



Determination 2016/050

Regarding whether proposed alterations to a three-level office building require a lift to satisfy requirements for access and facilities for persons with disabilities at 363 East Tamaki Road, Auckland

Summary

This determination considers whether a lift is required to a three-level office building as part of alterations to the existing building. The determination discusses the requirements of section 118, the effect of unit titles, the performance requirements of Clause D1, and whether there is sufficient information on which to conclude that compliance to the extent required by section 112 is achieved without a lift being installed.

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 this determination are:
 - the owner of the building, East Tamaki Partnership Ltd (“the applicant”), acting through an agent
 - Auckland City Council, carrying out its duties as a building consent authority (“the authority”).
- 1.3 I have also provided a copy of the draft determination to the Office for Disability Issues (“ODI”) at the Ministry of Social Development, as a department with which the Chief Executive must consult under section 170 of the Act.
- 1.4 This determination arises from the applicant’s dissatisfaction with the authority’s decision to not waive the requirement for a lift to be installed in the office building at 363 East Tamaki Road, which is being altered, and the resulting decision against granting building consent for the proposed building work.
- 1.5 The application for this determination referred only to the decision of the authority not to issue a waiver of the requirement to install a lift. In accordance with section 67, the authority cannot grant a waiver of the Building Code relating to access and facilities for use by people with disabilities; under section 69 the Chief Executive may grant such a waiver, but not if it relates to a new building.

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

- 1.6 I note, however, that the authority does have the power to decide whether it is reasonably practicable to require the installation of a lift under section 112 when a building consent is being considered for alterations to an existing building.
- 1.7 I take the view, as I did in Determination 2006/073, that under section 112 a building consent authority has not merely a power but a positive duty to decide whether proposed alterations to a building will achieve compliance with the Building Code as nearly as is reasonably practicable. That decision does not amount to a waiver or modification of the Building Code. Accordingly, I do not agree that because the authority could not grant a waiver of the provisions of the Building Code for access and facilities for use by people with disabilities, that the authority did not exercise its power to decide whether it is reasonably practicable to require the installation of a lift under section 112 in this instance.
- 1.8 I therefore consider that the matter for determination² is whether the building work, as proposed without a lift, will satisfy the provisions of section 112(1) of the Act regarding alterations to existing buildings.
- 1.9 In making my decision, I have considered the submissions of the parties and ODI in this matter. I have not considered compliance of the proposed building work with any other aspects of the Act or other clauses of the Building Code.
- 1.10 The relevant sections of the Act and clauses of the Building Code referred to in this determination are set out in Appendix A.

2. The existing building, building work and background

2.1 The building

- 2.1.1 The building at 363 East Tamaki Drive was originally constructed in 1966 on a site sloping downwards from street level to the rear of the site in a north-south direction.
- 2.1.2 The building consists of:
- Lower Ground Level: an approximate net floor area³ of 256m², design occupancy of 24, and the location of proposed Tenancy A. Access to this level is through an existing level threshold door on the south side of the building. From this level there is also access to Stair 1 at the west end of the building.
 - Ground Floor Level: an approximate net floor area of 460m², total design occupancy of 45, and the location of proposed Tenancies B (comprising 222m²) and C (comprising 238m²). Access to this level from the street is by way of an existing ramp on the north side of the building, leading to an existing level threshold door into the central lobby. Stair 2 is located in the central lobby, providing access to Level 1. Stair 1 is located at the west end of the building, leading to both the Lower Ground Level and Level 1, and Stair 3 the east end leading to Level 1.
 - Level 1: an approximate net floor area of 477m², total design occupancy of 47, and the location of proposed Tenancies D (comprising 218m²) and E (comprising 259m²). Access to this level is primarily by way of Stair 2 from the lobby located on the Ground Floor Level. Alternative access routes are via

² Under sections 177(1)(a) of the Act

³ It is noted that the fire report and the plan 'Proposed Floor Plans, Ref J16-0373 200 Prop Plan', Revision A4, dated 22 June 2016, indicate different floor areas. In considering the floor area of Level 1, I have used the figures indicated on the plans. Note however that the figures used in each document amount respectively to a total floor area for Level 1 of over 400m².

Stair 1 at the west end of the building, or Stair 3 at the east end. There is no level threshold entry point or alternative accessible entry point to Level 1.

