



Determination 2018/008

Regarding accessible parking facilities for a proposed mixed-use building at 10 Auburn Street, Takapuna, Auckland

Summary

This determination considers the compliance of a proposed building in respect of parking provisions for people with disabilities to access the commercial spaces on the ground floor. The building contains mechanical stacking car parks that have been designated for use by residents only.



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, Katie Gordon, Manager Determinations, 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 owner of the property, Auburn Street Trustees Ltd, who applied for this determination (“the applicant”), acting through an agent
 - Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 A draft of this determination was sent to the Office for Disability Issues (ODI) at the Ministry of Social Development by way of consultation under section 170(b) of the Act.

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.

- 1.4 The matter arises from an application for a staged building consent for the construction of a new apartment building with commercial tenancies on the ground floor. The building work does not include parking for the ground level commercial tenancies but incorporates mechanically stacked car parking that is designated for use by the residents. The authority is of the view that section 118 of the Act requires provision for car parking for people with disabilities who will visit or work in the commercial part of the building, and the authority has refused to grant the second stage of the building consent on that basis.
- 1.5 The matters to be determined² whether the proposed building work without car parking facilities for people with disabilities (referred to as “accessible parking”) will comply with section 118 of the Act, and the exercise of the authority’s powers of decision in refusing to grant the building consent.
- 1.6 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 (First Schedule, Building Regulations 1992). The relevant sections of the Act, clauses of the Building Code and paragraphs of the New Zealand Standard discussed in this determination are copied in Appendix A.
- 1.7 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.

2. The building work

- 2.1 The proposed building work that is the subject of this determination is the construction of a new building with nine levels. The building consists of:

Ground level

- two commercial tenancies
- mechanical stacking car parks

Level 1

- void and plant spaces

Levels 2 to 8

- apartments

- 2.2 The site area is 500m², and the building footprint is 223m². The commercial tenancies make up approximately 80m². The applicant has designated the car parks for the use of the residents only and all 15 car parks have been pre-sold to residents.
- 2.3 Other than a temporary loading bay (see Figure 1), the only parking provided on site is the mechanically stacked car parks. The parks are entered at ground level, and there are five stacking bays with a total of 15 car parks.
- 2.4 The approximate vertical height between platforms is 1800mm, the double stacker is 4900mm wide and the single is 2600mm wide. The agent has advised that the stacked car parks would not be suitable for use by people with disabilities.

² Under sections 177(1)(a), 177(1)(b) and 177(2)(a) of the Act.

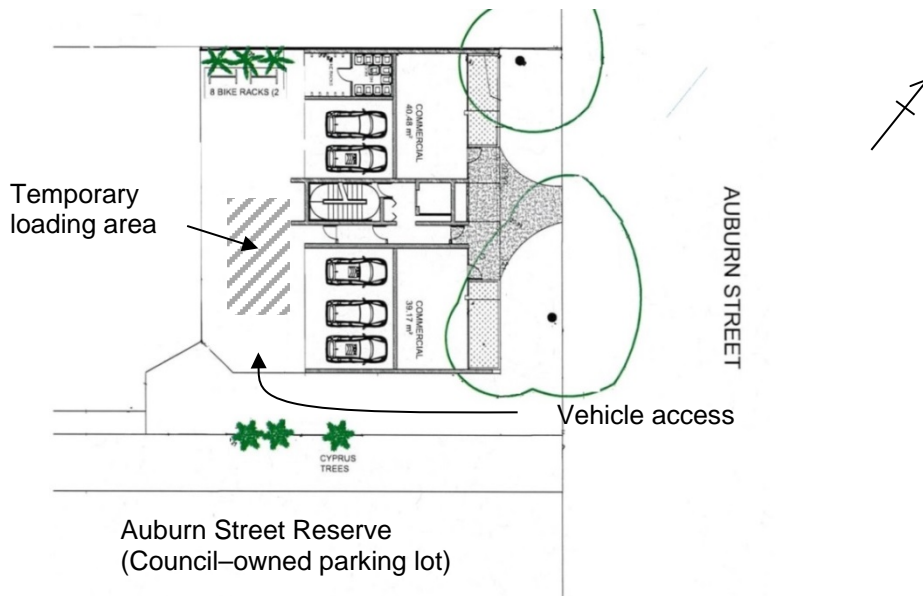


Figure 1: Site plan (not to scale)

- 2.5 Adjacent to the property is a Council-owned parking lot (see Figure 2 below), which includes two 3500mm-wide car parks. There is level access between the car parks and the entrance to the building.



