

15 April 2024

STATEMENT OF COMMON GROUND

TOWN AND COUNTRY PLANNING ACT 1990

THE TOWN AND COUNTRY PLANNING (ENFORCEMENT)
(DETERMINATION BY INSPECTORS) (INQUIRIES PROCEDURE)
(ENGLAND) RULES 2002/2685

PINS REF: APP/L5810/C/24/3339372

LPA REF: 18/0025/EN/BCN

APPEAL BY MR FRANCESCO BOGLIONE AND PETERSHAM NURSERIES
LIMITED AGAINST THE ISSUE OF AN ENFORCEMENT NOTICE BY THE
LONDON BOROUGH OF RICHMOND UPON THAMES AT PETERSHAM
NURSERIES, PETERSHAM ROAD, PETERSHAM, RICHMOND

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SECTION 1: INTRODUCTION

Section 1: Introduction

1. This Statement of Common Ground has been prepared in in relation to an appeal (**the Appeal**) made on behalf of Mr Francesco Boglione and Petersham Nurseries Limited (**the Appellant**) in respect of land at Petersham Nurseries, Petersham Road, Petersham, Richmond TW10 7AB (**the site**).
2. The Appeal is against the service by the London Borough of Richmond upon Thames (**the Council**) of an enforcement notice with reference 18/0025/EN/BCN (**the Enforcement Notice**) alleging a breach of planning control as follows:

“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. A copy of planning permission reference 08/4312/FUL is attached (“the Planning Permission”).

It appears to the Council that the following conditions attached to the Planning Permission have not been complied with:

U27543 NS04 Hours of Use – Café/Restaurant

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

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

U27544 NS05 Café/Restaurant areas

SECTION 1: INTRODUCTION

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

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

These conditions are being breached because 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).

3. The purpose of this Statement is to set out those matters that have been agreed between the Appellant and the Council and those matters which remain in dispute, which will be the focus of each party's case at the forthcoming inquiry.
4. Under Ground A of the Appeal, the Appellant is seeking:
 - a. an extension to the hours of operation to allow the sale and consumption of food on or off the premises up to three evenings per week between Wednesday to Saturday from 5pm to 11pm in the area edged pink on the Plan at Appendix 1; and
 - b. extended areas for the preparation and consumption of food and beverages in the areas dashed pink on the Plan
(the Development).
5. This Statement comprises the following sections:
 - **Section 2** sets out the details of the site and the surrounding area;
 - **Section 3** sets out the planning history of the site;
 - **Section 4** provides a list of the relevant Planning Policies;
 - **Section 5** sets out the matters relating to the Appeal that are agreed between the Appellant and the Council; and

SECTION 1: INTRODUCTION

- **Section 6** sets out the matters relating to the Appeal that have not yet been agreed between the Appellant and the Council and therefore remain in dispute.

SECTION 2: SITE AND SURROUNDING AREA

Section 2: Site and Surrounding Area

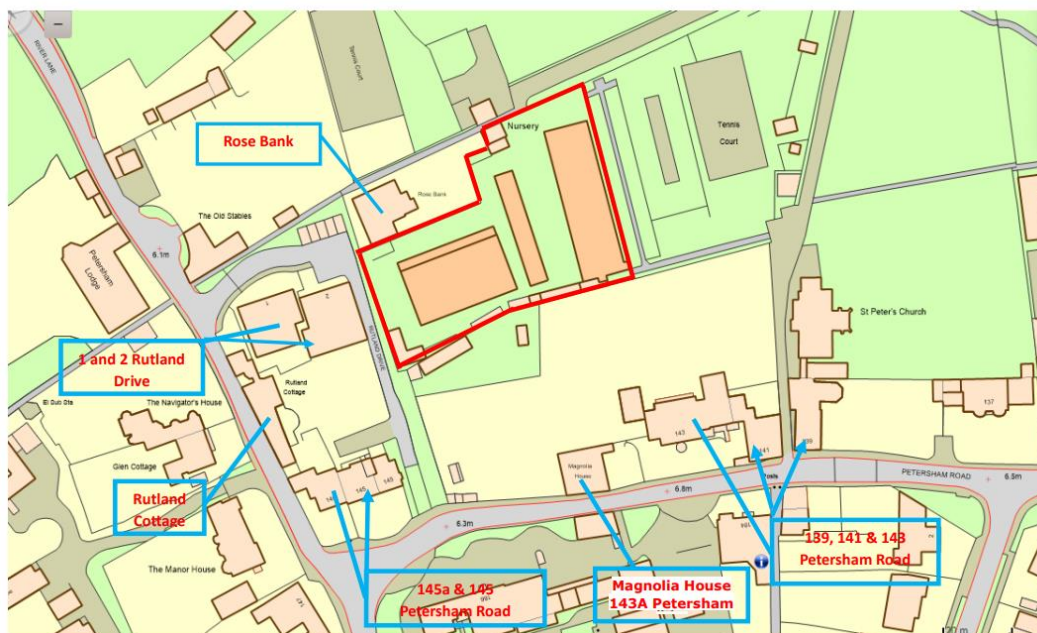
1. Petersham Nurseries comprises three glass greenhouse structures, separate brick and timber buildings and outdoor areas, which together accommodate the plant and shop sales and display areas, seating areas, the kitchen, toilets and staff office. The seating areas and kitchen operate as an established cafe/restaurant (<https://petershamnurseries.com/save-our-restaurant/>).
2. The site is located on the northern side of Petersham Road, to the rear of 143 Petersham Road (also known as Petersham House). The site is accessed via Church Lane, which runs between 141 Petersham Road and St Peter's Church. Pedestrian access is via a pathway which runs from River Lane.
3. Petersham Meadows, which is designated as an Other Site of Nature Importance, and hard standing adjoin the site to the north. Petersham Nurseries Limited have a licence agreement with the Council, which owns the adjacent land, to use it as a turning area for service vehicles. The land to the north is within the Thames Policy Area.
4. The site is located within the Petersham Conservation Area and within Metropolitan Open Land (**MOL**). There are also several listed buildings in the vicinity of the Nurseries:
 - Parish Church of St Peter – Grade II*
 - Petersham House, 143 Petersham Road (including gates and railings) – Grade II*
 - The Coach House, 141 Petersham Road – Grade II
 - Magnolia House, 143a Petersham Road (and Ice House) – Grade II
 - Rutland lodge, 145 Petersham Road (including gate and piers) – Grade II*
 - Petersham War Memorial & various monuments in the churchyard of St Peter's Church – Grade II
 - The Manor House – Grade II
 - Glen Cottage – Grade II
 - The Navigators House – Grade II
 - Petersham Lodge – Grade II

