

## Determination 2010/66

### The provision of access and facilities for people with disabilities to a new building at the Emilia Maud Nixon Garden of Memories, Uxbridge Road, Manukau



#### 1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“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 that Department. The following are the parties to this determination:

- the applicant, Mrs G Mackereth (“the applicant”) who is a person with a direct interest with respect to the provision of access and facilities for people with disabilities
- Manukau City Council, the owner of the building (“the owner”)
- Manukau City Council, carrying out its duties and functions as a territorial authority or building consent authority (“the authority”).

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<sup>1</sup> The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Department are all available at [www.dbh.govt.nz](http://www.dbh.govt.nz) or by contacting the Department on 0800 242 243

- 1.2 The Howick Community Board (“the community board”) has been included as a person with an interest in this determination.
- 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 This determination arises from the decision of the authority (acting in its capacity as a building consent authority) to issue a building consent to itself (in its capacity as the owner of the building). The building consent is for the construction of a new building.
- 1.5 The adequacy of the provisions that have been made in the proposed building for access and facilities for people with disabilities are in dispute.
- 1.6 Therefore, I consider the matter for determination<sup>2</sup> is whether the decision of the authority to issue a building consent for the proposed building was correct, with respect to the provisions that have been made for access and facilities for people with disabilities.
- 1.7 In making my decision I have considered the application and submissions of the parties and person with an interest, the report of the expert commissioned by the Department to advise on this dispute (“the expert”), the information presented at the hearing, and the other evidence in this matter. I have not considered any other aspects of the Building Act or Building Code other than those relating to access and facilities for people with disabilities.