Figure 2: Aerial view showing adjacent parking lot (from Google)

3. Background

- 3.1 The proposal, with no accessible parking provided for the commercial tenancies, was granted land use consent under the Resource Management Act. The agent has advised that during the process of obtaining consent, the planning department of the authority encouraged the applicant to have as few car parks as possible.

3.2 Building consent documentation

- 3.2.1 The building consent application was lodged with the authority in two stages. Stage one consists of foundations, drainage and structure, and was granted building consent in January 2017.

3.2.2 A firm of architectural designers was engaged to provide an accessibility report in support of the building consent. Under the subtitle “Approachability”, the undated report notes that there are two 3500mm wide car parks in the parking lot adjacent to the property that are approximately 91m from the main entrance of the building. The report concluded:

Given the proximity of the Council provided Accessible Carparks, the route available to the Commercial units and notwithstanding the applicable [land use consent] which provides for no accessible carparks on site we believe that the provisions of [Clause] D1 have been met.

Specifically Clauses D1.1(c), D1.3.1, D1.3.2(a) and D1.3.3, D1.3.6 have been satisfied.

3.2.3 On 17 July 2017 a traffic engineering consultant provided advice to the agent in regards to the disputed issue. The consultant noted that no accessible parking was proposed as part of the building work and that the development had been granted consent under the Resource Management Act. The consultant observed that a large proportion of retail and other commercial floor-space throughout the Takapuna Centre has no accessible parking, and the parking provisions under the Auckland Unitary Plan do not require parking to be provided for commercial activity within the city centre and all metropolitan, town and local centres Auckland-wide.

3.2.4 The agent sought advice from a lawyer on the matter, and was advised that ‘the Building Code deals with accessibility where there are carparks, but there are none’ and the proposal ‘does not infringe NZS4121’³.

3.2.5 The agent also sought advice from an officer of the Ministry. The officer responded by email on 9 October 2017 noting that if there was a commercial component to the building then section 118 applied. The agent then put the question to the officer: “if there are no carparks for the commercial units would it mean that accessible parking spaces are not required?” The officer referred to Clause D1.3.2(a) and stated that the Building Code does not require car parking associated with buildings.

3.3 Ongoing correspondence and authority’s refusal

3.3.1 On 24 October 2017 the agent put the Ministry official’s advice to the authority in support of the view that accessible parking was not required. The authority responded, noting that the land use consent did not absolve the applicant from complying with the Act and that the advice from the Ministry official had confirmed that section 118 applied to the commercial component of the development.

3.3.2 The parties continued to correspond on the matter (in summary):

The agent

- The Building Code does not require buildings to be provided with car parking spaces.
- There are no car parking spaces provided for the commercial spaces, therefore no accessible spaces are required.
- The building can be approached from the boundary – reasonable and adequate provision has been made for access to the building.

³ New Zealand Standard NZS 4121:2001 Design for Access and Mobility – Buildings and Associated Facilities

- The advice from the Ministry official, the opinion of the traffic engineering consultant, and the legal opinion received all support the view that accessible car parking is not required.

The authority

- Approval under the Resource Management Act is not a valid reason for not complying with the Building Code.
- The accessible route can be from the street boundary or from an accessible car park, and the authority has not insisted that the building must have an accessible car park.
- The building has made some provision for some car parking, which means the provisions in Clause D1 come into effect.
- The proposal to reserve a parking space in the adjacent lot is not a suitable option to resolve compliance of this building – express permission from Auckland Transport would be required.

(I note here that this determination does not consider the proposal to reserve a parking space in the adjacent lot, but considers whether publically available accessible parking in the adjacent Council-owned lot satisfies the requirements in section 118 in this case.)

3.3.3 On 23 November 2017 the authority advised the agent that as the issue with accessible car parking had not been resolved the authority was ‘not in a position to grant [building] consent’.

