



Appeal Decision

Inquiry held on 2 to 5 July 2024

Site visits made on 1 and 4 July 2024

by D Hartley BA (Hons) MTP MBA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 12TH JULY 2024

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 planning permission Ref 08/4312/FUL granted on 29 July 2009.
- The development to which the permission relates is the 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 to 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) and (g) of the Town and Country Planning Act 1990 as amended (the Act). 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.

Decision

1. The appeal is allowed and the enforcement notice is quashed. In accordance with section 177(1)(b) and section 177(4) of the 1990 Act (as amended), the conditions U27543NS04 and U27544NS05 attached to the planning permission

dated 29 July 2009, ref 08/4312/FUL, are discharged and the following new conditions are substituted: -

A) There shall be no sale of food for consumption on or off the premises during the following times: Tuesday to Saturday – before 10.00 hours and after 17.00 hours, and on Sundays – before 11.00 hours and after 17.00 hours (save that for up to three evenings a week (not Sundays to Tuesdays) the premises may open for café/restaurant use between 17.00 hours and 23.00 hours for consumption on the premises in the areas shown edged black on approved drawing number SP01 dated June 2024 appended to this decision during which times the Evening Management Plan dated 1 November 2023 shall be complied with). The premises shall not open for café/restaurant use on Mondays (excluding bank/public holidays when the premises may open between 11.00 hours and 17.00 hours). A notice to this effect shall be displayed at all times on the premises so as to be visible.

B) The café/restaurant areas shall be confined solely to the areas identified for these purposes within the blue and black edged lines on approved drawing number SP01 dated June 2024 as appended to this decision.

C) No amplified music or sound system shall be used or generated within the external areas (including the pergola area shown edged green on the approved drawing number SP01 dated June 2024) of the café/restaurant use hereby approved before 10.00 hours and after 17.00 hours.

D) The festoon lighting along Church Lane shall be removed within 28 days of the date of the failure to meet any of the requirements set out at (i) to (iv) below:

(i) Within 3 months of the date of this decision details of a lighting scheme relating to Church Lane, proposing to remove the festoon lighting and replace with low level lighting pointing downwards, shall be submitted to the local planning authority for its approval.

(ii) If within 8 months of the date of this decision the local planning authority refuse to approve the scheme or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State.

(iii) If an appeal is made in pursuance of (ii) above, that appeal shall have been finally determined and the submitted scheme shall have been approved by the Secretary of State.

(iv) The approved lighting scheme shall have been carried out and completed in accordance with the approved timetable.

Once agreed, the scheme shall be implemented within 4 months from the approval date and subsequently maintained in the approved form for the duration of the approved development.

E) The noise climate of the surrounding area shall be protected such that the A-weighted equivalent continuous noise level (LAeq) as measured 1 metre from any facade of any noise sensitive premises over any 5 minute period with amplified music (or other amplified sound) taking place after 17:00hrs in connection with the approved cafe/restaurant use shall not increase compared to the same measure, from the same position, and over a comparable period,

with no amplified music (or other amplified sound) taking place. All amplified music equipment within the internal areas of the buildings located within the land edged black on approved plan number SP01 dated June 2024 should be controlled by a limiter which should be set and locked preventing unauthorised access. The sound limiter setting should be fully documented, and a calibration certificate provided to, and approved by, the local planning authority.

F)The café/restaurant use after 17.00 hours shall be restricted to pre-booked reservations only with one sitting operating on any evening that the café/restaurant use is in operation.

G)Smoking and vaping after 17.00 hours shall be limited to the area hatched red on approved drawing SP01 dated June 2024 appended to this decision.

Application for Costs

2. An application for costs was made by Mr Francesco Boglione of Petersham Nurseries Limited against the London Borough of Richmond-upon-Thames. This application is the subject of a separate Decision.

Background and Preliminary Matters

3. The Notice has been issued under Section 171A(1)(b) of the Act which relates to a breach of planning control amounting to a failure to comply with conditions which are the subject of planning permission 08/4312/FUL, dated 29 July 2009 (2009 Permission), for a '*permanent mixed use as garden centre (class A1) and café/restaurant*'. The Notice does not attack the mixed use of the appeal site. The main parties agree that the site continues to be a mixed garden centre and café/restaurant use within a single planning unit. It is common ground that the following two conditions of planning permission 08/4312/FUL have been breached and these are the subject of the Notice and the grounds of appeal: -
 - Condition 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 10.00hrs and after 16.30hrs 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*'. The reason for this condition is stated as '*to safeguard the MOL, conservation area, amenities of nearby residential properties and the area generally*'.
 - Condition 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 reason for this condition is stated as '*to safeguard the MOL, conservation area, amenities of nearby residential properties and the area generally*'.
4. There is a history of other applications being submitted to the local planning authority (LPA) for the appeal site including a planning application in 2010¹ to extend the hours of use of the restaurant (i.e., condition U27543NS04) to allow opening between 19.00 and 23.00 hours on Thursdays, Fridays and Saturdays (this application was withdrawn), and a refused planning application in 2012² to vary condition U27543NS04 to include opening between 19.00 and 23.00 hours

¹ Planning application 10/2914/VRC

² Planning application 12/0067/VRC

on Saturday each week. A further planning application³ was submitted to the LPA in 2014 and refused in January 2018 for the variation of condition U27543NS04 to allow the sale of food for the consumption on the premises between the hours of 09.00 and 18.00 hours on Mondays, Tuesdays and Wednesdays, 09.00 and 23.00 hours on Thursdays, Fridays and Saturdays, and between 11.00 and 18.00 hours on Sundays.

5. Of relevance to the ground (a) deemed planning application is a lawful development certificate (LDC) for the site dated 4 September 2023⁴ which confirms that the following has taken place continuously for a period of ten years and hence is lawful: -
 - *'1)The café/restaurant has been in operation selling food and beverages to visiting customers between 10am and 5pm Tuesday to Sunday excluding Mondays in exceedance of the hours specified in condition NSO4 of LPA ref: 08/4312/FUL.*
 - *2)The areas used for the preparation, sale and consumption of food and beverages have operated in exceedance of the areas specified in condition NS05 of LPA ref 08/4312/FUL to the extent that they have also operated in the areas identified as 1 & 2 within the submitted Statement of Truths insofar as they also correlate with the red line delineated on the updated drawing reference Plan 02-277-03 RP02 received October 2022.*
 - *3)The business has been carried out by Petersham Nurseries Ltd, notwithstanding that the land has remained in the ownership of Francesco Boglione'.*
6. The LDC also states, under the heading split decision, *'for the avoidance of doubt, the LPA considers that insufficient information has been submitted to satisfactorily prove that for a continuous period of 10 years:*
 - *1)The cafe/restaurant have 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;*
 - *2)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. Consequently, it has not been demonstrated that the development is lawful within the meaning of Section 191 of the Town and Country Planning Act 1990'.*
7. In deciding whether it was expedient to take enforcement action, the Council's Planning Committee considered various options. It decided on the option of underenforcing in respect of the breach of conditions. Indeed, the requirements of the notice permit bank holiday consumption of food on or off the premises

³ Planning application 14/0345/VSC

⁴ LDC reference 21/3108/ES191

between 11.00 and 17.00 hours, as well as allowing the use of more café/restaurant areas than allowed under the 2009 Permission and the LDC. This is shown as being delineated by means of a blue line on Plan 2 attached to the Notice.

