



APPEAL BY:
Mr Nathan Eriemo

AGAINST THE COUNCIL OF THE LONDON BOROUGH OF HILLINGDON'S REFUSAL TO GRANT
CONSENT FOR:

*"Proposed change of use from C3 (Residential Family Dwelling) to C4 for 6 persons max
(Small HMO)"*

AT

84 Tolcarne Drive, Hillingdon, Eastcote, HA5 2DG

Council of the London Borough of Hillingdon Reference: 35338/APP/2024/1664

WRITTEN REPRESENTATIONS: GROUNDS OF APPEAL

October 2024

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1. Introduction

1.1 This appeal is made on behalf of Mr Nathan Eriemo in relation to a proposal at 84 Tolcarne Drive, Hillingdon, Eastcote, HA5 2DG.

1.2 This Planning Statement has been prepared to accompany an appeal associated with an application for a Lawful Development Certificate (LDC) for proposed use or operations. In line with S192(2) of The Town and Country Planning Act 1990 (henceforth referred to as 'the Act'), the purpose of this Statement is to provide evidence to demonstrate the lawfulness of the following at the date of the LDC application:

"The change of use from C3 (Residential Family Dwelling) to C4 for 6 persons max (Small HMO)."

1.3 The original application was submitted on 24 June 2024. It was refused by the Council on 12 August 2024 for the following reason:

1. Due to the internal size of the bedrooms, the HMO would have an occupancy level of above 6 persons and would be classed as a large HMO (Sui Generis) use that would require the submission of a full planning application. As such it would fail to meet Class L, Schedule 2, Part 3 of the Town and Country Planning (General Permitted Development) Order 2015.

1.4 The appeal as a whole has been submitted with; a plan showing the land to which this change of use relates, a description of the use to which it relates, reasons for determining the use to be lawful (detailed throughout this Statement) and an identification of the specific date of the application for the certificate. This is in accordance with S192(3) of the Act.

1.5 The original application was also made on an appropriate form and included the particulars referred to in the form. It was accompanied by; a plan identifying the land to which the application relates drawn to an identified scale and showing the direction of North; such evidence verifying the information included in the application as the applicant can provide; a statement setting out the applicant's interest in the land (see

submitted Application Form), the name and address of any other person known to the applicant to have an interest in the land and whether any such other person has been notified of the application. This is in accordance with Article 39.-(1) and (2) of The Town and Country Planning (Development Management Procedure) (England) Order 2015.

1.6 For these reasons, this application, and thereby appeal, are considered valid.

2. The Site

2.1 The appeal site is located on the south western side of Tolcarne Drive. It accommodates No. 84, a two-storey, detached, residential dwelling constructed mainly of facing brickwork and elements of render under a tiled roof. This dwelling is located within a sub-urban area characterised by residential dwellings of differing architectural composition and materials palette. Similar to nearby properties, No. 84 is set behind a sizeable area of hardstanding used for the parking of vehicles. The appeal building is shown at Figure 1 below.



Figure 1: Appeal property.

2.2 The carriageway is not heavily parked, owing to restrictions in the form of double and single yellow lines. On-street parking bays are provided. However, these are subject to certain restrictions (permit holders only Monday – Friday between 1-2pm). The absence of parking stress, together with parking restrictions along the carriageway, is depicted at Figure 2 below.

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Figure 2: View north westward along Tolcarne Drive showing absence of parking pressure and highway restrictions.

3. The Appeal Proposal

- 3.1 The appeal proposal is simple in that it seeks to confirm that the proposed change of use from C3 (Residential Family Dwelling) to C4 for 6 persons max (Small HMO) is lawful and can commence in the absence of formal planning permission.
- 3.2 This change would not result in any alterations to the external elevations of the appeal building. Neither would it result in any internal alterations at first floor level. The existing three-bedroomed dwelling would be converted to a six-bedroomed HMO by virtue of ground floor alterations. In essence, the kitchen would be divided to form a new bedroom and two more bedrooms would be formed by converting the existing living and reception rooms. These ground floor alterations are depicted at Figure 3 below.

