

Installation of a lift on the addition of a bar to a hotel

1 THE MATTER TO BE DETERMINED

- 1.1 The matter before the Authority is whether a building consent should be issued for the alteration of a hotel building without the installation of a lift.
- 1.2 The Authority takes the view that it is being asked in effect to determine whether the building will comply as nearly as is reasonably practicable with clause D1.3.4 of the building code (the First Schedule to the Building Regulations 1992).
- 1.3 In making its determination the Authority has not considered compliance with any other provisions of the building code or of the Building Act 1991 (“the Act”).

2 THE PARTIES

- 2.1 The applicant, acting through a firm of consulting engineers, was the lessee of the upper floors of the building applying for the determination under authorisation from the owner. The territorial authority was the only other party.

3 THE BUILDING

- 3.1 The building is described as a “backpackers hotel”. It is on a corner site with frontages onto two streets and a service lane. It has four storeys:

Level 1 (ground level), approximately 300 m², is leased to a tenant and currently used as a restaurant. Two entrances, separate from the restaurant, open on to flights of stairs leading to the hotel on the upper floors. One of those entrances is off one of the streets, the other is off the other street.

Level 2, approximately 300 m², contains hotel accommodation units.

Level 3, approximately 210 m², contains hotel accommodation units. Level 3 is set back from level 2 on both street frontages.

Level 4, approximately 100 m² contains a bar and toilets. Level 4 is set back from level 3 on both street frontages. Part of the flat roof of Level 3 serves as a deck area for level 4.

- 3.2 Access to the upper storeys is by the two flights of stairs mentioned above.

- 3.3 The Authority has not attempted to assess the design occupancy for each level.
- 3.4 The proposed alterations involve converting part of Level 3 from accommodation units to a bar and associated facilities, with a floor area of approximately 40 m², plus installing a new deck, with an area of approximately 16 m², at level 3.

4 THE LEGISLATION

- 4.1 The relevant provisions of section 38 of the Building Act are:

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 47A of this Act), as nearly as is reasonably practicable, to the same extent as if it were a new building . . .

It is not disputed that section 47A applies to the building concerned. Section 47A(1) provides that:

In any case where provision is being made for the construction or alteration of any building to which the public are to be admitted, whether on payment or otherwise, reasonable and adequate provision by way of access, parking provisions, and sanitary conveniences, shall be made for persons with disabilities who may be expected to visit or work in that building and carry out normal activities and processes in that building.

- 4.2 The relevant provisions of clause D1 of the building code (the First Schedule to the Building Regulations) are:

D1.3.2 At least one access route shall have features to enable people with disabilities to:

- (b) Have access to the internal space served by the principal access . . .

D1.3.4 An accessible route . . . shall:

- (c) Include a lift complying with Clause D2 “Mechanical Installations for Access” 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 . . .
 - (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

- 4.3 For the reasons set out in Determination 95/008, the Authority takes the view that compliance with NZS 4121 is to be accepted as establishing compliance with the corresponding provisions of the building code. The relevant provisions of NZS 4121 are:

304.1

Lifts complying with section 209 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, or a three-storey building where the gross aggregate floor area of the upper floors is less than 500 m². [section 304.1 does not apply to buildings for certain uses as listed in section 304.2]

Schedule F

Lifts are not required in two-and-three storey hotels and motels provided that the accessible units, reception office, restaurant, bars, and other communal facilities are on the ground floor.

5 THE SUBMISSIONS

5.1 Initially, the applicant made written submissions but the territorial authority merely acknowledged the receipt of the application documents. The Authority issued a draft determination on that basis. The applicant did not accept that draft but the territorial authority did. At the request of the applicant, the Authority held a hearing at which the applicant appeared. The territorial authority did not appear but provided a written submission. The following account of the parties' submissions is based on both the original submissions and the additional submissions made at the hearing.

5.2 The applicant described the building as having "three full floors with a part floor", and made the following submissions:

Building Code Requirements

If this were a stand-alone project, a lift would not be required as it would be below the threshold floor area (400 m²) or number of people (50).

Impracticability

. . . provision of a lift that is accessible in any realistic way is in the back of the building with access from the service lane.

Future Developments

In the long term it is intended to upgrade the entry to the . . . accommodation and include a lift. This however will require using some of the area currently occupied by the shop This will be possible when the lease for the shop expires.

Special circumstances

" . . . the bar will be licensed for less than 50 people".

" . . . there have been no other stipulation on other [bars in the district] for similar lift access".

" . . . the market which is targeted for the bar are of the upper echelon and thus are an important economic piece of [the district]".

" . . . the clientele are not likely to use a lift".

"The [proposed] bar is both innovative and respectful of the theme of [the district]. We have identified a niche market that can only add value to [the district]."

