Determination No 2001/4

Installation of a lift to a training restaurant

1 THE MATTER TO BE DETERMINED

1.1 The matter before the Authority was whether a lift should be provided to a restaurant because there had been a change of use.

1.2 The Authority took the view that it was being asked in effect to determine whether there had been a change of use and if so whether the building without a lift would comply as nearly as is reasonably practicable with clause D1.3.4(c) of the building code (the First Schedule to the Building Regulations 1992) as required by section 46(2)(a) of the Building Act 1991.

1.3 In making its determination, the Authority has not considered any other provisions of the building code.

2 THE PARTIES

2.1 The applicant, acting through a firm of architects, was a training provider for the hospitality industry. It leased part of the building concerned. The applicant named the other parties as the owner and the territorial authority concerned, and each of them acknowledged having received the application and supporting documents.

2.2 The definition of "party" in section 16 includes the owner but not a tenant. Usually, when a tenant applies for a determination it is acting under the provisions of its lease and therefore can be seen as acting as an agent for and on behalf of the owner. In this case, that was effectively confirmed by the fact that the owner has received all of the documents and raised no objections. Accordingly, the Authority took the view that the only parties to the determination were in fact the applicant tenant and the territorial authority.

3 THE BUILDING AND THE COURSE OF EVENTS

3.1 The building is of two storeys. The applicant occupies the upper floor. The applicant and the territorial authority did not agree on the gross floor area, the applicant saying that it was 466 m^2, the territorial authority saying that it was 474.89 m^2. There was also disagreement on the design occupancy of the upper floor, the applicant saying that it was a maximum of 45 people, the territorial authority saying that it could be as many as 72 people.

3.2 The restaurant concerned is a "training restaurant". Students cook and serve lunches in the restaurant as part of their training. Originally guests used the restaurant by invitation only and no charges were made. However, in order to enable students to train in a commercial environment, the applicant intended to introduce charges, although guests would still be people with connections to students attending courses in the building or to the applicant. The introduction of charges meant that licenses had to be obtained from the territorial authority, which took the view that there was to be a change of use for the purposes of section 46.

3.3 The territorial authority decided that lift access to the restaurant was necessary for compliance with section 46.

4 THE LEGISLATION AND NZS 4121

4.1 The relevant provisions of section 46 are:

> (2) The use of the building shall not be changed unless the territorial authority is satisfied on reasonable grounds that in its new use the building will—
>
> (a) Comply with the provisions of the building code 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

4.2 Section 47A(3) says:

> Any provision that is made to meet the requirements of disabled persons in accordance with New Zealand Standard Specification No 4121 (being the code of practice for design for access and use of buildings by persons with disabilities) and any amendments thereof (whether made before or after the commencement of this subsection), or in accordance with any standard specification that is in substitution therefor, shall, in respect of matters subject to this Act, be deemed to be one of the documents establishing compliance with the building code for the purposes of section 49 of this Act.

4.3 Section 47A(4) says:

> The provisions of this section shall apply to buildings . . . intended to be used for . . . the following purposes:
>
> (m) Educational institutions, including public and private primary, intermediate, and secondary schools, universities, polytechnics, and other tertiary institutions
>
> (r) Restaurants, bars, cafeterias, and catering facilities

4.4 Clause D1.3.4(c)(iii) of the building code requires a lift to be provided in a two storey building to which section 47A applies and which has a design occupancy of 40 or more persons on the upper floor.

4.5 The Authority takes the view that compliance with the provisions of NZS 4121 is also to be accepted as establishing compliance with the corresponding provisions of the building code (see Determinations 94/006, 95/001, and 95/008). Clause 9.1.3.2

of NZS 4121:2001 (previously clause 304 of NZS 4121:1985) provides that a lift is not required in the case of a two-storey building where the gross floor area of the upper floor is less than 400 m^2.

5 THE SUBMISSIONS

5.1 The applicant's submission

5.1.1 The applicant submitted that:

(a) The mere introduction of charging is not a change of use and therefore section 46 does not apply; and

(b) "The area is not significantly over 400 m^2 (466). The number of occupants is not significantly over 40 (45 normally)."

5.1.2 The applicant also supplied a plan showing two classrooms each marked "15 people", a seminar room marked "10 people", a training kitchen marked "15 people" and a training restaurant marked "32 seat".

5.2 The territorial authority's submission

5.2.1 The territorial authority contended that there would be a change of use in two respects:

(a) "By opening the Restaurant to the public (whether invited or not)", and

(b) "By a significant increase in numbers".

5.2.2 The territorial authority submitted that in 1996, when the building changed its use from offices to a training centre, access and facilities for use by people with disabilities were provided on the ground floor. The territorial authority accepted that wheelchair users were unlikely to be enrolling in the type of course that was to be conducted on the first floor. It also accepted a statement that there would be a maximum of 40 persons on the upper floor at any one time, assuming an occupant density of 0.1 person/m^2 (presumably from the entry "vocational training rooms in schools" in Table A2 of the Fire Safety Annexe to Approved Document C4). However, the territorial authority said at the time that it believed a more appropriate occupant density would be 0.5 (presumably from the entry "classrooms"), and stated that "should the use proposed at the time cease and a different form of activity be commenced the situation would be revised".

5.2.3 The territorial authority had recently observed up to 20 students and staff on the upper floor at one time, and given that the restaurant has fixed seating for 32 guests that gives a total of 52 and possibly more occupants.

