



Determination 2014/040

Regarding the issue of a building consent and subsequent amendments in respect of access for people with disabilities to a new swimming pool at the Coastlands Aquatic Centre, Paraparaumu

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
- D Shaw, acting via an agent, and P Curry on behalf of the Wellington Paraplegic and Physically Disabled Trust (“WPPDT”), (together “the applicants”) as persons with a direct interest in the matter
 - Kāpiti Coast District Council, carrying out its duties as a territorial authority and building consent authority, acting through its Building Controls section (“the authority”); and in its role as the building owner, acting through the Aquatic Facilities Manager for the aquatic centre.
- 1.3 I have also forwarded a copy of the draft determination to the Office for Disability Issues (“ODI”), at the Ministry of Social Development, by way of consultation under section 170 of the Act.
- 1.4 This determination arises from the construction of an aquatic centre that was provided with a hoist (“the hoist”) and a set of removable stairs as the means of access for people with disabilities to the main swimming pool. After construction a removable ramp was installed. The applicants hold the view that without a ramp the pool did not comply with section 118 of the Act nor Clause D1² of the Building Code (Schedule 1 of the Building Regulations 1992) and accordingly that the building consent was incorrectly issued.

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.

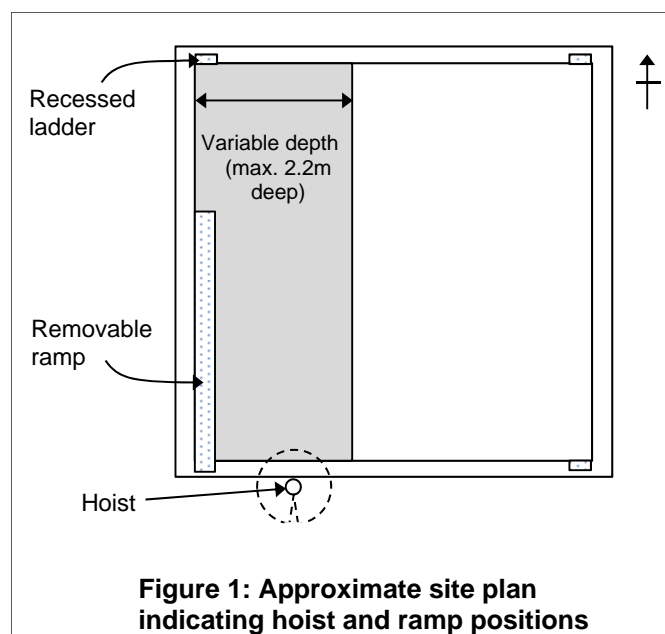
² In this determination, unless otherwise stated, references to sections are to sections of the Act, and references to Clauses are to Clauses of the Building Code.

- 1.5 The matter to be determined³ is therefore the exercise of the authority's powers of decision in issuing the building consent and subsequent relevant amendments in respect of the provision of access for people with disabilities to the main pool at the Coastlands Aquatic Centre.
- 1.6 In making my decision, I have considered the submissions of the parties, ODI, and the other evidence in this matter. I have not considered the requirements of the Act or the Building Code in relation to any other aspects of the aquatic centre.
- 1.7 The Kāpiti Coast District Council, as owner of the facility, applied for a determination on whether the pool complies with Clause D1 to the extent required by section 118 in respect of the use of a hoist, removable ramp, and removable stairs. That matter forms a separate determination (2014/038)⁴ and is not considered further in this determination.
- 1.8 The matter of access into the main pool has previously been the subject of mediation through the Human Rights Commission. I have no jurisdiction under other enactments and this determination considers only building matters relating to the Building Act and its Regulations.
- 1.9 The relevant sections of the Act, clauses of the Building Code, and paragraphs from NZS 4121⁵ discussed in this determination are set out in Appendix A.

2. The building work

- 2.1 The aquatic centre has three pools: the main swimming pool, a 'programmes' pool, and a small 'toddlers' pool.

- 2.2 The main swimming pool (access into which as described in the consent documentation is the subject of this determination) is approximately 25m x 25m with three sets of recessed ladders. A portion of the pool floor is able to be varied in depth; it can be raised to the height of the surrounding floor level or lowered to 2.2m. The remainder of the pool is 2.4m deep with a 3m sloping section that connects the variable and fixed floor sections. (Refer figure 1 adjacent.)