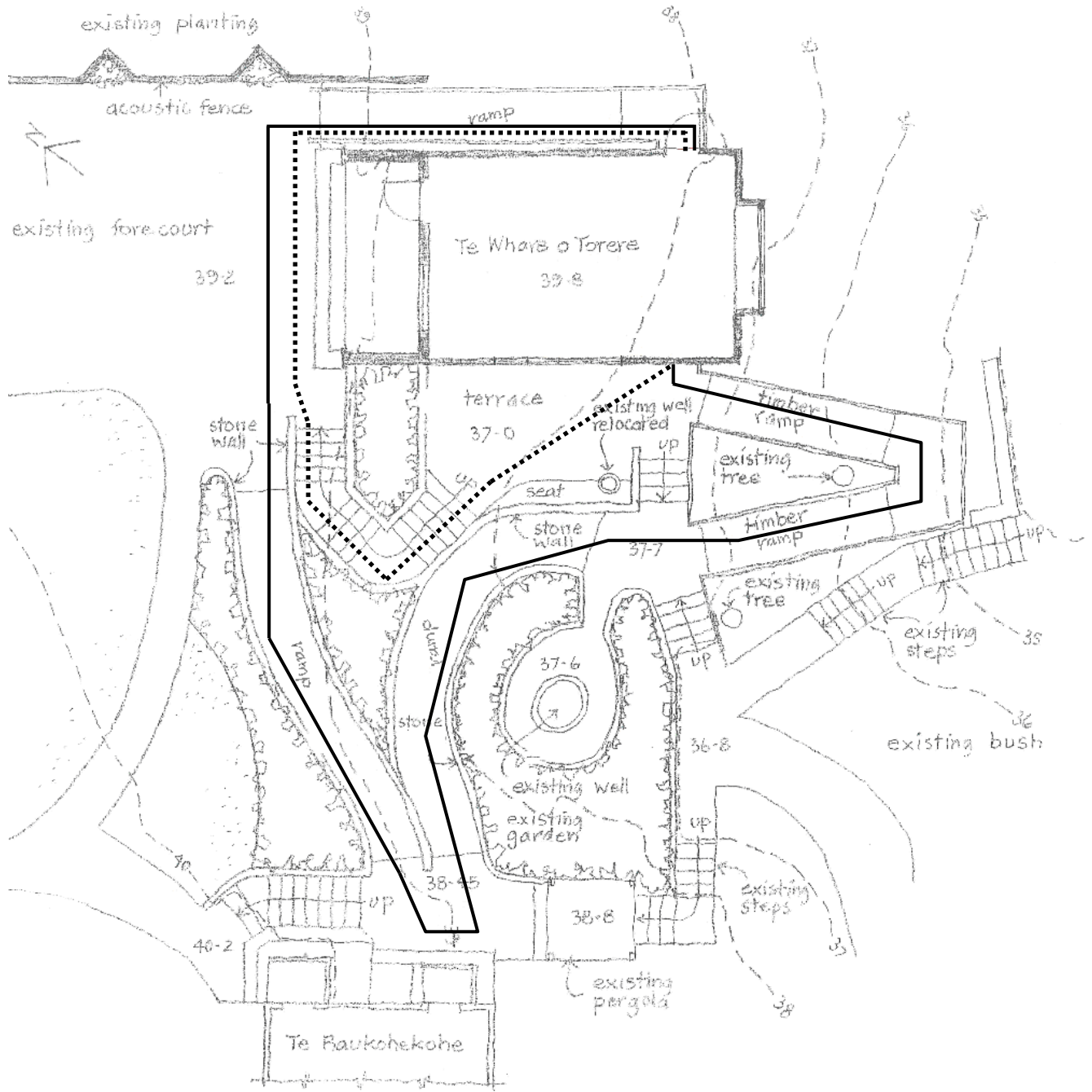
## **2. The building work**

- 2.1 The proposed building is a two-storey whare on a steeply sloping site. The main entrance to the building is to the upper floor of the proposed building (at ground floor level). This level is proposed to have an exhibition and teaching space and assembly area, and the lower floor will have sanitary facilities, a kitchen and an office.
- 2.2 The building is being constructed to replace an existing building that was damaged by fire. The proposed replacement building is to be situated on the site of the existing building, which is in a garden reserve that is managed by the authority.
- 2.3 The floor area of each level of the building is approximately 47m<sup>2</sup>. The height between the two floors is 2.65 metres and there is 2.8 metres between the upper floor and the terrace outside the lower floor.
- 2.4 There is no internal access provided between the upper and lower floors. Steps on the exterior of the south-west side of the building provide access between the upper and lower levels.
- 2.5 Ramps are proposed to be built to provide an accessible route between the exhibition and teaching space on the upper floor and the toilets on the lower floor. The ramps are approximately 58 metres long, made up of approximately 36 metres of 1:12 sloping ramps and 22 metres of flat areas and landings. Figure 1 shows the proposed building and the routes between the upper and lower floors of the building.

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<sup>2</sup> In terms of sections 177(b)(i) of the Act. 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.

Figure 1: the proposed building and routes between the floors



..... Proposed route between lower and upper floors using exterior stairs (refer to paragraph 2.4)

———— Proposed accessible route (refer to paragraph 2.5)

### 3. Background

- 3.1 The old single storey whare was damaged by fire in 2004.
- 3.2 The authority issued a building consent (number 091931) for the construction of a new whare on 17 September 2009. The proposed building will be of the same footprint as the old single-storey building.
- 3.3 An application for a determination was received by the Department on 9 December 2009.

### 4. The submissions

- 4.1 The applicant provided copies of plans for the building and ramps, and extracts from the applicant's submission for the resource consent hearing about the proposed building work, in which the applicant expressed her objection to the proposed accessible route. The applicant also included copies of correspondence between the applicant, the authority and the community board, in which she explained that the proposed ramp would be a disaster in terms of added costs and no elderly or disabled person would be able to use it.
- 4.2 The community board provided copies of plans for the building and ramps, and a letter to the Department stating:

The wheelchair access envisaged clearly fails to meet legal requirements ... From the assembly area upstairs, a paraplegic would have to cope with a 60-plus metre access-way which includes five ramps, two of which are curved and separated by a hairpin bend. Another two, around and under a 70 year old kahikatea tree, are also separated by a very acute bend. They are to be made of timber and as they would be wet for a great deal of time in winter and spring would cause anyone in a wheelchair a great deal of trouble trying to get traction or in braking.

