



An  
Bord  
Pleanála

## Inspector's Report ABP-308863-20.

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<b>Development</b>	Construction of a 3-5 storey over basement mixed use building to accommodate a ground floor retail unit and 67 no. apartments.
<b>Location</b>	280-288 Harold's Cross Road, Dublin.
<b>Building Control Authority</b>	Dublin City Council
<b>Building Control Authority Ref.</b>	DAC/2020/0400
<b>Applicant/Appellant</b>	Briargate Developments Harold's Cross Ltd.
<b>Type of Application</b>	Appeal v Condition
<b>Building Control Authority Decision</b>	Grant DAC with Conditions
<b>Type of Appeal</b>	First Party v Condition
<b>Date of Site Inspection</b>	03 <sup>rd</sup> June 2021.
<b>Inspector</b>	Patricia Calleary

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## 1.0 Introduction

- 1.1. This report addresses **an appeal against Condition No. 6** attached to a disability access certificate (DAC), granted under the Building Control Act 1990, as amended, for a new building comprising a three to five-storey mixed-use development.

## 2.0 Information Considered

- 2.1. The information considered includes:

- Copy of DAC application and supporting drawings and documents (including compliance report) submitted to the Building Control Authority (BCA).
- Initial application to BCA including technical compliance report and drawings.
- DAC (granted).
- BCA Technical Assessment.
- Written appeal and supporting drawings.
- BCA response to appeal.
- Appellant's further response.

## 3.0 Description of Works

- 3.1. The development comprises a new three to five storey over-basement mixed-use building proposed to accommodate a ground-floor retail unit and 67 apartments<sup>1</sup> at ground to fourth floors with associated balconies. A basement level accommodating 35 no. car parking spaces, bicycle parking, refuse stores and plant rooms is also included. Landscape works, boundary treatments, signage, bicycle parking and associated works and services are also proposed. Internally, the apartments at upper levels are served by means of stairs and a lift access.

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<sup>1</sup> There are 67 apartments shown on the drawings submitted and also referred to in the grounds of appeal. A total of 66 apartments, which seems to be an error, is set out in the application form (and consequently the DAC grant).

## 4.0 Building Control Authority Decision

### 4.1. Decision

- 4.1.1. The BCA granted the DAC with six conditions attached. Condition no.6, the subject matter of this appeal sets out the following:

**Condition No.6:** Wheelchair access shall be provided to each external terrace/balcony areas.

**Reason:** To ensure that all facilities within the building are accessible to and useable and that they are constructed to facilitate active participation.

### 4.2. Building Control Technical Assessment (13<sup>th</sup> October 2020)

- 4.2.1. The recommendation to grant the DAC reflects the decision of the BCA to **grant the DAC subject to six conditions**. The BCA technical assessment considered the following:

- Approach and Access to the building;
- Circulation within the building;
- Sanitary facilities for buildings other than dwellings;
- Other facilities in buildings other than dwellings;
- Aids to communication;
- Access and facilities in each apartment.

## 5.0 Building Control History

- 5.1.1. The proposal is for a new building on site. There is no previous DAC history of relevance pertaining to the site. I am not aware of any DACs decided by the Board on appeal relating to similar issues regarding balcony/terrace access for private apartments.

## 6.0 Legislation and Technical Guidance

- 6.1. The **Building Regulations 1997-2019**, including The Building Regulations (Part M Amendment) Regulations 2010 (S.1. No 513 of 2010) apply. Part M1 (Access and

Use) requires 'Adequate provision shall be made to enable people with disabilities to safely and independently access and use a building'.

6.2. **Technical Guidance Document (TGD): Part M (Access and Use) 2010** provides guidance in relation to Part M of the Second Schedule to the Regulations, as amended by the Building Regulations (Part M Amendment) Regulations 2010 (S.I. No. 513 of 2010). Relevant sections of the TGD: Part M are referenced in the assessment below.