³ Under sections 177(1)(b) and 177(2)(a)

⁴ Determination 2014/038: Regarding compliance of access for people with disabilities to a new swimming pool at the Coastlands Aquatic Centre, Paraparaumu (*Ministry of Business, Innovation and Employment*) 8 September 2014

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

- 2.3 I have taken the side of the pool where the hoist is installed as being the southern end. The hoist is positioned approximately 6m along the south pool wall (typically in the third lane across). The hoist has a solid bucket seat, a lifting capacity of 150kg, and a push button control allowing it to be operated by the user. It rotates 360° and the seat of the hoist can be lowered to a short distance below the water.
- 2.4 The removable ramp is approximately 15.4m long and 1.2m wide, with a 1:12 slope, a non-slip surface, and handrails on both sides that run the full length of the ramp. There is a 1.2m landing located 9m down the ramp. When in use the ramp is positioned along the west wall of the pool. The ramp is constructed in sections and is on wheels; it is able to be removed from the pool when the moveable floor is raised to the height of the surrounding floor level. When not in use the sections of the ramp are stacked and stored in a nearby bay on the pool concourse. Aquatic wheelchairs are available at the centre for people who use wheelchairs to use to enter the pool by way of the ramp.
- 2.5 In general use the swimming lanes in the main pool run north/south and the ramp is in place with the variable floor depth at 1.2m. The lanes painted on the pool floor run east/west. The start blocks are located along the eastern edge of the pool.
- 2.6 The main pool is largely used by members of the public, swim clubs and schools. Normal activities in the main pool include lane swimming, learning to swim programmes, aqua-jogging/walking, and activities such as aquatic fitness classes. During the school holiday period there are also activities catering to children.
- 2.7 The programmes pool is 9m x 15m and in a separate room from the main pool. It has a sloping floor from 0.7m to 1.2m and a permanent ramp at the southern (shallow) end of the pool. Normal activities in the programmes pool include learning to swim programmes and other scheduled activities for children and adults. The temperature of the water in the programmes pool is 32 degrees, which is warmer than the main pool.
- 2.8 At the time of the application for determination, current management of the facility's schedule included removing the ramp once a week and repositioning the lanes to east/west to allow for the moveable floor to be lowered to its deepest setting and the pool used for training by groups of competitive swimmers for a fixed period of time. The Aquatic Facilities Manager has stated that removal/installation of the ramp and reconfiguring the pool takes approximately 45 minutes.
- 2.9 The stairs, initially installed before the ramp, were used at times when the ramp was removed but the floor remained at 1.2m depth. The stairs are 5m long, have 120mm risers, 500mm deep treads, and handrails on both sides for the full length of the stairs

3. The background

- 3.1 The supporting documentation dated 22 September 2011 provided for the building consent stated the means of compliance for clause D1 as being NZS 4121. There were no drawings or specifications showing features giving access into the main pool for people with disabilities.

- 3.2 On 2 December 2011, the authority issued building consent No. 110466 for the aquatic centre building and the associated pools and plant.
- 3.3 An amendment to the consent was applied for on 23 May 2013, the drawings for which indicate a hoist to the main pool, and the pool opened in August 2013.
- 3.4 On 4 July 2013 the authority issued a certificate of public use, and on 10 August 2013 the aquatic centre was opened with a hoist in place and a set of removable stairs to the main pool. No amendment to the consent was made to include the stairs or hoist and the stairs were removed when the ramp was installed.
- 3.5 On 7 September 2013 the authority granted an amendment to the building consent (11046C) for construction of a new removable ramp to provide for access to the main pool. The ramp was installed at some time in February 2014.
- 3.6 On 28 February 2014 the authority granted an amendment to the building consent (110466D) for the installation of the hoist. The hoist had already been installed and the purpose of the amendment was 'to align the documentation with the as-built work'.

4. Submissions

- 4.1 The Ministry received an application for a determination from the agent on 8 April 2014. The agent had previously made a submission in respect of Determination 2014/038 on the access features (the hoist, removable ramp and stairs), and I have summarised points raised in that submission that relate to the matters under consideration in this determination as follows:
- The aquatic centre and associated main pool is a new building; people with disabilities are clearly expected and entitled to use the pools and accessibility must be provided for them to carry out normal activities at the centre.
 - A ramp into the main pool had been included in the architect's planning design, discussions, public meeting minutes and reports and accessibility audits.
 - It is unclear on what basis the consent was granted, whether it was on the basis of there being ramp access to the main pool or there being a moveable hoist shared between the spa and main pool.
 - If the recommendation in NZS 4121 (i.e. a ramp) was not the basis for consent approval, what was the provision for 'reasonable and adequate access' to the main pool that was given in the consent application?
 - An email from an officer of the authority (on 15 January 2013) stated that 'we have aimed to provide access for people with a range of disabilities but have not designed the pool to enable unaided access for those without the ability to walk'.
- 4.2 The agent also noted, on behalf of the applicant she is representing, that the applicant found stairs into the pool extremely difficult to use and that the provision of only the hoist or stairs had been a barrier to her using the pool. The agent also commented that the applicants had little information about the authority's process in granting the

building consent and requested the Ministry ascertain ‘the details and exact basis on which the application for building consent was made and granted’.

