



Determination 2013/039

Regarding the provision of access from the seawall at The Esplanade, St Clair, Dunedin to the adjacent beach



1. The matter 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 and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to the determination are:

- the Dunedin City Council, as the owner of the seawall, acting through its Transportation Operations branch (“the applicant”)
- the Dunedin City Council, carrying out its duties as a territorial authority and building consent authority, acting through its Building Controls section (“the authority”)

1.3 This determination arises due to the applicant’s proposal to remove three flights of steps and the ramp that provide access from the top of the seawall to the beach at St Clair, Dunedin, and the authority’s opinion that if this were to occur the seawall would not comply with Clause D1 of the Building Code as it relates to access for people with disabilities.

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

- 1.4 I therefore take the view that the matter to be determined² is whether the seawall, if its steps and ramps are altered as proposed, will comply with Clause D1 of the Building Code.
- 1.5 In making my decision, I have considered the submissions of the parties, the report of an independent expert (“the expert”) commissioned by the Ministry to advise on this dispute, and the other evidence in this matter.
- 1.6 I have forwarded a copy of this draft determination to the Office for Disability Issues, at the Ministry of Social Development, by way of consultation under section 170 of the Act.

2. The building work

- 2.1 The proposed building work involves making alterations to an existing seawall at St Clair in Dunedin.
- 2.2 The seawall, which spans the beachfront in the suburbs of St Clair and St Kilda, protects the city from erosion and inundation by the sea and was built in 2004 to replace an older wall. It includes four sets of steps (each with two flights) and a ramp which provide access from The Esplanade down to St Clair beach, a vertical distance of approximately 4.6m.
- 2.3 A code compliance certificate for the completed seawall was applied for in September 2007. The authority declined this on 12 October 2007, due to various remedial works that needed to be completed before the certificate could be issued. I do not know if these works were ever done, but no code compliance certificate was issued.
- 2.4 Since the seawall was constructed, two sets of steps and the ramp have been badly damaged leading to structural failures, mainly due to the action of the sea. The ramp is currently unusable as a result.
- 2.5 The proposed alterations involve removing the damaged ramp and one set of stairs, with the remaining damaged stair being altered so that only one flight remains leading down to the beach. This work will include making good any gaps in the barrier at the top of the seawall.

3. Background

- 3.1 The applicant intends to apply for an amendment to the original building consent for the seawall, to enable the ramp and one set of damaged steps to be removed, and the remaining set of steps to be reduced to one flight.

² Under sections 177(1)(a) of the Act

- 3.2 The applicant and authority have discussed this proposal, and the authority has indicated that it will not accept the amendment on the grounds that if the ramp is removed the seawall will not comply with the provisions of the Building Code and Building Act 2004 as they relate to access for people with disabilities.
- 3.3 The applicant's position is that section 118 of the Building Act (applicant's emphasis shown):
- ... only requires "**reasonable**" access for "*persons with disabilities who may be expected to – (a) visit or work in that building*". This would only require such access to be provided to locations that people with disabilities are **expected** to visit (i.e. the top of the wall) but not to the beach, which is inaccessible to people in wheelchairs. It would only be **reasonable** to require provision of access appropriate for someone that can also navigate the beach environment.
- 3.4 The applicant contends that the top of the seawall is fully accessible to people in wheelchairs, and that the remaining two flights of stairs (unaffected by the proposed alterations) comply with the requirements of Clause D1 of the Building Code, in that 'they are specially designed to be accessible to persons, including those with some forms of disability, that can be reasonably expected to also access the beach'.
- 3.5 The authority does not agree with the applicant's position, stating that that 'access and facilities for people with disabilities needs to be provided'.
- 3.6 The applicant applied for a determination on the matter and this was received by the Ministry on 19 November 2012.

