

Determination

under the

Building Act 1991

No. 95/002: Access for people with disabilities to be provided in the alteration of a local government administration building two storeys high

1. The matter to be determined

- 1.1 The matter before the Authority was whether a lift suitable for use by people with disabilities should be installed in the alteration of a local government administration building in order to comply with section 38 of the Building Act. That section provides in effect that after an alteration the building concerned is to comply with certain provisions of the building code (the First Schedule to the Building Regulations 1992), including the provisions for access and facilities for use by people with disabilities, “as nearly as is reasonably practicable, to the same extent as if it were a new building”.
- 1.2 The applicant, and the only party to the determination, was the local authority (“the Council”) which owns the building. Being in doubt about the matter, the Council applied to the Authority for a determination.
- 1.3 The Council appears to have made its application in the belief that making the alterations without installing a lift would require a waiver or modification of the building code which could be granted only by the Authority under section 34(6) of the Building Act. The Authority disagrees, for reasons set out in the Authority’s statement “Access and Facilities for People with Disabilities” published in *Building Industry Authority News* No. 23, June 1993. The question is not whether there should be a modification or waiver of the building code but whether the building, after the proposed alteration, would comply with the provisions of the building code for access and facilities for use by people with disabilities “as nearly as is reasonably practicable, to the same extent as if it were a new building”.
- 1.4 The Authority takes the view that it is being asked in effect to determine whether, after the proposed alteration, the building, without a lift, would comply as nearly as is reasonably practicable with clause D1 “Access routes” of the building code.
- 1.5 In making its determination, the Authority has not considered whether the proposed building will comply with any other provisions of the building code.

2. The building

- 2.1 The building is outside the central building district on a site now zoned for tourist accommodation. It has two storeys. The ground floor area is 849 square metres, the upper floor area is 831 square metres. As originally erected in 1968, the building had an area of approximately 600 square metres on each floor. It was extended in 1985 by the addition of approximately 230 square metres on each floor, and again in 1989 by the addition of approximately 40 square metres on each floor. The current proposal is for a further extension of approximately 40 square metres on the ground floor.
- 2.2 The ground floor contains public counters, offices, and other facilities. The upper floor contains more offices, including that of the mayor, the council chamber, a committee room, a councillors' lounge, and other facilities.
- 2.3 The Council advised that 44 staff members work on the ground floor and 32 on the upper floor. Approximately another 50 staff members will be in attendance at peak times (although it was not stated if any of them would be on the upper floor) and 20 or more customers could be in the building at any one time (again it was not stated if any would be on the upper floor). In addition, from 10 to 50 extra people could be in the council chambers for meetings of the Council or its committees.
- 2.4 The proposed extensions to the ground floor are intended to improve the Council's service to the public, and in particular to provide facilities for a "one-stop" property information service. There will be some consequential adjustments to the partitioning of the upper floor.

3. The legislation

- 3.1 When the building was originally erected in 1968 there appears to have been no statutory requirements for access and facilities for people with disabilities.
- 3.2 At the time of the 1985 extension, however, section 25 of the Disabled Persons Community Welfare Act 1975 (since amended) required reasonable and adequate provision to be made for people with disabilities in "the major reconstruction" of any building to which that section applied, including the building concerned. Section 25(1) gave the Director-General of Social Welfare a power of exemption, and section 25(2) provided that any provision made in accordance with NZS 4121 was deemed to be reasonable and adequate. The then current (1971) version of NZS 4121 provided:

5.4 Ground floor facilities Where elevators or ramps to floors above ground floor in public buildings are not provided -

 - (a) All public space should be located on the ground floor; *or*
 - (b) Interview or reception space for upper floor offices should be provided on the ground floor.
- 3.3 It is arguable that the 1986 extension (about a 50% increase in floor area) amounted to a "major reconstruction" within the meaning of the Disabled Persons Community

Welfare Act at that time, and the same might possibly be the case with the 1989 extension (about a 10% increase) also.

