

<b>ENFORCEMENT REPORT REF: 18/0025/EN/BCN</b>	
<b>ADDRESS</b>	<b>PETERSHAM NURSERIES, PETERSHAM ROAD, PETERSHAM</b>
<b>ENFORCEMENT ISSUE</b>	<b>BREACH OF PLANNING CONDITIONS: a) U27543 NS04 HOURS OF USE – CAFÉ/RESTAURANT b) U27544 NS05 CAFÉ/RESTAURANT AREAS c) NS08 PERSONAL PERMISSION</b>
<b>CONTACT OFFICERS</b>	<b>AARON DAWKINS/CRAIG RAYBOULD</b>
<b>WARD</b>	<b>HAM, PETERSHAM AND RICHMOND RIVERSIDE</b>



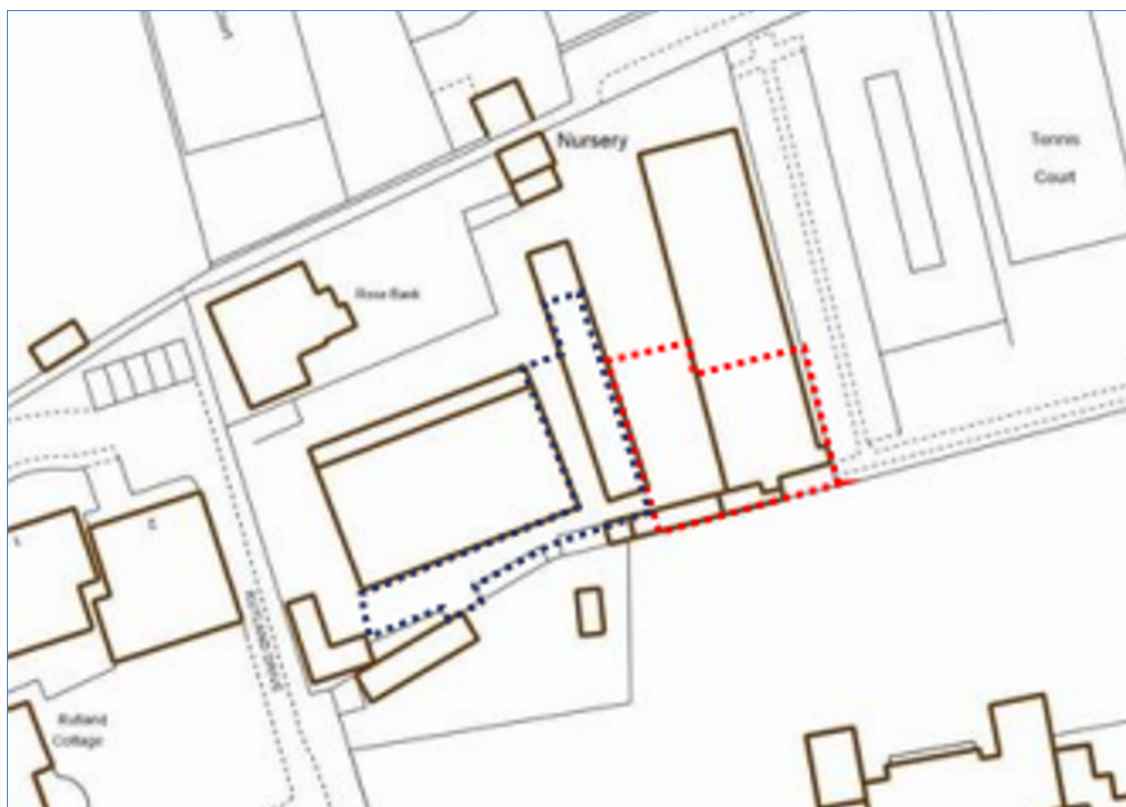
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**1. SUMMARY**

- 1.1 The planning system exists to control the development and use of land in the public interest. The planning system can only achieve this if planning controls are enforced when necessary. The enforcement of planning controls is therefore a fundamental part of the planning system.
- 1.2 The main objectives of the planning enforcement function are to remedy harm to public amenity resulting from a breach of planning control and to manage it, making sure that the integrity of the planning system is not undermined. A breach of planning control is development carried out without the requisite consent from the Council.
- 1.3 The café/restaurant at Petersham Nurseries is currently being operated in breach of the planning conditions relating to the hours and areas of use as set out on their

operative planning permission 08/4312/FUL. The applicant further considers that the business is being carried out in breach of the personal permission condition.

- 1.4 In deciding whether or not to take action, the Local Planning Authority must consider if it is 'expedient' to do so, that is whether the action proposed to be taken is appropriate and commensurate with any alleged harm that has been or is being caused. This involves deciding whether the breach of planning control unacceptably affects public amenity, prejudices planning policy objectives or the existing use of land or buildings meriting protection in the public interest. A judgement has to be made in each case as to the seriousness of the breach and the level of any harm that it causes.
- 1.5 The applicant has previously sought planning permission for an extension of the hours of use. Application 12/0067/VRC to vary the hours of operation condition by allowing the café/restaurant element to operate from 19.00 to 23.00 on Saturday every week was refused permission on 29 March 2012 under delegated powers due to harm to neighbouring amenity and because it was considered inappropriate development in MOL, harmful to its openness.
- 1.6 A subsequent application 14/0345/VRC sought to allow for the sale of food for consumption on the premises, between the hours of 09.00 and 18.00 on Mondays, Tuesdays and Wednesdays, 09.00 and 23.00 on Thursdays, Fridays and Saturdays and 11.00 and 18.00 on Sundays. This was refused by the Planning Committee at its meeting on 17.01.2018 again for reasons of harm to residential amenity and MOL.
- 1.7 There has been no change to the thrust of planning policy in respect of MOL or protection of neighbouring amenity in the interim period and in the context of these earlier decisions, it is considered that the breach of planning conditions insofar as it relates to *evening* openings is demonstrably harmful and it is expedient to serve an Enforcement Notice in this respect.
- 1.8 There is no harm arising from the business being carried out by Petersham Nurseries Ltd. as opposed to Mr Francesco Boglione. Sufficient evidence was provided in application 21/3108/ES191 to satisfy officers that in this respect, the breach would be lawful through the passage of time.
- 1.9 Evidence presented in 21/3108/ES191 also demonstrates a minor extension to the permitted hours to 5pm, Tuesday to Sunday, has been carried on for a period in excess of ten years continuously and is now immune from enforcement action.
- 1.10 With respect to the areas of use, 21/3108/ES191 demonstrated that there are areas within Petersham Nurseries which have been used for additional café/restaurant seating for some considerable time. The LPA considered granting a lawful development certificate for '*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.*'. The decision not to do so is a relevant consideration. The Council is also required to consider whether the action it might take is proportionate to the breach identified. The recommendation from Officers is that the Enforcement Notice would 'under enforce' the full extent of the conditions and include additional areas, that whilst not evidenced as being immune from enforcement action, are not considered to be causing any planning harm, mainly due to the separation distances from these areas and neighbouring residential properties. These are delineated with a blue line. See below map:



- 1.11 For clarity, the term 'under enforcement' identifies a breach of planning control which could have required any buildings or works to be removed, or an activity to stop, but has stipulated some lesser requirements. When all the requirements of the notice have been complied with, then planning permission is deemed to be granted for those remaining operations or use (section 173(11) of the Town and Country Planning Act 1990).

**RECOMMENDATION:** It is recommended that the Planning Committee resolved that

- a) An **ENFORCEMENT NOTICE** be issued; and
- b) In the event of the notice not being complied with, to grant delegated authority to the Assistant Director of Environment and Community Services to take further action as necessary including proceeding to prosecution.

## **2. REASON FOR PLANNING COMMITTEE DETERMINATION**

- 2.1 The Council's constitution states that the Assistant Director of Environment & Community Services (Planning & Transport Strategy) may decline to exercise her delegated powers in a particular case, including, without limitation, in cases where in her view it would be in the public interest for the matter to be heard by Committee. In such cases, she must then refer the matter promptly to Committee for consideration.
- 2.2 In light of the planning history including an earlier refusal of evening opening by the Planning Committee and the public interest, the Assistant Director declines to exercise her delegated powers in this case.