4. Submissions

- 4.1 The applicant originally applied for a determination about whether 'the steps and ramp from the top of the wall to the adjacent beach' complied with the Building Code (among other things). The expert (see paragraph 5) subsequently clarified this with the applicant, who confirmed that it was seeking a determination about whether, 'if the ramp is removed will the seawall still comply with Clause D1 of the Building Code?'
- 4.2 The applicant's view was summarised in the application that:
- ... this particular beach environment places a high demand on the physical capabilities of people entering it...[It] includes a number of risks that make it unsuitable for a significant section of the population, and as such, it is unreasonable to provide access for people that are unable to cope with the access provided over the existing steps that meet the requirements of NZS 4121^[3].
- 4.3 The applicant provided copies of:
- correspondence between the parties
 - photos of the current seawall, including the steps and ramp
 - a plan of the wall as it was before the building work in 2004

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

- plans for the 2004 construction of the current wall
- plans for the proposed changes to the current seawall, dated 2013.

4.4 The authority did not make a submission in response to the application, but noted in a later email to the Ministry that '[the authority considers] the seawall to be a new building and as such needs to be fully accessible'.

4.5 The draft determination and submissions

4.5.1 A draft determination was sent to the parties and ODI for their comment on 23 April 2013. The draft concluded that it would not be reasonable to require access be made for those who would then be physically unable to get off the ramp and negotiate the beach itself and therefore a ramp was not required, but that the remaining stairs did not comply with Clause D1.3.4(i) as an accessible route.

4.5.2 ODI forwarded comment by way of a letter dated 15 May 2013, suggesting that
Incorporation of a ramp would facilitate reasonable and adequate access for **any** people who may be expected to visit or carry out normal activities and processes at the beach. As such, incorporation of a ramp would be good practice.

4.5.3 A response was received from the authority on 16 May 2013 accepting the draft without further comment. No separate response was received from the applicant and the authority verbally confirmed that it's response was on behalf of the applicant also.

5. The expert's report

5.1 As noted in paragraph 1.5, I engaged an expert to assist me. The expert is a member of the New Zealand Institute of Architects. The expert was engaged to review the documentation and provide a report about the proposed building work. The expert made a site visit to the seawall on 29 January and provided a report dated 11 March 2013, a copy of which was sent to the parties the same day.

5.2 The expert's report provided an overall description of the beach environment, the seawall and access in its current condition, and the proposed changes.

5.3 The expert noted that the intended use of the ramp and stairs is to provide access to and from the beach and therefore anyone using that access would have the intention to use the beach. The expert described the beach as a 'physically challenging as well as an environmentally dynamic place' and noted that beach environment included:

- large variations in beach sand level (in the order of 1.5m)
- soft sand
- exposed rocks
- the beach was fully inundated at high tide or during rough seas.

5.4 The expert was of the opinion that a person using a wheelchair could not use the beach under normal or usual conditions, and it would be unlikely they could do so

unaided (as required by the definition of ‘accessible route’). The expert also noted that the transition from a ramp to the beach, where there is large variation in sand levels and the presence of rocks and/or soft sand, would most likely preclude a person using a wheelchair from accessing the beach itself.

- 5.5 The expert considered that an ambulant person with a disability ‘may well be able to negotiate the beach on a regular basis’, however, in regard to the compliance of stair access the expert noted that handrails to three of the stairs stopped short of the last tread and on another the extensions were not of the correct configuration, and accordingly did not comply with Clause D1.3.4(i). The expert commented on the large variation in beach condition and sand levels at the base of the stairs and noted that ‘it is a challenging proposition to provide compliant handrails that will provide the necessary guidance and support to ambulant people with disabilities...’
- 5.6 The expert concluded that the ramp was not required for the seawall to comply with Clause D1 to the extent required by the Act, but that the handrails do not comply with Clause D1.3.4(i). The expert considered that Clause D1.3.2 would require only one of the sets of stairs be made compliant for ambulant people with a disability.

6. Discussion

- 6.1 The parties are agreed that the seawall, including the proposed alterations, is a building to which section 118 of the Act applies. The parties also agree that it is a ‘new building’ and that section 69 of the Act does not apply to the work.
- 6.2 The matter at issue is whether ‘reasonable and adequate access’ is to be provided for people with disabilities from the top of the sea wall to the beach if the proposed alterations are completed. There is no dispute about the sufficiency of access to the top of the seawall; it is the adequacy of the “access-ways” (ramp and steps) from the top of the seawall to the beach, once altered, which is at issue.
- 6.3 The relevant provision is section 118 of the Act, which reads:
- 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.
- 6.4 Section 16 of the Act states that buildings must comply in their “intended use” with the Building Code. The intended use of the various access-ways is to provide access to and from the seawall and the beach, and the intended use of the ramp would be the provision of an accessible route for people with disabilities.
- 6.5 I note that ‘reasonable and adequate access’ is not defined in the Act, however Clause A2 of the Building Code defines “adequate” as being adequate to achieve the objectives of the Building Code, therefore assessment is against the performance requirements set out in Clause D1.

