

BUILDING ACT 1984 - SECTION 39

APPEAL AGAINST REFUSAL BY THE COUNCIL TO RELAX REQUIREMENTS M1 AND M3, AND REQUIREMENT K5, OF SCHEDULE 1 TO THE BUILDING REGULATIONS 2000 (AS AMENDED), IN RESPECT OF THE CONSTRUCTION OF A SWIMMING POOL AND CHANGING FACILITIES, FORMING AN EXTENSION TO A LEISURE CENTRE

The building work and appeal

3. The papers submitted indicate that the building work to which this appeal relates is largely complete and comprised the construction of a 25m swimming pool and changing facilities, forming an extension to an existing leisure centre. The Council had given you outline comments on your proposals indicating the need for extra facilities, prior to receiving a building regulations full plans application for the work on 7 December 2006. The Council then issued a plan assessment report (which was later revised) containing a detailed breakdown of items which needed design changes or further details to achieve compliance with the Building Regulations and there followed an exchange of correspondence about these items. Although the work commenced in June 2007 the outstanding items, primarily relating to access and facilities for disabled people, were not resolved and the Council did not approve your plans.

4. You explain that the matters in dispute are highlighted in the Council's letter of 26 September 2008 and items 7 to 20 of the outstanding items list of 2 September 2008 titled *Plan assessment and works on site items*, which includes detailed comments from both parties. As you were not able to reach agreement, you sent an email to the Council dated 9 July 2009, in which you formally requested a relaxation of items 7 to 20 on the outstanding items list, as you considered these to be too onerous.

5. As the items in question mainly related to Requirements M1, M3 and K5 (item 14 only) of the Building Regulations, the Council treated your relaxation request as an application to relax these requirements which was refused in a letter to you dated 24 July 2009. It is against this refusal that you have appealed to the Secretary of State.

The appellant's case

6. You state that from an early stage in the project, consultation was undertaken with the Council about the requirements of the Disability Discrimination Act 1995 (DDA) to establish the brief. You subsequently had the "Stage C" and "Stage D" plans for the work signed off by the Head of Culture and Major Projects at the Council (on behalf of your client). You felt you had fulfilled your client's brief and complied with the requirements of the guidance in Approved Document M (*AD M – Access to and use of buildings*), the Sport England guide *Access for Disabled People* and BS 8300:2001 guidance. You consider the difference of opinion between the Council and yourselves during the construction process related to guidance, not legislation.

7. You add that you commissioned an independent Approved Inspector to comment on your application and provide you with a report giving advice against the outstanding

list of items. You say that this determined that you had provided a reasonable solution within the building design for most of these issues.

The Council's case

8. The Council refers to its correspondence giving details of the various items in question which in the Council's opinion do not demonstrate compliance with Requirements M1 and M3 in Part M of the Building Regulations. These are:

(a) The individual design items and site works indicated in the plan assessment and works on site report dated 2 September 2008.

(b) The Council's letter of 26 September 2008 which provides details of the dispute and the Council's overall opinion on the issues relating to AD M and other relevant guidance documents, along with the extent to which the guidance in these documents should be followed to demonstrate compliance with the Building Regulations. The letter also sets out the Council's views in relation to the design process and Building Control's input into that process.

(c) The Council's letter of 24 July 2009 which sets out the reasons for refusing your relaxation request and provides a response to the Approved Inspector report used as part of your case for appeal. This letter explains, amongst other things, that the Council considers that:

- AD M applies to all building types but where guidance is required for more specialist situations reference should be made to other relevant guidance. For sports facilities, including public swimming pools, paragraphs 2.13 (Table 2), 4.11, 5.6 (note) and 5.17 (note) of AD M refer the reader to the Sport England guide for specialist advice;
- there may be alternative ways of achieving compliance, other than those set out in AD M, but if other means are going to be used to demonstrate compliance with Requirements M1 and M3 these alternatives should be designed by persons or bodies who have expert knowledge of, and experience in, the needs of disabled persons in relation to swimming pools. In the Council's opinion this has not happened in this case and as a result following the guidance in the Sport England guide is the best way to demonstrate compliance;
- it is not a client's choice whether or not to comply with Building Regulations as these are national building standards.

9. The Council points out that – in addition to Requirements M1 and M3 - there is one outstanding item (no 14) relating to Requirement K5 of the Building Regulations. However, the Council concludes with its view “that the fundamental issue in question is the status of other guidance documents which are referenced within Approved Documents and whether these should be treated as Approved Documents because they give guidance on particular building types and situations which the Approved Document does not cover”. The Council's correspondence explains why it considers such guidance should be followed in this case to demonstrate compliance with the requirements of Part M.

