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Chartered Engineers
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Report 3708

**An Bord Pleanála Appeal regarding the decision by Limerick City and
County Council to refuse to grant a revised Fire Safety Certificate
at 12 Mallow Street, Limerick**

Client: An Bord Pleanála,
64 Marlborough Street,
Dublin 1

FAO: The Secretary

FENNELL'S BAY, CROSSHAVEN, CO. CORK, IRELAND
TEL: (021) 4832882 EMAIL: RConnolly@FireRiskSolutions.com

PRINCIPAL: DR R CONNOLLY BE, PhD, CEng, MIEI, MIFireE, MSFPE
Registered in Ireland No. 334019

BUILDING CONTROL ACT, 1990 to 2014 – APPEAL

**FIRE SAFETY CERTIFICATE APPLICATION FOR
AT 12 MALLOW STREET, LIMERICK**

APPEAL AGAINST REFUSAL TO GRANT A REVISED FIRE SAFETY CERTIFICATE

AN BORD PLEANÁLA APPEAL REFERENCE 310227-21

Local Authority: Limerick City & County Council

Appellant: Bridget & Rory O'Donnell

RECOMMENDATION

This appeal should be upheld and a Revised Fire Safety Certificate granted subject to the Condition:-

Condition

The works to which the application relates shall be completed in accordance with the plans, specifications and particulars submitted on 21st October 2020 and 27th November 2020. Where details are not specified on drawings and plans submitted, the works shall comply in all respects with Part B of the Building Regulations, 1997 to 2017.

Reason

In order to comply with Parts B1, B2 and B3 to the Building Regulations 1997.

Reasons & Considerations

Having regard to the form, use and layout of the building, it is considered that the specific package of enhanced fire safety precautions proposed by the appellant are sufficient to deliver compliance with Part B1 of the Second Schedule of the Building Regulations, 1997-2017. For that reason, a Revised Fire Safety Certificate should be granted. A standard condition requiring that works be completed in accordance with the various details proposed should be attached to confirm the agreed basis of design.

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Dr. Raymond J Connolly

BE, PhD, CEng, MIEI, MIFireE, MSFPE

CONTENTS

	Page No.
1. Relevant information	5
2. Background	6
3. Reprise of appeal as presented	7
4. Consideration	9
5. Conclusion	13

1. RELEVANT INFORMATION

- i. Application for a Revised Fire Safety Certificate by Seamus McElligott on behalf of Bridget & Rory O'Donnell to Limerick City and County Council (form originally dated 22nd February 2020) and re-submitted under letter dated 21st October 2020.
- ii. Compliance Report by Seamus McElligott dated 22nd February 2020 including associated drawings.
- iii. Letter of further information from Cáit Ní Cheallacháin on behalf of Bridget & Rory O'Donnell to Limerick City and County Council dated 27th November 2020.
- iv. Decision to Refuse a Revised Fire Safety Certificate application (Ref. F8457/SB/NM) under Order No. FIR65/21 by Limerick City & County Council dated 20th April 2021.
- v. Letter of appeal from Cáit Ní Cheallacháin on behalf of Bridget & Rory O'Donnell to An Bord Pleanála dated 13th May 2020, including 14 no. appendices.
- vi. Letter from Limerick City & County Council to An Bord Pleanála dated 25th June 2021.
- vii. Letter to An Bord Pleanála dated 11th July 2021 from Cáit Ní Cheallacháin on behalf of Bridget & Rory O'Donnell responding to the Limerick City & County Council submission.
- viii. Limerick City & County Council History Files F8374/GB/MFR, F7840, 19/FSC/D/117 and 18/257.

2. BACKGROUND

Seamus McElligott acting as agent for Bridget and Rory O'Donnell made an application to Limerick City & County Council for the re-visiting of previously granted Fire Safety Certificate Ref. 19/FSC/D/117 to permit use of the third floor within an existing domestic dwelling at No. 12 Mallow Street, Limerick. The original Fire Safety Certificate related to the sub-division at ground level of the existing 4-storey over basement dwelling to fully separate the basement (to comprise a stand-alone externally accessed flat) and upper levels (comprising a 4-storey dwellinghouse). However, to expedite approval the applicant conceded that the topmost (third) floor level of the truncated dwellinghouse would remain unoccupied (except for maintenance access), i.e. no habitable usage.

