



## Determination 2008/116

11 December 2008

### Refusal of a code compliance certificate for a new kindergarten at 74 Bowmont Street, Invercargill



#### 1. The matters to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of the Department. The applicant is the Southland Kindergarten Association (Inc) (“the applicant”). The other parties are the Invercargill City Council carrying out its duties and functions as a territorial authority or a building consent authority (“the authority”) and the Ministry of Education as an organisation that has a right or obligation under section 139B of the Education Act 1989 to give written notice to a territorial authority in respect of matters to which the Act applies.
- 1.2 I have also copied this determination to the Office for Disability Issues (“the ODI”), Ministry of Social Development, by way of consultation under section 170.

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<sup>1</sup> The Building Act 2004 is available from the Department’s website at [www.dbh.govt.nz](http://www.dbh.govt.nz).

- 1.3 The matter for determination (under section 177(b)(i)) is whether the authority's decision to refuse to issue a code compliance certificate for a new kindergarten ("the building") is correct.
- 1.4 The decision to refuse to issue was made by the authority because it could not be satisfied that the building, with door and gate latches ("the latches") as currently positioned, complies with Clause D1 of the Building Code<sup>2</sup> (Schedule 1 of the Building Regulations 1992) ("the Building Code").
- 1.5 In making my decision, I have considered the submissions of the parties and the other evidence in this matter. I have not considered any other aspects of the Act or the Building Code.
- 1.6 In this determination, unless otherwise stated, references to sections are to sections of the Act, references to clauses are to clauses of the Building Code, and references to regulations are to regulations of the "Education (Early Childhood Centres) Regulations 1998" ("the Childhood Regulations").

## 2. The building

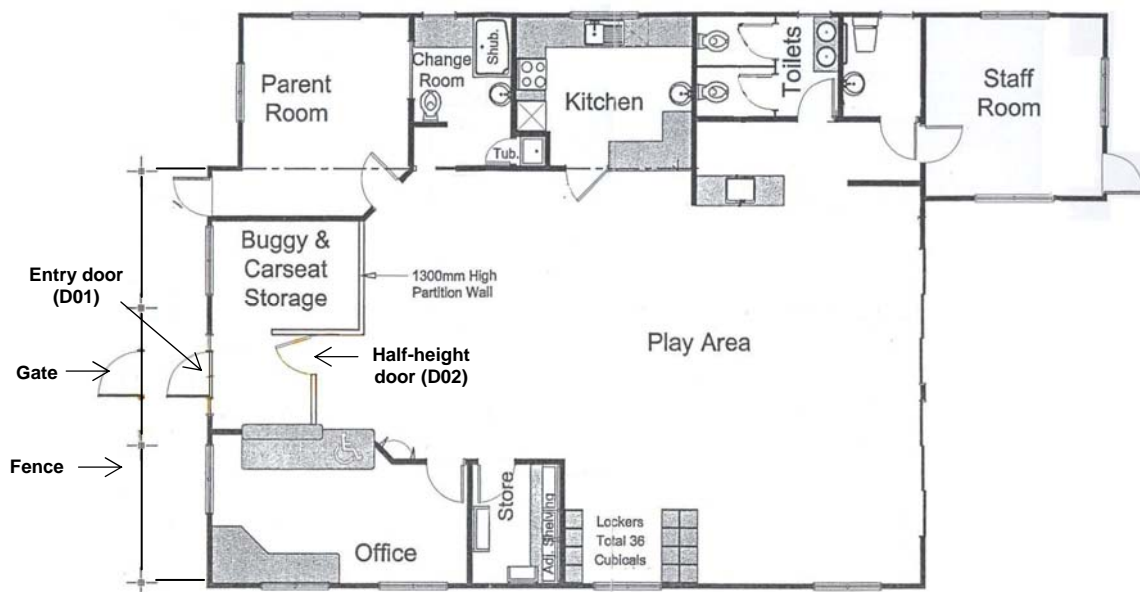


Figure 1: Revised floor plan showing the gate and doors D01 and D02

- 2.1 The building is a newly constructed kindergarten as shown in Figure 1 above. The main entry points to the building are located at the:
- 870mm wide x 1200mm high gate in the fence around the entrance area ("the gate"), which is hung on spring hinges and has a magnetically operated

<sup>2</sup> The Building Code is available from the Department's website at [www.dbh.govt.nz](http://www.dbh.govt.nz).

latch with a “lift up” handle. The lift up handle can be operated by one hand and is currently set at a height of 1230mm above ground level.