## **3. DESCRIPTION OF THE SITE AND ITS SURROUNDINGS**

- 3.1 Petersham Nurseries is located on the northern side of Petersham Road, to the rear of no.143. Vehicular access is from Church Lane, which runs between no.141 Petersham Road and St Peters Church. A pedestrian access is via a pathway which runs from River Lane.
- 3.2 The site is located within the Petersham Conservation Area and is located within Metropolitan Open Land (MOL). The surrounding area is open in nature, with a semi-rural character. Petersham Meadows, which is designated as an Other Site of Nature Importance, and a hardstanding adjoin the site to the north. The Nursery has a licence agreement with the Council, which owns the adjacent land, to use it as a turning area for service vehicles. This land to the north is within the Thames Policy Area.
- 3.3 Several listed buildings surround the site to the west, south and east including:
- Magnolia House 143A Petersham Road (Grade II)
  - 143 Petersham Road (Grade II\*)
  - The Coach House 141 Petersham Road (Grade II)
  - Rutland Lodge 145 Petersham Road (Grade II\*)
  - St Peters Church, Petersham Road (Grade II\*)
  - The Manor House, River Lane (Grade II)
  - Glen Cottage, River Lane (Grade II)
  - The Navigators House, River Lane (Grade II)
  - Petersham Lodge, River Lane (Grade II)
- 3.4 Rose Bank, the residential property which directly adjoins the site to the north is locally listed as a Building of Townscape Merit. Further to the west, The Old Stables on River Lane and Belvoir Cottage are BTMs.
- 3.5 Residential properties border the site to the west and south. In addition to those cited above are no's 1 and 2 Rutland Drive to the west on the other side of Rutland Drive. Many of the surrounding properties have extensive curtilages which contributes to the semi-rural nature character of the area.

#### **4. DESCRIPTION OF THE ALLEGED BREACH**

- 4.1 Planning permission 08/4312/FUL was granted on 29.07.2009 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)". This application was granted subject to conditions including the following:

##### 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

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.

##### 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 owned by Mr Francesco Boglione. REASON: To safeguard the amenities of the adjoining residents and the area generally.

- 4.2 With respect to the hours of operation, Petersham Nurseries has been advertising on its website that the opening hours are operating in breach of condition, being:

Petersham Nurseries Café

- Monday Closed (except Bank Holidays)
- Tue-Thus 12pm-5pm
- Fri 12pm-5pm, 6.30pm-11pm
- Saturday 12pm-5pm
- Sunday 12pm-5pm

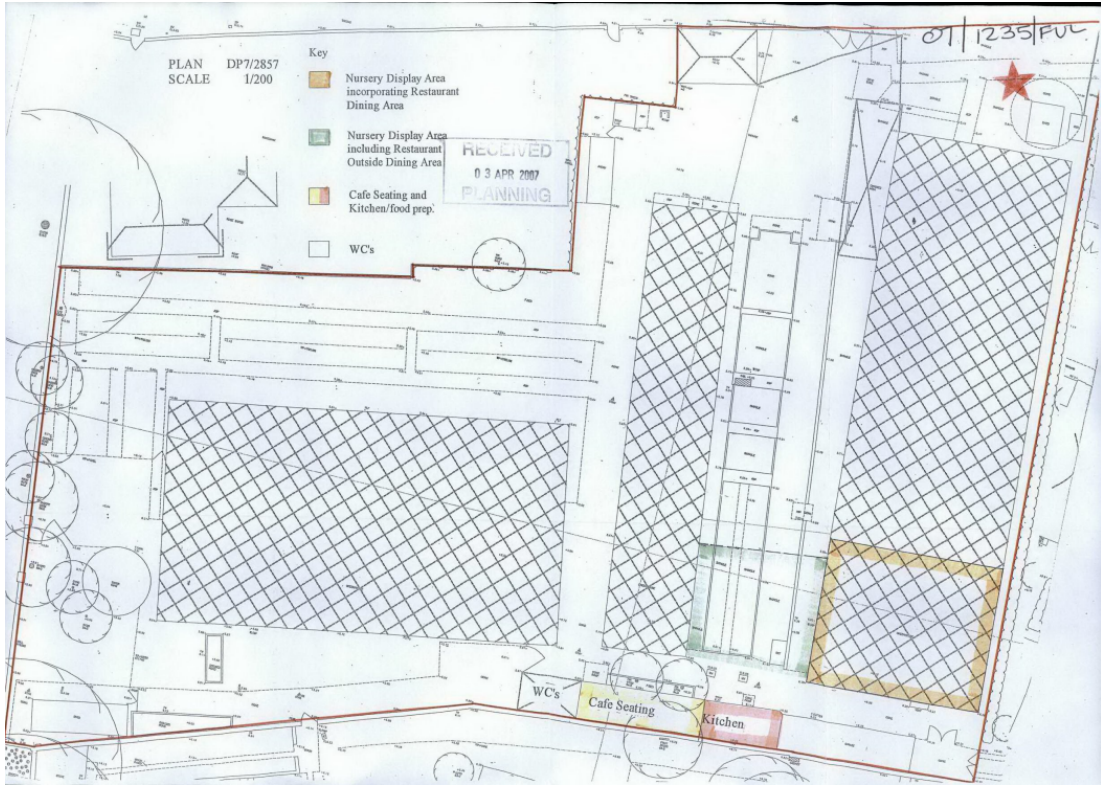
Supper Club is open for bookings on every Friday and (limited Saturdays).

The Teahouse

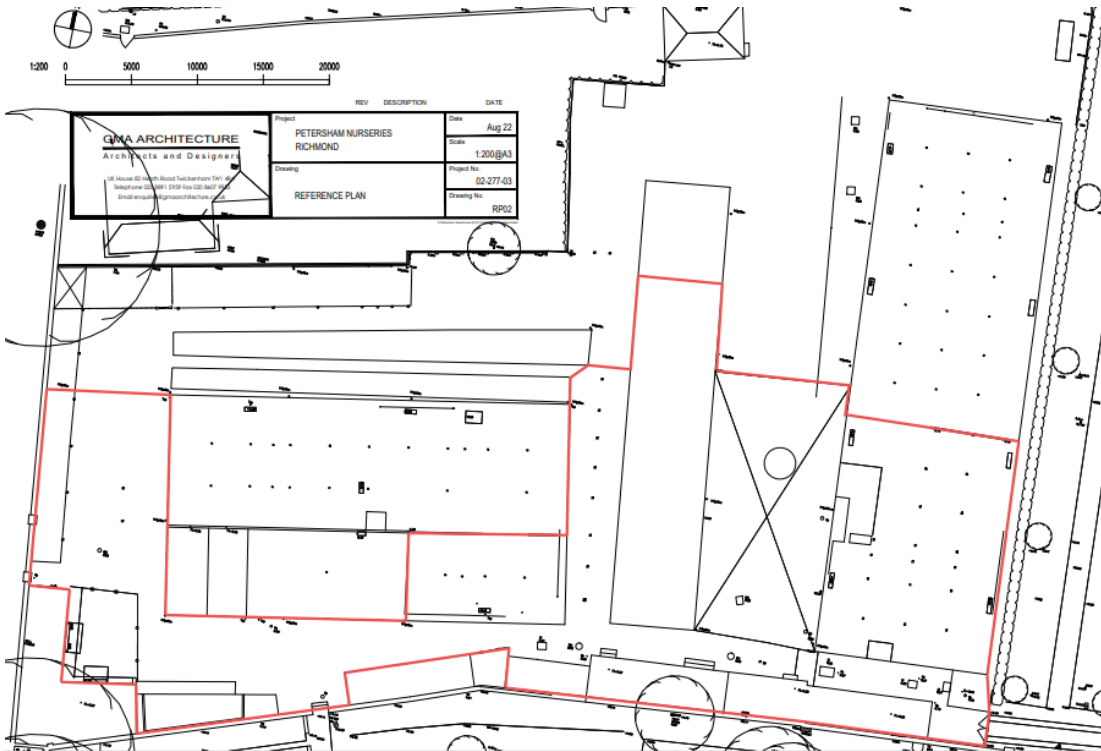
- Monday Closed (except Bank Holidays)
- Tue-Sat 10am-4pm
- Sunday 11am-4pm

- 4.3 Within the recent application 21/3108/PS191, Petersham Nurseries sought to gain a Certificate of Lawful Development for café/restaurant operation during the following hours: "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." A Certificate could not be granted for the terms sought but a partial approval was given for selling food and beverages to visiting customers between 10am-5pm Tuesday to Sunday excluding Mondays.
- 4.4 With respect to the extent of the café/restaurant area, the approved extent on Drawing Number DP7/2857 is shown on the plan below to include the areas in orange, green and yellow highlighting:





4.5 Within the recent application 21/3108/PS191, Petersham Nurseries sought to gain a Certificate of Lawful Development for the following areas of café/restaurant use, as defined by the red line:



4.6 On officer's site visits to Petersham Nurseries, café/restaurant seating has also been witnessed in the north-eastern corner of the site adjacent the entrance and on the northern border as the site adjoins Rose Bank.

