

Inspector's Report

Appeal against Refusal of a Disability Access Certificate with respect to a change of use of a retail shop to restaurant café at ground floor and a change of use from restaurant and storage at first and second floor to provide 4 No. AirBnB bedroom units at Circle of Friends, Main Street (also known as High Street), Inistioge, Co. Kilkenny (A Protected Structure, Ref. No.: C546)

Board DAC Appeal Ref. No.: ABP 308260-20

Building Control Authority Ref. No.: DACA 20-036

Appellant: Mr Johnnie McGrath
Main Street
Inistioge
Co. Kilkenny

Agent: Terry Brennan
TBCE
Consultant Engineers
Cootes Lane
College Road
Killkenny

Building Control Authority: Kilkenny County Council

Inspector: Michael Mohan, FRIAI

Appendix Attached: None

Table of Contents

Ref.	Section	Page
1.0	Introduction	3
1.1	Site Description	3
1.2	Subject Matter of Application	3
1.3	Building Control Authority Decision	4
2.0	Information Considered	4
3.0	Relevant History / Cases	5
4.0	DAC Application	5
5.0	Appellant's Case	6
6.0	Building Control Authority's Case	7
7.0	Considerations	8
7.1	Level of detail provided in the application to meet the requirements of the Building Control (Amendment) Regulations 2009	8
7.2	Meeting the requirements of Part M of the Building Regulations	8
8.0	Assessment	11
9.0	Conclusions / Recommendations	12
9.1	Reasons and Considerations	12

1.0 Introduction

1.1. Site description

The subject building is a 3-storey Protected Structure, with a retail shop at ground floor, restaurant café at first floor and storage at second floor, located on the corner of Main (High) Street and The Square in the centre of Inistioge village, Co. Kilkenny

The proposed development includes a change of use of the retail shop to restaurant café at ground floor and a change of use from restaurant and storage at first and second floor to provide 4 No. AirBnB bedroom units.

Access to the site is from Main Street where the public road and footpath are inclined at a gradient of 1:10. There are two access openings in the boundary wall from the public footpath, one with two steps and the other one is level. There is a centrally located entrance door to the building with a 100mm step and an additional shop front entrance with level access.

1.2 Subject Matter of Application

The application is for development works to a Protected Structure of 218m m², including the change of use of a retail shop to restaurant café at ground floor and the change of use from restaurant and storage at first and second floor to provide 4 No. AirBnB/bedroom units.

The Disability Access Certificate application was submitted by the Agent, Terry Brennan Consulting Engineers, on behalf of Johnnie McGrath and was received by the Building Control Authority (BCA) on the 8th June 2020 and included:

- Completed DAC application form
- 2 No. copies of drawings:

Drawing Number	Title	Scale
	Site Location Map	1:2500@A3
201_039_800	Site Layout-Ground Floor Plan	1:50@A1
201_039_802	First Floor Plan	1:50@A1
201_039_803	Second Floor Plan	1:50@A1
201_039_804	Elevations & Section	1:50@A1

- 2 No. copies of the Disability Access Certificate Compliance Report.
- Letter from the Agent dated 24th February 2020.
- €500.00 application fee.

Additional information was requested by the Building Control Authority (BCA) on the 30th June 2020.

The Agent submitted a letter, dated 15th July 2020, in response to the request for additional information which was received by the BCA on 16th July 2020.

The Agent submitted a request for Extension of Time to which the BCA agreed and issued the Extension of Time Request and Agreement to the Agent on 29th July 2020.

1.3 Building Control Authority Decision

The BCA issued a Notification to Refuse to Grant A Disability Access Certificate, DAC No. DACA 20-036, Decision Date: 27th July 2020. Three reasons were attached to the Notification:

2.0 Information Considered

The following information was considered as part of the appeal process:

2.1 Disability Access Certificate application:

Ref. No. DACA 20-036

The application including DAC Compliance Report and drawings, listed at 1.2 above, lodged by the Agent. It was received by the BCA on 8th June 2020. Additional Information was received by the BCA on 16th July 2020. All of these documents were received by the Board from the BCA 9th October 2020.

The BCA issued a Notification to Refuse to Grant A Disability Access Certificate, DAC No.: DACA 20-036, Decision Date: 27th July 2020. The Board received a copy from the BCA on 9th October 2020.

