

Access for people with disabilities to the stage in a school hall

1 THE MATTER TO BE DETERMINED

- 1.1 The matter before the Authority is a doubt about whether access is to be provided for people with disabilities to the stage in a new school hall.
- 1.2 The Authority takes the view that it is being asked to:
 - (a) Decide whether the stage, without access for people with disabilities, will comply with clause D1 of the building code (the First Schedule to the Building Regulations) or with NZS 4121: 2001; and if not
 - (b) Decide whether to grant a waiver or modification of the relevant provisions of the building code.

2 THE PARTIES

- 2.1 The applicant was the territorial authority, the other party was the Ministry of Education.

3 THE BUILDING AND THE SEQUENCE OF EVENTS

- 3.1 The building is a new school hall. It appears from the submissions that the hall has been completed, including the stage, but that there is no access to the stage for people with disabilities.
- 3.2 Apparently, a building consent was issued for the hall excluding the stage. Apparently the stage, without access for people with disabilities, was then constructed without a building consent. That was justified on the grounds that the stage was a platform from which it was not possible for a person to fall more than 1 m and therefore exempted from the need for building consent under paragraph (i) of the Third Schedule to the Building Act.
- 3.3 However, section 7(1) of the Building Act provides that all building work must comply with the building code to the extent required by the Act whether or not a building consent is required.
- 3.4 The matter was submitted to the Authority in the belief that the Authority, but not the territorial authority, had the power to grant waivers or modifications of the

relevant provisions of the building code in respect of new buildings. The Authority takes the view that, as a matter of law, that belief was mistaken, see 6.1 below.

4 THE LEGISLATION AND NZS 4121

4.1 The relevant provisions of the Building Act are:

(a) Section 7(1), which reads:

(1) All building work shall comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

(b) The relevant provisions of section 20, which read:

20. Determinations by Authority - A determination by the Authority in relation to a matter referred to it under section 17 of this Act may incorporate waivers or modifications and conditions that a territorial authority is empowered to grant or impose . . .

(c) The relevant provisions of section 38, which read:

38. Alterations to existing buildings - 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 . . .

(d) The relevant provisions of section 47A, which read:

47A. Access and facilities for persons with disabilities to and within buildings— (1) 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.

(2) Notwithstanding the provisions of subsection (1) of this section, 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 this Act 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.

(4) The provisions of this section shall apply to, but shall not be limited to, buildings, and parts of buildings . . . that are intended to be used for or associated with one or more of the following purposes:

(m) Educational institutions, including public and private primary, intermediate, and secondary schools . . .

(e) Sections 34(4) and (7), which read:

(4) The territorial authority may grant a building consent subject to—

(a) Such waivers or modifications of the building code, or any document for use in establishing compliance with the building code, subject to such conditions as the territorial authority considers appropriate; and

(b) Such conditions as the territorial authority is authorised to impose under this Act or the regulations in force under this Act.

(7) Notwithstanding subsection (4) of this section, in relation to any building to which section 47A of this Act applies, a waiver or modification relating to access and facilities for use by people with disabilities shall only be granted by the Authority in a determination issued under Part III of this Act which is in accordance with the requirements of the said section 47A.

4.2 The relevant provisions of the building code are:

Clause D1—ACCESS ROUTES

Provisions

Limits on application

OBJECTIVE

D1.1 The objective of this provision is:

(c) Ensure that people with disabilities are able to enter and carry out normal activities and functions within *buildings*.

Objective D1.1(c) shall apply only to those buildings to which section 47A of the Act applies.

FUNCTIONAL REQUIREMENT

D1.2.1 *Buildings* shall be provided with reasonable and adequate access to enable safe and easy movement of people.

Requirement D1.2.1 shall not apply to *Ancillary buildings* or *Outbuildings*.

PERFORMANCE

D1.3.1 *Access routes* shall enable people to:

- (a) Safely and easily approach the main entrance of buildings from the apron or construction edge of a building,
- (c) Move into spaces within buildings by such means as corridors, doors, stairs, ramps and lifts,

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,
- (c) Have access to and within those spaces where they may be expected to work or visit . . .

Performance D1.3.2 shall not apply to *Housing*, *Outbuildings*, *Ancillary buildings*, and to *Industrial buildings* where no more than 10 people are employed.

4.3 The relevant provision of the acceptable solution D1/AS1 in Approved Document D1 is:

8.2.1 An *accessible route* shall be provided to a podium or stage area.

4.4 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 provision of NZS 4121 is:

12.2 Places of assembly and entertainment

People with disabilities shall be able to be seated as part of an audience. They shall be able to speak, lecture or entertain an audience from the main stage of a place of assembly or entertainment and have access to all backstage facilities including performers changing areas, toilet shower facilities and the green room.

