



Appeal Decision

Site visit made on 19 February 2024

by N Thomas MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 1 March 2024

Appeal Ref: APP/F3545/X/22/3313634

Harlequin Business Park, Mildenhall Drove, Kenny Hill, Suffolk IP28 8DS

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Tim James-Parker against the decision of West Suffolk Council.
 - The application ref DC/22/1103/CLE, dated 21 June 2022, was refused by notice dated 12 August 2022.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is the use of Unit 1 as two separate planning units – (1) commercial Class E and (2) residential Class C3.
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Decision

1. The appeal is dismissed.

Applications for costs

2. An application for costs was made by Mr Tim James-Parker against West Suffolk Council. This application is the subject of a separate Decision.

Procedural Matters

3. I have taken the address and the description of the development for which the LDC is sought from the application form.
4. The application form refers to commercial Use Class E but does not specify the actual use. The Planning Practice Guidance (PPG)¹ makes it clear that the application needs to describe exactly what is being applied for, not simply the use class. Class E includes a wide range of uses and the application therefore lacks precision as to the nature of the use which is claimed to be lawful. It is clear from the application documents that the specific commercial use in question is as an escape room. If I were minded to allow the appeal I would need to consider whether the use is described with sufficient precision.

Background

5. In an application for an LDC, the onus is on the applicant to provide all the relevant information and evidence to support their case. On appeal, the Inspector's role is to decide whether, on the evidence, the Council's refusal to issue an LDC was well-founded or not. The case must be considered solely on the relevant legal tests and the planning merits are of no relevance. The

¹ Paragraph: 005 Reference ID: 17c-005-20140306 Revision date: 06 03 2014

burden of proof lies with the appellant, who must show, on the balance of probabilities, that the development was lawful at the date of the application.

6. The concept of 'fallback' is not relevant to an LDC appeal, as there is no planning judgement to be made in relation to the degree of harm.
7. The application sought confirmation that the use of the site for separate commercial class E use and C3 residential was lawful, at the time that the application was made. The appellant's case is that the residential use was lawful as the use began more than four years before the date of the application, and that the commercial planning unit was lawful because it has planning permission for an escape room. There is no dispute between the parties that the residential use started in 2013 and that the use as an escape room was granted planning permission in 2019.
8. Section 191(2) states that existing uses and operations are lawful at any time if (a) no enforcement action may then be taken in respect of them and (b) they do not constitute a contravention of any of the requirements of any enforcement notice or breach of condition notice then in force.
9. Section 57(4) states that where an enforcement notice has been issued in respect of any development of land, planning permission is not required for its use for the purpose for which it could lawfully have been used if that development had not been carried out.

Whether in contravention of the requirements of an enforcement notice then in force

10. The Council issued an enforcement notice on 18 May 2021 alleging the change of use of Unit 1 Harlequin Business Park to a mixed use of residential accommodation and escape room. A subsequent appeal against the notice was dismissed and the enforcement notice was upheld with variations² on 31 January 2022. The requirements include the cessation of the mixed use of residential accommodation and escape room. As the enforcement notice was upheld the requirements are now in force.
11. The continuation of the mixed use was therefore unlawful on the date of the application and cannot become immune from enforcement action. The appellant argues however that the mixed use was not occurring at the time the notice was served, and in fact the use was as two separate planning units, both of which were lawful uses.
12. The validity of an enforcement notice can only be questioned by an appeal under section 174 of the 1990 Act. Section 289 sets out that where the Secretary of State gives a decision in proceedings on an appeal against an enforcement notice the appellant may appeal to the High Court against the decision on a point of law or require the Secretary of State to state and sign a case for the opinion of the High Court. There was no appeal to the High Court. The validity of the enforcement notice cannot now be questioned. The appeal against the enforcement notice did not succeed and there is no reason for me to conclude that the decision was erroneous.
13. In any event, the appellant put forward similar arguments in support of the appeal against the enforcement notice under section 174. The Inspector dealt

² Ref APP/F3545/C/21/3277551

with this as a 'hidden' appeal on ground (b) and found that there was insufficient evidence to establish that the unit had been divided into two physically and functionally separate planning units. The appeal on ground (b) therefore failed. Additional evidence has been provided with the application and the appeal seeking to demonstrate that there were in fact two planning units, effectively seeking to revisit the enforcement notice appeal decision. None of the evidence persuades me that the use of the site at the time of the application was not as alleged in the enforcement notice nor that there has been a change in circumstances since the notice was issued.

14. Even if it could be demonstrated that there has been a change in circumstances since the enforcement notice appeal, so that there are now two planning units, they would not be immune from enforcement action due to the passage of time. The appeal cannot therefore succeed.

Whether there was a lawful use of the land that could be resumed

15. The appellant argues that the residential use started in June 2013 and had already become lawful by the time the escape room use commenced in 2017. Planning permission³ was subsequently granted in September 2019 for the escape room in part of the ground floor of the unit. It may be the case that there is a lawful use or uses of the site which could be resumed in accordance with section 57(4). However, I have insufficient evidence in order to reach a conclusion on that matter. In particular, it is not clear that lawful uses were established prior to the unauthorised mixed use.

Conclusion

16. For the reasons given above I conclude that the Council's refusal to grant an LDC in respect of the use of Unit 1 as two separate planning units – (1) commercial Class E and (2) residential Class C3 was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act (as amended).

N Thomas

INSPECTOR

³ Ref DC/19/0462/FUL