The Secretary of State's consideration

10. The Secretary of State has given careful consideration to the particular circumstances of this case and the representations made by both parties, but before commenting on these he would like to make some observations.

11. The Secretary of State is obliged to take into account all of the relevant facts pertaining to each matter on which an appeal has been lodged, so it is vital that the parties set out a clear and concise case particularly where a large number of items are put forward for consideration. In this instance, it is noted that the final representations made by both parties to the Secretary of State are poorly structured, fail to clearly identify which issues remain unresolved, and are lacking in clear and concise explanations as to the merits of either party's views. This has presented challenges and contributed to the delay in formulating an appropriate response. In particular, it should be noted that it is not for the Secretary of State to arbitrate on matters of contractual agreement or dispute between two parties and indeed he has no powers to do so. Submitting what appear to be snagging lists as part of an appeal is therefore unhelpful.

12. As the information provided by the parties in respect of many of the items in dispute in this case is insufficient to enable an item by item judgement, the Secretary of State has only made observations in general terms of what may be deemed reasonable or appropriate in relation to the functional requirements of the Building Regulations in question. However, where the Secretary of State considers sufficient information has been provided, he has made specific findings.

13. Turning to the details of this particular case, the Secretary of State notes from the papers submitted that:

- You state that the matters in dispute are highlighted in the Council's letter of 26 September 2008 and the outstanding items list dated 2 September 2008, "of which items 7 to 20 are in question under this application for appeal". The Council summarises in its letter to you dated 24 July 2009 that your appeal relates to Requirements M1, M3 and K5 of the Building Regulations.
- The Council has made its views clear that the appropriate means of achieving compliance with Part M requirements was by following the guidance in AD M and, where reference is made in AD M to documents providing guidance in relation to specialist areas, following that guidance would be a reasonable method of achieving compliance.

14. Although both you and the Council have presented this dispute as an appeal to relax Requirements M1, M3 and K5 of the Building Regulations, and the Secretary of State has dealt with it as such, he takes the view that the matters in dispute and the representations made relating to these matters are primarily concerned with a difference of opinion as to which guidance should be followed in order to satisfy the functional requirements of the Building Regulations in question.

15. The Secretary of State also notes that you commissioned an independent Approved Inspector to comment on your application and provide advice against the outstanding items list, although the Council challenges some of the findings in the report. The Secretary of State takes the view that, although the document may provide weight

as to the varying degree of compliance or non compliance, it cannot demonstrate conclusively that the functional requirements of the Building Regulations have actually been satisfied.

Approved Documents

16. It should be noted that the purpose of an Approved Document is to provide practical guidance on compliance with the functional requirements of the Building Regulations covered by that Document in common building situations. However, there may well be alternative ways of achieving compliance with the requirements. Thus there is no obligation to adopt any particular solution contained in an Approved Document if you prefer to meet, and can demonstrate compliance with, the relevant requirement in some other way which demonstrates equivalent performance.

17. It is the Secretary of State's opinion that where a person carrying out work chooses to follow the guidance in an Approved Document, and that Document is silent on particular issues but refers to other guidance covering those issues, the guidance referred to should be given due consideration. He considers that where the limitations of an Approved Document are recognised, it could be reasonable for compliance to be demonstrated by following such guidance. He also considers that where one chooses to deviate from appropriate and relevant guidance in an Approved Document or referenced guidance covering areas not addressed in the Approved Document, early discussions with the relevant Building Control Body are imperative and suitable justification should be provided to demonstrate that the functional requirements of the Building Regulations are still satisfied. Similarly, it is unlikely to be acceptable to follow the Approved Document guidance (or other referenced guidance) for some components of a particular part of a project, but deviate from the guidance for other components without suitable justification.

18. In this case, AD M provides clear guidance as to how the functional requirements of Part M can be met in relation to a number of the issues under appeal and which are common to many building types, such as the reception counter, public address systems and provisions relating to the fire alarm and lighting systems. Where AD M is silent on issues of greater technical complexity in less common circumstances such as might be found in a sports complex, AD M provides clear references to the Sport England guide as a source of further guidance. This could therefore be used in negotiation to determine reasonable provision.

19. For example, the Secretary of State notes that the Council has requested that contrasting support rails be provided from the changing area to the poolside. You say that two handrails have been provided at the entrance of the changing village from the pool to control access and these can be used as support rails. The Secretary of State has not been provided with all necessary information for this particular item to judge whether or not the current provision complies with Requirement M1. However, as AD M does not address this particular issue, he considers that it would be appropriate to use the further relevant guidance referenced by AD M in the Sport England guide to ascertain whether the handrails that have been provided are 'fit for purpose' and reasonable. The Secretary of State wishes to make clear that this does not mean that a particular element of one provision could not satisfy the functional requirement of another. In this case, the handrails provided may be capable of acting both to control

movement and to provide support to the pool, but it is the rails' performance in providing support which needs to be considered in demonstrating compliance.

