



Determination 2009/110

Determination regarding access for people with disabilities to a café at 2200 East Coast Road, Silverdale, Auckland

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.
- 1.2 The parties to the determination are:
- Rodney Disability Advisory Group, the applicant for the determination (“the applicant”), who is a party under section 176(f) of the Act²
 - Raezanne Limited (“the café owners”) and Greenzone Holdings Limited (“the building owner”)
 - Rodney District Council (“the authority”), carrying out its duties as a building consent or territorial authority
- 1.3 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.
- 1.4 The applicant identified the matters for determination as whether the authority was correct to issue a building consent and code compliance certificate for an alteration to an existing building (“the building work”) and whether the building work complies with the Building Code with respect to the provisions that were made for access and facilities for people with disabilities.
- 1.5 Accordingly, I consider the matters to be determined³ are whether the building work complies with Clause D1 of the Building Code (Schedule 1 of the Building Regulations 1992) and whether the authority’s decisions to issue the building consent and the code compliance certificate were correct. In order to consider these matters, I am of the view that I must consider whether the authority correctly exercised its powers under section 112 of the Act with respect to the alterations to the building.⁴

¹ The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Department are all available at www.dbh.govt.nz or by contacting the Department on 0800 242 243.

² 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.

³ Under section 177(a) and 177(b)(i) of the Building Act

⁴ Determinable under section 177(d) of the Act.

- 1.6 In making my decision, I have considered the submissions of the parties, the report of the expert commissioned by the Department to advise on this dispute (“the expert”), and other evidence in this matter. I have not considered any other aspects of the Building Act or of the Building Code.

2 The building work

- 2.1 Figures 1 and 2 show the floor plan of the building before and after the alterations.

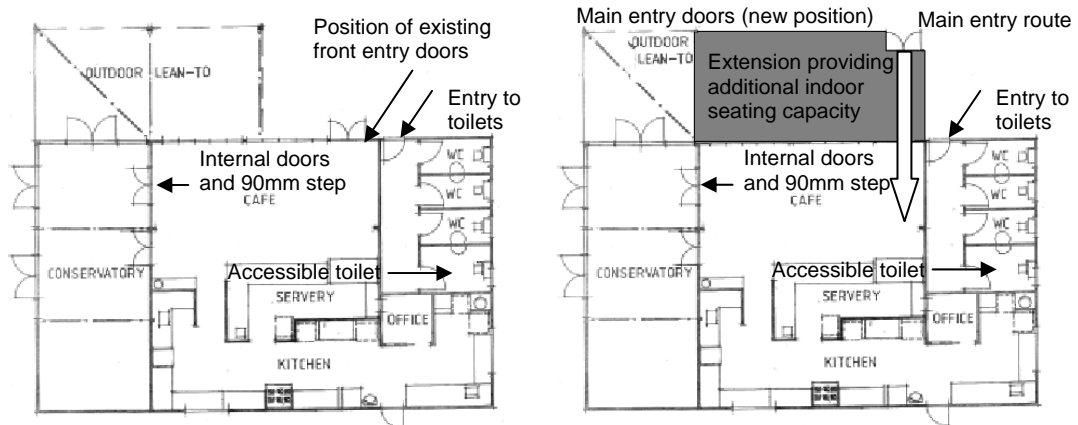


Figure 1: Floor plan before the alteration

Figure 2: Floor plan after the alteration

- 2.2 The building work was an alteration to an existing building. The building was extended to enclose an existing outdoor seating area of the café and provide additional indoor seating capacity (“the extension”).
- 2.3 The front entrance doors from the existing building were re-used in the extension at the new entrance, as the main entry doors. There is also an existing entrance at the conservatory. The building has sanitary facilities including an accessible toilet to which the entrance is an external door near the main entry doors.
- 2.4 The main entry doors have an exterior ramp with 1:18 slope, no level landing at the entry door, two 610mm leaves with magnetic latches that are manually operated for opening the doors, and a 30mm threshold.

