

Determination 2010/028

The provision of access for people with disabilities to a gymnasium at 32 Bow Street, Raglan



1. The matters to be determined

- 1.1 This is a determination under part 3, subpart 1 of the Building Act 2004¹ (“the Act”). It is 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 applicant is the owner of the building, I Mayes (“the applicant”). The other party is the Waikato District Council (“the authority”), carrying out its duties and functions as a territorial authority or a building consent authority.
- 1.3 I have also consulted with the Office for Disability Issues at the Ministry of Social Development, as I am required to do under section 170 of the Act².

¹ The Building Act 2004, 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 Building Act 2004 and references to clauses are to clauses of the Building Code.

- 1.4 The matter to be determined³ is whether the authority was correct to refuse to issue a building consent for the proposed alterations to an existing building, because it believed an accessible route to the building was required under section 112 of the Act.
- 1.5 In making my decision, I have considered the submissions of the parties. I have also considered a report by an expert engaged by the Department and the other evidence in this matter.

2. The building work

- 2.1 The building was originally built around 1930 and is single storey, with a gross floor area of around 125m². The building's entry is 2.1m above street level, with access by way of a flight of stairs from the footpath to the front door. The building has been used for a variety of purposes, most recently as a church. The applicant is now using the building as a gymnasium that is open to the public.
- 2.2 The new tenants are proposing to make alterations to the building, including, among other things, installing a level-entry shower. The total quoted cost for all of the proposed alterations is approximately \$8,800. The quoted cost of installing the shower is \$3080.00.

3. Background

- 3.1 The tenants have applied to the authority for a building consent for installing the level-entry shower. This has not yet been granted and the authority has stated that it believes that an access ramp for people with disabilities is required under section 112(1)(a) of the Act.
- 3.2 In response to this, the applicant has sourced plans and quotes for an access ramp and for installing a lift. The quote for the access ramp is \$27,400 plus GST, excluding the cost of the metal handrails. The quote for the electric lift is \$26,582.00 plus GST, excluding associated building or electrical work.
- 3.3 In correspondence to the authority, enclosing the above plans and quotes, the applicant has stated that 'we undertake to put in a ramp as per plans as soon as possible, if this is what you decide is required'.
- 3.4 On 14 November 2009, the applicant applied for a determination about the authority's requirement that a disabled access ramp should be installed as part of the proposed alterations.
- 3.5 The application was received by the Department on 18 November 2009.

³ Under section 177(b)(i) of the Building Act 2004.

4. The submissions

- 4.1 In the submission accompanying the application, the applicant requested a waiver of the requirement to install an access ramp ‘on the grounds that it is not reasonably practicable in the circumstances to put one in’.
- 4.2 The reasons that the applicant gave why it was not reasonably practicable to install a ramp were:
- the cost of building the ramp
 - the height of the building from street level, which meant that the ramp would have to run the full length of the building and would require extensive groundwork and a block retaining wall. The applicant stated that an access assessor who had visited the building had indicated ‘that such a long ramp would be a deterrent’
 - the cost of installing a lift as an alternative to the ramp, and the fact that the lift would need ongoing maintenance and would be vulnerable to vandalism.
- 4.3 In an email to the Department on 8 December 2009, the authority stated that it could ‘appreciate [that] the costs of installing a ramp may outweigh the benefits and the expense could be considered unreasonable’, and that it supported the application for a determination as a means of getting the Department’s advice on the matter. It also stated that it had required the installation of an access ramp because ‘the building has undertaken a change of use from a church to a gym’.
- 4.4 The draft determination was issued to the parties for comment on 11 February 2010. The parties accepted the draft without comment.
- 4.5 The Office for Disability Issues also advised that it agreed with the expert’s assessment. It accepted that there was not a change of use under the legislation and that the ‘requirements for compliance with the building code in relation to the new use are the same as under the previous use’. The Office for Disability Issues agreed that an ‘accessible route is not required to the building in order to comply with section 112 of the Act’.

