

- 1.3 The application, as worded, requires me to determine the following questions:
Was the authority correct in issuing:
- (a) a building consent that did not provide for wheelchair access to the top level of the viewing platform, and
 - (b) a notice to fix that excluded a requirement to provide wheelchair access to the top level of the viewing platform?
- 1.4 However in addition, and in response to a submission on the matter made by the authority (refer paragraph 4.1), I must also decide whether any amendment to the viewing platform forms part of the original consent or whether such an amendment is an alteration in terms of section 112 of the Act.
- 1.5 I have copied a draft determination to the Office for Disability Issues ("the ODI"), Ministry of Social Development by way of consultation under section 170.
- 1.6 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.

2 The building

- 2.1 The building work, which was built in accordance with the consented plans, consists of a viewing platform that provides views of the Jacobs River Estuary. The structure is approximately 24 metres long and culminates in a viewing platform ("the top platform") 2 metres above the adjacent wharf. The timber-framed structure is constructed with four levels, with steps at each change of level.
- 2.2 The top platform is 3.0 metres long x 3.3 metres wide, and is 450mm higher than the third level. The structure incorporates a curved access ramp ("the ramp") which runs from the wharf to the third level. Three steps connect the third level and the top platform. The ramp finishes approximately 3.0 metres from the steps leading up to the top platform.
- 2.3 All the viewing platform areas, and the ramp, are protected by stainless steel open balusters supporting tubular handrails.
- 2.4 I have also received a copy of a preliminary drawing dated August 2005 that shows the structure with an overall length of 29 metres and a top platform that is 8 metres long. This plan, which shows the access ramp terminating at the deck of the top platform, was superseded by the plans on which the building consent was ultimately issued.

3. Background

- 3.1 The authority issued a building consent (No BLD3106601) dated 13 October 2006 for the viewing platform.
- 3.2 The viewing platform was finally constructed in accordance with the consented plans, apart from some relatively minor amendments to the design.

3.3 In August 2007, a document entitled “An Audit of the Accessible Route” (“the Audit”) relating to the viewing platform was prepared by a Barrier Free Trust Auditor. The Audit described the building work and referred to a number of matters, the majority of which have since been rectified. However there were references to the non-compliance of the ramp that are relevant to this determination. These were:

No accessible view area. People whose eye level is lower than 1100 are entitled to have an unobstructed view of the available vistas, from the main levels.

The ramp does not continue to the highest level of the platform.

The Audit also commented on the views that can be obtained in the vicinity of and from the viewing platform itself. The Audit concluded that there were reasonable grounds for the authority to issue a Notice to Rectify (*sic*) to address the auditor’s recommendations.

3.4 The authority issued a notice to fix dated 5 November 2007. The notice to fix required certain non-compliant matters to be rectified but did not require any amendment to the access ramp itself.

3.5 On 11 November 2007, the advisor, acting on behalf of the Southland Disabled Persons Assembly, emailed a report to the authority, which raised access issues relating to the viewing platform. The report stated that the viewing platform did not comply with the access requirements of the Building Code. Nor did it meet the requirements of NZS 4121³ for the provisions of an accessible route. The advisor also provided alternative solutions to rectify this perceived non-compliance. As most of the issues noted in the report have since been rectified as described in paragraph 3.3, I consider that the outstanding relevant issue was the access ramp that finishes at the third level of the viewing platform, which is 450mm below the level of the top platform.

3.6 The authority responded by email on 19 December 2007, noting that most of the issues raised by the advisor were subject to a revised notice to fix. The authority had since reviewed and approved solutions that would rectify these issues. However, the authority were still of the opinion that the provisions of the Regulations had been met regarding disabled access. Wheelchair users were “in no way visually disadvantaged by having access to the level approx 450mm down from the [top level]” The open balusters afforded a full field of vision in all directions at the third level that was equivalent to those obtained at the top level.