- 4.3 The authority provided a copy of the building consent and supporting documentation.

#### **The first draft determination**

- 4.4 A first draft determination was provided to the parties for comment on 3 March 2010.
- 4.5 The applicant accepted the draft determination on 14 March 2010. The applicant and confirmed her agreement that the proposed building does not comply with the Building Code in that it would not provide reasonable, adequate, safe or easy access. The applicant also provided further information about:

- the impact of the shading provided to the ramps
- the disparity between the routes
- the details of the design and configuration of the lower floor facilities that would provide difficulties for people with disabilities.

- 4.6 In response to the draft determination, the authority made a submission dated 2 April 2010 that explained:
- it had granted the building consent because it was satisfied on reasonable grounds that all the proposed works complied with the Act and Building Code requirements and the consent had been processed by an accredited building consent authority

- ‘...there were omissions related to the slip resistance of the ramps but these would have been captured in the compliance phase of the development and before issue of the code compliance certificate’
- the design does meet ‘the requirement to be reasonable and adequate as the ramp lengths and design are as per the minimum requirements of the acceptable solution and as both able bodied and [people with disabilities] are required to travel via the exterior of the building to use the lower level...’
- ‘The measures are to meet the objectives, functional and performance requirements of the Building Code D1 and G1...’.

4.7 The applicant responded to the authority’s submission dated 2 April 2010. The applicant made a number of comments to reinforce her views expressed in her previous submission, and in particular disagreed with the authority’s view that the ramps may not be affected by debris from the nearby vegetation and commented that the proposed ramps would be slippery because they would be affected by shading at the site and the build up of algae and debris.

4.8 In response to the draft determination, ODI agreed with the draft determination and noted that ‘the proposed building does not comply with the relevant clauses of the Building Code ...’

### **The hearing**

4.9 I held a hearing in Howick on Wednesday 19 May at the request of the authority. In attendance at the hearing was the applicant, representatives of the community board, representatives from the authority both in its capacity as the owner of the building and the building consent authority, a representative of the trust that provides the community and cultural services associated with the building, representatives of the Department, including a referee engaged under section 187 and the expert (refer to paragraph 1.7). The hearing included a site visit.

4.10 The authority and owner presented information about the background to the dispute and the design of the building, including:

- the compliance of the design of the building with D1/AS1 and therefore with Clause D1
- the limitations of the design of the building due to the conditions of the resource consent
- the application of the District Plan and the Management Plan for the reserve
- the background to the views of the community
- that a ramp will always be longer than the equivalent set of stairs and this does not mean the ramp does not comply with the Building Code requirements.

4.11 These matters were discussed with input from all the parties and I have taken account of the information and discussions in preparing this determination.

## **The second draft determination**

- 4.12 A second draft determination was provided to the parties for comment on 9 June 2010.
- 4.13 In the second draft determination, I commented on the design constraints and noted the following points:
- The test of whether it is a new or altered building in terms of what is required constrains the design of the building. If it was an alteration to an existing building, then section 112 of the Act would apply, and would trigger the ‘as nearly as is reasonably practicable’ test for the matter of the provision of access for people with disabilities.
  - The location of the toilets in the building is a design constraint. The currently proposed location provides design challenges in meeting the requirements of the Building Code. Other options the parties may consider include providing sanitary facilities on the upper floor, providing a lift to give access to the lower floor, providing sanitary facilities outside the building (e.g. free standing or in the house).
- 4.14 The applicant accepted the second draft determination. The applicant noted that at the hearing a video was shown that demonstrated the difficulty caused by wet ramps.
- 4.15 The owner accepted the second draft determination and put forward the option of a proposed alternative solution, consisting of a 1400mm by 1100mm sized lift, noting the lift would be of a reduced size due to the limited use of the building, the small size of the building, and the cost of trying to put in a full sized lift.
- 4.16 The applicant agreed with the idea of installing a lift, however, felt a 1400mm by 1400mm sized lift would be more appropriate.

