

Access and facilities for people with disabilities in the alteration of a cinema building

1 THE MATTER TO BE DETERMINED

- 1.1 The matters before the Authority are disputes about the provision of a lift and the upgrading of accessible toilet facilities in the alteration of a cinema building.
- 1.2 The Authority takes the view that it is being asked to determine whether the proposed provisions for access and facilities for people with disabilities comply as nearly as is reasonably practicable with clauses D1.3.4(c) and G1.3.4 of the building code (the First Schedule to the Building Regulations 1992) as required by section 38 of the Building Act 1991.
- 1.3 Apart from those matters, the Authority has not considered any other aspects of the Building Act or of the building code in making this determination.

2 THE PARTIES

- 2.1 The applicant was the owner of the building acting through a firm of architects. The other party was the territorial authority.

3 THE BUILDING

- 3.1 As originally erected in about 1973 the two storey building contained a cinema with seating on the ground and upper floors plus two small retail tenancies. About twenty years later, the building was altered to make the entire ground floor into five retail tenancies, with part of the upper floor made into two smaller cinemas while the rest of the upper floor became a ceiling void over one of the ground floor tenancies.
- 3.2 The two cinemas on the upper floor provide seating for 132 and 54 people respectively, and the total area of the upper floor (excluding the ceiling void) is 407m².
- 3.3 The cinemas ceased operation in 2000. It was not currently intended to re-open them. A fire safety report was prepared by a consulting fire engineer recommending alterations to be made before the cinemas were re-opened in order to bring the means of escape from fire as nearly as was reasonably practicable to compliance with the relevant provisions of the building code. Those fire safety alterations would be additional to the alteration currently proposed.

- 3.4 The alteration currently proposed is to convert three of the tenancies into one by removing inter-tenancy walls and also removing the toilets serving two of the tenancies. The estimated cost of that alteration is \$7,500.
- 3.5 The remaining toilets include two that are approximately 1700 mm by 1500 mm. They were accessible toilets complying with NZS 4121 at the time of construction. However, in 2001, NZS 4121 was amended to require minimum dimensions of 1900 mm by 1600 mm, and to require a hand basin within the toilet compartment.
- 3.6 The same requirements appear in the acceptable solution G1/AS1 in Approved Document G1 issued by the Authority under section 49 of the Building Act as a document for use in establishing compliance with the building code. However, because the matter was approached in terms of NZS 4121, the determination has been made in those terms rather than in terms of G1/AS1.

4 THE LEGISLATION AND NZS 4121

- 4.1 As was discussed in Determination 95/008, what is now section 47A(3) of the Building Act provides that NZS 4121 is deemed to be one of the documents for establishing compliance with the building code, and section 50(1)(d) provides that a territorial authority shall accept compliance with such a document as establishing compliance with the building code. The Authority takes the view that the requirement to accept such documents applies not only to territorial authorities for the purposes of issuing building consents and code compliance certificates but also to the Authority for the purposes of making determinations.
- 4.2 As detailed below, the building code and NZS 4121 specify different circumstances in which a lift is to be provided. Thus a building complying with NZS 4121 in that respect might not comply with the building code (and the other way round). However, for the reasons given above the Authority considers that compliance with NZS 4121 must be accepted as establishing compliance with the building code. In effect, that means that an owner may choose whether to comply with the provisions of NZS 4121 or with the provisions of the building code.
- 4.3 The relevant provisions of the Building Act are:
- (a) Section 38:
- 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 . . .
- (c) Section 47A:
- (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 . . . 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.

(3) 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) 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:

(p) Places of assembly, including auditoriums, theatres, cinemas . . .

(d) **Section 50:**

(1) A territorial authority shall accept the following documents as establishing compliance with the provisions of the building code:

(d) Compliance with the provisions to that effect of a document prepared or approved by the Authority under section 49 of this Act.

4.4 **The relevant provisions of the building code 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, and
- (c) Have access to and within those spaces where they may be expected to work or visit, or which contain facilities for personal hygiene . . .

D1.3.4 An accessible route . . . shall:

- (c) Include a lift complying with Clause D2 “Mechanical Installations for Access” to upper floors where:
 - (iii) buildings are two storeys high and have a total design occupancy of 40 or more persons on the upper floor . . .