3.7 The advisor emailed the authority on 21 December 2007, stating that he was not in agreement with the authority’s contention. The advisor noted that “a wheelchair user is not able to get to all the spaces of the viewing platform that they might be expected to visit”. As the viewing platform’s purpose was to allow unobstructed views for everybody, it must be accessible for all people to do so.

3.8 The application for a determination was received by the Department on 20 May 2008.

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

4. The submissions

- 4.1 In a submission, dated 19 May 2008, the authority described the viewing platform. The authority was of the opinion that the provisions of the Building Code had been met as regards wheelchair access, as wheelchair users were not visually disadvantaged by not being able to access the top platform. The authority noted that it wanted its decision to issue a notice to fix that excluded wheelchair access to be determined. The authority also noted that if the structure was “upgraded” this would amount to an alteration that needed to be assessed in the context of being “as near as is practicable”. Such an alteration would be impracticable in terms of cost and disruption. The authority also referred to Determination 2007/111, which it considered to be relevant in this case.
- 4.2 The authority forwarded copies of:
- the plans
 - the building consent
 - the notice to fix
 - the report from the advisor forwarded to the authority on 11 November 2007
 - the 2006/7 version of the authority’s “Variation/Amendment” forms
 - the relevant correspondence.
- 4.3 On 30 May 2008, the advisor emailed the Department and queried the contradiction between NZS 4121 and the Building Code, which had been mentioned by the project consultants in an email to the authority sent in July 2007. The advisor noted that the documentation provided clearly set out his contentions.
- 4.4 The advisor forwarded copies of:
- some of the plans
 - a list of proposed alternatives provided by the contractor for the viewing platform
 - the report “An Audit of the Accessible Route”
 - the report from the advisor forwarded to the authority on 11 November 2007
 - a paper titled “Riverton Focal Point” prepared by a consultant
 - a background paper titled “a Platform with a view...for some!”
 - a “Memorandum to Riverton/Aparima Community Board” relating to the final costs of the entire Focal Point project
 - a sketch drawing prepared by the project consultants to the authority, dated 28 September 2007, and showed a new ramp 5400mm long, providing access from the third level to the top platform
 - relevant correspondence.

5 The legislation and the Compliance Documents

5.1 Relevant provisions of the Act are:

17 All building work must comply with building code

All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

19 How compliance with building code is established

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

49 Grant of building consent

- (1) A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.
- (2) However, a building consent authority is not required to grant a building consent until it receives—
- (a) any charge fixed by it in relation to the consent; and
- (b) any levy payable under section 53.

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.

Schedule 2

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

- (g) central, regional, and local government offices and facilities:

- (z) other buildings, premises, or facilities to which the public are to be admitted, whether for free or on payment of a charge.

5.2 Relevant provisions of the Building Code are:

CLAUSE A2—INTERPRETATION

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

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

Accessible Having features to permit use by people with disabilities.

Accessible route An access route usable by people with disabilities. It shall be a continuous route that can be negotiated unaided by a wheelchair user. The route shall extend from street boundary or carparking area to those spaces within the building required to be accessible to enable people with disabilities to carry out normal activities and processes within the building.

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

- (a) Approach the *building* from the street boundary or, where required to be provided, the *building* car park,
- (b) Have access to the internal space served by the principal access, and
- (c) Have access to and within those spaces where they may be expected to work or visit...

6. Comments from the ODI

6.1 I forwarded the determination application to ODI, so that it could provide a preliminary assessment of the matters arising from that application.

6.2 The ODI responded in a letter to the Department dated 1 July 2008. In summary, the ODI stated that the viewing platform was covered by section 118 and Schedule 2 of the Act. The structure therefore required an accessible route “to enable disabled persons to visit the structure and carry out normal activities and processes there on an equal basis with others”. The ODI went on to say:

The provision of an accessible route to the second highest [level] of the structure cannot be said to provide equitable access for disabled people to carry on normal processes and activities there on an equal basis with others. In particular, a disabled person wishing to take in uninterrupted 360 degree views from the location that is accessible is obstructed by the top platform which necessarily impedes a substantial portion of the viewing range for a disabled visitor. There appears to be cogent evidence presented by wheelchair users that their viewing range from the accessible platform is obstructed by the top platform.