## **5. The expert’s report**

- 5.1 As mentioned in paragraph 1.7, I engaged an independent expert to provide an assessment of whether the proposed building complied with the Building Code with respect to the provision of access and facilities for people with disabilities. The expert is a member of the New Zealand Institute of Architects with specialist expertise in accessibility matters. The expert provided a report assessing the situation dated 29 January 2010.
- 5.2 With respect to the Building Code, the expert noted that there is one functional requirement and three performance criteria of Clause D1 and one performance criteria of Clause G1 that are directly relevant:
- D1.2.1 – ‘Buildings shall be provided with reasonable and adequate access to enable safe and easy movement of people.’
  - D1.3.2(c) – ‘At least one access route shall have features to enable people with disabilities to 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(c) – ‘Access routes shall have a safe cross fall, and safe slope in the direction of travel.’
  - D1.3.3(d) – ‘Access routes shall have adequate slip-resistant walking surfaces under all conditions of normal use.’

- G1.3.3 – ‘Facilities for personal hygiene shall be provided in convenient locations.’
- 5.3 D1/AS1 is silent on curved ramps, however, the expert noted that curved ramps place additional physical demands on a person controlling a wheelchair, and these demands must be compensated for in the design of a curved ramp. NZS 4121<sup>3</sup> states ‘If a curved or circular ramp is provided it needs to adequately address the relationships of gradient, radius and width.’ The expert was of the view that while the top curved ramp was of a gentle gradient the design of the lower ramp was not adequate as it has a tight turn at the bottom end.
- 5.4 The expert noted that there are no specific requirements for the route to be covered, however, with respect to the slip resistance of the proposed ramps adequate slip-resistant walking surfaces are required under all conditions of normal use. The expert was of the view that the conditions of normal use to be considered in this case includes the shading provided by the surrounding vegetation and proposed building, the exposure to the elements including rain, the build-up of vegetation litter and algal growth on the ramps, the removal of surface moisture, and the ability of the ramp surfaces to dry out under natural conditions.
- 5.5 The expert noted that neither Acceptable Solution D1/AS1 nor compliance document NZS 4121 place specific limitations on the maximum length of an accessible route. However, the proposed accessible route provides neither safe nor easy movement as required by the performance requirement Clause D1.2.1.
- 5.6 The expert also noted that the accessible sanitary facilities have not been provided in a convenient location in accordance with Clause G1.3.3.
- 5.7 Therefore, the expert found that the proposed accessible route did not meet the requirements of Clauses D1 and G1.
- 5.8 The expert also noted that the Management Plan for the gardens and the District Plan had been used as reasons to limit the footprint of the building and to justify the configuration of the building, but the Act is not concerned with restrictions on the size of the building because of a Management Plan or the District Plan and decisions made under other statutes are no reason to allow non-compliance with the Building Code.
- 5.9 The expert also assessed the compliance of the specific features of the proposed accessible route with D1/AS1 and NZS 4121 as follows:

Feature	Requirement	D1/AS1 Clause	Compliant	NZS 4121 Clause	Compliant
Cross fall	1:100 to 1:50	Clause 1.2.2	Complies	Clause 6.1(b)	Complies
Slope	1:12 maximum	Clause 3.1.1	Complies	Clause 6.4.2.2	Complies
Rise between landings	750mm maximum	Clause 3.3.1	Complies	Clause 6.5.1	Complies
Length of landings	1200mm maximum	Clause 3.3.3	Complies	Clause 6.5.2	Complies

