

7 October 2014

## **BUILDING ACT 1984 - SECTION 39**

### **APPEAL AGAINST REFUSAL TO DISPENSE REQUIREMENT B1 (MEANS AND WARNING OF ESCAPE) IN PART B (FIRE SAFETY) OF SCHEDULE 1 TO THE BUILDING REGULATIONS 2010 (AS AMENDED), IN RESPECT OF REMOVAL OF 3 INTERNAL WALLS AND INSTALLATION OF BI-FOLD DOOR**

#### **The building work and appeal**

3. The papers submitted state that the building / building work to which this appeal relates to a building which is a three storey, 5 bedroom Victorian terraced house used as a domestic dwelling. The ground floor consists of a living room, hallway, open plan dining room and kitchen. The first floor consists of a landing, 3 bedrooms and a bathroom. The second floor consists of a landing, 2 bedrooms and a bathroom. Beneath the ground floor is an unconverted basement.

The building work consisted of knocking through the kitchen and dining room, including through part of the existing hallway to create an open plan space. A new door was erected between the hallway and the new open plan space. Bifold doors were fitted to the rear of the space and the existing back door removed (see attached plans of the existing and new layouts).

As a result of the work, the escape route from the cellar passes into the open plan space then leads to either the bifold doors to the rear of the house or through a door into a hallway leading to the front door. The Local Authority's Building Control body have stated that the cellar access previously discharged into the hallway and now discharges into the open plan space, the cellar is now an inner room (Approved Document B1, paragraph 2.9) and must be fitted with an additional escape window and light well and a linked smoke alarm system.

The disagreement with building control is twofold. First, you believe that the assertion that there has been a material alteration to be incorrect so that the requirements that are being imposed are inappropriate. Secondly, if a material alteration has taken place the requirements are too onerous and inappropriate given that the cellar is not habitable.

It is against this refusal that the appellant appealed to the Secretary of State.

#### **The appellant's case**

4. You believe that, in relation to the material alteration, the regulations state that there is a material alteration if a building is less satisfactory than before in relation to the relevant requirements, one being requirement B1. Under this

requirement, a single means of egress (Approved Document B1, paragraph 2.13) is suitable for a basement storey if there are no habitable rooms within in. The basement has not been altered as part of the work and since there are no habitable rooms and you do not believe you have materially altered the cellar egress. Paragraph 2.13 makes no comment as to where the cellar should discharge, In fact, it is not uncommon for the entrance to be via a hatchway in the floor so the previous condition where it discharged to a hallway was beyond what was required by the Regulations.

Ignoring the argument above regarding material alteration, you believe the requirement of an escape window and linked alarms to be overly onerous since Approved Document B1, paragraph 2.13 requires only a secondary means of egress from a basement storey if there are not. In your appeal to the Council you have set out the justification for why you believe the cellar space to be non-habitable space.

Further to this Guidance note B1.ii states that the design of means and escape and fire safety measures should be based on an assessment of risk and B1.v states that in certain circumstances a single direction of escape can be accepted as providing reasonable safety....dependant on the use and associated risk.

In terms of risk, the cellar space in not habitable, has a very low frequency of use and any use is for extremely short duration. It is unlikely to be used other than waking hours. This makes the risk negligible.

Were the space to be converted to a habitable space, you would expect to have to apply for Building Regs approval and fit an additional escape window at that time however in its present condition this requirement you believe is excessive and unnecessary.

In addition to the appellant's formal application, the appellant e-mailed The Council on 30 May, 3 June, 16 June and 24 June 2014 requesting their comments on why it was not prepared to grant a dispensation.

Your e-mail 30 May 2014:

"Many thanks for your response. Having read your requirements I can see the reasoning behind the measures you have outlined in terms of fire safety and the reasoning behind it given the change to the cellar access. Both the secondary means of egress and local alarm linked to the kitchen alarm are reasonable additions and ,while I fully appreciate that cost is not a consideration where safety is concerned, these, particularly the below ground window, are expensive additional works that I am not clear are strictly necessary within the regulations.

Approved Document B, Section 2 Means of Escape, 2.13 Basements, paraphrasing requires a protected stairway or an external door or window if the basement storey contains any habitable room. This I would suggest is not the case here as by the definition of a habitable room none exist within the cellar so although we may have modified where the access point is located, the requirement for the basement means of escape remains unchanged. Were we in

future to have the basement converted into a living space I would expect to have to apply for Building Regulations approval to convert it into a habitable space on the assumption that it currently is not and would expect, quite reasonably at that point to have to install windows for the purpose of a secondary escape.