- 2.1.3 The access routes to the building render it two storey for the purposes of this determination.
- 2.1.4 The use of the building is not explicit in documentation provided by the applicant, however, the fire report has utilised ‘C/AS5 Acceptable Solution for Buildings used for Business, Commercial and Low Level Storage (Risk Group WB)’ as the basis for the assessment. The tenancies are therefore considered to have the classified use “Commercial”⁴, with the intention to be used as offices (as noted in the fire report).

2.2 Building work

- 2.2.1 The application for determination indicates that the building work was initially intended to be largely a cosmetic upgrade to extend the life of the building. The nature of the proposed building work has evolved to include a substantial upgrade of fire safety features and conversion to five individual tenancies. This will involve demolition of existing internal partitions and finishes, fire-rated construction, and provision of four additional toilets to the building (including reconfiguration of toilets for one accessible toilet per tenancy unit).
- 2.2.2 In a letter dated 1 July 2016, the applicant advised that the total building cost (assumed cost of upgrade, not building value) is \$800,000, of which 80% is attributable to the fire upgrade and toilets. The applicant expects that installation of a lift would cost approximately \$100,000 in addition to this.
- 2.2.3 The proposed building work does not include provision for a lift to enable access to Level 1 in accordance with section 118. In its application for determination, the applicant’s view was that:
- Given the age of the building, we would argue it is not practicable to install this lift with these costs in mind. We are however increasing the level of amenity in the building including adding 5x accessible toilets. Tenancies B, C and A, all have ramped or level access, and form the majority of the building.
- 2.2.4 The applicant has identified two possible locations for a lift:
- Option 1 – internally in the central entry lobby, or
 - Option 2 – externally at the rear of the building.

3. Background

- 3.1 The applicant applied to the authority for a building consent to carry out the building work detailed in paragraph 2.2.1. As stated in paragraph 2.2.3, the proposed building work for which the building consent is sought does not include provision for a lift. The documentation of the building consent application was not provided in the application for this determination.
- 3.2 In its application for determination, however, the applicant informed the Ministry that the authority did not issue a waiver for the requirement to install a lift as part of the proposed building work. As a result, and confirmed by the applicant via telephone on 11 August 2016, the authority has not granted a building consent at this time. The building consent is on hold until the difference in opinion on whether a lift is required is resolved, by way of this determination.

⁴ As defined in Building Code Clause A1 – Classified Uses

- 3.3 The applicant has further informed in a letter dated 18 July 2016 that there has been verbal communication with the authority regarding the need for a lift with respect to the building consent application. The applicant was informed that the authority does not hold authority on this matter; I consider this accurate regarding the limitation of the authority's power to issue a waiver of the Building Code relating to access and facilities for use by people with disabilities.
- 3.4 In this same letter, the applicant detailed lift design options that had been considered (as set out in paragraph 2.2.4 above), and reiterated the cost implication of the requirement for a lift, which has become more burdensome for the applicant since discovering asbestos which will require its isolation and removal.
- 3.5 Concurrent with the proposed building work described herein, the applicant also applied for resource consent to undertake a Unit Title subdivision, which would result in the establishment of five principal units. Subdivision consent was granted on 13 June 2016.
- 3.6 An application for a determination was received by the Ministry on 4 July 2016.

4. The submissions

- 4.1 The application for determination was accompanied by:
- a letter from the applicant titled 'Summary of Events: Application for Waiver to Lift Requirement', dated 1 July 2016
 - a letter from the applicant titled 'Our View: Application for Waiver to Lift Requirement', Dated 1 July 2016
 - a fire report dated 23 May 2016
 - plans and details of the existing building and proposed building work.
- 4.2 In response to a request by the Ministry for more information on 15 July 2016, the applicant provided:
- a letter from the applicant titled 'RFI: Application for Determination at 363 East Tamaki Road, East Tamaki, Auckland', dated 18 July 2016
 - a copy of 'Decision on application for subdivision consent under the Resource Management Act 1991', dated 13 June 2016.
- 4.3 The authority did not provide a submission in response to the application.
- 4.4 A draft determination was issued to the parties and ODI for comment on 15 September 2016.
- 4.5 The agent responded on 20 September 2016, and the authority responded on 21 September 2016; both accepted the draft without further comment.
- 4.6 ODI responded by email on 30 September 2016, noting it supported the decision set out in the draft.

5. Discussion

5.1 Access and facilities for persons with disabilities

- 5.1.1 The requirements of section 118 apply to the construction or alteration of a building to which members of the public are admitted, and requires reasonable and adequate provision for persons with disabilities who may visit, work and carry out normal activities and processes in the building, by way of access, parking, and sanitary facilities.
- 5.1.2 There is no dispute that the use of the building falls within the scope of section 118(2) and Schedule 2, and therefore that it is required to make reasonable and adequate provision for people with disabilities.
- 5.1.3 The applicant has made some effort towards this provision by the reconfiguration of toilets to provide five accessible toilets in total, one for each tenancy. However, the proposed alterations do not make provision for people with a disability to access Level 1 of the building by way of a lift.