SECTION 2: SITE AND SURROUNDING AREA

5. Rose Bank, the residential property which directly adjoins the site to the north is locally listed as a Building of Townscape Merit (**BTM**). The Old Stables on River Lane and Rutland Cottage are also BTMs.

6. The closest residential properties to the appeal site are: Rose Bank Cottage (shares boundary with the Appellant's site, No. 2 Rutland Drive (approx. 5.5 metres away from the boundary of the appeal site), No.1 Rutland Drive (approx. 23 metres away from the boundary of the appeal site), Rutland Cottages (approx. 37 metres away from the appeal site), 145a Petersham Road and 145 Petersham Road (approx. 37 metres and 25 metres away from the boundary of the appeal site), Magnolia House (approx. 45 metres away from the boundary of the breach site), Nos.139, 141,143 Petersham Road (approx. 56 metres, 50 metres and 37 metres away from the boundary of the appeal site)¹. These are shown on the map below (a copy will be provided with the Council's statement).

Location of neighbouring residential properties



7. There are no other relevant planning constraints which affect the site.

¹ The distances are according to the Council and have not been verified by the Appellant.

SECTION 3: RELEVANT PLANNING HISTORY

Section 3: Relevant Planning History

1. The site has been in use as a garden centre, selling plants and associated products to the general public since 1962. Planning history records show that planning permission was granted for greenhouse structures between 1967 and 1970 (LPA refs. 67/183, 67/884, 67/2117 and 70/560).
2. In June 1998 a Certificate of Lawful Existing Use or Development (CLEUD) for the use of the premises as 'Use as a garden centre comprising open sales and display of plants and garden centre products; covered sales and display of garden centre products; ancillary storage and equipment plus sales office; plant growing areas; and public entrance courtyard and vehicle turning and loading area' was granted by the Council (LPA ref. 98/0525). The effect of the 1998 certificate was that the site could be used for open A1 retail use (now Class E) without the need for planning permission and had no restriction on hours or areas of operation.
3. A café/restaurant was opened in 2004, ancillary to the garden centre use. In 2007, following discussions with the Council, who held the view that the café/restaurant was no longer ancillary to the primary retail (A1) function of the garden centre and that a mixed use A1/A3 approval was required, a planning application was submitted to regularise the use.
4. A temporary planning permission was granted for this mixed use of the site, from the previous A1 use, on 11 December 2007 (LPA Ref. 07/1235/FUL). Condition 1 stated that the consent was for one year only, expiring on 30 November 2008. The reason the consent was temporary was to monitor and review the use after it had been in operation and to see if the impacts could be successfully mitigated, much of this was based on the success of the Green Travel Plan and mitigating impacts from travel to and from the site and the associated impacts on the Metropolitan Open Land, Conservation Area, neighbouring listed buildings and generally the surrounding environment.
5. The mixed A3 use was restricted by areas and hours. The A1 use had no such restriction and could operate without restrictions within the site's red line boundary.

SECTION 3: RELEVANT PLANNING HISTORY

6. An application for planning permission to allow permanent A1/A3 mixed use of the site was approved by the Council on 29 July 2009 (LPA ref. 08/4312/FUL). This was approved by the Council following a year of observing travel management in line with the Green Travel Plan and found that there was no harm to neighbour amenity, Metropolitan Open Land, important views from Richmond Hill or highways and parking in the area. The permanent permission was subject to a number of conditions and the wording and status of the conditions attached to the decision notice are set out below.

Condition reference	Condition wording	Status
U27539 NS01 - Green Travel Plan & Review	<p>Within 3 months of the date of this permission a full travel plan which accords with Transport for London’s “Guidance for Workplace Travel Planning for Development (2008)” shall be developed and submitted to and approved by the local planning authority in writing (“first approval date”) and shall be implemented on the first approval date and shall be reviewed and revised annually by each anniversary of the first approval date and in accordance with the requirements set out in i) to I v) below:</p> <p>i) by a date no later than 10 months after the first approval date a survey methodology shall be submitted for the travel plan which shall be iTrace compliant to the local planning authority for its approval in writing</p> <p>ii) by a date no later than 12 months after the first approval date a revised travel plan incorporating the results arising from the approved survey methodology shall be submitted to the local planning authority for its approval and the approved revised</p>	<p>The condition has been partially discharged via references 08/4312/DD02 and 08/4312/DD04</p> <p>*Annual approval has not been submitted*²</p>

² The Council stated on late 12 April 2024 that the Green Travel Plan has not been reviewed and approved annually. This has not yet been verified by the Appellant.

