

Determination 2008/60

Provision of lift access in the alteration and change of use of a commercial building at 15 Tay Street, Invercargill

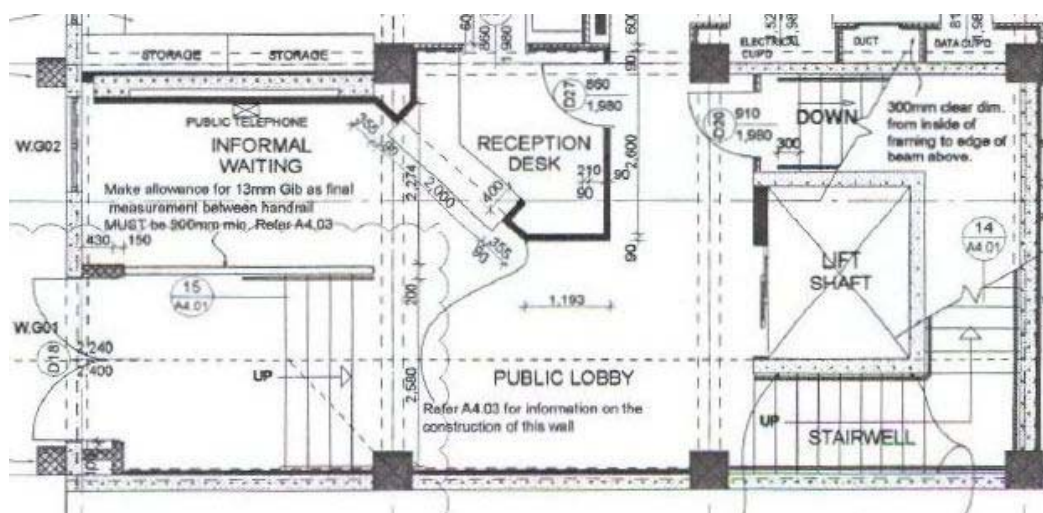


Figure 1: Ground floor layout as built

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, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of the Department. The applicant is Tay Ventures Limited (“the applicant”). The other party is the Invercargill City Council (“the territorial authority”).
- 1.2 The Office for Disability Issues (“the ODI”) at the Ministry of Social Development has been included as being a department with which the Chief Executive must consult under section 170 of the Act.

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

- 1.3 This determination arises from the territorial authority's decision to refuse to amend a building consent for the alteration and change of use of a maximum six-storey high building ("the building") without a platform lift.
- 1.4 I take the view that the matter for determination is whether the building without a platform lift that provides disabled access to the main entrance of the building complies with Clause D1 of the Building Code² (Schedule 1, Building Regulations 1992).
- 1.5 In this determination, unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code. In making my decision, I have not considered any other aspects of the Act or the Building Code.

2 The building

- 2.1 The building in question, which originally was a commercial building, is a total of 6 storeys high and is situated within a city block of adjoining buildings bounded by Tay and Wood Streets. The building was subsequently converted into student accommodation with basement parking and storage. Apart from one separate tenancy, the five upper floors contain small apartments and communal living and kitchen areas. There are two accessible apartments on each of the first, second and third floors. The main pedestrian access is from Tay Street ("the front of the building") via an entrance lobby that gives access to a public lobby containing the main stairs and the main lift, which services the building from the basement up to all levels. From the information that I have received, I believe that the building has been completed with a full width entry stair and is occupied.
- 2.2 At this point, I note that the applicant has forwarded two identically identified and dated plans of the ground floor of the building, both designated A1.01. One of these plans (Figure 2) shows a platform lift at the entry and a part-width entrance stair. The other plan (Figure 1) shows a full width entry stair but no lift. The territorial authority has informed me that the layout shown in Figure 2 was included in the building consent documentation.