8. I am mindful of section 173(11) of the Act and the consequences in terms of the requirements of the enforcement notice. In other words, if the Notice were to be upheld, planning permission would be treated as being granted in respect of the requirements of the notice. I shall therefore take this into account as a 'fallback' position as part of the consideration of the deemed planning application.
9. The development plan for the area comprises the London Plan 2021 (London Plan), the London Borough of Richmond Upon Thames Local Plan 2018 (LP) and the Ham and Petersham Neighbourhood Plan 2018 (NP). The Council has prepared a new draft Local Plan and submitted its publication version for examination on 19 January 2024 (Draft Plan). The completed statement of common ground lists relevant Draft Plan policies for the purposes of considering the ground (a) deemed planning application. There is common ground that other than Draft Policy 46, the relevant Draft Plan policies should be afforded '*limited weight*' in decision making terms. This is in the context of paragraph 48 of the National Planning Policy Framework 2023 (the Framework). I have no reason to disagree with this common ground position.
10. The only dispute relates to Draft policy 46 (Amenity and Living Conditions) which the LPA attributes 'moderate weight' as a material planning consideration. The evidence is that no objections have been raised to this policy. Hence, I shall also afford it moderate weight as a material planning consideration. This is not, in any event, a determinative matter as policy LP8 of the LP and paragraph 135(f) of the Framework also seek to protect the living conditions of the occupiers of existing and future adjoining and neighbouring properties.
11. Appeals on grounds (d) and (f) of section 174(2) of the Act were originally made by the appellant. However, the ground (f) appeal was confirmed as being withdrawn by the appellant in the completed statement of common ground signed and dated 15 April 2024, and the ground (d) appeal was withdrawn by the appellant at final comments stage.

Ground (a) appeal and the deemed planning application

12. An appeal made on ground (a) is that in respect of a breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged.
13. I have considered the reasons for issuing the notice. The appeal site falls within Metropolitan Open Land as defined in policy G3 of the London Plan 2021 (LP). Policy G3 of the LP states that MOL is afforded the same status and protection as Green Belt. In this context the main issues are: -
 - Whether the breach of planning control results in inappropriate development in Metropolitan Open Land (MOL) including its effect on the openness and purposes of the MOL,

- the effect of the development on the living conditions of the occupiers of neighbouring properties in respect of noise, disturbance, and light,
 - the effect of the development on the character and appearance of the area, and,
 - if the development is inappropriate in MOL, whether the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations so as to amount to the very special circumstances necessary to justify development.
14. For the avoidance of doubt, the main issues were agreed between the main parties at the case management conference.

Whether inappropriate development in the MOL

15. The LPA contends that when planning permission was approved for the mixed garden centre and café/restaurant use, it was inappropriate development in the MOL. In contrast, the appellant maintains that the approved mixed use did not comprise inappropriate development in the MOL. For the reasons outlined below, it has not been necessary for me to reach a view about whether the development comprised inappropriate development in the MOL in respect of the 2019 Permission.
16. The Notice does not relate to an unauthorised material change of use of the land and nor does it relate to unauthorised operational development. The Notice relates to a failure to comply with two conditions imposed on the 2019 Permission. When the Notice was issued, the evidence indicates that the café/restaurant was operating as follows in breach of condition U27543NS04 of the 2009 Permission: -
- Monday – closed except bank holidays.
 - Tuesday – Wednesday – 12 pm to 5 pm.
 - Thursday to Saturday – 12 pm to 5 pm and 6.30 pm to 11 pm.
 - Sunday – 12 pm to 5 pm.
17. In addition, the evidence is that when the Notice was issued additional areas of the site were being used for unauthorised café/restaurant purposes. The evidence is that there are areas that are in breach of condition U27544NS05 and outside the lawful café/restaurant areas confirmed in the LDC.
18. It is necessary that I consider the deemed planning application based on the above, i.e., a continuation of the mixed garden centre and café/restaurant use without compliance with conditions U27543NS04 and U27544NS05 of the 2009 Permission. In this regard, I shall consider whether the breach of conditions have preserved the openness of the MOL when the mixed use is considered as a whole and whether any conflict has occurred to the purposes of including land within the MOL.
19. The appellant states that the above should be in the context of paragraph 155(d) of the Framework which states that the re-use of buildings, provided that they are of permanent and substantial construction, would not be inappropriate development subject to preserving openness and there being no conflict with the purposes of the designation. The Council takes the view that

- the relevant paragraph in the Framework is paragraph 155(e) (i.e., material change of use of the land) based on a view that the appellant has requested that planning permission is granted as distinct from the relevant conditions being discharged having regard to section 174(2)(a) of the Act.
20. Despite the differences of opinion between the main parties about whether paragraph 155(d) or paragraph 155(e) is relevant in this case, and, indeed, whether the appellant has or has not requested that planning permission is granted, or the appeal conditions are discharged, there is, in any event, common ground between the main parties that this is not a determinative factor in considering the ground (a) deemed planning application. This is because both exceptions require the decision maker to consider the effect of such development on the openness and purposes of the MOL. The main parties agreed that it was necessary for me to consider the latter and that would determine whether the resultant development would or would not constitute inappropriate development in the MOL.
 21. The Courts have held that openness can have both spatial and visual aspects. In this regard, the National Planning Practice Guidance (PPG) states *'in other words, the visual impact of the proposal may be relevant, as could its volume'*. The PPG also states that openness may also need to take account of the *'degree of activity likely to be generated, such as traffic generation'*.
 22. The breaches of planning control do not relate to the erection of any extensions or structures. To this extent, I find that the breaches of planning control have had no adverse spatial impact on the openness of the MOL in relative terms.
 23. The evidence is that additional and unauthorised space has been used within the planning unit for consuming food. Furthermore, the evidence is that the evening opening for café/restaurant purposes (i.e., between 18.30 and 23.00 hours three nights per week) has, on occasion, had the effect of generating some additional car parking in surrounding roads, including in Church Lane. This is in the context that evening opening for the café/restaurant is not currently permitted.
 24. The evidence from the appellant is that evening 'supper clubs' have generally included in the region of 100 covers (sometimes slightly more and sometimes less) and in one evening sitting. In this regard, the effect of the breach of planning control is that in respect of the café/restaurant part of the mixed use, there have been more associated people, parked cars, and vehicular/pedestrian movements in the evening than was permitted when the 2009 Permission was approved.
 25. While no extensions or structures have been erected in respect of the breach of planning control, the evidence is that outside seating areas have been formed within the extended restaurant/café areas. However, these are small and moveable chattels and are positioned within the walled grounds of the appeal site. Hence, they are not visually appreciated within the wider MOL landscape, or from public viewpoints. In these respects, I find that the openness of the MOL has been preserved in spatial and visual terms.
 26. Photographic evidence from other interested parties appear to demonstrate that during some periods of evening café/restaurant use, the surrounding streets, including Church Lane, have included more parked cars and associated activity than would have been likely if the appeal site had operated lawfully

