

Inspector's Report

Appeal against a condition attached to a Disability Access Certificate for material alterations and a change of use of the first floor from retail to restaurant (595sq.m. including basement & ground floor) at 61/62 Mary Street, Dublin 1, D01 XP94

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| Board DAC Appeal Ref. No.: | ABP-311535-21 |
| Building Control Authority Ref. No.: BCMS Submission No.: | DAC2104435DC 4002246 |
| Appellant: | JSMT Distribution Ltd. Unit 18, KCR Industrial Estate Kimmage Dublin 12 |
| Agent: | Rogers Brassil Associates 72 Albert Road Lower Sandycove Dún Laoghaire Co. Dublin |
| Building Control Authority: | Dublin City Council |
| Inspector: | Michael Mohan, FRIAI |
| Appendix Attached: | None |

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1.0 Introduction

1.1. Site description

The building is existing. It is located in one of the main shopping streets in the city and comprises three / part four stories above basement. Access is directly from the public footpath.

Currently the ground and first floors are used for retail with the remaining upper floors and basement being used for storage. The works relating to this DAC application/appeal affect the basement, ground and first floors. The second and third floors will remain vacant and no works are proposed to them. Works to the basement involve provision of storage and upgrading existing staff areas. Layout changes are proposed to the ground floor associated with the retail use. The main alterations relate to the material change of use of the first floor from retail use to a restaurant.

1.2 Subject Matter of Application

The application is for a material change of use of the first floor from retail to restaurant and material alterations to the basement, ground and first floor.

The Disability Access Certificate application, BCMS Reference No, DAC2104435DC, Submission No. 4002246, was submitted by Rogers Brassil Associates, on behalf of JSMT Distribution Ltd, and was received by the Building Control Authority (BCA) on the 16th July 2021 and included:

- Completed DAC application form and cheque for €800.
- Copies of the following drawings:

| Drawing Number | Title | Scale |
|-----------------------|---|--------------|
| MS-DAC-01 | Site Location Map | 1:1000 |
| MS-DAC-02 | Proposed Basement Floor Plan | 1:100 |
| MS-DAC-03 | Proposed Ground Floor Plan | 1:100 |
| MS-DAC-04 | Proposed First Floor Plan | 1:100 |
| MS-DAC-05 | Existing Second Floor Plan | 1:100 |
| MS-DAC-06 | Existing Third Floor Plan | 1:100 |
| MS-DAC-07 | Proposed Elevation & Section A-A | 1:100 |
| MS-DAC-08 | Proposed Elevation to Jervis Lane Upper | 1:100 |
| MS-DAC-09 | Existing Basement Floor Plan | 1:100 |
| MS-DAC-10 | Existing Ground Floor Plan | 1:100 |
| MS-DAC-11 | Existing First Floor Plan | 1:100 |
| MS-DAC-12 | Existing Second Floor Plan | 1:100 |
| MS-DAC-13 | Existing Third Floor Plan | 1:100 |
| MS-DAC-14 | Existing Elevation & Section A-A | 1:100 |
| MS-DAC-15 | Existing Elevation to Jervis Lane Upper | 1:100 |
| MS-DAC-16 | Site Layout Plan | 1:250 |

The list of drawings shown in the table above were received as part of the appeal by An Bord Pleanála on 29th September 2021.

- Copy of Disability Access Certificate Application Report.

1.3 Building Control Authority Decision

- The BCA issued a Disability Access Certificate File Ref. No, DAC2104435DC, Submission No. 4002246, dated 10th September 2021. Eleven Conditions were attached to the Disability Access Certificate.

2.0 Information Considered

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

1. Disability Access Certificate application:

File Ref. No, DAC2104435DC, Submission No. 4002246

Application including Disability Access Certificate Application Report and drawings, listed at 1.2 above, was lodged by Rogers Brassil Associates. It was received by the BCA via the BCMS system on 16th July 2021 and received by the Board from the BCA 13th October 2021.