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<sup>3</sup> New Zealand Standard NZS 4121: 2001 Design for access and mobility: Buildings and associated facilities

Feature	Requirement	D1/AS1 Clause	Compliant	NZS 4121 Clause	Compliant
Surface slip resistance in the wet	Acceptable slip resistances from Table 2 as follows:	Clause 3.1.4		Clause 4.6.1	Does not comply (requires compliance with D1/AS1)
	Profiled timber, sloping	Test	Does not comply as testing results not provided		
	Profiled timber, across profile, level	Acceptable	Complies		
	Profiled timber, along profile, level	Not acceptable	Does not comply		
	Cobblestones, level	Acceptable	Complies		
	Exposed rounded aggregate, sloping	Test	Does not comply as testing results not provided		
	Exposed crushed aggregate, sloping	Acceptable	Complies		
	Exposed rounded aggregate, level	Test	Does not comply as testing results not provided		
	Exposed crushed aggregate, sloping	Acceptable	Complies		
Ramp shape	A curved ramp needs to adequately address the relationships of gradient radius and width.			Clause 6.4.1	Does not comply

### Responses from the parties to the expert's report

- 5.10 In response to the expert's report, the authority, in its role as the owner of the building, provided a revised design for the proposed building in order to address the findings of the expert. The revised design ("the revised proposed accessible route") replaced the curved sections of the ramps with two straight ramps, with a landing in between and square plastic mesh has been specified for the surface of the timber ramp and landing areas, and exposed crushed aggregate paving has been specified for the concrete ramps and landings.
- 5.11 In response to the authority's submission, the applicant commented that the revised proposed accessible route does not address the issue of easy, safe, and convenient access.

## 6. Discussion

### The requirements for access and facilities for people with disabilities

- 6.1 The underlying aim of the Act is to ensure that new and existing buildings meet the performance requirements in the Building Code with respect to the provision of access and facilities for people with disabilities. The emphasis on the requirement to provide access and facilities for people with disabilities is evident in the various provisions relating to the requirements (refer to sections 3, 4, 67, 69, 112, 115, 118 to 120, 170, and 176 of the Act). I also note that NZS 4121 is the only New Zealand Standard that is incorporated by reference into the Act.
- 6.2 The provisions relating to access and facilities for people with disabilities are key features of the Act, and new buildings which people with disabilities could be expected to visit or work must have reasonable and adequate provision made so people with disabilities can carry out normal activities and processes in the building.



- 6.3 The proposed building is a building that requires the provision of access and facilities for people with disabilities, in accordance with section 118 and paragraphs (n) and (z) of Schedule 2 of the Act.
- 6.4 As such, the building comes within the ambit of Clauses D1.1(c) and G1.1(c), which require that people with disabilities are able to carry out normal activities and processes within the building and:  
Clause G1.3.3 requires that:  
‘Facilities for personal hygiene shall be provided in convenient locations.’  
Building Code Clause D1.3.2(c) requires that:  
At least one access route shall have features to enable people with disabilities to:  
(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”.
- 6.5 The performance requirements for Clause G1 are such that the sanitary facilities must be:
- in sufficient number and appropriate for the people who are intended to use them
  - provided in convenient locations
  - accessible for people with disabilities.
- 6.6 I take the view that the word ‘convenient’ in the Clause G1.3.3 must be given its ordinary and natural meaning. The Collins Concise English Dictionary defines ‘convenient’ as:
- 1 suitable for one’s purpose or needs; opportune
  - 2 easy to use
  - 3 close by or easily accessible; handy
- 6.7 I consider that these meanings are appropriate to the context of ‘convenient locations’ in Clause G1.
- 6.8 In deciding whether a particular location is convenient, account needs to be taken not only of the distance, but also of the nature of the route of travel, and in particular whether it is smooth and level and whether it is exposed to the weather.
- 6.9 I note the comments of the expert, who is of the view that a person in a wheelchair would face difficulties in traversing the 58 metre proposed accessible route. The difficulties include the ease of use of the proposed accessible route, which is an exterior route and unprotected from the weather, and the time required to travel to and from the sanitary facilities because of the length of the route that is required to be made up of ramps with a 1:12 maximum slope that cover a vertical distance between the floors of the building of 2.8 metres.
- 6.10 I am of the view that the accessible sanitary facilities are therefore not in a ‘convenient location’ in accordance with Clause G1, because of the difficulties that would be faced in traversing the proposed accessible route.
- 6.11 I also note that in respect of the revised proposed accessible route, square plastic mesh is noted on the timber decking. That is not one of the surface finishes noted in Table 2 of D1/AS1, so compliance with D1/AS1 has not been achieved in respect of the slip resistance to the ramps. No information has been provided as to how that surface finish will provide adequate slip resistance under all conditions of normal use.