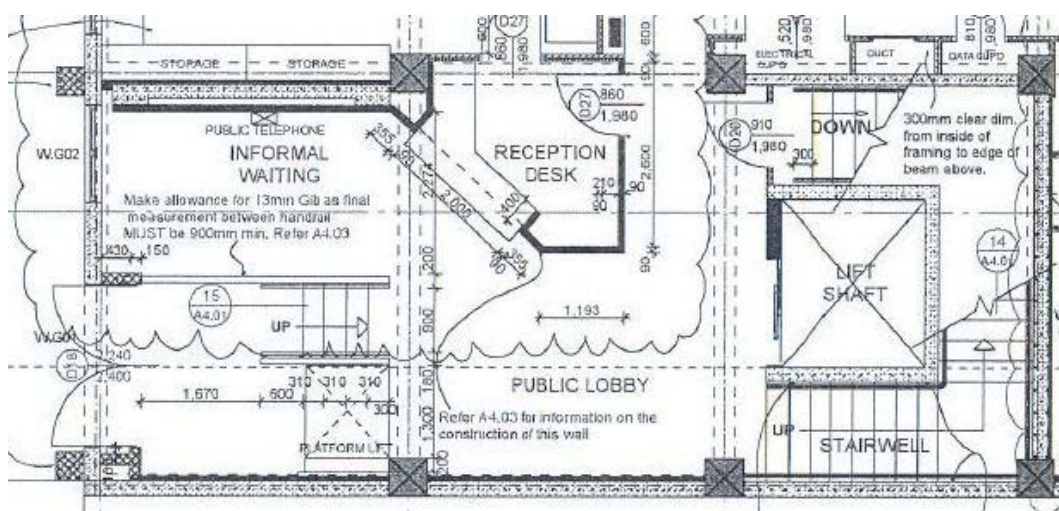


Figure 2: Ground floor layout as consented

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

- 2.3 As shown on the consented plans, the main entrance lobby, which has a floor level approximately 640mm lower than the main ground floor level of the building, is divided into two sections. One section, which is 900mm wide, has a flight of steps leading up to the public lobby. The other section is shown as having a platform lift size 1300mm x 930mm to provide disabled access up to the main floor level. Vehicular access is provided from Wood Street (“the back of the building”) into the basement, which has lift access to the upper floors.

3. Background

- 3.1 On 20 April 2004 the territorial authority issued a building consent (No BDG200203357/BCA) under the Building Act 1991 (“the former Act”) for the conversion of a commercial building to provide student accommodation (“the building”). The consented plans included an accessible lift platform to the front foyer of the building.
- 3.2 On 14 October 2004, the designers of the building (“the designers”) wrote to the territorial authority stating that it was intended to amend the accessible access to the building for people with disabilities. This amendment entailed the deletion of the consented platform lift and the addition of an appropriately signed access route for people with disabilities through the rear entry of the building. The reason given for the amendment was that the installation of a platform lift would restrict the width of the access stairs. This would make the stairs inadequate for access to and from the building, especially in the case of an emergency.
- 3.3 In November 2004 an undated application (No 200404569) was made for an amendment to the original building consent. The scope of the amendment related to “alterations to façade and canopy and entry”.
- 3.4 In an undated document, the territorial authority acknowledged receipt of the application for an amendment but noted that the application could not be processed until certain information was provided. The document also stated that a determination was required regarding access for people with disabilities.
- 3.5 On 21 January 2005 the designers again wrote to the territorial authority, stating that they were of the opinion that safety in the case of an emergency far outweighed accessible route issues. The narrowing of the safe route at the front access to a width of 900mm created a potential bottle neck in times of emergency. This would pose dangers for able-bodied people attempting to exit the building and severely restrict the emergency services attempting to remove disabled persons from the building. The rear access was not only adequate but also was the main access for persons arriving by car. Accessible car parks were also situated at the same level as this entry. In addition, the building was not a public building and entry could only be accessed via a swipe-card system.
- 3.6 On 28 January 2005 the territorial authority wrote to the designers, stating that the territorial authority had decided that the accessible route to the building was to be via the main entrance. The territorial authority noted that the original consent application and the preliminary plans had indicated that a lift would be installed adjacent to the

main entrance foyer. This alternative solution had been accepted by the territorial authority at that time.