- during this time. However, the parking and movement of vehicles, and comings and goings of customers, are intermittent activities and have largely taken place within what is an essentially suburban and built-up area of the MOL, as distinct from the more open and undeveloped parts of the MOL immediately to the north, such as Petersham Meadows.
27. At the inquiry, the appellant agreed that the evening café/restaurant use would be confined to one part of an existing building only and that there would be only one sitting per night for each of the three nights. It is noteworthy that on Saturday 4 May 2024, the evidence from the appellant's noise assessment survey was that there were 80 covers (one sitting) and that food and drink was being consumed from only the part of the building shaded yellow in the note from Big Sky Acoustics dated 24 May 2024. This occurred between the hours of 18.30 and 23.00. The note explains that at this time, the maximum number of associated cars in the unadopted part of Church Lane was 10 and that no amplified music or system was in operation inside or outside any part of the building. The consultant states that *'some customers did go outside to smoke/vape in small numbers, typically one or two people, and remained close to the dining area in the area just to the west of the area shaded yellow'*.
28. I find that the appellant's technical evidence demonstrates that the scale of the activities, including parking of vehicles, pedestrian comings and goings, car headlights and noise associated with the breach of planning control has been such that it would preserve the openness of the MOL. Overall, I find that the openness of the MOL has been preserved following the 're-use' of buildings on the land and, in this regard, there has been no conflict with paragraph 155 of the Framework.
29. I acknowledged that the evidence indicates that during the night-time, the existing planning permission would not likely give rise to the same amount of evening car parking or general pedestrian activity within surrounding roads or pathways. However, the evidence does not indicate that prior to the breach of planning control taking place, there was no activity at all in the evening from vehicles and/or pedestrians in surrounding roads or pathways, including in Church Lane and River Lane, and unconnected with Petersham Nurseries.
30. In any event, I do not find that the degree of activity, movement and/or car parking in association with the breach of planning control is such that one could reasonably claim that the openness of the MOL has not been preserved. I accept that the breach of planning control is likely to mean that more vehicles park in Church Lane than would be the case if the existing conditions were to remain in place. However, the evidence is that some car parking, associated with the existing planning permission for Petersham Nurseries, takes place in the daytime. Indeed, I noticed a very steady turnover of parked vehicles near to the entrance to the site during my site visit which took place during the afternoon of 1 July 2024.
31. Clearly the existing planning permission generates some car parking in surrounding areas and, in particular, my site visit revealed that Church Lane is used. This is a matter that I have considered as part of my consideration of the overall effect of the breach of planning control on the visual or spatial openness of surrounding roads with the MOL.
32. In this case, I do not find that the breach of conditions has caused conflict with any of the purposes of the MOL. There are no new buildings, and the breach of

- planning control has not given rise to unrestricted sprawl of a large built-up area. The site does not form part of a gap between neighbouring towns and would not result in neighbouring towns merging into one another. The appeal site is located within an established and self-contained property boundary and any associated car parking and outside activities are generally closely aligned with the existing built form. Consequently, I find that the breach of planning control suitably safeguards the countryside from encroachment. It is noteworthy that at the inquiry the Council agreed in cross examination that the breach of planning control did not conflict with purposes (a) and (c) of paragraph 143 of the Framework.
33. I deal with heritage matters later in this decision, but for the reasons outlined consider that the setting and special character of the historic town has been preserved. The Council do not accept this point and raised it as an area of concern at cross examination stage. However, on the basis that it has concluded that there has been no harm caused to the settings of listed or locally listed buildings, or to the character and appearance of the Petersham Conservation Area, all of which form part of the special character of the historic town, I fail to understand why the Council considers that the breach of planning control has resulted in conflict with paragraph 143(d) of the Framework, i.e., *'to preserve the setting and special character of historic towns'*.
34. Even if one were to take the view that paragraph 143(d) should be considered differently to the Council's view about the acceptable effect of the breach of planning control on the Petersham Conservation Area, and other designated and non-designated heritage assets, it is noteworthy, in any event, that at the inquiry the Council's witness did not suitably substantiate the alleged concern about alleged conflict with this MOL purpose. I do not find that there is any credible evidence to support a view that the breach of planning control fails to preserve the setting and special character of the historic town.
35. Finally, the breach of planning control essentially seeks to re-adjust the balance of the mix of uses within the appeal site and to include evening dining (three days per week). On the evidence before me, including that from Ms Boglione, I find that the breach of planning control has had some very positive regenerative benefits on a previously developed site.
36. For the above reasons, I find that the degree of any activity arising from the breach of planning control is such that the openness of the MOL has been preserved. Moreover, no conflict has occurred with any of the MOL purposes. Therefore, the breach of planning control or the resultant development does not amount to inappropriate development in the MOL. Indeed, the evidence does not reasonably support any claim that the breach of planning control has not protected and retained the MOL in predominantly open use as required by policy LP13 of the LP.
37. I therefore conclude that the breach of planning control does not amount to inappropriate development in the MOL. Notwithstanding the dispute about whether paragraph 155(d) or 155(e) of the Framework is relevant to this case, the point is that the evidence demonstrates that the breach of planning control has preserved the openness of the MOL and there has been no conflict with any of the purposes of the MOL. Furthermore, the breach of planning control has not led to conflict with policy LP13 of the LP which seeks to retain MOL predominantly in open use, policy G3 of the London Plan which states that MOL

should be afforded the same status and level of protection as Green Belt and should be protected from inappropriate development in accordance with national planning policy tests that apply to the Green Belt, or with policy LP35 of the Draft Plan.

38. In reaching the above conclusion, I have considered the appeal decisions referenced by the Council⁵. However, they are not directly analogous to the site conditions and circumstances relating to this appeal. In particular, the Surrey appeal decision related to a material change of use enforcement notice, and not to a breach of condition enforcement notice, and did not relate to the use of public roads for car parking purposes. In any event, I have determined this appeal based on the site conditions in and around the appeal site and the evidence that is before me. None of the referenced appeal decisions alter or outweigh my conclusion on this issue.

Living conditions - noise & disturbance

39. The appeal site, including its main vehicular access from Petersham Road and along Church Lane (which is also a public right of way and partly adopted up to where in turns west), is surrounded by several residential properties including 139, 141, 143, 143A, Magnolia House, 145, 145a Petersham Road; Rutland Cottage, River Lane; and Rose Bank, 1 and 2 Rutland Drive. The garden area of Rose Bank shares a boundary with the appeal site.
40. There are outside seating areas on the western boundary of the site and the evidence is that at least some of the land on the boundary with the south of Rose Bank (i.e., a relatively 'small square area') was being used for café/restaurant purposes prior to the Notice being issued. On my site visit, I was able to see that there are windows on the elevation of Rose Bank which face the appeal site both at ground and first floor level. I have considered the position of these windows, as well as boundary treatment, in reaching my conclusion on this main issue. I note that the appellant has agreed a plan which would mean that the 'small square area' would not be used for café/restaurant purposes at any time.
41. No. 2 Rutland Drive is relatively close to an unauthorised outside café/restaurant area, albeit that it is separated from it by a wall and then an access drive. I acknowledge that the occupiers of this property say that they '*have not been impacted in any way by the evening openings at Petersham Nurseries*'. I do not find that this comment in itself should be interpreted as somehow discrediting the concerns raised by the occupiers of Rose Bank. Indeed, the side elevation of No. 2 Rutland Drive faces the unauthorised café/restaurant area, and its garden area is separated from it by a road and where there is an 'L' shaped building on the appeal site which to some extent would act as a noise buffer. No. 2 Rutland Drive and Rose Bank are positioned differently.
42. In my judgement, and given the proximity to surrounding neighbouring properties, playing amplified music and/or the gathering of customers in the unauthorised outside café/restaurant areas during the evening would have the potential to unacceptably harm the peaceful enjoyment of the rear garden space of Rose Bank from the character of noise such as cheering, chatting, or laughing from groups of people. The evidence does not indicate that use of the

⁵ This includes appeal Ref APP/L3625/C/16/3157470 – Walton Hill, Surrey.

unauthorised space for café/restaurant purposes along the western boundary would be harmful in noise terms in the daytime. That said, it is reasonable that a distinction is made between nighttime and daytime use of the site from the point of view of the occupiers of the neighbouring dwellinghouses having a reasonable degree of peace and quiet.