## 5 RELEVANT PLANNING HISTORY

- 5.1 It appears that a nursery has existed on the site since at least 1962. In 1998 a Certificate of Lawful Use was granted in respect of use of the premises 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 (98/0525).
- 5.2 A retrospective planning application for a mixed use as a garden centre (Class A1) and café/restaurant (Class A3) was granted temporary permission on 29 November 2007 for a limited period of one year. The reason for the temporary consent was to enable the Council to monitor and review the use after it had been in operation, to see if its impact had been successfully mitigated, particularly by the implementation of a Green Travel Plan (07/1235/FUL).
- 5.3 Planning permission was subsequently granted on 23 July 2009 for the continuation of the mixed garden centre and café/restaurant use on a permanent basis. Condition U27543 NS04 restricted the hours of use of the café/restaurant element to between 10.00 and 16.30 on Tuesday to Saturday, 11.00 and 16:30 on Sundays and not at all on Mondays (08/4312/FUL).
- 5.4 An application was submitted in 2011 to vary this condition by allowing the café/restaurant element to operate from 19.00 to 23.00 on Thursday, Friday and Saturday every week. This was withdrawn by the applicants on 11 August 2012 (10/2914/VRC).
- 5.5 Application 12/0067/VRC to vary the hours of operation condition by allowing the café/restaurant element to operate from 19.00 to 23.00 on Saturday every week was refused permission on 29 March 2012 for the following reason:

*The 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 policies DM OS 1, DM TC 5 and DM DC 5 of the Council's Development Management Plan adopted November 2011.*

- 5.6 A further application to vary the hours was then made in 2014. 14/0345/VRC sought to allow for the sale of food for consumption on the premises, between the hours of 09.00 and 18.00 on Mondays, Tuesdays and Wednesdays, 09.00 and 23.00 on Thursdays, Fridays and Saturdays and 11.00 and 18.00 on Sundays. This was refused by the Planning Committee at their meeting on 17 January 2018 for the following reason:

*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 DM DC 5 of the Development Management Plan adopted November 2011 and policies LP 8, LP 10 and LP 13 of the Publication Local Plan.*

- 5.7 The minutes of the Committee meeting record that:

*“The committee noted that Petersham Nurseries’ restaurant operations were particularly highly regarded in the local area and beyond. The committee was also mindful of the sensitivity of the site and the protections it was afforded, having been designated as metropolitan open land. Members considered the impact on residential amenity. The committee debated whether a case of very special circumstances had been made by the applicant that warranted permission being granted. On balance it was considered that whilst the restaurant operation was highly successful, the circumstances were not exceptional enough to warrant planning permission being granted.”*

- 5.8 In 2021 an application was made for a Lawful Development Certificate. The applicant sought to establish that a breach of condition had been occurring for sufficient time as to gain immunity from enforcement. The terms of the Certificate sought to establish that:

1. The cafe/restaurant have been in operation selling food and beverages to visiting customers between 10am-11pm Tuesday to Sundays excluding Mondays (but including Bank Holidays). 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 hatched area shown on drawing reference 292-03-AOU 01. The operation has exceeded the areas specified in condition NS05 of LPA ref: 08/4312/FUL;
3. The business has been carried out by Petersham Nurseries Ltd contrary to condition NS08 of LPA reference 08/4312/FUL.

- 5.9 Within such an application, the burden of proof lies on the applicant. Whilst a substantial amount of evidence was presented to show sporadic breaches in the hours condition, and various breaches in the areas of use, the evidence was insufficient to demonstrate that a continuous breach had subsisted for 10 years for the full extent of the terms sought for the Certificate.

- 5.10 The legislation does however allow the Local Planning Authority to unilaterally modify the description of development and grant a Certificate for a modified description to development which it does consider lawful. As such, the LPA granted a Certificate of Lawfulness on 4/09/23 for the following description of development:

*A lawful development certificate is sought for the following operations/use that were subject to conditions on LPA ref 08/4312/FUL and have taken place continuously over a period in excess of the last 10 years in the following manner:*

1. *The cafe/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

## 6. DEVELOPMENT PLAN

6.1 The main Development Plan policies applying to the site are:

### Richmond Local Plan (2018)

Issue	Local Plan Policy
Local Character and Design Quality	LP1
Impact on Designated Heritage Assets	LP3
Impact on Non-Designated Heritage Assets	LP4
Impact on Amenity and Living Conditions	LP8
Green Infrastructure, Green Belt, Metropolitan Open Land and Local green Space	LP12, LP13
River corridors	LP18
Sustainable Travel Choices	LP44
Parking Standards and Servicing	LP45

These policies can be found at

[https://www.richmond.gov.uk/media/15935/adopted\\_local\\_plan\\_interim.pdf](https://www.richmond.gov.uk/media/15935/adopted_local_plan_interim.pdf)

### Richmond draft Publication Version Local Plan (2023)

The Richmond Publication Version Local Plan (Regulation 19 version) and its supporting documents, including all representations received, was considered at Full Council on 27 April. Approval was given to consult at Regulation 19 and, further, to submit the Local Plan to the Secretary of State for Examination in due course. The Publication Version Local Plan, including its accompanying documents, were also published for consultation on 9 June 2023. Together with the evidence, the Plan is a material consideration for the purposes of decision-making on planning applications.

Issue	Publication Local Plan Policy
Living Locally and the 20-Minute Neighbourhood	1
Spatial strategy: Managing Change in the Borough	2
Local Character and Design Quality	28
Impact on Designated Heritage Assets	29
Impact on Non-Designated Heritage Assets	30
Green Infrastructure, Green Belt, Metropolitan Open Land and Local Green Space	34, 35
River and River Corridors	40
Sustainable Travel Choices	47
Parking Standards and Servicing	LP45
Vehicle Parking Standards and Cycle Parking	48

These policies can be found at

[https://www.richmond.gov.uk/media/fomccpcf/publication\\_local\\_plan\\_low\\_resolution.pdf](https://www.richmond.gov.uk/media/fomccpcf/publication_local_plan_low_resolution.pdf)

## London Plan (2021)

Issue	London Plan Policy
Building strong and inclusive communities	GG1
Making the best use of land	GG2
Fire Safety	D12
Heritage conservation and growth	HC1
Metropolitan Open Land	G3
Transport	T4, T5, T6

These policies can be found at

[https://www.london.gov.uk/sites/default/files/the\\_london\\_plan\\_2021.pdf](https://www.london.gov.uk/sites/default/files/the_london_plan_2021.pdf)

## Ham and Petersham Neighbourhood Plan (2018)

Issue	Local Plan Policy
Protecting Green Character	C1

These policies can be found at

[https://www.richmond.gov.uk/media/16749/hpn\\_plan\\_2018\\_to\\_2033\\_january\\_2019.pdf](https://www.richmond.gov.uk/media/16749/hpn_plan_2018_to_2033_january_2019.pdf)

## 7. MATERIAL PLANNING CONSIDERATIONS

### National Planning Policy Framework (NPPF) (2021) sections

Section 2: Achieving Sustainable Development

Section 4: Decision-making

Section 11: Making effective use of land

Section 13: Protecting Green Belt Land

These policies can be found at:

<https://www.gov.uk/guidance/national-planning-policy-framework>

### Supplementary Planning Documents

- Transport
- Conservation Areas

These policies can be found at:

[https://www.richmond.gov.uk/services/planning/planning\\_policy/local\\_plan/supplementary\\_planning\\_documents\\_and\\_guidance](https://www.richmond.gov.uk/services/planning/planning_policy/local_plan/supplementary_planning_documents_and_guidance)

### Other Local Strategies or Publications

Other strategies or publications material to the proposal are:

- Community Infrastructure Levy
- [Petersham Conservation Area Statement](#)
- [Petersham Conservation Area Appraisal](#)

### Considerations for development in a Conservation Area

In considering whether to grant planning permission (or enforce against a breach) with respect to any buildings or other land in a conservation area, Section 72 of the Planning (Listed buildings and Conservation Areas) Act 1990 requires that special attention shall

be paid to the desirability of preserving or enhancing the character or appearance of the Conservation Area. In this context, "preserving", means doing no harm.