5. THE SUBMISSIONS

5.1 The Ministry of Education made various submissions that would be relevant only if the installation of the stage amounted to the alteration of an existing building. Those submissions are set out and discussed in 6.3.3.4 below.

5.2 The territorial authority made no specific submissions, but it seems clear that, if it had had the power to do so, the territorial authority would have waived the building code requirement for access to the stage for people with disabilities.

6 DISCUSSION

6.1 General

6.1.1 There is no dispute that the hall is a building to which section 47A applies, and that therefore both the building code and NZS 4121 require that the stage shall be provided with access for people with disabilities.

6.1.2 As it said in Determinations 2000/2 and 2001/10, the Authority takes the view that sections 34(7) and 47A(2) authorise the Authority to grant waivers or modifications of the provisions of the building code for access and facilities for people with disabilities in respect of the alteration of an existing building only, and not in respect of the construction of a new building.

6.1.3 For the reasons set out in 6.2 below, the Authority considers that the installation of the stage must be regarded as part of the construction of the new hall. Therefore, neither the Authority nor anyone else has the power to waive the building code requirement for access to the stage by people with disabilities.

6.1.4 If so, then that is the end of the matter, because the Act gives the Authority no choice but to determine that the stage must be provided with means of access for people with disabilities.

6.1.5 However, in case the Authority is wrong about the installation of the stage being part of the construction of a new building, 6.3 below discusses what the Authority would decide if, as a matter of law, the installation of the stage must be regarded as an alteration to an existing building.

6.2 Why the Authority believes that the installation of the stage must be regarded as part of the construction of the new hall

6.2.1 The original plans and specifications submitted for building consent included a stage. The building consent was amended by the omission of the stage when those responsible for the construction of the hall were informed of the requirement for access by people with disabilities. The stage, with no such access, was then installed without building consent.

6.2.2 The Authority does not know whether the stage was installed during the construction of the hall as a whole or after the rest of the hall had been completed. Nevertheless, the construction of the hall and the installation of the stage were clearly so close in time, and so much part of the original intention, that the Authority considers that they must be seen as a single project.

6.2.3 It might have been different if the installation of the stage had been clearly a new project undertaken a significant time after the hall had been completed although, as the Authority said in Determination 95/002, “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”.

6.3 What if the installation of the stage must be regarded as an alteration to an existing building?

6.3.1 General

6.3.1.1 If the Authority is wrong, and the installation of the stage is to be regarded as an alteration to an existing building, then that alteration could be made without building consent because it comes within paragraph (i) of the Third Schedule. However, the Authority takes the view that an owner may choose to apply for a building consent for work that comes within the Third Schedule. Thus there are two possibilities:

- (a) Alteration made without building consent; and
- (b) Alteration made with building consent.

6.3.2 Alteration without building consent

6.3.2.1 Section 38 does not apply if there is no building consent. However, section 7(1) requires that the building work concerned, the installation of the stage, must “comply with the building code to the extent required by this Act”.

6.3.2.2 The Authority takes the view that the words “to the extent required by this Act” mean in effect “subject to any waivers or modifications granted under section 34(4)”. Because section 34(4) is subject to section 34(7), such waivers or modifications cannot be of the provisions of the building code for access and facilities for people with disabilities. In other words, even if the installation of the stage must be regarded as the alteration of an existing building made without the need for building consent, the stage must comply with the provisions of the building code for access by people with disabilities.

6.3.3 *Alteration with building consent*

6.3.3.1 If a building consent had been sought for the alteration, then section 38 applies and the territorial authority must be satisfied that the building as a whole, after the alteration, will comply “as nearly as is reasonably practicable” with the provisions of the building code for access and facilities for people with disabilities. That decision does not involve any waiver or modification of those provisions. However, the Authority takes the view that section 38 must be read together with section 7(1) to the effect that:

- (a) Under section 7(1) any new work must comply with the building code subject to any waiver or modification granted by the territorial authority, which cannot include waiver or modification of provisions for access and facilities for people with disabilities; and
- (b) The effect of the new work must be to bring the building as a whole to compliance with the building code in respect of access and facilities for people with disabilities (and certain other matters) “as nearly as is reasonably practicable”.

(See also Determination 2000/5, where the same view is expressed in different words.)

6.3.3.2 In other words, section 38 does not derogate from the requirement that all new building work must comply completely with the provisions for access and facilities for people with disabilities.

6.3.3.3 However, if the Authority is wrong about that, then the question is whether, after the installation of the stage without access for people with disabilities, the building as a whole complies as nearly as is reasonably practicable with the relevant provisions of the building code. That requirement has been applied in several determinations, and has been considered by the High Court¹, which held that the extent of what was reasonably practicable:

. . . 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.

