Determination

under the

Building Act 1991

No. 96/005: Access for people with disabilities in a racecourse building

1. The matter to be determined

1.1 The matter before the Authority was whether a building consent should be issued for building work on what has been described, in the documents submitted to the Authority, as both a new building and as the alteration of an existing building on a racecourse. There is no lift access for people with disabilities in the existing building and it is not proposed to include a lift in the new building work.

1.2 The Authority took the view that it was being asked in effect to determine whether:

(a) The proposed work would include the construction of a new building as distinct from the alteration of an existing building; and

(b) If the proposed work would include the construction of a new building, whether that building, without a lift, would comply with clause D1.3.4(c) of the building code (the First Schedule to the Building Regulations 1992); or

(c) If the proposed work would be the alteration of an existing building, whether that building, after the alteration, would comply as nearly as is reasonably practicable with clause D1.3.4(c) without a lift.

1.3 In making its determination, the Authority has not considered whether the proposed building, or the existing building as altered, will comply with any other provisions of the building code.

2. The parties

2.1 The applicant was the local jockey club acting through the firm of architects and engineers responsible for the design of the building ("the applicant"). The other party was the territorial authority concerned ("the Council").

2.2 Neither party wished to speak and call evidence.

3. The existing building and the proposed building work

3.1 The existing building consists of:

(a) A members' grandstand having two storeys. The lower floor is accessible from the outside and includes a sponsor's room and accessible sanitary facilities. The upper floor, having a gross floor area of approximately 390 m^2, contains a lounge area and associated facilities.

(b) A single storey wing abutting the grandstand and containing jockeys' rooms; and

(c) An elevated viewing deck reached by stairs from the ground and forming in effect a verandah in front of the jockeys' rooms.

3.2 The proposed building work consists of:

(a) Erecting over the jockeys' rooms:

(i) A floor, at the same level as the upper floor of the existing grandstand, containing a sponsor's lounge, with associated sanitary facilities and other service rooms, having a gross area of approximately 260 m^2; and

(ii) Two higher floors ("the tower") containing facilities for judges, commentators, and camera operators, each having a gross area of approximately 35 m^2; and

(b) Removing the roof of the jockeys' rooms;

(c) Altering the walls and partitions of the jockeys' rooms so that the underside of the new construction for the lounge area will serve as the roof to the jockeys' rooms;

(d) Altering the viewing deck;

(e) Installing accessible toilet facilities on the ground floor of the grandstand; and

(f) Altering the external wall of the grandstand where it abuts the sponsor's lounge and installing a door between the member's lounge and a lobby leading to the sponsor's lounge in the new construction.

3.3 The building work will be structurally independent of the existing building, and the sponsor's lounge will be separated from the members lounge by fire rated construction.

4. The legislation

4.1 The relevant legislative provisions are in the Disabled Persons Community Welfare Act, the Building Act, and either the building code (the First Schedule to the Building Regulations), or (for the reasons set out in Determinations 94/006, 95/001, and 95/008) NZS 4121 "New

Zealand Standard Code of Practice for Design for Access and use of Buildings and Facilities by Disabled Persons".

4.2 Section 25(4) of the Disabled Persons Community Welfare Act says:

> (4) The provisions of this section shall apply to . . .
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> (q) Places of assembly, including . . . sports stadiums . . .

4.3 Section 6(2) of the Building Act says:

> ...(2) To achieve the purposes of this Act, particular regard shall be had to the need to -
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> (e) Provide, both to and within buildings to which section 25 of the Disabled Persons Community Welfare Act 1975 applies, means of access and facilities that meet the requirements of that Act to ensure that reasonable and adequate provision is made for people with disabilities to enter and carry out normal activities and processes in those buildings . . .

4.4 Section 38 of the Building Act says:

> 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 -
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> (a) Comply with the provisions of the building code for means of escape from fire, and for access and facilities for use by people with disabilities (where this is a requirement in terms of section 25 of the Disabled Persons Community Welfare Act 1975), as nearly as is reasonably practicable, to the same extent as if it were a new building; and
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> (b) Continue to comply with the other provisions of the building code to at least the same extent as before the alteration.

4.5 As discussed in Determination 96/003, the Authority considers that under the Building Act and the Disabled Persons Community Welfare Act the Authority does not have the power to waive or modify the provisions of the building code (or the power provisions of NZS 4121) in respect of the construction of a new building.

4.6 Clause D1 of the building code says (defined terms in italic type):

> **D1.3.2** At least one *access route* shall have features to enable *people with disabilities* to:
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> (b) Have access to the internal space served by the principal access . . .