- main entry door to the building proper (“door D01”) with a lever handle set at a height of 900mm above floor level. This door is not subject to this determination.
- internal half-height door, 1300mm high (“door D02”) that is situated between the entry foyer and the play area. It is controlled by a closing hinge and currently has a lever handle set at a height of 910mm above floor level and a supplementary magnetic bolt fixed near the top of its entrance side face. Entry through the half-door requires the use of two hands to operate the lever handle and latch simultaneously. The configuration of lever handle and latch requires someone to reach over the half-door to release it when leaving.

2.2 At the formal hearing I was informed that the children attending the kindergarten were 2 to 5 years old, although I understand the Education Regulations are for centres with children less than 6 years of age.

### **3. Background**

3.1 The kindergarten was built following the issue of building consent No 2007/958 by the authority.

3.2 The fence and gate were not included in the original building consent issued for the kindergarten. During the final inspection the authority’s staff discovered the presence of the fence and gate. The applicant’s designer requested an amendment to the consent for the fence and some other matters. The amendment to the consent was noted on the council files with the proviso that “the main entrance door and gate must be accessible by people with disabilities”.

3.3 Between 14 November 2007 and 18 April 2008 correspondence took place between the authority and the applicant regarding the height at which the latches to the gate and door D02 were to be fixed. The final outcome of this correspondence can be summarised as follows:

- The applicant’s position was that it was bound by the requirements of the Childhood Regulations issued by the Ministry of Education, which required the latches to be located at 1600mm above floor level. The applicant stated that the safety of the children using the premises was of paramount importance and it had taken reasonable steps to provide a safe environment for them.
- The authority’s position was that it was bound by the requirements of the Act and the Building Code. It considered the Building Code required the operating knob of the gate latch to be lowered to a height of 1200mm and the magnetic bolt on door D02 be removed to ensure that people with disabilities are able to enter and carry out normal activities in the building.
- Both parties agreed that the requirements of the Childhood Regulations and the Building Code were incompatible.

- 3.4 The applicant wrote to the Ministry of Education on 29 November 2007, pointing out what it saw as the incompatibility of the Childhood Regulations and the Building Code height requirements for door and gate locks.
- 3.5 Following an application from the Kindergarten Association, the authority refused to issue a code compliance certificate unless the latches were fixed in accordance with the “Building Code”.
- 3.6 The authority issued a certificate for public use dated 26 November 2007 for the premises.
- 3.7 The application for a determination was received by the Department on 6 May 2008.

#### **4. The submissions**

- 4.1 In written submissions to the Department, the applicant described the background to the matter in dispute and referred to the conflict between the requirements of the Childhood Regulations and the Building Code. The applicant noted the amendments requested by the authority and stated that the applicant wanted:

- to change the gate magnetic latch to 1600mm above floor level, which was a Ministry of Education requirement
- to retain the magnetic bolt on door D02.

The applicant also stated that its main priority was the safety of the children.

- 4.2 The applicant forwarded copies of:

- the revised floor plan
- the certificate for public use
- the relevant Childhood Regulations
- the relevant correspondence
- correspondence from other kindergarten organisations
- the applicant’s General Manager’s report to its Board of Governors of 21 November 2007
- guidance information from the Ministry of Education
- a set of photographs showing the access points in question.

- 4.3 The authority made a submission dated 19 May 2008. The authority stated that gate and door latches needed to be at appropriate heights for persons with disabilities to enter and carry out normal processes within the building and this was a requirement of the Act. The authority appreciated the applicant’s safety concerns but it had a duty to ensure that any person with a disability could use the building without assistance.
- 4.4 The authority forwarded a copy of a letter dated 4 April 2008 that it sent to the applicant’s design consultant.

4.5 Copies of the submissions were provided to each of the parties.

## 5. The legislation

5.1 The relevant provisions of the Act include:

### 3 Purpose

The purpose of this Act is to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings, to ensure that—

- (a) people who use buildings can do so safely and without endangering their health; and
- (b) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and
- (c) people who use a building can escape from the building if it is on fire; and
- (d) buildings are designed, constructed, and able to be used in ways that promote sustainable development.