SECTION 3: RELEVANT PLANNING HISTORY

	<p>travel plan including any revisions or suggestions made</p> <p>by the local planning authority shall be implemented upon receipt of such approval;</p> <p>iii) by a date no later than 2 months prior to the submission of a revised travel plan each year in accordance with iv) below, a survey methodology for the travel plan which is iTrace compliant shall be submitted to and approved by the local planning authority;</p> <p>iv) a revised travel plan shall be submitted to the local planning authority for its approval annually by each anniversary of the first approval date for a period of 10 years from the first approval date and on each occasion the approved revised travel plan including any revisions or suggestions made by the local planning authority shall be implemented upon receipt of such approval.</p>	
<p>U27540 NS02 - Cycle Parking</p>	<p>Additional cycle parking facilities shall be provided in accordance with detailed drawings to be submitted to and approved in writing by the Local Planning Authority, such drawings to show the position, design, materials and finishes thereof.</p>	<p>Discharged under reference 08/4312/DD0 2</p>
<p>U27541 NS03 - Servicing and Deliveries</p>	<p>Within 6 weeks of the permission hereby granted the applicant is required to submit a servicing and delivery schedule to be submitted to and approved in writing by the Local Planning Authority, and should include measures to prevent servicing and delivery taking place during the peak hours of 11:30 to 15:00 hours Monday – Saturday and at any time on Sunday and restrictions on the weights of vehicles allowed to visit the site.</p>	<p>Discharged under reference 08/4312/DD0 3</p>

SECTION 3: RELEVANT PLANNING HISTORY

U27543 NS04 - Hours of Use – Café/Restaurant	There shall be no sale of food for consumption on or off the premises during the following times: Tuesday to Sunday – before 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 always be displayed at all times on the premises so as to be visible from outside.	The Appellant asserts non-compliance since 2010
U27544 NS05 – Café/Restaurant Area	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 Appellant asserts non-compliance since 2010
U27545 NS06 - Extraction Equipment	Any equipment required to effectively suppress the emission of fumes or smell and obviate any other nuisance from cooking processes carried out in the premises to be installed shall be submitted to and approved in writing by the Local Planning Authority.	Discharged under reference 08/4312/DD01
U27546 NS07 - Air Conditioning Equipment	No air conditioning apparatus, equipment or ducting shall be erected, placed or fixed to any part of the roof or external faces of the building(s), otherwise than as submitted to agreed in writing by the Local Planning Authority.	No action required
U27547 NS08 – Personal Permission	The A1/A3 mixed use hereby permitted shall only be carried out by Mr Francesco Boglione for the period during which the premises are owed by Mr Francesco Boglione.	Superseded by application reference 21/3108/ES191

7. An application for planning permission to vary condition NS04 (hours of use) of LPA ref. 08/4312/FUL to include opening between 19:00 and 23:00 on Thursday, Friday and Saturday evenings was submitted to the Council in 2010 but was withdrawn on 11 August 2011 (LPA ref. 10/2914/VRC).
8. A subsequent application for planning permission was submitted to open in the evening on Saturdays and was refused by the Council on 1 June 2012 29 March 2012 (LPA ref. 12/0067/VRC).

SECTION 3: RELEVANT PLANNING HISTORY

9. The reason for refusal was: “proposal would result in the expansion of an inappropriate use to the detriment of the character of Metropolitan Open Land and would result in an adverse effect on the amenities of neighbouring residential occupiers and the area generally. As such the proposal would be contrary to policy CP10 of the London Borough of Richmond upon Thames Local Development Framework Core Strategy adopted April 2009 and DM OS 1, DM TC 5 and DM DC 5 of the Council’s Development Management Plan adopted November 2011”. In respect of character and appearance, the Officer’s Report writes that:

“It is considered that, up to now, the mixed use of the site has at least preserved the character and appearance of the conservation area, in so far as there has been no overall increase of area or built form on the garden centre site. The other impacts upon the conservation area are linked to the additional vehicular movements and car parking on site. In considering the previous application to retain the mixed use on a permanent basis, the Committee considered that the mitigation measures set out in the Green Travel Plan has been successful. The issue with the current proposal to extend the hours of use whether any demonstrable harm would be created by additional vehicular movements and car parking in the area and if there would be any undue visual impact on the character and appearance of this part of the Petersham Road Conservation Area. In officers’ opinion, this is less likely to be a sustainable objection, the visual impact being difficult to identify”.

In respect of transport considerations, the Officer’s Report writes that:

“On the basis of the submitted information, officers are satisfied that the proposal to extend the hours of operation would not have an adverse impact on the functioning of the local highway network or add unacceptably to levels of on-street parking in the locality”.

10. A further application for planning permission was submitted on 3 February 2014 and was refused on 18 January 2018 (LPA ref. 14/0345/VSC) for the variation of condition NS04 to allow the sale of food for the consumption on the premises between the hours of 9:00 and 18:00 on Mondays, Tuesdays and Wednesdays, 9:00 and 23:00 on Thursdays, Fridays and Saturdays and between 11:00 and 18:00 on Sundays. The reason for refusal was:

SECTION 3: RELEVANT PLANNING HISTORY

“the proposal would result in the expansion of an inappropriate use to the detriment of the character and function of Metropolitan Open Land and would, by reason of an increased level of pedestrian and vehicular activity around the site, result in an adverse effect on the amenities of neighbouring residential occupiers and the area generally. As such the proposal would be contrary to the National Planning Policy Framework and the Local Plan, including policy CP10 of the Local Development Framework Core Strategy adopted April 2009, policies DM OS 1, DM TC 5 and DMDC 5 of the Development Management Plan adopted November 2011 and policies LP 8, LP 10 and LP 13 of the Publication Local Plan.”

