

1. Instructions

- 1.1. We are instructed by Toks Osibogun, Strategic Property Manager serving Richmond and Wandsworth Borough Councils, to advise on the likelihood of planning permission being granted by Richmond Borough Council (the “**Council**”) in respect of the proposed schemes for 100% affordable housing on three Council owned properties (collectively the “**Properties**”). Currently the Properties have a D1 planning use and their retention as community buildings is protected in the Council’s Local Plan.
- 1.2. There is an identified need for affordable housing provision across the Borough, with Richmond having one of the highest average housing prices in the UK.
- 1.3. When determining applications which involve the loss of social or community infrastructure, the Local Plan requires applicants to undertake a marketing exercise to test whether there is demand for a social / community use for the site. The terms of the marketing exercise required are prescribed in the Local Plan and are fairly extensive. The Council, as landowner and proposed applicant, has not undertaken a marketing exercise in respect of the Properties which would comply fully with the prescribed requirements. It is in this context that we have been asked to advise whether the proposed applications would fail or whether the steps undertaken to find alternative social / community uses for the Properties and the proposed provision of 100% affordable housing schemes militate in favour of granting permission.

2. Summary of Advice

- 2.1. The Council as Local Planning Authority is required by law to determine applications in accordance with Section 70(2) Town and Country Planning Act 1990 (the “**Act**”) and Section 38(6) of the Planning and Compulsory Purchase Act 2004 (the “**2004 Act**”). The effect of these statutory provisions is that applications must be determined in accordance with the development plan unless material considerations indicate otherwise.
- 2.2. In the absence of marketing exercises for the Properties which comply with the requirements of the Local Plan, a decision to grant planning permission would be a departure from the Local Plan.
- 2.3. The next step is to consider whether there are material considerations that, notwithstanding the breach of the Local Plan policy requiring specific marketing requirements, indicate that permission should be granted.
- 2.4. There are material considerations specific to the marketing issue that are in favour of the grant of planning permission. The availability of the Properties for community / social uses has been published on the Council’s Property and Reinvestment Programme, which is publicly available, for well in excess of the two year marketing period required by the Local Plan. Alternative occupiers have not been identified despite efforts from Council departments to secure alternative service users. Furthermore the Council’s evidence suggests that the Properties will remain vacant if planning permission for the alternative uses is not granted. Our view is that significant weight should be given to these material considerations.
- 2.5. In addition, we suggest that significant weight should be given to the community benefits that will be obtained by providing housing developments that are 100% affordable, particularly in the context of the high level of need for affordable housing in the Borough.

- 2.6. It is important to emphasise that the weight to be given to particular material consideration is a matter for the decision maker and the courts will not seek to interfere provided that the decision is lawfully made.
- 2.7. We consider that granting planning permissions for 100% affordable housing schemes for the Properties in breach of the marketing requirements of the Local Plan would be a decision that could lawfully be made and we would suggest the material considerations weigh strongly in favour of granting permission subject to compliance with the usual planning considerations relating to scale, design, highways etc...

3. The Properties

- 3.1. A brief summary of the current status of the Properties is set out below:

Meadows Hall

- 3.2. Up until 2011, Meadows Hall was occupied by Age Concern as a day care centre. With the assistance of the Council Age Concern moved to a newer facility at the Twickenham Day Centre. Meadows Hall has remained vacant since Age Concern's departure.
- 3.3. At a meeting of the Cabinet on the 19 September 2013, it was resolved to sell Meadows Hall on the proviso that it would be sold as a scheme for a 100% affordable housing. The resolution to sell the property for affordable housing was to meet the Council's Housing and Homelessness and Planning Policies.
- 3.4. In the period since the property became vacant the Council have not been able to identify any operational requirement for the property as a D1 use. The property has since been demolished and the site is vacant.

Mereway Day Centre

- 3.5. This property was previously used a day care centre. On 26th January 2012 the property was considered surplus to requirements by the Council's Cabinet. The property was subsequently included on the Council's Property Sales and Reinvestment Programme. The property has remained vacant since 2012 with no community use being identified.