### 17 All building work to 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.

### 18 Building work not required to achieve performance criteria additional to or more restrictive than building code

- (1) A person who carries out any building work is not required by this Act to—
  - (a) achieve performance criteria that are additional to, or more restrictive than, the performance criteria prescribed in the building code in relation to that building work; or
  - (b) take any action in respect of that building work if it complies with the building code.
- (2) Subsection (1) is subject to any express provision to the contrary in any Act.

### 23 Effect of compliance documents

A person may comply with a compliance document in order to comply with the provisions of the building code to which the document relates, but doing so is not the only means of complying with those provisions.

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

- (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.

### 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.

#### **119 Compliance document for requirements of persons with disabilities**

- (1) This section applies to—
  - (a) the New Zealand Standard Specification No 4121 (the code of practice for design for access and use of buildings by persons with disabilities), together with any modifications to that standard specification in force immediately before the commencement of this section; or . . .
- (2) A standard specification to which this section applies is to be taken as a compliance document.

#### **Schedule 2: Buildings in respect of which requirement for provision of access and facilities for persons with disabilities applies**

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:

- (d) childcare centres and kindergartens:

5.2 The relevant provisions of the Building Code include:

**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...

#### **The term “accessible route” is defined in Clause A2 as:**

An access route useable 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 people with disabilities to carry out normal activities and processes within the building.

5.3 The relevant provisions of compliance document D1/AS1 include:

**7.0.5 Door handles** – Accessible doors shall be openable with one hand and have a lever action operation for handles, locks and latches. Handles shall be between 900mm and 1200mm above floor level. Pull handles and push plates are acceptable only where doors are not latched.

5.4 The relevant provisions of NZS 4121<sup>3</sup> include:

#### **2.2 Function and context of use**

...Through section 47A of the Building Act [now section 118 of the 2004 Act] this standard is deemed to be one of the documents establishing compliance with the Building Code (NZBC). As such it is only one way of meeting the performance

<sup>3</sup> New Zealand Standard NZS 4121: 2001 Design for access and mobility – Buildings and associated facilities

requirements of the NZBC. Designers may use 'alternative solutions' provided they can show the alternative meets the performance requirements.

### **7.3.7 Door handles and hardware**

Door handles and related hardware and accessories shall comply with the following requirements:

- (a) Handles shall be between 900 mm and 1200 mm (optimum 1000 mm) above the finished floor level...

## **6. The draft determinations**

- 6.1 I prepared a draft determination, which I sent first to the ODI by way of consultation, on 17 June 2008.
- 6.2 The ODI responded in a letter dated 8 July 2008 stating that it considered that the draft determination was correct. The ODI noted the conflict that arises between the Building Code and the Childhood Regulations and also noted that any conflict could not be decided through the Act's determination process.
- 6.3 The ODI's response concentrated on the building's compliance with the Building Code and made no comment on, or comparisons with, the objectives of the Childhood Regulations to keeping children safe.
- 6.4 I also sent the draft to the parties for comment on 9 July 2008. The authority accepted the draft. The applicant did not accept the draft and in a submission dated 26 September 2008 noted the problems that would arise if the latches were to be lowered.
- 6.5 I issued a second draft determination prior to the hearing. I decided to issue the second draft as I had seen some correspondence on the matter which suggested to me that some of the words used in the earlier draft were not helpful to the parties in identifying a way to deal with what is clearly a difficult problem.
- 6.6 Following a hearing, and taking into account the matters discussed at that meeting, I issued a third draft determination, copies of which were forwarded to the parties and the ODI on 16 October 2008. The applicants accepted the draft determination without comment.
- 6.7 The authority also accepted the draft, and in a covering letter to the Department dated 22 October 2008, noted that if the Department considers that an alternative solution can be accepted by the authority, then the authority would accept and act on that advice. The authority also noted that this was a case where there was conflict between different legislative requirements.
- 6.8 The ODI commented on the third draft determination in a memo to the Department dated 5 November 2008. The ODI considered that the safety of children using early childhood centres was a "management" issue, which should not be resolved in the context of a Building Act determination. The ODI suggested that there were a number of ways that compliance with the Regulations could be met that did not compromise compliance with the Act. The ODI had serious concerns about the proposed solution set out in the determination and my interpretation of NZS 4121

as to its justification. The ODI recommended that the first draft be reinstated without any reference to an alternative solution.

