

Determination

under the

Building Act 1991

No. 97/001: Access and facilities for people with disabilities in the alteration of a commercial building two storeys high

1. General

1.1 The matter to be determined

- 1.1.1 The matter before the Authority is whether a lift should be installed in the alteration of a building in order to comply with section 38 of the Building Act.
- 1.1.2 The applicant applied for this determination in terms of section 25(2) of the Disabled Persons Community Welfare Act rather than section 17 of the Building Act, see 10 below. Nevertheless, the Authority takes the view that it is being asked in effect to determine whether the altered building, without a lift, complies as nearly as is reasonably practicable with clause D1 “Access routes” of the building code (the First Schedule to the Building Regulations).
- 1.1.3 In making its determination, the Authority has not considered whether the proposed building will comply with any other provisions of the building code.

1.2 The Authority’s approach to the determination

- 1.2.1 In considering whether a building complies as nearly as is reasonably practicable with a particular provision of the building code 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 appeal¹.
- 1.2.2 In upholding Determination 93/004, the High Court said of the question as to whether a building complied with a particular requirement of the building code “as nearly as is reasonably practicable to the same extent as if it were a new building”:

¹ *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.

“It must be considered in relation to the purpose of the requirement and the problems involved in complying with it, sometimes referred to as ‘the sacrifice’. A weighing exercise is involved. The weight of the considerations will vary according to the circumstances and it is generally accepted that where considerations of human safety are involved, factors which impinge upon those considerations must be given an appropriate weight.”

2. The parties

2.1 The applicant was the owner of the building, the other party was the territorial authority concerned.

2.1 Neither party wished to speak and call evidence.

3. The building and the sequence of events

3.1 The building has two storeys, each of approximately 500 m². Half of the ground floor is occupied by a bank, the other half by a firm of real estate agents. The upper floor is occupied by a language school. The school has been in the building for six years and has a maximum of 79 people present at any one time (16 teachers and administrators and 63 students).

3.2 The applicant wished to refurbish the bank premises, and engaged professional advisers for the purpose. The work involved altering various internal partitions, removing three external doors and various external windows, and installing a new door and various new windows. The advisers considered, and the applicant accepted, that a building consent was not required, and the work was accordingly completed without consent.

3.3 When the territorial authority became aware of the work, it considered that a building consent had been required and therefore the building should have been upgraded to the extent required by section 38. The territorial authority accordingly issued a notice to rectify calling for additional work to be done in order to upgrade the building’s provisions for means of escape from fire and for access and facilities for use by people with disabilities, including the provision of a lift.

3.4 The applicant and the territorial authority have reached agreement on the details of rectification work for means of escape from fire and for certain provisions for people with disabilities. However, the applicant disputes the territorial authority’s requirement for a lift to be provided so as to give people with disabilities access to the upper floor and has accordingly submitted that matter to the Authority for determination.

3.5 The applicant has also asked the Authority to confirm whether the territorial authority has the power to agree, as it has done, to a ramp from the street which does not comply with clause D1.3.4(b) in that it is not wide enough for a person in a wheelchair to negotiate while permitting an ambulant person to pass. If the territorial authority does not have the power to accept that deviation from the building code then the applicant submits the point for determination by the Authority. That matter is discussed in 9 below.

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 There was no dispute that the building is one to which section 25 of the Disabled Persons Community Welfare Act applies. There was also no dispute that if it were a new building it would be required to include a lift.
- 4.3 There was no dispute that building consent was required for at least some of the refurbishment.
- 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 -
- (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
 - (b) Continue to comply with the other provisions of the building code to at least the same extent as before the alteration.
- 4.6 Clause D1.3.4(c) of the building code requires a lift to upper floors where (defined terms in italic type):
- (iii) *buildings* are two storeys high and have a total design occupancy of 40 or more persons on the upper floor . . .
 - (iv) An upper floor, irrespective of design occupancy, is to be used for the purposes of public reception areas of banks, central, regional, and local government offices and facilities, hospitals, medical and dental surgeries, and medical, paramedical and other primary health care centres.
- 4.7 In Determination 92.1103, the Authority took the view that for a new building the design occupancy could be calculated from Table A2 of Appendix A to Approved Document C4.
- 4.8 Compliance with NZS 4121 is equivalent to compliance with the corresponding provisions of the building code. The relevant provision of NZS 4121 are clause 304 and Schedule D, which require:

304.1

Lifts . . . shall be installed provided that in the case of a two-storey building where the gross floor area of the upper floor is less than 400 m² . . . a lift need not be provided . . .