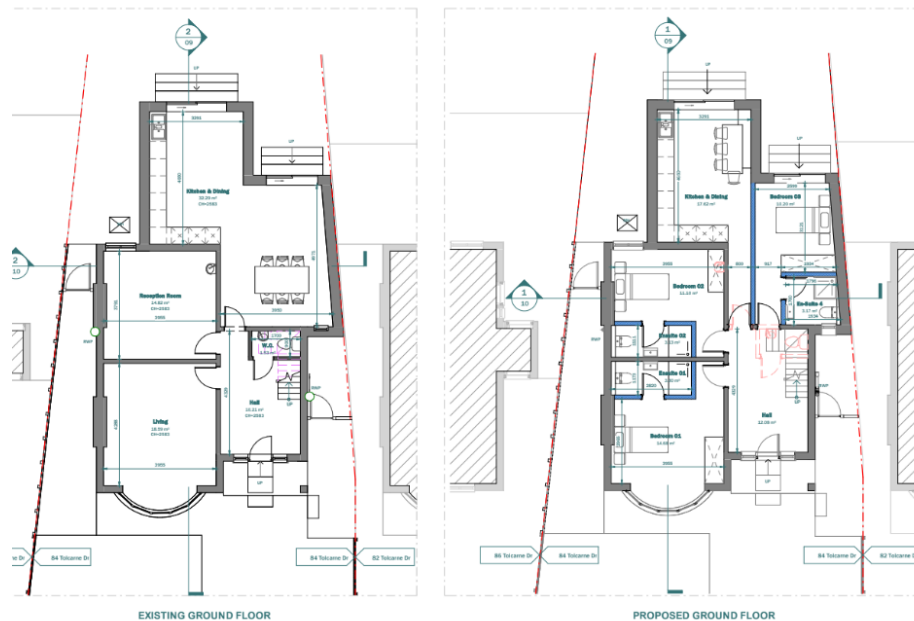


Figure 3: Ground floor alterations to facilitate change of use.

4. Relevant Legislation and Law

The Town and Country Planning Act

- 4.1 S192(1) provides for the making of an application to ascertain whether (a) any proposed use of buildings or other land; or (b) any operations proposed to be carried out in, on, over or under land would be lawful.
- 4.2 Under s192(2), the relevant date for ascertaining whether the proposed development would be lawful is the date of the LDC application. This remains the case even if some modification to the description of the development and/or the plans is agreed.
- 4.3 S192(4) states that the lawfulness of any use or operations for which a certificate is in force under this s192 shall be conclusively presumed unless there is a material change, before the use is instituted or the operations are begun, in any of the matters relevant to determining such lawfulness.
- 4.4 S193(4) of the Act provides that a LDC may be issued under s192 for the whole or part of the land specified in the application.

Evidence and the Burden of Proof

- 4.5 There are a number of legal principles that are commonly referred and adhered to during the consideration of evidence submitted pursuant to S192 of the Act. These are as follows:
- 4.6 The burden of proof is on the applicant in LDC applications to make their case (*Nelsovil v SSE [1962] 13 P&CR 151*).
- 4.7 The standard of proof is the civil standard, which is the 'balance of probabilities' or whether something is more likely than not (*Thrasyvoulou v SSE [1984] JPL 732*).
- 4.8 If there is no evidence to contradict the applicant's version of events or make it less than probable, and their evidence is sufficiently precise and unambiguous, it should be accepted (*Gabbitas v SSE & Newham BC [1985] JPL 630 and Ravensdale Ltd v SSCLG [2016] EWHC 2374 (Admin)*).
- 4.9 However, any evidence must be properly analysed on the balance of probabilities test with regard to its source, content, consistency and probable reliability (*Mahajan v SSTLR & Hounslow LBC [2002] JPL 928*).

The Meaning of Development

- 4.10 S55 of the Act provides a broad definition in subsection (1) of 'development' for the purposes of the Act and related legislation. This is the starting point for this assessment because 'development' requires planning permission under s57(1) of the Act, and the carrying out of development without the required planning permission constitutes a breach of planning control under s171A(1) of the Act.
- 4.11 S55(2) makes exemptions to the definition, providing that particular operations or uses shall not be taken for the purposes of the Act as involving development (and therefore do not require any grant of planning permission). S55(3) and (4) provide for particular inclusions.
- 4.12 'Development' comprises 'two limbs:

- The carrying out of building, engineering, mining or other operations in, on, over or under land; and
- The making of any material change in the use of any buildings or other land.

4.13 The distinction between the two limbs runs through the Act and is confirmed by the definition of 'use' in s336(1) as not including use for the carrying out of any building or other operations on land. Thus, it was held by *Lord Denning in Parkes v SSE [1979] 1 All ER 21172* that operational development 'comprises activities which result in some physical alteration to the land, which has some activities which are done in, alongside or on the land but degree of permanence to the land itself, whereas... 'uses' do not interfere with the actual physical characteristics of the land'.