### **The resource consent**

- 6.12 I note that the limitations of the resource consent for the proposed building have been used as the reason for the configuration of the building. It appears that the resource consent that was obtained for the project has been driven by a number of factors, including the District Plan and the Management Plan for the site as well as local considerations.
- 6.13 The resource consent that was obtained imposes conditions on the footprint of the building.
- 6.14 The Building Act does not permit a waiver or modification from the provision of access and facilities for people with disabilities in a new building. However, the authority is of the view that in order to comply with the resource consent, a lesser standard of compliance with the Building Code may have to be permitted. It is my view that the limitations of the Management Plan or the resource consent that has been granted are not reasons to allow non-compliance with the Building Code.
- 6.15 It is my view that there are solutions available for this building that would comply with the Building Code.

### **Conclusion**

- 6.16 As provided for 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.
- 6.17 Accordingly, as I have found that the proposed building does not comply with Building Code Clauses D1 and G1, it is my view that the building consent was incorrectly issued.

### **The proposed lift**

- 6.18 With respect to the owner's suggestion that a 1400mm deep by 1100mm wide lift be considered as a proposed alternative solution and the building consent amended, I comment as follows:
- NZS 4121 is an Acceptable Solution only, and must be read against the performance requirements of Clause D1. NZS 4121 makes specific provision for lifts used in alterations to be of the size proposed.
  - The very limited size of the building, together with the limited number of levels, would suggest that a lift with dimensions of 1400mm by 1100mm would still enable the building to comply with Clause D1.
  - The 1400mm by 1100mm is a standard ISO sized lift. Both the British and Australian standards require lifts to be a minimum of 1400mm by 1100mm for wheelchair users.
  - In this case, it would be reasonable to accept the proposed lift as an alternative solution complying with Clause D1 and amend the building consent accordingly, provided the other requirements of NZS 4121 with respect to lift cars are met.

## **7. Decision**

- 7.1 In accordance with section 188 of the Act, I hereby determine that the proposed building does not comply with Building Code Clauses D1 and G1, and therefore I reverse the decision of the authority to issue a building consent.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 30 July 2010.

John Gardiner  
**Manager Determinations**

## Appendix: The legislation

The relevant provisions of the Building Act are:

### **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.

### **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.

### **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:

- (n) libraries, museums, art galleries, and other cultural institutions;
- (z) other buildings, premises, or facilities to which the public are to be admitted, whether for free or on payment of a charge.

The relevant provisions of the Building Code are:

### **Clause D1**

#### **OBJECTIVE**

**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.

#### **FUNCTIONAL REQUIREMENT**

**D1.2.1** Buildings shall be provided with reasonable and adequate access to enable safe and easy movement of people

#### **PERFORMANCE**

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

- (b) Have access to the internal space served by the principal access, 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".

### **Clause G1**

#### **PERFORMANCE**

**G1.3.3** Facilities for personal hygiene shall be provided in convenient locations.