Strathmore Centre Site

- 3.6. This property was formerly used by Social Services and Youth Offending Service. These services closed and the property has remained vacant, aside from the SCAMPs nursery, for the last seven years. The property is reported to be in a very poor condition and it is anticipated that any affordable housing scheme for this property would make provision for the SCAMPs nursery to be re-provided within the scheme.

4. Local Plan

- 4.1. In order for the Council to be able to grant planning permission for residential uses for the Properties, the Council as Local Planning Authority, would need to be satisfied that the loss of social and community infrastructure, the protection of which is secured through the Council's local plan policies, can be justified by the benefits of securing affordable housing.
- 4.2. A development plan "is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and discretion in the exercise of discretionary

powers, while allowing a measure of flexibility to be retained”¹. The Council’s local plan was adopted on 3 July 2018 (the “Plan”) and policies relating to affordable housing and social and community infrastructure are referred to below.

Affordable Housing Policy

- 4.3. The Plan identifies affordable housing provision as a “key priority of the Plan”² with the Council’s Strategic Objective setting out a requirement to “*pursue all opportunities to maximise affordable housing across the Borough through a range of measures including providing more choice in the different types of affordable housing and different levels of availability*”³.
- 4.4. Policy LP 36 sets out the affordable housing policy and paragraph 9.3.1 identifies that the Borough Strategic Market Housing Assessment dated December 2016 identified a net deficit of 964 affordable homes per annum between 2014 to 2033, thus identifying that the need for affordable homes in the borough remains “*substantial*”.
- 4.5. Consideration of the strategic objective and the affordable housing policy need to be given significant weight in the application process.

Social and Community Infrastructure Policy

- 4.6. Policy LP 28 (Social and Community Infrastructure) identifies the need to resist the loss of social and community infrastructure and is a material consideration in the assessment of any planning applications for residential use.
- 4.7. Part A of policy LP 28 requires the Council to work with providers and developers to ensure that there is adequate provision of community services and facilities, especially where there is an identified need or shortage. To date the Council have not been able to identify a need or shortage of such buildings in the Borough. The Properties have remained vacant for some considerable time and have been referred to in disposal and property update reports for a number of years. Their availability has been identified on the Council’s Property Sales and Reinvestment Programme and Council departments, including Achieving for Children and Adults and Social Services, have worked closely with community groups to find a service user but the operational requirement has not been identified.
- 4.8. Part C of policy LP 28 deals with the loss of social or community infrastructure and provides that loss of social or community infrastructure will be resisted unless proposals involving any loss of social and community infrastructure can demonstrate the following:
 1. *That there is no longer an identified community need for the facilities or they no longer meet the needs of users and cannot be adapted; or*
 2. *That the existing facilities are being adequately re-provided in a different way or elsewhere in a convenient alternative location accessible to the current community it supports, or that there are sufficient suitable alternative facilities in the locality; and*
 3. *The potential of re-using or redeveloping the existing site for the same or an alternative social infrastructure use for which there is a local need has been fully assessed. This should include evidence of completion of a full and proper marketing exercise of the site for a period of at least two consecutive years in line with requirements set out in Appendix 5.*

¹ Tesco Stores Limited v Dundee City Council [2012] 2 P. & C.R. 9

² Paragraph 3.1.7 Spatial Strategy of the Local Plan.

