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## Appeal Decision

Site visit made on 29 November 2021

**by Sarah Dyer BA BTP MRTPI MCMI**

**an Inspector appointed by the Secretary of State**

**Decision date: 31<sup>st</sup> January 2022**

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**Appeal Ref: APP/F3545/C/21/3277551**

**Land at Escape Rooms Suffolk, Unit 1 Harlequin Business Park,  
Mildenhall Drove, Kenny Hill IP28 8DS**

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
  - The appeal is made by Mr Tim James-Parker against an enforcement notice issued by West Suffolk Council.
  - The enforcement notice, numbered EN/19/0009, was issued on 18 May 2021.
  - The breach of planning control as alleged in the notice is without planning permission, the change of use to a mixed use of residential accommodation and escape room at Unit 1 Harlequin Business Park, Mildenhall Drove, Kenny Hill IP28 8DS in the approximate position marked with a cross on the attached plan.
  - The requirements of the notice are
    - (1) Cease the use of Unit 1 Harlequin Business Park Mildenhall Drove Kenny Hill Suffolk for residential purposes
    - (2) Remove all items, articles and paraphernalia from the property that were brought onto the land to facilitate the domestic use.
  - The period for compliance with the requirements is 6 months.
  - The appeal is proceeding on the grounds set out in section 174(2)(d), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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### Decision

1. It is directed that the enforcement notice is varied by the deletion of 6 months and the substitution of 12 months as the period for compliance and by the deletion of the requirements set out on the notice and their substitution as follows:
  - (1) Cease the use of Unit 1 Harlequin Business Park Mildenhall Drove Kenny Hill Suffolk for a mixed use of residential accommodation and escape room.
  - (2) Remove all items, articles and paraphernalia from the property that were brought onto the land to facilitate the mixed use of residential accommodation and escape room.
2. Subject to these variations, the enforcement notice is upheld.

### Procedural Matters

3. The appeal form states that the appeal is submitted on ground (d) only. However, the appellant subsequently confirmed that he wishes to appeal on grounds (d), (f) and (g). He has addressed all three grounds in his appeal statement and the Council has had the opportunity to respond to them. Therefore, there would be no prejudice were I to consider the appeal under grounds (d), (f) and (g) as set out in the banner heading.

4. The appellant also argues that the residential accommodation and the escape room use, which are referred to in the alleged breach of planning control, are two separate uses and not a mixed use. This point is more appropriately considered as a ground (b) case, that the matters to which the notice relates have not occurred. The parties were asked for their comments in this regard.
5. The appellant confirmed that he did not want to provide any further information and wanted to rely on the submission which had already been made. The Council was of the view that as ground (b) had not been pleaded it cannot be considered.
6. It is my duty to be up to date as to the law and to ensure that it is applied correctly to the facts as found. Consequently, contrary to the view of the Council, I must be alert to and deal with any 'hidden' grounds of appeal. I must also be mindful of my powers under s176(1) of the Act to vary the terms of the notice. Therefore, I shall consider the appeal under ground (b) and whether any potential amendment of the notice should be made in the light of my findings on ground (b).

### **Ground (b)**

7. An appeal under ground (b) is that the matters to which the notice relates have not occurred. This is a legal ground of appeal, and the onus of proof lies with the appellant.
8. In this case there is no dispute that as a matter of fact Unit 1 is used for residential purposes and as an escape room. The dispute centres on whether Unit 1 is in a mixed use, as alleged in the notice or whether it accommodates two separate planning units, one planning unit forming a dwelling and the other the escape room. Effectively the appellant is arguing that the allegation is wholly wrong. If the evidence which he provides is sufficiently precise and unambiguous and meets the standard of proof which is the balance of probabilities, then the appeal on ground (b) would succeed.

### *Background*

9. The appellant has sought to establish the use of Unit 1 at the Harlequin Business Park (Unit 1) as falling within Class C3 Dwellinghouse through the submission of two applications for a Certificate of Lawful Existing Use or Development (LDC) (Council Ref. DC19/0436 and DC/20/0875/CLE). The Council refused to issue a certificate on both occasions and the appellant did not implement his right of appeal in either case.

### *Reasons*

10. The appeal before me relates to the allegation that Unit 1 is in a mixed use of residential accommodation and escape room.
11. I observed on site that the site comprises a building and an open yard area. There is a parking area between the building and Mildenhall Drove, but this does not fall within the appeal site. There is also a timber structure along the building frontage and a partially timber clad container unit which also mainly fall outside the site boundary.
12. Within the yard area there is a storage shed containing domestic items, a covered seating area and an artificial turf space functioning as garden space.