To give effect to that duty, decisions of the court have confirmed that for development proposed to be carried out in a conservation area, a decision-maker should accord "considerable importance and weight" to the desirability of preserving or enhancing the character or appearance of the conservation area, when weighing this factor in the balance with other material considerations which have not been given this special statutory status. This creates a strong presumption against granting planning permission where harm to the character or appearance of a conservation area is identified. The presumption can be rebutted by material considerations powerful enough to do so.

In applications where the decision-maker is satisfied that there will be no harm to the character or appearance of a conservation area, the statutory presumption against granting planning permission described above falls away. In such cases the development should be permitted or refused in accordance with the policies of the development plan and other material considerations.

## **8. THIRD PARTY INTEREST**

8.1 The Local Planning Authority will protect the identity of complainants to Planning Enforcement and will treat such details as confidential.

8.2 Within the most recent planning history there have been third party representations both in support and opposition. The issues raised within those representations elucidate the material planning considerations relevant to the consideration of the proposed Enforcement recommendation. A summary of the issues raised can be viewed in the Officer Reports for the respective applications. These can be viewed at:

- 21/3108/ES191  
[https://www2.richmond.gov.uk/lbrplanning/Planning\\_CaseNo.aspx?strCASENO=21/3108/ES191](https://www2.richmond.gov.uk/lbrplanning/Planning_CaseNo.aspx?strCASENO=21/3108/ES191)
- 14/0345/VRC:  
<https://cabnet.richmond.gov.uk/documents/s71516/14.0345.VRC%20-%20Petersham%20Nurseries%20Petersham%20Road%20Richmond.pdf>

## **9. PLANNING CONSIDERATIONS FOR ENFORCEMENT ACTION**

9.1 The main planning considerations in this case are:

- i. Metropolitan Open Land (MOL)
- ii. Design and impact on Heritage Assets
- iii. Residential amenity
- iv. Transport

### ***Issue i – MOL***

9.2 As the site is designated as MOL, London Plan policy G3, Local Plan policies LP13 and LP31 and draft Publication Version Local Plan Policy 35 are relevant, as are paragraphs 137-151 of the NPPF on Green Belts, which applies equally to MOL. The government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential

characteristics of Green Belts are their openness and their permanence, as such it is a policy to restrain development.

- 9.3 Policy LP13 states that the borough's MOL will be protected and maintained in predominantly open use. Appropriate uses in MOL include public and private open spaces and playing fields and open recreation and sport. Development will be supported if it is appropriate and helps secure the objectives of improving the MOL. These requirements are retained in Policy 35 of the draft Publication Version Local Plan.
- 9.4 It has previously been concluded through the planning history that an intensification of the restaurant use would constitute inappropriate development in MOL. The Committee Report for the latest application 14/0345/VRC stated that:
- 9.5 *"The site is located within the MOL, which generally has a presumption against any inappropriate development and the existing mixed Class A1/A3 use is not identified as an appropriate use, although it is accepted that the retail nursery element of the use has existed on the site for more than fifty years. The policies do, however, recognise that there may be exceptional cases where it will be appropriate to allow modest development. Paragraph 4.1.3 of the DMDPD states that:*
- "New uses will only be considered if they are by their nature open or depend upon open uses for their enjoyment and if they conserve and enhance the open nature, character and biodiversity interest of MOL."*
- 9.6 *The lawful use of the site as a garden centre was a material planning consideration when assessing the original change of use applications, which involved part of the Class A1 floorspace going to a Class A3 use, rather than totally new Class A3 floorspace being created.*
- 9.7 *Small scale or low-key café use ancillary to a garden centre use is relatively common, even for such uses within MOL, but it is considered that the café/restaurant use (A3 use), which can accommodate approximately 120 covers, has become a destination in its own right, with a national and international reputation. In determining the previously approved applications, where the proposed hours of use were set within the existing hours of operation of the nursery use, the Committee considered that the stringent conditions that had been recommended were sufficient to mitigate the impact of the proposal, the restrictions on the hours of operation being a key component of that consideration.*
- 9.8 *Inappropriate development is by definition, harmful to MOL and should not be approved except in very special circumstances. The NPPF advises that very special circumstances will not exist unless the potential harm by reason of its inappropriateness is clearly outweighed by other considerations. It is recognised that the café/restaurant at Petersham Nurseries has become a very popular and successful local business, in part assisted by its special setting in this semi-rural and tranquil location. Whilst the role that the business as a whole plays in the local community and the desire to support an employment and visitor generating use is given weight in the assessment, these benefits are not considered to be significantly related specifically to the extension of the restaurant use, do not meet the tests for exceptional cases set out in policies DM OS 2 and LP13, and are not considered to clearly outweigh the harm arising to the character of MOL.*
- 9.9 *In the case of the 2012 refused application, it was considered that the proposed extension of hours into the late evening, on one day per week, was a step too far, in*

*terms of the harmful effect on the character of the MOL. The operation of an inappropriate use within a 'dark area', into the late evening would have a harmful impact on the character of the MOL, with the introduction of movement, and associated light pollution from headlights and noise from engines, from cars and taxis in and around the site.*

- 9.10 *In the submitted planning statement (letter from WYG dated 13 July 2017), the applicants suggest that the proposal conforms to national planning guidance with regard to Green Belt/MOL. The applicants do not accept that the proposal will have any impact on the character of the MOL, as there is no physical development proposed and the proposal involves the use of an existing building. However, as stated above, the adopted policy clearly sets out that uses do have an impact on the character and function of the MOL and this view has been supported in a number of appeal decisions.*
- 9.11 *The Committee has previously considered that an extension to the hours of operation for the Class A3 restaurant element of the permitted mixed use, for one evening per week, would cause demonstrable harm to the character of the Metropolitan Open Land, by reason of it being an intensification of an inappropriate use. The current proposal includes a much more extensive level of evening hours' operation than that previously considered to be harmful to the MOL, for three evenings per week, with a consequentially more harmful impact and the proposal is therefore considered to be contrary to the Council's adopted and emerging policies in respect of MOL."*
- 9.12 Since the time of that Planning Committee (January 2018) there have been updates to national and local policy. The thrust of MOL policy has remained consistent throughout but the assessment is reconsidered below.
- 9.13 The NPPF states that a local planning authority should regard the construction of new buildings as inappropriate in the green belt (para 149). This is not applicable as the breach does not involve new buildings. The NPPF continues at para 150 that, "Certain other forms of development are also not inappropriate in the Green Belt provided they preserve its openness and do not conflict with the purposes of including land within it" and then goes on to list such other forms of development.
- 9.14 Looking at the history, it was recognised that the café/restaurant use is already an exceptional use in designated MOL but was initially considered acceptable on the basis that such ancillary facilities are common in garden centres and can support the outdoor open space element of the use, and on the basis of the restrictions on the hours of operation set out in condition NS04 to mitigate the impact of the proposals. The decision was made very much on the basis that the food offer would be an ancillary and complementary activity to the established retail use. The breach intensifies the use of the existing premises. The additional seating areas are such that the dominant use could now arguably be considered as the café/restaurant as opposed to the retail business. The additional hours of use further exacerbate this harm. The existing use is an inappropriate use in MOL and the breach intensifies this further.
- 9.15 The requirement of para 150 is that the exceptions may only apply provided the development/breach preserves the openness of MOL and does not conflict with the purposes of including land within it.
- 9.16 Openness is both a spatial and a visual concept, and there is a wealth of relevant case law around this part of an assessment. The Supreme Court grappled with this exception in *Samuel Smith Old Brewery (Tadcaster) and others) v North Yorkshire County Council* [2020] UKSC 3, and the findings of Sales LJ in *Turner* [2016] EWCA Civ 466 was not disputed:

*“The concept of ‘openness of the Green Belt’ is not narrowly limited to the volumetric approach suggested by [counsel]. The word ‘openness’ is open-textured and a number of factors are capable of being relevant... Prominent among these will be factors relevant to how built up the Green Belt is now and how built up it would be if redevelopment occurs ... and factors relevant to the visual impact on the aspect of openness which the Green Belt presents.”*

- 9.17 The breach of conditions does not cause spatial harm to MOL. There is no physical development associated with the increased hours of operation. Whilst the exterior seating areas are physically present, these chairs and tables are all moveable objects and do not have any greater harm to openness spatially than other objects which would alternatively be placed in these areas for retail sale. Indeed, it can reasonably be expected that such a retailer may sell outdoor furniture.
- 9.18 With respect to visual harm, the case that the activity generated by a use in terms of comings and goings, and the parking of vehicles at premises, can be harmful to MOL policy, has been made many times and supported at appeal. It remains the case that as the restaurant becomes even more of a destination in its own right, opening outside of the garden centre hours or indeed dominating business in the evening even if the retail hours were to be extended, it will intensify an inappropriate use in designated MOL. The increased comings and goings and associated disturbance affect the tranquility of the area and thus impacts on the character of the MOL, representing an intrusion of urban characteristics into the MOL. This does not ‘preserve openness’.
- 9.19 In relation to the purposes of including land within Green Belt, these are set out in the NPPF being a) to check the unrestricted sprawl of large built-up areas; b) to prevent neighbouring towns merging into one another; c) to assist in safeguarding the countryside from encroachment; d) to preserve the setting and spatial character of historic towns; and e) to assist in urban regeneration by encouraging the recycling of derelict and other urban land. The nature of the breach has the effect of urbanising the character of the site and this conflicts with purposes (a), (c) and (d).
- 9.20 It is concluded that the extension of opening hours into the evening is inappropriate development. A modest extension of daytime hours in a manner that is compatible with normal operational retail hours would not have the same urbanising impact compared with lawful operation and would not be considered to have the same harm to openness. An extension of the seating areas would not be considered to have an urbanising impact provided that the overall extent of that area remained complementary to the garden centre use during retail hours and would not become the dominant use. These factors must be considered in any decision on the extent to which to under-enforce the breach of planning control.
- 9.21 Paragraph 148 of the NPPF states “When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt.”
- 9.22 Paragraph 148 continues “‘Very special circumstances’ will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations.” Where the breach of planning control constitutes inappropriate development, it is necessary to consider if there are any ‘Very Special Circumstances’ to justify under-enforcement. This assessment must be done in consideration of the case as a whole and this is discussed further below in this report.



**Issue ii – Design and impact on heritage assets**

- 9.23 As recognised in the NPPF, good design is a key aspect of sustainable development. Decisions should ensure developments add to the overall quality of the area; are sympathetic to local character and history (whilst not preventing or discouraging appropriate innovation or change); optimise the potential of the site; and create places that are safe, inclusive and promote health and wellbeing. Local Plan policy LP1 states, whilst policies require development to make the best use of land, this is to be achieved in a manner that respects, contributes to and enhances the local environment.
- 9.24 Policy LP3 and LP4 requires development to preserve both designated and non-designated heritage assets respectively. Policy LP18 requires development within the Thames Policy Area to respect the special character of the reach as set out in the Thames Landscape Strategy. The thrust of these policies remains consistent in the draft Publication Version Local Plan under Policies 28, 29, 30 and 40.
- 9.25 The breach of the conditions does not involve any physical development, but a use in itself can have the potential to impact upon the significance and character of heritage assets. The Committee Report for application 14/0345/VRC remains relevant and stated that:
- 9.26 *The Petersham Conservation Area Statement describes the area as a distinctive, well defined historic settlement. There are important views between the village and the surrounding green space of riverside meadows, parkland and Richmond Hill, a setting which contributes to its exceptional rural character. There is no specific reference to Petersham Nurseries in the Petersham Conservation Area Statement; however, there is reference to River Lane that leads to the riverbank, described as a quiet retreat from Petersham Road, and the surviving historic alleyways, which further contribute to the distinctive village character of this area, one of which leads to the entrance of Petersham Nurseries.*
- 9.27 *The amount of building on the Petersham Nurseries site has not altered significantly since the approval of the Certificate of Lawful Use in 1998. As the lawful use of the site is one of retail facilities and a café/restaurant, traffic generation and parking is an established feature at the site, not only in terms of customers and staff, but also with deliveries of plants, supplies and equipment. Furthermore, given the nature of the retail function of a garden centre often the products purchased at the site can be of bulky and/or awkward proportions, and therefore necessitate the use of a vehicle to transport them. 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, and the later one to extend the evening hours of the restaurant element, the Committee considered that the mitigation measures set out in the Green Travel Plan had been successful. The issue with the current proposal to extend the hours of use even further is 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 Conservation Area. As previously reported, in officers' opinion, this is less likely to be a sustainable objection, the visual impact on the character and appearance of the conservation area being difficult to identify.*
- 9.28 The earlier application was not refused on grounds of impact to designated or non-designated heritage assets. As per those decisions, the current breach of condition is

not considered to cause harm to the significance of nearby listed and locally listed buildings by virtue of the activity within their setting, or harm to the significance, character and appearance of the Conservation Area or Thames Policy Area.

***Issue iii – Residential amenity***

- 9.29 Policy LP8 states in considering proposals for development, the Council will seek to protect adjoining properties from unreasonable loss of privacy, pollution, visual intrusion, noise and disturbance. Policy LP 10 seeks to ensure that the local environmental impacts of developments do not lead to detrimental effects on the amenity of existing occupiers of surrounding land. Similar requirements are also imposed under Policy 46 of the draft Publication Version Local Plan. There are residential properties in proximity to the site that will be impacted by the proposal, as described in section 3 of this report.
- 9.30 By way of background, the Committee Report for application 14/0345/VRC stated:
- 9.31 *Whilst the introduction of a Class A3 use in this out-of-centre, semi-rural location would not normally be acceptable, the Committee has previously accepted that the circumstances of the case, and the conditions imposed on the original permission to mitigate the impact of the proposal, were sufficient to overcome the objections to the scheme.*
- 9.32 *In the case of the current application, a significant test would be if the proposed use would have a negative effect on the environment and amenity of residents. This assessment would need to be made with specific regard to following considerations:*
- Noise, Smells and Fumes (from within the site)*
- 9.33 *The nearest residential properties to the kitchen serving the restaurant are no.143 Petersham Road, Magnolia House and Rose Bank Cottage. These properties are approximately 40m, 45m and 50m from the kitchen respectively. Nos.139 and 141 Petersham Road are two houses which flank the Church Lane junction to Petersham Road, which are also located over 60m from the site. No complaints have been received regarding the use of the kitchen and a new ventilation and extraction system has been installed, having been approved in March 2013 (08/4312/DD01).*
- 9.34 *The applicants have submitted an Environmental Noise Assessment, prepared utilising national noise and planning policy guidance and surveys undertaken when the Supper Club is operational, which concludes that during the day and evening, noise disturbance from the restaurant results in no adverse effects in terms of annoyance or sleep disturbance.*
- 9.35 *The distance of the restaurant building from neighbouring houses means that it is unlikely that noise from within the premises would present a problem. The applicants, responding to a number of objectors' complaints about music, have previously categorically stated that no music will be played at the premises. This can be secured by condition.*
- 9.36 *The applicants have also implemented a change to the pedestrian access arrangements to the restaurant, during Supper Club operation, which has involved creating a sole access at the north-eastern boundary to the site, some 60 metres from the nearest residential neighbour. This also assists in mitigating any potential noise nuisance/disturbance from within the site.*