D1.3.4 An *accessible route* . . . shall:

(c) Include a lift . . . to upper floors where:

(i) *buildings* are four or more storeys high,

(ii) *buildings* are three storeys high and have a total design occupancy of 50 or more persons on the two upper floors, and

(iii) *buildings* are two storeys high and have a total design occupancy of 40 or more persons on the upper floor . . .

4.7 Compliance with NZS 4121 is equivalent to compliance with the corresponding provisions of the building code. The relevant provisions of NZS 4121 are:

(a) Clause 304, which provides that, subject to certain conditions, a lift is not required "in the case of a two-storey building [excluding places of assembly for 250 or more people and certain other buildings] where the gross floor area of the upper floor is less than 400 m^2, or a three-storey building where the gross aggregate floor area of the upper floors is less than 500 m^2"; and

(b) Schedule D which provides that "If the provisions of this Standard do not require a lift to be installed [in a place of assembly], then the principal activities shall be located on the ground floor."

4.6 The design occupancies of the sponsor's lounge and the members' lounge clearly exceed those mentioned in clause D1.3.4(c), but the gross floor areas do not necessarily exceed those mentioned in clause 304 of NZS 4121. The discussion below, therefore, is almost entirely in terms of NZS 4121.

5. The submissions

5.1 General

5.1.1 The territorial authority did not make any specific submissions, but the application for determination included copies of previous correspondence between the parties, including the territorial authority's reasons for refusing building consent, as well as specific submissions from the applicant. The applicant also provided further factual information at the request of the Authority.

5.1.2 The Authority obtained, and copied to the parties, a report from a consultant specialising in access and facilities for people with disabilities who gave his reasons for considering that the building work should be treated as the alteration of an existing building rather than as the construction of a new building. On that basis, the consultant recommended that a lift should be provided. The territorial authority made no submissions on that report. The applicant took issue with several passages in the report, and disagreed with its recommendation.

5.2 The applicant's submissions

5.2.1 The applicant submitted that:

(a) The existing building was not being extended but a separate new building was being erected;

(b) "The new room has an area less than the 400 m^2 stipulated in [NZS 4121] as the maximum allowable first floor area without a lift";

5.2.2 The applicant's submissions also made several points about management, including:

(a) Members would not be entitled to use the sponsor's lounge;

(b) Admission to the various rooms and areas would be controlled by security personnel;

(c) If people with disabilities were to attend sponsor's functions then the sponsor's room on the ground floor of the grandstand could be used;

(d) There is currently uncontrolled access for members from the grandstand to the viewing deck and there would continue to be such access to the altered viewing deck; and

(e) The people who would use the tower were employed on a regional basis, and the corresponding facilities at other racecourses in the region were not accessible.

5.2.3 Despite the applicant's submission that the existing building was not being extended, various documents attached to the submission which the applicant had previously submitted to the territorial authority referred to the building work as being the alteration of an existing building.

5.2.4 The applicant also submitted a letter from the manager of a local rest home to the effect that residents, many of them in wheelchairs, had visited the racecourse on numerous occasions and had found the facilities on the ground floor of the existing members' grandstand "more than adequate" for their needs.

6. Discussion

6.1 Principle activities

6.1.1 Schedule D of NZS 4121 applies to the building or buildings concerned. For the purposes of that schedule, the Authority accepts that the principle activities of the building or buildings are:

(a) Viewing races;

(b) Using lounge areas and associated facilities, whether in association with viewing races or while attending functions held in such areas.

6.1.2 The Authority notes that those activities are located on the ground floor as well as on the upper floor of the existing building. In Determination 96/003, the Authority said "Schedule D is to be interpreted as meaning that the principal activities are to be located on the ground floor *to the extent necessary to ensure that reasonable and adequate provision is made for people with disabilities to take part in those activities*".

6.1.3 The Authority therefore considers that the facilities on the ground floor of the existing building satisfy Schedule D.

6.1.4 The activities to be undertaken by judges, commentators, and camera operators in the proposed tower are undertaken by so few people that the Authority does not consider them to be "principle activities" for the purposes of Schedule D.

6.1.5 Nevertheless, the Authority rejects the applicant's submission to the effect that because the people who would use the tower were employed on a regional basis, and the corresponding facilities at other racecourses in the region were not accessible, therefore there was no reason why the new facilities at this racecourse should be accessible either. The Authority has been given no reason to believe that people with disabilities are prevented, solely by their disabilities, from acting as judges or commentators or camera operators with the consequence that section 25 of the Disabled Persons Community Welfare Act does not apply to the tower because no people with disabilities are to be expected to visit or work in the building. The question of whether the tower should be accessible will therefore be considered on the same basis as the other parts of the building or buildings concerned.