43. I am cognisant of the appellant's noise survey conclusion which indicates that average noise levels at the closest residential property do not increase when the restaurant is in use. However, the evidence indicates that the survey data relating to evening use of the restaurant did not include outside dining within the areas annotated with a 'pink' dashed line on the plan appended to the statement of common ground (i.e., including the land on the western boundary). I find that evening use of the unauthorised outside café/restaurant area has the potential to lead to unacceptable levels of disturbance for the occupiers of some neighbouring properties, in particular those residing at Rose Bank, in terms of the character of noise from either amplified music being played, or from customers enjoying their social time with friends and/or family with associated chatting, laughing, and cheering.
44. Given the position of surrounding dwellinghouses, I find that it is reasonable that dining is not permitted in defined outside areas during the evening (i.e., between 17.00 and 23.00 hours) and that during these times only the area shown within the black edged lines on drawing No. SP1 dated June 2024 are permitted to be used for café/restaurant purposes. On my site visit, I was able to see that the areas within the black edged lines were a reasonable distance away from neighbouring residential properties such as Rose Bank and 2 Rutland Drive.
45. In the evening, I find that it is reasonable that surrounding residents should be able to expect a reasonable degree of peace and quiet as they relax or enjoy their garden environment prior to then turning in for the day. This is a matter that could be controlled by condition. The appellant has indicated, in any event, that he only wishes to use the café/restaurant space shown within the black edged lines on plan No. SP01 dated June 2024 and has agreed a condition in this regard. In other words, the appellant is content that no outside areas (other than the Pergola area) are used for dining purposes after 17.00 hours.
46. In respect of the land which immediately adjoins the northern boundary of the site with Rose Bank, I find that the regular gathering of diners in this location would have the potential to cause adverse disturbance to the quiet and reasonable use of the neighbouring garden, whether that be in the daytime or the nighttime. Owing to the proximity of this part of the site to the neighbouring garden and property, and the absence of any technical evidence assessing any actual use of this part of the site for café/restaurant purposes, I find that harm may likely be caused to the living conditions of the occupiers of Rose Bank, particularly from the likely character of noise associated with laughing, talking or cheering amongst diners. I appreciate that such space would not likely be used as intensively in the autumn and winter months due to inclement weather, but this would not likely be the case in the spring and summer months.
47. It is noteworthy that the appellant does not, in any event, wish to use the northern part of the site adjacent to Rose Bank for dining purposes. In fact, he has agreed a plan which would restrict areas for café/restaurant purposes

should the deemed planning application be allowed. Plan No. SP01 dated June 2024 does not identify use of the land immediately adjacent to the boundary with Rose Bank for daytime or evening café/restaurant use. I am satisfied that owing to the position of the café/restaurant space within the western part of the blue edged line on drawing SP01 dated June 2024 (i.e., set back from Rose Bank) its café/restaurant use would be acceptable from the point of view of disturbance not being caused to the occupiers of this property in the daytime. The technical evidence supports this conclusion.

48. I have considered the noise complaints made to the Council's Noise Nuisance Team between 2020 and 2023 and during alleged evening hours. The basis of such complaints was '*loud music*', '*very loud amplified jazz music*', '*music from Petersham Nurseries*' and '*loud music last night*'. The appellant is of the view that as the Council did not take any action in respect of these matters, and did not communicate with the appellant about the substance of any such complaints, I should not give them any material weight. At the inquiry, Ms Boglione indicated that noise on 13 October 2018 was in fact associated with a private party at Petersham House and hence was not from Petersham Nurseries. Furthermore, she said that on 25 April 2020 noise was from '*livestreaming music*' at Petersham House and not at Petersham Nurseries. At the inquiry, the Council's witness confirmed that he had had no reason to disagree with what was said by Ms Boglione. The evidence also indicates that some of the complaints related to times when Petersham Nurseries was in fact closed due to the Covid-19 pandemic.
49. In the absence of any evidence of detailed investigations from the Council's Noise Nuisance Team, and, given the comments made by Ms Boglione at the inquiry, I do not afford the noise complaints any material weight in terms of this appeal. Put simply, the Council has not provided any objective evidence to substantiate any claim that either the complaints related directly to Petersham Nursery activities and/or that any material harm was caused to the occupiers of surrounding residents from alleged noise. While complaints appear to post-date alleged noise issues, had there actually been a persistent issue from Petersham Nurseries I find that it would have been likely that the Council's Noise Nuisance Team would have communicated with the appellant, which did not happen, and, furthermore, would likely have asked complainants to keep a log of any alleged noise nuisance. There is no evidence to indicate that any of this occurred.
50. Notwithstanding the above, I find that playing music or using a PA system in the evening and outside, may have the potential to cause noise disturbance to surrounding residents. I shall return to this issue later in the decision.
51. Prior to the inquiry, I was able to appreciate the appeal site in its immediate context and was able to walk surrounding roads and paths. Visits were made both in the daytime and then during the nighttime. On 1 July 2024, the mixed use was in operation during my daytime visit. However, the premises were not open during my nighttime visit (i.e., at about 19.00 hours). I was able to experience some difference between the general vehicular and pedestrian comings and goings in the daytime when compared to the nighttime. The evening visit was particularly useful as it established a 'baseline' in terms of car parking and general activity in surrounding streets (e.g., Church Lane and River Lane) when Petersham Nurseries was closed.

52. In respect of my evening site visit, I did notice some change between the day and evening in terms of the extent of general comings and goings. I accept that my site visits were only a snapshot in time, but, nevertheless, my account of less activity in the evening when compared to the daytime is also borne out by representations made by several third parties. However, it could not reasonably be said that no activity at all occurs within Church Lane or River Lane during the evening. The evidence shows that some cars are parked in these streets in the evening and, furthermore, that there are some comings and goings from walkers, runners and cyclists in the surrounding area which are unconnected with the use of Petersham Nurseries.
53. I was also able to visit the site on an accompanied basis on 4 July 2024 during the evening and when the restaurant was in operation (92 covers). The dinner service started at 18.30 hours and customers were required to leave by no later than 23.00 hours. I was on site from 18.15 hours and so was able to see the first customers arriving using the 'evening' gate (i.e., a gate further away from residential properties than the customer gate used in the daytime). I then returned at about 20.15 hours so that I could experience what was likely to be the busiest period of the evening. I accept that these visits were only snapshots in time, but I can confirm that the customers that I noticed arriving and leaving did so swiftly and, in my judgement, in a respectful manner given the existence of surrounding residential properties.
54. During my site visits on this day/evening, there were 3 cars and 1 motorcycle parked in the unadopted part of Church Lane at 18.48 hours. There were 7 cars and one motorcycle parked in the unadopted part of Church Lane at 20.15 hours and 1 car connected with the dinner service on the adopted part of Church Lane. I also noticed two customers being dropped off in electric or hybrid taxis shortly after 18.30 hours. There were marshals in operation. It was evident that there was compliance with the evening management plan dated 1 November 2023.
55. During these times, I also noted that a small number of cars were parked on the adopted part of Church Lane, albeit that they were not connected with Petersham Nurseries. I also noticed on my site visits that, intermittently, there were walkers, cyclists and runners using Church Lane and the pathway alongside Rose Bank to River Lane. Again, these movements were not associated with the evening use of Petersham Nurseries.
56. The evidence is that staff leave the evening café/restaurant via land at Petersham House and through a gate which is at the bottom end of the adopted part of Church Lane. It is essentially opposite the listed church. I walked this route as part of my site visit. Given its location, I am satisfied that staff leaving the site from this exit would not cause harm to the living conditions of neighbouring residents. Moreover, the exit is in convenient walking distance of Petersham Road where there are bus stops.
57. In my judgement, and, based on the evidence that is before me, use of the café/restaurant areas shown within the blue edged areas on drawing No. SP01 dated June 2024 would be acceptable in the daytime from a living conditions point of view. However, I find that in the evening (i.e., from 17.00 hours) it is necessary that amplified music/systems (including in the pergola area) are not operated in outside areas. I find that playing some amplified music inside identified café/restaurant buildings may be acceptable, but this would need to