11. An informative attached to the decision notice issued on 18 January 2018 for LPA ref. 14/0345/VSC advised that:

“Officers understand that the use of the premises is currently operating in breach of both condition NS05 ‘Café/Restaurant Areas’ and NS04 ‘Hours of Use – Café/Restaurant of planning permission 08/4312/FUL. This application has been determined on the basis of the information submitted to it, which has included no request to vary condition NS05 ‘Café/Restaurant Areas’ or the associated drawing. The Council is ready to enter into formal pre-application discussions to advise the applicants of relevant policy and guidance in respect of this matter.”

12. In response to the refusal, the applicant entered into pre-application discussions with the Council in the Spring of 2018. The Council cannot locate a draft application having been received. A planning contravention notice was received on 9 April 2021.
13. On 31 August 2021, a CLEUD application was submitted to the Council regarding conditions NS04, NS05 and NS08 of 08/4312/FUL (LPA ref: 21/3108/ES191). The CLEUD application was submitted due to the passage of time and the purported continuous use of the operational areas of the site and the evening operations and was supported by significant evidence. The period that the application covered was between 2009 – 2019 i.e. since the grant of planning permission on 29 July 2009. The submitted evidence was from a variety of sources. The Council did not find the evidence demonstrated on the balance of probability continuous use for the terms sought in the certificate.

SECTION 3: RELEVANT PLANNING HISTORY

14. On 4 September 2023, the Council amended the description of the certificate application (as it is allowed under the legislation) and granted a certificate for the following:

1. The café/restaurant has been in operation selling food and beverages to visiting customers between 10am-5pm Tuesday to Sunday excluding Mondays in exceedance of 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 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 and 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.

15. The CLEUD certified a small extension of opening hours, a larger operational restaurant/café area and that the personal condition was no longer applicable. The Council did not accept the evidence submitted regarding evening use and of the café/restaurant operating over the full area the CLEUD sought confirmation for.

16. On 13 September 2023, the Planning Committee considered a report by officers to take enforcement action against Petersham Nurseries. The Committee resolved to “under enforce” evening operations and those seating areas closest to neighbouring properties. The Council accepted that there would be no impact on heritage assets.

17. Enforcement

Opened Date: 09.11.2005 Enforcement Enquiry

Reference: 05/0556/EN/UCU

Premises used for activities not ancillary to the nursery.

This enquiry is closed.

Enforcement

SECTION 3: RELEVANT PLANNING HISTORY

Opened date: 18/01/2018 Enforcement Enquiry

Reference: 18/0025/EN/BCN

Breach of conditions NS04 (Hours of Use) and NS05 (Limiting the Extent of the Café/Restaurant use) of permission ref. 08/4312/FUL

This enquiry is still ongoing.

Licensing

18. In September 2022, the Council granted Petersham Nurseries Ltd a new premises licence under the Licensing Act 2003. The opening hours authorised under the new licence are: Monday - 09:00 to 17:00; Tuesday - 09:00 to 17:00; Wednesday - 09:00 to 23:00; Thursday - 09:00 to 23:00; Friday - 09:00 to 23:00; Saturday - 09:00 to 23:00 and Sunday - 11:00 to 17:00. The licence permits the sale of alcohol up to 17:00hrs seven days a week and additionally, on no more than three days per week on Wednesdays to Saturdays, up until 22:30.

19. As part of the application, Petersham Nurseries offered up several additional controls which have formed conditions on the premises licence. This includes limiting the sale of alcohol after 5pm to a more limited area (Greenhouse 1 and the pergola area), limiting the sale of alcohol beyond 5pm to three nights per week, and changing the start time on Sundays to be after 11am to ensure no conflict with St Peter's Church, and specific conditions agreed with the police.

Environmental Health Complaints

20. The Council's Noise and Nuisance team have received 5 complaints from neighbours since 2020³.

³ The Council has asserted for the first time on late 12 April 2024 that the Noise and Nuisance team have received 5 complaints from neighbours but has not provided copies of these to the Appellant.

SECTION 4: PLANNING POLICY

Section 4: Planning Policy

1. Planning decisions must be taken in accordance with the Development Plan unless there are material considerations that indicate otherwise as set out in section 38(6) of the Planning and Compulsory Purchase Act 2004.

Development Plan

2. The parties agree the Council's Development Plan comprises the London Plan (2021), the Council's Local Plan (2018) and the Ham and Petersham Neighbourhood Plan (2018). Full weight should be applied to the relevant policies outlined in paragraph 3 which are comprised within the Development Plan. The Council are also preparing a new Local Plan which was submitted for examination in January 2024.
3. The parties agree the relevant policies in the context of this appeal include the following:

London Plan 2021

- Policy GG1 Building strong and inclusive communities
- Policy GG2 Making the best use of land
- Policy GG5 Growing a good economy
- Policy E10 Visitor Infrastructure
- Policy HC1 Heritage conservation and growth
- Policy HC6 Supporting the night time economy
- Policy G3 Metropolitan Open Land
- Policy T4 Assessing and mitigating transport impacts
- Policy T5 Cycling
- Policy T6 Car parking

Local Plan 2018

- LP1 Local Character and Design Quality
- LP3 Designated Heritage Assets
- LP4 Non-Designated Heritage Assets

SECTION 4: PLANNING POLICY

- LP5 Views and Vistas
- LP8 Amenity and Living Conditions
- LP10 Local Environment Impacts, Pollution and Land Contamination
- LP12 Green Infrastructure
- LP13 Green Belt, Metropolitan Open Land and Local Green Space
- LP18 River corridors
- LP40 Employment and Local Economy
- LP43 Visitor Economy
- LP44 Sustainable Travel Choices
- LP45 Parking Standards and Servicing

Ham and Petersham Neighbourhood Plan

- Policy C1 Protecting green character
- Policy R1 Enhancing retail uses

Draft (Reg 19) Publication Version, Local Plan

4. The Council are also preparing a new Local Plan. The Richmond Publication Version Local Plan (Regulation 19 version) was published on 9 June 2023 for public consultation which ended on 24 July 2023.
5. The Publication Version Local Plan, together with all the representations received during the representation period, the plan and its supporting documents were submitted to the Secretary of State for examination on 19 January 2024. The submission documents do not form part of the statutory development plan for the Borough, however, by publishing and submitting the Borough Local Plan for independent examination the Council has formally confirmed its intention to adopt the Publication Plan.
6. The Publication Version Local Plan, including its evidence base, are material considerations for decision-making. The weight to be given to each of the emerging policies and allocations will depend on an assessment against the criteria set out in paragraph 48 of the NPPF.