- 3.4 Nevertheless, the Council has been advised by retired staff concerned with the 1986 extension that “there was consideration towards installing a lift, but finance constraints prevented that, and that there was no requirement to seek any approval to not include a lift”.
- 3.5 Section 25 of the Disabled Persons Community Welfare Act was amended in 1991 by way of the Building Act, and now requires provision for people with disabilities to be made in the “alteration” of a building to which it applies. The word “alteration” is not defined in the Disabled Persons Community Welfare Act, but it does refer to the Building Act and provides that NZS 4121 is deemed to be one of the documents establishing compliance with the building code.
- 3.6 The corresponding provisions of the Building Act provide that no building consent shall be granted for the alteration of an existing building unless the territorial authority is satisfied that after the alteration the building will comply with the provisions of the building code for access and facilities for people with disabilities as nearly as is reasonably practicable as if it were a new building.
- 3.7 For new buildings, clause D1.3.4(c) of the building code provides that a lift is to be provided in a two-storey if the upper floor has a total design occupancy of 40 or more persons, but in any case irrespective of design occupancy if the upper floor is to be used for the purposes of public reception areas of local government offices.
- 3.8 For new buildings, clause 216.1.1 of NZS 4121 provides that rooms and areas used for meetings shall be on an access route negotiable unaided by a person in a wheelchair. Clause 304 provides that a lift is to be provided in a two-storey if the upper floor has a gross aggregate floor area of 400 square metres or more, but in any case irrespective of area where the upper floor is to be used for the purpose of public reception areas for municipal offices.
- 3.9 The Local Government Official Information and Meetings Act 1987 requires that meetings (as defined in that Act) of the Council itself, its committees, and its subcommittees shall be open to the public except in special circumstances.

4. The Council’s contentions

- 4.1 The Council accepts that if the building were a new building it would require a lift. The Council also accepts that there are no significant technical difficulties in providing a lift.
- 4.2 The Council estimates that the proposed alterations (without a lift) will cost approximately \$61,000 and that it will cost approximately an additional \$95,000 to install a 900 mm x 1200 mm hydraulic platform lift which does not have automatic doors.
- 4.3 In other words, installing such a lift would increase the costs of the proposed alterations by approximately 150%.

- 4.4 The Council submitted that as the building is outside the central building district on a site zoned for tourist accommodation, saying:

The expectations are that the Council will probably sell the whole property within ten years as a consequence of that misuse of the land (possibly even earlier). The building may then be gutted and converted into a hotel or similar by the new owner.

- 4.5 The Council contended that in those circumstances the 150% increase in costs makes it unreasonable to require a lift to be installed.

5. Discussion

5.1 The previous alterations

- 5.1.1 The Authority is not required to decide whether, contrary to the Council's opinion at the time, the then current legislation required a lift to be installed as part of the 1986 extension unless a waiver was issued by the Director-General of Social Welfare.

- 5.1.2 However, the history of this building provides an illustration of how successive alterations, even if some or all of them are comparatively minor, can in the aggregate and over a period of time significantly affect the extent to which an existing building complies with the building code.

5.2 Application of the current statutory provisions

- 5.2.1 In two previous determinations the Authority said that it took "public reception areas" to be those areas to which the public needed to have access to avail themselves of the services provided for them in the building. In this case, the public has a right to attend meetings in the council chamber under the Local Government Official Information and Meetings Act and they need to have access to the upper floor for that purpose. The Authority therefore considers that the upper floor includes public reception areas, so that if the building were a new building a lift would be required irrespective of the design occupancy or the floor area of the upper floor. However, the Authority notes that even if the council chambers were on the ground floor both the design occupancy and the floor area of the upper floor are such that a lift would be required.

5.3 Is consideration of upgrading justified?

- 5.3.1 The Council did not argue that the proposed extension was so minor that it did not justify any upgrading of the building as a whole. Nevertheless, a question that arises frequently in practice is whether a particular alteration to an existing building justifies a requirement to upgrade the whole of the building.

- 5.3.2 Section 38 of the Building Act provides that no building consent shall be granted for the alteration of an existing building unless the territorial authority is satisfied that after the alteration the building will comply with certain provisions of the building code, as nearly as is reasonably practicable, to the same extent as if it were a new building. In this case, the relevant provisions relate to access for people with disabilities.