## 7.0 The Appeal

### 7.1. Appellant's Case

7.1.1. The following is set out in the grounds of appeal.

- A fully accessible circulation route has been provided to all public areas of the building.
- Provision of a visitable habitable room and a visitable WC has been achieved in all residential units.
- Design meets the requirements of the Building Regulations 1997-2019 and the relevant Technical Guidance documents.
- The objective of Sections 3.3.1 (Objective) and 3.3.2.1 (Horizontal Circulation in a dwelling) of TGD M:2010 have been achieved in all residential units within the development. All units have a visitable habitable room, a visitable WC and a visitable bedroom.
- Wheelchair access to balconies may be seen as going beyond the requirements of Section 3.3.1 of TGD M, however, access is available to a proportional percentage of balconies within the development.
- Provides a description of the structural make-up of the balconies stating that the depth of floor construction is increased externally at balconies and flat roofs to incorporate insulation and achieve compliance with Part L of the Building Regulations and eliminate cold bridging occurrence and risk of water ingress.

- At some locations, level balconies have been provided by employing a steel cantilever design.
- Provides drawings and a table to indicate the number of balconies with level access (23 in total).

## 7.2. **Building Control Authority Response**

7.2.1. The BCA response to the appeal includes the following:

- Part M of the Building regulations requires that 'Adequate provision shall be made for people to access and use a building, its facilities and environs'.
- Section 0.1 of TGD: M 2010 states that buildings should be designed so that they are easy for people to use and to reflect the fact that people experience changes in their abilities as they progress through different stages of their life.
- The requirements of Part M are intended to underpin the principles of universal design.
- Condition no.6 requires that the external balcony of the apartments is designed to be accessible to people who use wheelchairs.
- Modern apartment design provides a balcony or terrace as an extension of living room.
- A significant step up to the balcony (as proposed) makes future adaption of apartments for people who use wheelchairs highly unlikely and contrary to principles of universal design, and in the view of the BCA, also Part M1 of TGD: Part M 2010.
- The design solution is noted, but it includes an unnecessary obstacle for accessing the balcony/terrace and the design could be amended.

## 7.3. **Appellant's further response**

- The design meets the requirements of M1 (of TGD: Part M 2010) in that all floors of the building are fully accessible, and all services and environs of the building are either accessible or an equivalent accessible provision is made.
- There is no requirement in the technical guidance for all areas within a private dwelling to be fully accessible.

- Section 0.1e (e) of the guidance states that ‘new dwellings are visitable’.
- The requirements for dwellings are outlined in Section 0.4.
- Each apartment has at least one habitable room and a visitable WC is also provided at the entry level in each apartment.
- All private dwellings are required to be visitable, but not all areas are required to be ‘accessible’.

## 8.0 Assessment

### 8.1. Introduction

- 8.1.1. The development relates to a new building that is a three to five storey over-basement mixed-use building proposing to accommodate a ground floor retail unit and 67 no. apartments at ground to fourth floors.
- 8.1.2. Construction is stated to have commenced on site on 23<sup>rd</sup> March 2020 and an application for a DAC was lodged on the 15<sup>th</sup> September 2020. The DAC was granted on 11<sup>th</sup> November 2020 with six conditions, including Condition No.6, the subject matter of this appeal. All apartments are served by stairs and there is also lift access specified to be in accordance with section 1.3.4.2 of TGM: 2010.
- 8.1.3. The construction phase is well advanced. As the Board will be aware, a DAC is required before a building can be **occupied**. It is not necessary to have obtained a DAC prior to commencement of the development.

### 8.2. Scope of Appeal

- 8.2.1. Having reviewed all relevant documentation and drawings on file and having regard to the nature of the condition under appeal, I am satisfied that the determination by the Board of this application as it had been made to it in the first instance would not be warranted. Accordingly, I consider that it would be appropriate to use the provisions of Article 40(2) of the Building Control Regulations 1997-2021 in this case. My assessment below considers the appeal against the attachment of condition no.6.

