

Determination 2006/104

Access for people with disabilities to the Mt Victoria / Matairangi Summit Lookout, Wellington

1 The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 (“the Act”) made under due authorisation by me, John Gardiner, Determinations Manager, Department of Building and Housing (“the DBH”), for and on behalf of the Chief Executive of the DBH.
- 1.2 The applicant is the Wellington City Council (“the territorial authority”) in its capacity as the owner of the building. There are no other parties.
- 1.3 The application arises from proposed alterations to the Mt Victoria/Matairangi Summit Lookout (“the lookout”) and the difficulties involved in providing a route to the lookout that can be negotiated unaided by a wheelchair user (“an accessible route”) as required by clause D1 of the Building Code (the First Schedule to the Building Regulations 1992).
- 1.4 The application was worded as being a request for the Chief Executive to grant, by way of a determination, a waiver of clauses D1.3.4(a) to (e) inclusive, in accordance with section 69 of the Act. However, I also considered the application of the “as nearly as is reasonably practicable” provision of section 112(1)(a).
- 1.5 In making my decision I have not considered any other aspects of the Act or of the Building Code.
- 1.6 Unless otherwise stated, references below to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

2 The lookout

- 2.1 The lookout is one of Wellington City's major tourist attractions. It is part of the Mt Victoria Precinct, which includes the Byrd Memorial and other viewing locations, several of which are accessible but do not provide the 360° view available from the lookout.
- 2.2 The lookout is to be enlarged as part of a general upgrading to make the area a more attractive and interesting place to visit. The lookout will be a concrete viewing platform with glassed balustrades. The upgrading will include the provision of two accessible car parks adjacent to the Byrd Memorial. The territorial authority proposes to provide stepped access from the accessible car parks to the lookout.
- 2.3 The lookout is approximately 16 m higher than the accessible car parks. The proposed stepped route between them is approximately 74 metres long. An accessible ramped access route would need to be approximately four times as long, almost 300 metres, and would also involve extensive additional earthworks. An inclined wheelchair lift from the road to the lookout is estimated to cost approximately \$300,000.
- 2.4 Figure 1 below shows the proposed stepped route, Figure 2 shows an accessible ramped route, and Figure 3 shows an accessible wheelchair lift.