³ Paragraph 2.3 of the Plan

- 4.9. The policy acknowledges that where the Council is satisfied that the criteria have been met then alternative employment and affordable housing schemes can be considered. In respect of each of the Properties the criteria set out in paragraphs 1 & 2 of the policy has been met. In accordance with paragraph 1 of LP 28 the Council has not been able to identify a need for the Properties in the time they have been vacant, and in accordance with paragraph 2 the existing facilities have been re-provided or will be re-provided as part of the proposed affordable housing schemes. The Council has commissioned a report to identify the existing provision of social and community infrastructure in the Borough and the report has identified that in respect of each of the Properties the D1 use is not required to supplement the existing D1 uses. Copies of the reports are attached at Appendix 1 to this advice.
- 4.10. The criteria in paragraphs 1 & 2 are however, caveated by a requirement to market the Properties for a period of two years in accordance with the criteria set out in Appendix 5 of the Local Plan. The Properties have been available on the Council's Property Sales and Reinvestment Programme, a publicly available document, throughout the vacant period. In respect of each of the Properties, their availability has been identified on the programme for a period well in excess of the two years required by the policy. In addition the relevant departments within the Council have been aware of the availability.
- 4.11. Appendix 5 of the Local Plan sets out the criteria for the marketing and sets out specific actions to be undertaken to accord with the marketing requirements of policy LP 28. Appendix 5 requires a period of two years marketing through a commercial agent and to be accessible on property databases, search engines and other relevant websites at a price commensurate with the existing quality and location of the premises. This has not been carried out in respect of any of the properties. The granting of planning consent for affordable housing schemes would result in a departure from policy on this basis. The question is whether the lack of marketing in accordance with the policy and the resulting departure from policy can be outweighed by the fact that the properties have been vacant, and that their availability has been known to relevant departments.
- 4.12. Appendix 5 provides specific marketing requirements at 18.0.13 in respect of Social and Community Infrastructure and requires any marketing strategy to meet the requirements.
1. Evidence that the facility is no longer needed. Evidence of meaningful engagement with service providers or a public disposal process would be required to demonstrate this.
On the basis of the consultation responses from Achieving for Children and Adults and Social Services it is clear that despite efforts to locate suitable service users no identified need has been found. The properties have been made available on the Council's Sales and Reinvestment Programme without a positive response. It is also likely that given the dilapidated state of the properties that the types of organisations identified for these sites would not have the funding to renovate/rebuild to bring them to a standard for which they could serve a proper function.
 2. Evidence that the loss of the facility would not have a detrimental impact on social and community service provision. For example, a marketing report could provide details of alternative facilities in close proximity and provide evidence that existing users have all been successfully relocated and this has not resulted in any shortfall in provision.
A report has been prepared which identifies the existing provision in the area. In addition the existing services have already been relocated or as a result of organisational changes within the Council we understand that services are more commonly being commissioned as opposed to being provided directly by the Council. In the time since the relocation no new occupiers have been identified.

3. Consideration should be given to the potential for adapting the site/ premises to meet community needs either now or in the future.

Given the dilapidated condition of the properties there is likely to be a significant cost implication to any occupiers looking to restore the Properties for D1 use. Any renovation/rebuild is going to incur significant expenditure and the ability for organisations looking to occupy these sorts of properties are unlikely to have the capital available to secure this.

4. Evidence should be provided to show that the premises have been offered at a reasonable charge to appropriate user groups, e.g. at a discounted rate to community groups of voluntary organisations.

Achieving for Children and Adults and Social Services have not identified any occupational requirement for any of the sites since the time of decommissioning. At the time of relocating existing services from Meadows Hall and the Strathmore Centre Site, Adults and Social Services carried out extensive consultations with stakeholders at the time of relocation and decommissioning at which time no occupational requirement was identified.

5. Legal Position

- 5.1. The development plan considerations in the determining of planning applications are twofold. First as a material matter in Section 70(2) of the Town and Country Planning Act 1990 (the "Act"); and second as a presumption in favour of planning policy as set out in Section 38(6) of the Planning and Compulsory Purchase Act 2004 (the "2004 Act")

- 5.2. Section 70(2) of the Act provides:

In dealing with such an application the authority shall have regard to

(a) the provisions of the development plan, so far as material to the application

- 5.3. Section 38(6) of the 2004 Act provides:

"if regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise".

- 5.4. The weight to be attached to any material considerations are a matter of judgment for the decision maker and are not determined by the provisions of statute.