The Revised Fire Safety Certificate subject of the current appeal is effectively seeking to reverse that undertaking to prohibit habitable use of the third floor. The application was refused by Limerick City and County Council (under Order No. FIR65/21) on 20th April 2021 for reasons of fire safety and specifically that:-

- The proposed habitable rooms on the third floor, which is more than 7.5 metres above street level, would not be provided with an alternative escape route as recommended by Section 4.4 of BS 5588:Part 1:1990, e.g. by means of a second protected stairway.
- No secondary protected stairway is proposed to be included.

On 13th May 2021, Cáit Ní Cheallacháin appealed, on behalf of Bridget & Rory O'Donnell, to An Bord Pleanála against the refusal to grant the Revised Fire Safety Certificate. This Report concerns that appeal.

3. REPRISE OF APPEAL (AS PRESENTED)

The subject works are stated to comprise the material alteration of the previously approved sub-division of a long-established 4-storey single dwellinghouse over basement into two separate dwellings, i.e. a stand-alone basement flat and a 3-storey dwellinghouse with a non-habitable third floor. The original works were approved by Limerick City and County Council under Fire Safety Certificate Reg. Ref. 19/FSC/D/117. The proposed alteration comprises the removal of the prohibition of residential usage of the third floor level, i.e. to deliver a 4-storey single family dwellinghouse. It is noted that the third floor level sits more than 7.5 metres above street level. Additional safety measures were proposed by the applicant including:-

- At ground floor level, removal of the door between the kitchen and the protected stairway.
- Upgrading of door between living room and stairway to FD30.
- Provision of self-closing devices to fire doors opening into stairway.
- Provision of a proprietary automatic fire suppression system to the kitchen.
- Upgrading of the automatic fire detection and alarm system to Grade LD1 to BS 5839.
- Provision of a 1.0 m² automatic opening vent above the stairs.

The appellant contends that the building has been made safer due to the above works. The appellant has also submitted a Risk Assessment by a third party fire engineer, Mr. Steve Emery, that concludes that the provision of enhanced fire precautions are sufficient to permit habitable use of the third floor in a manner that is no more dangerous than would be the case for an equivalent building less than 7.5 metres in height but missing these various fire safety provisions.

The appellant contends that Technical Guidance Document B permits some flexibility in the provision of fire precautions to existing buildings, particularly those of architectural or historic merit. The rigid imposition of prescriptive guidance in Technical Guidance Document B that would require provision of sprinklers throughout or provision of a secondary means of escape from the third floor level (given that it is more than 7.5 metres above ground level) as might be appropriate to a new building does not represent the flexible approach necessary for a 210 year old building.

The appellant presents a number of further arguments in support of the appeal including:-

- The impracticality of installing a second stairway within an existing building.
- The impracticality of installing a protected passageway from the ground level courtyard to the public laneway.
- The fact that the staircase is shared by a single household.
- The fact that the third floor is existing for 210 years with third floor bedrooms in use (presumably up until completion of works associated with Fire Safety Certificate 19/FSC/D/1117 wherein habitable usage of the third floor should have been discontinued).

In response to the appeal, Limerick City & County Council observed that their refusal is based on their observation of guidance contained in BS 5588:Part 1:1990 as appropriate to habitable storeys more than 7.5 metres above ground level within a dwellinghouse, i.e. requiring of a secondary escape route.

The appellant responded to the Council's observation by suggesting that BS 5588:Part 1:1990 is out-of-date and in any event its guidance does not cover existing residential buildings. The appellant further notes the absence of objection from the Fire Officer during the planning process.

4. CONSIDERATION

In the Revised Fire Safety Certificate Compliance Report submitted by the applicant's agent to Limerick City & County Council, the choice was explicitly made to demonstrate compliance with Part B1 to the Building Regulations using BS 5588:Part 1:1990 and BS 9991:2001[*sic*]. In such a context, the appellant cannot reasonably seek to sustain an appeal on the basis that application of the code is unsuitable. For the avoidance of doubt, it is entirely reasonable and consistent for Limerick City & County Council to refuse to grant the application on the basis of the design's contravention with the recommendations of the chosen codes of practice.