3 Background

- 3.1 A building consent was granted by the authority for the alterations to the existing building (building consent number ABA1001281). I have not seen the building consent.
- 3.2 On 6 July 2008, the applicant wrote to the authority requesting that the access to the café be investigated, noting that the café had just re-opened after renovations. A month later, the applicant wrote to the authority opposing the solution that had been implemented for access to the café, which involved making the access route for people with disabilities the existing conservatory entry. Based on information provided by the applicant, I understand a code compliance certificate was issued for the building work sometime in December 2008.
- 3.3 In a letter to the Department that accompanied the application, the applicant noted that ‘the Building Act, NZS 4121⁵ and D1/AS1 all have a clear intention to give disabled people equal access routes into and through the built environment the same

⁵ New Zealand Standard NZS 4121: 2001 Design for access and mobility – Buildings and associated facilities

as for all able bodied people...’, and as the issue had not been resolved, the applicant was seeking a determination. The application for a determination was received by the Department on 27 May 2009.

4 The submissions

4.1 The applicant provided a plan of the existing building and the extension and previous correspondence between the applicant and the authority. In a letter to the Department accompanying the application, the applicant noted that they believed that it is ‘not acceptable to direct disabled people to an alternative and more crowded entry when it was perfectly achievable to build the main entry doors to allow clear and independent access in all weather conditions.’

4.2 I have also received the following submissions in response to the application and the expert’s report, and I have taken account of the points raised by the parties in this determination:

Party	Submission	Key points quoted from submission
The café owners	30 June 2009	The building work that was done has not added any seating and the entry doors have been improved for all customers. The doors are only closed for five to ten percent of days, due to bad weather. It was agreed... that the conservatory entry could be the accessible route and the [café owners] undertook to add signs and smaller tables. Pull handles and a magnetic door latch were added to the front entry doors to provide better access.
The applicant	1 July 2009	...the alternative entry through the conservatory is discriminatory to the disabled patrons and unusable when the café is busy. An alternative entry would not be required if the main entry was accessible at all times...
The authority	13 July 2009	The addition was assessed in terms of section 112 of the [Act]. [The authority] is satisfied that Subsection 1(a) and 1(b) of section 112 has been met. In any case, the [authority] is authorised by this section in subsection 2 to make a judgement call in respect to the level of compliance. The route described in the expert report [through the conservatory] is not an accessible route which would not be appropriate for any person entering the restaurant and has not been approved as part of the consent or code compliance certificate process. When the law allows [an authority] to exercise a discretion, it is then inappropriate for the exercise of that discretion to be challenged. The question becomes whether or not in exercising that discretion we turned our mind to the issues required by section 112. If having turned our mind to the items that needed to be considered then the decision should stand. There is no point in legislation giving the power to exercise discretion to [an authority] and then for higher authority to over rule the discretion so exercised. ...the [High Court] has ruled that the discretion can not be over ruled if the [authority] turned their mind to the issues involved in the exercise of the discretion.
The café owners	14 July 2009	We are disappointed the expert report does not seem to consider the access suitable for disabled people. We have always been happy to work with [the authority] to make sure access is reasonable and compliant. The doors have been operating for about ten years have been very operational and probably a better solution than that being proposed.
The applicant	15 July 2009	...the double front doors are the main point of entry into the café for able-bodied patrons and that disabled patrons should be able to use the same entry point. ...modifications to the width of the leafs of each door is possible...

The draft determination

4.3 A draft determination was issued to the parties for comment on 18 August 2009. The draft was also sent to ODI by way of consultation under section 170 of the Act.

4.4 The authority did not accept the draft determination, and requested a hearing and raised the following issues:

- [building work that] can be regarded as an alteration for the purpose of section 112...
- [its] discretion... in terms of section 112...
- the extent of the accessible route that needs to be provided
- the information that was lacking in the building consent application when the consent was granted.

4.5 In response to the draft determination, the café owners stated:

...it seems we are in breach of the Building Code and we need to remove the small easy to open door on a magnetic latch and replace it with a larger harder to open door. ...the [authority], who inspected the building work on site, saw the common sense of the doors operating as they have over the last 8 years and with the adjustment to pull handles and magnetic latches saw it as the best access for disabled people.