6.9 While appreciating the ODI concerns, and carefully considering its comments, I am still of the opinion that the discussions and conclusions preceding the decision in the third draft determination remain valid.

## **7. The hearing and site visit**

7.1 The applicant requested a hearing, which was held on 3 October 2008 before me. I was accompanied by a Referee engaged by the Chief Executive under section 187(2) of the Act. The hearing was followed by a site visit to the property to inspect the access into the building.

7.2 The hearing and site visit were attended by:

- the applicant represented by three of its officers
- the authority represented by one of its officers
- the Ministry of Education represented by two of its officers
- two other staff members of the Department.

### **7.3 The hearing**

7.3.1 All the parties spoke at the hearing and the site visit. The evidence presented by those present enabled me to amplify or clarify various matters of fact and was of assistance to me in preparing this determination. The parties also discussed potential solutions to the problem.

7.3.2 I summarise the authority's opinions as follows:

- Neither the height of the latch on the gate nor the two-hand operation necessary to open door D02 complied with the Building Code.
- Both NZS 4121 and D1/AS1 required "unaided" access and the authority would have difficulty accepting that the people in wheelchairs would require assistance to access the building.
- One possible solution could see the doors fitted with remotely-controlled locks with all users needing to use a buzzer to notify staff they need to be let into the building. Ease of access for those in wheelchairs would be the same as able-bodied users.
- The authority would consider the proposals discussed at the meeting as an alternative solution.

7.3.3 The applicant stated that:



- both the gate and door D02 were required to prevent children leaving the building of their own accord, especially as the entrance lobby became crowded at times
- it accepted that the lever handle latch could be removed from door D02 without compromising the requirements of the Childhood Regulations
- the installation of a buzzer to attract the attention of staff would be too disruptive to the running of the kindergarten
- any decision reached in the determination had repercussions for other kindergartens
- the ratio of staff to children is such that children cannot be under observation at all times, hence the necessity to have latches and the like positioned so as to be out of the reach of the children. If the latches are set at the levels described in NZS 4121, a child might be able to open the door and leave the building without being observed by a staff member.

7.3.4 The parties discussed various solutions to overcome the concerns of the parties and I describe a provisional solution discussed in paragraph 10 below. It was also noted that the requirements set out in the Act itself could lead to a solution outside of those in the compliance documents (being NZS 4212 and D1/AS1).

7.3.5 After the hearing the attendees undertook a site visit and examined the existing access provisions and further discussed solutions that could meet both the requirements of the Building Code and the Childhood Regulations.

## **8. Is the authority's decision correct?**

8.1. The applicant has applied for a determination of the authority's decision to refuse to issue a code compliance certificate ("CCC"). This is a simplified explanation of the way a CCC under the Act is obtained:

- An owner must apply for a building consent for proposed building work (sections 44(1)).
- A building consent authority can only grant a building consent if it is satisfied on reasonable grounds that the provisions of the Building Code would be met (section 49(1)).
- Once obtained, the work then must be carried out in accordance with that building consent (section 40(1)).
- As soon as practicable after the building work is completed, the building owner must apply for the CCC (section 92(1)).
- The building consent authority must issue the CCC if it is satisfied on reasonable grounds that the building work complies with the building consent (section 94(1)).

- 8.2. In this case, a building consent was obtained for the construction of the kindergarten but not all the work was carried out in accordance with the consent. The applicant constructed the fence with the gate at issue in this determination outside the bounds of the consent the authority had granted. On the final inspection the authority could not issue a CCC unless it was satisfied that the non-consented work would comply with the Building Code and the building consent was amended to reflect what was or would be in place. The amendment to the building consent was done informally by way of a file note on the applicant's file. That note included reference to the authority requiring the main entrance gate to be accessible by people with disabilities.
- 8.3. When it came to the authority's assessment of whether it was satisfied on reasonable grounds that the building work complied with the consent and whether to issue the CCC, it was not able to issue the CCC because the work still did not comply with the building consent as amended. The authority was not satisfied with respect to access to the building for persons with disabilities. Accordingly, it refused the application for a CCC.
- 8.4. The kindergarten is a public building clearly falling within section 118 and Schedule 2 of the Act and is therefore required to be accessible for persons with disabilities. I note that apart from the gate and door hardware, all the other requirements to accommodate people with disabilities, including those in wheelchairs, have been met. However, the latches on the gate and door D02 are currently fixed at heights that inhibit accessibility for people with disabilities and accordingly do not comply with the building consent as amended because:
- the latch at the front gate is at a height which prevents operation by a person using a wheelchair to access the building via the principal access
  - the access through the internal half-door D02 requires two-handed operation which restricts use by a person using a wheelchair or other persons with disabilities who are unable to operate a two-handed latch.
- 8.5. For those reasons I conclude that the gate and door do not comply with the consent as amended and accordingly, the authority's decision to refuse the application for a CCC was correct.

