staff. The Council is also aware that the owner operates other 'Petersham Nurseries' restaurants in London which may assist in absorbing any lost bookings or redeployed staff. It is the Council's position 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.

5. **Appeal under ground "f"**

*The steps required to comply with the requirements of the notice are excessive, and lesser steps would overcome the objections.*

- 5.1 The Appellant has informed the Council that appeal under ground "f" is being withdrawn. If this information is wrong, the Council reserve the right to respond to it in evidence.

6. **Matters arising from pre-Inquiry notes**

- 6.1 The Council can confirm that an enforcement notice has been served with the breach set out in the notice being a breach of planning conditions. The notice is served under section 171A(1)(b) of the TCPA 1990 and is not a breach of condition notice under section 187A. The notice does not attack the lawful use of the premises as mixed use - garden centre (Class E) and café/restaurant (Class E) - nor does it allege an unauthorised material change of use when the notice was served. Rather it relates to breach of conditions NS04 and NS05 attached to the permission (8/4312/FUL).

- 6.2 The operating hours of the café/restaurant at the time the notice was served are:

**Petersham Nurseries café/restaurant**

Monday - Closed (except Bank Holidays)

Tue-Wed: 12pm-5pm

Thurs-Sat: 12pm-5pm, 6.30pm-11pm

Sunday 12pm-5pm

Supper Club is open for bookings on every Friday and (limited Saturdays).

### **Location of neighbouring residential properties**

6.3 Location plan of the neighbouring residential properties to the breach site is attached as Appendix 9 and number of comments received by the Council when LDC application (our ref: 21/3108/ES191) was submitted is provided as Appendix 11 to this statement of case. The Council took a deliberate decision when granting permission for the mixed-use of the site by confining the A3 use to a specific area and controlling the hours of operation in order to reduce amenity harm to neighbouring residential properties. The neighbouring residents whose living conditions have been affected by the breach of planning control at the Appellant's site are:

- Rose Bank Cottage – it is located to the north and shares boundary with the breach site. It is the closest residential property to the breach site. The approved operating hours and restriction of the A3 use area ensure that any amenity harm is limited to the operating hours of the A3 use. The expansion of the A3 use to areas adjacent to the boundary wall with this property and extended operating hours results in undue extension of the nuisance to late evenings and at night. Nuisance as a result of the extension of the A3 use and extended operating hours impact this property in terms of noise nuisance and disturbance from increased vehicular movement and staff and customers arriving and leaving the premises late at night. Residents of this property are unable to peacefully enjoy their home and garden especially in the summer due to excessive noise from the breach site. They are being forced to close their windows during this period to reduce noise nuisance and disturbance to the property. Their comments on the LDC application and the impact of the breach of conditions on their property is set out in Appendix 11.
- Nos.139, 141,143 Petersham Road and Magnolia House are located to the south of the breach site. The buildings are over 30m away from the boundary of the breach site. Nos. 141 and 139 Petersham Road adjoins Church Lane at the junction with Petersham Road. The harm to the amenities of these properties arise from vehicular movement, noise from cars, staff and patrons going to and leaving the site in cars, taxis and on foot as a result of the extended operating hours and expansion of the A3 use area.
- Rutland Cottages, nos.1 & 2 Rutland Drive, 145a Petersham Road and 145 Petersham Road are located to the west of the breach site. No. 2 Rutland Drive is less than 6m away from the boundary of the breach site. Rutland Cottage is about

37m away from the boundary and nos. 145 and 145a Petersham Road are over 20m away from the boundary of the breach site. Noise nuisance as a result of the expansion of the A3 use area and extended operating hours impact these properties in terms of noise nuisance and disturbance from increased vehicular movement and staff and customers going to and leaving the premises late at night. Comments on the LDC application and the impact of the breach of conditions on residents of Ruthland Drive is set out in Appendix 11.

- The amenity of residents of the local area is harmed by noise and activities generated by the restaurant use, disturbance as a result of vehicular movement and staff, patrons going to and leaving the site and light pollution from the appeal site and car headlights.