*Noise and disturbance outside the site*

- 9.37 *Nuisance and disturbance commonly associated with Class A3 uses usually relates to traffic and parking, vehicular and pedestrian movements and noise at anti-social times (generally in the late evening and at night-time). In addition, general noise and disturbance can occur at those times when groups of customers leave the premises and staff clear up and leave. This should not currently have been the case here as the permitted hours of operation do not extend into the evening. Nevertheless, the nuisance and disturbance created by additional traffic, car parking and customer noise associated with the restaurant use is understandably a major concern for local residents, and is a significant issue upon which this application should be assessed.*
- 9.38 *Noise from customers arriving at and departing from the premises is difficult to evaluate. Following government advice and guidance, the applicants' Environmental Noise Assessment (ENA) rightly draws a distinction between noise impacts which are intrusive, and which can be managed and mitigated, and those which are disruptive and should be avoided. The ENA suggests that there is no objectionable noise nuisance arising from the use of the premises as a result of the current occasional Supper Club evening operations. However, this is based on surveys which provide only a snapshot of evening activities on a particular evening. There continues to be anecdotal evidence from neighbouring occupiers that noise and disturbance from people leaving the premises by car and on foot does currently occur when the 'Supper Club' evening events have taken place. The applicants claim that the effects of this impact are exaggerated and stress that the mitigation measures that have been put in place are sufficient to address any concerns. These measures include:*
- *management of car parking and staff and customer methods of travel;*
  - *management of taxi movements;*
  - *management of pedestrian and vehicular departures;*
  - *delivery management;*
  - *management of refuse collection and recycling.*
- 9.39 *Whilst the results of the applicants' noise surveys are not disputed, it is suggested that the results of a one-off, closely managed and monitored event may not bear comparison with the effects of 150 (annually) regular, less closely managed and monitored events, particularly if the cumulative impact of this proposal is considered.*
- 9.40 *A number of objectors continue to refer to problems of traffic generation, parking issues and customer noise in association with current and past evening 'Supper Club' activities at the restaurant, which have been strongly refuted by the applicants. Matters relating to traffic and car parking are considered further in the Traffic and Car Parking section of this report, below. Notwithstanding the assertions of the applicants that objectors' claims are exaggerated, it is considered that the level of continuing anecdotal evidence of nuisance arising from the occasional 'Supper Club' evening events at the premises is indicative that there is potential for further loss of amenity to neighbouring residential occupiers if evening opening was permitted on a significantly more regular basis as currently proposed. As suggested in the consideration of the previously refused scheme, this could result from increased numbers of vehicle movements, including taxis, passing down the currently very quiet lanes, car doors slamming, engine noise and noise from customers and staff leaving the premises late at night, together with noise and disturbance from clearing up (including collection and disposal of bottles). Some of these impacts, such as bottle collection and disposal, could be prevented by condition and some mitigated to an extent by the applicants' suggested Service and Operations Management Plan. However, in officers' view, although car doors, engines running and voices may not be considered*

*to result in a significant adverse impact in many other locations, given the tranquillity of this area such sounds are considered to be noticeable and intrusive, and given the lateness of the hours at times when residents may be trying to sleep, are also considered likely to cross over into noticeable and disruptive. The extent of the intensification would extend the likely occurrence of noise and consequent disruption throughout the year to a degree that is considered unacceptable.*

*Hours of operation*

- 9.41 *In its consideration of the original planning applications for mixed Class A1/A3 use of the premises, the Committee previously took the view that any disturbance to residential amenity could be mitigated through the use of a condition controlling hours of operation, agreeing to the suggested hours of 1000 – 1630 Tuesday to Saturday and from 11.00 – 16.30 on Sundays and no opening on Mondays. In its consideration of the 2012 proposal, the Committee has previously decided the extension of hours on one day per week to be unacceptable. Whilst preventing the opening on a Monday is considered to be anomalous (this restriction seems to have reflected the use of the premises at the time the original application was made), officers take the view that the current proposal to extend the hours of use of the restaurant element by an even greater period of time, namely late into the evening three evenings per week, would be unacceptable for the reasons stated above.”*
- 9.42 It is important to note that the above assessment was made on the basis that the approved café/restaurant seating areas were tightly confined to those approved i.e. in the areas closest to the kitchen and well separated from residential neighbours. At present, the breach of condition is such that there are substantially more covers available for customers across the site as a whole and the seating areas are positioned directly adjacent to residential boundaries. Furthermore, the above assessment considered what mitigation could be put in place by condition, and these could not be applied in any decision to under-enforce i.e. restrictions on music and bottle collection at unsociable times. Given these factors and in the context of the earlier decisions, Officers remain of the view that under-enforcing evening openings would be demonstrably harmful to residential amenity.

**Issue iv – Transport**

- 9.43 The NPPF requires that development only be prevented or refused on highway grounds if there would be an unacceptable impact on highway safety, or the residential cumulative impacts on the road network would be severe (para. 111). Policy LP45 of the Local Plan and Policy 48 of the draft Publication Version Local Plan state that the Council will require new development to make provision for the accommodation of vehicles in order to provide for the needs of the development while minimising the impact of car-based travel including on the operation of the road network and local environment, making the best use of the land.
- 9.44 The Committee Report for application 14/0345/VRC stated:
- 9.45 *“Petersham Nurseries is situated in a sensitive location. It lies to the rear of 143 Petersham Road. The site can only be accessed by vehicles via Church Lane, which is a narrow road leading to the entrance of Petersham Nurseries and the turning circle. Pedestrian access is also achieved via an alleyway that connects Church Lane with River Lane at the entrance of the site.*
- 9.46 *The main parking area at the site is along Church Lane on the northern boundary of the Nurseries, where there is space for approximately 30 vehicles to be parked in a*

reasonable fashion (the Travel Plan suggested that there are 24 parking spaces, including three disabled, outside the nursery entrance and a further 14 spaces along Church Lane). The Nursery employs a dedicated parking assistant who directs vehicles along Church Lane and informs visitors of the parking facilities. For the Supper Club events, two parking attendants are utilized, to direct customers from and to Petersham Road and to regulate the activities of taxis and other drivers.

- 9.47 The previous report relating to the 2012 refused scheme, accepted by the Committee, stated that Petersham Nurseries had achieved impressive results over the years since the mixed Class A1/A3 use commenced. They have also shown a commitment to sustainable travel (and other practices) as demonstrated through the extent to which they have implemented numerous initiatives all designed to change the travel behaviour of its staff and visitors towards more sustainable modes. Customers for the Supper Clubs are encouraged to provide details of travel and not to drive. Car sharing and use of taxis is also encouraged.
- 9.48 During the operation of their occasional 'Supper Club' evenings, the applicants have carried out surveys of travel arrangements of guests attending and submitted this information in support of the current application. Two detailed surveys have been undertaken, one for a Supper Club on 23 October 2015, the other for a Supper Club on 9 December 2016, and Transport Statements analysing the results have been submitted in support of the application. The split for the modes of transport for persons attending the Supper Clubs is set out below:

*Supper Club 23 October 2015*

<b>MODE</b>	<b>No. of vehicles</b>	<b>No. of people</b>	<b>% total people</b>
Taxi	16	39	49
Car	7	21	27
Walk	-	14	18
Bus	-	4	5
Cycle	1	1	1

*Supper Club 9 December 2016*

<b>Mode</b>	<b>No. of vehicles</b>	<b>No. of people</b>	<b>% total people</b>
Taxi	18	50	49
Car	20	46	45
Walk	1	2	2
Bus	2	4	4
Cycle	1	1	1

- 9.49 It will be noted from these surveys that the progress on migration of customers away from the private car does not appear to have been maintained, with an increase in the number of private cars from 7 in 2015 to 20 in 2016.
- 9.50 There are approximately 40 potential parking spaces within Church Lane, although 6 of these spaces are not available for use on Supper Club evenings. The latest parking survey, from 9 December 2016, indicates that, of the 20 private cars attending the evening event, 17 parked in Church Lane, 2 in River Lane and 1 in Cedar Heights.