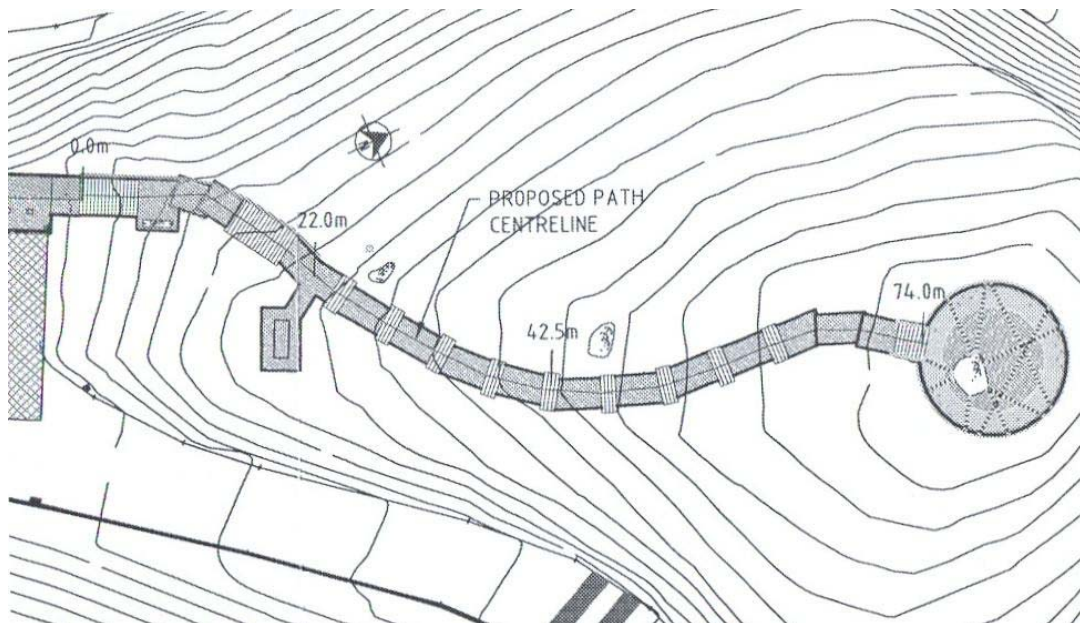


Figure 1: The proposed stepped route

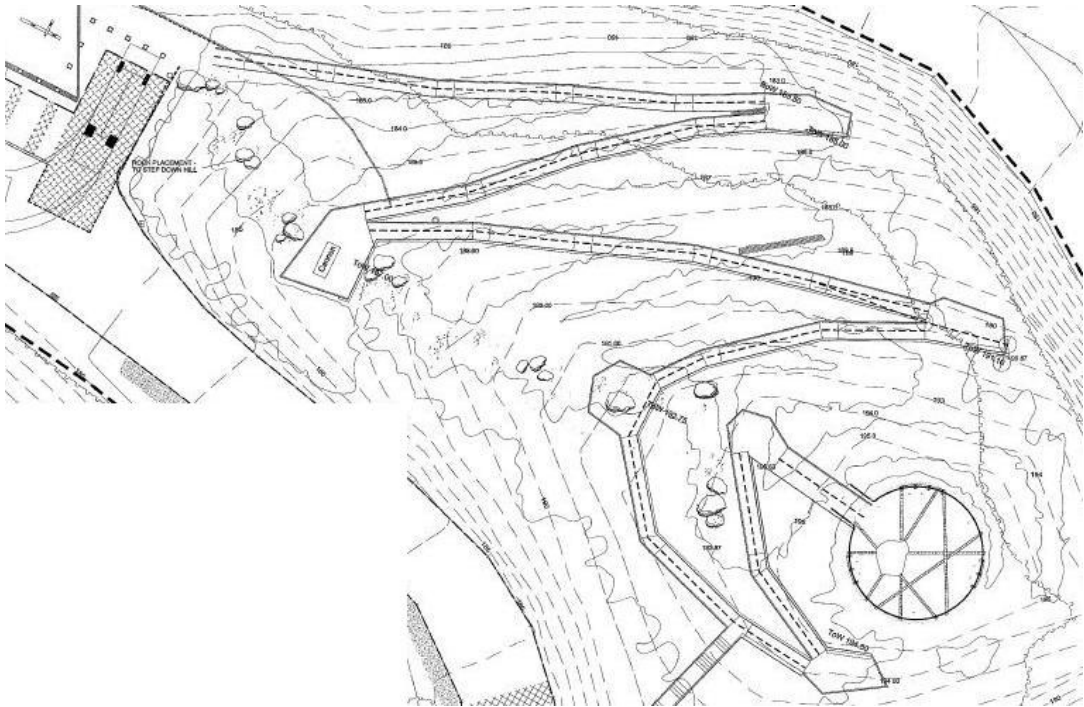


Figure 2: The accessible ramped route

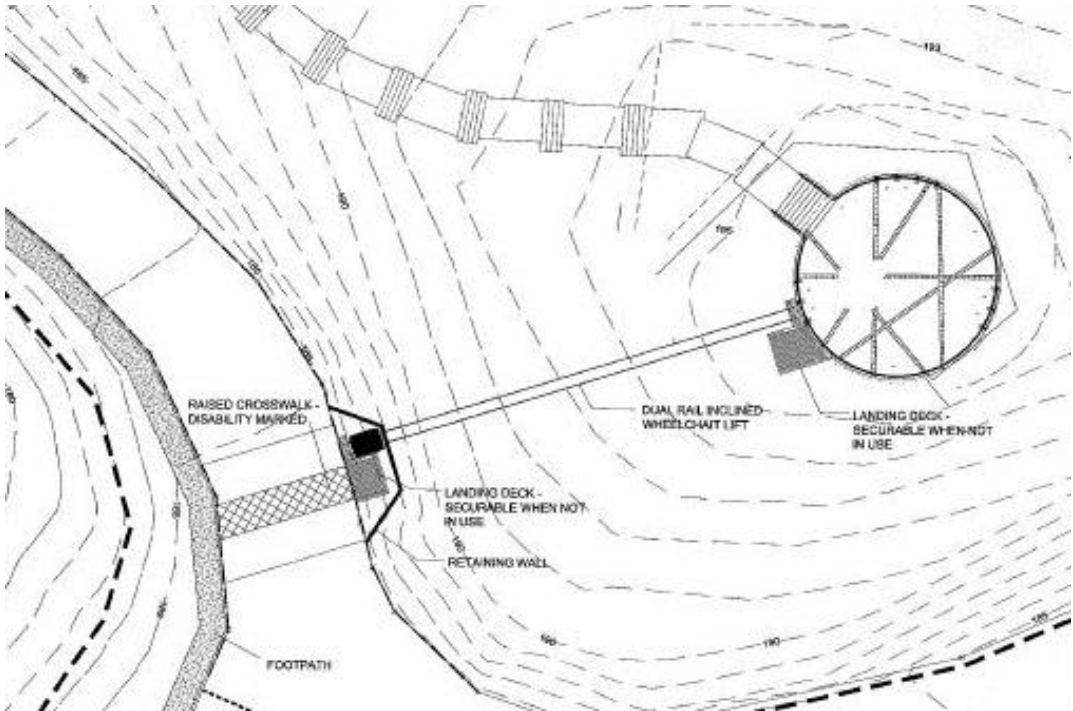


Figure 3: The accessible wheelchair lift

3 The legislation and the compliance documents

3.1 Relevant provisions of the Act are:

17 All building work must comply with building code

All building work must 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.

19 How compliance with building code is established

- (1) A building consent authority must accept any or all of the following as establishing compliance with the building code:
 - (b) compliance with the provisions of a compliance document . . .

67 Territorial authority may grant building consent subject to waivers or modifications of building code

- (1) A building consent authority that is a territorial authority may grant an application for a building consent subject to a waiver or modification of the building code.
- (2) A waiver or modification of the building code under subsection (1) may be subject to any conditions that the territorial authority considers appropriate.
- (3) The territorial authority cannot grant an application for a building consent subject to a waiver or modification of the building code relating to access and facilities for people with disabilities.

69 Waiver or modification may only be granted by chief executive in certain cases

- (1) This section applies to a waiver or modification of the building code that relates to—
 - (a) an existing building to which section 118 applies; and
 - (b) access and facilities for use by people with disabilities.
- (2) If this section applies, the chief executive may grant a waiver or modification only in a determination issued under subpart 1 of Part 3.
- (3) This section does not apply to a waiver or modification of the building code that relates to a new building.

112 Alterations to existing buildings

- (1) A building consent authority must not grant a building consent for the alteration of an existing building, or part of an existing building, unless the building consent authority is satisfied that, after the alteration, the building will—
 - (a) comply, as nearly as is reasonably practicable . . . , with the provisions of the building code that relate to—
 - (i) means of escape from fire; and

- (ii) access and facilities for persons with disabilities (if this is a requirement in terms of section 118); and . . .