6.2 How many stories will be created by the building work?

6.2.1 The applicant's submission referred to 400 m^2 as being the "maximum allowable first floor area without a lift". That is the case for a building having two storeys only, see clause 304 of NZS 4121. The proposed building work will create four storeys because of the tower. For a new building having four storeys a lift is required irrespective of floor areas. (For a building having three storeys the corresponding area is 500 m^2 "gross aggregate floor area of the upper floors". Four storey buildings are not specifically mentioned in NZS 4121 but are specifically mentioned in clause D1.3.4(c)(i) of the building code.)

6.2.2 The building work will be either the construction of a new building having four storeys or the alteration of an existing building so that it will have four storeys.

6.2.3 The Authority recognises that the two floors of the tower each have a comparatively small gross floor area of approximately 35 m2. Nevertheless, there is nothing in either NZS 4121 or the building code itself which would permit them to be disregarded, and 35 m^2 is not so small that the existence of the tower may be regarded as a trifling matter with which the law is not concerned.

6.3 How many buildings will there be after the building work?

6.3.1 The applicant contended that after the building work there would be two buildings, neither of which would be required to have a lift because the upper floor of each would be less than the 400 m^2 at which NZS 4121 requires a lift in a building having two storeys. The consultant's report was written largely on that basis. For the reasons set out in 6.2.1 above, the Authority considers that the applicant's contention is incorrect. Accordingly, the question of how many buildings there will be after the building work will be considered in the context that the determination turns on whether the building work should be classified entirely as the alteration of the existing building or partly as the alteration of the existing building and partly as the construction of a new building, see 1.2(a) above.

6.3.2 If, after the proposed building work, there are two buildings, see 1.2(b) above, then the new building is required to include a lift for the reasons set out in 6.2 above. There is no power for the Authority to waive that requirement, see 4.5 above

6.3.3 On the other hand, if, after the proposed work, there is still only one building then that building must include a lift if reasonably practicable.

6.3.4 Section 3 of the Building Act defines the word "building" in very broad terms, and includes the following:

> (2) For the purposes of [Part IX of this Act,] a building consent, a code compliance certificate, and a compliance schedule the term "building" also includes -
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> (a) Any part of a building; and
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> (b) Any 2 or more buildings which, on completion of any building work, are intended to be managed as 1 building with a common use and a common set of ownership arrangements.

6.3.5 Clearly, that definition allows the existing building and the new building work to be treated as a single building for the purposes of a building consent. However, the Authority does not consider that the definition prevents the existing building and the new construction from being treated as two buildings. The Authority regards section 3(2) as being a sensible provision for administrative flexibility. It would obviously be absurd for two separate building consents to be required in this case, whether or not two separate buildings are involved. It would also obviously be absurd in other cases for separate building consents to be required for building work in separate parts of the same building. The Authority considers that where a provision of the Building Act or the building code could be applied to a part of a building, to the whole of that building, or to all of the buildings in the same complex as the building concerned, then the provision should be applied to whichever is the more reasonable in the circumstances.

6.3.6 In any case, it can be queried whether the definition of "building" in section 3 of the Building Act is relevant to the phrase "buildings to which section 25 of the Disabled Persons

Community Welfare Act applies". Section 25 can clearly apply only to something which is a "building" for the purposes of the Disabled Persons Community Welfare Act[1]. That Act does not contain any definition of the word "building", a point which has arisen in several cases which have come before the Courts. MP 4121 "Guide to the approachability, accessibility and usability of buildings", a commentary on NZS 4121, discusses such cases, but they are mainly concerned with the effects of subdividing a building to create separate legal titles and do not appear to be relevant to this determination. Thus the Authority concludes that for the purposes of this determination the word "building" in the Disabled Persons Community Welfare Act is to be given its ordinary and natural meaning.

6.3.7 The consultant's report mentioned in 5.1.2 above gave various reasons for concluding that after the alterations there would still be only one building. He considered structural matters, the fact that there was access from the members' lounge to the sponsor's lounge and the viewing deck, and concluded that the sponsor's lounge and the member' stand would each rely on the other for some facilities. The Authority recognises the use of that approach, but does not accept that it is determinative in this case. That is because the Authority takes the view that other buildings in the same complex may be taken into account when deciding whether the building concerned complies with particular provisions of the building code (see Determinations 94/004, 95/003, and 96/003).