2.2 Appeal Documentation submitted by Agent:

The appeal documentation, received by the Board on 23rd September 2020, included:

- Letter from the Agent, dated 21st September 2020.
- Letter from the Appellant, dated 22nd September 2020.
- Copies of the DAC Technical Report and drawings (listed at 1.2 above).
- Copy of response to further information request from BCA.
- Cheque for €500 with respect to the fee for the appeal.

2.3 Application Documentation from BCA

Kilkenny County Council submitted a letter to the Board, dated 7th October 2020 (in response to a request from the Board, dated 25th

September 2020), which was received by the Board on 9th October 2020 and included copies of the following:

- Copy of the application
- Copies of any plans, documents particulars, evidence of additional information obtained from the applicant.
- Copies of reports prepared by BCA.
- Certified copy of BCA's Manager's Order, dated 26th August 2020.
- Certified copy of Notification of Decision to Refuse, DACA 20-036, dated 27th August 2020, addressed to the Applicant, c/o the Agent.
- Certified copy of Disability Access Certificate DACA 20-036, Decision date 16th July 2020, addressed to the Agent.
- Copies of pre-application notes & communication.

2.4 Notification of a Disability Access Certificate:

Disability Access Certificate, Ref. No. DACA 20-036, issued by the BCA to the Agent on 27th August 2020 and was received by the Board on 9th October 2020, from the BCA. The reasons for the refusal are listed in 1.3 above.

2.5 Observations from the BCA in relation to the appeal:

The BCA submitted a letter to the Board, dated 7th October 2020, which was received by the Board on 9th October 2020. It included the information referred to in 2.3 above which related to the DAC application.

The Board requested comments from the BCA in relation the appeal in a letter dated 27th October 2020. The BCA submitted no further comments on the appeal by 16th November 2020, the deadline date stipulated by the Board.

3.0 Relevant history/cases

BCA's Building Surveyor's Report, dated 26th August 2020, referred to four relevant examples of appeals to An Bord Pleanála on other buildings Ref. Nos. DS0056; DS0057; 302961 and DV0006.

4.0 DAC application

Disability Access Certificate application:

Ref. No. DACA 20-036 application including Disability Access Report and drawings, listed at 1.2 above, was lodged by Terry Brennan Consulting Engineers. It was received by the BCA on 8th June 2020 with additional information received by the BCA on 16th July 2020 and all of these were received by the Board from the BCA 9th October 2020.

Included in the Agent's additional information, dated 15th July 2020 and received by the BCA on 16th July 2020, was a request for the BCA to grant a partial dispensation and relaxation of the relevant requirements of TGD Part M 2010.

5.0 Appellant's case

Terry Brennan Consulting Engineers lodged an appeal on behalf of the applicant/appellant, dated 21st September 2020, against the Refusal to Grant a Disability Access Certificate DACA 20-036. The appeal was received by the Board on 23rd September 2020.

The following is a brief outline of the Appellant's case:

- The existing building is unused and finding a commercially viable use is challenging. The current proposals represent the only practicable option for viability. The enlarged café at ground floor level will allow the café to become a viable commercial business. The bedroom accommodation on the upper floors will provide some seasonal and essential business to supplement the primary café business.
- Existing site constraints, including public roadway and footpath gradients, prohibit modification of existing features.
- Neither an accessible approach or accessible entrance was achievable and it is unreasonable of the BCA to insist on an accessible bedroom in a building which is not independently accessible.
- The physical room spaces in the building are not sufficiently large enough to accommodate an independent accessible bathroom, accessible kitchen facilities and accessible bedroom and circulation space.
- Reference is made to the following extracts from TGD Part M 2010:
- Page 7 - where it states that the adoption without modification of the guidance in this document may not, in all circumstances, be appropriate.
- 0.7 and 0.8 - which advise on the determination of 'practicability' with respect to works to an existing building
- The BCA has discretion in specific cases to grant a relaxation of the Part M requirements and the applicant believes that a relaxation should be granted.
- The existing physical restraints are insurmountable and totally outside the control of the applicant. The applicant proposes the only practicable solution which includes the provision of ambulant disable access, ambulant circulation and sanitary facilities at all levels of the building.