In a similar vein, it is pointed out that the failure of the Fire Authority to object to a design in the context of the *Planning and Development Act* imposes no constraints on its capacity, indeed obligation, to subsequently ensure that the design complies with the *Building Regulations*. It is a matter for the designer to detail and validate to the necessary extent as to how a proposed design meets the requirements of the Building Regulations. The absence of such information at planning stage typically limits the capacity of a Fire Authority to properly consider anything beyond "big picture" fire safety issues. In simple terms, the absence of an objection from the Fire Authority at planning stage cannot be construed as assuring a future approval at Fire Safety Certificate stage.

All works that fall within the scope of Part B to the Building Regulations remain subject to the functional requirements of those Regulations. Outside of the formal process of applying for a dispensation, once an application for a Fire Safety Certificate is made, the applicability of Part B to the Building Regulations is not a matter within the discretion of the Fire Authority. Parts B1 to B5 apply to subject works regardless of the age, condition, heritage value or economic circumstances surrounding the proposed works.

The Building Regulations do not apply retrospectively, i.e. existing buildings are not required to be continually upgraded to meet changing and improving Building Regulation standards. However, new works (other than minor works) within existing buildings need to meet the relevant requirements of the Building Regulations that are current at the time when the works are being undertaken. Further, those parts of an existing building that are not new and therefore not subject of the Building Regulations, shall not become subject of some new or greater contravention with Building Regulations as a result of the works. In the context of the subject building at 12 Mallow Street, this means that the initial application to sub-divide the existing dwellinghouse at ground floor level to form two stand-alone dwellings should have demonstrated *inter-alia* compliance with Building Regulation B3 (prevention of fire spread between newly formed neighbouring dwellings) and Building Regulation B1 (whether installation of the new ground floor would impact upon the existing escape routes to an extent that

would give rise to a new or greater contravention with the Regulations). Given that the existing ground and 3 no. upper levels of the existing dwellinghouse were not relying on exit at basement level, installation of an imperforate barrier between ground and basement levels could not logically have negatively impacted upon the existing means of escape facilities. In simple terms, whilst occupants of the third floor at 12 Mallow Street may have been living with a degree of fire safety risk significantly higher compared to third floor occupants within a new building, this existing and long-standing degree of risk was not increased by the new sub-division installed at ground level.

The approach that appears to have been adopted by Limerick City & County Council in its consideration of both the original Fire Safety Certificate and the subject Revised Fire Safety Certificate is one where the proposed installation of the sub-dividing floor was viewed as a “trigger event” that required both of the newly formed dwellings to individually meet modern means of escape requirements. It is my view that such an approach fails to avail of the flexibility offered to existing buildings by Clause 11(1)(b) of the Building Regulations, 1997. My view is expressed without any negative connotation regarding the motivation of the Council nor any endorsement of BS 5588:Part 1:1990 as comprising a modern standard. It is the case that the applicant referenced BS 5588:Part 1 as the preferred design standard and ultimately it is a matter for the applicant to demonstrate compliance with the Regulations.

Clause 11(1)(b) of the Building Regulations 1997 makes clear that the Regulations only apply to parts of a building affected by the subject works only to the extent whereby works shall be demonstrated not to cause a new or greater contravention with the Regulations. Where existing parts of the building do not achieve nor have ever needed to achieve compliance with the Regulations, then the threshold of “no new or greater contravention” clearly allows retention of the existing situation – notwithstanding the intuitive antipathy for enforcing authorities towards being seen to approving standards that are lesser than what is currently considered to be safe. Whilst it is reasonable for the local authority to make designers aware of where they may be sitting within the spectrum of fire safety risk, it remains the prerogative of designers to choose on behalf of their clients not to improve their existing fire safety risk to the extent demanded by specific modern codes of practice. In this specific case, a robust package of fire safety enhancements has been evolved by the building’s designers to deliver an alternative and less invasive means of reducing fire safety risk.

There is, however, a difficulty with this appeal. The difficulty arises from the manner in which matters have reached their current point. The threshold of causing “no new and greater contravention” with Part B to the Building Regulations was available in the original application for sub-division of the building as approved under Fire Safety Certificate 19/FSC/D/1117. As outlined above, the case could have been made at that juncture that the occupants of the upper levels of the 4-storey dwellinghouse

were not exposed to any increased fire safety risk by the installation of the sub-dividing floor at ground level. However, that argument was not sustained at that time and as a tactical move, the application was completed on the basis of the third floor level not being a habitable space and the Fire Safety Certificate was granted on this basis. This is not in dispute between the parties.