Guidance note B1.ii, paraphrasing, states that the fire safety measures should be based on assessment of risk. In terms of risk, the cellar space is not habitable, has a very low frequency of use and any use at all is for extremely short duration ie putting something down there for storage or to get it out again. It is unlikely to have multiple occupants simultaneously down there and is very unlikely to be used other than during sociable hours. The probability of being trapped by a fire and therefore the risk would be negligible.

I don't wish to dispute that either of the requirements you have imposed are not generally sensible additions and the addition of windows and light wells for light if nothing else is certainly something we had planned to eventually carry out when we have the available funds. As detailed above however, I don't see how the regulations apply to the development we are currently undertaking making them a requirement at this point in time.

I would appreciate your thoughts on the above."

#### Appellant's e-mail 03 June:

Thanks again for your reply. I would like to discuss the matter but thought it would be easier to put down my comments first as a basis for the discussion. In response to the points you make.

- On what basis is the situation deemed worse than before? Approved Document B, paragraph 0.20, Material Alteration, paraphrasing, states an alteration which results in the building being less satisfactory than before *in relation to the requirements of part B1*. As previously detailed, there was no requirement within B1 (paragraph 2.13) for the basement to have two means of escape and (by paragraph 2.13) there is still no requirement, therefore for the purposes of this development we have not materially altered the building in relation to the requirements for the cellar.
- You state that you have no control over the use of the area. Surely the use of the space is irrelevant unless it is a habitable area. That the chambers have doors is stretching it, they are more garden gates than doors and the hinges have rusted to the point they are more likely to fall off than close, there is a single light switch at the entrance covering the whole cellar area, no heating, no natural light, a coal chute that is still open to the front pathway and drips water in when it rains and provides a significant amount of additional ventilation when it is windy. On what basis would this space be considered as habitable, it was not sold to me as such?

- There is concern over whether a future owner would apply for the relevant Building Regulation approval. If I were to sell the house, I would not be able to legally represent the cellar on the basis that it was a habitable room and I would not be able to represent it as such without a notice of completion from building control confirming that I had met the requirements of making the space habitable. Any competent conveyancer would request this information during a sale. Having sold it as non-habitable I have no control over what future owners may or may not do but neither is it my responsibility to account for the possible future actions of another person. The cellar may remain untouched and never be developed in which case it would never require any additional escape route.
- The cellar is the full footprint of the house. This is not quite correct as the back section of the house, existing hallway and rear room are not cellared. However, I accept your point that there are chambers below two ground floor rooms and the hallway. Neither Approved Document B, paragraph 2.13, nor the definition of a basement storey within Approved Document B make any reference to size and are concerned only with the fact that it is a basement.

My intention is not to dismiss out of hand your requirements or argue simply for the sake of it but I still cannot see within the regulations where this requirement is specified. I can see that were the cellar a habitable space it would be very different however I cannot see the basis on which it would be considered habitable and if not habitable why it would require the specified additional measures.”

Appellant’s e-mail dated 16 June 2014, stated:

“Thanks for your reply. However this has not resolved the issue.

Regardless of the current or proposed use of the basement the Statutory Instrument requires that where alteration works are carried out the work is considered to be a material alteration if following the works, it the results in a ‘building... not complying with a relevant requirement where previously it did’. A ‘relevant requirement’ includes the need to comply with Requirement B1 of the Building Regulations which requires that all buildings be provided with adequate means of escape and early warning.

SI 2010 No.2214, which is I assume to what you refer, states that “appropriate” provisions for early warning and escape are required”. There are no further sections with information or definition within the SI as to what may or may not be “appropriate” with regards to a basement so we can refer only to the approved documents.

Approved Document B1, paragraph 2.13 defines for a basement’s “appropriate” means of escape the requirement of a secondary escape or protected stairway *only* if containing a habitable room. As there were no habitable rooms previously

therefore there was no requirement to have a secondary means of escape and since there are still no habitable rooms, this situation remains unaltered. We have therefore not materially changed the access in terms of complying with the relevant requirements.”

Appellant’s e-mail 24 June 2014, stated:

#### APPEAL FOR DISPENSATION

I wish to make a formal appeal for a dispensation with regard to the building notice referenced above as I believe that the requirements imposed following the site inspection and sent in the letter dated 28 May to be inappropriate and unreasonable. Had the application been a full plans application, I would have been looking for a determination since I do not believe that the requirements to be necessary within regulation.

Within the Regulations, appropriate provisions for early warning and escape are required. I contend that a single route of egress from an uninhabited and non-habitable room is entirely appropriate and it is unreasonable to require provision of a secondary escape route and linked some alarms to what is all intents and purposes a store room.

While I appreciate that Building Regulations cannot control the use to which rooms are put once work is completed, my position would be that the cellar/basement space (the terms are used interchangeably in this letter) is not only non-habitable for normal purposes and that offer than for storage, short of converting the space properly and getting building control sign off, there is no other use the space could be put to.