SECTION 4: PLANNING POLICY

7. The weight to be applied to the policies in the emerging Local Plan are a matter of dispute as set out in section 6 of this document.
8. A summary of main issues raised during the Publication Local Plan (Regulation 19) consultation and summary of the Council's response (January 2024) are available via the Council's website.

Other Material Considerations

9. The following supplementary planning documents are also of relevance to the Ground A appeal:
 - Transport
 - Conservation Areas
 - Petersham Conservation Area Statement
 - Petersham Conservation Area Appraisal
10. The following parts of the National Planning Policy Framework 2023 (**NPPF**) are particularly relevant to the Appeal:
 - Section 2 Achieving Sustainable Development
 - Section 4 Decision-making
 - Section 6 Building a strong, competitive economy
 - Section 9 Promoting sustainable transport
 - Section 11 Making Effective Use of Land
 - Section 13 Protecting Green Belt Land
 - Section 16 Conserving and enhancing the historic environment

SECTION 5: MATTERS AGREED

Section 5: Matters Agreed

The following matters are not in dispute:

A. The Enforcement Notice

1. A mixed retail and restaurant/café use was occurring when the Enforcement Notice was issued.
2. The Council are not seeking to enforce against the lawful use of the site.
3. The Enforcement Notice relates to breach of conditions NS04 (hours of use cafe/restaurant) and NS05 (cafe / restaurant areas) attached to planning permission ref: 08/4312/FUL.

The approved hours of cafe / restaurant use are:

Tuesday to Sunday: 1000hrs -1630hrs (the Council are under enforcing to allow opening to 1700hrs)

Sundays: 1100hrs - 1630hrs (the Council are under enforcing to allow opening to 1700hrs)

The approved cafe / restaurant areas are shown in Drawing Number DP7/2857, shown edged pink and black on the attached Plan at Appendix 1.

B. Policy

4. The Council do not allege conflict with their Transport SPD or Conservation Areas SPG.

C. Ground A of the Appeal

Transport

5. There is no assertion by the Council that there are departures from the Appellant's Green Travel Plan.

Restaurant/café covers

6. The daytime covers in the restaurant/café account for the tables being "turned" and there being two sittings. There is one sitting for dinner and the tables are therefore not turned.

SECTION 5: MATTERS AGREED

Metropolitan Open Land

7. The Council is not alleging spatial harm to the Metropolitan Open Land.

Premises licence

8. The decision maker may take the premises licence into account.
9. The licence has been subject to public consultation and, in issuing the licence, the Council was satisfied the four licensing objectives were met, for the premises to sell alcohol, namely:
 - a. the prevention of crime and disorder;
 - b. public safety;
 - c. prevention of public nuisance;
 - d. the protection of children from harm.
10. The premises licence allows the sale of alcohol at times which exceed the permitted opening hours in Condition NS04 (in terms of the Development) all year round.
11. The Home Office's statutory guidance to support licensing authorities in the carrying out of their functions under the Licensing Act 2003 states⁴:

“Public nuisance is given a statutory meaning in many pieces of legislation. It is however not narrowly defined in the 2003 Act and retains its broad common law meaning. It may include in appropriate circumstances the reduction of the living and working amenity and environment of other persons living and working in the area of the licensed premises. Public nuisance may also arise as a result of the adverse effects of artificial light, dust, odour and insects or where its effect is prejudicial to health.”
12. The premises licence issued for Petersham Nurseries is for the sale of alcohol for consumption on and off the premises. The sale of alcohol is only one element of the activities carried out at the café/restaurant.
13. The Council's Statement of Licensing Policy states:

⁴ Paragraph 2.22, Revised Guidance issued under section 182 of the Licensing Act 2003, Home Office, December 2023

SECTION 5: MATTERS AGREED

"... the planning department are a responsible authority under the Licensing Act 2003 and the Council will take account of relevant representations in regard to planning issues including those relating to the appropriate operating hours of a licensed premises."

The Council have no information as to whether the planning department made representations to the licensing application.

Heritage

14. The alleged breaches do not cause harm to the significance of nearby listed and locally listed buildings or harm the significance, character or appearance of the Petersham Conservation Area.

Use

15. The Certificate of Lawful Existing Use 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.
16. The café/restaurant operation could be intensified during the permitted hours.

Ground F of the Appeal

17. The Appellant is no longer pursuing Ground F of their appeal.

SECTION 6: MATTERS IN DISPUTE

Section 6: Matters in Dispute

The following matters are in dispute:

A. Ground A of the Appeal

Metropolitan Open Land

1. The Appellant's position is that:
 - i. They do not consider the Development inappropriate development in the Green Belt.
 - ii. Concerns relating to the alleged breaches of planning control relate in fact to a general 'character' effect matter, rather than a MOL effect matter.
 - iii. The alleged breaches do not have an unacceptable visual impact on the character of the MOL.
 - iv. Reference to character in LP13 goes beyond Policy G3 and the NPPF (which does not refer to character).
2. The Council will seek to demonstrate:
 - i. That breach of conditions NS04 and NS05 do affect the character and openness of MOL. Character being a general harm. Openness being a specific harm to the MOL.
 - ii. Policy LP13 is consistent with policy G3 of the London Plan and the NPPF.