## **9. Discussion**

- 9.1. At the heart of the matter is an apparent conflict between the access requirements and the child safety requirements at the kindergarten for which there are no solutions available at present. I do note that while the ODI has suggested there were a number of ways that mutual compliance might be met, no specific solution was put forward. While I have already come to a conclusion on the matter for determination (see paragraph 1.3), I recognise this apparent conflict, and the challenges it has caused for the authority and the applicant.
- 9.2. This is a particularly difficult case. Discussions between the parties and the Department have resulted in potential alternative solutions that could meet the conflicting requirements. While not within the scope of this determination I consider

that this case calls for a broader discussion of potential solutions and not just a determination of the matter in dispute.

9.3. The acceptance of any alternative solution is of course up to the authority, which has responsibilities under the Act and must satisfy itself on matters of compliance in order for the matters here to be resolved.

9.4. The conflict appears to be between the two sets of statutory instruments and also between some of the interpretive documentation published in support of those two instruments. On the one hand, regulation 24(1)(l) of the Childhood Regulations requires that

The licensee of a licensed centre must ensure that -

Outside doors, fences, and gates are secure and safe enough to ensure that children are not able to leave the centre without the knowledge of a staff member...

The Regulations are supplemented by non-mandatory Ministry of Education guidelines that recommend the heights of barriers to prevent children from leaving a premises. It is on these heights that the applicant relies. As stated by the applicant, the kindergarten may not be able to function if these criteria cannot be met.

9.5. On the other hand, the authority, while accepting the applicant's concerns, states that it has no other option but to apply the requirements of the Act and the Building Code, basing much of its argument on the requirements of the compliance documents that disabled access is to be "unaided". The authority considers these requirements are also set out in Clauses A2, D1.3.2, and D1.3.4 (where the term "accessible route" is mentioned) and in D1/AS1.

9.6. However, compliance documents are not the only way of complying with the performance requirements of the Building Code. This is stated in section 23 of the Act and in section 2.2 of NZS 4121 (as set out in paragraph 5.4 above).

9.7. In this instance, compliance with NZS 4121 or D1/AS1 creates a potential conflict with the "secure and safe" requirements set out in the Childhood Regulations.

9.8. What is required is that legislation be complied with. As both the Building Code and Childhood Regulations are performance-based, and because neither prescribes how compliance is to be achieved, the requirements of the Building Code and Childhood Regulations do not conflict as a matter of fact; it is the interpretative documents that do.

9.9. In considering any potential solution, the wording of the Act itself must be considered. Section 3 states that the purpose of the Act is to ensure that people who use buildings "can do so safely" as well as requiring buildings to have attributes that contribute appropriately to the "physical independence" of the people using them. Section 118(1) requires "**reasonable and adequate** provision by way of access ... must be made for persons with disabilities" (my emphasis) and that phrase is used in Clause D1.2.1 of the Building Code as well. I note that the term "unaided" in the context of "access" does not occur in the body of the Act itself.

- 9.10. I am of the opinion that the requirements of the Act must be considered when applying the Building Code and the appropriate compliance documents. As such, I believe that it may be permissible to apply the section 118 wording of “reasonable and adequate” in balancing the safety of the children using the kindergarten with the strict “unaided” access interpretation preferred by the authority as defined in NZS 4121 and the Code. Referring again to section 2.2 of NZS 4121, I note that designers may use “alternative solutions” in the context of that Standard.
- 9.11. NZS 4121 is a Standard created by Standards New Zealand and was specifically endorsed by Parliament in the Building Act as being a compliance document, compliance with which will be deemed to be compliance with the Building Code.
- 9.12. That document, for the most part, stipulates a strict requirement for unaided access to buildings for people with disabilities.
- 9.13. In two places, however, the Standard acknowledges that the strict requirement for unaided access may be mitigated. These situations are noted in sections 4.2.2 and 9.1.3.2. These are:

#### **4.2 Accessible route**

##### **4.2.2**

There will be situations where the local topography will not allow an accessible route to be fully provided. Other solutions that provide reasonable and adequate access may be approved provided that the principles of accessibility are maximized in alternative designs.