### **Summary and chronology of events concerning breach of conditions NS04 and NS05**

6.4 The relevant chronology of events concerning breach of conditions NS04 and NS05 are:

- Planning permission reference 08/4312/FUL was granted by the Council 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), subject to conditions.
- Conditions NS04 and NS05 were imposed. Condition NS04 restricts A3 use to 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. While condition NS05 restricted A3 use to the areas identified on approved drawing no. DP7/2857 of permission reference 07/1235/FUL.
- A number of planning applications (reference: 10/2914/VRC -withdrawn; 12/0067/VRC - refused and 14/0345/VRC – refused) were submitted to vary the operating hours in the interim. One was withdrawn and two were refused permission. Copy of the decision notices are provided in Appendix 2 and 3.
- It was reported to the Council in 2018 (case ref: 18/0025/EN/BCN) that the café/restaurant at Petersham Nurseries is operating in breach of the planning conditions

relating to the hours and areas of A3 use as set out in planning permission reference 08/4312/FUL.

- A Lawful Development Certificate application (our ref: 21/3108/ES191) was submitted to demonstrate that breach of conditions NS04 and NS05 has continued for 10 or more years. This application was amended and approved on 4 September 2023 because information the applicant submitted with the application did not support the original development description presented to the Council that conditions NS04 and NS05 have been breached for 10 or more years. Copy of the decision notice and officer's report are provided in appendix 4 and 5.
- Following this decision, authority was subsequently obtained from the Planning Committee in September 2023 to serve an enforcement notice. The notice was served in November 2023. It was withdrawn and re-served in January 2024 due to error in the citing of the planning policies on the notice.

### **Licensing notice**

6.5 The license decision notice issued on 28 September 2022 grants consent for the following operating hours:

- **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.

- 6.6 The application for their new licence was received on 8th August 2022, with a last date for representations to be received as 5th September 2022. Licensing team have confirmed that planning department was consulted, as a statutory consultee for all licence applications, but no response was received. Licensing team also made the following comment “*however, I would add that the absence of a planning response is not unusual for a licence application, even one with planning history. Only representations that are relevant to the licensing objectives may be considered*”.

The Council will demonstrate that planning and license departments operate under different regimes, therefore any amenity assessment undertaken during licensing application is not the same as it would be under planning consideration. As a result, it is not automatic that planning permission would be granted for identical operating hours.

- 6.7 The reason for this view is set out in paragraph 14.65 of the Home Office Revised Guidance issued under section 182 of the Licensing Act 2003 dated December 2023 which 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***”.

- 6.8 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 as Appendix 10. While officers are

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.

- 6.9 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”.*

The Licensing Sub-Committee report for the notice issued on 28 September 2022 (see Appendix 12 for full report) supports paragraphs 14.65 and 14.66 by stating 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”.***

**Character and openness of the MOL**

- 6.10 The notice does not attack the lawful use of the site as garden centre and café/restaurant because planning permission has already been granted this use. Therefore, the notice does not relate to inappropriate development in the Green Belt. However, it relates to the harm caused by breach of conditions NS04 and NS05 and the impact these are having on the amenity and living conditions of neighbouring residential properties and the urbanising effect it causes which is detrimental to the character and openness of the

(MOL) arising from the use of the restaurant/ café for longer hours and over extended area.

- 6.11 The Council is of the view that the café/restaurant operating beyond the approved hours and area within the site negatively impact on the character and openness of the MOL through increased comings and goings and associated disturbance affect the tranquillity and semi-rural nature of the area as set out in paragraph: 001 Reference ID: 64-001-20190722 of the PPG. As a result, both character and openness of MOL are relevant to this appeal. Paragraphs 152 – 156 of the NPPF, policy G3 of the London Plan (2021), policy LP13 of the adopted Local Plan (2018) and policy LP35 of the Publication Version of Local Plan are relevant to the appeal.

## 7. **Conclusion**

- 7.1 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 under Approved Drawing Number DP7/2857 (in breach of condition NS05 - café/restaurant areas) 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).