The ODI suggested that the determination should require the authority to issue a notice to fix that would require the top platform to be lowered to the third platform level.

7. The draft determination

7.1 Copies of a draft determination were forwarded to the parties and the ODI on 11 August 2008.

7.2 The authority did not accept the draft determination and made a submission to the Department dated 13 August 2008. In summary the submission stated:

- The authority still held the view that the provisions of the Building Code were met on reasonable grounds. The only remedy to upgrade the viewing platform would be to lower the height of the upper platform to the height of the level below, and this would not visually enhance the view for wheelchair users.
- As the lowering of the upper platform constituted a variation to the original consent it required a staged consent application as it was a “significant variation”, a term which had been previously interpreted by the Department. If the work did require a “staged consent” it would be an alteration in terms of section 112. This in turn would require access and facilities for persons with disabilities to be assessed in terms of “as near as reasonably practicable”. As such, a wheelchair user is not visually disadvantaged 450mm down from the top level and this benefit is outweighed by the cost of rectification.
- The view from the third level is obstructed by the balustrade and this would still be the case if the viewing platform is lowered to the level below it.
- The authority referred to a previous determination, which considered an accommodation building with inadequate fire-ratings that had been completed without a building consent. That determination found that the benefits of providing upgrade fire separations were outweighed by the prohibitive costs involved. This decision, the authority contended could be applied to the current situation.

7.3 On 21 August, the authority made a further submission to the Department reiterating its opinion that any remedial work to the viewing platform would constitute a “major or significant variation” from the original consented documents. This was in line with an interpretation given by the Department in its article in the August 2008 “BCA Accreditation and Registration Guide” published by the Department and entitled “Variation and Amendments to Building Consents”. If a result of the determination was the requirement to issue a notice to fix, then this would be in terms of an amendment under section 112. The authority also referred to the previously issued determination that it had cited in its previous submission.

7.4 The advisor accepted the draft and in an attached letter dated 20 August 2008, commented on the first of the authority’s submissions regarding the determination. I summarise the comments as follows:

- The viewing platform impedes a 360° view for a wheelchair holder and, as it has incorrectly issued a building consent, the authority cannot now argue that an alteration providing such a view is a “significant change”. As such, compliance with section 118 is required rather than compliance with section 112. Accordingly the authority cannot issue a waiver.

- The determination referred to by the authority does not bind the Department and in any event, it was in relation to an existing building.
- The advisor had been informed that the overall cost of the Focal Point project was in excess of \$9 million dollars. A project manager had advised that the cost of a cantilevered ramp to the upper platform would be in the order of \$15,000 to \$20,000 and lowering the top platform some \$20,000.
- Reference was made to the “Riverton Focal Point” paper, in which it was stated that any further reductions would not allow views over the adjacent Aparima Bridge”

8. Discussion

8.1 Compliance with the Building Code

- 8.1.1 The viewing platform is a building which, in accordance with section 118 and paragraphs (g) and (z) of Schedule 2, requires the provision of access and facilities for persons with disabilities. As such, the building comes within the ambit of Clauses D1.3.2 (b) and (c), which require a 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 and provide access to spaces where they may be expected to visit.
- 8.1.2 As set out in section 49, an authority can only grant a building consent if it is satisfied on reasonable grounds that the provisions of the Building Code would be met if the building work were properly completed in accordance with the documentation accompanying an application. Accordingly, I must decide whether the viewing platform as consented and constructed is code-compliant.
- 8.1.3 I consider that the only outstanding Building Code matter to be determined is whether the lack of wheelchair access to the top platform makes the viewing platform non-compliant. I refer only to wheelchair access, as I believe that adequate provision has now been made for all persons with disabilities who are not confined to wheelchairs to access the top platform.
- 8.1.4 The authority has argued that as wheelchair users were not visually disadvantaged by not being able to access the top platform, the Building Code requirements for wheelchair access have been met.
- 8.1.5 As described in paragraph 3.5, the advisor did not accept that the wheelchair access provided met either the requirements of the Building Code or NZS 4121.
- 8.1.6 In basic terms, all building work must comply with the Building Code as set out in Section 17, while section 18 states that performance criteria additional or more restrictive to the Act cannot be required unless any other legislation specifically demands it.
- 8.1.7 Having established the disabled access requirements of the building, I now turn to the matter concerning the ramp itself. Section 119 states that NZS 4121 is to be taken as a compliance document. In accordance with section 19(1)(b) the authority