5.2.4 The territorial authority also disputed the applicant's claim that the gross floor area was 466 m^2, stating it had previously been told that it was 478.89 m^2.

6 DISCUSSION

6.1 Is there a change of use?

6.1.1 The Building Act does not define the term "change of use", and the Authority accordingly takes the view that it is to be given its ordinary and natural meaning in context.

6.1.2 The changes are that guests in the restaurant are to be charged and that licenses for the sale of food and the sale of liquor are therefore required. Guests will be limited to a list of people with connections to students attending courses in the building or to the applicant. Thus there will be no significant change in clientele. However, the Authority considers that it is irrelevant whether the restaurant is open to the general public or only to invited guests.

6.1.3 The territorial authority did not dispute that a facility in which meals are prepared and served by students without charge is properly described as a "training restaurant". The Authority considers that a facility in which meals are prepared and served by students but at a charge is also properly described as a training restaurant. The Authority notes that some museums now charge for admission that was previously free, but they are still properly described as museums, their use has not changed. Conversely, some municipal parking buildings may be used without charge on weekends and holidays, but they are still parking buildings.

6.1.4 The Authority concludes that the introduction of charges does not constitute a change of use for the purposes of the Building Act.

6.1.5 As to the need for licences, an article entitled "The Building Act 1991 & the Sale of Liquor Act 1989" published in *Building Industry Authority News* No. 19, November 1992, said:

> for the purposes of the Building Act there is no change of use when a shop starts to sell liquor, the shop is still a shop even though it now needs a license under the Sale of Liquor Act, and the same applies when a restaurant becomes a licensed restaurant, and so on.

The Authority reaffirms that view, and accordingly does not consider that the licensing of the restaurant constitutes a change of use.

6.1.6 It could be argued that the introduction of charging changed the classified use of the restaurant under clause A1 of the building code from Assembly Care to Commercial. However, although that might be a factor to be taken into account, the Authority takes the view that the definitions of the building code cannot be applied to the Act. The Authority does not accept that in the ordinary and natural use of those words the restaurant can be said to have changed from being school premises to being commercial premises.

6.1.7 As regards any increase in the numbers of people likely to be in the building at any one time, that might represent an intensification of use but the Authority takes the view that it does not amount to a change of use. It would be different if the use had been officially recorded in terms of numbers of people, for example if the building

warrant of fitness and other documents required by the Building Act had stated the use of the building as including "training centre and restaurant for a total of up to 40 students and guests".

6.1.8 If there is no change of use then section 46 does not apply and that is the end of the matter.

6.1.9 However, the interpretation of the phrase "change of use" as it is used in the Building Act is a question of law, and the Authority is not a Court. In case the Authority's interpretation is wrong, and there has been a change of use so that section 46 applies, the following sets out the Authority's views as to whether that would mean that a lift is required.

6.2 Is a lift needed if there is a change of use?

6.2.1 If section 46 applies, then it requires a lift to be installed if that is necessary to bring the building to compliance with the provisions of the building code for access and facilities for use by people with disabilities "as nearly as is reasonably practicable as if it were a new building". If it were a new building, then a lift would not be required if the design occupancy was less than 40 persons, see 4.3 above, or if the gross floor area was less than 400 m^2, see 4.4 above.

6.2.2 The Authority has been given no information as to whether it is reasonably practicable to install a lift other than the disputed information about occupancy and floor area.

6.2.3 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 . . . .

6.2.4 In this case the purpose of the requirement is to enable wheelchair users to visit the restaurant. The obvious sacrifices are the cost of installing a lift and the resulting loss of useable floor space. The extent to which the building fails to comply in terms of floor area or occupancy is also relevant.

6.2.5 The Authority has been given no information as to the cost of installing a lift, but it would clearly be significant.

6.2.6 The installation of a lift would reduce the floor area by, very approximately, 6 m^2, and there would be a similar loss of useable floor area on the ground floor. The gross floor area of the upper floor would then be between 15% and 18% greater than the 400 m^2 at which a lift would be required in a new building.

6.2.7 As to occupancy, the Authority cannot reconcile the applicant's claimed maximum of 45 people, see 5.1.2 above, with the numbers shown on the plan, even allowing for the fact that one of the classrooms will not be in use when meals are being served in the restaurant. The territorial authority's estimate of "52 and possibly more", see 5.2.2 above, seems more realistic. However, the applicant and the territorial authority agree that wheelchair users will not enrol in the course. Even if there was a lift, therefore, the only wheelchair users would be amongst the 32 people who can be seated in the restaurant at any one time. That does not affect the design occupancy for the purposes of clause D1.3.4(c)(iii) of the building code, see 4.4 above. Nevertheless, the fact that only 32 diners need to be considered as possibly being wheelchair users means that installing a lift would be less of a benefit for people with disabilities than might appear from the design occupancy of the upper floor.

6.2.8 On balance, therefore, the Authority concludes that the sacrifices involved in installing a lift outweigh the benefit of making the restaurant accessible to wheelchair users.

7 THE AUTHORITY'S DECISION

7.1 The Authority takes the view that there is no change of use and therefore section 46 does not apply.

7.2 However, if section 46 did apply the Authority would determine that the building, without a lift, complies as nearly as is reasonably practicable with the provisions of the building code for access and facilities for use by people with disabilities.

7.3 In accordance with section 20(a) of the Building Act, therefore, the Authority hereby reverses the territorial authority's decision to require a lift to be installed.

Signed for and on behalf of the Building Industry Authority on this 16th day of May 2001

W A Porteous
Chief Executive