

Determination 2005/49

Access for people with disabilities to mezzanine floors in a supermarket

1 THE MATTER TO BE DETERMINED

- 1.1 This is a determination under section 17 of the Building Act 1991 (“the Act”), as amended by section 424 of the Building Act 2004, made under due authorisation by me, John Gardiner, Determinations Manager, Department of Building and Housing, for and on behalf of the Chief Executive of that Department.
- 1.2 I take the view that the matter for determination is a dispute about access for people with disabilities to certain upper floor areas of a proposed new supermarket, and specifically whether the supermarket building as proposed without lift access to those areas complies with clause D1.3.4(c) of the building code (the First Schedule to the Building Regulations 1992).
- 1.3 In making this determination, I have not considered any other requirements of the building code.

2 THE PARTIES

- 2.1 The applicant is the owner acting through a firm of architects. The only other party is the territorial authority concerned.

3 THE BUILDING

- 3.1 The building as proposed consists of a basement car park, a ground floor shopping area, and three mezzanine floor areas referred to as the office mezzanine floor, the staff mezzanine floor, and the plant room mezzanine floor. There is a lift between the basement and the shopping area. There are accessible stairs from the ground floor to the office mezzanine floor and to the staff mezzanine floor. The stairs from the ground floor to the plant room mezzanine floor are not accessible. There is a service walkway between the staff mezzanine floor and the plant room mezzanine floor but the owner did not state whether that walkway was accessible.

- 3.2 The mezzanine floors as shown on plans submitted by the owner are:
- (a) The office mezzanine floor, gross floor area 398 m², containing offices, a boardroom, and kitchen, toilet, and other associated facilities.
 - (b) The staff mezzanine floor, gross floor area 238 m², containing a staff training room, cafeteria, lockers, and toilet, laundry, and other facilities.
 - (b) The plant room mezzanine floor, gross floor area 250 m², containing a generator and air handling and refrigeration equipment.
- 3.3 The territorial authority refused to grant a building consent unless lift access was provided to the mezzanine floors.
- 3.4 The owner disputed that decision, based on its interpretation of the Act and the building code, and applied for this determination.
- 3.5 There is no dispute that the building is one to which section 47A of the Act applies.

4 THE LEGISLATION AND NZS 4121

4.1 Provisions as to access and facilities for people with disabilities

4.1.1 The relevant provisions of section 47A are:

“(1) In any [building to which this section applies] reasonable and adequate provision by way of access . . . 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 . . . shall . . . be deemed to be one of the documents establishing compliance with the building code for the purposes of section 49 of this Act.”

4.1.2 The relevant provisions of the building code are:

“**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,

“(iii) buildings are two storeys high and have a total design occupancy of 40 or more persons on the upper floor . . .”

where the terms “accessible” and “accessible route” are defined as:

“**Accessible** Having features to permit use by people with disabilities.

“**Accessible route** An access route usable by people with disabilities. It shall be a continuous route that can be negotiated unaided by a wheelchair user. The route shall extend from street boundary or car parking area to those spaces within the building

required to be accessible to enable people with disabilities to carry out normal activities and processes within the building.”

4.1.3 The relevant provisions of NZS 4121: 2001 are:

“9.1.3 Provision of lifts

“9.1.3.2 Two and three storey buildings

“Where 9.1.3.1 is not applicable [because, as in this case, upper floors are not intended to be used for certain purposes] a lift is not required when:

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

“(b) Buildings are three storeys high and have a gross floor area of the upper floors of less than 500 m²;

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

4.2 Relationship between the building code and NZS 4121

4.2.1 In Determination 2003/5 the previous Building Industry Authority (“the Authority”) said:

“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 . . . 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.”

4.2.2 I take the same views on those matters, noting also that while compliance with NZS 4121 must be accepted as establishing compliance with the building code it is not the only means of establishing such compliance.

5 THE SUBMISSIONS AND DISCUSSION

5.1 My jurisdiction

5.1.1 In respect of a power to waive or modify the provision of the building code for access and facilities for people with disabilities, section 47A of the Act says:

“(1) In any [building to which this section applies] reasonable and adequate provision by way of access . . . 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 3 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.”