4.6 The ODI, in its response, stated:

The approach to resolving any perceived differences between Clause D1 paragraph 7.0.3 and NZS 4121 section 7.3 is eminently sensible and practicable. It appears to us that the solution as proposed by the [café owners] and by the [authority] undermines the essential purpose of the Act and Code to ensure that buildings have attributes that contribute to the physical independence and well-being of all users.

4.7 The applicant accepted the draft determination, and made no further comments.

The hearing

4.8 I held a hearing in Orewa on 29 September 2009. I was accompanied by a referee engaged by the Chief Executive under section 187 of the Act. Representatives from the authority, the applicant, the café owners, and the Department were in attendance.

4.9 The authority submitted a summary of the reasons that it did not accept the draft determination:

- The definition of “alter” in section 7 of the Building Act 2004 includes “additions”. Additions [(by their nature)] must include new building work. Section 112 includes additions and thereby includes the new building work.
- Both accessible routes should be able to be assessed subject to the section 112 requirements. [The authority does]... not accept that if the accessible route was via the conservatory, the section 112 requirement would apply, while if the main entrance door, which was moved forward, was the accessible route, section 112 requirements would not comply.
- ...the [main] entrance door provides the opening width required by the performance requirements of the Building Code... While the [café] is open, both leaves of the door must remain unlatched. ...the doors can be accepted as an alternative solution that would comply with the Building Code.
- The Building Code specified that there be no threshold on an accessible route while both acceptable solutions specify a maximum height of 25mm. It is also noted that the Building Code performance measures do not require an absolutely level platform in front of the main doors. The accessible route has a 30mm threshold that should have been reduced to 20mm prior to the [code compliance certificate] being issued if compliance with the acceptable solution was intended.
- ...there is not basis for suggesting that the building consent was not properly issued. The main entrance doors were reused in the alterations to the restaurant and moved

[three] metres forward. The reuse of these main entrance doors was acceptable in compliance with the tests under section 112 of the [Act]. Both leaves of these doors must remain unlatched. In this respect, [the authority] can legitimately exercise the discretion that section 112 of the [Act] provides. While the 30mm threshold and sloping platform in front of the entrance doors does not comply with the acceptable solution, it may well be acceptable as an alternative solution.

- 4.10 The café owners explained that they had worked with the authority to ensure the main entry doors were easily accessed and they had come up with a fair and reasonable solution and explained that they are very service orientated, they had processes in place to ensure the doors weren't bolted, and that they had never had any complaints from patrons about the access to the café. Furthermore, the doors are almost always open, and changing the doors from a small, easy to open leaf, to a larger, harder to open door, will make access more difficult for people with disabilities. The café owners also explained that it is no longer the case that the conservatory entrance is being used as an accessible entrance. The conservatory entrance was temporarily labelled as accessible as a possible solution to the problem, however it was later agreed between the café owners and the authority that a better solution would be to modify the handles and latches to the main entry doors.
- 4.11 The applicant made no further comments.

The second draft determination

- 4.12 A second draft determination was issued to the parties for comment on 2 November 2009.
- 4.13 The authority accepted the second draft determination, noting:
- Section 112 implies that a waiver from the strict requirements of the Building Code is possible for the whole building including the alteration. However, the test for 'as is reasonably practical' is a high threshold test and hence [the authority's] acceptance of the determination. We do agree with the operator of the café that extending the requirements to the entrance of the accessible toilet block is unreasonable given that it was not the subject of the determination application or the hearing.
- 4.14 The café owners did not accept the second draft determination, stating:
- To say that we have to change the toilets when we have not touched them during the alterations is stupid; you have no right to do so in a determination which has not raised the issue and will be binding on not just us but the industry as a whole. You infer you could make us rebuild the café to whatever standards you dream up if we so much as change a door handle.
- 4.15 The applicant accepted the second draft determination.

5 The legislation

- 5.1 The following legislation applies in this determination (the full text is in Appendix A):
- section 7 of the Act - Interpretation
 - section 17 of the Act - All building work must comply with building code
 - section 112 of the Act - Alterations to existing buildings
 - section 118 of the Act - Access and facilities for persons with disabilities to and within buildings
 - Clauses D1.3.2, D1.3.3, D1.3.4 of the Building Code.