4.3 The authority provided a submission dated 1 May 2014 which included an outline of the building consent and amendments granted. The points raised in the authority’s submission were as follows (in summary):

- The consent application was for the complex in its entirety and not only for the main pool. The application stated the means of compliance as NZS 4121; the standard is not the only way to show compliance with the Building Code.
- While the application did lack some detail regarding access to the main pool and how compliance was to be achieved, the authority believes the complex does comply with the objective, functional and performance requirements of Clause D1. The objective considers “building” as defined under section 8 of the Act, rather than a part of the building such as the main pool.
- The authority is of the view that the amendments (110466C and 110466D) provide ‘phased clarification’ on the way that access to the main pool is provided.
- The certificate of public use was issued on the basis that the authority was satisfied on reasonable grounds that members of the public could use the building safely.

4.4 The authority provided copies of documentation related to BC110466, and the amendments 110466C and 110466 D. I have noted those documents that include reference to the accessibility as follows:

BC110466

- A request for information (“RFI”) dated 1 September 2011, which included 16 items regarding accessibility (none involving access into the pool).
- An undated handwritten list which included as item #7 ‘Main Pool? Access for Disabled.’ (I note that many items on this list appear in an RFI dated 6 September 2011; however the question over access to the main pool is not included in that RFI).
- A processing checklist with annotated list regarding accessibility and a notation dated 5 October 2011 in regards to accessibility issues that stated ‘all items rectified or revised except the following two items [which related to the fire report and a handrail to the bleachers]’
- A ‘dialogue record’ which notes dates of correspondence, meetings and telephone conversations between 5 August 2011 and 26 October 2011, and which was ‘signed off’ by an officer of the authority on 14 October 2011 that the plans comply with the Building Code in respect of accessibility.

110466C (for the removable ramp)

- A processing checklist which notes four items requiring attention and an RFI dated 14 August 2013 addressed to the architect.

- A ‘dialogue record’ which noted the date of the RFI and a telephone conversation with the architect in which the outstanding issues were discussed in detail, and that a complete set of revised drawings was subsequently received.

110466D (for the hoist)

- One page from the application for amendment, noting further information requested was received.

4.5 On 5 May 2014 I sought further information from the authority in respect of whether design features for access into the main pool were included in the drawings or specifications that accompanied the building consent application. The authority responded on 12 May 2014 noting that there was no detailed design in the original consent documentation, but that:

the installation of a hoist was being discussed at that time and it was understood one was going to be installed to facilitate access to the water at the main pool

4.6 The first draft determination

- 4.6.1 A draft determination was issued to the parties and ODI on 12 May 2014.
- 4.6.2 The authority and WPPDT both responded by email on 21 May 2014, accepting the draft without further comment.
- 4.6.3 The response from the agent acting on behalf of the other applicant was received on 26 May 2014, and the applicant accepted the draft without further comment.
- 4.6.4 No responses to the draft were received from ODI or from the Aquatic Facilities Manager.

4.7 The second draft determination

- 4.7.1 On review I considered that the first draft was in error. Paragraph 5.11.4 of the first draft stated:
- ... the amendment for the hoist is subsequent to the amendment providing for the removable ramp. Given that the ramp is sufficient to satisfy the access requirements the hoist is an additional means of access, and I consider that the authority was correct in its decision to grant the amendment to the consent.
- 4.7.2 The first draft did not take account of the fact that the amendment to the consent for the hoist was granted after the hoist was installed. I amended the draft determination accordingly (refer paragraphs 5.13.8 and 5.13.9), and issued a second draft for comment.
- 4.7.3 A response was received from ODI by way of email on 7 August 2014; ODI supported the second draft determination.
- 4.7.4 The authority responded on 11 August 2014, accepting the second draft with no further comment.
- 4.7.5 By email on 25 August 2014 WPPDT advised that it had no further comment to make on the second draft.
- 4.7.6 By email on 28 August 2014, the agent acting on behalf of one of the applicants advised no further comment was forthcoming, but requested that relevant content in a submission made by REACT to the Determination 2014/038 be taken into account.

