

Determination 2006/40

Requirement for a lift in Building 4, 17 Lambie Drive, Manukau City

1 The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) 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. References to sections are to sections of the Act unless otherwise stated.
- 1.2 The applicant is Centro Investments Ltd (“the owner”) and the only other party is the Manukau City Council (“the territorial authority”).
- 1.3 The application arises from a dispute about whether a lift must be installed in a two-storey building proposed to be used by a district health board for the administration arm of a children’s mental health unit.
- 1.4 I take the view that the matters to be determined are:
 - (a) Whether a lift is necessary for compliance with clause D1.3.4(c) of the Building Code² (the First Schedule to the Building Regulations 1992), and if so
 - (b) Whether the building is to undergo a change of use in terms of 115 and the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 (“the BS Regulations”), and if so
 - (c) Whether it is reasonably practicable to install a lift.
- 1.5 In making my decision I have not considered any other aspects of the Act or of the Building Code.

2 The building and the sequence of events

- 2.1 The building is one of six similar two-storey buildings on the same allotment. Each floor of each building is held under a separate unit title. The building concerned has

¹ The Building Act 2004 is available from the Department’s website at www.dbh.govt.nz

² The Building Code is available from the Department’s website at www.dbh.govt.nz

730 m² gross floor area on each floor. There are accessible sanitary facilities on each floor. Access between floors is by a flight of stairs.

- 2.2 The building was erected under a building consent issued in 2001 under the Building Act 1991 (“the former Act”). The consent was issued by the territorial authority in reliance on a certificate issued by a building certifier which was approved by the Building Industry Authority (“the Authority”) under the former Act but is no longer in practice as a building certifier.
- 2.3 The building consent itself does not identify the intended use(s) of the building, but the application for that consent identified them as “Commercial Industrial”. It is not disputed that the building is one to which section 118 “Access and facilities for use by people with disabilities” applies.
- 2.4 I have not been informed as to if or when a code compliance certificate was issued for the original construction, but I assume that it was done some time between 2002 and 2005.
- 2.5 After the shell of the building had been completed, the upper floor remained unoccupied. In 2005, the owner wished to let the upper floor to the local district health board, and discussed with the territorial authority an application for a new building consent for “internal fit out” of the upper floor as offices for a maximum of 60 people. The territorial authority said that “the alterations would require the installation of a lift to serve the upper floor”. The owner asked the territorial authority to grant a waiver of the relevant requirement of the Building Code, and when the territorial authority replied that it could not do so the owner applied for this determination.

3 The legislation and the compliance documents

- 3.1 Section 112 of the Act reads:

- “(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
 - “(b) continue to comply with the other provisions of the building code to at least the same extent as before the alteration.

- 3.2 I take the view that under section 67 a territorial authority cannot grant a waiver of the Building Code relating to access and facilities for use by people with disabilities, and that under section 69 the chief executive may grant such a waiver but not if it relates to a new building.

3.3 The relevant provisions of the Building Code are:

“**D1.3.2** At least one access route [in a building to which section 118 applies] shall [be accessible].

“**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, or
- (iv) an upper floor, irrespective of design occupancy, is to be used for the purposes of public reception areas of banks, central, regional and local government offices and facilities, hospitals, medical and dental surgeries and medical, paramedical and other primary health care centres . . .”

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.”

3.4 The relevant provisions of NZS 4121 are:

“**9.1.3 Provision of lifts**

“**9.1.3.1 General**

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

“(b) The upper floor(s) of any building are to be used as the public reception areas of:

“(i) Banks . . .

“(c) The upper floor(s) are designed or intended to be used as:

(i) Public areas of hospitals, medical consulting rooms, dental surgeries and other primary health care centres . . .

“**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 . . .”

3.5 Thus the Building Code and NZS 4121 specify different circumstances in which a lift is to be provided. A building complying with NZS 4121 might not comply with the Building Code (and the other way round).

3.6 Nevertheless, I take the view 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.

- 3.7 I take that view that because section 119(2) provides that NZS 4121 is to be taken as a compliance document and section 19(1)(b) says that a building consent authority must accept compliance with such a document as establishing compliance with the Building Code. I also take the view that the requirement to accept such documents applies not only to building consent authorities for the purposes of issuing building consents and code compliance certificates but also to the chief executive for the purposes of making determinations. (The Authority took the same view in several determinations under the former Act.)

4 The submissions

- 4.1 The owner referred to section 38 of the former Act (now section 112) and submitted that the “difficulties . . . in installing a lift are considerable and clearly outweigh the benefits”. Those difficulties were identified as:
- (a) Installing a lift would necessitate “an elaborate boundary adjustment” to the unit title to the ground floor.
 - (b) Costs and time delays for the district health board.
 - (c) The district health board would provide, at ground floor level in the building concerned or in other buildings on the same allotment, appropriate facilities for people with disabilities who might otherwise be expected to visit or work on the upper floor.
- 4.2 The owner also claimed that the territorial authority had “waived the requirement for an elevator” for another of the buildings on the same allotment.
- 4.3 The territorial authority chose to make no specific submissions.