G1.3.4 Personal hygiene facilities provided for people with disabilities shall be accessible.

4.5 **The relevant provisions of NZS 4121:2001 are:**

9.1.3.1 General

An accessible route shall include a lift to upper floors where:

- (c) The upper floors are designed or intended to be used as:
 - (ii) Places of public assembly for 250 or more people.

9.1.3.2 Two and three storey buildings

Where 9.1.3.1 is not applicable a lift is not required where:

- (a) Buildings are two storeys high and have a gross floor area of the upper floor of less than 400 m²;

provided that the ground floor complies with the requirements of this Standard and the upper floors have access for people with ambulant disabilities.

10.5.4 Dimensions

Accessible toilet units shall have sufficient space to allow wheelchair users to transfer to the toilet pan from the side of the pan; to approach and use the pan from the front; and for use by a commode.

The minimum dimensions of a compartment shall be 1900 mm by 1600 mm . . .

5. THE SUBMISSIONS

5.1 The territorial authority

5.1.1 The territorial authority formally acknowledged receipt of the application and accompanying documents, but did not make any submissions. However, in correspondence with the architect the territorial authority had said:

“ . . . access and facilities for the disabled are a very specific requirement of the Building Act as well as the code, and the Council cannot waive any of those requirements. We have no discretion in the matter.

“Effectively then, if the code requires a lift then one will have to be provided. Alternatively, a waiver should be applied for directly to the BIA. . . .

“In any event, I do not believe that we can accept the small [toilet] compartments as reasonably complying.”

5.2 The applicant

5.2.1 In respect of the provision of a lift, the architect, on behalf of the applicant, accepted that if this were a new building then:

- (a) Clause D1.3.4(c)(iii) of the building code would require the provision of a lift because the design occupancy of the upper floor (220) of 40 or more persons; and
- (b) Clause 9.1.3 of NZS 4121:2001 would also require the provision of a lift because the upper floor has a gross floor area (407 m²) of more than 400 m².

5.2.2 The architect cited Determination 99/005¹ in respect of the “as nearly as is reasonably practicable” test and Authority’s approach of weighing the sacrifices involved in any particular upgrading against the benefits of that upgrading. On that basis, the architect submitted that:

- (a) “If a lift is not installed, the disadvantage will be that people who cannot climb stairs will not be able to use the upper floor, as is presently the case. That is the only disadvantage to be weighed against the sacrifices required to install a lift.”

¹ The same approach was taken in Determinations 95/002, 95/006, 96/001, 96/005, 97/001, 97/002, 97/009, 99/001, 99/015, 2001/4, 2002/2, and 2002/8.

- (b) The corresponding sacrifices would be:
- (i) “Substantial demolition and reconstruction of the ground floor and toilet.”
 - (ii) “Reduction in the size of one of the cinemas.”
 - (iii) “Loss of the existing confectionary bar on the first floor.”
 - (iv) The cost, estimated as being “in the region of \$100,000”.

5.2.3 The architect also pointed out that at 407 m² the floor area was only marginally larger than the 400 m² below which a lift would not be required by NZS 4121.

5.2.4 In respect of the accessible toilets, the question was:

“Whether or not it is reasonably practicable to increase the plan dimensions of the two existing toilet compartments from 1500 x 1700mm to 1600 x 1900mm.”

5.2.5 The architect submitted that the stair imposed a constraint on alterations to the toilet area. He provided a sketch showing how the dimensions of the accessible compartments could be increased to comply with NZS 4121. The necessary building work would include the demolitions and reconstruction of partitions, the removal and relocation of electrical, plumbing, and drainage services, and redecoration, including the replacement floor coverings. Furthermore, submitted the architect, the new layout would interfere with the access to other toilets and to a service duct.