118 Access and facilities for persons with disabilities to and within buildings

- (1) If provision is being made for the construction or alteration of any building to which members of the public are to be admitted, whether for free or on payment of a charge, reasonable and adequate provision by way of access, parking provisions, and sanitary facilities must be made for persons with disabilities who may be expected to—
 - (a) visit or work in that building; and
 - (b) carry out normal activities and processes in that building.
- (2) This section applies, but is not limited, to buildings that are intended to be used for, or associated with, 1 or more of the purposes specified in Schedule 2.

177 Application for determination

A party may apply to the chief executive for a determination in relation to 1 or more of the following matters:

- (d) the exercise by a territorial authority of its powers under sections 112 and 115 to 116 (which relate to alterations to, or changes in the use of, a building) . . .

188 Determination by chief executive

- (1) A determination by the chief executive must—
 - (a) confirm, reverse, or modify the decision or exercise of a power to which it relates; or
 - (b) determine the matter to which it relates.
- (3) A determination may incorporate—
 - (a) waivers or modifications of the building code; and
 - (b) conditions that a territorial authority or regional authority, as the case may be, is able to grant or impose.

Schedule 2 . . .

The buildings in respect of which the requirement for the provision of access and facilities for persons with disabilities apply are, without limitation, as follows:

- (g) central, regional, and local government offices and facilities:
- (n) libraries, museums, art galleries, and other cultural institutions:
- (z) other buildings, premises, or facilities to which the public are to be admitted, whether for free or on payment of a charge.

3.2 Relevant provision of the Building Code are:

CLAUSE A2—INTERPRETATION

In this building code unless the context otherwise requires, words shall have the meanings given under this Clause. Meanings given in the Building Act 1991 apply equally to the building code.

Access route A continuous route that permits people and goods to move between the apron or construction edge of the building to spaces within a building, and between spaces within a building.

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 carparking 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.