4.14 One must therefore distinguish between the two limbs of development. The Court of Appeal held in *West Bowers Farm Products Ltd v Essex CC [1985] JPL 857* that a distinction should be drawn between composite activities where one constituent part was ancillary to the other, and where two or more activities were substantial and separate as a matter of fact and degree. The construction of a reservoir involved the extraction of gravel, and so planning permission was required for both engineering and mining operations. That said, in *R v Durham CC ex parte Lowther [2002] P&CR 22*, it was held that different aspects of a process do not always fall to be categorised as different operations or uses for planning purposes.

Material Changes of Use

4.15 While the meaning of 'use' is provided in s336(1) to the 1990 Act, the concept of a material change of use is not defined in statute or statutory instrument. The basic approach is that, for a material change of use to have occurred, **there must be some significant difference in the character of the activities from what has gone on previously as a matter of fact and degree.**

4.16 For example, a change in the nature of goods stored will not be material if the overall character of the activity and general implications for the area remain the same (*Snook v SSE [1976] JPL 303*).

- 4.17 Off-site effects may be relevant to whether there has been a material change of use (*Westminster CC v SSCLG & Oriol Badia and Property Investment (Development) Ltd [2015] EWCA Civ*).
- 4.18 It was held in *Richmond upon Thames LBC v SSETR [2001] JPL 84* that the extent to which a particular use fulfils a legitimate or recognised planning purpose is relevant in deciding whether there has been a material change of use. The following legal principles relevant to such a determination were laid down in *R (oao) Kensington and Chelsea RBC v SSCLG & Reis & Tong [2016] EWHC 1785 (Admin)*:
- a) A planning purpose is one which relates to the character of the use of land;
 - b) Whether there would be a material change of use or development in terms of s55(1) depends upon whether there would be a change in the character of the use of land;
 - c) The extent to which an existing use fulfils a proper planning purpose is relevant in deciding whether a change from that use would amount to a material change of use. The need for a land use such as housing or a type of housing in a particular area is a planning purpose which relates to the character of the use of land;
 - d) Whether the loss of an existing use would have a significant planning consequence, even where there would be no amenity or environmental impact, is relevant to an assessment of whether a change from that use would represent a material change of use;
 - e) The questions are ones of fact and degree for the decision-maker and only subject to challenge on public law grounds;
 - f) Whether or not a planning policy addresses a planning consequence of the loss of the use is relevant but not determinative of whether the loss would have a significant planning consequence or consequences.
- 4.19 Lastly, the intensification of a use may amount to a material change of use only if and where that causes the character of the use to change in a fundamental way. In *Hertfordshire CC v SSCLG & Metal and Waste Recycling Ltd [2012] EWCA Civ 1473*, the Court held that: 'What must be determined is whether the increase in the scale of the use has reached the point

where it gives rise to such materially different planning circumstances that, as a matter of fact and degree, it has resulted in a such a change in the definable character of the use that it amounts to a material change of use’.

5. The Appellant’s Case

5.1 This section of the Statement addresses the Council’s reason for refusal. This will be done by consideration of one main issue which is:

- Whether or not the change of use from C3 (Residential Family Dwelling) to C4 for 6 persons max (Small HMO) constitutes development for the purposes of s55 of the Act.

1) Not Development

5.2 The proposal seeks confirmation that the change of use from the existing three-bedroomed C3 (Residential Family Dwelling) to a C4 use for 6 persons maximum (Small HMO) would be lawful.

5.3 There would be no external alterations to the appeal property to facilitate this change. Its elevations and fenestration pattern would not be altered. Moreover, internal alterations simply do not constitute development. As such, the proposed change would not result in any activities that result in any physical alteration to the land. In line with the principles of *Parkes v SSE [1979] 1 All ER 21172*, there is simply no building, engineering or other operations.

5.4 The only question that therefore arises is whether or not the proposed change of use is *material*. A change between Use Classes cannot signify a material change. This is simply irrelevant. Ultimately, this question only resolves itself as an inquiry into the changed character of the use as compared with the previous character of the use, and as to its impact in planning terms.

5.5 As identified in this Statement, No. 84 is a detached residential unit. Its plot is entirely domestic in nature. The immediate area is also residential in character, with dwellings, gardens, means of enclosure and other residential paraphernalia (such as parked vehicles on front drives) clearly apparent.