- 3.7 On 13 December 2005, the applicant applied for a determination and in a covering letter dated 14 December 2005, the designers noted that the platform lift was to give access for disabled persons from footpath level to the ground floor of the building for a height of 640mm. The departure was requested because the lift installation restricted the width of the entry area to 2400 mm and the access from the main entry stairs to 800mm where the Building Code required a minimum of 1000mm. The rear access was from the basement level where the disabled car parks were situated and which also has main lift access to all floors and amenities within the building. Finally, the building is staffed 24 hours per day and the staff, who can be contacted from the front of the building via an intercom system, can provide assistance if necessary. Signage would inform persons of this facility.
- 3.8 Due to a lack of information from the applicant, the application for a determination was subsequently considered to be withdrawn by the Department on 12 September 2006.
- 3.9 According to file notes provided by the territorial authority, some telephone communication passed between the territorial authority and the applicant between 29 January 2007 and 12 March 2007 regarding the status of the application for an amendment.
- 3.10 On 26 March 2007, the territorial authority wrote to the applicant, stating that the territorial authority were still of the opinion that the accessible entry needed to be provided from the front of the building.
- 3.11 On 4 April 2007, the designers wrote to the territorial authority stating that they supported the reasons supporting the amendment application as set out in their letter to the territorial authority dated 14 December 2005. In addition, the designers noted that:
- an accessible ramp would be added to the design
 - the current access from the rear of the building is working well and is considered to be the safest and most practical accessible path available
 - the provision of the platform lift would create a danger considering the opening width of 2100mm and the minimum platform dimensions of 900mm x 1400mm, which could create a bottleneck in an emergency situation
 - as the building usage is “managed accommodation”, it is staffed 24 hours per day and assistance is always available for disabled guests
 - signage will be provided at the front entrance advising the location of the entry point for disabled visitors and assistance can be summoned via the intercom system.
- 3.12 A second undated application (No 2002/33357/A) for an amendment to the original building consent was made, which was apparently received by the territorial authority in May 2007. The scope of the amendment was to provide the assessable access at the rear of the building.
- 3.13 On 29 May 2007, the territorial authority wrote to the architects declining the amendment application.

- 3.14 A second application for a determination was received by the Department on 20 August 2007, and on receipt of the appropriate fee, the determination process commenced on 24 September 2007.
- 3.15 Following a request from the Department for further information, the applicant engaged the services of firm of consultants (“the consultants”) to assess the implications of providing a platform lift in the foyer of the building.
- 3.16 On 12 October 2007, the consultants wrote to the applicant and described the structure of the building at the location of the entrance area. The consultants noted that in order to install the lift:
- part of the existing floor slab would need to be removed eliminating the present informal waiting area
 - the support conditions for the existing footpath level slab would be changed, possibly necessitating the removal of the lower level slab also
 - essentially, the entire slab within the bay A-B and 4-6 could be replaced, effectively blocking the main access route out of the building for up to 10 days.

The consultants also estimated the re-construction of the floor slab would cost in excess of \$60,000, together with addition costs relating to refurbishment of the basement and ground floor areas, possible temporary closure of the accommodation and the cost of lift installation itself.

- 3.17 At this point, I observe that, based on the consultants’ comments, if the lift installation is to go ahead, the lift would now be positioned in the existing informal waiting area. This location differs from that shown on the consented plans, which show the lift as being situated in the entrance lobby.

4. The submissions

- 4.1 In the application for a determination, the matter for determination was noted as being the refusal of the territorial authority to issue of a waiver or a modification of the Building Code that provided “accessible access other than that for which consent was given”.
- 4.2 The applicant forwarded copies of:
- some of the plans
 - the correspondence with the territorial authority
 - a letter from a person with disabilities dated 20 July 2007, in which this person stated that she resided in the building and because of her disability used the basement access to enter the building. She was satisfied with this arrangement at the present time.
- 4.3 In a submission dated 30 August 2007, the territorial authority noted that:
- the building was subject to a change of use and the original consent included an accessible entry from the front of the building by means of a platform-type lift.

- the lift had been agreed to by the parties and construction had processed to a point where some re-working would now be required to install it.
- it was not reasonable for a person to walk around the city block to access the building through the car park, which could well be locked or have some security system installed
- the design could have been carried out to accommodate the lift and the entry access stair without compromising the safety of building users
- it considered that the question of “managed accommodation was not relevant in the context of the Act
- it would be difficult to implement directional signage that could clearly guide people around a city block.

4.4 On 4 January 2008, the territorial authority faxed the Department, stating that its position was that an accessible entry should be provided at the main doors to the building. It also noted that the designers’ original intention was to install a lift. It was the territorial authority’s view that it was not acceptable to prevent some persons entering the building at the main doors and have them traverse around the city block to enter the building, given that the car park entry may not always be open.

4.5 The territorial authority forwarded copies of:

- the building consent and some consent documentation
- the two building consent amendment application forms
- the correspondence with the applicant and the designers
- some of the territorial authority’s file notes
- an aerial photograph of the city block containing the building.

5. The legislation and the compliance documents

5.1 In paragraph 3.1, I have noted that the building consent was issued under the former Act. Accordingly, apart from the consideration of a modification to the consent, I have generally applied the sections of that Act in this determination.

5.2 The relevant provisions of the former Act include:

7 All building work to comply with building code

- (1) All building work shall 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.