304.2

Notwithstanding the requirements of 304.1 lifts shall be installed in all two-and-three storied buildings where the whole or part of the upper floors are designed or intended to be used for such purposes as:

- (a) Places of assembly for 250 or more persons
- (b) Public reception areas for:
 - (i) Banks
 - (ii) Municipal offices
 - (iii) Government offices or government agencies
- (c) Medical consulting rooms
- (d) Dental surgeries
- (e) Public libraries, or
- (f) Principal public bars of hotels and taverns.

SCHEDULE D

CHURCHES . . . EDUCATIONAL AND CULTURAL INSTITUTIONS, INCLUDING SCHOOLS . . . AND OTHER PLACES OF PUBLIC ASSEMBLY

2 Educational institutions

- (b) *Lifts.* If the provisions of this Standard do not require a lift to be installed, then the principal activities of the building shall be located on the ground floor.

4.9 The Authority notes that certain new buildings are in effect exempted from the requirement to install a lift because they are used by fewer than a certain number of people or have less than a certain upper floor area. In any particular case there could well be individual people with disabilities who are disadvantaged by the fact that there is no lift, but that disadvantage must be accepted in terms of the legislation. In other words, there is a statutory degree of disadvantage which must be accepted.

5. The extent to which the building fails to comply with the provisions of the building code for access and facilities for use by people with disabilities

5.1 *General*

5.1.1 If the building were a proposed new building, then:

- (a) From the drawings submitted to the Authority, and applying Table A2 of Appendix A to Approved Document C4, the design occupancy would be more than 70. Under clause D1.3.4(c)(iii) of the building code, therefore, a lift would be required.
- (b) The gross area of the upper floor is stated as being approximately 500 m². Under clause 304 of NZS 4121, therefore, a lift would be required. Even if the area were less than 400 m², a lift would be required to satisfy Schedule D if that schedule applies.

5.2 *In terms of the building code*

- 5.2.1 The building code refers to the design occupancy. That is a concept appropriate to proposed new buildings. When considering the alteration of an existing building, the Authority takes the view that the actual maximum number of people known to be present at any one time may be treated as the design occupancy, but only if it is reasonable to believe that number will not increase for so long as there is no further alteration and the building remains in the same use. In this case, the Authority accepts the applicant's statement as to the maximum of 79 people present at any one time, and considers that the available floor area appears to be such that no significant increase in that maximum is to be expected in its current use by the school.
- 5.2.2 The maximum of 79 people present is considerably in excess of the design occupancy of 40 at which a lift would be required in a new building under clause D1.3.4(c)(iii) of the building code.
- 5.2.3 For the reasons given below, the Authority considers that the disadvantage in terms of NZS 4121 is less than the disadvantage in terms of the building code. Accordingly, no further consideration is given to the building code because the Authority considers that NZS 4121 is in effect an alternative to the building code and also considers that the applicant is entitled to have its case considered in terms of whichever alternative is the more favourable to the applicant.

5.3 *In terms of NZS 4121*

- 5.3.1 NZS 4121 refers to the gross floor area of the upper floor.
- 5.3.2 In this case, the gross floor area is 500 m². Clause 304.1 of NZS 4121 requires a lift to be provided in a new building if the gross floor area is 400 m² or more.
- 5.3.3 However, the building does not comply with Schedule D if that schedule applies.
- 5.3.4 The Authority notes that Schedule D applies to “. . . schools . . . and other places of public assembly”, and that the term “places of assembly” is defined in clause 104 as follows:

PLACES OF ASSEMBLY. In addition to a theatre, cinema, or public hall, a building or part thereof used or intended to be used as a place of assembly for 250 or more persons, seated or unseated.