D1.3.2 At least one *access route* shall have features to enable *people with disabilities* to:

- (a) Approach the *building* from the street boundary or, where required to be provided, the *building* car park,
- (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 . . .

D1.3.4 An *accessible route*, in addition to the requirement of Clause D1.3.3, shall:

- (a) Be easy to find, as required by Clause F8 “Signs”,
- (b) Have *adequate* activity space to enable a person in a wheelchair to negotiate the route while permitting an ambulant person to pass,
- (c) Include a lift complying with Clause D2 “Mechanical Installations for Access” to upper floors where . . .
- (d) Contain no thresholds or upstands forming a barrier to an unaided wheelchair user,
- (e) Have means to prevent the wheel of a wheelchair dropping over the side of the *accessible route*,
- (h) Have stair treads with leading edge which is rounded, and
- (i) Have *handrails* on both sides of the *accessible route* when the slope of the route exceeds 1 in 20. The *handrails* shall be continuous along both sides of the stair, ramp and landing except where the *handrail* is interrupted by a doorway.

3.3 The compliance documents D1/AS1 and NZS 4121 specify requirements for accessible ramps, including a maximum slope of 1:12 and a maximum rise of 750 mm between 1200 mm landings.

4 The submissions

4.1 The territorial authority's application

4.1.1 The territorial authority's application was supported by extensive documentation, including an aerial photograph, engineering drawings for accessible ramped and lift access, and tender documentation for the proposed development including stepped access.

4.1.2 The territorial authority made the following points in the application:

- (a) The proposed stepped route, although not useable by people in wheelchairs, would improve access for people with ambulant disabilities.
- (b) To iwi this is a significant cultural site, so it is important for the development to "touch the summit lightly".
- (c) There are other lookouts in the area that are accessible and provide comparable views.

4.1.3 In effect, the territorial authority submitted that "provision of access to the Lookout for people with disabilities as per D1 of the Building Code is unreasonable", taking account of:

- (a) The extensive earthworks required for ramp access; and
- (b) The approximately \$300,000 cost of lift access.

4.1.4 The territorial authority had undertaken market research and called for public comments on the upgrading, and had consulted its disability interest group, iwi, and other internal and external stakeholders about accessibility issues. There was no support for a wheelchair lift, a general recognition that accessible ramp access would be difficult, and support for the territorial authority's application for a waiver of relevant provisions of the Building Code for access by people with disabilities.

4.1.5 Asked whether it had considered whether, in terms of section 112, the proposed alterations, including stepped access, complied as nearly as is reasonably practicable with the accessibility provisions of the Building Code, the territorial authority advised that it considered it inappropriate for it to make such a decision.

4.2 The Office for Disability Issues' comments

4.2.1 In accordance with section 170, I consulted the Office for Disability Issues ("the ODI"), acting for the Chief Executive of the Ministry of Social Development.

4.2.2 The ODI's response included a detailed discussion of the issues. It considered that it would be in the public interest that a person using a wheelchair could reach the lookout and take in the views on an equal basis with others, but acknowledged that there were countervailing interests to be considered. The ODI did not support a waiver but would consider supporting ramped access at a steeper than 1:12 gradient

such that a wheelchair user, with the assistance of another person, could reach the lookout.

4.2.3 The ODI concluded:

“It is our view that section 118 of the Building Act 2004 applies to this case as the lookout point would be a facility to which members of the public are to be admitted under clause (z) of Schedule 2.

“If the Department of Building and Housing were considering granting a building consent for the lookout development under section 112 of the Act then our view is that, on balance, access to as many people as possible to the summit is required via an access route that enables a greater proportion of disabled people to reach the summit. The presence of an existing built access route to the summit confirms this view.

“In terms of accessibility, it seems to us that if pathway access to the summit and a viewing platform is to continue to be provided then it is important that the route to the summit be as accessible as possible. Without an accessible route to the summit many Wellington City ratepayers may be denied the opportunity of taking in the total Wellington view that is available only from the summit. Therefore, there should be a route provided to enable as many as possible of those who require wheelchairs and other assistive devices for mobility to attempt to reach the summit and enjoy the views on an equal basis with others.”