6 The expert's report

- 6.1 As referred to in paragraph 1.6, I engaged an independent expert to provide an assessment of the condition of those building elements subject to the determination. The expert is a Registered Architect with specialist expertise in accessibility matters. The expert used information about the case sought from the authority, and information provided in the application and submission, but did not inspect the site. The expert furnished a report that was dated 8 July 2009.
- 6.2 The expert noted the following features about the main entry route, using D1/AS1 and NZS4121 as a means of compliance with the Building Code:

Feature	Route	Acceptable solution or Standard	Compliant
Ramp	Exterior ramp with 1:18 slope, no level landing at entry door	Ramps to have a maximum gradient of 1:12 Level landing a minimum of 1200mm wide at top or bottom or ramps clear of door swings	No
Doors	Two 610mm leaves, manually operated	Minimum clear opening of a door of 760mm or double doors with one leaf that has minimum clear opening of 760mm	No
Threshold	30mm threshold at entry doors	Stepped thresholds a maximum of 20mm	No

- 6.3 The expert noted that given the location and extent of the new building work, which included a new entrance, ramp, and threshold, that there is no practical reason why the new entrance to the extension could not have been built to comply with the level landing and threshold requirements of the compliance documents and therefore the associated performance criteria of the Building Code.
- 6.4 With respect to the main entry doors to the extension, the expert noted that without a compliant door, accessibility is significantly compromised and the cost of fitting a compliant door would not have been prohibitive relative to the cost of the project.

7 Requirements of the Act

Section 118 in relation to a café

- 7.1 A café is a building to which the requirement of Section 118 for access and facilities for persons with disabilities applies. This is because section 118 applies to buildings that are intended to be used for or associated with the purposes set out in schedule 2 of the Act. Schedule 2 explicitly lists buildings that have the purpose of being used as a cafeteria as buildings to which the requirements for access and facilities for people with disabilities applies. The Building Code requires an accessible route be provided.
- 7.2 An accessible route is required to be a 'continuous route that can be negotiated unaided by a wheelchair user' and 'the route shall extend from street boundary or car parking 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'. There is no requirement that the accessible route must be the main entrance to a building (refer to Clause D1.3.2).

Section 17 and the definition of ‘alter’ in relation to alterations to an existing building

- 7.3 The authority takes the view that building work, which is an extension to an existing building, falls under the definition of ‘alter’ under section 7. While the section 7 definition was not discussed in the first draft determination, I consider that it is clear that an extension is an alteration and I agree with the authority on this interpretation.
- 7.4 The authority’s position about alterations to existing buildings is that section 112 applies to any building work that consists of an alteration, and therefore only the alteration itself need comply ‘as nearly as is reasonably practicable’ with respect to the provision of access for people with disabilities.
- 7.5 I do not accept the authority’s position that the application of section 112 means that building work that consists of alterations to an existing building need only comply as nearly as is reasonably practicable. This would allow a lower standard of compliance with the Building Code to be accepted in respect of alterations.

The section 112 test

- 7.6 The section 112 test applies to the entire altered building, rather than just the alteration itself. Section 112 states ‘...unless the [authority] is satisfied that, **after the alteration, the building will...**’ (my emphasis).
- 7.7 Section 112 does not detract from the section 17 requirement that all building work must comply with the Building Code, to the extent required by the Act and unless the building work is subject to a waiver or modification of the Building Code.
- 7.8 I note that under section 67(3) the 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.’
- 7.9 Therefore, with respect to the provision of access and facilities for people with disabilities:
- the new building work that is an alteration must comply fully with the requirements of the Building Code
 - the building, as a whole, after the alteration, must comply with the Building Code to the extent required by section 112.
- 7.10 Under section 112, it is the building after the alteration, (i.e. the whole building that includes the existing building as well as the new building work), which must:
- comply as nearly as is reasonably practicable with respect to means of escape from fire, and
 - comply as nearly as is reasonably practicable with respect to the provision of access and facilities for people with disabilities, and
 - continue to comply to as at least the same extent as before the alteration for all other Building Code clauses.⁶

⁶ Alterations to existing building and section 112 have been discussed in many previous determinations. Refer in particular to determination 2009/60 for further discussion about the application of section 112.