- 5.3.5 On the face of it, therefore, Schedule D applies only to buildings used as places of assembly for more than 250 people. On that interpretation, Schedule D does not apply to the building concerned.
- 5.3.6 However, that is inconsistent with the fact that clause 2(b) of Schedule D refers to buildings for which “the provisions of this Standard do not require a lift”, whereas under clause 304.2, a lift is required in a building used as a place of assembly for 250 or more people irrespective of the area of the upper floor or floors.
- 5.3.7 That inconsistency can be resolved if the buildings to which Schedule D applies are taken to be buildings or building complexes in which 250 or more people assemble. On that basis, Schedule D does not apply to the building with which this determination is concerned. The fact that the upper floor of the building is used for what is referred to as a “school” for teaching English as a second language does not mean that the building is a “school” for the purposes of Schedule D.
- 5.3.8 The Authority concludes that in terms of NZS 4121, Schedule D does not apply and the extent to which the building fails to comply without a lift relates solely to the gross floor area.

6. The submissions

- 6.1 The territorial authority made no specific submissions. The notice to rectify sets out detailed particulars of the building’s failure to 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. However, the Authority has no information as to the discussions between the parties and in particular the territorial authority’s reasons for considering that it is reasonably practicable to provide lift access.
- 6.2 The applicant’s submissions identified the sacrifices involved in upgrading access to the upper floor. Those sacrifices are outlined in 7 below.
- 6.3 The applicant also submitted detailed legal arguments to the effect that the Building Act did not authorise territorial authorities or the Authority to modify the property rights of “innocent bystanders” (in this case the rights of the language school and the real estate agents to the quiet enjoyment of the areas they had leased without the applicant entering those areas to install a lift and without those areas being reduced to make room for a lift). On the view the Authority takes of the matter, see 8 below, it is not necessary to discuss those arguments.
- 6.4 To assist it in understanding the building technicalities involved, the Authority obtained a report from a building consultant with experience in the field of access and facilities for use by people with disabilities. The report gave the consultant’s reasons for considering that it was both practicable and reasonable for a lift to be installed, and for rejecting the stair climber option.

6.5 That report was copied to the parties. The territorial authority pointed out that the consultant's comments as to the acceptability of a ramp did not relate to the ramp referred to in 3.5 above but to another ramp proposed in association with one of the lift options. The applicant also pointed out that misunderstanding, and accepted the consultant's rejection of the stair climber option. The Authority has taken account of those comments. The applicant also submitted that it was inappropriate for the report to refer to legal as distinct from technical issues, in other words that it was for the Authority to decide on reasonableness and the consultant should be concerned only with practicability. The Authority accepts that submission.

7. Sacrifices involved in upgrading access to the second floor

7.1 Options

7.1.1 The applicant submitted that the options for upgrading access to the upper floor were: An internal lift, an external lift, and a stair climber.

7.2 Lifts

7.2.1 Each of the lift options would cost in excess of \$125,000 (exclusive of GST, professional fees, and project management).

7.2.2 Each of the lift options would necessitate some disruption to the use of both floors of the building while the lift was being installed.

7.2.3 An internal lift would take up space currently used by the school. That would detract from the use of the upper floor.

7.2.4 An external lift would not take up space currently used by the school, but it would occupy a carpark. The number of carparks available is much less than the number required by the district plan under the Resource Management Act. The applicant submits that: "It is a moot point whether [resource] consent would be granted."

7.2.5 The Authority has not been informed of any discussions between the applicant and the territorial authority about this matter.

7.3 Stair climber

7.3.1 A stair climber is similar to a wheelchair stairlift as described in Determination 96/001 except that a stair climber is a motorised seat which does not accommodate a wheelchair. It would cost approximately \$20,000 (exclusive of GST, professional fees, and project management).

7.3.2 The Authority accepts the applicant's contention that the number of people with ambulant disabilities who would benefit from a stair climber substantially outnumbers the number of wheelchair users who could not use a stair climber without assistance from someone else who would carry the wheelchair up the stairs.

7.3.3 The applicant submitted no details of any particular stair climber that it had in mind. In particular, the Authority was given no information as to whether the stair climber concerned would affect the use of the stairs as a means of escape from fire.