- be controlled by means of a planning condition including the use of a noise limiter. Such a condition has been agreed by the main parties.
58. Without additional and/or new controls being in place, I find that regular and very intensive evening use of the site as a café/restaurant has the potential to cause unacceptable harm to the quiet enjoyment of some of the surrounding residential properties from the point of view of vehicular and pedestrian comings and goings, the parking of vehicles and general chatting/activity associated with customers. Without some new controls in place, there is potential for harm to be caused to the peaceful enjoyment of the occupiers of some residential properties, in particular Rose Bank and dwellinghouses within the vicinity of River Lane, where the evidence is that historically some customers have parked or indeed have walked to or from the site.
59. The traffic surveys undertaken by i-Transport indicate that most of the traffic generated by the evening operation of Petersham Nurseries has occurred on Church Lane. On 4 May 2024, when use of the site as a restaurant was taking place (80 covers and one sitting), the peak traffic generation was 19 vehicle movements between 2200 and 2300 hours. This is similar to 14 February 2024 (101 covers and one sitting) where there was a peak traffic generation of 20 vehicles between 19.00 and 20.00 hours. I do not find that this level of traffic and associated movement causes harm to the living conditions of the occupiers of neighbouring properties.
60. In my judgement, the evidence demonstrates that evening use of the site as a café/restaurant would not cause harm to the living conditions of the occupiers of surrounding residential properties in noise and disturbance terms from car parking, comings and goings, or a general activity point of view, subject to the imposition of associated conditions which would (i) confine the area of café/restaurant use to specified areas (i.e., including evening dining areas only within the black edged lines shown on plan No. SP01 dated June 2024), (ii) confining smoking or vaping to a specified area (i.e., away from neighbouring residential properties), (iii) implementation of the appellant's evening management plan dated 1 November 2023, and (iv) restrictions on where and how amplified music/systems can be operated.
61. On the evidence that is before me, including the technical reports prepared by the appellant, which incidentally have not been disputed by the Council, I am satisfied that confining the evening café/restaurant use to only that space within the black edged lines on plan No. SP01 dated June 2024 would impose a suitable physical constraint/control on the number of covers/diners that could be accommodated within such space.
62. Ms Boglione commented at the inquiry that the external evening café/restaurant space (i.e., the pergola area within the black edged land on plan No. SP01 dated June 2024) is seldom used given inclement weather. She commented that if it is used then the relevant part of the greenhouse is not used. Ms Boglione commented that both areas are not used at the same time because *'the kitchen would not be able to cope with that'*. I have no reason to disagree with this having seen the size of the kitchen.
63. When asked about what would likely be the maximum number of covers during an evening dinner service, she replied *'about 130'*. This appears to be borne out by the evidence of 'supper clubs' over several years. In fact, the evidence

- is that historically the number of evening covers has been much less than this and with the highest recorded number being 126.
64. In respect of the evening management plan, it is noteworthy that a minimum of two parking marshals are on duty from 17.00 hours and until the evening cafe/restaurant closes. Furthermore, I note that the sole customer entrance and exit to the site in the evenings is from a gate which is suitably away from Rose Bank. In other words, I find that this acceptably takes pedestrian activity away from the nearest residential property than was previously the case.
65. I have considered the marshalling activity in the context of the noise assessment findings which indicates that on 4 May 2024, when an evening supper club with 80 covers took place (one sitting), there were 10 associated cars parked in the unadopted part of Church Lane. I have no reason to doubt the evidence that no cars associated with this use were parked in the other part of Church Lane at this time. On the evidence that is before me, I am content that use of the identified space for evening dining would not lead to unacceptable levels of car parking within Church Lane or within other surrounding roads. Furthermore, I find that the extent of pedestrian or other comings and goings would not be at a level where it would cause unacceptable harm to the living conditions of neighbouring properties from a general disturbance point of view. I reach this conclusion based on the appellant's technical evidence, as well as my own site visit observations.
66. Overall, I find that the evening management plan would be enforceable. It includes sole use of the identified gate by customers, and the existence of two car parking marshals from 17.00 until 23.00 hours. Furthermore, I note the appellant's transport evidence (this includes the use of drone surveys) which does not indicate a material level of movements associated with the breaches of planning control, either in the daytime or the evening. This is reflected in terms of what I saw on my site visit on 4 July 2024.
67. In the context of an area which the evidence indicates already has some level of pedestrian and vehicular movements in the evening which are unconnected with Petersham Nurseries, I do not find that the extended cafe/restaurant hours, if limited to use of the building/part of the site within the black edged lines on drawing No. SP01 dated June 2024, would have a harmful effect on the living conditions of occupiers of surrounding residential properties in noise and disturbance terms.
68. Overall, I find that the evening management plan, if secured by condition, would have the effect of providing an additional and necessary element of control in terms of evening dining and safeguarding the living conditions of neighbouring residents. While the appellant's evidence (which is not disputed by the Council) does not indicate that the evening café/restaurant operation has caused actual harm to surrounding residents from a noise and disturbance point of view, I find that the evening management plan would assist in terms of relieving some of the anxieties of surrounding residents about general disturbance. Given the presence of marshals, it would seek to ensure that the comings and goings from pedestrians and vehicles was managed efficiently and smoothly during the three evening sittings each week, thereby minimising the possibility of actual or perceived disturbance being caused to residents in the area.

69. Subject to the imposition of associated conditions relating to the breaches of planning control, I find that the resultant development would not cause material harm to the living conditions of the occupiers of neighbouring residential properties in respect of noise and disturbance. Indeed, subject to the imposition of conditions, I have no reason to disagree with the appellant's uncontested noise evidence which indicates that the noise experienced by the occupiers of nearby dwellinghouses would be 'negligible'. In this regard, I conclude that there would be no conflict with the amenity requirements of policies LP8 and LP10 of the LP, paragraphs 135(f), 180(e) and 191 of the Framework, and policy 46 of the Draft Plan.

Living Conditions - Lighting

70. As part of the appeal, the appellant has submitted an Artificial Lighting Impact Assessment (ALIA) prepared by Buro Happold. A site survey of the existing baseline artificial lighting conditions was undertaken when the site was operational during the hours of both daylight and darkness and was assessed in accordance with the guidance within the Institute of Lighting Professionals Guidance Note GN01:21 'The Reduction of Obtrusive Light' (ILP Guidance).
71. Festoon lighting is used for the illumination of the spaces within the inside restaurant areas. Due to the translucent material of the greenhouses, I find that the upward distribution of light and the intensity of the light is suitably shielded. In other words, the evidence is that there is no direct light emission into the nighttime sky. This also applies in respect of the effect on Petersham Meadows, although I deal with this specifically in biodiversity terms later in this decision. I am satisfied that internal and external lighting from the site falls within the permitted parameters stated in the ILP Guidance. In this regard, I therefore find that the breach of planning control has had a negligible impact on the surrounding properties.
72. While I accept that car headlights may be noticeable in surrounding roads during the hours of darkness, including within Church Lane, it must be emphasised that the surrounding roads are public highways, and it cannot be assumed that all car headlights within surrounding roads are associated with use of the appeal site as a café/restaurant use.
73. The evidence does not indicate that the illumination of headlights would impact directly onto known residential window openings. Even if there was a window(s) which would be impacted, use of the surrounding roads by vehicles in the evening in association with the café/restaurant use of the mixed-use site, including vehicle parking and manoeuvring in Church Lane, is intermittent. In customer terms, it has essentially ended by 23.00 hours.
74. In this case, the evidence does not support a view that evening use of the appeal site for café/restaurant purposes has or would cause material harm to the living conditions of the occupiers of surrounding properties from a light pollution or penetration point of view. It is noteworthy that in cross examination, the Council's witness did not dispute the findings of the appellant's ALIA.
75. In living conditions terms, I conclude that the evidence demonstrates that the breach of planning control is acceptable from a lighting point of view, and, in this regard, there has been no conflict with the amenity requirements of

policies LP8 and LP10 of the LP, paragraphs 135(f) and 191 of the Framework, and policy 46 of the Draft Plan.