5. The expert’s report

- 5.1 On 10 December 2009, I engaged an expert to consider ‘whether it is reasonable to require an accessible route to be installed (be it by ramp or other means)’. The expert is a registered architect with particular expertise in access matters. The expert examined the papers and provided his opinion in a report dated 15 January 2010.
- 5.2 The expert’s report was sent to the parties for comment on 19 January 2010.

5.3 The access ramp

- 5.3.1 The expert noted that either a lift or a ramp would fit the definition of an accessible route under the Building Act 2004 and the Building Code. However, as the building only had one storey, there was no requirement under Clause D1.3.4(c) to install a lift irrespective of the difference in height between the street and the building.

- 5.3.2 The expert noted that the ramp shown in the applicant's plans was 25.5m long, excluding landings, and complied with both the Acceptable Solution for access routes, D1/AS1, and NZS 4121⁴. The expert noted the advice that the applicant had received about the length of the ramp being a deterrent to people with disabilities, but stated that this did not make the ramp unreasonable, as NZS 4121 shows a longer ramp, rising to a greater height than the one in the applicant's plans.
- 5.3.3 The expert considered the cost of the ramp compared with the cost of the intended work (the shower):
- in absolute terms the value of [the intended] work is minor, as is its size and affect on the building. The quote for the ramp equates to nine times the value of the intended work, while the size of the ramp and its effect on the site is significant. It is my opinion that the cost, scale and effect of the required work is out of all proportion to the intended work ...
- 5.3.4 The expert was of the opinion that the access ramp would be of limited value to people with disabilities, given that other aspects of the building's design meant that it would still be difficult for such people to use the gym. The expert noted that neither the gym's toilet nor the proposed level-entry shower would be accessible to people with disabilities and stated that:
- both of these accessible features are necessary to enable a person in a wheelchair to properly use the gym in its intended use and without them the ramp is of rather limited benefit. It is therefore my opinion that to require the ramp is unreasonable in these circumstances.
- 5.3.5 The expert concluded that it was unreasonable to require the ramp to be built and that the ramp was 'not required for the building to comply, as nearly as is reasonably practicable, with the provisions of the Building Code that relate to access and facilities for people with disabilities'.

5.4 Other matters

- 5.4.1 The expert noted that changing a building's use from a church to a gymnasium is not a change of use as it is described in Schedule 2 of the Building (Specified Systems, Change of Use, and Earthquake Prone Buildings) Regulations 2005. Both churches and gymnasiums have the same use, being CS (Crowd Small). The expert also noted that, if the building had in fact changed use, the provisions of section 115 would apply and not section 112.
- 5.4.2 The expert also questioned whether a building consent was required for the level entry shower, given the provisions of Schedule 1, paragraph (ag). The expert's opinion was that, if the owner received adequate design and documentation advice, then it was likely that the conditions in paragraph (ag) would be met, and no building consent would be required. The expert concluded that, '[i]f no consent is required, section 112 does not apply and the issue of the ramp's requirement cannot arise.'

⁴ New Zealand Standard NZS 4121: 2001 Design for access and mobility – Buildings and associated facilities

5.4.3 The expert then went on to consider the features, other than the ramp, that would enable people with disabilities to use the building.

... accessible features that are necessary to enable the building to be used in its intended use are not provided. I suspect that there are also numerous other smaller and less expensive items (e.g. lever-style handles, door widths, heights of switches and controls, vanity and handbasin dimensions, tap details, and the like) within the building that do not comply but that could improve the usability of the gym for people in wheelchairs far more than a ramp.

Further, there appears to be no consideration of, for instance, the handrails or nosings of the entry steps and other possible improvements in compliance for people with disabilities who are not in wheelchairs. It is often the smaller details, which are usually of far lesser cost – and could therefore possibly be considered reasonably practicable – that can significantly improve access and facilities for people with disabilities in altered buildings ...

