

Date: 26/05/05

Ref: 45/3/173

Note: The following letter which has had personal details edited out was issued by our former department, the Office of the Deputy Prime Minister (ODPM). ODPM became Communities and Local Government on 5 May 2006 - all references in the text to ODPM now refer to Communities and Local Government.

Building Act 1984 - Section 39

Appeal against refusal by the borough council to dispense with Requirement M2 (access and use) of the Building Regulations 2000 (as amended) in respect of access to the basement level of a completed new building at a high school.

The appeal

3. The building work to which this appeal relates comprises the construction of a new building primarily comprising a swimming pool and arts block extension to a high school, which was completed in February 2004. The new building is set alongside existing school buildings which have been extended and altered since the school moved to its present site in 1945. The plans indicate that, to the east of the new building, the existing school buildings comprise: a lodge; the existing main building; a gymnasium; assembly hall; laboratory block; and some temporary accommodation.

4. The new building has four storeys and is approximately 680m² in plan area. It comprises a swimming pool and ancillary facilities at basement level, with the ground, mezzanine and first floors above containing facilities for the English, art, music and sixth form departments.

5. The school site slopes downwards from the existing buildings towards the new building, the level difference between the top of steps leading from the existing school roadway approach and the basement forecourt of the new building being 0.645m. The new building has been provided with level-access entrances to both ground floor and basement levels. The ground floor level access is available adjacent to parking bays provided at the south end of the building. A lift adjacent to the south entrance serves the mezzanine and first floors above but you indicate that, because of the swimming pool, it was not feasible to extend the lift to basement level. The basement has its own level-access entrance at the north (front) end of the building. An internal stair connects the basement level to the ground floor.

6. The building work was the subject of a full plans application which was approved by the borough council, subject to a number of conditions including provision of "Details of the ramp to the basement area". However, in your view: "*...it proved impossible to design a ramp complying with Building Regulations which could be practically accommodated within the available forecourt area*" and you therefore proposed the following alternative access arrangements for disabled people to the basement entrance of the new building:

(i) the provision of external steps suitable for ambulant disabled people between the existing school roadway approach and the hard-paved forecourt to the basement level at the north/east corner of the new building

(ii) a separate vehicle and pedestrian entrance west of the new building, with parking space for disabled people immediately adjacent to the basement entrance. This would provide for wheelchair users to arrive by car, or alternatively they could travel between the two forecourt levels by way of the pavement.

7. The borough council responded indicating that your proposed alternative access arrangement for wheelchair users was not acceptable and suggested instead the provision of "a platform lift or other device".

8. You then consulted with access consultants, who carried out a full access audit of the school in relation to the Disability Discrimination Act 2005 (DDA) and gave their assessment of the issues arising. This indicated that "there is a difference in level between the main entrance drive and the basement floor" of the new building "of around 1100mm" and supported your assertion that a ramp, particularly in line with the latest guidance in BS 8300:2001, would be impractical because of the length required and would be difficult for wheelchair users to negotiate. Although the access consultants considered that your proposed alternative access route via the pavement was not acceptable, they made a number of recommendations, including that handrails should be fitted to both sides of the ambulant steps and that the "necessary foundations and services should be put in place for the installation of a platform lift in the future". Accordingly, you submitted a copy of your access consultants' letter, together with your proposal for a possible future installation of a platform lift, to the borough council.

9. The borough council further responded giving reasons why the council was unable to dispense with Requirement M2 of the Building Regulations, relating to wheelchair access to the swimming pool at the basement level of the new building. It is against that decision that you have appealed to the First Secretary of State.

The appellant's case

10. You refer to your access consultants' letter of 18 March 2004 which concurs with your view that a ramp is impractical, and does not support the case for a platform lift to be provided at this stage.

11. You acknowledge that, should the school acquire a wheelchair-bound pupil or member of staff, a platform lift might have to be installed on the basis of a specific need. However, you consider that this is not a probable scenario as - even after following your access consultants' advice on compliance with the DDA - the school is unlikely to be able to accommodate entirely non-ambulant pupils or staff, given the configuration of the existing buildings on many different levels. You therefore consider that if a platform lift were installed it would remain unused for long periods of time, giving rise to difficulties in maintaining reliability. Nonetheless, you have carried out a study to demonstrate the feasibility of such an installation in the future which forms part of your revised proposals to the borough council.