### **8.3. Discussion**

#### **8.3.1. Appellants Case**

It is the appellant's case that the proposed design meets the requirement of TGD:M 2010, including M1 (adequate provision shall be made for people who access and use a building, its facilities and environs). It is submitted that there is no requirement that all areas within a private dwelling are fully accessible. Instead, the requirement of the guidance, as expressed through Section 0.1 of TGD:M 2010, is that 'new dwellings are visitable' and, as expanded on in Section 0.4, in which it is set out that at least one habitable room and a visitable WC are provided at the entry level of each apartment. It is submitted by the appellant that the condition attached is an incorrect interpretation of TGD M 2010. Notwithstanding the above arguments, it is stated that 23 of the 67 apartment units will be fitted with level access balconies, however, the remaining 44 units will not.

On the day of my inspection, I observed the two types of balconies that are now under construction. Forty-four of these are concrete balconies, recessed into the building, and these also function as a concrete roof over the apartment beneath. The recess and balconies are staggered on alternative floors. It is submitted in the appeal that these balconies will not have level access because of requirements to incorporate insulation and achieve compliance with Part L of the Building Regulations and to eliminate cold bridging occurrence and because of risk of water ingress. This design has the effect of requiring an upstand and hence the finished floor level of the balconies will be above the internal floor level within the apartments and will not be accessible for persons in wheelchairs. The remaining 23 apartments propose a bolt on steel balcony and these project outwards from the building and are not constrained because they do not function as a roof over balconies beneath. These will have level access and will be accessible for persons using wheelchairs.

It is submitted that the design meets specific requirements of the guidance specified in TGD: M 2010, specifically Sections 3.3.1 (Objective) and 3.3.2.1 (Horizontal circulation in a dwelling).

#### **8.3.2. DCC Building Control Authority's Case**

It is the BCA's case that Condition no.6 requires external balconies of private apartments to be accessible to people who use wheelchairs. It is submitted that Part



M of the Building regulations requires that 'Adequate provision shall be made for people to access and use a building, its facilities and environs' and this extends to balcony/terrace areas. In support of the condition, the BCA refer to Section 0.1 of TGD: M 2010, which states that buildings should be designed so that they are easy for people to use and to reflect the fact that people experience changes in their abilities as they progress through different stages of their life. It is also set out that the situation of a significant step up to the balcony (as proposed) makes future adaption of apartments for people who use wheelchairs highly unlikely and contrary to the principles of universal design, and in the view of the BCA, also Part M1 of the technical guidance document.

#### 8.4. Technical Assessment

- 8.4.1. Part M of the Building Regulations deals with 'Access and Use'. The associated Technical Guidance Document M provides guidance indicating how the requirements of Part M can be achieved in practice. Where works are carried out in accordance with TGD M, this will, *prima facie*, indicate compliance with Part M of the Second Schedule attached to the Building Regulations.
- 8.4.2. It is firstly relevant to note that all apartment units are accessible by stairs and a lift. Otherwise, the requirements for private dwellings (which can readily be interpreted as extending to include private apartments), is set out in Clause 0.1(e) of TGD M: 2010 requiring that 'new dwellings are visitable'. This is expanded on in Clause 0.4 in where the following is set out:

'Dwellings should be designed and constructed so that:

(ii) people can have access **to the main habitable rooms at entry level.**

Where there is no habitable room at this level, it is considered adequate to provide for access to habitable rooms on the storey containing the main living room. Access to this storey from the entry storey may be by means of a stairway suitable for use by ambulant disabled people;

(iii) a WC is provided **at each entry level, or**, where there are no habitable rooms at this level, **on the storey containing the main living room'**.

8.4.3. Having reviewed the design, each apartment has at least one habitable room and a visitable WC, both located at entry level. Therefore, each apartment meets the requirements for being 'visitable' set out in Section 0.1(e) and expanded in Section 0.4, specifically (0.4)(ii) and (iii). In addition to the above, noting the design drawings, the compliance report and other conditions attached to the DAC, the requirements of Section 3.3 (circulation within dwellings) and 3.3.2.1 (horizontal circulation within a dwelling) are achieved in all of the apartment units. This is not disputed. Of relevance is the last paragraph of the guidance in this section, which requires:

'Where a stepped change of level is provided within the storey, e.g., because of the slope of the site, it should be located so that at **least one habitable room and a room containing a WC** can be accessed from the accessible entrance without the need to negotiate the step(s)'.