- 5.5. The provisions of Section 70(2) of the Act and Section 38(6) of the 2004 Act must be read together. Section 38(6) of the 2004 Act creates a presumption in favour of the development plan but "it requires to be emphasised, however, that the matter is nevertheless still one of judgment, and that this judgment is to be exercised by the relevant decision-taker. The development plan does not, even with the benefit of section [38(6)] have absolute authority. It is at liberty to depart from the development plan if material considerations indicate otherwise"⁴ and "if the application does not accord with the development plan it will be refused unless there are material considerations indicating that it should be granted. If there are material considerations indicating that it should not be followed then a decision contrary to it provisions can properly be given"⁵

Materiality

⁴ R Cala Homes (South) Limited v Secretary of State for Communities and Local Government [2011] J.P.L. 1458.

⁵ R Cala Homes (South) Limited v Secretary of State for Communities and Local Government [2011] J.P.L. 1458.

- 5.6. The Council, as local planning authority, is required to have regard to all considerations that are material to an application. For a matter to be a material consideration it must be a planning consideration. It has been held that “any consideration which relates to the use and development of land is capable of being a material consideration. Whether a particular consideration falling within that broad class is material in any given case will depend on the circumstances”⁶
- 5.6.1. The Council is being asked to consider whether a departure from local plan policy in this situation is justified on the basis that the provision of a wholly affordable housing scheme being a material consideration. It is clear that the Properties have been redundant for some time without an identifiable need for their existing use.
- 5.7. In the case of all three Properties their availability has been known to relevant persons operating within the Council and publicly on the Property Sales and Reinvestment Programme. In the time that the Properties have been vacant a service user has not been identified.
- 5.8. It has to be considered whether the retention of the existing use is likely to result in such a use being taken up again by an occupier, or whether it is likely to remain vacant. The test to consider is whether “in a contest between the planning merits of two competing uses, to justify refusal of permission for use B on the sole ground that use A ought to be preserved, it must...be necessary at least to show a balance of probability that, if permission is refused for use B, the land in dispute will be effectively put to use A”⁷.
- 5.9. It is unlikely that the existing use would be reinstated on the basis that the Properties have been vacant for so long. However the Plan addresses the matters that need to be considered before an alternative use can be granted. In particular matters of marketing.
- 5.10. Specific cases relating to the promotion of social objectives have been considered by the courts and it has been held that provided the social goal falls within the planning sphere it can be considered in the planning process. The promotion of affordable housing is the promotion of a social objective. The Local Plan identifies that wholly affordable housing schemes should be considered as alternative uses to community buildings, provided the caveats set down in the Local Plan have been considered.

6. Section 123 Local Government Act 1972

- 6.1. Legally councils have the power to dispose of land ‘in any manner they see fit’ for the ‘best price reasonably obtainable’ pursuant to the provisions of S123 of the Local Government Act 1972 (the LGA”). The Council have a duty to obtain ‘best consideration’ for the properties. The provisions of Section 123 need to be considered in any disposal of the Properties to ensure that the Council do not fetter their discretion. By way of example the Council need to consider the potential situation whereby the Properties are purchased by a speculative developer purchases the Properties with D1 use but with a view to obtaining planning permission for residential development in the future.

7. Conclusion

- 7.1. The Council, as Local Planning Authority, is required to consider the development plan as a whole. As a result, any application for planning permission will need to be considered in terms of the loss of the community buildings but balanced against the promotion of affordable housing. A

⁶ Stringer v Minister of Housing and Local Government [1971] 1 All E.R.