5 Discussion

5.1 General

- 5.1.1 Given that section 118 applies, then the installation of a lift is necessary for compliance with the Building Code unless the design occupancy of the upper floor is fewer than 40 people. For fire design purposes, the occupant density of 0.1 specified in Table 2.2 of the acceptable solutions C/AS1 indicates that more than 70 people can be expected to be present at any one time. The installation of a lift is necessary for compliance with NZS 4121 whatever the design occupancy because the gross floor area of the upper floor exceeds 400 m².
- 5.1.2 I take the view that when it applied for the original building consent for the erection of the building, the owner knew or ought to have known that, without a lift, the commercial or industrial uses to which the building could be put in compliance with the code were limited to uses in which the upper floor would have a maximum design occupancy of 39 persons.
- 5.1.3 As for the proposed new building consent for the fit-out of the upper floor, in Determination 2004/5 the Authority took the view that, under the former Act, the fit-

out of a particular area in the shell of a new building to suit the needs of the first tenant was part of the construction of the building and could not be treated as an alteration to an existing building. In other words, a building was to be treated as a new building under construction until all of it was actually completed and ready for use.

- 5.1.4 Under that interpretation, the fit-out would have to be by way of an amendment to the original building consent for a new building, which would mean that I would have no power to waive the requirement for a lift, see paragraph 3.2 above. However, I recognise that under the former Act it was possible to issue an interim code compliance certificate in respect of a stage of construction, which cannot be done under the current Act. Accordingly, that interpretation might not apply under the current Act. I offer no opinion on whether, for the purposes of this determination, the building work concerned should be treated as the completion of a new building or the alteration of an existing building because, on the view I take of the matter, see paragraph 5.3, even if it is treated as an alteration, so that I have the power to waive the requirement for a lift, I do not consider it reasonable to do so.

5.2 Application of the “as nearly as is reasonably practicable” test

- 5.2.1 Assuming, but not deciding, that the fit-out is an alteration to an existing building, the question becomes whether, in terms of section 112, it is reasonably practicable to install a lift.
- 5.2.2 The “as nearly as is reasonably practicable” test is discussed in numerous determinations issued by the Authority under the former Act³. I take the view that the same test applies under the current Act.
- 5.2.3 In considering any particular item of upgrading, the Authority applied the interpretation of the words “as nearly as is reasonably practicable” adopted by the High Court in *Auckland City Council v New Zealand Fire Service* [1996] 1 NZLR 330, an appeal against Determination 93/004, in which it was held that:
- “[Whether any particular item of upgrading is required] 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.”
- 5.2.4 Applying that approach, the benefits of installing a lift are that people with disabilities would be able to visit and work in the upper floor. Those benefits must be weighed against the difficulties or sacrifices identified by the owner, see 4.1 and 4.4 above.

³ See Determinations 1993/2, 1993/3, 1993/4, 1994/2, 1994/5, 1995/2, 1995/6, 1996/1, 1996/5, 1997/1, 1997/2, 1997/9, 1999/1, 1999/15, 2001/4, 2002/2, 2002/5 and 2002/8.

5.3 Boundary adjustments

- 5.3.1 I recognise that a boundary adjustment, see 4.1(a) above, may amount to a sacrifice, but I take no account of that sacrifice in this case because it arises from the fact that the owner reduced the costs of erecting the building by limiting the uses to which it could be put. I note that the Authority took a similar approach to a tenancy agreement in Determination 99/015.

5.4 Costs and time delays

- 5.4.1 The same reasoning applies to the costs and time delays of installing a lift, see 4.1(b). I consider it irrelevant whether those costs would fall on the owner or on the district health board.

5.5 Provision of appropriate facilities elsewhere

- 5.5.1 The owner submitted that the district health board would provide appropriate facilities elsewhere, see 4.1(c) above. In Determination 92.1103 the Authority decided that a lift was not required in the alteration of a two-storey bank building. However, in that case and subsequent similar cases, the upper floor was used for the purpose of a public reception area, so that clause D1.3.4(c)(iv) of the Building Code applied even though the design occupancy and the gross area were such that a lift was not required under clause D1.3.4(c)(iii) of the Building Code or under clause 9.1.3.2 of NZS 4121.
- 5.5.2 In the present case, both the design occupancy and the gross floor area are such that a lift is required even if the upper floor does not include any public reception areas. Accordingly, I take no account of the proposal to provide alternative facilities.

5.6 Previous waiver

- 5.6.1 The owner submitted that the territorial authority had “waived the requirement for an elevator” for another of the buildings on the same allotment. I take the view that my determination cannot be influenced by the previous actions of the territorial authority. Incidentally, I note that territorial authorities have no power to issue such waivers, see 3.2 above, although they do have the power to decide whether it is reasonably practicable to require the installation of a lift under section 112 when an existing building is being altered or under section 115 when an existing building is undergoing a change of use.

6 Conclusion

- 6.1 The building does not comply with the provisions of the Building Code for access and facilities for use by people with disabilities.
- 6.2 If the fit-out is to be treated as the completion of a new building then I have no power to waive or modify those provisions.
- 6.3 If the fit-out is to be treated as an alteration to an existing building, I cannot take account of any of the sacrifices identified by the owner and therefore consider that

the building, after the alteration, will not comply as nearly as is reasonably practicable with the provisions of the Building Code for access and facilities for use by people with disabilities.

6.4 In either case, I have no choice but to decide that the installation of a lift is required.

7 The decision

7.1 In accordance with section 188(1) of the Act, I hereby determine that a lift must be installed if the building is to be used as offices for more than 39 people.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 17 May 2006.

John Gardiner

Determinations Manager