Policy

3. The Council will seek to demonstrate that breach of conditions NS04 and NS05 are contrary to national, regional, and local planning policies and planning permission should be refused for the breach of planning control outlined in the Enforcement Notice but only insofar as it relates to the period 5pm to 11pm on three evenings per week, since the Council are under-enforcing (and thereby granting planning permission) for opening until 5pm, and in relation to the additional area sought by the Appellant as indicated on the Plan.

Premises licence

4. The Appellant's position is that:
 - i. The premises licence is a material planning consideration.

SECTION 6: MATTERS IN DISPUTE

- ii. The Council's licensing sub-committee considered in substance and effect the same living conditions matters in determining the premises licence as outlined in the Enforcement Notice, namely the potential for pedestrian, vehicular and commercial activity to harm the amenity and living conditions of neighbouring residents.
 - iii. There are no material differences between the living considerations to be considered as part of this appeal as would be considered in the licensing control regime.
5. The Council will:
 - i. Seek to demonstrate that licensing and planning operate under separate regimes and the grant of a premises licence consent for the sale and consumption of alcohol for an extended operating hour of the café/restaurant does not guarantee that planning permission would automatically be forthcoming for similar operating hours.
 - ii. Give limited weight to the grant of license consent as would be set out in the Council's statement of case. 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**".
 - iii. Allege departures from the Appellant's Evening Management Plan.

Amenity

6. The Council will also seek to demonstrate that the breach of conditions results in harm to the amenity of the adjoining properties in relation to opening in the period 5pm to 11pm on three days per week, accounting for the planning permission granted by the Council's under-enforcement in the Enforcement Notice.
7. A location plan showing the residential properties situated close to the appeal site and complaints received by the Council in response to LDC application (our ref: 21/3108/ES191) will be provided with the Council's 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

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the hours of operation in order to reduce harm to the amenity of neighbouring residential properties. Those residents whose living conditions have been affected by the breach of planning control at the Appellant's site are:

- i. 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 would be provided with the Council's statement of case.
- ii. 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.
- iii. 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. Noise nuisance as a result of the extension of the A3 use and extended operating hours impact these properties in terms of noise nuisance and disturbance from increased traffic generation and staff and customers leaving the premises late at night. Comments on the LDC application and the impact of the breach of conditions on residents of Rutland Drive would be provided with the Council's statement of case.

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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.

8. The Appellant's disagree and their position is that:
 - i. The alleged breaches do not cause harm to neighbouring residents (including in terms of pedestrian, vehicular and commercial activity).
 - ii. They have not been provided with any evidence as to the allegations in paragraph 7 above and will address them in evidence.

Conditions

9. The following conditions have been proposed by the Council:
 - Within 3 months of the date of this decision, a Noise Management Plan (NMP) shall be submitted to and approved in writing by the Local Planning Authority setting out how the management of the Class E restaurant use in the areas/hours in exceedance of those permitted under ref 08/4312/FUL shall be undertaken to minimise the noise impact upon neighbouring residents. The restaurant use in exceedance of that permitted under ref 08/4312/FUL shall not be operated other than in accordance with the NMP. The NMP shall include (as a minimum) written details of the following information:
 - (i) Organisational responsibility for noise control
 - (ii) Management of outdoor space and parking
 - (iii) Details of community liaison and complaints logging and investigation to be made available to the LPA on request
 - (iv) Details in regard to management of smoking areas
 - (v) No music, amplified sound system or other form of loud noise (such as singing or chanting) shall be used or generated from within buildings/greenhouses which is audible outside the curtilage of the premises.

Appellant's response: The approved Evening Management Plan sets out various measures to manage any potential disturbance associated with the evening restaurant trade. In respect of the above issues, the Evening Management Plan already includes

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details of the management of outdoor space and parking and provides details in regard to management of smoking.

- No home delivery of food shall occur from the premises.

Appellant's response: This has never been in issue and it is therefore considered such condition is not necessary and relevant to the development to be permitted.

- No music or amplified sound system shall be used or generated within the external areas of restaurant use hereby approved at any time.

Appellant's response: Under consideration.

- Staff and customer/visitor travel surveys for the evening use of the premises shall be undertaken in accordance with a survey methodology to be submitted to and approved by the Local Planning Authority prior to it being carried out. Within 6 months of the date of the approval of those details, a new travel plan based on the results of the survey shall be submitted with clear objectives, targets, actions and timeframes to manage the transport needs of staff and customer / visitors to the development in the evening, to minimise car usage and to achieve a shift to alternative transport modes.

Appellant's response: There is already a Green Travel Plan in place.

- Following approval by the Local Planning Authority, the applicant shall then implement these actions to secure the objectives and targets within the approved plan. The travel plan (including surveys) shall be annually revised, and a written review of the travel plan submitted and approved by Council by the anniversary of its first approval and yearly thereafter. At the third anniversary, the travel plan (including surveys) shall be re-written and resubmitted for further approval by the Council. This review and re-write cycle shall continue every three years and any approved revision shall be implemented within three months of the date of approval.
- Appellant's response: There is already a Green Travel Plan in place.

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- Within 3 months of the date of this decision, details of the refuse and recycling storage for Class E restaurant use in the areas in exceedance of those permitted under ref 08/4312/FUL are submitted to and approved in writing by the LPA. The refuse and recycling storage shall be provided in accordance with those details and prior to first occupation of development and shall be retained for the users of the development thereafter and for no other purpose.