Part of the yard area is fenced off parallel to the building and this forms access to the residential accommodation and the escape room.

13. Within the building there is an entrance and hallway which serves as access to the escape room and to the residential accommodation. Off the hallway is a room containing a toilet and wash basin and washing machines. This is marked on the plans submitted by the appellant as in dual use. The escape room is located behind a door off the hallway.
14. The garden and outdoor seating areas and the access into the residential space are marked private. In addition to the hallway access, the living accommodation is also accessible from the outdoor space directly into the kitchen.
15. The appellant argues that there are two planning units on the site, the C3 dwellinghouse and the escape room. The Council considers that the site is a single planning unit in mixed use. Both parties refer to the tests established by *Burdle & Williams v SSE & New Forest DC* [1972] 1 WLR 1207 (Burdle) in relation to the determination of the planning unit.
16. In *Burdle* it was held that the planning unit is usually the unit of occupation unless a smaller area can be identified which, as a matter of fact and degree, is physically separate and distinct and occupied for different and unrelated purposes. The concept of physical and functional separation is key and both physical and functional separation are required before a smaller unit can be identified.
17. Unit 1 is occupied by the appellant and his daughter. However, I was able to establish as a result of my site visit that Unit 1 accommodates two physically separate areas which are occupied for different and unrelated purposes. The only exception is the dual use of the toilet and wash basin on the ground floor adjacent to the entrance. In comparison with the size of Unit 1 this shared space takes up a very small part of the building.
18. The residential unit also has a bathroom and kitchen providing alternative facilities which in practice are more directly accessible and likely to be used by its occupiers. On that basis the presence of shared space on the ground floor does not undermine the status of the escape room and residential space as two physically separate areas.
19. Turning to the functional relationship between the residential unit and the escape room, the appellant explains that the operator of the escape room needs to be on site to carry out activities associated with their use. On site presence when the escape room is in use is also needed to ensure adherence with pandemic-related rules and for fire safety and insurance purposes.
20. The Council refers to the appellant describing the arrangement between the escape room and the residential unit as being akin to someone working from home. Furthermore, the appellant says that he sought pre-application advice as to whether the Council would support a temporary or personal planning permission linked to the business use for the continuation of the residential use. These points introduce a level of ambiguity into the appellant's description of the use of the building as a whole.
21. Having regard to the tests established by *Burdle* I find that whilst there is evidence to support the contention that Unit 1 has been divided into two

physically separate units, the functional relationship between the two uses is unclear. The onus is on the appellant to demonstrate that the alleged breach is incorrect and the evidence which he has provided does not establish that the escape room use, and the residential unit are functionally separate.

22. In the light of this finding, I conclude that it has not been shown by the appellant that the matters specified in the notice have not occurred. Therefore, the appeal fails on ground (b).

### **Ground (d)**

23. An appeal on ground (d) is on the basis that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters. This is a legal ground of appeal, and the onus of proof lies with the appellant. The evidence must be sufficiently precise and unambiguous, and the standard of proof is the balance of probabilities.
24. This ground of appeal accepts that at some stage there has been a breach of planning control, but that it is immune from enforcement action, by virtue of the duration of the breach. I have concluded that the breach of planning permission is correctly described in the notice leading to failure on ground (b). Therefore, contrary to the appellant's arguments, the relevant period during which the mixed use must be demonstrated as taking place for a continuous period is 10 years.
25. The appellant says that the residential use has been instigated since June 2013 and that the escape room operation began in October 2017. On this basis the mixed use has been in operation for less than 10 years and the appeal fails on ground (d).

### **Ground (f)**

26. As part of my consideration of ground (d), the evidence has shown that the use of the residential unit may have been continued for a four year period prior to the commencement of the mixed use. The decision notices which the Council issued in respect of the previous applications for an LDC do not make it clear whether the period of residential use prior to the mixed use was considered. In the light of this the requirements of the notice need to be varied, before I consider the appellants appeal on ground (f), for the reasons which I have set out below.
27. If it can be established that the residential use was present continuously for four years, it may constitute the previous lawful use of part of the building and the appellant would be entitled to revert to it. As worded the first requirement requires the cessation of the residential use only. If this requirement is retained without amendment, and the appeal is dismissed and the notice upheld, the appellant would be unable to revert to what may be a lawful use or to obtain a certificate of lawfulness for the residential use. This results from the effect of Section 191(2)(b) of the Act which prevents a use being lawful where it would contravene the requirements of any enforcement notice.
28. The principle from *Mansi v Elstree RDC* (1965) 16 P&CR 153 is that an enforcement notice which purports to take away existing use rights should be varied so as to preserve them. Such is the case here and it is necessary to vary the first requirement.