4.3 The expert’s report

4.3.1 I also obtained a report on the application from an architect with a particular interest in access and facilities for use by people with disabilities (“the expert”). That report considered the proposed access provisions in relation to the relevant sections of the Act, and concluded that:

- (a) The provision of an accessible route between the Byrd Memorial carpark and the lookout “is neither practical nor reasonable and should not be required [but] other parts of the proposed works [should be] made fully accessible to a person in a wheelchair”.
- (b) The route between the Byrd Memorial and the lookout should be “made accessible to people with disabilities who are not in a wheelchair”. That would require attention to be paid to “the tread depth of the stairs, the handrail diameter, and the handrail end slope/extension details”.
- (c) Any waiver should be confined to clauses D1.3.4(b), (c), (d), and (e) and should apply only in respect of the route between the Byrd Memorial carpark and the lookout.

4.3.2 The expert also commented that the matter “could have been considered under s 112 and the same conclusions reached”.

4.4 The territorial authority’s response

4.4.1 I copied the Office for Disability Issues comments and the expert’s report to the territorial authority, which responded that:

- (a) The stairs and handrails of the proposed stepped access would be suitable for people with ambulant disabilities.
- (b) A waiver was sought only for “clause D1.3.4 subparts (a) to (e) inclusive”.
- (c) “Cost is not the only consideration in our application for a waiver. The costs of a fully accessible walkway although not costed are likely to be less than the chair lift option. However, there are significant cultural and landscape issues . . . which were the drivers behind our application for a waiver.”
- (d) “. . . the incorporation of ramped access, even at steeper grades, is not feasible or practical.”

4.5 The draft determination

- 4.5.1 After considering the submissions, I prepared a draft determination (the draft”) which I sent to the territorial authority and the ODI for comment. The draft was to the effect that it was not reasonably practicable for the access to comply with the Building Code.
- 4.5.2 The territorial authority accepted the draft but made several comments, mostly non-controversial, which have been taken into account in the final determination.
- 4.5.3 The ODI did not accept the draft, reiterating its view that “the overarching public amenity interest favours a solution that enables all people to reach the summit lookout and take in the views on an equal basis with others”. In particular, the ODI considered, for reasons that are addressed below, that I had overstated the sacrifices involved in making the route accessible.

4.6 The informal hearing

- 4.6.1 I, together with other DBH officials, had a meeting on 25 October 2006 with representatives from the territorial authority, its Disability Reference Group, and the ODI (“the informal hearing”).
- 4.6.2 Points made at the informal hearing were:
 - (a) The capital cost of ramp access would be similar to if not higher than that of the inclined wheelchair lift, although on-going maintenance costs would be lower.
 - (b) The length of the ramp access would make it difficult for wheelchair users, particularly considering the exposed nature of the lookout.
 - (c) The ODI confirmed its views as outlined in 4.2 and 4.5.3 above.
 - (d) The territorial authority explained its consultation process and the internal discussions that had resulted in its applying to the Chief Executive for a waiver rather than applying to itself for a building consent.

- (e) The territorial authority had plans to provide an accessible route to another lookout point, which is adjacent to the road. I applauded the intention but consider that it is not relevant to this determination.

5 Discussion

5.1 General

- 5.1.1 In the discussion below, the term “accessibility requirements” means the provisions of the Building Code that relate to access and facilities for use by people with disabilities.
- 5.1.2 The territorial authority applied for a waiver of clauses D1.3.4(a) to (e) inclusive, whereas the expert considered that only clauses D1.3.4(b) to (e) should be considered for waiver. Clause D1.3.4(a) relates to signs. If D1.3.4(b) to (e) were waived, then the route would not be accessible and should not carry the accessibility sign. However, any waiver of the accessibility requirements would apply only to the stepped route from the accessible car parks to the summit.
- 5.1.3 The proposed upgrading of the lookout with stepped access would be an alteration of an existing building such that, after the alteration, the building will not comply with the accessibility requirements. Therefore:
 - (a) Under section 69 the Chief Executive may, by way of a determination, grant a waiver or modification of the accessibility requirements.
 - (b) Under section 112, the territorial authority may issue a building consent for work that does not comply completely with the accessibility requirements, provide that it is satisfied that after the alteration the lookout will comply with those requirements “as nearly as is reasonably practicable”.
 - (c) Under section 177, the Chief Executive may make a determination in relation to a building consent issued under section 112, and under section 188 such a determination may incorporate waivers or modifications of the accessibility requirements.
- 5.1.4 The territorial authority chose to apply to the Chief Executive for a waiver rather than to grant itself a building consent for the proposed work, with or without applying for a determination in respect of that building consent¹.
- 5.1.5 The application was fully documented and well argued, but, as I said in the draft, included the clear implication that the territorial authority would prefer to alter the lookout without bringing it to compliance with the accessibility requirements but was not willing to make a formal decision to that effect. The territorial authority contested that statement, saying that:

¹ See Determination 2006/72 for a recent example where a territorial authority’s decision made in its capacity as a building consent authority was disputed by the territorial authority itself in its capacity as a landowner.