There are currently no windows and natural light. There is an untouched coal chute that, for a cast iron cover is open to the elements and drips water when it rains. There is ingress of damp through both front and rear walls. The walls consist of exposed brickwork throughout numerous gaps where services have run. There has been a single light switch serving the entire cellar space located at the top of the stairs. There is no central heating within the space. The floor consists of cobbles/bricks laid into the ground on their sides, many of which are now loose and the floor as a result is extremely uneven in places. Finally, having purchased the house in 2012, the cellar was not sold as a habitable space, nor were I to sell it on could I sell it as such and within the RICS homebuyers report carried out on 18 June 2012 prior to purchase, under part F9 the surveyor noted that “One must appreciate that the cellar areas are not habitable due to the likelihood of water ingress occurring at any time”. While the Edwardians may have considered this a useable space, it is not in the modern sense of the word.

Approved Document B1, paragraph 2.13 is quite clear that a basement with no habitable rooms requires only a single method of egress. This requirement makes no presumptions as to where the basement discharges to, i.e. is not conditional, it simply states that a second means of egress is only required if there are habitable

rooms in the cellar. This further implies that a basement space is not generally considered as habitable.

The regulation is not entirely prescriptive and leaves an element of interpretation. Guidance note B1.ii, paraphrasing, states that the fire safety measures should be based on assessment of risk. Guidance note B1.v states that in certain circumstances a single direction of escape can be accepted as providing reasonable safety. In terms of risk, the cellar space is not habitable, is therefore unlikely to have multiple occupants, has a very low frequency of use and any use is for a short duration. Given that a fire is extremely unlikely event in the first place and that the probability of one occurring during very infrequent visits to the cellar at just the right time despite the short duration of visit to the cellar the occupant became trapped, in terms of assessment of risk the probability of this occurring and thus the risk of being trapped in the cellar is negligible.

Whilst the imposed requirements make absolute sense in terms of habitable space, I believe that the definition of an inner room is being inappropriately applied and the resultant requirement is excessively onerous for a non habitable space and as such wish to apply for a dispensation with regard to the requirement to fit an escape window and linked smoke alarm to the cellar.”

### **The Council's case**

5. The Council sent the Department its views, by letter, on 11 July 2014, explaining it's refusal to dispense with requirement B. The Council stated that it's refusal to dispense was fully explained in e-mail correspondence between the appellant and local authority on the 28 May, 03 June and 16 June 2014 respectively:

#### E-mail on 28 May 2014:

“Thank you for this information. Please be aware that I need to send this for consultation with the LA structural engineer, any comments I shall forward on. In relation to the works the removal of the hallway wall has caused an inner room situation to the cellar. Before the cellar discharged directly into the hallway however know it discharges into the kitchen meaning the means of escape is worse that before. In this regard you will need to provide an egress window to one of the cellar chambers (min 450mm wide and 0.74mm high to give a clear openable area of 0.33m<sup>2</sup>). Please be aware that the light well to the egress provision will need to comply with the building regulations (until design proposed unable to specify which Approved documents would dictate). The sill height must be no greater than 1100mm from the finished floor level. Hard wired interlinked optical smoke detection will be required to the cellar circulation space interlinked to an optical hard wired heat detector within the kitchen area.

In the meantime I shall send the information off for structural consultation.”

E-mail on 3 June 2014:

“Thank you for the email. I discussed this with my manager as I only want to enforce what is necessary and enforce what I can. My manager was in agreement with myself that the situation has been made worse than before and unfortunately we have no control over the use of this area say once the works have been signed off. We would have to hope and assume that a responsible owner would apply for the required Building regulations to ensure compliance when they started any works- obviously this is what you have indicated you will do however If you sell and a subsequent owner does not then this is a different matter. In addition the cellar is the full footprint of the house and not merely one small cellar area - it has several chambered areas with doors. I suggest in this regard you speak to my manager if you wish to appeal. My manager can be contacted on 0161 474 3556 between 10am-3pm daily. In the meantime I am awaiting our structural engineer to come back with his response to the calculations which we only submitted for consult on the commencement inspection- upon receipt I will forward any comments.”

E-mail on 16 June 2014:

“I have now had a chance to look through the correspondence between yourself and my colleague and would reply as follows. The original plan layout for the ground floor of your house shows that prior to the alteration works the basement area was accessed by a door from the hallway which allowed any users of the basement area to exit the basement in an emergency in a degree of safety.