5.2 Alterations to existing buildings

- 5.2.1 Section 112 applies when an existing building is being altered, and requires a building consent authority not to grant building consent unless satisfied that the building, after the alteration, will comply as nearly as is reasonably practicable, with the provisions of the Building Code that relate to means of escape from fire, and access and facilities for persons with disabilities (if this is a requirement in terms of section 118).
- 5.2.2 Determination 1997/001⁵ clarifies, by reference to a legal opinion from the Crown Law Office⁶, that:
- A territorial authority may lawfully issue a building consent for the alteration of a building if it is satisfied that after the alteration the building will comply as nearly as is reasonably practicable with the provisions of the New Zealand Building Code for access and facilities for use by people with disabilities even though it will not comply in all respects.
- 5.2.3 The position confirmed by the Crown Law Office has been maintained in numerous determinations since this time.
- 5.2.4 There is no dispute that the proposed building work described in paragraph 2.2.1 falls within the definition of ‘alter’ under the Act.⁷
- 5.2.5 As the matter relates to a lift, I must consider whether the building requires a lift in order to be satisfied that the building, after its alteration, will comply as nearly as is reasonably practicable with the provisions of the Building Code that relate to access and facilities for persons with disabilities under section 112.

5.3 Unit Titles

- 5.3.1 Despite the subdivision of the building into five principal units (with intended Unit Title tenancies), I have considered the building as a whole with respect to access and facilities for people with disabilities.

⁵ *Determination No. 97/001: Access and facilities for people with disabilities in the alteration of a commercial building two storeys high* (17 February 1997) Building Industry Authority

⁶ Issued in the *Building Industry Authority News*, No. 23, June 1993

⁷ See section 7 of the Act

- 5.3.2 Previous determinations (including 2010/140⁸) have summarised that the section 112 test applies to the entire altered building, rather than only those parts of the building that are altered.
- 5.3.3 I take the same approach to the Unit Titles as I did in Determination 2008/47⁹ with respect to the requirement for access and facilities for persons with disabilities – that this detail is not relevant for the matter being determined, particularly given that Tenancies D and E on Level 1 share access by way of the Ground Floor entry lobby and Stair 2.
- 5.3.4 The Unit Titles are however relevant for fire-rating purposes.
- 5.3.5 Accordingly, in deciding whether a lift as a means to access Level 1 for persons with disabilities is required by D1.3.4(c) or NZS4121¹⁰, I consider the combined floor area and occupancy numbers for this level.

5.4 The performance requirements of Clause D1

- 5.4.1 Clause D1.3.4(c) of the Building Code requires that a lift shall be provided in accessible buildings that ‘are two storeys high and have a total design occupancy of 40 or more persons on the upper floor’.
- 5.4.2 However, section 119 provides that New Zealand Standard NZS 4121 ‘is to be taken as a compliance document’, and section 19 provides that a building consent authority must accept compliance with the provision of a compliance document as establishing compliance with the Building Code.
- 5.4.3 Clause 9.1.3.2 of NZS 4121 provides that, for a two storey building in which the upper floor is not intended to be used for certain purposes, a lift is not required if the gross floor area of the upper floor is less than 400m².
- 5.4.4 The Building Code and NZS 4121 therefore specify different circumstances in which a lift is to be provided.
- 5.4.5 Given that section 118 applies in this instance, the installation of a lift is necessary for compliance with the Building Code if the design occupancy of Level 1 is 40 people or more, and if compliance is to be established by way of NZS 4121 a lift is necessary if the total floor area of Level 1 is 400m² or more.
- 5.4.6 The fire report provided by the applicant states that the occupant density of Level 1 is 10m² per person, indicating that 47 people can be expected to be present on Level 1 at any one time.
- 5.4.7 I noted earlier the variance in floor areas provided in the documentation submitted by the applicant. The fire report states the floor area for Level 1 as 460m², while the plans state the approximate net floor area for Level 1 as 477m². In both cases, the threshold for the requirement to install a lift to comply with NZS 4121 is met, in that the floor area exceeds 400m².
- 5.4.8 The Act allows existing buildings, which would require lifts if they were new buildings, to be altered without the installation of lifts where that is not reasonably practicable.