Appellant's response: this goes beyond the issues in the appeal. As this condition is not agreed, the Appellant disputes the relevance of Policy LP24 of the Local Plan 2018.

- The café/restaurant areas shall be confined solely to the areas identified for these purposes on XXXXXX.

Appellant's response: Further detail of the areas proposed by the Council is needed in order to consider.

- There shall be no sale of food for consumption on or off the premises after 11pm. A notice to this effect shall be displayed at all times on the premises so as to be visible from outside.

Appellant's response: There is no justification for a notice setting out what the hours are. In addition, the conditions should not seek to restrict the wider lawful use of the site.

10. The Appellant is proposing the following condition:

- "The facilities shall not open as a café/restaurant in the evening save in compliance with the Evening Management Plan dated 1 November 2023".

The Council's response is that the Evening Management Plan dated 1 November 2023 is not an approved planning document. A condition is proposed for details application to be submitted for consideration to discharge Noise Management Plan (NMP).

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Emerging Local Plan

11. The relevant policies of the emerging Local Plan in the context of this appeal are outlined in the table below. The weight to be applied to each policy is a matter of dispute and it is the Appellant's position that significant weight cannot be applied whilst the policies are the subject of unresolved objections.
12. The Council considers the emerging Borough Local Plan to be sound and legally compliant, officers and Councillors should accord relevant policies and allocations significant weight in the determination of applications taking account of the extent to which there are unresolved objections to relevant policies. Therefore, the weight afforded to each policy at this stage will differ depending on the level and type of representation to that policy. This is addressed in more detail in the assessment below where it is relevant to the application.

<u>Draft policy</u>	<u>Unresolved objections</u>	<u>LPA's view on weight</u>	<u>Appellant's view on weight</u>
LP1 Living Locally	A number of objections have been raised which have not yet been resolved The Council states they are not relevant to the appeal.	Limited weight	Limited weight
LP2 Spatial strategy	No major objection raised	Limited weight	Limited weight
LP7 Waste and the Circular Economy	No major objection raised	Limited weight	Limited weight
LP21 Protecting the Local Economy	A number of objections have been raised which have not yet been resolved The Council states they are not relevant to the appeal	Limited weight	Limited weight
LP26 Visitor Economy	The Council states there is no objection relevant to the appeal.	Limited weight	Limited weight
LP28 Local Character and Design Quality	A number of specific objections have been raised. The Council	Limited weight	Limited weight

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	states they are not relevant to the appeal		
LP29 Designated Heritage Assets	A number of specific objections have been raised. The Council states they are not relevant to the appeal	Limited weight	Limited weight
LP30 Non-designated Heritage Assets	A number of specific objections have been raised	Limited weight	Limited weight
LP31 Views and Vistas	A number of specific site comments have been received	Limited weight	Limited weight
LP34 Green Belt and Blue Infrastructure	The Council states no objection raised relevant to the appeal.	Limited weight	Limited weight
LP35 Green Belt, Metropolitan Open Land and Local Green Space	<p>The Council states no objection relevant to the appeal has been raised.</p> <p>The Appellant states that they raised an objection at Regulation 18 stage which was ignored by the Council and remains unresolved.</p> <p>The Council states they have already responded to the Appellant's agent on this matter.</p>	Limited weight	Limited weight
LP40 Rivers and Corridors	A number of specific objections have been raised. The Council states they are not relevant to the appeal.	Limited weight	Limited weight
LP46 Amenity and Living Conditions	No objection raised	Moderate weight	Limited weight
LP47 Sustainable Travel Choices	A number of unresolved objections have been raised. The Council states they are not	Limited weight	Limited weight

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	relevant to the appeal.		
LP48 Vehicular Parking Standards, Cycle Parking, Servicing and Construction Logistics Management	A number of unresolved objections have been raised. The Council states they are not relevant to the appeal.	Limited weight	Limited weight
LP53 Local Environment Impacts	Unresolved objections relate to specific issues which the Council state are not relevant to the appeal.	Limited weight	Limited weight

Restaurant/café covers

13. The Appellant's position is that:

- a. The covers for the restaurant/café that were in place when the Enforcement Notice was issued and those that would reasonably be capable of being accommodated in respect of the requirements of the Enforcement Notice are as set out in Schedule 2.
- b. The dashed pink areas on the Plan are used on a weather dependent/seasonable basis and do not contribute to the maximum amount of covers that can be accommodated by the kitchens at Petersham Nurseries.

14. The Council's position is that it does not agree:

- c. the table at Schedule 2; or
- d. that the dashed pink areas are used on a weather dependent/seasonable basis and do not contribute to the maximum amount of covers that can be accommodated by the kitchens at Petersham Nurseries.

Use

15. It is the Council's position that:

- a. 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 operations which would continue to apply) by reason of Article 3(4) of the Town and Country Planning (General Permitted Development) (England) Order 2015.

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16. The Appellant's position is that:

- a. 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 operations which would continue to apply). The GPDO is not relevant in this context.
- b. If the site changed use within Class E and a new, separate use commenced that was not restricted by condition and did not materially change the use of the land, it could operate with no limits on its hours of operation or areas of use.

Transport

17. The Council states it is a fact that annual travel plans and monitoring have not been submitted annually by the Appellant as required by condition. This has not yet been verified by the Appellant.

Ground D of the Appeal




18. The Appellant's position is that the evidence summarised at Appendix 1 and 2 of the Officer's Report for the Certificate of Lawfulness application ref. 21/3108/ES191 demonstrates breach of condition NS04 on the dates shown.

19. The Council will seek to demonstrate that breach of conditions NG04 and NS05 occurred as a matter of fact but the breach had not become immune from planning enforcement action when the Enforcement Notice was served.