29. Although the notice describes the breach as a mixed use, the first requirement only secures the cessation of use of the residential unit. The Council suggests that this is because the escape room use benefits from planning permission. However, even if the requirement referred to cessation of the mixed use, it could not prevent the escape room use if that is a lawful use of part of the building.
30. The second requirement refers specifically to 'domestic use' therefore it would also need to be varied to relate to the mixed use so as to align with the variation to the first requirement.
31. The requirements of the notice as varied would be:
- (1) Cease the use of Unit 1 Harlequin Business Park Mildenhall Drove Kenny Hill Suffolk for a mixed use of residential accommodation and escape room.
  - (2) Remove all items, articles and paraphernalia from the property that were brought onto the land to facilitate the mixed use of residential accommodation and escape room.
32. The notice is aimed at the mixed use and the parties have addressed the mixed use in their submissions. Thus, neither the appellant nor the Council would be prejudiced were I to vary the notice accordingly.
33. The appellant considers that the second requirement which is to 'remove all items, articles and paraphernalia from the property that were brought onto the land to facilitate the domestic use' is excessive. Specifically, he argues that the removal of facilities such as the toilet, cooking/welfare facilities and office space would curtail the lawful escape room use.
34. The variation of the second requirement which I have made removes reference to the domestic use and requires the removal of any items which facilitate the mixed use. This requirement is necessary to remedy the breach of planning permission as it is described on the notice. The requirement relates to the items, articles and paraphernalia which need to be removed not those which can be retained. The appellant is best placed to ascertain which items etc. facilitate the mixed use and which can be retained in association with the lawful use(s) of the building.
35. An appeal on ground (f) cannot address issues relating to whether the requirements are vague or imprecise. This is a matter for consideration in respect of whether the notice requires correction or variation. In this case, whilst I have varied the requirements, I do not find the phrase 'items, articles and paraphernalia' to be insufficiently clear for the appellant to be unable to ascertain what needs to be removed to comply with the notice.
36. It has not been shown that the requirements, as amended, exceed what is necessary. For this reason, the appeal fails on ground (f).

### **Ground (g)**

37. Ground (g) is that the period specified for compliance with the notice falls short of what should reasonably be allowed. The appellant considers that the compliance period of 6 months is too short because this provides insufficient time for himself and his daughter to find alternative accommodation particularly given his financial situation. Furthermore, as a result of the

pandemic the escape room business has lost income and the appellant considers that it will take 18 months for the business to fully recover to pre-pandemic levels.

38. The view of the Council is that the appellant has been aware of the unauthorised use since 2019 and on this basis a 6 month compliance period is reasonable. However, the Council accepts that the effects of the pandemic may not have reduced by the time my decision is issued and for that reason it is receptive to altering the compliance period. The Council can also assist with any housing issues which the appellant may have.
39. The appellant is entitled to assume success on any ground therefore I shall reject the Council's suggestion that the appellant has had time during the appeal proceedings to take action to find alternative accommodation.
40. There is no evidence before me to suggest that the appellant could not secure alternative accommodation for himself and his daughter within the 6 month compliance period. However, in view of the uncertainty about the continuing effect of the pandemic on his business and the added complication of his financial situation an extension of the compliance period is reasonable and necessary.
41. As the building is occupied in part as residential accommodation, upholding the notice could cause the loss of someone's home, subject to whether the lawful use of the residential unit can be established, and there could be interference with the occupiers' rights. Therefore, the right set out under Article 8 of the European Convention on Human Rights, which is the right for respect for private and family life is engaged.
42. However, Article 8 is a qualified right and in this case the rights of the individual are outweighed by the public interests. This is on the basis of the harm which arises from development which is contrary to planning policies which protect the countryside, and which control the siting of development relative to sources of pollution such as noise. It is necessary and proportionate to require the residential use to cease and there is no evidence before me to suggest that alternative accommodation could not be found within an extended compliance period.
43. An extension of the compliance period to 18 months as requested by the appellant would undermine the enforcement process and there is no supporting evidence to show that this length of time is necessary to achieve compliance with the notice. Therefore, it seems to me that an extension of the compliance period to 12 months would be a reasonable compromise and would allow time for alternative accommodation to be sourced and the assistance of the Council engaged if that proves necessary.
44. For the reasons given above, I conclude that the period for compliance with the notice falls short of what is reasonable. I shall vary the enforcement notice prior to upholding it. The appeal on ground (g) succeeds to that extent.

## **Conclusion**

45. The appeal succeeds in part and the enforcement notice is upheld with variations in the terms set out above in the Decision.

*Sarah Dyer*

Inspector