⁷ Westminster City Council v British Waterways Board [1985] A.C. 676

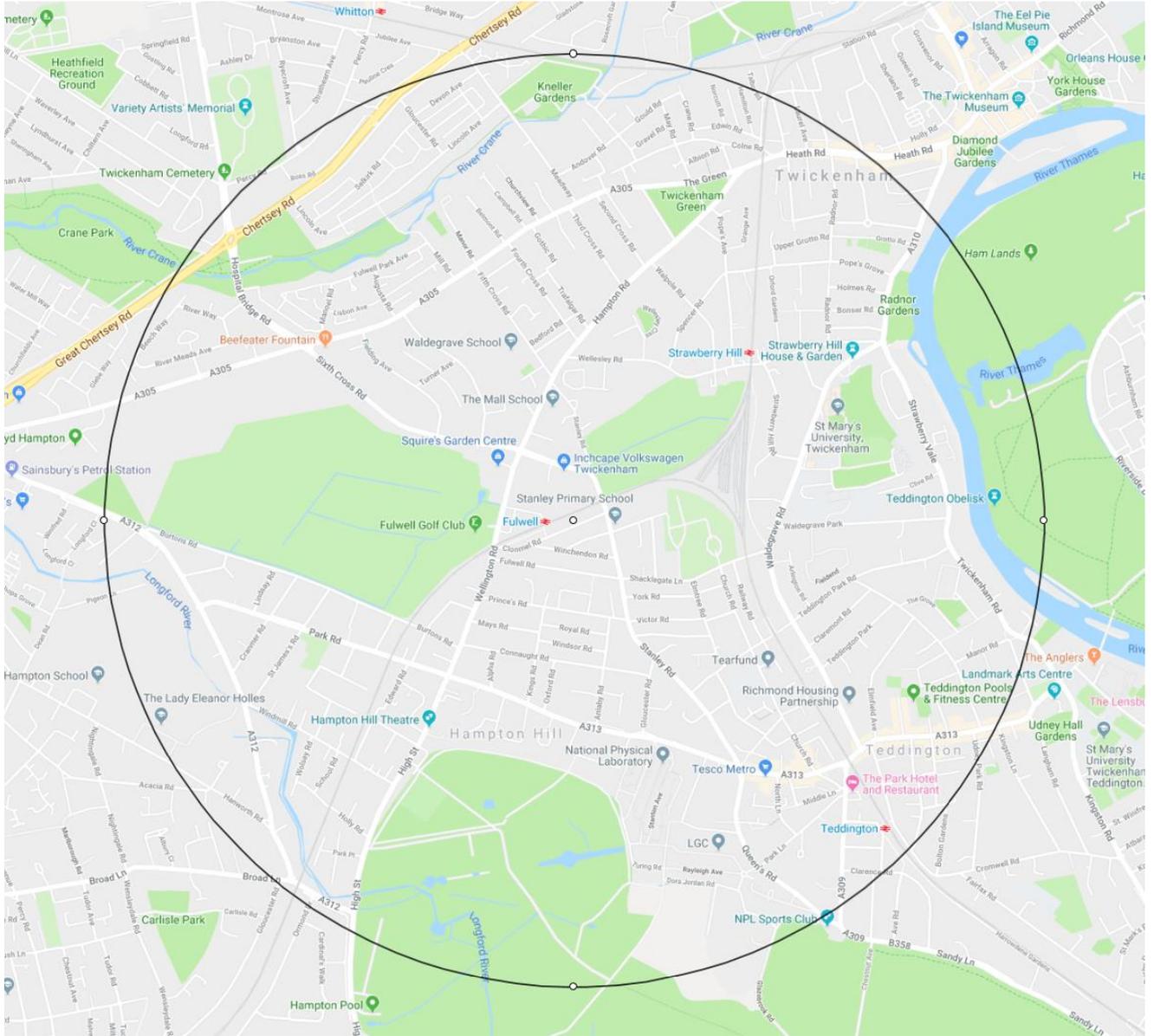
decision to grant planning permission for wholly affordable housing schemes is likely to be considered a departure from Local Plan policy LP 28 on the basis that the requirement to undertake a formal marketing strategy will not be fulfilled. However, it is considered that the availability of the Properties on the Council's Property and Reinvestment Programme well in excess of the two year period is material to any application when considering whether there is a departure from policy.