3.3.4 The same day the agent wrote to the authority requesting a review of the decision, noting:

- the authority’s planning department discouraged car parking within the design, and it was agreed that the stacking parks would be provided for the apartments only
- the size of the stacking spaces is unsuitable for accessible space requirements
- delivery and unloading of goods in the area nominated was agreed with the authority’s traffic engineers
- due to the size of the site it was not possible to provide an additional parking space.

3.3.5 The agent also noted they had considered changing the use of the ground floor spaces from commercial to residential, and had investigated the possibility of a designated accessible car park space in the adjacent parking lot, but that both options proved problematic.

4. The submissions

4.1 The Ministry received an application for determination on 20 December 2017.

4.2 The agent provided a submission setting out the background to the dispute and reiterating the points that had been raised with the authority (refer paragraph 3.3). With the application and in further information provided after requests from the Ministry, the agent provided copies of:

- site and ground floor plans

- correspondence between the parties
 - correspondence with an officer of the Ministry
 - the letter from a traffic engineer and legal advice received
 - the accessibility report
 - the technical data sheets for the mechanical stackers.
- 4.3 The agent noted that the authority's planning department discouraged car parking, due to the location of the building and the authority's overall desire for less parking under the Unitary Plan, and that it was agreed in the planning stages that there was to be no car parking associated with the commercial spaces.
- 4.4 The agent submitted that the authority appeared to be taking the view that section 118 required accessible car parking facilities associated with the building, but the agent's interpretation is that 'reasonable and adequate provision' does not translate as requiring car parking. The agent questioned how the authority's interpretation would apply to the likes of central city buildings in Queen Street and other similar developments.
- 4.5 The agent maintains the view that the Building Code only requires accessible car parking where car parking is provided, and as there are no car parks provided for the commercial tenancies it follows that no accessible car parking is required. That being the case, the agent considers that the proposed building work complies with Clause D1.3.2(a).
- 4.6 The authority responded to the application for a determination by email on 24 January 2018, noting its view the matter for determination is whether section 118(1) mandates the provision of an accessible parking space within the site. The authority provided a copy of a letter from the agent (refer paragraph 3.3.4), and submitted the following:
- The building consent application is for a mixed residential and commercial building and the provisions of s118(1) are triggered.
 - The relevant performance requirement is Clause D1.3.6.
 - The building is not part of a larger development providing accessible car parking spaces.
 - Existing publicly owned car parks with accessible parking spaces may not be used as a means of satisfying the requirements of s118(1).
- 4.7 In response to requests from the Ministry for more information, the agent provided more detail on the building spaces and advised that the carparks are owned by individual purchasers of the apartments and that all 15 had been sold.
- 4.8 A draft of this determination was sent to the parties and ODI for comment on 27 February 2018.
- 4.9 By email on 2 March 2018 the applicant accepted the draft without further comment.
- 4.10 ODI provided comment by email on 8 March 2018, noting that it supported the decision as compliant with existing legislation. ODI noted that while the legislation does not compel building owners to do more than is prescribed by the Building Code, ODI encourages private and public building owners 'to choose commissioning building designs that enable equity of access to all areas by disabled people from the beginning.'

- 4.11 The authority provided a response to the draft determination on 13 March 2018, requesting a minor amendment to the decision to specifically refer to the publically provided accessible car park spaces.

5. Discussion

5.1 The legislative requirements for access for people with disabilities

5.1.1 Section 118 applies to (but is not limited to) buildings that are intended to be used for, or associated with, one or more of the purposes specified in Schedule 2. It is not disputed that as the proposed building incorporates two commercial tenancies on the ground floor, the building falls under Schedule 2(f) and accordingly section 118 applies.

5.1.2 Section 118 provides:

(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.

5.1.3 The term “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 that are relevant to the provision of access for people with disabilities (refer Appendix A).

5.1.4 In determining whether the proposed building complies, I have turned my mind to:

- whether section 118 requires accessible parking be provided on the site, and
- whether the building with parking provided solely for the use of the residents of the apartments complies to the extent required under section 118.