12. To support your contention that you have made reasonable provision for disabled people to access the new building, you have responded to the reasons given in the borough council's dispensation refusal notice as follows:

(i) you consider that adequate access has been made for wheelchair users to the new building. The difference in level between the two forecourts is a result of the topography of the site

(ii) you agree with the borough council that the principle of a ramped access, as opposed to a lift, was discussed and agreed by the council at an early stage and point out that ramped access is available via the pavement. The requirement for a lift was not mentioned until over two years after the council's conditional approval

(iii) in response to the borough council's argument that the new building contains a Part M (Access and facilities for disabled people) compliant lift which could have been extended to basement level, you point out that the lift is situated at the south end of the building. As the swimming pool takes up the whole width of the building (which was restricted by planning constraints to the line of the pre-existing library building), wheelchair users and other lift users would have to travel by the edge of the pool for its whole length before arriving at the changing areas at the front. From a safety point of view you considered this to be unacceptable

(iv) in response to the borough council's argument that one of the conditions of the approval notice was that the details of the ramp be submitted prior to the work being carried out on site, you comment that the external work had only just commenced on site prior to your letter to the council

(v) you accept the borough council's statement that the provision of a platform lift at a later stage would not be enforceable under the Building Regulations once a Completion Certificate had been issued, but you contend that, as a platform lift would only be required in the event of a need-specific response to the requirements of the DDA, this point is not relevant

(vi) although the borough council suggests that the school may not have sufficient funds to install a platform lift at a later stage, you state that the DDA does not allow lack of funds as a sufficient reason for not carrying out necessary work.

13. In response to the borough council's representations to the First Secretary of State (referred to below), you commented further to emphasise the following points:

(i) you refer to condition 7 of the planning consent you have received, which states that the pool "*shall be used only for activities ancillary to the authorised educational use of the site*", which effectively means staff and pupils only. You draw further attention to the views expressed by your access consultants which indicate that a platform lift, if installed, would be extremely unlikely to be used, and also refer to your experience in other schools of such lift installations being shunned by disabled people because they are inherently discriminatory and also failing to work because they are seldom operated.

(ii) although the new building is substantial and almost free-standing, it is an integral part of a complex of existing buildings which fall short of current standards of disabled access, even after improvements to ensure compliance with the DDA

(iii) even if the planning consent was amended to allow use of the swimming pool by outside users, you consider that you have made sufficient provision for this by providing parking at the same level as the pool entrance. Such users would be unlikely to need access to other parts of the school

The borough council's case

14. Further to its refusal notice, the borough council has reiterated the following reasons to justify its refusal to dispense with Requirement M2:

(i) as a new building, it should have incorporated full access to all areas at the design stage and all facilities should be provided at the time of construction. Reliance on the fitting of a platform lift once an individual's need has been identified is not a reasonable approach. While acknowledging the principle of reasonable adjustment under the DDA, the borough council considers that this should not be extended to cover basic vertical circulation within and around a new building

(ii) the issue of ramped access for wheelchair users was raised at an early stage of the building control checking process. Your proposed "ramped access" via the pavement would not accord with the guidance in *Approved*

Document M (Access and facilities for disabled people - 1999 edition) and would result in a wheelchair user having to travel a much greater distance than an able bodied person, which the borough council does not consider reasonable. The council notes that your access consultants agree with this view

(iii) it was in response to your statement that a ramp could not be provided that the borough council suggested the provision of a platform lift or other device as a possible solution to the access issue.

The First Secretary of State's consideration

15. The material date for this appeal is the date your application for a dispensation of the requirement was refused by the borough council, which means that the applicable requirement for this case is Requirement M2 (Access and use) of the Building Regulations 2000 (as amended up to, and including, SI 2002/2871), and that the relevant guidance on how to comply with this and the other requirements of Part 'M' of the Building Regulations is the 1999 edition of *Approved Document M (Access and facilities for disabled people)*. This requirement and approved document were superseded by an amendment to Part M of the regulations in May 2004 (ie *SI 2003/2692*), and a revised *Approved Document M (2004 edition)*, but in accordance with the prescribed transitional provisions these are not applicable to this case.

16. The First Secretary of State has had regard to the fact that the DDA, as amended by the Special Educational Needs and Disability Act 2001, does not require a body responsible for a school to remove or alter a physical feature (for example, one arising from the design or construction of the school premises) and thus there is no immediate obligation on schools to improve access beyond the confines of what is required to comply with Part M of the Building Regulations in relation to relevant building work. The DDA as amended, however, imposes a duty to plan strategically and make progress in increasing accessibility to schools' premises which will require schools, (including independent schools and non-maintained special schools) within a reasonable time, to prepare and implement an accessibility plan. This will have to address three distinct elements of planned improvements in access for disabled pupils, the second of which is relevant in the context of this appeal:

- improvements in access to the curriculum;
- physical improvements to increase access to education and associated services; and
- improvements in the provision of information in a range of formats for disabled pupils.