8 Analysis of the building and building work

Compliance with the Building Code to the extent required by the Act

- 8.1 The main entry route does not comply with Clause D1 because there is no level landing at the door, there is a stepped threshold greater than 20mm and the doors do not have a clear opening of 760mm for one of the leafs.
- 8.2 The authority has commented that the front entrance doors are an alternative solution and are therefore compliant with the Building Code. A clear opening of at least 760mm is required by NZS 4121 and D1/AS1. I note an Acceptable Solution is not the only way of achieving the performance requirements of the Building Code. However, usually when there is non-compliance with one provision of an Acceptable Solution, it will be necessary to add one or more other provisions to compensate for that in order to comply with the Building Code. I do not agree with the authority that the double doors with two 610mm leafs provide comparable access to the Acceptable Solution.
- 8.3 While I acknowledge the café owners and authority's comments that the doors are almost always open, I note that as discussed in past determinations such as 2001/3 and 1992/1102, the Act does not consider the management of buildings, and assurances as to future management practices will be rarely enforceable under the Act. While the current café owners may comply with the practice of keeping both leafs of the doors unlatched, future owners may not be so accommodating. The Act can only ensure that the doors will always be accessible by enforcing a requirement that it is not possible for the doors to be inaccessible regardless of any practices adopted by building owners and occupiers.

The building consent

- 8.4 I acknowledge that the intention of the café owners was to construct a compliant extension. I also acknowledge that the building consent was issued by the authority on the basis of its interpretation of section 112.
- 8.5 However, I am of the view that the authority should not have applied the section 112 test to the work in the extension, which is new building work. The authority should have assessed the new building work in terms of whether it complied fully with the requirements of the Building Code, and section 112 should have only been applied to consider the compliance of the building as a whole, after the alteration.
- 8.6 The ramp, the threshold, and the doors of the main entry do not comply with the Building Code. I note that the fact that the doors were part of the original entrance does not mean they can be deemed acceptable by virtue of section 112. The doors are part of the new main entrance way and are therefore new building work. Without a compliant entry to the café, accessibility is significantly compromised. The new landing and threshold, and the doors, whether new, or reused and modified, needed to have been designed and built to fully comply with the requirements of Clause D1.
- 8.7 Further to paragraph 8.5, I note that in assessing the proposal, the authority should also have considered whether the whole building after the alteration would comply as nearly as reasonably practicable with the provisions of the Building Code relating to access and facilities for people with disabilities. An approach regarding the question of whether a building complies 'as nearly as is reasonably practicable' with particular provisions of the Building Code has been established and discussed in many previous

determinations. This approach involves the balancing of the sacrifices and difficulties of upgrading against the advantages of upgrading and follows the approach of the High Court⁷. There may have been other accessibility features to the building that may have been upgraded with very little cost at the time the building work was undertaken, such as the threshold to the accessible toilet.

8.8 I therefore consider that the building consent was incorrectly granted for this building work.

The code compliance certificate

8.9 Given that the building work has now been completed and the authority's decision to issue the building consent relied upon, I consider it would be impractical to reverse the authority's decision to issue the building consent. I am of the view that a practical solution is for the authority's decision to issue the code compliance certificate to be reversed and for the authority to issue a notice to fix requiring the building work be brought into compliance with the Building Code.

8.10 As the building consent was incorrectly granted using the wrong legal test, I am of the opinion the decision to issue the code compliance certificate was predicated on a mistake of law. Therefore, the code compliance certificate was also incorrectly issued.

8.11 I accept that the task of achieving compliance at this stage may be more difficult than might have otherwise been the case, however, the fact that the work has been completed cannot, of itself, change my view of how the Building Act and the Building Code should have been applied to the situation.