6.0 Building Control Authority's case

The BCA did not submit comments on the appeal when requested to do so by the Board on 27th October 2020. However, the documents which they provided to the Board on 9th October 2020 include reports and correspondence which adequately outlines their case. The following is a brief summary of the BCA's case:

- The BCA refer to Section 1.3.4.1.1 TGD Part M 2010: Where no lift or lifting device is provided, the same range of services/facilities that are available on the other levels should be made available on the entry or accessible level.
- The provision of "ambulant accessible" sleeping accommodation is not a substitute for the requirement of at least one wheelchair accessible accommodation unit.
- The BCA referred to four previous appeal cases Ref. Nos.: DS0056; DS0057; 302961 and DV0006 which were decided by ABP.
- DS0056 and DS0057 were related to hotels where only ambulant accessible accommodation was proposed in buildings which were separate to the main hotel buildings and which were either located in the grounds of the hotel or nearby. All these buildings were Protected Structures. In each case fully accessible accommodation was available in the main hotel buildings. Therefore, the hotels were in a position to offer accessible accommodation as an alternative. Both appeals were upheld by ABP and DACs were issued.
- 302961 concerned an appeal against a condition requiring the provision of a lift where the same facilities could be provided on the accessible ground floor. ABP upheld the appeal so that the lift was not required.
- DV0006 concerned an appeal against lift provision where a material change of use was proposed. ABP decided that a lift was required because the building had a large floor area.
- The applicant is the owner of the whole building and the design could have ensured equitable access to both the restaurant and to at least one short-stay accommodation unit.
- The BCA were mindful that refusal of a DAC would put a halt to this commercial project and offered the applicant the opportunity to submit a revised design.
- No revised design was submitted.
- The BCA did not offer a relaxation as accessible bedroom accommodation could have been provided on the ground floor in a revised design.

7.0 Considerations

7.1 Level of detail provided in the application to meet the requirements of the Building Control (Amendment) Regulations 2009

Section 20 (D) 3(b) of the Building Control (Amendment) Regulation 2009 states that a DAC application should:

- *Identify and describe the works or building to which the application relates;*
- *Enable the building control authority to assess, whether the said works or building would, if constructed in accordance with the said plans and other particulars, comply with the requirements of Part M of the Second Schedule to the Building Regulations;*
- *Identify the nature and extent of the proposed use and, where appropriate, of the existing use of the building concerned.*

Section 20(D) 4 of the Building Control (Amendment) Regulation 2009 states:

(c) *Where a building control authority consider that an application for a disability access certificate does not comply with paragraph (3), they may, as they consider appropriate, having regard to the extent of the failure to comply with the said paragraph, by notice in writing—*

(i) inform the applicant that the application is invalid and cannot be considered by the authority, or

(ii) require the applicant to furnish such further plans, calculations, specifications or particulars, or such additional fee, as may be necessary to comply with the said article

(d) *Where a building control authority serve a notice in accordance with subparagraph (c), they shall return to the applicant all the documents and the fee which accompanied the application.*

7.2 Meeting the requirements of Part M of the Building Regulations

Legislative Considerations

Part M of the Second Schedule to the Building Regulations, (as amended), provides as follows:

To meet the requirements of M1: *Adequate provision shall be made for people to access and use a building, its facilities and environs.*

Technical Guidance:

In the Compliance Report, Terry Brennan Consulting Engineers stated that the report demonstrated that the area subject of this application, if constructed in accordance with the drawings and design details submitted with the application, together with performance standards set out in this report, will comply with the requirements of Part M (Access and Use) of the Second Schedule of the Building Regulations (1997), and the Building Regulations 2010.

Reference to TGD Part M 2010 provides the following guidance:**Page 7, TGD Part M 2010:**

In the case of material alterations or change of use of existing buildings, the adoption without modification of the guidance in this document may not, in all circumstances, be appropriate. In particular, the adherence to guidance, including codes, standards or technical specifications, intended for application to new work may be unduly restrictive or impracticable. Buildings of architectural or historical interest are especially likely to give rise to such circumstances. In these situations, alternative approaches based on the principles contained in the document may be more relevant and should be considered.

0.7 TGD Part M 2010:

In the determination of 'practicability' with respect to works to an existing building, its facilities or its environs the following non-exhaustive list of circumstances should be considered. (i) Where the works would have a significant adverse effect on the historical significance of the existing building, facility or environs e.g. works to a Protected Structure²; (ii) Where the existing structural conditions would require moving or altering a load bearing member which is an essential part of the overall structural stability of the building; (iii) Where other existing physical or site constraints would prohibit modification of an existing feature;

0.8 TGD Part M 2010 referring to Existing Buildings:

Building Regulations do not apply to buildings subject to the National Monuments Acts 1930 to 2004.

0.6 sets out the application of Part M to buildings, new and existing.

The term 'practicability' is used in connection with works (e.g. material alterations and certain material changes of use) to existing buildings which identifies instances where achieving standards of accessibility associated with new buildings is not feasible because of particular circumstances. Refer to 0.7 for guidance on determining practicability.