- 9.51 *Although the surveys represent only a snapshot of the operation, the supplementary Transport Statements submitted with this application support the contention that there is capacity within Church Lane to accommodate the number of cars wishing to park at the site during Supper Club operation. It is considered that overspill onto surrounding streets does not constitute a severe impact on transport grounds.*
- 9.52 *Similarly, the overall number of vehicular movements generated by the use, resulting from 18 taxis (36 return journeys) and 20 cars (40 return journeys) is also not considered to give rise to a severe cumulative impact, as required in the NPPF, to justify refusal on transport grounds.*
- 9.53 *In her assessment of the previously refused application, the Transport Officer had taken account of the survey information provided with that submission and concluded that evening opening on one day per week was unlikely to be detrimental to the functioning of the local highway network. She recommended that a condition would be required on any permission to require that any evening opening should be restricted to Saturday only and that no other events should be held at the venue on the same night.*

#### **Refuse provision and servicing**

- 9.54 *Currently, refuse is collected from the turning circle at the north of the premises. This provision is considered adequate and is proposed to continue. The applicants have previously provided letters from two of their main suppliers, advising that they do not anticipate a need for additional deliveries, nor any change in the size of vehicle or delivery times from those existing at present.*
- 9.55 *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.”*
- 9.56 Again, it is important to note that the above conclusions were based on survey data for a limited number of people attending an evening event. The expansion of seating across the site is such that any decision to under-enforce against all breaches could potentially lead to a much greater number of movements in the evenings. This must be factored into the consideration of harm and the precise terms of any Enforcement Notice.
- 9.57 The Committee has previously accepted that the Green Travel Plan that is in operation at Petersham Nurseries appears to be mitigating the impact of the existing mixed garden centre and café/restaurant use during the currently permitted hours and that no nuisance arises from the current use from within the site itself. It is considered that a minor extension to the operational daytime hours will not exacerbate the harm.
- 9.58 It is accepted that allowing the restaurant element to operate on a Monday and Bank Holidays, during hours permitted for the remainder of the week, would address the currently anomalous restriction, which appears to reflect the opening times of the garden centre when the original application was submitted.

#### **Very Special Circumstances**

- 9.59 The proposal is inappropriate development in designated Metropolitan Open Land. Paragraph 147 of the NPPF states that inappropriate development is, by definition, harmful to the Green Belt and such development should not be approved except in



Very Special Circumstances (VSC). Paragraph 148 of the NPPF states that Very Special Circumstances will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations.

- 9.60 The Courts have not defined 'very special', beyond confirming that the words must be given their ordinary and natural meaning as contained in *R(Chelmsford BC) v First Secretary of State* [2004] EWHC 2978 (Admin):

*'The words 'very special' must be given their ordinary and natural meaning. Since the expression 'very special' is so familiar, any attempt at definition is probably superfluous, but for what it is worth, the Shorter Oxford English Dictionary tells us that special means:*

*Of such a kind as to exceed or excel in some way that which is usual or common; exceptional in character, quality or degree. The circumstances must not be merely special in the sense of unusual or exceptional, but very special'.*

- 9.61 The decision-taker must exercise a qualitative judgment and ask whether the circumstances, taken together, are very special and explain that reasoning.
- 9.62 The National Planning Policy Framework confirms that harm to the Green Belt should be afforded substantial weight. Harm arises from the reduction in visual openness by virtue of the evening hours and intensification of inappropriate use. This amounts to substantial weight against the proposal.
- 9.63 It is necessary to identify whether there is 'any other harm' arising from the proposal. A Court of Appeal judgment (*Redhill Aerodrome*) has confirmed that the interpretation given to any other harm in what is now paragraph 144 of the Framework is such that it is not restricted to harm to the Green Belt.
- 9.64 The Officers assessment is that harm also arises to residential amenity from the evening opening especially. The extension to the number of covers available on the site and in particular their proximity to neighbouring boundaries exacerbates this harm.
- 9.65 The onus is on the applicant to demonstrate a case for VSCs. Given the nature of this enforcement report, no case has been put forward by the applicant for VSC. However, it is noted that an argument to allow evening operation has previously been made to the Planning Committee. The minutes of the Committee from 17.01.2018 record Members conclusions in this respect:
- 9.66 *"The committee noted that Petersham Nurseries' restaurant operations were particularly highly regarded in the local area and beyond. The committee was also mindful of the sensitivity of the site and the protections it was afforded, having been designated as metropolitan open land. Members considered the impact on residential amenity. The committee debated whether a case of very special circumstances had been made by the applicant that warranted permission being granted. On balance it was considered that whilst the restaurant operation was highly successful, the circumstances were not exceptional enough to warrant planning permission being granted."*
- 9.67 Officers consider that these conclusions remain applicable. There are no very special circumstances which clearly outweigh the harm to MOL and its openness, and the other harm arising to residential amenity.

## **10. OTHER CONSIDERATIONS**

- 10.1 Should the Enforcement Notice not be complied with, there will be a financial cost associated with pursuing consequent action.
- 10.2 There are reputational risks arising from the LPA failing to take action where there has been an abuse of its lawful processes.

## **11. PROPOSED ENFORCEMENT ACTION**

### **Options for remedying the breach of planning control**

- 11.1 **Option 1:** Issue an enforcement notice requiring strict adherence to conditions NS04 and NS05 imposed under 08/4312/FUL (except where the Certificate of Lawfulness granted under reference 21/3108/ES191 confirms immunity from enforcement).
- 11.2 This would have the effect of requiring full compliance with the conditions-imposed on planning permission 08/4312/FUL. This action is considered disproportionate to the breach of planning control, as a reduction in the hours of use and the café/restaurants areas would remedy the harm which has been identified, rather than a restoration to the approved hours.
- 11.3 **Option 2:** “Under-enforce” i.e. only taking enforcement action against the elements of the breach which are considered harmful in planning terms.
- 11.4 This would require partial compliance with the planning conditions imposed on planning permission 08/4312/FUL to an extent which would mitigate and remedy any caused by the breach of planning control. This would include allowing a small extension to the café/restaurant operating hours (Tuesday to Sunday 10am to 5pm and 11am to 5pm Bank Holidays) and an increase in the area the café/restaurant operates to the rear of the site and part of the central greenhouse. This area is delineated in blue in the map overleaf.
- 11.5 **Option 3:** Take no further action.
- 11.6 This would allow the breach to continue unabated, despite the policy contraventions established with this report, which include harm to residential amenity and inappropriate development within Metropolitan Open Land. Allowing these breaches to continue unabated would be an ineffective form of enforcement and regulation and could lead to the breaches become immune from further enforcement action.