5. Discussion

- 5.1 There is no dispute that the aquatic centre is a building to which section 118 of the Act applies under Schedule 2(p); the centre houses swimming baths to which members of the public are admitted.
- 5.2 The matter at issue is the level of access to the main pool that was described in the consent documentation and in subsequent amendments to satisfy the provisions of Clause D1 to the extent required by section 118 of the Act, and whether the documentation provided sufficient information for the authority to be ‘satisfied on reasonable grounds’ that the building work would comply.
- 5.3 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.
- 5.4 I note that ‘reasonable and adequate access’ is not defined in the Act. Clause A2 of the Building Code defines “adequate” as being adequate to achieve the objectives of the Building Code.
- 5.5 The relevant provisions of the Building Code are as follows:
- 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. (my emphasis)
- D1.2.1 Buildings shall be provided with reasonable and adequate access to enable safe and easy movement of people.
- ...
- D 1.3.1 Access routes shall enable people to:
- ...
- (c) move into spaces within buildings by such means as corridors, doors, stairs, ramps and lifts,
- ...
- 5.6 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.
- 5.7 I do not accept the authority’s view that compliance with Clause D1 is only in respect of the “building” and does not include “part of the building”, in this case the part of the building being the main pool. The provisions of Clause D1 are in respect of access within buildings, and Clause D1.3.1 specifically provides for access routes to enable people to ‘move into spaces within buildings’. In addition the relevant

“normal activities” for this building in terms of section 118 are activities carried out in the pools.

- 5.8 Section 119 states that NZS 4121 is to be taken as a compliance document and the specification supporting the building consent application identified NZS 4121 as the means of compliance. Section 12 of that Standard describes the requirements for access to places of assembly, entertainment and recreation; the only requirement that is relevant to the pool is paragraph 12.3.1.2, which states:

12.3.1.2 Access to the pool

The swimming pool shall be available from an accessible route and unaided access to the water shall be possible from the poolside.

The commentary to this paragraph notes:

C12.3.1.2 A ramp that leads from the poolside into the pool is the preferred means of access to the water. A slope of 1:12 down to a water depth of 1200mm is acceptable

- 5.9 It appears from notations in the authority’s consent processing records for BC110466 that there was a question over the access to the main pool (refer paragraph 4.4). The authority has stated that the question was resolved prior to the consent being issued as the authority was given to understand a hoist would be installed (refer paragraph 4.5) and the authority was of the view that this was sufficient to address accessibility to the main pool. (I note here that whether a hoist alone is sufficient is addressed in Determination 2014/038.) However there are no details recorded and the documentation was not amended to include the hoist prior to the consent being issued.
- 5.10 Although the stated means of compliance was NZS 4121, there were no details provided in the consent documentation as to how people with disabilities would have access into and out of the main pool. Based on the information provided by the parties, I hold the view that there was insufficient evidence in the consent application to be satisfied on reasonable grounds that the building work would comply with the requirements of Clause D1 to the extent required by section 118 of the Act in respect of access to the main pool for people with disabilities.
- 5.11 The issuing of a building consent is a statutory decision authorising building work to be undertaken. While a determination can reverse the decision to issue a building consent, the prejudice to an owner that is likely to occur when a building consent is reversed is a matter requiring careful consideration particularly where the decision to issue the consent has been relied upon. There would need to be compelling reasons to reverse that decision⁶.
- 5.12 In this case I am of the view that as the building work was brought into compliance with the Building Code and the consent has been amended to include a compliant ramp (refer paragraph 5.13.2 below) the decision to issue the building consent should not be reversed.

⁶ Determination 2009/115: Determination regarding a dispute about a house built by one shareholder of a jointly owned block of Maori land at 41 Rarapua Place, Te Puna, Tauranga (*Department of Building and Housing*) 24 December 2009