- 5.6 At present, a three-bedroomed property exists. That said, rooms sizes are large and there would be nothing preventing the occupation of the C3 property by six individuals. This is not an uncommon family size in a property of this nature. Furthermore, there is nothing preventing the occupiers from converting the building in the manner proposed now and still occupying it as a single property. Consequently, even as a C3 single unit, the building could still accommodate up to six persons (if not more).
- 5.7 It follows that comings and goings to and from the site, even if increased marginally by a HMO use, would not be materially changed compared to the current C3 use. This would also be true for the number of vehicles that could be owned at the site. The same number of vehicles would be parked on the site's hardstanding and any other vehicles owned by occupants would be displaced away from it (given the highway restrictions in force). As such, neither the occupants nor vehicle ownership would result in any material change to the character of the site. It would still be read as a low-level residential use compatible with the size of the property. There would be no notable or appreciable intensification of this residential use (a test with a high bar to pass).
- 5.8 The garden area would not be severed by boundary treatment and no new hardstanding would be formed. As identified, there would be no additional doors or windows. Bins would not be increased and could be stored behind an existing gate to the side of the property. They would not be visible. Given the comparable level of occupation and vehicle ownership, there would not be any additional noise and disturbance at the site form a C4 use, other than that typically associated with residential occupation.
- 5.9 It follows that there would be no perceptible change in the character of the use of the land. This is clearly indicative of there not being a material change of use with regard to the principles established in *Richmond upon Thames LBC v SSETR [2001] JPL 84* and *R (oao) Kensington and Chelsea RBC v SSCLG & Reis & Tong [2016] EWHC 1785 (Admin)*.

- 5.10 This assertion is reinforced given that there is no Article 4 Direction preventing the change of use (should it be development) from a single dwellinghouse to a HMO. This illustrates that the Council do not recognise any harmful change in character in this area as a result of such a change. It remains an area characterised by single residential properties and this would not change despite the HMO use at No. 84.
- 5.11 Turning to planning policy, the site's residential use would remain. There would be no net loss of a dwelling from the Council's housing stock. There would therefore be no contravention of the Council's strategy outlined by Policy H1 of the Local Plan Part 1: Strategic Policies (2012) insofar as it seeks to resist the loss of housing. Furthermore, there are no policies within the Council's development plan that specifically resist the creation of HMOs. Rather, these are supported in certain circumstances (as outlined in Policy DMH5 of the Local Plan Part 2: Development Management Policies).
- 5.12 In this case, the HMO would be in a highly accessible area. Indeed, there are a number of bus stops along Joel Street within a three minute walk of the site. These provide services to areas including Northwood and Ruislip Common and are easily and safely accessible along footways at named streets with active frontages. Accordingly, occupants of the HMO would not be reliant on a private vehicle to get around, further reducing the likelihood of vehicle ownership at the appeal site and reinforcing assertions that the character of the site or area would not be changed by such ownership.
- 5.13 Additionally, the proposal would provide high quality internal living conditions for occupants which would not be unduly cramped. Moreover, as discussed, there would be no adverse effects on the living conditions of the occupants of neighbouring properties as comings and goings and noise levels would not be materially different from the site's use as a C3 dwellinghouse.
- 5.14 It follows that, not only would the planning purpose of a HMO use relate to the character of the land, but this fulfils a proper planning purpose that would not have any significant planning policy consequences. On the contrary, it would be in accordance with good planning policy in relation to HMO use. Again, this is evidence of the absence of any *material* change of use in line with the findings of *Richmond upon*

Thames LBC v SSETR [2001] JPL 84, Wakelin v SSE and R (oao) Kensington and Chelsea RBC v SSCLG & Reis & Tong [2016] EWHC 1785 (Admin). This assertion is further reinforced given that the Council can demonstrate a 5 year supply of deliverable housing land. Even if there was a loss of a unit from the housing stock at the site, which would not be the case, this would therefore have no overall planning policy effect.