8.4.4. The above guidance set out in Section 3.3.2.1 re-states the requirement for private dwellings and by extension, private apartment units, that is the provision of **one habitable room** and a **room containing a WC**, both that are required to be accessible from the accessible entrance.

8.4.5. TGD: Part M provides very specific guidance requiring all dwellings (and by extension private apartments) to be 'visitable'. The spirit of the guidance is that persons with varying access needs, including persons in wheelchairs, can visit another person's private home (dwelling or apartment). Specifically, the guidance requires that a visitor can access a habitable room, for example the sitting room, and use a WC close to the habitable room. The current guidance does not require that persons visiting a private dwelling or apartment can access the external balcony/terrace. Access to a habitable room and WC has been provided in all of the apartments at the appeal location. The guidance contained in TGD: M 2010 does not require anything further, including the provision of access for wheelchairs on balconies.

8.4.6. Notwithstanding the above, as noted in the appeal, 23 of the 67 apartments provide level access to balconies. The appellant makes the case that this number, which equates to 34% of all apartments in the development is well in excess of the precedent set out in TGD: Part M for other accessible facilities, including in Section 1.5.2 (facilities in **buildings other than dwellings** - introduction), where one guest

bedroom out of every twenty accessible bedrooms is required in hotels. I also note that under Section 1.1.5 (Approach to **buildings other than dwellings**-on-site car parking), at least 5% of car parking spaces provided are required to be designated car parking spaces exclusively for the holders of a disabled person's parking permit. These specific requirements relate to buildings other than dwellings where generally a higher standard of access is required to facilitate visiting members of the public. The proposal for 23 of the 67 private apartment units to be provided with balconies/terrace areas which are accessible for persons using wheelchairs goes beyond the requirements for private dwellings and apartments, and as is set out directly above, would, nonetheless, exceed the requirements for higher standard required for '**buildings other than dwellings**'.

- 8.4.7. While I note the desire of the BCA in promoting a greater standard of access and the design philosophy of universal design, nonetheless, their interpretation of Part M:2010 overall requirement for '**Adequate provision shall be made for people to access and use a building, its facilities and environs**' extending to the balcony/terrace area, goes beyond the current minimum statutory requirement of the Building Regulations and the supporting technical guidance provided in TGD: Part M 2010.
- 8.4.8. In relation to the BCA's reference to Section 0.1 of TGD 2010 which sets out that buildings should be designed so that they are easy to use and reflect the fact that people experience changes in their abilities as they progress through different stages in their life, this is general guidance under the heading (0.1 – General). The section sets out the context of the guidance and refers to **all building types**, not just dwellings/apartments. Of relevance, under the same heading (0.1 General), part (e) includes a requirement that 'all **dwellings** are visitable'. The guidance is expanded further under 0.4 (Dwellings) and I have dealt with this in Section 8.4.2 of my assessment above.
- 8.4.9. Having regard to the assessment above, I conclude that the provision of wheelchair access onto the balcony areas, as set out in Condition no.6, is not required to satisfy the statutory requirements of Part M of the current Building Regulations, specifically M1 (Adequate provision shall be made for people to access and use a building, its facilities and environs).

## 9.0 Recommendation

- 9.1. I recommend that An Bord Pleanála hereby allows the appeal, and that based on the Reasons and Considerations set out below, directs the Building Control Authority to **REMOVE** condition No.6.

## 10.0 Reasons and Considerations

Having regard to the nature and extent of the proposed works, to the guidance given in Technical Guidance Document M: 2010 (Access and Use), to the submissions made in connection with the Disability Access Certificate application and appeal, and to the report and recommendations of the reporting inspector, it is considered that subject to the removal of Condition No.6 that compliance with the current statutory requirements of Part M of the current Building Regulations, specifically M1 (Adequate provision shall be made for people to access and use a building, its facilities and environs) would be achieved.

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Patricia Calleary

5<sup>th</sup> June 2021