¹ *Auckland CC v NZ Fire Service* 19/10/95, Gallen J, HC Wellington AP336/93, partially reported at [1996] 1 NZLR 330.

6.3.3.4 The submissions by the Ministry of Education mentioned in 5.1 above amounted to identifying “sacrifices”. Those submissions and the Authority’s responses are:

- (a) Its socio-economic rating for the school was decile 1A, which is the most underprivileged rating available. The hall had been constructed with funds provided by the school itself and by charitable donations. There was little parental help available to the school and there was “no way additional funds can be raised from the parents or surrounding district”.

The Authority accepts that cost is a relevant consideration, so that it must decide whether the cost of a particular provision is in balance with, or reasonably corresponds to, the benefit achieved by that provision. The Authority takes the view that the financial situation of the particular owner concerned is irrelevant to that decision.

- (b) “The school currently have no wheelchair bound staff or pupils and have not had any for many years.”

The Authority regards that as irrelevant given that the school is a building to which section 47A applies, see section 47A(4)(m).

- (c) A ramp would provide “a serious tripping or falling hazard . . . The way to combat this is to have the ramp constructed in a lockable totally enclosed space.”

The Authority is aware that there are significant numbers of ramps in New Zealand schools, but is not aware of any special concerns about their safety having actually arisen in practice. Furthermore, it considers that having a ramp in a “lockable totally enclosed space” is clearly contrary to the objective of making access for people with disabilities an integral part of buildings. A ramp is not a special provision for use at a particular time.

- (d) Cost:

- (i) The cost of a ramp would be \$21,420, which included \$13,440 for “Building space occupied by ramp” and \$2,200 for “Doors and isolation for safety”.

The Authority does not accept that the costs of space occupied by ramp or the cost of doors and isolation for safety may be legitimately added to the cost of the ramp structure itself. Thus the estimated cost of a ramp appears to be of the order of \$6,000.

- (ii) The cost of a lift would be \$20,350.

The Authority notes that the \$20,350 cost stated for a lift does not allow for the future costs of maintenance. However, given the cost of a ramp, there is no need to consider the cost of a lift.

- (e) “In the once a year event where a public performance is being held and the disabled person is to present an item a portable lifting platform can be obtained.”

The Authority notes that the Ministry of Education does not mention the possibility of the hall being used as a community facility. In any event, the Authority does not accept that pupils will not use the stage more than once a year. Even if that were the case a temporary lift is not part of the building and would not fulfil the requirements of the building code.

- (f) “It is important to realise the school has not had a need for this for many years and these circumstances may or may not occur in the foreseeable future.”

The Authority regards that as irrelevant given that the school is a building to which section 47A applies, see section 47A(4)(m).

6.3.3.5 The Authority accordingly considers that even if the installation of the stage must be regarded as an alteration to an existing building, and even if section 7(1) does not require the stage to comply with the building code, section 38 requires that the stage shall be provided with access for people with disabilities.

7 CONCLUSION

7.1 The Authority concludes that, as a matter of law, section 47A of the Building Act and clause D1.3.2 of the building code require the provision of access for people with disabilities to the stage, as does NZS 4121, and that neither the Authority nor anyone else has the power to waive or modify that requirement.

7.2 The Authority also concludes that, without such access, the building as a whole does not comply with the relevant provisions of the building code as nearly as is reasonably practicable.

7.3 The Authority has every sympathy for the school, faced as it is with funding difficulties. Nevertheless, those difficulties do not exempt the school from complying with the law, and specifically with the requirements of the Building Act for access and facilities for use by people with disabilities.

8 THE AUTHORITY'S DECISION

8.1 In accordance with section 20 of the Building Act, the Authority hereby determines that:

- (a) The stage, without access for people with disabilities, does not comply with clause D1 of the building code (the First Schedule to the Building Regulations) or with NZS 4121 as required by section 7(1);
- (b) The Authority does not have the power to grant a waiver or modification of the provisions of the building code for access and facilities for people with disabilities in respect of a new building; and
- (c) If, contrary to the view taken by the Authority, the installation of the stage must be regarded as an alteration to an existing building, then:
 - (i) The stage is nevertheless still required by section 7(1) to comply with the provisions of the building code for access by people with disabilities; and even if it were not
 - (ii) After the installation of the stage without access for people with disabilities, the building as a whole does not comply as nearly as is reasonably practicable with the provisions of the building code for access and facilities for people with disabilities as required by section 38.

Signed for and on behalf of the Building Industry Authority on this 31st day of
January 2003

Barry Brown
Presiding Member