9 What is to be done now?

9.1 Remediation work is required to bring the building work into compliance with the Building Code. Once the authority has withdrawn the code compliance certificate in compliance with this determination, the authority should issue a notice to fix that requires the building owner and café owner to bring the building work into compliance with the Building Code. The notice to fix should not specify how the work is to be brought into compliance with the Building Code. That is a matter for the owner to propose, as an amendment to the building consent, and for the authority to accept or reject.

9.2 The authority has requested guidance be provided with respect to the elements of the entrance that require remediation work to be undertaken in order to bring the main entry into compliance with the Code. As such I have outlined the elements of the main entrance that require remediation work, although I note that these are for guidance only and should not be included on the notice to fix:

- Reduce one door leaf to 400mm and provide a new door at least 760mm wide and preferably 800mm (within the existing frame).
- Provide a 1200mm × 1200mm flat landing outside the doors. Raise the level so that a 20mm maximum threshold is achieved.
- Provide a 1 in 12 maximum ramp to the landing.

⁷ Auckland City Council v New Zealand Fire Service, 19/10/95, Gallen J, HC Wellington AP 336/93.

10 The decision

10.1 In accordance with section 188 I hereby determine that

- the building work does not comply with Clause D1
- the building consent was incorrectly issued because the authority used the wrong test and incorrectly exercised its powers under section 112
- the code compliance certificate was incorrectly issued because it was predicated on an incorrectly issued building consent, and accordingly I reverse the authority's decision to issue the Code Compliance Certificate.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 16 December 2009.

John Gardiner
Manager Determinations

Appendix A - Legislation

The relevant provisions of the Act are:

7 Interpretation

alter, in relation to a building, includes to rebuild, re-erect, repair, enlarge, and extend the building

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.

112 Alterations to existing buildings

(1) A building consent authority must not grant a building consent for the alteration of an existing building, or part of an existing building, unless the building consent authority is satisfied that, after the alteration, the building will—

- (a) comply, as nearly as is reasonably practicable . . . , with the provisions of the building code that relate to—
 - (ii) access and facilities for persons with disabilities (if this is a requirement in terms of section 118)

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.

The relevant provisions of the Building Code are:

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 carpark,
- (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, or which contain facilities for personal hygiene as required by Clause G1 “Personal Hygiene”.

D1.3.3 Access routes shall:

- (a) Have adequate activity space,
- (b) Be free from dangerous obstructions and from any projections likely to cause an obstruction,
 - (i) Not contain isolated steps
- (m) Have landings of appropriate dimensions where a door opens from or onto a stair, ramp, or ladder so that the door does not create a hazard,

D1.3.4 An accessible route, in addition to the requirement of Clause D1.3.3, shall:

- (a) Be easy to find, as required by Clause F8 “Signs”,
- (b) Have adequate activity space to enable a person in a wheelchair to negotiate the route while permitting an ambulant person to pass.

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.

The relevant provisions of compliance documents D1/AS1 and NZS 4121 are:

	D1/AS1	NZS 4121: 2001
Ramp slope	<p>3.1.1 The maximum acceptable slopes for ramps are given in Table 3. The choice of slope must take account of the type of use and risk of slipping.</p> <p>Table 3 shows the maximum slope for an accessible ramp is 1 in 12.</p>	<p>6.4.2.2 Gradient The maximum gradient of a ramp other than a kerb or step ramp shall be 1 in 12.</p>
Level landings	<p>3.3.1 Landings shall be level, and be provided at the top and bottom of all ramps.</p>	<p>7.1.3 Design The design of a main entrance to a building shall provide for: (a) A level approach space no less than 1200x1200mm both inside and outside the entrance door.</p>
Stepped threshold	<p>1.3.2 Threshold weather stops projecting no more than 20mm above the threshold finished surface are acceptable.</p>	<p>7.1.4.1 Stepped thresholds When a stepped threshold is required and the change in level is 20mm or less, no ramp is required.</p>
Door opening	<p>7.0.3 Width – Accessible doors shall have at least 760mm clear opening.</p>	<p>7.3.1 Clear opening The minimum clear width of a doorway shall be 760mm when the door is open.</p> <p>7.3.1.1 Double doors Double doors on a accessible route shall have at least one leaf that provides a minimum clear opening of 760mm.</p>