6 DISCUSSION

6.1 The territorial authority’s power to apply the “as nearly as is reasonably practicable” test

6.1.1 When the territorial authority said that it could not make a decision that the building without a lift complied as nearly as is reasonably practicable with the relevant provision of the building code, the architect responded by quoting the following passage from Determination 97/001:

“5.3 The Authority agrees that a territorial authority does not have the power to waive or modify the provisions for access and facilities for use by people with disabilities in a new building, but takes a different view in respect of the upgrading required by section 38 when an existing building is being altered. On the basis of a legal opinion from the Crown Law Office, the Authority has issued a statement (see *Building Industry Authority News* No. 23, June 1993) which includes the following:

“A territorial authority may lawfully issue a building consent for the alteration of a building if it is satisfied that after the alteration the building will comply as nearly as is reasonably practicable with the provisions of the New Zealand Building Code for access and facilities for use by people with disabilities even though it will not comply in all respects.”

6.1.2 The Authority included passages to the same effect in Determinations 97/001 and 99/001, and continues to take that view.

6.2 The installation of a lift

6.2.1 The cinemas have ceased operation. They cannot resume operations unless and until further alterations are made to their means of escape from fire. However, the Authority takes the view that there has not been a change of use, and that there will therefore not be another change of use if and when the cinemas resume operations. The cinemas are still cinemas even though they are not operating, just as a school is still a school when it is closed for holidays.

6.2.2 The gross floor area of the upper floor is 407 m². By way of comparison, a new two-storey building with a gross floor area of 399 m² on the upper floor, but with no lift, could have a cinema seating up to 250 people on its upper floor and still comply with NZS 4121.

6.2.3 On the other hand, the design occupancy of the upper floor is considerably greater than the 40 persons at which a lift is required by clause D1.3.4(c)(iii) of the building code. Nevertheless, the Building Act provides that compliance with NZS 4121 “and any amendments thereof” must be accepted as establishing compliance with the building code. NZS 4121:1985 was issued before the building code came into force, but the relevant provisions remained unaltered in the revised NZS 4121:2001.

6.2.4 While the cinemas remain out of operation there will be little if any benefit from the installation of a lift. On the other hand, the sacrifices necessary to install a lift are significant, see 5.2.2(b) above.

6.2.5 Weighing the benefit, if any, against the sacrifices in accordance with the approach mentioned in 5.2.2 above, and recognising that the cited cost of \$100,000 might be over-estimated, the Authority concludes that it is not reasonably practicable to install a lift.

6.2.6 However, that applies only while the cinemas are not in operation. They cannot lawfully resume operations unless and until further alterations are made to the building to upgrade the means of escape from fire for the cinemas. Those alterations cannot lawfully be made without a further building consent. If and when the owner applies for such a building consent, section 38 (but not section 46) will apply, and the territorial authority will need to consider whether, in the new circumstances, the installation of a lift is necessary to bring the building to compliance with the provisions of the building code for access and facilities for people with disabilities “as nearly as is reasonably practicable to the same extent as if it were a new building”.

6.3 The toilets

- 6.3.1 The Authority takes the view that, except as provided by section 43(2) of the Building Act, when considering whether the existing toilets comply with the building code one must apply the current code, not what was required when they were first constructed. The fact is that although they complied with NZS 4121:1985 when they were built, they do not now comply with the current NZS 4121:2001. (Of course, complying with NZS 4121 is not the only way of complying with the corresponding provisions of the building code, but in this case the parties accept that the toilets do not comply with the building code.)
- 6.3.2 The benefits of improving the accessible toilets by increasing the cubicle sizes and installing hand basins in the cubicles are significant, especially as the alterations have reduced the total numbers of toilets available to users of the building. The architect has shown at least one way in which that can be done, and has identified the sacrifices involved.
- 6.3.3 Weighing the benefit against the sacrifices in accordance with the approach mentioned in 5.2.2 above, the Authority concludes that it is reasonably practicable to alter the two existing accessible toilet compartments to comply with NZS 4121: 2001.

7 THE AUTHORITY'S DECISION

- 7.1 In accordance with section 20 of the Building Act, the Authority hereby determines that the building altered as proposed will comply with the provisions of the building code for access and facilities for people with disabilities as nearly as is reasonably practicable to the same extent as if it were a new building as required by section 38 of the Building Act if:
- (a) A lift is not provided, but
 - (b) The two existing accessible toilet compartments are altered to comply with NZS 4121: 2001.

Signed for and on behalf of the Building Industry Authority on this 12th day of March 2003.

W A Porteous
Chief Executive