Effect on the character and appearance of the area

76. It is necessary that I consider the effect of the breach of planning control on the character and appearance of the area. The Notice relates to breaches of two planning conditions. It does not relate to an unauthorised mixed use of the site as a garden centre and café/restaurant, or to unauthorised operational development.
77. I do not find that the breach of planning conditions has caused harm to the character or appearance of the area in terms of the use of the unauthorised café/restaurant areas within the appeal site itself. The appeal site is physically enclosed from public view by high boundary walls and hence the provision of outside tables and chairs, use of additional parts of existing buildings for café/restaurant use, and the variation in the mix of garden centre versus café/restaurant use, has not resulted in a discernible change to the character and appearance of the area.
78. The appeal site, including surrounding roads where most motorists/customers travel, park, or walk, is located within a suburban context where existing activity and movement is already part of the general character of the locality. That said, the appeal site and its immediate surroundings do offer a quieter environment when compared to the very busy Petersham Road. My second site visit on 1 July 2024 (approximately 19.00 hours) revealed that this transition was apparent in the evening when Petersham Nurseries was otherwise closed, and when it is likely that most of the surrounding residents were relaxing in their homes. My site visit was only a snapshot in time, but nonetheless there were only three vehicles parked in Church Lane which compared to significantly more in the daytime. In the evening, I witnessed a cyclist and a small number of walkers which was in direct contrast to the pedestrian and vehicular activity in the daytime. Noise from overhead airplanes was audible intermittently both in the daytime and the evening.
79. In addition to the above, the character of the appeal site, coupled with its very immediate road context, is also experienced by passers-by as being distinctively different from the more open, green, and quieter area to the north known as Petersham Meadows. As one approaches the appeal site from the more open and rural area known as Petersham Meadows, it is quite noticeable that one has moved into a relatively more developed environment and hence where one would reasonably expect more activity including the parking of vehicles. The appeal site does not fall within a designated '*tranquil*' area. Based on my site visit observations, and the evidence that is before me, I do not consider that it could be reasonably categorised as such even if the NP refers to '*pastoral tranquillity*' in the context of the nearby albeit separate Petersham Meadows. Nonetheless, I do find that the appeal site is relatively quieter than Petersham Road which is experienced as being busier.
80. In the context of the above, and the evidence that is before me, I do not find that use of the surrounding roads, including Church Lane, as part of the evening use of the site for café/restaurant purposes, has unacceptably changed the character or appearance of the area, including the character of this part of the MOL. I acknowledge that if the cafe/restaurant were to be uncontrolled in terms of the number of sittings or extent of space that could be utilised for this

purpose in the evening, or if outside amplified music/systems were operated at night, there is potential for harm to be caused to the otherwise more peaceful surrounding residential environment and hence, in turn, this could cause harm to the character of the area which is experienced as being quieter relative to Petersham Road. However, the imposition of conditions, as already detailed above, would ensure that the degree of activity, movements, and car parking associated with the breach of planning control would not be at such a level as to cause harm to the character of the area.

81. I do not find that the extent of lighting from car headlights, or from the buildings within the appeal site itself, would have the effect of causing harm to the character and appearance of the area. I reach this conclusion having regard to the assessment and findings in the appellant's Artificial Lighting Impact Assessment (ALIA) as well as my own site visit observations. The evidence is that light spillage from car headlights towards other parts of the MOL, such as Petersham Meadows, is not significant. That said, external festoon lighting has been installed alongside Church Lane and this is unshielded and emits light distribution with direct upward emissions into the sky.
82. In the context of the above, I do not disagree with the recommendations in the appellant's ALIA which is that a more sensitive lighting environment would be possible in Church Lane. I find that if the festoon lighting were to be replaced with the installation of say very low-level lighting bollards, it would ensure that upward light spill onto the sky was avoided and, in addition, would ensure that the otherwise darker character of this public road, relative to Petersham Road, would suitably reflect the rest of the environment that immediately surrounds the appeal site. Furthermore, I do not doubt, in relative terms, that this would also have some biodiversity benefits from the point of view of foraging bats. This is a matter that could be controlled by means of a lighting condition thereby ensuring that the character of the area is suitably protected, as well as matters of biodiversity importance.
83. I do not find that the breach of planning control has resulted in adverse harm being caused to any important views and vistas either within the CA or from outside the CA. Petersham Meadows, which is adjacent to the appeal site, is designated as a green space in figure 7.1 of the NP and, to this extent, policy C1 is relevant. As per my reasoning above, and subject to conditional control, I do not find that the breach of planning control would conflict with policy C1 of the NP in so far that there would continue to be a clear distinction between the existing built-up area and the green space known as Petersham Meadows.
84. Reference has been made by other interested parties to alleged harm to protected views in the Council's Draft Local Views SPD 2022 (views 004, 005 and 006). This is not an adopted SPD and so I afford it limited weight in decision making terms. The evidence indicates that Richmond Terrace and Richmond Hill is a protected view by an Act of Parliament in 1902. From Richmond Terrace Walk (Grade II*), one can view across the River Thames Valley and from various viewing points along the viewing terrace encompassing, in the wider foreground, the pastoral-looking Petersham Common and Meadow setting and the foreground landscape to Petersham Lodge. I do not disagree with the Council that the breach of planning control, which includes no new buildings and closely aligned car parking, would not have an adverse impact on any of the proposed or protected important views.

85. For the collective reasons outlined above, and, subject to the imposition of several necessary conditions, I conclude that the breach of planning control has not caused harm to the character or appearance of the area. Therefore, it accords with the design, character, and appearance requirements of policy LP1 of the LP, policy C1 of the NP, and chapter 12 of the Framework.

Other Considerations - general

86. The appellant has referred to the fact that there is a premises license in place for the site which permits evening use as a café/restaurant and including the sale of alcohol. However, this is a different controlling regime, and this fact was made very clear in the licensing committee report. The existence of a premises license does not have a material bearing on how I have determined this appeal. I have determined this appeal on its individual planning merits and have exercised my own professional judgement based on the evidence that is before me and my site visit observations. In reaching this view, I have considered paragraph 14.66 of the Home Office Revised Guidance issued under section 182 of the Licensing Act 2003 which 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'*.

87. Other interested parties have commented that the breach of planning control has caused harm to the free flow of traffic on Petersham Road and that there has been vehicular and pedestrian conflict at the junction with Church Lane. There is no objective evidence before me to support such a view and, furthermore, my assessment is focussed on whether there is any evidence that the breach of conditions has resulted in unacceptable highway safety impacts or that it has resulted in a severe impact on the flow of traffic in the area. This is not borne out by the evidence, particularly in terms of evening use of the site as a café/restaurant, and in the context that the site already has planning permission for a mixed garden centre and café/restaurant use. It is noteworthy, that Crashmap Data between 1999 and 2022 shows only one accident in Petersham Road and close to Church Lane, but this involved a bus colliding with a pedestrian walking in the carriageway.

88. I have considered car parking availability and the operation of the mixed-use site with the identified new conditions imposed. I am satisfied that there is no evidence to substantiate a claim that the resultant development would give rise to any significant on-street car parking demand issues. In this regard, I do not find that harm would be caused to the living conditions of the occupiers of surrounding dwellinghouses.

89. In fact, the appellant's noise assessment indicates that on Saturday 4 May 2024, when a dinner service was in operation between 18.30 and 23.00 (a total of 80 covers) there were 10 cars parked in the 'car park' (i.e., the non-adopted part of Church Lane). The appellant's noise assessment consultant states that *'the appellant has no record of cars parked elsewhere in the immediate area associated with the use of the evening restaurant that evening, but that there would have been no need in any event for guests to park elsewhere, due to the spaces available in Church Lane'*. Furthermore, there is no evidence that the resultant development would have a severe impact on traffic flows in the area.