⁸ *Determination 2010/140 The issuing of a code compliance certificate for the upgrading of the emergency lighting system of two buildings at Aoraki Polytechnic* (23 December 2010) Department of Building and Housing

⁹ *Determination 2008/47 Provision of lift access in a proposed unit-title development containing a cluster of 25 units* (6 June 2008) Department of Building and Housing

¹⁰ New Zealand Standard *NZS 4121:2001 Design for access and mobility: Buildings and associated facilities*

5.5 As nearly as is reasonably practicable

5.5.1 In keeping with previous determinations addressing the ‘as nearly as is reasonably practicable’ test under section 112, I refer to determination 2006/040¹¹ and the interpretation of the words ‘as nearly as is reasonably practicable’ adopted by the High Court in *Auckland City Council v New Zealand Fire Service* [1996] 1 NZLR 330 (an appeal against Determination 93/004) in which it was held that:

[Whether any particular item of upgrading is required] must be considered in relation to the purpose of the requirement and the problems involved in complying with it, sometimes referred to as “the sacrifice”. A weighing exercise is involved. The weight of the considerations will vary according to the circumstances and it is generally accepted that where considerations of human safety are involved, factors which impinge upon those considerations must be given an appropriate weight.’

5.5.2 I therefore consider that the question of compliance as nearly as is reasonably practicable involves balancing the benefits of any particular item of upgrade against the costs or sacrifices of installing that item. In this instance, the item for consideration regarding benefits and sacrifices is installation of a lift.

5.5.3 The benefits of installing a lift in this building are that people with disabilities that prevent them from using stairs will be able to visit and work on Level 1. I note also that the existing footprint of the building does physically allow for installation of a lift.

5.5.4 The applicant set out a number of sacrifices of each lift option in their submission dated 1 July 2016. The applicant’s estimate cost for installation of a lift (regardless of option below) is \$100,000.

5.5.5 For Option 1 (internal lift), the applicant states the following sacrifices:

- A lift pit would intrude into the basement where the electrical services cabling is located, which is difficult to relocate.
- The location of the lift in the main lobby would impede on space in this area of the building significantly.
- Windows would be blocked.
- Construction work may be required to rebuild shear walls and support the stairs.
- The Resource Consent may require amendment.

5.5.6 For Option 2 (external lift), the applicant states the following sacrifices:

- The lift pit would descend into an area where there are in-ground services located.
- Parking space would be reduced.
- Windows would be blocked.
- Construction of a new rear landing and stairs would be required that may impact landscaping and the need for a retaining wall also.

¹¹ *Determination 2006/040 Requirement for a lift in Building 4, 17 Lambie Drive, Manukau City* (17 May 2006) Department of Building and Housing

5.5.7 In weighing the benefits against the sacrifices, I consider that:

- The applicant faces financial burden in the proposed building alterations, and particularly since the discovery of asbestos. I understand that further financial burden by way of alterations may prevent the building work altogether.
- The current internal option for the lift indicates that a significant portion of the lobby would not be available, however, I consider this less significant as a sacrifice in that Stair 2 would remain accessible.
- The plans indicate that the lift options submitted by the applicant are not the only practicable options in terms of location. Further, there may be additional options for a lift design that would result in less sacrifices than those set out by the applicant (including financial cost of installation).
- Any future alteration to the building, particularly if it results in an increase in the gross floor area of Level 1, will need a building consent and consequent reconsideration of access and facilities for use by people with disabilities.

5.5.8 I note that New Zealand Standard NZS 4334¹² provides solutions for passenger lifts in low rise, low speed, and low accompany situations as applies in this case. I consider that an alternative lift design and/or location for the lift may well result in less sacrifices for the applicant. Consideration of an alternative lift option such as this would likely reduce the cost of installation significantly, and may also reduce or eliminate the sacrifices identified for each option in paragraphs 5.5.5 and 5.5.6 above.

5.5.9 I consider therefore that the applicant has not investigated alternative lift design or location options thoroughly enough to prove that installation of a lift is not reasonably practicable.

5.5.10 It is suggested the applicant explores alternative options for lift design, as provided for in NZS 4334, to:

- primarily, meet the requirements for access and facilities for persons with disabilities; and
- align with the applicant's financial budget constraints; and
- meet the applicant's aesthetic and practical preferences for the building space.

5.6 Section 112(2)

5.6.1 I note that the alterations in this case include a substantial upgrade of fire safety features and provision of accessible toilets. While I have not been asked to determine this matter, and from the background it appears the applicant has not sought a decision from the authority in respect of section 112(2), I provide the following commentary on the application of section(2) as it may be relevant in this case.