##### **9.1.3.2 Two and three storey buildings**

Where 9.1.3.1 [the requirement to provide a lift] is not applicable 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 400m<sup>2</sup>,
- (b) Buildings are three storeys high and have a gross floor area of the upper floors of less than 500m<sup>2</sup>,

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

- 9.14. Section 4.2.2 addresses the situation where the local topography will not allow an accessible route to be fully provided. In that situation, alternative solutions that provide reasonable and adequate access may be approved so long as the principles of accessibility are maximised. Section 9.1.3.2 mitigates the strict requirement to provide lifts in certain two and three storey buildings provided other accessibility requirements are met.
- 9.15. These sections appear to reflect an underlying policy intent that in certain circumstances the strict requirements for unaided access should instead be a

requirement to make reasonable and adequate provision for access for people with disabilities, while maximising principles of accessibility.

- 9.16 This approach clearly reflects the requirements of the primary legislation – the Building Act – which as noted above requires in section 118 that “reasonable and adequate access” provision for persons with disabilities must be made in certain public buildings.
- 9.17 As set out in paragraphs 9.9.and 9.10, I have noted that the Building Code’s strict requirement for unaided access has to be interpreted in light of the policy intent of the Act itself and of Parliament’s statutory endorsement of NZS 4121 and its principles.
- 9.18 In the present case, until a design solution that meets both building and education requirements is found, there is a compelling case to argue that, based on the above analysis, some mitigation of the strict access requirements is appropriate. This is because in the absence of a mutually compliant design solution, the strict application of access requirements will place children at the kindergarten at some risk, allowing them to leave the kindergarten unobserved by staff, directly onto a busy road.
- 9.19 In my view, the physical safety of the children is a compelling basis upon which to take this approach, which would be appropriate only in limited and exceptional circumstances.
- 9.20 Any solution taking this approach would not comply with either of the compliance documents, so would be an alternative solution that uses NZS 4121 or D1/AS1 as guidance in other respects to show that the principles of access have been maximised.

## **10. A suggested solution**

- 10.1 Discussions among the parties resulted in a possible solution for this particular situation that, in accordance with the approach discussed above, could both maximise access for persons with disabilities and comply with the Childcare Regulations. The solution discussed was as follows:
- The removal of the existing lever handle on door D02 would mean that a person using a wheelchair could access the building through the principal access unaided. However, a person using a wheelchair would need to request adult assistance in order to leave the premises through the door. If this proposed solution was replicated on the gate, i.e. the existing latch was removed and replaced with a magnetic latch at 900mm above the ground, both the door and gate would meet the requirements for single-handed operation.
  - The proposed latch configuration as described above would require a person inside the door or gate to reach over some 300mm to open the door to gain access to the outside. This would ensure that children of an age who are attending the kindergarten could not leave the building unaided. However additional protection would be required at the gate to prevent children reaching through the rails and opening the latch. This could be provided by

fixing sheets of clear plastic (for example acrylic or polycarbonate) over the full area of the gate and the adjoining side panel.

- To assist the exit of people in wheelchairs, a notice inside the main door access should also be provided setting out the need to request assistance from any adult person present in the building. The sign should also describe the procedure required for able-bodied adults to open the access door and gate in order to leave the building in the case of an emergency. In addition, the applicant has stated that all staff members would be instructed to provide such assistance.

10.2 If the applicant is satisfied that the door and gate hardware configuration described in paragraph 10.1 meets the requirements of the Childcare Regulations and the Building Code, it should forward a detailed proposal to the authority. The authority can then consider it in the light of my observations set out in paragraphs 9.1 to 9.20.

## **11. The decision**

11.1 In accordance with section 188 I hereby determine that:

- the decision of the authority not to issue a code compliance certificate for the building is confirmed.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 11 December 2008.

John Gardiner  
**Manager Determinations**