5.1.2 In Determination 2001/10 the Authority said:

“6.2.1 . . . section 47A(2) of the Building Act gives the Authority the power, by way of determination, to waive or modify the requirements for access and facilities for people with disabilities, but only in respect of the alteration of a building. . . . No-one has the legal power to waive or modify those requirements in respect of a new building.”

5.1.3 I take the same view.

5.2 The issues

5.2.1 In considering whether the building complies with either or both clause D1.3.4(c) of the building code and clause 9.1.3.2 of NZS 4121, I take it from the submissions that the issues are:

- (a) Is the building two or three storeys high?
- (b) What is the design occupancy and the gross floor area of each mezzanine floor?
- (c) Are the three mezzanine floors to be considered individually or in combination?
- (d) In conclusion, given the answers to (a), (b), and (c) above, does the building comply with either or both the building code and NZS 4121?

5.3 General

5.3.1 The territorial authority did not make any specific submission, but in correspondence with the owner the territorial authority said:

“Lifts as accessible routes from the ground floor to the mezzanine floors are to be provided to meet the Building Code as the floors are more than 400 m² in total area and designed for more than 40 people.”

5.3.2 The owner submitted that it owned several similar buildings having multiple mezzanine floors individually less than 400 m² but aggregating more than 400 m². Other territorial authorities had accepted those as complying with the building code without the need for lift access to the mezzanine floors.

5.3.3 The owner also made the submissions outlined below in respect of the issues identified in 5.2.1 above.

5.4 Is the building two or three storeys high?

5.4.1 The owner submitted that Determination 97/003 established that “the inclusion of the undercroft car park floor in the proposed building does not require the proposed building to be considered as a 3 storey building”.

5.4.2 Determination 97/003 concerned a building on a sloping site with an open area used for car parking beneath the ground floor, but with no internal access to the ground floor, and one floor above the ground floor. The relevant passages from that determination are:

“3.2 Beneath the ‘ground floor’ is a car parking area served by a vehicle ramp adjacent to the main entrance. There is no internal access from the car parking area to the ‘ground floor’.

“5.3 In the context of structural design, the building must clearly be treated as having three storeys. In the context of means of escape from fire it must clearly be treated as having two storeys.

“5.4 In the context of access for people with disabilities, the car parking area is different in kind from the ground and top floors and need not be regarded as a storey of the building. As far as a user of the building is concerned, the car parking area might just as well be beside rather than beneath the building.”

5.4.3 The building considered in this determination also has a basement car park, but in this case with internal lift access to the ground floor but not to the mezzanine floors. I therefore consider that the building should be treated as being two storeys high in the context of access and facilities for people with disabilities.

5.5 What is the design occupancy and the gross floor area of each mezzanine floor?

5.5.1 For the office mezzanine floor:

(a) The design occupancy for the office mezzanine floor was stated as 39, being the occupant load for fire design purposes calculated in accordance with the acceptable solution C/AS1. The Authority took the view in previous determinations that the occupant load could be accepted as the design occupancy for the purposes of clause D1.3.4(c) of the building code. I take the same view.

(b) The gross floor area of the office floor was stated as 398 m².

5.5.2 The staff mezzanine floor:

(a) The design occupancy for the staff mezzanine floor was stated as 19.

(b) The gross floor area of the staff mezzanine floor was stated as 238 m².

5.5.3 The plant room mezzanine floor is visited only intermittently so that C/AS1 does not require it to be assessed for occupant load. I therefore consider that it has a design occupancy of zero. Its gross floor area was stated as 250 m².

5.6 Are the three mezzanine floors to be considered individually or in combination?

5.6.1 The owner submitted that it was unreasonable for the floor areas of the mezzanine floors to be aggregated because:

- “i) Each mezzanine floor area is less than 400 m²
- “ii) Each mezzanine floor area serve entirely different functions
- “iii) Each mezzanine floor area is fully separated from the other
- “iv) Toilet, staff room and storage facilities for the use of persons with disabilities are to be at the ground floor level.
- “v) [Stairs to the office and staff mezzanine floors] are designed as accessible stairs and could be used by persons with lesser disabilities
- “vi) Administrative office persons with disabilities could be employed in offices and use facilities located and provided on the ground floor for persons with disabilities . . .”