5.6.2 Section 112(2) provides for the situation where an owner decides not to undertake proposed alterations because the upgrade requirements of section 112(1) relating to means of escape from fire and access and facilities for persons with disabilities, and the need for the building to continue to comply with the other provisions of the Building Code to the same extent as before the alteration, are considered to be too onerous or costly. Section 112(2) enables an authority to approve alterations where the alterations will result in improvements to attributes of the building that relate to

¹² New Zealand Standard NZS 4334:2012 Platform lifts and low speed lifts

means of escape from fire or access and facilities for persons with disabilities, and where it is considered by the authority that the benefits of partial compliance with the requirements of section 112(1) will outweigh the detriment of not fully complying with all of those requirements.

- 5.6.3 Under section 112(2) an authority may, in general terms, allow an alteration to part of an existing building if it is satisfied that:
- (a) the alteration would not take place if the building has to comply as nearly as is reasonably practicable with the provisions of the Building Code relating to the means of escape from fire and access and facilities for persons with disabilities, and has to continue to comply with the other provisions of the Building Code to the same extent as before the alteration; and
 - (b) the alteration will result in improvements to attributes of the building that relate to means of escape from fire or access and facilities for persons with disabilities; and
 - (c) any improvements referred to in (b) above outweigh any detriment that is likely to arise from non-compliance with the requirements of section 112(1) (i.e., the upgrade requirements relating to means of escape from fire and access and facilities for persons with disabilities, and the building continuing to comply with the other provisions of the Building Code to the same extent as before the alteration).

6. The decision

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the building work, as proposed without a lift, does not comply as nearly as is reasonably practicable with Clause D1 of the Building Code (or NZS 4121) to the extent required by sections 112(1) and 118 of the Act.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 5 October 2016.

John Gardiner
Manager Determinations and Assurance

Appendix A

A.1 The relevant sections of the Act include:

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.

69 Waiver or modification may only be granted by chief executive in certain cases

- (1) This section applies to a waiver or modification of the building code that relates to—
 - (a) an existing building to which section 118 applies; and
 - (b) access and facilities for use by people with disabilities.
- (2) If this section applies, the chief executive may grant a waiver or modification only in a determination issued under subpart 1 of Part 3.
- (3) This section does not apply to a waiver or modification of the building code that relates to a new building or that is contained in national multiple-use approval.

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,—
 - (a) the building will 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) the building will,—
 - i. if it complied with the other provisions of the building code immediately before the building work began, continue to comply with those provisions; or
 - ii. if it did not comply with the other provisions of the building code immediately before the building work began, continue to comply at least to the same extent as it did then comply.
- (2) Despite subsection (1), a territorial authority may, by written notice to the owner of a building, allow the alteration of an existing building, or part of an existing building, without the building complying with provisions of the building code specified by the territorial authority if the territorial authority is satisfied that,—
 - (a) if the building were required to comply with the relevant provisions of the building code, the alteration would not take place; and
 - (b) the alteration will result in improvements to attributes of the building that relate to—
 - i. means of escape from fire; or
 - ii. access and facilities for persons with disabilities; and
 - (c) the improvements referred to in paragraph (b) outweigh any detriment that is likely to arise as a result of the building not complying with the relevant provisions of the building code.

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:

...

- (f) commercial buildings and premises for business and professional purposes, including computer centres:

...

- (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 include:

Clause A2—Interpretation

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

D1.1

The objective of the provision is:

- (a) Safeguard people from injury during movement into, within and out of buildings,
- (b) Safeguard people from injury resulting from the movement of vehicles into, within and out of buildings, and
- (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:

...

- (c) have access to and within those spaces where they may be expected to work or visit, or which contain facilities for personal hygiene as required by Clause G1 Personal hygiene.

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

...

- (b) include a lift complying with Clause D2 Mechanical installations for access to upper floors where:

...

- (iii) buildings are two storeys high and have a total design occupancy of 40 or more persons on the upper floor, ...

A.3 Relevant provisions of NZS 4121 include:

9.1.3.2 Two and three storey buildings

Where 9.1.3.1 is not applicable a lift is not required when:

- (a) Buildings are two storeys high and have a gross floor area of the upper floor of less than 400 m²;
- (b) Buildings are three storeys high and have a gross floor area of the upper floors of less than 500 m²;

provided that the ground floor complies with the requirements of this Standard and the upper floors have access for ambulant people with disabilities.