5.2 On-site parking

5.2.1 The authority holds the view that accessible car parking spaces in Council-owned car parks may not be used as a means of satisfying section 118.

5.2.2 The use of accessible public car parking spaces to satisfy the provision for “reasonable and adequate” parking for people with disabilities is provided for in NZS 4121. That Standard is cited in section 119 of the Act as an Acceptable Solution and must be accepted by building consent authorities as establishing compliance with the Building Code.

5.2.3 Paragraph 5.2.2 of NZS 4121 states:

5.2.2 Council provision

Where car parking is provided by the local authority and not by the building owner then the required spaces shall be in the vicinity of the site or building and shall be connected to the site or building by an accessible route.^[4]

⁴ 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.

5.2.4 Accordingly, where car parking is not provided as part of the design of the building or the site, it is acceptable to rely on publicly available Council-owned car parking facilities as a means of achieving compliance with the requirements of section 118.

5.3 Designated parking

5.3.1 The authority has interpreted section 118 as meaning that accessible car parking must be available within the site when a building to which members of the public are to be admitted is constructed or altered.

5.3.2 Section 118 of the Act does not create an obligation to incorporate accessible car parking in every building or building site for which section 118(1) is triggered. For example, dairies, and small suburban stores and cafes are all buildings listed in Schedule 2 to which the requirement for the provision of access and facilities for persons with disabilities apply. However it would not be practical, and perhaps not even feasible, to incorporate car parking into every building or on every site.

5.3.3 What section 118 requires is “reasonable and adequate provision” for accessible parking. In some instances what is considered “reasonable and adequate” will be, or will incorporate, publicly accessible car parking that is nearby.

5.3.4 In this case parking has been incorporated into the design of the building. This has raised an issue of whether some of the car parking incorporated in the design of the building must be available as accessible parking to meet the requirements of section 118 as it applies to the commercial use of part of the building.

5.3.5 The intended use of the building is a mix of housing and commercial, with car parking associated with the housing only. The question therefore is whether the building complies with section 118 of the Act (which applies only to the commercial use of part of the building) when the available parking is only available for the use of residents.

5.3.6 The applicant has argued the car parking incorporated into the building is designated for the use of the residents, and as housing does not trigger section 118 and there is no parking available on site for the commercial tenancies, no accessible parking is required.

5.3.7 I do not agree that for a building that comes within Schedule 2 of the Act the choice to designate car parking for the intended use that doesn't trigger section 118 negates the obligations under section 118 that relate to the building as a whole. However, it does not necessarily follow that simply because parking is provided in the building that some of the parking must be available to the commercial tenancies and therefore accessible parking is required. What is required is an assessment of whether the provisions for parking as required under section 118 are “reasonable and adequate” in the circumstances.

5.3.8 In this case there is insufficient space on the site to provide additional parking other than that which is incorporated in the building; the building has a relatively small footprint; the building space designated for commercial use is small in comparison with the space designated for housing (80m² of commercial space as compared with approximately 1350m² of residential floor area); and there is accessible car parking provided by the local authority in the adjacent site with an accessible route to the building entrance.

- 5.3.9 In the particular set of circumstances in this case I am of the view that the accessible parking in the adjacent local authority owned car park meets the test of reasonable and adequate provision of parking for the commercial tenancies within this building.
- 5.3.10 I emphasise that each determination is considered on a case-by-case basis. Accordingly, the fact that a particular parking arrangement has been established as being compliant in relation to a particular building and site does not necessarily mean that the same parking arrangement will be compliant in another situation.