5.3 The territorial authority made the following submission:

The [territorial authority] is unable to issue a building consent for the proposed alterations to an existing building as it is of the opinion that based on the plans and specifications submitted for building consent it cannot issue a building consent in accordance with section 38 of the Building Act.

The applicant has not demonstrated to our satisfaction that it is not reasonably practicable to provide access and facilities for use by people with disabilities in this building. Section 34(7) of the Building Act specifically forbids territorial authorities to grant waivers in respect of access and facilities for use by people with disabilities and any waiver or modification can only be issued by way of a Determination.

6 DISCUSSION

6.1 *Building code requirements*

6.1.1 The Authority recognises that level 4 has a significantly smaller floor area than lower levels, but does not consider that level 4 can be ignored and the building treated as if it were a three storey building when in fact it is clearly a four storey building. Thus the Authority does not accept the applicant's submission that a lift would not be required if the building were a "stand alone project", which the Authority takes to mean if it were a new building. As can be seen from 3.2 above, both the building code and NZS 4121 require a lift in any building of four or more storeys to which section 47A applies.

6.1.2 In order to comply with clause D1.3.4(c) of the building code, therefore, the building needs to be upgraded by the installation of a lift. The question is whether it is reasonably practicable to do so.

6.2 *Impracticability and future developments*

6.2.1 In considering any particular item of upgrading, the Authority applies the interpretation of the words "as nearly as is reasonably practicable to the same extent as if it were a new building" decided by the High Court in *Auckland City Council v New Zealand Fire Service* [1996] 1 NZLR 330, an appeal against Determination 93/004, in which it was held that:

Whether any particular item of upgrading is required] 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

6.2.2 The Authority accepts that it would be "unrealistic" to provide a lift off the service lane and remote from the both existing entrances to the hotel. That could not be described as "reasonable and adequate" provision for people with disabilities.

6.2.3 The Authority recognises that the setbacks to Levels 3 and 4 mean that a lift serving all upper storeys would require significant alterations to the layout of the restaurant on Level 1, with consequential loss of useable floor area.

- 6.2.4 The benefit of having a lift is that that people who are unable to use stairs will have access to the hotel facilities, including both bars. In this case, the Authority has not taken into account that a lift in a four storey building is of obvious benefit to everyone using the building.
- 6.2.5 That benefit to people unable to use stairs must be weighed against the sacrifices not only of the cost of installing the lift but also the disruption to the restaurant business.
- 6.2.6 Installing a lift in an existing building will always involve such sacrifices, but in this case the situation is complicated by the fact that Level 1 is leased to a separate tenant. The Authority has no information about the terms of the tenancy agreement, but recognises that in practice neither the applicant nor the owner can install a lift without either obtaining the consent of the tenant of Level 1 or breaching the lease with no doubt significant financial consequences.
- 6.2.7 The Authority does not consider that it can take account of sacrifices which arise solely because of a tenancy agreement. In other words, the Authority does not accept that the particular terms of the current Level 1 tenancy agreement are relevant to the statutory question of whether it is reasonably practicable to install a lift. Thus the Authority has weighed the benefits against the sacrifices as if Level 1 had not been leased to a third party.
- 6.2.8 If additional sacrifices arising out of the tenancy agreement are unacceptable to the applicant or the owner, then the proposed alterations will no doubt need to be postponed until the agreement expires. That is a consequence which could have been foreseen from the existence of the Level 1 tenancy agreement.

6.3 *Special circumstances*

- 6.3.1 The size and nature of the proposed bar, its benefits for the district, and whether or not its clientele are “likely to use a lift” are largely beside the point. Section 38 refers to “the building” not to “that part of the building intended to be altered”. The upper levels of the building are used as a hotel. The benefit of installing a lift is access to the hotel, not merely to the bar. The installation of a lift would not detract from the nature of the bar and would increase its potential clientele. Thus the applicant’s “special circumstances” do not indicate any additional sacrifice not covered by the applicant’s other submissions.

6.4 *Conclusion*

- 6.4.1 On balance, the Authority concludes that it is reasonably practicable to install a lift in that the benefit outweighs the sacrifices.
- 6.4.2 The Authority’s task, in accordance with section 38, is to decide whether or not it is reasonably practicable to install a lift. The Authority recognises that the installation of a lift might make it uneconomic for the applicant to proceed with the proposed alterations, at least while Level 1 is leased to a third party. However, that is a commercial matter to be decided by the applicant.

7 THE AUTHORITY’S DECISION

- 7.1 In accordance with section 20(a) of the Building Act the Authority hereby determines that it is reasonably practicable to install a lift and therefore that a building consent is not to be issued for the proposed alterations unless a lift is installed.

Signed for and on behalf of the Building Industry Authority on this 22nd day of December 1999

W A Porteous
Chief Executive