- 7.2. The Council's evidence suggests that the Properties will remain vacant if permission for the alternative uses is not granted. Alternative occupiers have not been identified despite efforts from Council departments to secure alternative service users. Significant weight should be given to the marketing carried out through the Council's Property and Reinvestment Programme and the engagement of Council departments with service users.
- 7.3. In addition, we suggest that significant weight should be given to the community benefits that will be obtained by providing housing developments that are 100% affordable, particularly in the context of the high level of need for affordable housing in the Borough.
- 7.4. It is important to emphasise that the weight to be given to particular material consideration is a matter for the decision maker and the courts will not seek to interfere provided that the decision is lawfully made.
- 7.5. We consider that granting planning permissions for 100% affordable housing schemes for the Properties in breach of the marketing requirements of the Local Plan would be a decision that could lawfully be made and we would suggest the material considerations weigh strongly in favour of granting permission subject to compliance with the usual planning considerations relating to scale, design, highways etc...
- 7.6. At the request of the Council we will be seeking advice from Counsel, David Forsdick QC.

May 2019

Appendix 1

Map showing 1mile radius of Strathmore Youth Club – TW11 8UH



Link to map:

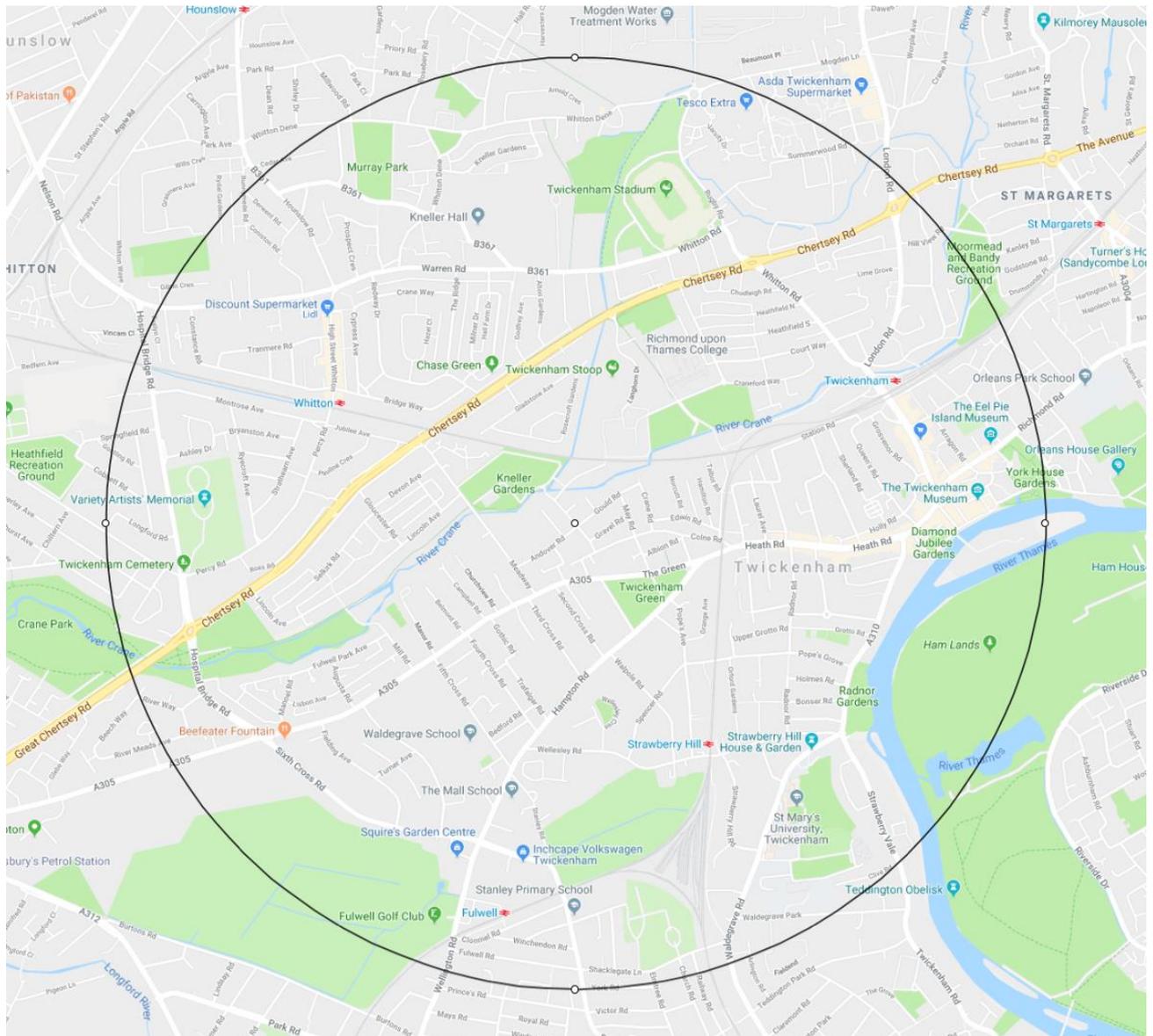
<https://www.mapdevelopers.com/draw-circle-tool.php?circles=%5B%5B1609.34%2C51.4339027%2C-0.3480715%2C%22%23AAAAA%22%2C%22%23000000%22%2C0%5D%5D>