In addition the First Secretary of State notes that the Secretary of State for Education and Skills provides guidance for local education authorities (LEAs) and schools on how they should implement their planning duties. The Office for Standards in Education (Ofsted) inspects LEA accessibility strategies and school accessibility plans. The Secretary of State for Education and Skills has

powers to direct schools and LEAs if it is thought that either a school or an LEA has not complied with their planning duties, or has acted unreasonably in carrying out their duties.

17. Turning to this case, the First Secretary of State notes that the borough council imposed as a condition of approval of your full plans application that you should provide details of a ramped access to the swimming pool (ie basement) level of the new building.

18. As stated in paragraphs 6 and 8 above it is your view, endorsed by your access consultants, that a ramped access can not practicably be accommodated within the available forecourt area, based on a difference in level of approximately 1.100m.

19. The First Secretary of State has therefore to consider, first, whether in his view the provision of ramped access would have been impracticable as stated for the purpose of complying with Requirement M2, and second, whether any of the alternatives proposed would satisfy the requirement.

20. The First Secretary of State considers, as set out in paragraph 5 above, that the difference in level between the roadway at the top of the shallow flight of steps down to the basement forecourt shown on your drawing and the perimeter of the basement forecourt is not 1.100m as suggested in your access consultants' report, but 0.645m. In his view, a ramped access, to conform to the recommendations of *Approved Document M (1999 edition)*, could be accommodated, if not comfortably within the limits of the hard-paved area shown, then at most by intruding minimally onto the soft landscaped area, and thus would not be impracticable as stated. The First Secretary of State therefore considers that the assertion that a ramped access in accordance with *Approved Document M (1999 edition)* cannot be accommodated is not supported by the evidence submitted.

21. The First Secretary of State does agree with your consultants and the borough council, however, that your proposed alternative access route via the pavement, which would require a wheelchair user to leave the school premises and travel via the public footpath, is unacceptable.

22. The First Secretary of State also considers that the arrangement shown on your drawing for car parking (adjacent to the swimming pool entrance with protected space alongside to permit a wheelchair user to alight) does not appear to allow sufficient space for the wheelchair user to gain access into the new building, either between the side of the parked car and the flank wall of the building, where the approximately 600mm wide route is further impeded by bollards along its centre line, or between the front of the car and the caretaker's store, where the route is approximately 400mm wide. This would also be self-evidently unacceptable.

23. In the First Secretary of State's view, the provision of - not future provision for - a platform lift would also satisfy Requirement M2, but this would be subject to the difficulties referred to in paragraphs 11 and 13(i) above.

24. The First Secretary of State notes that Requirement M2 requires reasonable provision to *"be made for disabled people to gain access to and to use the building"*. In his view, this means that such provision should be adequately considered at design stage and could in this case have been achieved with an appropriately located lift serving every floor of the new building. Furthermore, in the absence of such a lift, it appears that such provision could practicably be made in this case by construction of a ramped access to the basement level in accordance with *Approved Document M (1999 edition)*.

25. With reference also to the obligations under Part 4 of the DDA to plan strategically to improve access, and the enhanced guidance on good practice in accessibility provided by *BS 8300:2001 (Design of buildings and their approaches to meet the needs of disabled people - Code of Practice)*, the school may wish to re-consider whether the provision of a ramp and steps in accordance with the recommendation of this British Standard would be achievable in this case. The First Secretary of State concludes that the potential for achieving compliance with Requirement M2 has not been fully explored in this case and that it would not therefore be appropriate to dispense with the requirement.

The First Secretary of State's decision

26. The First Secretary of State has given careful consideration to the particular circumstances of this case and the arguments presented by both parties. He is concerned that wherever feasible every effort should be made to secure compliance with the requirements of Part M.

27. As indicated above, the First Secretary of State has concluded that it would not be appropriate to dispense with Requirement M2 (Access and use) of Schedule 1 to the Building Regulations 2000 (as amended up to, and including, SI 2002/2871) in this case, and that the borough council therefore came to the correct decision in refusing to dispense with this requirement. Accordingly, he dismisses your appeal.