*Determination No. 2003/11*

# *Access and facilities for people with disabilities in the conversion of a commercial building to a health club*

## 1 THE MATTER TO BE DETERMINED

1.1 The matter before the Authority is a doubt about whether a lift is required in the conversion of a commercial building to a health club.

1.2 The Authority takes the view that it is being asked to determine whether the proposed access for people with disabilities complies as nearly as is reasonably practicable with clause D1 "Access routes" of the building code (the First Schedule to the Building Regulations 1992).

1.3 In making its determination the Authority has not considered any other aspects of the Building Act 1991 or of the building code.

## 2 THE PARTIES

2.1 The applicant is the tenant of the building, but the Authority accepts that the tenant is acting for and on behalf of the owner. The only other party is the territorial authority concerned.

## 3 THE BUILDING

3.1 The building is on a sloping site and has two floor levels, referred to as the "ground floor", "main level", or "upper level", and the "basement" or "lower level". Access between floors is a stairway. The main entrance and reception are on the upper level, and there is an accessible car park at that level. There is also level access to the lower level, and an accessible car park at that level.

3.2 The building was altered, in accordance with a building consent, so that the upper level contains various health club facilities and accessible toilet facilities, including a shower. The lower level contains male and female changing rooms, each with a spa pool, a sauna, and toilet facilities.

3.3 However, the proposed alterations submitted for building consent included the provision of a lift, which has not been installed (or, in the words of the applicant, "is not operational").

3.4 The territorial authority called upon the owner to install the lift in accordance with the building consent or to apply to the Authority for a determination. In effect, therefore, the territorial authority decided not to amend the building consent by omitting the lift.

## 4. THE SUBMISSIONS

4.1 There was no dispute that if this were a new building then it would be required to have a lift.

4.2 The territorial authority did not make any specific submissions.

4.3 The applicant submitted that:

(a) "The only things that are not available on the main level is the spa and sauna."

In fact, for reasons set out by the applicant, neither the spas nor the saunas have features to permit use by people with disabilities.

(b) "It is [the club's] policy to have at least two staff members on at all times [partly] to assist anyone who is unable to use the stairs and wants to. Up until now no-one has needed that service."

(c) "Since [the club] opened . . . we have had only 3 disabled people join the club out of our 2000 plus members. Of the three, two came in, exercised, and went home without showering (like many of our members), while the remaining person showered and changed in the upstairs disabled toilet."

## 5 DISCUSSION

5.1 The question is whether the building, in its new use as a health club, complies with the provisions of the building code for access by people with disabilities "as nearly as is reasonably practicable to the same extent as if it were a new building", as required by section 46(2)(a) of the Building Act 1991.

5.2 The Authority was not asked to consider toilet facilities, spas, and saunas on the lower level, and assumes that the territorial authority considered that it was not reasonably practicable to make them accessible. The Authority offers no comment in this case, but notes that in other cases it might be necessary to consider whether such facilities as spas and saunas must be accessible in order to comply with clauses D1.3.2(c) of the building code.

5.3 The situation, therefore, is that people with disabilities have level access to both the upper and the lower levels, but do not have direct access between the two levels. The fact that 3 people with disabilities are or were members of the club and used its facilities is irrelevant, merely demonstrating that they adapted to the situation not that the situation is acceptable.

5.4 As the building consent is associated with a change of use of the building, the relevant provision of the Building Act is section 46, which requires that in its new use the building must 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". That requirement has been considered by the High Court[1], 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.

That approach of weighing the benefits against the sacrifices has been followed in numerous determinations[2].

5.5 The alterations as carried out under the building consent appear to have involved significant cost compared with the cost of the lift originally intended to be installed under that consent.

5.6 The only apparent sacrifice involved would be the cost of installing the lift.

5.7 The Authority considers that the benefits of full accessibility to both levels for current and future users of the building outweighs the cost of the lift.

## 6 THE AUTHORITY'S DECISION

6.1 In accordance with section 20 of the Building Act, the Authority hereby determines that the building without a lift does not 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.

6.2 The Authority accordingly confirms the territorial authority's decision not to amend the building consent by omitting the lift.

Signed for and on behalf of the Building Industry Authority on this 20th day of October 2003.

Richard Martin
Acting Chief Executive

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

[2] See Determinations 95/002, 95/006, 96/001, 96/005, 97/001, 97/002, 97/009, 99/001, 99/015, 2001/4, 2002/2, 2002/8, and 2003/5.