

Determination 2008/78

Provision of lift access to a unit in an office development at 2 Bishop Dunn Place, Botany, Manukau City

1 The matters 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 the Buisman Dental Trust (“the owner”) acting through the Managing Director of a construction company as its agent. The other party is the Manukau City Council, carrying out its duties and functions as a territorial authority or building consent authority (“the authority”). The Office for Disability Issues (“the ODI”), Ministry of Social Development has been included as being a department with which, under section 170 of the Act, the Chief Executive must consult.
- 1.2 The matter for determination is the authority’s decision to issue a notice to fix in respect of the requirement for a lift to be installed in an office development to provide access from the ground floor level to a particular unit on the first floor.
- 1.3 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 Code² (Schedule 1, Building Regulations 1992).
- 1.4 In making this determination I have confined it to the matter described in paragraph 1.2 and have not considered any other aspect of compliance with the Building Code. In particular my decision cannot be considered in terms of a waiver under section 67.

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.

2 The building

- 2.1 The development, described as a business centre, is a complex of about 30 units, 18 at ground floor level and 15 at first floor level, which I understand are, or are intended to be unit-titled when titles are issued. Some of the units are on two levels.

3 Background

- 3.1 I have received a copy of an undated building consent No 040878 issued by the authority, and stated to be for "New Building". I have also received a copy of the corresponding code compliance certificate, dated 23 May 2005, for the complex.
- 3.2 One of the units in the complex (number 20) is the subject of this determination. It is a one-level unit on the first floor, and intended to be used for a dental clinic and law office. I have received a copy of a building consent No 062271, dated 12 July 2006, and stated to be for the:

Internal Fit out law office & dentist. This is stage 1 of 2, stage 2 is installation of lift.

- 3.3 I have also received a copy of the corresponding code compliance certificate dated 2 August 2006 which notes:

This is stage 1 of 2, stage 2 is installation of lift.

- 3.4 I have taken the view that as the application for building consent No 062271 for the fit out contained no plans and specifications for the installation of a lift, the reference to a lift in that consent is no more than an administrative measure to remind the owner that a lift was required to be installed in a subsequent construction stage. I view the reference to a lift in the code compliance certificate dated 2 August 2006 as being a similar administrative way of reinforcing the requirement for a lift in a subsequent construction stage.

- 3.5 There are external stairs connecting the two levels but there is no stair connection between units on the two levels and no interconnection between the units on the same level. It is not possible to drive to a location on the site that would provide direct access to the upper floor, as all car-parking is at the ground level.

- 3.6 I note that in a letter dated 10 April 2007 to the law firm that I understand is now located in unit 20 on the first floor of the building, the authority said

The use of any type of Stair lift is not acceptable to comply with the provisions of the Building Code for access for the disabled. There have been determinations which have supported this and I have enclosed one for your information.

The Building Authority was given the assurance that a building consent for the lift would be forthcoming and this was the basis on which the stage 1 consent was issued. It has been over six months since a Code Compliance Certificate for stage 1 was issued and any further delay in submitting a Building Consent application may result in enforcement action.

Please contact the writer to discuss the timetable for lodging the required application.

- 3.7 In a letter dated 22 January 2008 to the applicant, the authority said:

Our assessment of the use of the building means that in order to comply with the Building Act 2004 and associated Building Regulations a lift is required.

There are two courses of action available to you:

1. Apply for a Building Consent to install the lift.
2. This according to our assessment would make the building compliant. A Notice to Fix under the Building Act 2004 is attached to this correspondence requiring you to do this.
3. Apply for a determination
4. If you wish to dispute this requirement for a lift to service the Dentist and Law Office and Council's Notice to Fix, you can apply to the Department of Building and Housing for a determination. Details on how to go about this are available through the Department's website, www.dbh.govt.nz.
5. Please let us know when you apply for a determination as we will withdraw the Notice to Fix pending the Department's ruling on the matter.

3.8 I received the application for determination on 17 March 2008

4 The legislation and the compliance documents

4.1 The relevant provisions of the Act include:

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

- (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.
- (3) This section does not apply to a waiver or modification of the building code that relates to a new building.

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:

- (f) commercial buildings and premises for business and professional purposes, including computer centres:
- (y) factories and industrial buildings where more than 10 persons are employed:
- (z) other buildings, premises, or facilities to which the public are to be admitted, whether for free or on payment of a charge.

4.2 The relevant provisions of Clause D1 include:

D1.1 The objective of this provision is

- (c) Ensure that people with disabilities are able to enter and carry out normal activities and functions within buildings.

D1.3.4 An accessible route, in addition to the requirement of Clause D1.3.3, 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 . . . (emphasis added) .

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.

4.3 The relevant provisions of the Acceptable Solution D1/AS1 include:

12.0 Lifts

12.0.1 For the purposes of determining whether a lift must be provided for people with disabilities to access upper floors, the design occupancy shall be determined using C/AS1 Paragraph 2.3.7 and Table 2.2.