6. The legislation

6.1 The relevant sections of the Building Act 2004 include:

Section 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—
 - (i) means of escape from fire; and
 - (ii) access and facilities for persons with disabilities (if this is a requirement in terms of section 118); and
 - (b) continue to comply with the other provisions of the building code to at least the same extent as before the alteration.

Section 115 Code compliance requirements: change of use

An owner of a building must not change the use of the building,—

- (a) in a case where the change involves the incorporation in the building of 1 or more household units...
- (b) in any other case, unless the territorial authority gives the owner written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use, will—
 - (i) comply, as nearly as is reasonably practicable, with every provision of the building code that relates to either or both of the following matters:
 - (A) means of escape from fire, protection of other property, sanitary facilities, structural performance, and fire-rating performance:
 - (B) access and facilities for people with disabilities (if this is a requirement under section 118); and
 - (ii) continue to comply with the other provisions of the building code to at least the same extent as before the change of use.

Section 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 1 Exempt building work

A building consent is not required for the following building work:

- ... (ag) the alteration to the interior of any non-residential building (for example, a shop, office, library, factory, warehouse, church, or school), if the alteration does not—
 - (i) reduce compliance with the provisions of the building code that relate to means of escape from fire, protection of other property, sanitary facilities, structural stability, fire-rating performance, and access and facilities for persons with disabilities; or
 - (ii) modify or affect any specified system:

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:

- ... (p) places of assembly, including auditoriums, theatres, cinemas, halls, sports stadiums, conference facilities, clubrooms, recreation centres, and swimming baths:

6.2 The relevant section of the Building (Specified Systems, Change of Use, and Earthquake Prone Buildings) Regulations 2005 is:

Schedule 2 Uses of all or parts of buildings

Uses related to crowd activities

Use: CS (Crowd Small)

Spaces or dwellings: enclosed spaces (without kitchens or cooking facilities) where 100 or fewer people gather for participating in activities

Examples: cinemas (with qualifying spaces), art galleries, auditoria, bowling alleys, churches, clubs (non-residential), community halls, court rooms, dance halls, day-care centres, gymnasias, lecture halls, museums, eating places (excluding kitchens), taverns, enclosed grandstands, indoor swimming pools

7. Discussion

7.1 The application of the legislation

- 7.1.1 The authority has said that it believes that an access ramp is required under the provisions of section 112.
- 7.1.2 Section 112 only applies if the building is one to which section 118 of the Act also applies. Section 118 applies to buildings ‘to which members of the public are to be admitted, whether for free or on payment of a charge’ and to buildings with the uses specified in Schedule 2 of the Act.
- 7.1.3 It is clear that, as a gymnasium and as a place of assembly or recreation centre under item (p) in Schedule 2, section 118 applies to the building. Therefore, section 112 also applies when a building consent is applied for in respect of alterations to that building.
- 7.1.4 The authority also stated that section 112 applied because the building had undergone a change of use. I agree with the expert (see paragraph 5.4.1) that the change from a church to a gymnasium does not constitute a change of use as described in the regulations, and therefore section 115 does not apply in this case.
- 7.1.5 Section 112 states that a building consent authority must not grant a building consent for alterations unless it is satisfied that, after the alterations, the building will comply ‘as nearly as reasonably practicable with the provisions of the Building Code that relate to ‘...access and facilities for persons with disabilities’. The relevant provision of the Building Code in this case is Clause D1 Access Routes, which sets the performance requirements for access that buildings must meet to the extent required by the Act.
- 7.1.6 Having examined the applicant’s submissions, the expert was satisfied that the access ramp, if built as designed, would comply with Clause D1 of the Building Code. I accept this assessment. I also accept the expert’s opinion that a lift is not required under Clause D1.3.4(c).