90. I note the comment made by the occupier of Petersham Lodge about an incident when an alleged visitor to Petersham Nurseries blocked his driveway

and hence it was necessary to contact the Council's parking enforcement team who then put an enforcement ticket on the car. While I do not doubt that this incident was very inconvenient for the occupier of Petersham Lodge, there is no evidence that this incident took place in the evening or specifically in connection with any unauthorised café/restaurant use of the site. Moreover, and, in any event, it is encouraging that the Council will likely issue car parking tickets in the area, where necessary, whether that be in connection with the use of Petersham Nurseries, or indeed any other unconnected activity. This suggests to me that the threat of car parking enforcement action being taken is likely to be a deterrent, whether in connection with the current authorised use of the appeal site, or in connection with appeal site activities which are the subject of the breach of planning control.

91. Representations are made that the marshals have allegedly been ineffective in the past. I am not certain what is meant by this, but it remains possible that the historic evening use of the site as a café/restaurant as part of TENs has been more intensive than would be permitted by condition if this appeal were to be allowed. As a matter of principle, I see no good reason why marshals would not prove to be effective in terms of ensuring compliance with the rules of the evening management plan and, to this extent, find that they would provide a useful role in ensuring that evening use of the site operated smoothly and with the best interests of surrounding residents in mind.
92. Comments have been made that Church Lane has potholes and is waterlogged. The evidence is that Church Lane is a public highway and hence it would be capable of being maintained by the Highway Authority. In any event, I did not notice any significant potholes or evidence of drainage issues as part of my site visits. Moreover, the comments made have not been reasonably substantiated with objective evidence.
93. I acknowledge that the appellant employs a significant number of people (directly and indirectly), and that Petersham Nurseries makes a very positive contribution to the area from a social, economic and tourism point of view. I also note the very significant level of support in terms of the submission of letters and postcards and including supportive comments made to an on-line Petersham Nurseries web site indicating that about 7,106 people support continuation of the development in breach of the conditions, and of which 1,036 live in Richmond Upon Thames. However, and, while clearly positive, these representations do not in themselves justify allowing the breach of planning control to continue without the imposition of the identified associated and necessary new conditions.
94. Moreover, there is no objective evidence before me to indicate that the necessary associated conditions would have the effect of making the Petersham Nurseries business operation unviable, or that it would cause material harm from a socio-economic point of view. I do not doubt that the evening use of the site for restaurant purposes generates additional profit for the business and that without this there would be some negative impacts in employment terms. However, at cross examination stage, Ms Boglione made it clear to me that if the appeal were allowed and the evening restaurant use were to be permitted within the area identified within the back edged lines on drawing SP1 dated June 2024, it would mean that the business as a whole would be profitable.

95. The appellant has referred to a fallback position in terms of the site being used for another commercial purpose utilising Class E change of use permitted development rights. The appellant states that he could open a gym or a creche without the need for planning permission and without any evening restrictions. The Council does not dispute that the appellant could operate the site in this way, and without the need for separate planning permission.
96. While there is a greater than theoretical prospect of this change happening, the evidence does not indicate that any actual attempts have been made to explore marketing or selling the site for any such purpose, or indeed that there would likely be interest in using the site for a Class E alternative use(s). Indeed, at the inquiry Ms Boglione indicated that while these matters had been discussed with the family, options had not been explored more fully in market terms.
97. While I do not doubt that the restaurant element of the business is profitable, I have not been provided with detailed financial information from the appellant (perhaps with some very commercially sensitive information redacted) which would conclusively demonstrate that without three evening supper clubs per week, the business as a whole would be financially unviable. Overall, I therefore afford the Class E permitted development fallback position only limited weight as a material planning consideration in favour of allowing the deemed planning application. It does not alter or outweigh my conclusion that while the ground (a) appeal should succeed, it is necessary to include new and necessary conditions associated with the breach of planning control.
98. Comments have been made by other interested parties that the proposal would cause harm to biodiversity and air quality. The evidence before me, including the appellant's Air Quality Report prepared by Cogan Environmental Consulting, and the Ecology Technical Note prepared by the Environmental Dimension Partnership, demonstrate suitably that the breach of planning control has not/would not cause harm to biodiversity and has had a negligible impact on air quality. A condition is necessary relating to the festoon lighting on Church Lane from a bat foraging point of view, but there is no evidence of any harm being caused to protected species or to biodiversity more generally. This includes Petersham Meadows to the north. The air quality effects arising from the breach of planning control are not significant.
99. At the inquiry, the Council asserted that the breach of planning control would conflict with the requirements of policy HC6 of the London Plan. Subject to the imposition of conditions, and the operation of the café/restaurant in the evening up to a maximum of three times per week, I find that the site is 'appropriate' for such a nighttime economy use. I acknowledge that the site may not have a high PTAL rating (it is said to be 1B), but there is no dispute between the main parties that nearby public transport is available, that car sharing takes place and that many visit the site in the evening on foot.
100. In my judgement, there are opportunities for visitors to use sustainable transport modes in accordance with the definition of sustainable transport modes in annex 2 of the Framework. Moreover, the evidence indicates that the appellant has and does seek to promote the use of sustainable transport modes in connection with use of the appeal site in both the daytime and evening. There was no dispute between the parties at the inquiry that there was already a travel plan in place in association with a condition on the existing planning permission and that this appeal did not relate to a breach of such a condition.

Furthermore, the evidence indicates that the existing travel plan condition has been effective in terms of encouraging the use of more sustainable modes of transport.

Other considerations – listed buildings and conservation area

101. There is common ground between the main parties that the breach of planning control would not cause harm to the setting of any nearby listed or locally listed buildings, or to the character and appearance of Petersham Conservation Area (CA) of which it forms part. In essence, the main parties are of the view that the breach of planning control preserves the setting of the listed buildings and the character and appearance of the CA.
102. I have considered the significance of the listed buildings and the CA and in these respects do not disagree with the views and findings outlined in the appellant's Heritage Impact Assessment prepared by Portico Heritage and dated May 2024. While the listed and locally listed buildings surrounding the appeal site have architectural and historic significance, most are positioned within their own enclosed grounds and are physically and visually separated from the appeal site owing to boundary treatment and vegetation.
103. I acknowledge the potential for more vehicles to be parked in Church Lane in association with an evening dinner service. However, the evidence is that the level of car parking in Church Lane would not be significant if the identified new conditions were imposed. Moreover, and, in any event, I do not find that further use of this public highway for car parking purposes, or indeed associated activity within the appeal site itself which is enclosed from public view by high walls, would cause harm to the historic or architectural significance of any nearby listed and locally listed building (including settings).
104. I agree with the position of the main parties that the breach of planning control does not cause harm to the settings of nearby listed and locally listed buildings. Moreover, I find that the breach of planning control has preserved the character and appearance of the CA. In this regard, I do not find any conflict with the conservation requirements of policies LP3 and LP4 of the LP, policy 29 of the Draft Local Plan, and chapter 16 of the Framework.

Ground (a) appeal planning balance and conclusion

105. I conclude that conditions U27543NS04 and U27544NS05 of the existing planning permission are neither reasonable nor necessary in their current form. I find that the breach of planning control does not amount to inappropriate development in the MOL. Indeed, the openness of the MOL has been preserved and there has been no conflict with the purposes of the MOL. I find that harm would not be caused to the living conditions of the occupiers of neighbouring properties in noise, disturbance, and light spillage terms subject to the imposition of new, albeit associated, conditions.
106. Conditions are necessary in respect of evening use of the site (up to three days per week) as a café/restaurant use. Such associated conditions relate to areas where the café/restaurant use can take place; no amplified music/systems being operated in outside spaces; a control on the use of amplified music/PA systems within the café/restaurant building; the identification of a dedicated area for smoking and/or vaping to take place; the

submission of alternative lighting on Church Lane, and the implementation of the evening management plan.