38 Alterations to existing buildings

No building consent shall be granted for the alteration of an existing building unless the territorial authority is satisfied that, after the alteration, the building will—

- (a) Comply with the provisions of the building code for means of escape from fire, and for access and facilities for use by people with disabilities (where this is a requirement in terms of section 47A of this Act); as nearly as is reasonably practicable, to the same extent as if it were a new building: and
- (b) Continue to comply with the other provisions of the building code to at least the same extent as before the alteration.

46 Change of use of buildings

- (1) It is the duty of an owner of a building to advise the territorial authority in writing if it is proposed—
 - (a) Change the use of the building and the change of use will require alterations to the building in order to bring the building into compliance with the building code...
- (2) The use of the building shall not be changed unless the territorial authority is satisfied on reasonable grounds that in its new use the building will—
 - (a) Comply with the provisions of the building code for means of escape from fire, protection of other property, sanitary facilities, and structural and fire-rating behaviour, and for access and facilities for use by people with disabilities (where this is a requirement in terms of section 47A of this Act); as nearly as is reasonably practicable, to the same extent as if it were a new building; and
 - (b) Continue to comply with the other provisions of the building code to at least the same extent as before the change of use.

47A Access and facilities for persons with disabilities to and within buildings

- (1) In the case where provision is being made for the construction or alteration of any building to which members of the public are to be admitted, whether on payment or otherwise, reasonable and adequate provision by way of access, parking provisions, and sanitary conveniences 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.
- (4) The provisions of this section shall apply to, but shall not limited, to buildings, and parts of buildings (including driveways, accessways, and passages within and between complexes and developments , and associated landscaping, if any) that are intended to be used for, or associated with, 1 or more of the purposes:
 - (j) Hotels, motels, hostels, halls of residence, holiday cabins, groups of pensioner flats, boarding houses, guest houses, and other premises providing accommodation for the public:
 - (z) Other buildings, premises, or facilities to which the public are to be admitted, whether on payment or otherwise.

49 Document for use in establishing compliance with the building code

- (1) The Authority may prepare or may approve, in whole or in part and subject to any modification it considers necessary or desirable, any document for use in establishing compliance with this Act.

5.3 Relevant provisions of the current Act include:

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.

433 Transitional provision for building consents granted under former Act

- (1) A building consent that was granted under section 43 of the former Act before the commencement of this section, must on that commencement, be treated as if it were a building consent issued under section 49.
- .
- (2) However—
 - (a) section 93 does not apply...

5.4 The relevant provisions of Clause D1 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...

5.5 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.

6. The draft determination

6.1 I prepared a draft determination which I sent to the ODI, by way of consultation under section 170.

6.2 The ODI agreed with the conclusions reached in the draft determination, noting that the decision was “sound and well-reasoned”. The ODI were of the opinion that the route round the city block represented a “gross disparity” compared with accessing the building through the front entrance.

6.3 I then sent the draft to the parties on 22 May 2008, together with the ODI's comments. Both the parties accepted the draft without comment.

7 Discussion

7.1 The territorial authority said in effect (see 4.1 above) that it could not issue a waiver or modification of the building consent for the building, because that would provide accessible access other than was approved in the consent.

7.2 In Determination 1997/001, made under the Building Act 1991 (“the former Act”), the Building Industry Authority (the antecedent of the Department) said:

5.3 The Authority agrees that a territorial authority does not have the power to waive or modify the provisions for access and facilities for use by people with disabilities in a new building, but takes a different view in respect of the upgrading required by section 38 when an existing building is being altered. On the basis of a legal opinion from the Crown Law Office, the Authority has issued a statement (see *Building Industry Authority News* No. 23, June 1993) which includes the following:

“A territorial authority may lawfully issue a building consent for the alteration of a building if it is satisfied that after the alteration the building will comply as nearly as is reasonably practicable with the provisions of the New Zealand Building Code for access and facilities for use by people with disabilities even though it will not comply in all respects.”

7.3 That was repeated in Determinations 1999/001 and 2003/5. I take the view that the relevant provisions of the Act are substantively identical to those of the former Act so that, in the absence of decided cases, I take the same view as did the Authority.

7.4 I note that there is no apparent disagreement between the parties that access facilities are to be provided in the building to enable persons with disabilities to enter and carry out normal activities within the building. Therefore, the matter to be considered is how

such access is to be provided. The territorial authority is of the opinion that the platform lift, which it considers to have been part of the original consent, must be installed. The territorial authority does not believe that it is reasonable for a person with disabilities to traverse around the city block to access the building through the basement car park.