5.6.2 In Determination 2000/5, the Authority considered whether two separate upper floor areas should be treated as a single floor. It said:

“6.2.4 The Authority takes the view that where a building has two or more upper floor areas separate from each other, then those areas are to be treated as a single floor unless it would be clearly unreasonable to do so.”

5.6.3 I accept that the Authority took the correct approach in that instance. I also note that section 47A requires access and facilities for people with disabilities only for “persons with disabilities who may be expected to visit or work . . . and carry out normal activities and processes in that building”.

5.6.4 The building code and NZS 4121 in effect provide certain parameters for deciding whether upper floors are required to be accessible by wheelchair users. I take the view that those parameters establish the acceptable benchmarks above which a building’s upper floors must be accessible. The building code benchmark depends on numbers of people, the NZS 4121 benchmark depends on gross floor areas. In my view both benchmarks remain the same whether or not an upper floor is divided into separate parts and whether or not there is an accessible route between any two or more of those parts.

5.6.5 In other words:

- (a) Separate upper floor areas must be aggregated for the purpose of deciding whether wheelchair access must be provided, and
- (b) If the aggregate design occupancy and the aggregate gross floor area are such that wheelchair access is required, then such access must be provided to all of those upper floor areas, except that
- (c) Floor areas which wheelchair users cannot be expected to visit or work in may be ignored for the purposes of (a) and (b) above.

- 5.6.6 In this case, I consider that people with disabilities cannot be expected to visit or work in the plant room mezzanine floor. Accordingly, it does not have to be aggregated with the other mezzanine floors and it is irrelevant whether or not the walkway mentioned in 3.1 above is accessible.
- 5.6.7 However, people with disabilities may be expected to visit or work in both the office mezzanine floor and the staff mezzanine floor and carry out normal activities and processes. I therefore consider that the aggregates of their design occupancies and gross floor areas must be taken into account. My responses to the arguments advanced by the owner (see 5.6.1 above) are:
- (a) The fact that each floor area is less than 400 m² is irrelevant to the decision as to whether the separate floor areas are to be aggregated.
 - (b) The fact that each floor area serves entirely different functions, if that is in fact the case, is irrelevant because the functions that are served are normal activities and processes, see 4.1.1 above.
 - (c) The fact that each mezzanine floor is separated from the other is irrelevant in the sense that this determination would not have been necessary if the floors had not been separated.
 - (d) The provision for people with disabilities on the ground floor are irrelevant to whether an upper floor is required to be accessible (although they might be relevant in respect of alterations and the like where the question is not whether the building complies completely with the building code but whether it complies as nearly as is reasonably practicable).
 - (e) Upper floors exempted from the requirement for lift access are required by NZS 4121 to be served by accessible stairs, see 4.1.3 above. The fact that accessible stairs have been provided does not justify a failure to provide lift access.

5.7 Conclusion

- 5.7.1 I conclude that in combination the office mezzanine floor and the staff mezzanine floor have an aggregate design occupancy of 58 people and an aggregate gross floor area of 636 m² and that therefore lift access to each of those floors is required for compliance with both the building code and NZS 4121. Lift access to the plant room mezzanine floor is not required.

6 WHAT IS TO BE DONE

- 6.1 It is not for me to decide how the building is to be brought to compliance with the provisions of clause D1.3.4(c) of the building code and in particular whether that is to be achieved by separate lifts to the office mezzanine floor and to the staff mezzanine floor, or by providing a single lift to either with an accessible route between them. That is a matter for the owner to propose and for the territorial authority to accept or reject, with any of the parties entitled to submit doubts or disputes to me for another determination.

7 DECISION

- 7.1 In accordance with section 20 of the Act, I hereby determine that lift access is required to the office mezzanine floor and to the staff mezzanine floor but not to the plant room mezzanine floor.
- 7.2 I accordingly modify the territorial authority's decision to the effect that the application for a building consent is refused unless lift access is provided to the office mezzanine floor and to the staff mezzanine floor but not to the plant room mezzanine floor.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 15 April 2005.

John Gardiner

Determinations Manager