- 5.3.3 On that interpretation of section 38, no building consent may be granted for any alteration, however small, unless that alteration includes whatever building work, if any, is necessary to upgrade the building to comply with the relevant provisions of the building code as nearly as is reasonably practicable. The Authority does not accept that interpretation, but considers that section 38 must be considered in the context of the Act as a whole and in particular of the wide discretion that it gives to territorial authorities and to the Authority under other sections.
- 5.3.4 The Authority therefore interprets section 38 as including an implied proviso to the effect that building consent shall not be refused unreasonably. In other words, and provided the other provisions of the Act are satisfied, it is unnecessary even to consider upgrading if it would be unreasonable, in the circumstances of the case concerned, to refuse a building consent for the alteration on the grounds that other building work is, or might be, necessary to upgrade the building to comply with the relevant provisions of the building code as nearly as is reasonably practicable.
- 5.3.5 The Authority considers that the relevant circumstances include the nature and extent of the proposed alteration, the extent, if any, to which the building as a whole fails to comply with the building code, and the extent to which that failure endangers or disadvantages people in general and people with disabilities in particular. The Authority does not consider that the difficulties, including the costs, of upgrading are relevant at this stage.
- 5.3.6 In making that decision, it is advisable to bear in mind the possibility of a series of alterations over a period of time, which, even if some or all of them are comparatively minor, might significantly affect the extent to which an existing building complies with the building code.
- 5.3.7 If, taking account of all relevant circumstances, it would be unreasonable to refuse a building consent unless the building is upgraded, then the building consent must be issued without any requirement for upgrading, and that is the end of the matter.
- 5.3.8 Only if it would be reasonable to refuse a building consent need consideration be given to what, if any, upgrading is to be required. The nature of such consideration, by balancing the sacrifices and difficulties of upgrading against the disadvantages of not upgrading, have been discussed in several previous determinations. In practice, of course, it is the responsibility of the applicant to include in the application for building consent plans and specifications for such additional work as is necessary to bring the building to compliance with the relevant provisions of the building code as nearly as is reasonably practicable.
- 5.3.9 In this case, the Authority took account of the following factors when considering whether it would be unreasonable to refuse building consent on the grounds that other building work is, or might be, necessary to upgrade the building to comply with the relevant provisions of the building code as nearly as is reasonably practicable:

Against upgrading

The proposed alteration is comparatively small, increasing the ground floor area by approximately

For upgrading

People who cannot use the stairs are effectively prevented from:

5%.

All of the Council's "customer services", but not Council and committee meetings, are available on the ground floor.

There is an expectation that the Council will sell the building during the next 10 years.

- Attending meetings of the Council and its committees as members of the public.
- Serving as councillors.
- Working on the upper floor.

5.3.10 The Authority considers that no account is to be taken of "expectations" that the Council "will probably" sell the building within 10 years. It might have been different if there had been an unconditional agreement for sale and purchase of the building in the reasonably near future and an assurance that the question of upgrading would necessarily be addressed again once the building changed ownership.

5.3.11 The Authority considers that the cost of upgrading is not relevant to the question of whether the proposed alteration justifies any requirement whatsoever for upgrading.

5.3.12 Having taken all relevant factors into account, the Authority decided that the factors in favour of upgrading outweigh the factors against upgrading to such an extent that it is reasonable to consider upgrading the building as a whole.

5.4 *What, if any, upgrading is reasonably practicable?*

5.4.1 The only upgrading measure to be considered in this case is the installation of a lift.

5.4.2 The Council contended that the cost of a lift, particularly in relation to the cost of the proposed extension, made it unreasonable to require a lift to be installed. The Authority accepts that the cost is relevant to whether it is reasonably practicable to install a lift, but that the cost is to be considered not in relation to the cost of the proposed alterations but in relation to the disadvantages arising from the lack of a lift.

5.4.3 The Authority considers that the Council's estimated cost for a lift is too low. Approved Document D2 provides that the minimum interior dimensions of a lift car for use by people with disabilities is 1400 mm x 1400 mm (paragraph 71.2 of D2/AS1) and that car and landing doors are to be power operated and fitted with passenger protective devices and delayed closing (paragraph 71.3 of D2/AS1). Of course, that acceptable solution is not mandatory, and the Council is entitled to accept some other solution that complies with the building code. However, the Authority considers that in this case the interior dimensions should be at least 900 mm x 1400 mm.

5.4.5 The additional cost of a lift suitable for people who cannot use the stairs will therefore probably be somewhat greater than the Council's estimate. Nevertheless, the Authority considers that on balance the disadvantages of not having a lift, as listed in 5.3.9 above, outweigh the only sacrifice or difficulty, namely the cost, of installing a lift.

6. The Authority's decision

- 6.1 In accordance with section 20(a) of the Building Act the Authority hereby determines that no building consent is to be issued for the alterations without the installation of a lift having minimum interior dimensions of 900 mm wide x 1400 mm deep and with power-operated doors fitted with appropriate passenger protection devices and delayed closing.

Signed for and on behalf of the Building Industry Authority on this 9th day of June 1995

J H Hunt
Chief Executive