8. Is it reasonably practicable to upgrade access for people with disabilities to the upper floor?

8.1 Lift access

8.1.1 The Authority has carefully considered the sacrifices and disadvantages outlined above.

8.1.2 The sacrifices involved in installing a lift (whether internal or external) appear to be almost the minimum one could expect for a building of this type. Nevertheless, costs exceeding \$125,000, reduction in the available floor area, on the upper floor in particular, and disruption during installation are considerable sacrifices.

8.1.3 The disadvantage of not installing a lift is that people who cannot climb stairs will not be able to use the upper floor. That is the only disadvantage to be weighed against the considerable sacrifices discussed above.

8.1.4 On balance, the Authority considers that the fact that people who cannot climb stairs will not be able to use the upper floor does not justify the expenditure of more than \$125,000 and the other sacrifices involved.

8.1.5 The Authority therefore concludes that it is not reasonably practicable to install a lift in the circumstances of this particular building.

8.2 Stair climber access

8.2.1 As mentioned in 6.5 above, the applicant accepted the consultant's rejection of the stair climber option, which the applicant had not advanced in any detail in any case. It is therefore not necessary to discuss that option any further except to record that the Authority did not consider it to be reasonably practicable in the circumstances of this particular building.

8.3 Future uses

8.3.1 The disadvantages discussed above relate specifically to the current use of the upper floor for the teaching of English as a second language.

8.3.2 In future, the upper floor may well be put to other uses. If so, then section 46 will require reconsideration of the access and facilities for use by people with disabilities. Any significant increase in the numbers of people present on the upper floor, and in particular any change to one of the uses mentioned in clause D1.3.4(c)(iv) of the building code or clause 304.2 of NZS 4121, might lead to a different conclusion as to whether it is reasonably practicable to install a lift.

9. Powers of the territorial authority

- 9.1 As mentioned in 3.5 above, the applicant also raised the question of whether the territorial authority has the power to accept an accessible route on the ground floor which includes a ramp which is not wide enough for an ambulant person to pass a person in a wheelchair.
- 9.2 The applicant put the question in terms of the territorial authority waiving the provisions of the building code for access and facilities for use by people with disabilities, which is specifically prohibited by section 34(7). That is a question of law, and the Authority is not a Court. Nevertheless, in the course of its functions, including but not limited to its function of considering applications for determinations, the Authority is frequently forced to consider the law and take a particular view of what the law requires.
- 9.3 On this question, the Authority takes the view that there was no waiver of the relevant provisions of the building code because there is no requirement that the building shall comply with those provisions. The requirement of section 38 is that the building shall comply with those provisions “as nearly as is reasonably practicable”. The Authority does not read section 34(7) as preventing a territorial authority from deciding whether proposed upgrading will bring the building concerned as nearly as is reasonably practicable to compliance with the provisions of the building code for access and facilities for use by people with disabilities.
- 9.4 Although it does not consider that it is required to do so, the Authority has considered the ramp concerned and concludes that it complies with the relevant provision of the building code as nearly as is reasonably practicable.

10. The relationship between section 17 of the Building Act and section 25(2) of the Disabled Persons Community Welfare Act

- 10.1 The applicant applied for this determination in terms of section 25(2) of the Disabled Persons Community Welfare Act rather than section 17 of the Building Act. Section 25(2) says:
- . . . in respect of the alteration of any existing building or premises, the Building Industry Authority may at any time by determination under Part III of the Building Act 1991 provide for a waiver or modification from all or any of the requirements of this section if, having regard to all the circumstances, the Building Industry Authority determines that it is reasonable to grant the waiver or modification.
- 10.2 The Authority takes the applicant to be submitting that even if a lift is required under section 38 of the Building Act, under the Disabled Persons Community Welfare Act the Authority has the power to waive that requirement.
- 10.3 As the Authority has concluded that it is not reasonably practicable to install a lift, it is not called upon to discuss the question of waiver.

11. The Authority's decision

11.1 In accordance with section 20(a) of the Building Act the Authority hereby reverses the territorial authority's decision that a lift is to be installed. Accordingly, a building consent is to be issued for the items of upgrading agreed between the parties not including a lift.

Signed for and on behalf of the Building Industry Authority on this 17th day of February 1997

J H Hunt
Chief Executive