must accept that compliance with the provisions of a compliance document establishes compliance with the Building Code. Section 6 of the Standard describes the requirements for access ramps. I am of the opinion that the only requirement that is relevant to the ramp is section 6.5.1, which states:

Landings shall have a minimum dimension of 1200mm.

The plans show that the landing at the top of the ramp (the level 3 platform) clearly meets this requirement.

- 8.1.8 The ramp as constructed terminates at the third level, which is only one of the four levels that could be considered as spaces where people are expected to visit. However, the ramp is also at the same level as the two lower platforms at stages of its incline.
- 8.1.9 In terms of access, I am of the opinion that the top platform is a space that any person using the viewing platform would wish to visit and this would include persons in wheelchairs. Any person visiting the platform would naturally want to go to the top of it.
- 8.1.10 However, the barrier provided by the steps from the third to the top level prevents persons in wheelchairs from accessing the top platform. In my opinion this lack of access is contrary to the requirements of Clauses D1.3.2(b) and (c), and leads me to conclude that the viewing platform in its current configuration does not comply with the requirements of the Building Code.

8.2 The authority's submission that any amendment to the viewing platform in its present form is an alteration in terms of section 112

- 8.2.1 The authority has argued that if any amendment to the viewing platform was required, this would be in the form of an alteration as set out in section 112, rather than part of the original consent. I note that the authority has not issued a code compliance certificate for the viewing platform but has issued a notice to fix in terms of the building consent, all of which leads me to believe that the original building consent is still current.
- 8.2.2 In its submissions to the draft determination, the authority has referred to the Department's advice included in the "Variations and Amendments to Building Consents" publication. In particular, the authority considered that in terms of that document, any adjustment of the top platform would constitute a "major or significant variation". As such, the adjustment would be an alteration in terms of section 112. The advisor disagreed with this proposition.
- 8.2.3 The authority has supplied me with a copy of its "Variation/Amendment forms, which it states is essentially the same as the advice provided by the Department. These forms note that a variation is treated as one of the following:

Minor variations requiring documenting on the inspection Prompt Sheet.

Significant variation requiring a staged consent linked to the original consent application for the work.

- 8.2.4 I note that, in accordance with the authority's documentation, even if any amendment to the viewing platform was considered to be "significant", it is still linked to the original consent. This interpretation convinces me that any variation made to the viewing platform does not require a separate consent and merely requires an amendment to the original consent. Having formed this view, the determination referred to by the authority is not relevant as that was decided in terms of an alteration to an existing building.
- 8.2.5 Accordingly, I am of the opinion that any amendment to the ramp, while it would require an amendment to that consent, cannot be considered as being an alteration in terms of section 112, and accordingly, the conclusion I reached in paragraph 8.1.10 is not changed.
- 8.2.6 Having reached this conclusion, I also note that a sketch plan showing an additional ramp from the third level to the top platform (refer paragraph 4.4) provides a relatively cost-effective solution to the access problem. In terms of cost this would not be disproportionate to the benefits accruing from the improved access.

9 The decision

- 9.1 In accordance with section 188 of the Act I hereby determine that:
- (a) the viewing platform as presently constructed does not comply with Clause D1.3.2 of the Building Code, and
 - (b) the authority's decision to issue a notice to fix that excluded a requirement to provide wheelchair access to the top level of the viewing platform is reversed.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 8 September 2008.

John Gardiner
Manager Determinations