2. Appeal Documentation submitted by Agent:

The appeal documentation, received by An Bord Pleanála on 29th September 2021, included:

- Letter of appeal from Rogers Brassil Associates to An Bord Pleanála, dated 18th September 2021.
- The list of drawings listed in the table shown in 1.2 above.
- Copy of Decision to Grant DAC with Conditions, date of issue 10th September 2021
- Copy of Disability Access Certificate Application Report.

3. Application Documentation from BCA

Dublin City Council, Building Control Division, submitted a letter to the An Bord Pleanála, dated 13th October 2021 (in response to a request from the Board, dated 1st October 2021), which was received by the An Bord Pleanála on 13th October 2021 and included copies of the following:

- Copy of the application documents including submitted drawings (listed in the table in Section 1.2 above) and Disability Access Certificate Application Report.

- Certified copy of Manager's Order, No.237/21, dated 10th September 2021.
- Certified copy of the Decision to Grant with Conditions dated 10th September 2021 and the BCA's Building Surveyor's Report, dated 22nd July 2021.

4. Notification of a Disability Access Certificate:

The BCA issued a Disability Access Certificate, File Ref. No, DAC2104435DC, Submission No. 4002246, dated 10th September 2021. Eleven Conditions were attached to the Disability Access Certificate.

5. Observations from the BCA in relation to the appeal:

The BCA submitted a letter with the BCA comments on the appeal to An Board Pleanála, dated 27th October 2021, which was received by the Board on the same day.

6. Invitation to Agent to make a submission

An Bord Pleanála's letter, dated 19th November 2021, to the Agent inviting him to make submissions or observations in relation to the submission, dated 27th October 2021, received from the BCA. An Bord Pleanála did not receive a response from the Agent.

3.0 Relevant history/cases

This Inspector is not aware of a previous DAC application relevant to this building.

4.0 DAC application

Disability Access Certificate application:

File Ref. No, DAC2104435DC, Submission No. 4002246

Application including Disability Access Certificate Application Report and drawings, listed at 1.2 above, was lodged by Rogers Brassil Associates. It was received by the BCA via the BCMS system on 16th July 2021 and received by the Board from the BCA 13th October 2021.

5.0 Appellant's case

Rogers Brassil Associates Ltd. lodged an appeal on behalf of the applicant/appellant, dated 18th September 2021, against Condition No. 3 attached to the Disability Access Certificate, DAC2104435DC. The appeal was received by the Board on 29th September 2021.

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

- The BCA did not take account of the fully accessible offering at ground floor level, of all the goods and services available at first floor level.
- To quote the Agent: "The building is in excess of 100 years old and should have been treated accordingly with regard to the practicality, feasibility / and onerous requirement to provide a lift".
- It should not have been assessed in the same way as a new building.
- Condition 3 is unfair and onerous.

6.0 Building Control Authority's case

The following is a brief summary of the BCA's case:

- The applicant proposed a significant change to the use of the building at first floor level.
- Only a small space of approx.9 sq.m. is proposed at ground floor level for a wheelchair user to use a table with 1 or 2 accompanying guests at most. There will be no scope to accommodate wheelchair users if this area is occupied, whereas availability would be greatly improved if there was access to the first floor. This dedicated space on the ground floor will be located within a predominantly retail shopping space, near the main entrance. It does not provide the same facilities as those on the first floor and segregates wheelchair users from the main restaurant, and could potentially be easily subsumed into the retail space.
- The facilities at first floor level are substantially different to the ground floor facilities. A lift should be provided for all building users to access the first floor seating area which would allow an inclusive approach rather than have wheelchair users segregated.
- It may not be practicable to accommodate a traditional passenger lift but it appears reasonable to provide a platform lift within the open void between the ground and first floors.
- All persons should be able to travel within the building conveniently and without discomfort to make use of all relevant facilities and to provide an inclusive approach.

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.*

The drawings submitted with the application and appeal provided sufficient detail to enable assessment of the application and appeal.