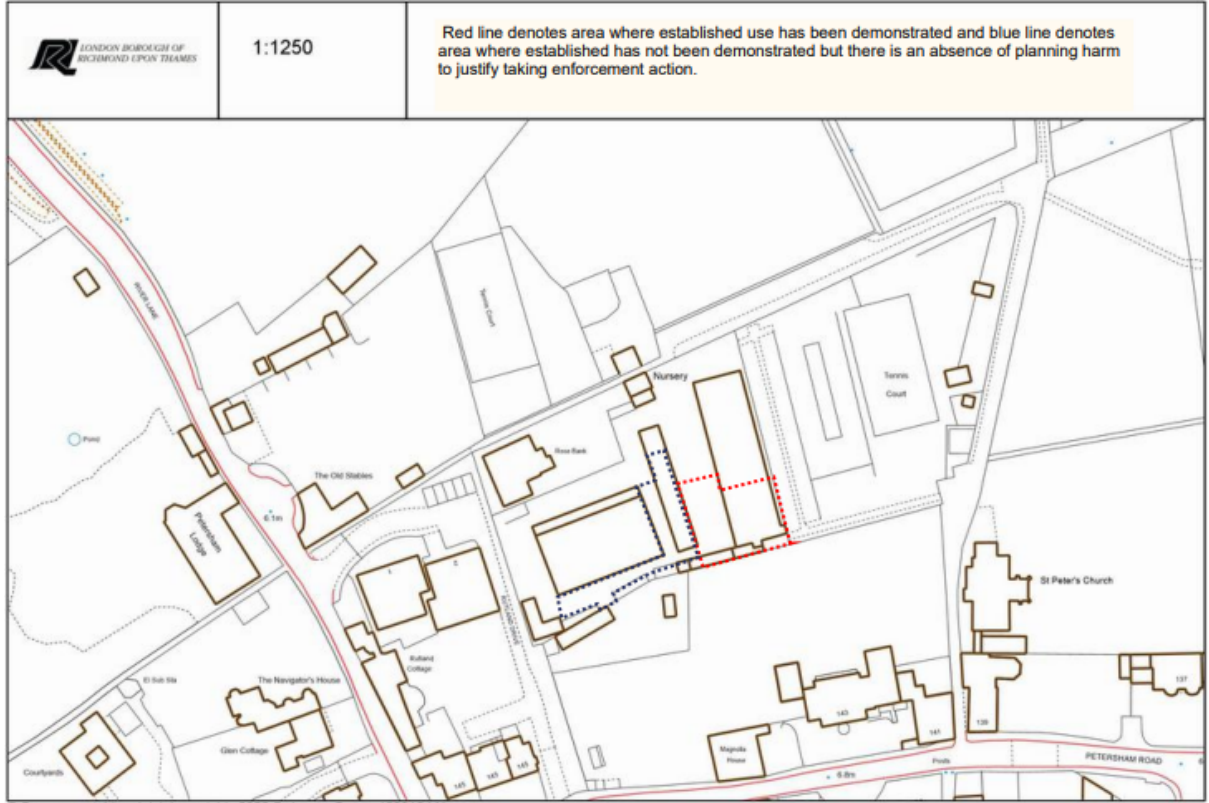
### **Recommendation**

- 11.7 The Committee is recommended to resolve to serve an Enforcement Notice pursuant to ‘Option 2’ to:

To 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.

Reason: A minor extension of the hours is not considered harmful to the residential amenity of the adjoining dwellings and would represent typical retail hours. Accordingly, it would be compliant with policies LP3, of the Local Plan and LP46 of the draft Publication Version Local Plan.

To restrict the café/restaurant areas to a confined area, which would be greater than that approved under application 08/4312/FUL but to a lesser extent than currently in operation, with a view of reducing the areas adjacent to the neighbouring residential properties. See attached map with the proposed area for café/restaurant use delineated in the red and blue lines.



Reason: A confined area for café/restaurant use, despite being of a greater extent than that approved under application 08/4312/FUL, would be of a less extent than currently in operation and designed to mitigate harm to the neighbouring residential properties by excluding the areas immediately adjacent to them from this area. In addition, it is considered that a limited increase in the café/restaurant use area, would not be harmful to the openness of the Metropolitan Open Land. Accordingly, it would comply with policies LP8, LP13 of the Local Plan and Policy 35 of the draft Publication Version Local Plan.

- 11.8 The compliance period is recommended to be: Two (2) months from the date the notice becomes effective. This is considered to be a reasonable amount of time for the business operation to be adjusted to the requirements of the enforcement notice.
- 11.9 In the event of the Notice not being complied with further action could be taken, including but not limited to prosecution proceedings.

**12. PROPORTIONALITY AND HUMAN RIGHTS**

- 12.1 This report sets out the alleged breaches of planning control and individually assesses the harm attributable to them. Where there is an absence of identifiable harm, the report proposes not to enforce against that element of the breach, or not to enforce against it in its entirety. This is an expedient and proportionate approach to remedying the harm caused by the breach which does not in this case, require full compliance with the relevant planning conditions. Policy contraventions have been

established, which notably include harm to residential amenity and inappropriate development within Metropolitan Open Land, which justify the proposed enforcement action.

- 12.2 The proposed action would impinge on the owners/occupiers' rights to private property free from interference (Article 1 of the First Protocol of the Human Rights Act 1998 and ECHR). This is however for the legitimate aim of addressing issues of wider public concern and accords with the principles established under *Lough-v-First Secretary of State* (2004) 1 WLR. Those on whom the notice will be served will also have the opportunity appeal to an independent body (The Planning Inspectorate), thereby according with Article 6 (right to a fair trial). The proposed action does not therefore breach the owner/occupiers Human Rights.

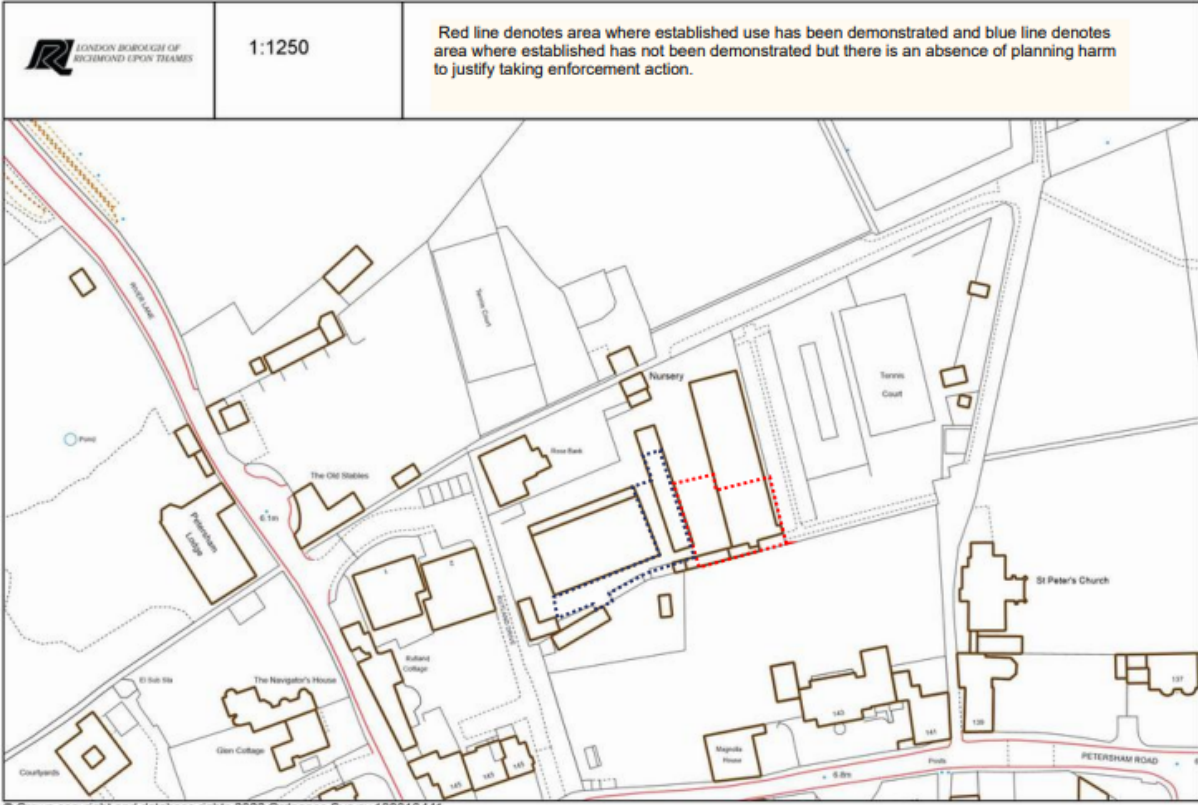
### **13. DRAFT ENFORCEMENT NOTICE DETAILS**

#### **Details of breach**

- 13.1 Without planning permission and within the last ten years, breach of conditions U27543 NS04 Hours of Use, U27544 NS05 Cafe/Restaurant Areas and U27547 NS08 Personal Permission of planning permission 08/4312/FUL

#### **Requirements**

- 13.2 Permanently cease the sale of food for consumption on or off the premises except between the following times: Tuesday to Sunday 10am to 5pm and Bank Holidays 11am to 5pm.
- 13.3 Permanently cease café/restaurant use of the land, except where in the areas defined i.e. the areas within the blue and red dotted lines shown in the attached plan.



**Compliance period**

13.4 Two (2) months from date the notice takes effect.