- 7.5 The applicant is in effect requesting a modification to the building consent that would delete the lift that was proposed to be installed, and which was shown on the consented plans. The applicant is asking whether the building would comply as nearly as is reasonably practicable without the platform lift. Also, it was noted that if the platform lift were to be installed, it would reduce the exit stair width and therefore seriously affect the ability of occupants to escape the building in the event of an emergency. The alternative access at the rear of the building was functioning well, adequate directional signage would be provided, and as the building is staffed 24 hours per day, assistance is always available to assist persons with disabilities.
- 7.6 The matter therefore comes down to whether the requirements of section 47A would be met by the alternative access provisions set out in the applicant's submissions.
- 7.7 I am of the opinion that the building comes within the ambit of Clause D1.3.2 (b), which requires the building to have at least one access route with features to enable people with disabilities to have access to the internal space served by the principal access. The principle access in this instance is at the front of the building. In my opinion, this provides a strong argument for the installation of the originally proposed platform lift, as there seems to be no alternative that would enable people with disabilities to enter the building through its main front entrance.
- 7.8 However, I also must consider the applicant's suggested alternative of access from the rear of the building. A person with disabilities arriving at the front of the building is faced with a journey of over 200 metres to traverse the city block associated with the building from the front entrance to the rear basement car park access. This route would also not be protected from inclement weather for much of its length. In addition, a pedestrian who enters through the basement access has to negotiate an area of moving traffic that can constitute a hazard. Accordingly, I do not accept that the rear entry is an adequate substitution for the direct access at the front of the building.
- 7.9 In Determination 1996/004, the Building Industry Authority said:
- 6.4.2 Whether any particular route of travel for wheelchair users can be accepted as adequate and reasonable is a matter to be decided in the light of all the circumstances of the case.
 - 6.4.3 The mere fact that a route of travel for wheelchair users is longer and more exposed to the weather than the corresponding route for others does not necessarily establish that the wheelchair route is unreasonable...
 - 6.4.5 In this case the lengths of the wheelchair routes and the gross disparities between the wheelchair routes and the other routes (see 3.4 above) make it impossible for the Authority to accept that the wheelchair routes are reasonable. For that reason also, the Authority concludes that the proposed complex does not comply with the building code.
- 7.10 In taking the same view as the Authority, and noting the gross disparity between the route of travel around the city block, compared with that of accessing the building

through the front entrance, I conclude that the alternative access route is not code-compliant. In making this decision, I am of the opinion that I do not have to consider the questions of signage and the 24-hour per day staffing of the building.

- 7.11 In previous determinations issued by the Authority an approach was established and discussed regarding the question of whether a building complies as nearly as is reasonably practicable with particular provisions of the Building Code. This approach involved the balancing of the sacrifices and difficulties of upgrading against the risks and disadvantages of not upgrading and follows the approach of the High Court³.
- 7.12 I continue to hold the views expressed in the previous relevant determinations, and therefore conclude that:
- (a) The benefits would be accessibility for people with disabilities and I consider that people with disabilities will be unreasonably disadvantaged by the lack of a platform lift.
 - (b) The sacrifices would be the direct cost of approximately \$60,000, the cost of the lift itself, the additional collateral costs, and the loss of useable space. Therefore, I accept that the installation of a lift in this particular building at a time when the building is complete would be a costly undertaking.
- 7.13 However, I note that the lift in question was part of the original consent and the cost of its installation would have been part of the original cost to alter the building. If that is the case, then the financial burden is only increased by having to install the lift after the other building work has been completed and having to perhaps close the accommodation on a temporary basis. These are factors that would not have occurred had the lift been installed in the first place.
- 7.14 I also note that, according to the consultants' report and as described in paragraph 3.17, the platform lift would now be installed in what is at present the informal waiting area. While this would result in a loss of an amenity space, it alleviates the bottleneck to the external access that was a concern of the designers.
- 7.15 Taking all of the above considerations into account, I am of the opinion that the benefits of installing the platform lift outweigh the sacrifices of not installing one.

8. The decision

- 8.1 In accordance with section 188 I hereby confirm the territorial authority's decision to refuse to issue a modification to the building consent that would delete the lift access.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 9 July 2008.

John Gardiner
Manager Determinations

³ *Auckland City Council v New Zealand Fire Service*, 19/10/95, Gallen J, HC Wellington AP 336/93.