Requirements M1 and M3

20. Requirements M1 and M3 of the Building Regulations specify that:

M1 - Reasonable provision shall be made for people to - (a) gain access to; and (b) use the building and its facilities.

M3 - If sanitary conveniences are provided in any building that is to be extended, reasonable provision shall be made within the extension for sanitary conveniences.

21. In this case you have followed the Approved Document guidance to achieve compliance with the above requirements for items such as ambulant shower areas and ambulant toilet provisions in essence, but have deviated from the guidance as to overall arrangement and/or surface finishes of fittings without any justification. In the Secretary of State's view the provision should follow the AD M guidance in full, or where appropriate the referenced guidance in the Sport England guide, unless the variation can be justified. Discussions should have taken place at an early stage to make it clear to all parties what provisions were required and, as the Council states, any alternative provision should have been supported by persons or bodies with expert knowledge and experience of the needs of disabled people.

22. It is the Secretary of State's opinion that a reasonable level of compliance in this case could be to provide a subdivided ambulant cubicle to have the same configuration of space and equipment as for a self-contained facility. For the open plan shower area, he considers that the guidance in the Sport England guide could be followed to demonstrate compliance. The Secretary of State also notes an issue over the required door widths has been raised. Although Diagram 21, *WC cubicle for ambulant disabled people*, in AD M does not specifically state the suggested door width, reference should be made to Table 2, *Minimum effective clear width of doors*, in AD M. In some circumstances the dimensions of such doors could be less than that recommended in Table 2, providing the actual provision is reasonable, but, the Secretary of State takes the view that to reduce the door widths to the extent to which has been presented in this case would be unreasonable and would not comply with Part M.

23. The Secretary of State considers that where there is provision for a wheelchair accessible unisex toilet and the overall arrangement and/or surface finishes of fittings deviate from the guidance in AD M, suitable justification ought to have been presented, which you do not appear to have provided in this case. Neither contractual nor financial reasoning would be considered adequate justification. Without such justification the provision should replicate the minimum standards in the guidance, and that due care and attention should also be given to the design considerations for such provisions.

24. Similarly, in the case of a wheelchair-accessible changing and shower facility, the Secretary of State considers that financial implications would not justify a decision not to locate a WC within that facility. What must be considered is the need for a WC to be readily available to users of the changing facility, particularly when a user may require a WC frequently and potentially whilst in the process of changing. This must, however, in this case be balanced by recognition that the only wheelchair-accessible unisex toilet for the locality would be contained within the accessible changing facility. It is the Secretary of State's opinion that the current layout complies with Requirement M3, because the

changing facility and the WC are adjacent to each other, while the arrangement ensures that the WC is available to other users whilst the changing facility is occupied.

25. As AD M does not address such items as family changing cubicles, the Secretary of State considers that in this case a reasonable level of compliance with Requirement M3 would be demonstrated if at least one of the family changing cubicles reflected the requirements given in the Sport England guide.

Requirement K5

26. Requirement K5 requires that:

- (1) Provision shall be made to prevent any door or gate - (a) which slides or opens upwards, from falling onto any person; and (b) which is powered, from trapping any person.*
- (2) Provision shall be made for powered doors and gates to be opened in the event of a power failure.*
- (3) Provision shall be made to ensure a clear view of the space on either side of a swing door or gate.*

It is the Secretary of State's view that in respect of the submitted documentation in this case it is unclear whether or not this requirement has been satisfied in relation to the automatic doors in question. He considers that this requirement makes an essential contribution to health and safety and that a case has not been made to relax it.

The Secretary of State's decision

27. As indicated above, in arriving at his decision, the Secretary of State has carefully reviewed the facts and details of this case and, where appropriate, given examples of how one may demonstrate compliance with the Building Regulations on such issues.

28. The Secretary of State has concluded that it would not be appropriate to relax Requirements M1 (Access and use) and M3 (Sanitary conveniences in extensions to buildings other than dwellings) in Part M (Access to and use of buildings), and Requirement K5 (Protection against impact from and trapping by doors) in Part K (Protection from falling, collision and impact), of Schedule 1 to the Building Regulations 2000 (as amended), as he considers that a case has not been made to support this. Accordingly, he dismisses your appeal. However, in his opinion, reasonable compliance has been demonstrated in accordance with Requirement M3 in relation to having the WC adjacent to, and not contained within the wheelchair-accessible changing and shower facility in this particular case, provided as part of the building work.

29. You should note that the Secretary of State has no further jurisdiction in this case and that any matters that follow should be taken up with the building control body.