107. Subject to the necessary new conditions, I have concluded that the breach of planning control would not cause harm to the character and appearance of the area, including Petersham Meadows and the MOL, that the settings of nearby listed and locally listed buildings would be preserved, and that the character and appearance of the CA would be preserved.
108. In reaching the above conclusions, I have considered the representations made by interested parties including those that occupy dwellinghouses surrounding the appeal site. In this regard, I have considered the rights of homeowners under Article 8 of the European Convention on Human Rights, as incorporated into the Human Rights Act 1998, which states that everyone has a right to respect for private and family life, their home and correspondence. I do not consider that such rights would be violated if the deemed planning application were approved.
109. Subject to the imposition of new conditions, the breach of planning control would not result in the occupiers of surrounding properties suffering unacceptable harm to their living conditions. I am therefore satisfied that a grant of planning permission would not unacceptably interfere with the right to respect for private and family life and their home. It is proportionate in the circumstances to allow the appeal.
110. Overall, I find that there are no material considerations that indicate the application should be determined other than in accordance with the development plan. For the reasons given above, I therefore conclude that the ground (a) appeal succeeds.

Ground (a) appeal conditions

111. Following discussion at the inquiry, the main parties prepared a revised list of suggested conditions. All but one of the conditions were agreed by the main parties. The condition in dispute relates to the submission of a noise management plan. Given the conclusion I have reached in respect of the noise and disturbance main issue, it is not necessary to impose such a condition. I shall, however, impose all of the other agreed conditions, and, in doing so, am satisfied that they all meet the tests for conditions as outlined in the Framework. Where necessary, I have made minor changes to the agreed conditions in the interests of precision and necessity.
112. In order to suitably safeguard the living conditions of the occupiers of neighbouring properties, and/or to ensure that the character of the locality is not harmed, it is necessary, based on the submitted evidence, to discharge the two conditions which are the subject of the existing planning permission for the mixed garden centre and café/restaurant use on the site, and to replace them with necessary conditions relating to permitted café/restaurant areas; permitted hours/days of use for the café/restaurant (including evening hours); permitting only a single dining sitting and pre-bookings in any one evening for the café/restaurant operation; the provision of a dedicated area for smoking/vaping; the implementation of the evening management plan; the prohibition of amplified music or systems from taking place within external areas before 10.00 hours and after 17.00 hours, and the imposition of a noise

condition relating to the use of amplified music/systems within buildings on the site (including the use of a sound limiter).

113. In the interests of biodiversity and the character of the area, it is necessary to impose a condition relating to new boundary lighting on Church Lane.

Overall Conclusion

114. For the reasons given above, I conclude that the appeal should succeed on ground (a) and the enforcement notice should be quashed. I shall discharge the conditions which are subject to the notice, and grant planning permission on the application deemed to have been made for the change of use previously permitted without complying with the conditions enforced against, but subject to the new conditions as described above. In these circumstances, the appeal on ground (g) does not fall to be considered.

D Hartley

INSPECTOR



Plan Accompanying the Ground (a) Appeal Deemed Planning Permission Conditions

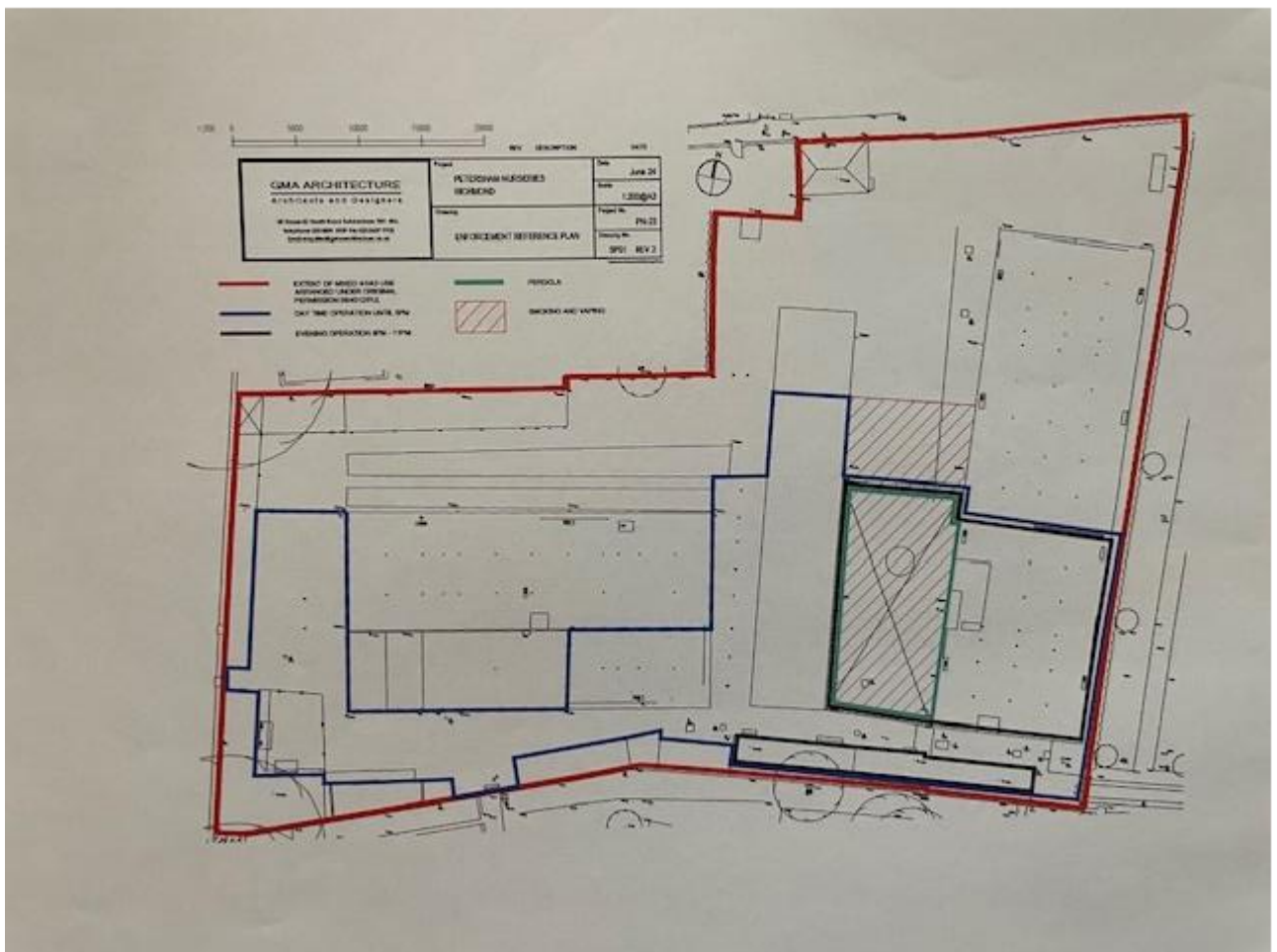
This is the plan (drawing No. SP01 dated June 2024) referred to in my decision dated: **12TH JULY 2024**

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

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

Reference: APP/L5810/C/24/3339372

Scale: Not to scale



APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY:

Mark Westmoreland Smith, Barrister, Kings Counsel

He called

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

FOR THE APPELLANT:

Scott Stemp, Barrister

He called

Richard Vivian, Big Sky Acoustics

James Bevis, i-Transport

Simon Ward, Propernomics Limited

Lara Boglione, Managing Director of Petersham Nurseries Limited

Nick Belsten, Executive Director, hgh Consulting

INTERESTED PERSONS:

Councillor Penny Frost

Mr Serge Lourie

DOCUMENTS SUBMITTED AT THE INQUIRY

ID1 – Appellant’s opening submissions

ID2 – Council’s opening submissions

ID3 – Council’s closing submissions

ID4 – Appellant’s closing submissions

ID5 – List of agreed conditions (apart from one) following the round table discussion and including an accompanying plan

ID6 – Appellant’s costs application