6.3.8 The Authority concludes that, for the purposes of this determination, there will still be only one building after the proposed building work because:

(a) Anyone who had no involvement in the building work would undoubtedly regard the final combination of members' lounge and grandstand, sponsor's lounge, viewing deck, and jockeys' rooms as constituting a single building.

(b) If section 3 of the Building Act applies, it is more reasonable for the purpose of that Act to treat the building work as being the alteration of an existing building rather than as being the erection of a new building with associated alterations to a separate existing building.

6.3.9 In other words, the Authority concludes that the aggregate of the building work itemised in 3.2 above can be properly described as the alteration of an existing building. In that regard, section 2 of the Building Act says:

> "Alter", in relation to a building, includes to rebuild, re-erect, repair, enlarge and extend; and "alteration" has a corresponding meaning.

[1] Section 25 of the Disabled Persons Community Welfare Act will become section 47A of the Building Act in due course as provided by the Health Reforms (Transitional Provisions) Act 1993. When that happens, then the word "building" in section 47A will have the meaning ascribed to it by section 3, but it has not yet happened at the time of writing.

6.4 Would it be reasonably practicable to include a lift?

6.4.1 After the alteration, the building will be of four storeys and a lift would be required for that reason if it were a new building.

6.4.2 In considering whether a building complies as nearly as is reasonably practicable with a particular provision of the building code, in this case clause D1.3.4(c), see 1.2(c) above, the Authority balances the sacrifices and difficulties of upgrading, in this case by installing a lift, against the risks and disadvantages of not upgrading. That approach has been discussed in several previous determinations and was considered by the High Court when it upheld Determination 93/004 on appeal[2].

6.4.3 In this case, the only sacrifice appears to be the costs of installing a lift and of undertaking the re-design and additional building work, if any, necessary to ensure that the lift is appropriately located to serve both the members' lounge, the sponsor's lounge, and the tower. The applicant did not assist the Authority with any estimates of what would be involved, but from the drawings submitted it appears that the costs involved can be expected to be significantly greater than the costs of installing a lift in an entirely new building containing the same facilities. Indeed, it is difficult to see how a single lift could be conveniently located to serve both lounges and also the tower unless the building is substantially re-designed.

6.4.4 The Authority notes that from the viewpoint of the vast majority of users of the building, excluding only the judges, commentators, and camera operators, the building will have only two storeys because only the ground and first floors will be available for their use. The aggregate gross area of the first floors will be approximately 620 m^2, which is almost half as much again as the area at which a lift would be required in a new two storey building.

6.4.5 The main disadvantage of not installing a lift appears to be that people who cannot use stairs (which includes many people who are not wheelchair users) will not have access to the sponsor's lounge and the members' lounge. They do not have access to the upper floor of the existing building at present, but the letter from a rest home mentioned in 5.2.4 above indicates that people with disabilities who wish to watch the races and use the associated facilities are not unreasonably disadvantaged by that because they can do so at ground floor level. They will continue to be able to do so after the alterations. As for those working at the racecourse, people with disabilities will not be able to work as waiters, bartenders, and so on in the two first floor lounges, but they will be able to undertake such work on the ground floor, so that the Authority considers that they too will not be unreasonably disadvantaged by the lack of a lift.

6.4.6 Another disadvantage is that people with disabilities will not be able to work in the tower. That disadvantage appears to relate to future opportunities rather than to present

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[2] *Auckland City Council v New Zealand Fire Service*, 19/10/95, Gallen J, HC Wellington AP 336/93, partially reported at [1996] 1 NZLR 330.

circumstances because the Authority has no reason to believe that there are in fact any people with disabilities doing such work. The Authority is well aware of the fact that they might not be doing the work because they do not have access to the work places in which it is done. Nevertheless, even if there are appropriately qualified people with disabilities wishing to undertake such work there are only a very few positions available and the fact that the facilities at one racetrack will not be accessible is not regarded as sufficient to justify the installation of a lift in the particular circumstances concerned.

6.4.7 On balance, therefore, the Authority considers that the disadvantage of people with disabilities not having access to the sponsor's lounge, when they do have access to corresponding facilities, and the disadvantage of people with disabilities not having access to the tower, are not sufficient to justify the additional costs of installing a lift.

7. The Authority's decision

7.1 In accordance with section 20(a) of the Building Act the Authority hereby reverses the territorial authority's decision to refuse building consent and determines that a building consent is to be issued for the building work concerned without a lift.

Signed for and on behalf of the Building Industry Authority on this 20th day of December 1996

J H Hunt
Chief Executive