- (a) “There had been no building consent application lodged so there is no opportunity for a formal decision.”
- (b) “The application for a waiver is a mechanism available under the Building Act which the Council has chosen to pursue. The Chief Executive . . . is required to make a decision whether to issue a waiver or not.”
- (c) “The Council has chosen to apply for a waiver . . . to avoid any potential for perceived conflict of interest”

5.1.6 My responses to those points are:

- (a) The only reason why there was “no opportunity for a formal decision” was that the territorial authority chose not to apply to itself for the necessary building consent.
- (b) The Chief Executive has a discretion whether or not to grant a waiver or modification.
- (c) The territorial authority’s wish “to avoid any potential for perceived conflict of interest” can also be seen as a wish to avoid or deflect criticism.

5.1.7 I consider that it is important for the Chief Executive to be as fully informed as possible regarding the matter for determination. That will not necessarily be the case if a building consent authority avoids making a decision and instead submits a matter for determination. Accordingly, I consider that, in general and as a matter of good practice, a building consent authority should make a decision before applying for a determination in respect of or relating to that decision. If it had made such a decision, it would have had to consider whether either ramp access or lift access was reasonably practicable in terms of section 112.

5.1.8 Furthermore, I consider that the Chief Executive’s power of waiver under section 69 should be used sparingly and only in cases where there is a clear need to exercise the discretion that is available to the Chief Executive but not to building consent authorities.

5.1.9 In this case, I am satisfied that I was in fact fully informed, particularly because of the involvement of the ODI. However, in future cases I could well decide to refuse an application for determination on the grounds that the application is not genuine because it is made so that an applicant building consent authority can avoid its responsibility for making a decision.

5.2 What is the difference between a waiver or modification of the Building Code and compliance “as nearly as is reasonably practicable”?

5.2.1 I take the view that a waiver or modification of the accessibility requirements (or of any other provision of the Building Code) may be granted, whether by a territorial authority or by the Chief Executive, only when it is reasonable to do so. Conversely, a waiver or modification must not be granted when it would be unreasonable to do so. An obvious example of an unreasonable waiver or modification would be one that meant that the building concerned would be dangerous in terms of section 121.

- 5.2.2 That “reasonableness” test appears at first sight to be less demanding than the “as nearly as is reasonably practicable” test under section 112². However, it is difficult to imagine any situation in which compliance with the Building Code would be reasonable but not practicable. In this case, I consider that there is no real difference between the two tests so that, as the expert said, the same conclusion could be reached if the matter was considered under section 112 rather than under section 69.

5.3 Possible access routes

- 5.3.1 The wheelchair lift shown in Fig. 3 above is clearly the ideal solution but very expensive at approximately \$300,000 plus significant annual maintenance costs. The territorial authority’s consultations revealed no support for lift access. I conclude that, on grounds of ongoing cost alone, it would not be reasonable to provide lift access (although it will need to be reconsidered in any future alterations to the lookout).

- 5.3.2 However, in response to the draft, the ODI said:

The cost of full access appears to be quite modest when one considers . . . that it is likely to cost less than about \$2 per citizen of Wellington for a permanent low-maintenance facility that will likely last forever and enable all people, for generations to come, to have easier access than at present.

- 5.3.3 I take the view that the cost of upgrading must be considered in relation to the benefit achieved not in relation to the ability of the owner to meet that cost. In any case, I do not accept that public spending can be justified on the grounds that the cost per head is small or insignificant. Furthermore, \$2 per head of population is several times that per ratepayer, and I do not think that the territorial authority could impose a corresponding increase in everyone’s rates without encountering significant criticism. See also paragraph 5.3.9 for the benefits concerned.