Where works to existing buildings are carried out in accordance with the guidance in Section 1 of this document, this will, prima facie, indicate compliance with Part M. Where it is not practicable to apply the guidance in Section 1 and works are carried out to Section 2, this will also prima facie indicate compliance with Part M.

Works to existing buildings, such as extensions, material alterations and certain material changes of use, can present many design challenges because of the individual character, appearance and environs of existing buildings. The adoption without modification of the guidance in this document may not in all circumstances be appropriate. While each existing building and site will present its own unique access opportunities and constraints, which may result in different ways of addressing accessibility, the fundamental priorities of accessibility should be as set out in M1, i.e. accessing and using a building, its facilities and environs.

Historic buildings include Protected Structures, which are included by each Planning Authority on a Record of Protected Structures. These buildings have been identified as having particular cultural significance and heritage value. As previously stated, the adoption without modification of the guidance in this document may not, in all circumstances, be appropriate for historic buildings. Liaison with the local Building Control Authority on alternative approaches based on the principles contained in this document may be more relevant and should be considered. In specific cases, a dispensation or relaxation (or partial dispensation or relaxation) of the Requirements may be granted by the local Building Control Authority.

1.3.4.1.1 TGD Part M 2010:

Where no lift or lifting device is provided, the same range of services/facilities that are available on the other levels should be made available on the entry or accessible level.

8.0 Assessment

This appeal is made against a Refusal to Grant a Disability Access Certificate. Having considered the drawings, reports, details and submissions on file it is considered that sufficient information has been provided to assess whether or not the said works (change of use) would, if constructed in accordance with the said plans and other particulars, comply with the requirements of Part M of the Second Schedule to the Building Regulations 1997 to 2019.

The main issue is whether adequate provision has been made to ensure that facilities have been provided for all users to meet the needs of people with a wide range of abilities and in particular the provision of the same range of services/facilities on an accessible level as those that are proposed on other floors in the building.

It is recognised that making use of a Protected Structure like this one is a challenge. While one can appreciate the appellant's commercial concerns, the Building Regulations do not address the financial viability of a development. The issue here is accessibility / Universal Design and whether a Disability Access Certificate can be issued.

The BCA assessed the application on the information submitted and decided to offer the applicant the opportunity to submit additional information to indicate how a one universal accessible bedroom and en-suite facility could be provided at the entry or accessible level, in accordance with the recommendations in Section 1.3.4.1.1 TGD Part M 2010.

In my opinion, if the existing kitchen/pre area & new service counter are retained, the ground floor room, on the other side of stairs, is not large enough to accommodate an independent accessible bathroom, accessible kitchen facilities and accessible bedroom and circulation space. The only part of the ground floor which has sufficient space to accommodate the accessible bedroom/en-suite is where the existing kitchen/prep area & new service counter are located. However, this would rule out the restaurant use. The Appellant cannot provide a ground floor accessible bedroom/en-suite if he wishes to retain the restaurant and he offered no alternative approaches based on the principles contained in TGD Part M 2010. Consequently, he asked the BCA for a dispensation or relaxation.

The BCA decided not to issue a dispensation or relaxation in this case as they could not find a good reason in the guidance that would justify it.

The Appellant has not demonstrated how the proposed development can comply with the requirements of Part M of the Second Schedule to the Building Regulations 1997 to 2019.

9.0 Conclusions / Recommendations

I agree with BCA's assessment of the application. I recommend that the Board rejects the appeal against the BCA's decision.

I recommend that the Board **Refuse** to issue a Disability Access Certificate for the following reasons.

9.1 Reasons and Considerations

Having regard to the provisions of the Building Regulations 1997 to 2019, Second Schedule, Part M, to the nature and layout of the proposed works and to the submission made in connection with the DAC application and appeal and to the report and recommendation of the reporting inspector, it is considered that the works (change of use) to which the application relates, if constructed in accordance with the plans, calculations, specifications and particulars submitted, would not demonstrate compliance with the requirements of Part M of the Second Schedule to the Building Regulations 1997 to 2019 for the following reasons:

Reason 1:

The Appellant has not provided adequate information to demonstrate compliance with Part M of the Second Schedule of the Building Regulations 1997 to 2019.

Reason 2:

The Appellant has not shown that the same range of services (compliant sleeping/sanitary facilities), similar to those on the upper floors, will be provided on the entry/accessible level.



Michael Mohan
Inspector

5th May 2021