The existing provision of D1 use has been examined within a 1 mile radius of the site, which has identified that this site is not required to supplement D1 uses. The area is well provided for such uses and services:

- **Creches, Day Nurseries and Day Centres:** There are eight day nurseries provided within this locality. The SCAMPS day nursery is also to be re-provided on this site.
- **Education:** There are a range of schools from Junior to High School level as a special schools and University.
- **Museums and Galleries:** There are two heritage sites within the local area.
- **Libraries:** The area is served by Teddington and Hampton Hill Libraries.

- **Public Halls:** There are numerous halls in the area available for hire.
- **Worship / Religious Services:** There is a variety of denominations of places of worship in the area.
- **Medical / Health Services:** There are 10 dentists of which four are private clinics. There are also four Doctor's surgeries in the area as well as the Teddington Memorial Hospital.

Map showing 1mile radius of Mereway Day Centre – TW2 6RF



Link to map:

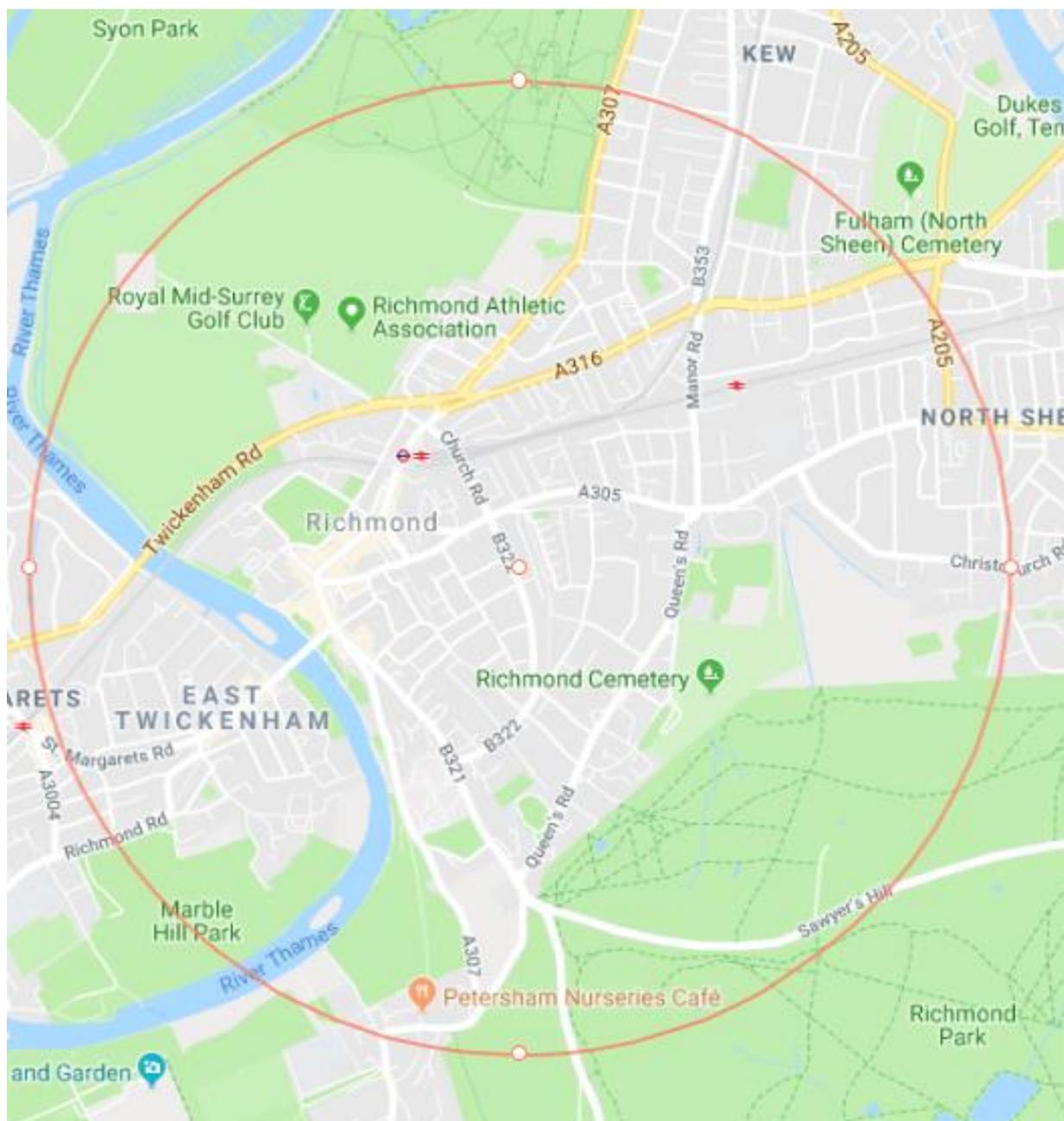
<https://www.mapdevelopers.com/draw-circle-tool.php?circles=%5B%5B1609.34%2C51.445954%2C-0.3459663%2C%22%23AAAAAA%22%2C%22%23000000%22%2C0%5D%5D>