6. Car parking generally

- 6.1 The agent submitted that based on the dimensions for car parking as described in paragraph 5.5 of NZS 4121, the stacked car parks are not suitable for use by people with disabilities. I presume the agent's reference is to people who use wheelchairs as mobility aids, and that the restricting feature is the dimensions of the stacking parks (refer paragraph 2.4). In this regard, while not central to the matter for determination, I offer the following comment.
- 6.2 The Act defines the term "person with a disability" as:
- "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"
- 6.3 NZS 4121 further interprets people with disabilities as "people whose ability to be freely mobile or to access and use buildings is affected by mental, physical, hearing or sight impairment" and provides a list that includes examples such as an inability to walk, walking difficulties, and lack of stamina (refer Appendix A4).
- 6.4 The dimensions set out in NZS 4121 allow for space that would be required for a person using a wheelchair. These dimensions take into account that the wheelchair may be attached to the roof of the vehicle on a hoist and the person requires space next to the vehicle to transition to the wheelchair, or the person may exit the vehicle from a ramp at the rear.
- 6.5 It may be possible therefore that the dimensions of mechanical stacking car parks, though not suitable for all vehicles or all people with disabilities, may be suitable for some. I note here that the specifications provided in regards to this particular building include the following comment:
- In case of short time user – only possible on upper platform and only if technically adjusted, ask [the supplier]: Or with attendant or valet parking all levels are possible for a short time user.
- 6.6 An alternative solution could include a mix of car parking facilities. For example: where there are size restrictions that make an accessible park of the dimensions set out in NZS 4121 unachievable, it may be that a car park with smaller dimensions but that is near to the building entrance is able to be utilised by a number of people with disabilities other than those that use a wheelchair. An assessment would then be required of what parking provisions are available for people for whom that car park would not be accessible.
- 6.7 As I have reached the conclusion the accessible parking in the adjacent lot meets the test of reasonable and adequate provision of parking (refer paragraph 5.3.9), I have not considered whether the specified stacking car parks would be suitable for some people with disabilities as part of an alternative solution in this case.

7. The decision

7.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:

- the proposed building work with car parking facilities that do not include accessible parking, but where there is an adjacent local authority owned accessible car park, complies to the extent required by section 118 of the Act, and
- the authority incorrectly exercised its powers of decision in refusing to grant the building consent on the basis that accessible parking had not been provided, and I reverse that decision, thus requiring the authority make a new decision taking into account this determination.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 23 March 2018.

Katie Gordon
Manager Determinations

Appendix A: The legislation

A.1 The relevant sections of the Building Act 2004 discussed in this determination:

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

...

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

A.2 The relevant clauses of the Building Code discussed in this determination:

Clause A2 – Interpretation

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 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

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.

D1.2.2 Where a building is provided with loading or parking spaces, they shall be constructed to permit safe and easy unloading and movement of vehicles, and to avoid conflict between vehicles and pedestrians.

Performance

D1.3.1 Access routes shall enable people to:

- (a) safely and easily approach the main entrance of buildings from the apron or construction edge of a building,
- (b) enter buildings,

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

(d) manoeuvre and park cars, and

(e) manoeuvre and park delivery vehicles required to use the loading space.

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, ...

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

[list of features (a) to (i)]

D1.3.6 Vehicle spaces for use by people with disabilities, shall, in addition to the requirements of Clause D1.3.5, be:

(a) provided in sufficient numbers,

(b) located to avoid conflict between vehicles and people using or moving to or from the space, and

(c) easy to find as required by Clause F8 Signs.

A.3 The relevant paragraphs of the Acceptable Solutions and Standards discussed in this determination:

Acceptable Solution D1/AS1 (Amendment 6)

10.0 Movement of Vehicles

10.1 Car parking areas

10.1.1 AS/NZS 2890 Part 1 is an Acceptable Solution for car parking areas and circulation routes.

COMMENT:

NZS 4121 in section 5 covers the provision of accessible car parking and the number of accessible parks to be provided.

New Zealand Standard NZS 4121:2001 Design for Access and Mobility – Buildings and Associated Facilities

A.4 The relevant New Zealand Standard NZS4121:2001

1.5 Definitions interpretation

1.5.1 Definitions

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;
- (l) Learning difficulties.

5 Car parks

5.1 General

Section [118] of the Building Act covers the need to provide car parks, parking buildings and parking facilities, ... Parking facilities or premises, whether private or public shall provide the required number of accessible car park spaces, refer to 5.4.

5.2 Location

5.2.1 Building owner provision

Parking spaces for people with disabilities shall be on the accessible route to a building and shall be provided close as practicable to the accessible entrance or to an accessible lift to the building or facilities (see figure 1).

5.2.2 Council provision

Where car parking is provided by the local authority and not by the building owner then the required spaces shall be in the vicinity of the site or building and shall be connected to the site or building by an accessible route.