- 6.6 Clause D1.3.2 requires that at least one access route shall have features to enable people with disabilities to approach the building from the street boundary, have access to the internal space served by the principal access, and have access to and within those spaces where they may be expected to work or visit. Clause D1.3.3 sets out the requirements for Access Routes, and Clause D1.3.4 sets out the additional requirements for Accessible Routes.
- 6.7 I accept the expert's assessment that St Clair beach is a physically challenging and environmentally dynamic place, and that this particular beach environment, includes large variations in the beach's level to the extent that at times the bottom of the steps and the previously constructed ramp rest on soft sand; at times they give access onto rocks; at times they are left some distance above the beach; and during full tides they and the beach are covered by the sea.
- 6.8 It is my view that persons visiting that particular beach will only be able to carry out "normal activities and processes" on the beach if they are physically capable of negotiating the beach environment, which is comparatively difficult. I note that people with a disability, including many with ambulant disabilities, would find it very difficult to use the beach once on it.
- 6.9 For these reasons, I hold the view that 'reasonable and adequate provision' for access to the beach for people in wheelchairs is not required under section 118 of the Act. I therefore conclude that a ramp is not required, and that in this respect the proposed alterations to the seawall comply with Clause D1 of the Building Code.
- 6.10 In addition an accessible route must also be a route that can be negotiated unaided by a person using a wheelchair. In this case, given the vertical drop of approximately 4.6m, compliance with the Acceptable Solution D1/AS1 would necessitate a ramp in the order of 60m in length with sufficient width to enable a person using a wheelchair to turn as this manoeuvre would not be able to be carried out on the beach itself. It is a questionable whether a ramp of this length which requires strength and stamina to safely use would be considered a route that is easily used by wheelchair users: the length of a ramp as an accessible route was considered in Determination 2010/066⁴.
- 6.11 For those with ambulant disabilities that leaves access to the beach via the flights of stairs. Even after the three damaged flights are removed, there will be five flights leading from the top of the seawall to the beach.
- 6.12 As far as I am aware, the code compliance of these stairs, and the proposal to remove some of them, is not in dispute between the parties. This includes compliance with the provisions in clause D1 relating to accessible routes. However, I draw attention to the expert's report in which he concluded that the handrails on the steps down to the beach do not comply with Clause D1.3.4(i) of Building Code, because they are not continuous.

⁴ Determination 2010/066: The provision of access and facilities for people with disabilities to a new building at the Emilia Maud Nixon Garden of Memories

- 6.13 I note here that, in reaching my decision, I have not considered other aspects of the code compliance of the seawall or the proposed alterations. In particular, I have not considered the durability, or otherwise, of the structures and elements involved. The parties should consider these matters when proposing and making changes to the building consent. I note also that at the time of writing the seawall has suffered significant storm damage and that the scope of the proposed building work may well have altered.

7. The Decision

- 7.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the proposed seawall with the ramp removed would comply with the requirements of the Building Act. However, the seawall does not comply with Clause D1.3.4(i) with respect to the stairs as an accessible route.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 15 July 2013.

John Gardiner
Manager Determinations and Assurance

Appendix A: The relevant legislation

A.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.

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:

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

A.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.

Adequate means adequate to achieve the objectives of the building code

Clause D1—ACCESS ROUTES**PERFORMANCE**

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...

D1.3.3 Access routes shall:

- (j) have smooth, reachable and graspable handrails to provide support and assist with movement along a stair or ladder...

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

- (i) have handrails on both sides of the accessible route when the slope of the route exceeds 1 in 20. The handrails shall be continuous along both sides of the stair, ramp and landing except where the handrail is interrupted by a doorway.