7.2 The application of Section 112

- 7.2.1 Having established that section 112 applies, the next question I must consider is whether it is reasonably practicable for the ramp to be installed as part of the alterations. That it is possible and practicable, to install a code-compliant ramp is clear from the applicant’s plans. What I must then consider is whether it is reasonable for the authority to insist upon the ramp being installed as a precondition of issuing the building consent.
- 7.2.2 The application of the ‘as nearly as is reasonably practicable’ test has been considered extensively in previous determinations. These determinations have established an approach for deciding if a building complies as nearly as is reasonably practicable with the Building Code that follows the approach taken by the High

Court⁵. The approach involves weighing the benefits of requiring compliance against the sacrifice of doing so.

- 7.2.3 I believe that a similar approach should be applied in this case and that I need to weigh the benefits of installing the access ramp (or an alternative accessible route) against the sacrifices of doing so. This will enable me to decide whether it is reasonably practicable for the ramp to be installed.
- 7.2.4 The benefits in this case are clear, as installing a ramp would provide access for people with disabilities to a building that, in its current design is quite inaccessible. It is important to note that this benefit would not be limited to people with disabilities, but would also extend to a much wider range of users.
- 7.2.5 The difficulties or sacrifices of installing the ramp have been outlined by the expert in his report. Firstly, there is the substantial cost of installing the ramp. While the cost of installation is not in itself a sufficient sacrifice, it is disproportionate to a significant extent when viewed against the relatively minor cost, and scope, of the alterations themselves and the overall value of the building.
- 7.2.6 Secondly is the limited usability that the ramp will afford, when the rest of the building is not being altered to make it fully accessible. While the ramp will give people with disabilities access into the gym, it will not enable them to move around or use the facilities once they are in the building.
- 7.2.7 Weighing these factors, I conclude that it is not reasonable (and hence not reasonably practicable) for the ramp to be built in order for the building to comply with Clause D1 of the Building Code.

7.3 Other access requirements

- 7.3.1 I accept the expert's opinion about the accessible features and facilities, other than the ramp, that could be taken to make the applicant's building more accessible for people with disabilities, whether or not they are in wheelchairs (see paragraph 5.4.3).
- 7.3.2 The requirements to provide access and facilities for people with disabilities in both section 112 and section 118 are broader than merely providing an accessible route into the building. They also require the building, and its facilities, to be internally accessible, so that people with disabilities can use the building once they are inside.
- 7.3.3 I reiterate the observations made by the expert that building consent authorities who are considering alterations under section 112, need to take a broader view of what is required in terms of access and facilities for people with disabilities when assessing whether or not a building will comply as nearly as is reasonably practicable with the Building Code.

7.4 Other matters

- 7.4.1 In his submission, the applicant stated that he was applying for a determination 'to waive the requirement to provide a wheelchair access ramp', as the authority had

⁵ *Auckland City Council v New Zealand Fire Service*, 19/1095, Gullen J, HC Wellington AP 336/93.

declined to issue one. Under section 67(1) of the Act, territorial authorities do have the ability to grant building consents that are subject to a waiver or modification of the Building Code. However, this power does not extend to waivers or modifications of the Building Code that relate to access and facilities for people with disabilities⁶.

- 7.4.2 In the current case, the authority did not have the ability to waive the access provisions in granting a building consent. It did, however, have the power to assess, under section 112, whether the building would comply as nearly as reasonably practicable with these provisions, and was free to exercise this power without the need for a determination.
- 7.4.3 I also note the expert's opinion that the intended work was exempt from requiring a building consent under Schedule 1 of the Act. On the facts of this determination, this point is not strictly relevant, as the applicant has already applied for a building consent and was free to do so, whether or not one was required. It is suggested the authority take this into account with respect to other similar work. However, irrespective of whether a building consent is required or not, the proposed work is still required to comply with the provisions of the Building Code.

8. The decision

- 8.1 In accordance with section 188 of the Building Act 2004, I determine that an accessible route is not required to the building in order to comply with section 112 of the Act, and I therefore reverse the authority's decision to refuse to issue a building consent.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 24 March 2010.

John Gardiner
Manager Determinations

⁶ Section 67(3) of the Building Act 2004.