Ground G of the Appeal

20. The Council would seek to demonstrate that sufficient time has been given to comply with the requirements of the Enforcement Notice.

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Signed on behalf of the Appellant 	Signed on behalf of the Council  
Date: 15 April 2024	Date 15 April 2024
Position: Simon Ricketts, Partner Town Legal LLP	Position: Craig Raybould, Planning Enforcement Team Manager Edward Appah, Senior Planning Enforcement Officer

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Appendix 1: Plan

1:200 0 5000 10000 15000 20000

REV DESCRIPTION DATE

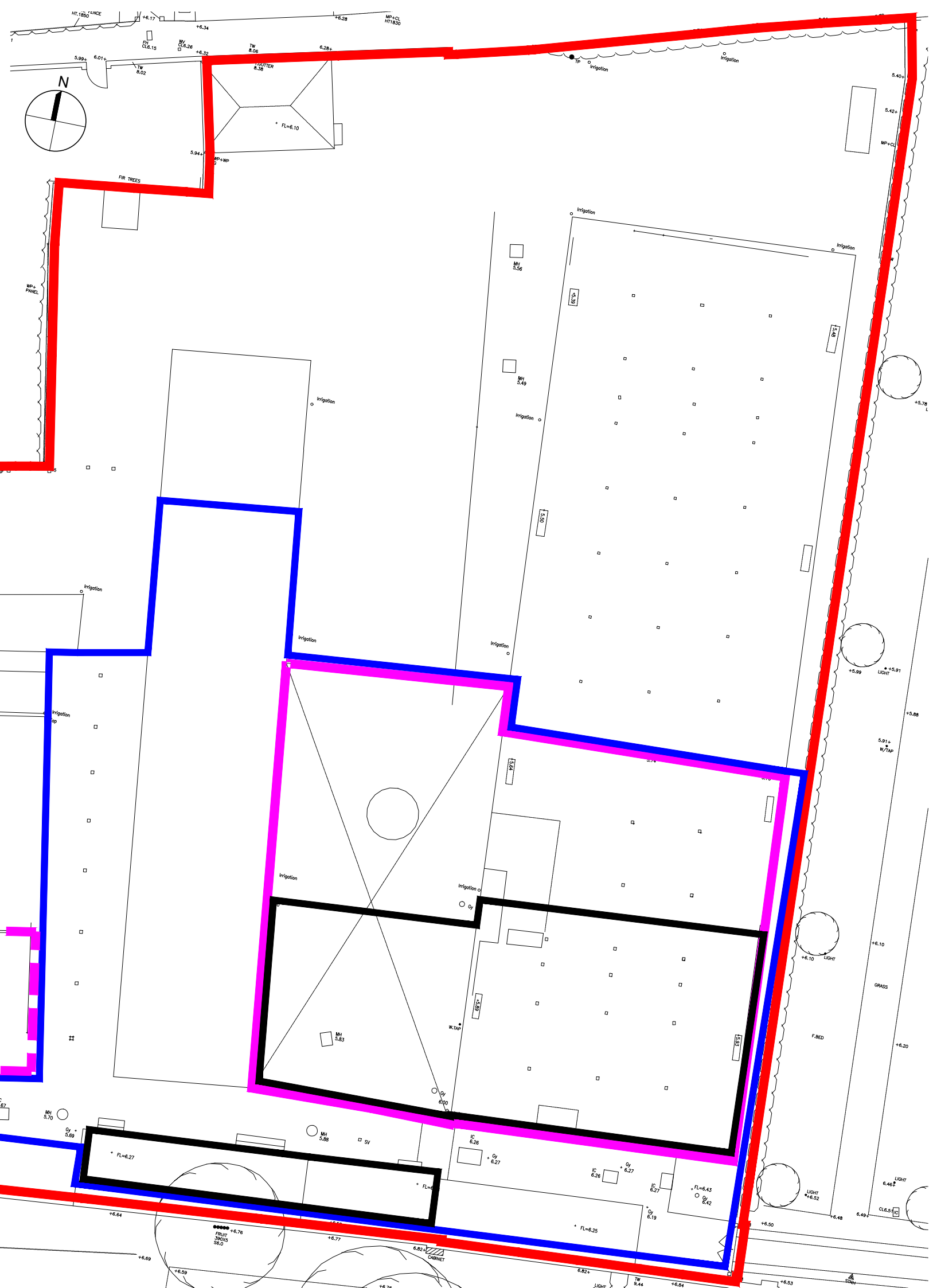
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Project	PETERSHAM NURSERIES RICHMOND	Date	April 24
		Scale	1:200@A3
Drawing	ENFORCEMENT REFERENCE PLAN	Project No.	PN-23
		Drawing No.	RP01 REV A

K:\Petersham Nurseries PN-23\Drawings\Plans

- EXTENT OF MIXED A1/A3 USE ARRANGED UNDER ORIGINAL PERMISSION 08/4312/FUL
- EXTENT OF EXTENDED CAFE / RESTAURANT AREA APPROVED UNDER 21/3108/ES191
- EXTENT OF AREA IDENTIFIED BY LBRUT AS SUITABLE FOR UNDER - ENFORCEMENT
- EXTENT OF UNAUTHORISED CAFE / RESTAURANT AREA
- EXTENT OF CAFE / RESTAURANT AREA APPROVED UNDER ORIGINAL PERMISSION 08/4312/FUL



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Appendix 2: Agreed covers

	Covers in place when the notice was issued		Covers which could reasonably be accommodated in respect of requirements of the notice	
	Daytime covers across the nurseries (maximum)	Evening covers	Daytime covers (maximum)	Evening covers
Wednesday	140	100	140	0
Thursday	140	100	140	0
Friday	140	100	140	0
Saturday	140	100	140	0