5.13 The subsequent amendments

- 5.13.1 The aquatic centre opened some eight months after the consent was issued, with a hoist and a set of stairs installed; no amendment was made to the consent at that time to reflect the as-built work.
- 5.13.2 On 7 September 2013 the authority granted an amendment to the building consent (11046C) for construction of a new removable ramp to provide for access to the main pool.
- 5.13.3 There are some concerns regarding the ramp being removable and the reliance on management practices to ensure it is in place when the pool is open to members of the public.
- 5.13.4 I have previously considered management practices in a number of determinations, such as Determination 2011/112⁷ in which I stated:
- 4.4.1 In essence, buildings must comply with the performance criteria in the Building Code in their intended use, and this includes both current and future owners of the property. As a result, management practices cannot be used to achieve compliance (except in limited circumstances dictated by statute), because current owners cannot vouch for the behaviour of future ones.”
- 5.13.5 I note that those previous determinations were in relation to the fencing of swimming and spa pools at private homes. I consider that public swimming pools, and other environments such as early childhood centres, are unique environments with a number of legislative and other requirements that may rely heavily or solely on management practices to, for example, ensure the safety of people using the pools or the safety of the children in the childcare centre. Indeed the Fencing of Swimming Pools Act waives the need for safety barriers to pools where ‘persons are employed and present to provide supervision of the pool whenever the pool is available for use’.
- 5.13.6 In this case with the removable ramp providing access to the main pool, the management practices that relate to the ramp’s removal are an integral aspect of compliance and it is for the owner to provide adequate documentation as to the management practices that will ensure the main pool is accessible to the extent required by section 118.
- 5.13.7 I am of the view that the documentation supporting the amendment 110466C should have included information on those management practices. However, the lack of this information doesn’t concern the scope of the building work covered by the amendment and the work constructing the ramp was carried out in accordance with the consent. Accordingly I consider that the additional information the authority considers necessary and in accord with the conclusions in this determination should be placed on the consent file with this determination.
- 5.13.8 At some point the original hoist that had been installed was removed and a different hoist installed. On 28 February 2014 the authority granted an amendment to the building consent (110466D) for the installation of the hoist; the hoist had already been installed.

⁷ Determination 2011/112 Compliance of a pool barrier with a gate opening inwards to the immediate pool area at 21 Bendigo Grove, Wellington (*Department of Building and Housing*) 22 December 2011.

5.13.9 From my knowledge of the sequence of events it appears that the building work to install the hoist was carried out without consent. I consider the authority incorrectly exercised its powers of decision in granting the amendment for building work that had already been undertaken. The decision to grant amendment to the consent 110466D is reversed by this determination and it is for the owner to apply for a certificate of acceptance to regularise the work carried out without consent.

6. The Decision

6.1 In accordance with section 188 of the Building Act 2004 I hereby determine that

- there was inadequate information in the building consent documentation to be satisfied on reasonable grounds that the building work would comply with Clause D1 of the Building Code to the extent required by the Act under section 118 in respect of access to the main pool, accordingly the authority incorrectly exercised its powers of decision in granting building consent 110466; however given the requirement for access has been satisfied by way of amendment 110466C I have not reversed the authority's decision
- the provision of a ramp complies with Clause D1 of the Building Code to the extent required under section 118 and I confirm the authority's decision to issue amendment 110466C
- the authority incorrectly exercised its powers of decision in granting an amendment for building work carried out without consent and I reverse the authority's decision to issue amendment 110466D.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 8 September 2014.

John Gardiner
Manager Determinations and Assurance

Appendix A

A.1 The relevant sections of the Act

7 Interpretation

person with a disability means a person who has an impairment or a combination of impairments that limits the extent to which the person can engage in the activities, pursuits, and processes of everyday life, including, without limitation, any of the following:

- (a) a physical, sensory, neurological, or intellectual impairment;
- (b) a mental illness

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 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

119 Acceptable solution for requirements of persons with disabilities

(1) This section applies to—

- (a) the New Zealand Standard Specification No 4121 (the code of practice for design for access and use of buildings by persons with disabilities), together with any modifications to that standard specification in force immediately before the commencement of this section; or

...

(2) A standard specification to which this section applies is to be taken as an acceptable solution

A.2 Relevant provisions of the Building Regulations 1992 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.

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

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

D1.3.1 Access routes shall enable people to:

...

(c) move into spaces within buildings by such means as corridors, doors, stairs, ramps and lifts, ...

D1.3.2 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.

A.3 The relevant New Zealand Standard NZS4121:2001

1.5 Definitions interpretation

1.5.1 Definitions

ACCESSIBLE means having features that permit use by people with disabilities.

PEOPLE WITH DISABILITIES means people whose ability to be freely mobile or to access and use buildings is affected by mental, physical, hearing or sight impairment, such as:

- (a) An inability to walk;
- (b) Walking difficulties;
- (c) Reliance on walking aids;
- (d) Partial sightedness or total blindness;
- (e) Hearing disabilities;
- (f) Lack of co-ordination;
- (g) Reaching disabilities;
- (h) Manipulation disabilities;
- (i) Lack of stamina;
- (j) Difficulties in interpreting and reacting to sensory information;
- (k) Extremes of physical size;

(I) Learning difficulties.

12 – Places of assembly, entertainment and recreation

12.3.1.2 Access to the pool

The swimming pool shall be available from an accessible route and unaided access to the water shall be possible from the poolside.

C12.3.1.2 A ramp that leads from the poolside into the pool is the preferred means of access to the water. A slope of 1:12 down to a water depth of 1200mm is acceptable