The subject appeal relates to the Revised Fire Safety Certificate necessary to return this currently uninhabited floor back into its previous habitable bedroom use. In this context, the question to be asked is whether the now proposed new introduction of bedrooms to the third floor would give rise to a new or greater contravention with Building Regulations than exists for the existing uninhabited floor. Quite clearly, the answer to this question is affirmative, i.e. persons sleeping in bedrooms at third floor level are at more risk and in more contravention of Part B1 than the existing situation, where no sleeping is permitted at third floor level. In effect by conceding the argument within the previous Fire Safety Certificate and changing the default existing situation, the applicant is technically precluded from now measuring the design against the previously existing situation. Instead, the level of safety for the proposed design needs to be compared against the current existing situation, i.e. vacant third floor.

This may appear to the applicants to be a matter of procedural semantics given their likely view that the entire “process” has been one continuum in the sense of moving from the pre-existing basement + four-storey B&B/dwellinghouse into their always intended outcome of a stand-alone basement and separate 4-storey dwellinghouse. However, were it the case that buildings could be developed by way of “piggy backing” Revised Fire Certificates in a piecemeal manner each seeking to be measured against the initial existing situation of effectively not meeting any modern safety standards, then one could easily imagine a scenario where the tactical programming of works and certification could undermine the intent behind the Regulations. Given its limited size and the apparent *bona-fides* of the design team involved, this issue does not come into play in this case but nonetheless the principle has to be observed. It is not acceptable for designers to give “short-term” commitments to expedite approvals only to seek to reverse them at a later stage in the expectation that nothing has changed in the interim. In simple terms, this argument should have been had and if necessary subject to appeal at the time of the original Fire Safety Certificate. Whilst the option to make revisions to design exists in statute, applications should at all times be evaluated against the appropriate “existing” situation.

In light of the above, the sole basis for the appeal boils down to the credibility of the appellant’s third party engineer’s assertion that “the additional fire precautions, both inherent and provided by the development are such that the additional height does not make the building any more dangerous than an equivalent building that is below 7.5 metres which does not have these precautions” (Mr. Steve Emery). Mr. Emery’s conclusion is not substantiated by anything beyond a very basic quantitative

analysis. However, Limerick City & County Council have not addressed this specific aspect of the appeal nor commented adversely on the analysis provided by Mr. Emery.

I am satisfied that the proposed package of fire safety precautions will ensure that occupants of the proposed third floor level in this specific instance would not be exposed to undue risk in the case of fire such as would give rise to non-compliance with Part B1 to the Building Regulations. For the avoidance of doubt, the measures understood to be proposed by the applicant in this context comprise:-

- Access to the stairway throughout its full height via minimum FD20 fire doors, including the half-landing utility room, but excluding bathrooms/WCs.
- Removal of the direct connection between the kitchen and the protected stairway.
- Upgrading of door between living room and stairway to FD30.
- Provision of self-closing devices to all fire doors opening into stairway.
- Provision of a proprietary automatic fire suppression system within the kitchen.
- Provision of automatic fire detection and alarm system to Grade LD1 to BS 5839:Part 6:2019.
- Provision of a 1.0 m² automatic opening vent above the stairs.
- Increased floor to ceiling heights as described with the application drawings.

The Revised Fire Safety Certificate Compliance Report prepared by Seamus McElligott and submitted with the application on 21st October 2020 refers.

Should the Board determine to grant of the Revised Fire Safety Certificate, it is recommended that the standard condition that would otherwise have been attached by Limerick City & County Council, had they decided to grant the application locally, should also be attached by the Board to the effect that “the works to which the application relates shall be completed in accordance with the plans, specifications and particulars submitted on 21st October 2020 and 27th November 2020. Where details are not specified on drawings and plans submitted, the works shall comply in all respects with Part B of the Building Regulations, 1997 to 2017”.

5. CONCLUSION

This appeal should be upheld and a Revised Fire Safety Certificate granted subject to the single Condition:-

Condition

The works to which the application relates shall be completed in accordance with the plans, specifications and particulars submitted on 21st October 2020 and 27th November 2020. Where details are not specified on drawings and plans submitted, the works shall comply in all respects with Part B of the Building Regulations, 1997 to 2017.

Reason

In order to comply with Parts B1, B2 and B3 to the Building Regulations 1997.

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