- 5.3.4 The accessible ramped access shown in Fig. 2 above (which incorporates a stepped “short-cut”) is approximately 290 m long whereas the proposed stepped access is approximately 74 metres long. Determinations 94/004 and 96/004 discussed the length of accessible ramped routes in comparison with stepped routes. Admittedly those determinations were essentially considering whether it would be reasonable to require lift access, but they tend to indicate that in this case the ramped access route is not a reasonable solution on the grounds of its length. Be that as it may, I consider that it would not be reasonable to require accessible ramped access because:

- (a) The capital cost is approximately the same as for lift access (although with lower maintenance costs).
- (b) As shown by Fig. 2, accessible ramped access would have a very significant effect on the landscape of the summit, which was a cause of concern to iwi, see 4.1 above. This is not simply a matter of visual experience, as discussed in Determination 92.1102, but a matter of cultural importance.

² Previous determinations have applied that test by balancing the benefits of any particular item of upgrading against the costs or sacrifices of installing that item. That approach was approved by the High Court in *Auckland CC v NZ Fire Service* [1996] 330.

- 5.3.5 The ODI favoured ramped access but at a steeper slope than the 1:12 specified in the compliance documents so that wheelchair users could use it with appropriate assistance. The territorial authority responded that such a solution “is not feasible or practical”.
- 5.3.6 In general, I consider that if an accessibility feature – such as a grab rail, a door handle, or, as in this case, a ramp – is provided then it should comply completely with the Building Code for use by people with disabilities without assistance. However, as the ODI suggested installing a steeper ramp for assisted wheelchair users, that suggestion is discussed below.
- 5.3.7 The compliance documents specify 1:12 as the maximum slope for an accessible ramp. The acceptable solution for access in general, F1/AS1, specifies 1:8 as the maximum slope for a “common ramp normally dry”, with 1:3 acceptable for a “service ramp” ramp incorporating footholds. Assuming, for the sake of argument, that a slope of 1:8 would be useable and safe for assisted wheelchair users, increasing the slope to 1:8 can be considered to reduce the length of the route by approximately one-third (ignoring landings). That would significantly reduce both the cost and the effect on the landscape. However, both the cost and the effect on the landscape would still be much larger than for the proposed stepped access.
- 5.3.8 In the draft, I said that those sacrifices must be weighed against the benefit that people in wheelchairs could reach the lookout with appropriate assistance. The ODI responded that the benefit would accrue to:

“[A] greater range of people, young and old, than only wheelchair users [including] parents with young children in pushchairs, elderly people, frail people, and many others with ambulant disabilities who would find 74 metres of stepped access difficult to negotiate. . . .

“This is not to ignore or to underestimate the cultural significance of the site to local iwi. But, rather to recognise that the greater part of the cultural significance itself is being able to reach the summit ‘to examine the sky’ (Matairangi).

“We consider that there appears to have been insufficient [consultation with] local iwi and other stakeholders on a design (incorporating an accessible route) that was more sympathetic to the natural contours of the ground. . . .”

- 5.3.9 That is a legitimate point. However:
- (a) As to the benefit to others as well as people with disabilities:
 - (i) That applies only to the lift option, not to accessible ramped access which, at approximately 290 m, would be so long as to be difficult for many of those concerned.
 - (ii) Previous accessibility determinations have considered only the benefits for people with disabilities. However, I take the view that, as a matter of law, I am not necessarily bound by previous determinations although I should depart from them only for good reason. In this case there appears to be no such reason because I do not consider that any increased benefit

would be sufficient to tip the balance in favour of either ramp or lift access.

- (b) As to cultural significance, the territorial authority had in fact consulted iwi and other stakeholders. I am not prepared to say that those consultations were insufficient, and the responses included with the application for determination do not support the ODI's comments.

5.3.10 Accordingly, balancing costs against benefits, I consider that it would not be reasonable to require either lift access or ramped access in this case.

5.3.11 This determination is not to be taken to imply that a 70 m ramped route with a slope of 1:8 would be reasonable for an assisted wheelchair user in any other case.

5.4 Conclusions

5.4.1 I conclude that:

- (a) It is reasonable for me to waive clauses D1.3.4(a) to (e) inclusive in respect of the access route between the accessible car parks and the lookout.
- (b) After the alterations, the lookout with stepped access would comply as nearly as is reasonably practicable with the accessibility requirements.
- (c) The stepped access route between the accessible car parks and the lookout must be made fully accessible for people with ambulant disabilities.

6 Decision

6.1 In accordance with sections 69 and 188(1) of the Act, I hereby grant a waiver of clauses D1.3.4(a) to (e) inclusive in respect of the access route between the accessible car parks and the lookout, provided that the stepped access is to comply with the requirements of D1/AS1 for accessible stairs.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 7 November 2006.

John Gardiner
Determinations Manager