The proposal removes this protection and makes the basement area an inner room off the kitchen. Regardless of the current or proposed use of the basement the Statutory Instrument requires that where alteration works are carried out the work is considered to be a material alteration if following the works, it the results in a ‘building... not complying with a relevant requirement where previously it did’. A ‘relevant requirement’ includes the need to comply with Requirement B1 of the Building Regulations which requires that all buildings be provided with adequate means of escape and early warning. The original construction would not have provided for a mains powered interlinked fire and smoke detection system but a level of safe escape would have been provided by the original ground floor design. This has been removed. As a result the situation as far as means of escape is concerned is less satisfactory than it was prior to the building works being carried out. To resolve this situation you would need to provide an alternative escape from the basement area which will at least create conditions similar to that which existed prior to your ground floor alterations. This should be supported by the provision of a mains powered interlinked smoke alarm in the basement area linked to an optical smoke detector in the kitchen area.

I hope this resolves the situation.”

E-mail on 26 June 2014:

Proposal: Removal of 3 internal walls, Installation of Bi-fold doors at rear.

Thank you for your application requesting dispensation of Requirement B1 of the Building Regulations in relation to the alterations carried out at your property. As we previously advised, the stair to the basement, from which there is no alternative escape route, was originally designed to discharge into an enclosed hallway at ground floor level. The works which have been carried out to remove this enclosure and are considered to be a material alteration as the works now result in a situation where a building which previously complied with a relevant requirement (Requirement B1) no longer does.

Having read your correspondence of 24 June 2014 together with your earlier e-mails (3 and 16 June 2014), I would advise that the justification given for the removal of the protection to the head of the stair is not satisfactory. The basement, regardless of its condition is part of the house and it's a requirement of the Building Regulations that:

*'The building shall be designed and constructed so that there are appropriate provisions for early warning and appropriate means of escape of fire from the building to a place of safety outside the building capable of being used at all material times'.*

As the property is not provided with a mains powered interlinked fire alarm system or an appropriate escape route from the basement it is considered that the risk to life from the proposed layout is unacceptable and for this reason this authority does not consider that it would be appropriate to dispense with Requirement B1.

As the local authority has refused your request for dispensation of Requirement B1 you have the right of an appeal to the Secretary of State against this decision provided that this occurs within one month of the date of being notified of refusal.

Guidance on how to make this appeal is available on the Planning Portal but a copy of the form is attached for your use."

### **The Secretary of State's consideration**

The Secretary of State has given careful consideration to the particular circumstances of this case and the arguments presented by both parties.

The Council have argued that the changes in layout resulting from the building work have resulted in the cellar becoming an inner room and as such the means of escape from the cellar has been made worse. The Secretary of State takes the view that the first issue in this case relates to the application of regulation 4(3): whether the building in question complied with requirement B1 before the work was carried out and continued to comply after the work was completed or, if the building did not comply with requirement B1 before the work was carried out, is now is no more unsatisfactory in respect of that requirement. If it is considered to be more unsatisfactory, the second issue is whether it is reasonable in the circumstances of this case to relax the requirement.

Inner rooms, where the escape route is via another room, with no other route of escape, are not normally considered acceptable where they are “habitable” rooms. This is because the risk of a person becoming trapped by a fire starting in the access room is considered to be too great. Non-habitable rooms tend to be occupied for shorter, intermittent periods and so the risk is considered to be lower.

For the purposes of requirement B1, Approved Document B defines a habitable room as a room used, or intended to be used for dwelling purposes (including...a kitchen, but not a bathroom). Parts of a house generally not considered to be habitable include loft areas which are used for occasional storage.

The Building Regulations cannot control the use to which rooms in dwellings are put once building work has been completed. As the provisions in Part B (Fire Safety) are designed to ensure the health and safety of people, the likely use of the cellar space (e.g. by future occupants) has to be taken into account.

As such, a judgement must be made as to whether the cellar space should be treated as storage only or as a space likely to be used for habitable purposes by the current, or any future occupants of the building without further adaptation. There is no definitive way of deciding this but Issues that might be taken into account when considering whether the space is a habitable room could include its size (particularly in relation to the rest of the building), whether it has electrical services (e.g. power sockets etc), is plastered, has a stair (of any type), and, if there is a window providing ventilation and natural light.

The Council consider that the cellar should be regarded as habitable space as it is the full footprint of the house and has several chambered areas with doors. However you have argued the doors are no more than garden gates, there is a single light switch at the entrance covering the whole cellar area, no heating, no natural light.

The Secretary of State has given careful consideration to the arguments presented by both parties and has concluded that the cellar is not a habitable room. As such the means of escape from the cellar, which complied with requirement B1 before the work was carried out, continues to comply with that requirement. It follows that it would not be necessary to relax requirement B1.

## **The Secretary of State's decision**

The Secretary of State has concluded that in this case the building continues to comply with requirement B1 and therefore regulation 4(3) of the Building Regulations 2010 is satisfied. There is therefore no need to relax or dispense with requirement B1.

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

A copy of this letter is being sent for information to the Council.