The existing provision of D1 use has been examined within a 1 mile radius of the site, which has identified that this site is not required to supplement D1 uses. The area is well provided for such uses and services:

- **Creches, Day Nurseries and Day Centres:** There are a variety of local services available.
- **Education:** There are numerous educational establishments at all levels. These include nine primary schools as well as several secondary and high schools.
- **Museums and Galleries:** The area benefits from three museums and two historic sites.
- **Libraries:** Three local libraries – Whitton, Heathfield and Twickenham are easily accessible.
- **Public Halls:** There are a number of public halls and community centres serving the area.

- **Worship / Religious Services:** There are a wide variety of places of worship serving the Christian faith.
- **Medical / Health Services:** There are several dental practices (including private) in the locality as well as six medical centres.

Map showing 1mile radius of Meadows Hall – TW10 6LN



Link to map:

<https://www.mapdevelopers.com/draw-circle-tool.php?circles=%5B%5B1609.34%2C51.4599561%2C-0.2966967%2C%22%23AA493E%22%2C%22%23FF7E5F%22%2C0%5D%5D>

The existing provision of D1 use has been examined within a 1 mile radius of the site, which has identified that this site is not required to supplement D1 uses. The area is well provided for such uses and services:

- **Creches, Day Nurseries and Day Centres:** There are 10 day nurseries which serve the local area.

- **Education:** There are a number of Primary and secondary Schools which cover the locality as well as an Adult Community College and the American University.
- **Museums and Galleries:** There are six heritage sites within the area including Richmond Museum.
- **Libraries:** There are two libraries within the area including Richmond Library and the Richmond Information and Reference Library in Whittaker Avenue.
- **Public Halls:** There are a couple of public halls available as well as two local Sports Centres and a variety of church hall spaces.
- **Worship / Religious Services:** There are a number of denominations represented in the area as well as the Richmond United Synagogue.
- **Medical / Health Services:** There are eight dental practices available, two of which are private. There are also nine medical centres that serve the area.