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 sub-paragraph (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 their Disability Access Certificate Application Report, Rogers Brassil Associates stated that the works will “comply substantially with the requirements Part M (Access for People with Disabilities) of the Building Regulations 2010”. The correct title of Part M of the Building Regulations 2010 should be “Access and Use”. In addition, they stated that reference was made to Section 2 of Part M which appears to be referring to Section 2 of the Technical Guidance Document Part M 2010.

Regarding the provision of a lift, TGD M 2010 2.3.4.1.1 states that *the guidance in 1.3.4.1 should be followed except where the provisions of 2.3.4.1 apply (see below).*

TGD M 2010 1.3.4.1.1 guides that passenger lifts should be provided in all multi-storey buildings but it allows for an exception where it states: “*non-residential or mixed use buildings with a nett floor area per floor of less than 200 m².....*”. In this case the first floor area exceeds 200 m².

TGD M 2.3.4.1. guides that “*The guidance in 1.3.4.1 should be followed except where it is not practicable to provide a passenger lift in an existing building, an enclosed vertical lifting platform should be provided in accordance with 2.3.4.1.1. Alternatively, 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 against a Condition attached to a Disability Access Certificate. Having considered the drawings, Disability Access Certificate Application Report, details and submissions on file it is considered that a *de novo* approach is not warranted.

The Agent appealed one condition:

Condition No. 3:

“Independent access to the restaurant at first floor shall be provided by means of a passenger lift or suitable platform lift”

Reason: To facilitate independent access and use of the building for all building users including wheelchair users.

The main issue to resolve is whether all people can access and use the facilities in the building.

The facilities on the first floor (which has a total floor area in excess of 200 m²) will include a restaurant with seating area of 60 sq.m, a servery, bakery and 2 no. standard WC cubicles. The facilities on the ground floor will include a supermarket with a space of approx. 9 m² which the Agent described as a “dedicated area to accommodate parties with non-ambulant disabled patrons”. It would probably be incapable of providing more than one table shared by perhaps a wheelchair user and three other people. There is also an accessible unisex WC on the ground floor. There are two staircases providing access from the ground to the first floor.

This dedicated area on the ground floor will be located within a predominantly retail space, near the main entrance. This location will be unsatisfactory as supermarket shoppers would be continuously passing by the table and the sliding doors would be constantly opening and closing. In addition, if it is already occupied there would be no alternative space to accommodate a wheelchair user.

The proposed dedicated area will not provide adequate space, or the same facilities or choice of seating compared to those on the first floor. It will segregate wheelchair users from the main restaurant and could potentially be easily subsumed into the retail space. It does not allow for an inclusive approach for wheelchair users.

The Agent was of the opinion that the requirement to provide a lift was impractical, not feasible and that it was onerous. There is an open void between the ground and first floors which could accommodate a platform lift without losing space on the first floor and it would not require the removal of any structural elements so it would be practical and feasible. Perhaps it is the cost of a platform lift which was considered “onerous”.

Clearly the same range of facilities which are available on the first floor are not being provided on the accessible ground floor.

The BCA are of the opinion that a passenger lift or platform lift should be installed to provide access to the first floor level restaurant as adequate alternative facilities are not being provided on the ground floor. I concur with that assessment.

I am of the opinion that the proposed Material Alterations and Change of Use warrant the provision of a passenger lift or platform lift to access the first floor level.

9.0 Conclusions / Recommendations

In conclusion, I recommend that An Bord Pleanála rejects the appeal and allows Condition No. 3 to be retained along with the other ten conditions in the granted Disability Access Certificate.

9.1 Reasons and Considerations

Having regard to the provisions of the Building Regulations 1997 to 2019, Second Schedule, Part M, to the form and layout of the existing building and the nature of the proposed works and to the submissions made in connection with the DAC application and appeal, it is considered that the works or building to which the application relates, if constructed in accordance with the plans, calculations, specifications and particulars submitted, and subject to compliance with the conditions attached to the Disability Access Certificate, will comply with the requirements of Part M of the Second Schedule to the Building Regulations 1997 to 2019.



Michael Mohan, FRIAI

Inspector, 10th February 2022