Overall Conclusion – Not Development

- 5.15 Taking everything together, there is no operational development associated with the change of use from a C3 unit to an HMO. There would be no perceptible change to site character resulting from this change and there would be no environmental effects of any consequence. The change would also accord with good local planning policy in relation to HMO development and would not result in any significant planning policy consequences. This would be the case were the site occupied by 6 or 8 persons (although only a 6 person HMO has been applied for).
- 5.16 It follows that the change to an HMO use would not result in any significant difference in the character of the activities from what has gone on previously as a C3 use as a matter of fact and degree.
- 5.17 On the balance of probabilities, the Inspector can therefore be satisfied that this proposed change would not be *material*. Quite simply, it is not development under s55 of the Town and Country Planning Act 1990 and the appeal should be allowed on this basis.
- 5.18 This is so regardless of the terminology used to describe the HMO (be this considered as a 'small' or 'large' HMO) and regardless of any change in Use Class (from C3 to either C4 or Sui Generis). These terms are not indicative of any *material* change of use. On the contrary, this must be assessed in the light of the relevant case law outlined in Section 4 to this Statement with regard to any change in the character of the site and any planning policy consequences (of which there are none). To do otherwise would be to err in law.

Other Matter – Permitted Development

- 5.19 The Council has not taken the first step outlined above in relation to assessing whether or not this change of use is actually development in the first instance. Simply stating that *“The proposal clearly involves development as defined in the Planning Acts...”* without any associated assessment is not sufficient. This has resulted in a flawed assessment. That said, for completeness, the appellant has considered the change as if it were development. To be clear, however, this is not the case for reasons outlined above. This is purely a hypothetical exercise.
- 5.20 There is no Article 4 Direction restricting any change of use from a C3 dwellinghouse to a C4 HMO. Permitted development rights at the property also remain intact. Consequently, Schedule 2, Part 3, Class L (b) of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (‘the GPDO’) can be engaged.
- 5.21 This Class permits the change of use between a ‘small HMO’ (use of a dwellinghouse by not more than six residents as a “house in multiple occupation” as defined in The Town and Country Planning (Use Classes) Order 1987 (as amended)). An HMO shared by more than that number of people is outside the scope of this C4 use class and is therefore a Sui Generis use.
- 5.22 The Council has considered that the proposed change of use cannot benefit from the provisions of Schedule 2, Part 3, Class L(b) simply on the basis that bedrooms could cumulatively accommodate more than 6 people. It is therefore asserted that the HMO could accommodate up to 8 occupants, representing a Sui Generis use beyond the scope of the relevant change permitted under the GPDO.
- 5.23 This is a wholly unreasonable and speculative assertion. Regardless of the sizes of the bedrooms, this is not what has been applied for. The applicant simply wishes to confirm that the change of use of the property to accommodate 6 people as an HMO would be lawful. There is no intention to use the building to occupy more than 6 people. It would simply be used for 6 occupants, secured by the HMO license obtained from the Council.

5.24 The Council should therefore have assessed this proposal on the basis of what has been applied for, not what it believes *could* at some point happen or what *could* be facilitated by the property. The Inspector is respectfully requested to determine the appeal on this basis.

5.25 Any further occupation of the site beyond 6 persons may possibly constitute a material change of use (although it may not) regardless of the change of use class to Sui Generis. Any change in site character as a result of a greater occupation may therefore require planning permission and is regulated in this fashion. It is not for the Council to pre-empt a possible breach in planning control as they have done here.

5.26 Quite simply, a certificate has been submitted to confirm that the change of use of the property from a C3 unit to a C4 HMO would be lawful. Even if this did constitute a material change of use (which is not the case) it is this change that must be considered under the provisions of the GPDO. It is permitted under Schedule 2, Part 3, Class L(b).

5.27 As such, even if the Inspector considers that this proposal represents development, which cannot be the case for reasons given, the change of use to occupy the building for 6 persons as an HMO would be lawful under the provisions of the GPDO.

6. Conclusion

6.1 On the balance of probabilities, the Inspector can be satisfied that the change of use from C3 (Residential Family Dwelling) to C4 for 6 persons max (Small HMO) does not represent a material change of use. It is simply not development under s55 of the Act. On this basis alone the use described in this appeal proposal should be confirmed as lawful.

6.2 Furthermore, even in the event that this change was considered to represent development, it must be assessed under the provisions of the GPDO on the basis of the development applied for (occupation by no more than 6 persons). Clearly, a Sui Generis use would not fall under the relevant change permitted by Schedule 2, Part 3, Class L(b). Such a change has not been applied for regardless of room sizes.

6.3 It is for the land owner to ensure that any development at the site accords with the Government's deemed consent under the GPDO, and this would be secured by

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relevant licensing. Accordingly, even if the change is considered material, it would be permitted development under the GPDO.

- 6.4 As such, it is respectfully requested that the appeal submitted under s192 of the Town and Country Planning Act 1990 be approved and the change of use from C3 (Residential Family Dwelling) to C4 for 6 persons max (Small HMO) be confirmed as lawful.