COMMENT:

Alternative design occupancies being less than derived from Table 2.2, must be justified with clear supporting information. Table 2.2 already takes account of effective floor area reductions for normal furnishings associated with a given activity, such as desks or workstations in offices. However, in a factory situation with fixed machinery, actual operator numbers may be acceptable as the occupant load.

12.0.2 Building size may also be used to determine the need for a lift for people with disabilities. NZS 4121 is an acceptable solution based on gross floor area.

4.4 The relevant provisions of NZS 4121³ include:

9.1 Provision of lifts

9.1.3.1 General

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

- (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 a lift is not required when:

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

5 The submissions and the draft determination

5.1 The authority made no submission. However, in correspondence with the authority I sought and obtained:

- some plans of the complex
- some plans of the fit out of unit 20
- a copy of building consent No 040878 for the construction of the complex
- a copy of the code compliance certificate for the complex
- a copy of the application for a building consent for the fit out
- a copy of building consent No 062271 for Stage 1 of the fit out of unit 20
- a copy of the code compliance certificate for Stage 1 of the fit out of unit 20
- a copy of a letter dated 12 December 2007 enclosing a notice to fix of the same date, and requiring the owner to apply for a building consent to install a lift, or to apply to the Department for a determination

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

- a copy of the notice to fix issued on 12 December 2007 requiring the owner to apply for a building consent to install a lift as Stage 2 of the development.

5.2 The owner made a submission dated 13 March 2008 that said:

In short this request is to wave (sic) the direction for the installation of a lift due to the fact this can not be facilitated within the proposed area designated by the developers plans and advice and also due to the lack of need for such a lift which has not been requested by any member of the public during the past 18 months as there are other facilities available near by.

The enclosed correspondence gives more detail in the regard.

My request to be heard is only if more explanation is required to clarify the sequence of events that have lead to this request or to explain the practical difficulties of installing a lift to the premises should a waver (sic) not be approved.

5.3 In addition to the application the owner submitted copies of:

- a letter dated 10 April 2007 from the authority to the firm of lawyers occupying unit 20 in the building (refer paragraph 4.1 above)
- a letter dated 22 January 2008 from the authority to the owner (refer paragraph 4.1 above)
- a letter dated 17 October 2007 from a firm of engineering consultants to the owner describing the work necessary to install a lift and estimation the cost of doing so
- a letter dated 25 February 2008 from the firm of lawyers to the owner outlining the resource and building consent processes that had been followed, noting that a code compliance certificate for Stage 1 was issued on 2 August 2006 and that Stage 2 was to be the installation of a lift. It also noted that “it is now virtually impossible” to install a lift
- four drawings depicting the building
- two photographs showing aspects of the foundation ground beam construction.

5.4 In the light of the above submissions I prepared a draft determination which I sent to the Office for Disability Issues ("ODI"), Ministry of Social Development on 28 May 2008, by way of consultation under section 170.

5.5 I also sent a copy of the draft determination to the parties to enable them to make any further submissions or to correct any errors of fact.

5.6 In its response to the draft determination on 20 June 2008 the ODI said that it agreed with the conclusion that a lift is required to be installed.

5.7 The authority accepted the draft determination on 27 June 2008.

5.8 The owner, through its agent, did not accept the draft and submitted a letter from its lawyers, dated 12 August 2008. In its covering letter accompanying the lawyers' letter the agent again raised the possibility of installing a stair lift rather than a vertical lift in a shaft. I observe that the unsuitability of a chair lift was recorded in paragraph 3.6 of the draft determination. No new evidence has been submitted to

alter my view, and that of the authority, that a chair lift is not a suitable lift in this case.

- 5.9 The owner's lawyers' letter makes some comments it asks me to take into account. These are prefaced by the observation that the draft determination does not reflect the reasons put forward by the applicants for not installing a lift, saying:

that it would be unreasonable if not almost impossible to place a lift in the designated situation without incurring massive costs of a much greater magnitude than anticipated by the applicant, the vendor of the premises, or even the Council...

The letter goes on to say that the draft determination does not give any consideration to the reasons that have been presented for the applicant's unwillingness to proceed with the placing of a lift on the premises. Those reasons are the following:

- (1) When the premises were marketed and advertised and the information was made to the applicant a description was given of the premises. In this description we read that all first floor office suites had individual access via private staircases and optional lifts if required. The applicant has no need for a lift but decided to enquire from both the owners and the lawyers acting for him in the purchase and was assured that the council did not require the placing of a lift as was shown with other medical health professionals in the complex who are on the first floor premises. We believe that the only reason why the Council became involved was due to the fact that a dental clinic is operated on the premises. In fact, resource consent was granted subject to building plans. Resource consent however did not require the placing of a lift. This was only made clear at a later stage as shown in the documentation. If the matter had been of such great importance for the Council then this should have been made clearer to the developers at the building stage, and also to the purchaser in the granting of the resource consent. This has not been done adverbially (sic) and seems to have been done as an add-on. This places the applicant who was the initial purchaser of the premises after building had been finished and ceilings and floorcoverings had been installed at a great disadvantage. The only building that took place afterwards, if that can be called "building" was the placing of partitions, a reception desk and fixation of dental chairs and some plumbing to each of the surgeries. In our eyes this is not quite understood as "building".
- (2) The second reason why the applicant is showing unwillingness to place a lift on the said premises is that the use in the past one a half years has not shown any real need for catering for the needs of incapacitated patients. The dental clinic simply does not have any incapacitated patients. Any one leaving the premises is brought to that state of consciousness (sic) where they cannot be viewed as incapacitated after sedation and they can walk down the stairs. With effect to those people who are unfortunately disabled or incapacitated in their daily lives we refer to the information brought forward showing that dental clinics are available in the immediate vicinity of the dental clinic. For this brief we refer to clinics that are a distance in two cases or (sic) no further than 300metres on (sic) the applicants address. There are further clinics at 600 metres and 1.5 kms and several other clinics within the reach of 3kms available to anyone who is incapacitated. It therefore seems highly unreasonable to require the applicant to cater for those incapacitated persons who should seek access to the applicant's surgery. Furthermore we refer to the information brought forward which shows that the only people who have required assistance in the past one a half years have been the clients of the law office. That is because the law office does have amongst its clients some disabled elderly clients. In all those situations the lawyer has met with his disabled clients in a quiet café situated in the business premises and no further than 40 metres from the lawyer's office. In other words the applicant's (sic) have

no need for a lift and nor are any of the applicant's clients disadvantaged by there not been (sic) a lift available at the said premises.

- 5.10 I have carefully considered the comments received from ODI and from the parties and have taken them into account in drafting this determination. I observe that, while the submission from the owner's lawyers gave a good explanation of the background and context of the owner's occupancy, it did not raise any new argument that I can consider in making my determination. The Building Act and its regulations are concerned with all possible occupants over the life of a building and not just the current occupants. The requirements of the Building Act in respect of new building work are described in the determination and cannot be waived.

6 Discussion

- 6.1 I observe that in its correspondence with the applicant (refer paragraph 5.1) the authority mentions the requirement for a lift, but does not mention the parking provisions or sanitary facilities for persons with disabilities. I therefore assume that the authority has no concerns in regard to the latter two matters.
- 6.2 Although in its submission (refer paragraph 5.2) the applicant suggests that the Department could grant a waiver of the requirements for accessibility, I note that, as this application concerns what was, at the time the consent for Stage 1 was issued, proposed new building work, sections 67 and 69 preclude the granting of such a waiver by the authority or by the Department.
- 6.3 I have received no submissions suggesting that the fit out of unit 20 was anything other than new work. It has not been argued, for example, that the fit out was an alteration. Had such an argument been made I would have referred to a previous determination (No 2004/5) in which the Building Industry Authority ("the Authority"), (the antecedent to the Department) considered the argument that a fitout was an alteration to a building. In its determination the Authority said:

The Authority disagrees. In the view of the Authority, the fit-out of a particular area in the shell of a building to suit the needs of the first tenant is part of the construction of the building and cannot be treated as an alteration of an existing building. The various building consents were all for stages of construction, not for alterations. In other words, the Authority takes the view that a building is to be treated as a new building under construction until all of it is actually completed and ready for use.

I agree with the Authority's view. The building work under consent No 062271 must be treated as a stage of construction of the building leading it to be completed and ready for use, and not as an alteration to the building.

- 6.4 I note the statement in the letter dated 10 April 2007 from the authority to the firm of lawyers in unit 20 that:

The Building Authority was given the assurance that a building consent for the lift would be forthcoming and this was the basis on which the Stage 1 consent was issued.

- 6.5 I have received no evidence to suggest that the requirement for a lift was not clear to the owner at the time the building work was designed and that, at the time the consent was sought for Stage 1, it was not ultimately intended to install a lift.

7 Conclusion

7.1 The purpose for which unit 20 is to be used (as a dental surgery) falls into section (f) of the Schedule 2, which (refer paragraph 4.1 above) refers to:

commercial buildings and premises for business and professional purposes, including computer centres:

7.2 Building Code section D 1.3.4(c)(iv) (refer paragraph 4.2 above), clearly applies in this case, because it refers to:

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....(my emphasis).

7.3 Taking account of the facts in paragraphs 7.1 and 7.2 I must conclude that a lift is required to make the building compliant with the Building Act and the Building Code.

7.4 The future installation of a lift was obviously intended when Building Consent No 062271 was issued for Stage 1 of the fit out on 12 July 2006 (refer paragraph 3.2).

8 The decision

8.1 In accordance with section 188 I hereby confirm the authority's decision to issue a notice to fix, dated 12 December 2007, requiring the owner to apply for a building consent to install a lift.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 15 August 2008.

John Gardiner
Manager Determinations