



Determination 2018/018

Regarding the decision to aggregate floor areas in a new development to determine the requirements of Clause D1 for a building at 147 Victoria Street West, Auckland



Summary

This determination considers the access requirements for a new office building being constructed as part of a development that includes an adjacent hotel. The determination discusses aggregation of floor areas for the purpose of establishing whether the requirement for a lift is triggered.

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 this determination are:

- the owners and developers of the building development, Safari Group Limited (“the applicant”)
- Auckland City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

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.

1.3 The application for this determination arises from the following:

- The applicant has proposed a mixed-use development consisting of an 11-storey building (“the hotel building”) and a two-storey building (“the office building”). The buildings are located over a two-storey underground carpark that covers the whole of the site.
- There is a difference in view between the authority and the applicant as to whether certain access requirements, including installation of a lift, are required in the office building to provide access for people with disabilities to Level 1 of that building.
- The authority is of the view that the access requirements are applicable on the basis that the aggregated Level 1 areas across the office building and hotel building, that together comprise the development at 147 Victoria Street, exceed the thresholds in both Clause D1.3.4(c)(iii) of the Building Code² and paragraph 9.1.3.2(a) of New Zealand Standard NZS 4121.2001 Design for access and mobility (“NZS 4121”).
- The applicant is of the view that the Level 1 floor areas should not be aggregated due to separate uses and intended ownership arrangements of the hotel building and the office building.

1.4 The matter to be determined³ is therefore whether the office building constructed in accordance with the original design submitted for building consent will comply with Clause D1 regarding access to Level 1 of the office building. In making this decision I must consider whether the hotel building and the office building are one building, and accordingly whether the Level 1 floor areas are aggregated to determine compliance.

1.5 In making my decision I have considered the submissions of the parties, and the other evidence in this matter. This includes correspondence between the parties, and plans and drawings for the proposed development. The relevant sections of the Act and paragraph of NZS 4121 discussed in this determination can be found in Appendix A.

1.6 A copy of the 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.

1.7 Matters outside this determination

1.7.1 This determination is limited to access to Level 1 of the office and hotel buildings. I have not considered the code-compliance of the remaining building work.

1.7.2 In the application for determination, the applicant requested an interim decision from the Manager Determinations under section 183 of the Act to allow building work to proceed. After this request was made, the authority issued a building consent for the revised design enabling work to proceed (refer paragraphs 3.1 and 3.6). An interim decision under section 183 of the Act was not required of the Ministry.

² 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)

³ Under section 177(1)(a) of the Act.

2. The building work

- 2.1 The building work comprising the mixed-use development consists of the 11-storey hotel building and two-storey office building, which are located over a two-storey underground carpark that covers the whole of the site. The proposed building work includes sub-structure, basement retaining, in-ground services, and superstructure.
- 2.2 The hotel building contains: ground-floor made up of retail and café/restaurant; Level 1⁴ made up of three unit titles containing offices, and toilets and plant room (see figure 1 below); three levels of hotel apartments; and seven levels of residential apartments.
- 2.3 The office building is attached to an existing 1890 heritage façade and contains office accommodation on Level 1 (396m²), and a podium level at ground (118m²) for a possible café or expansion of the office accommodation above. Level 1 of the office building includes reception, offices, meeting rooms, toilet facilities, and storage.

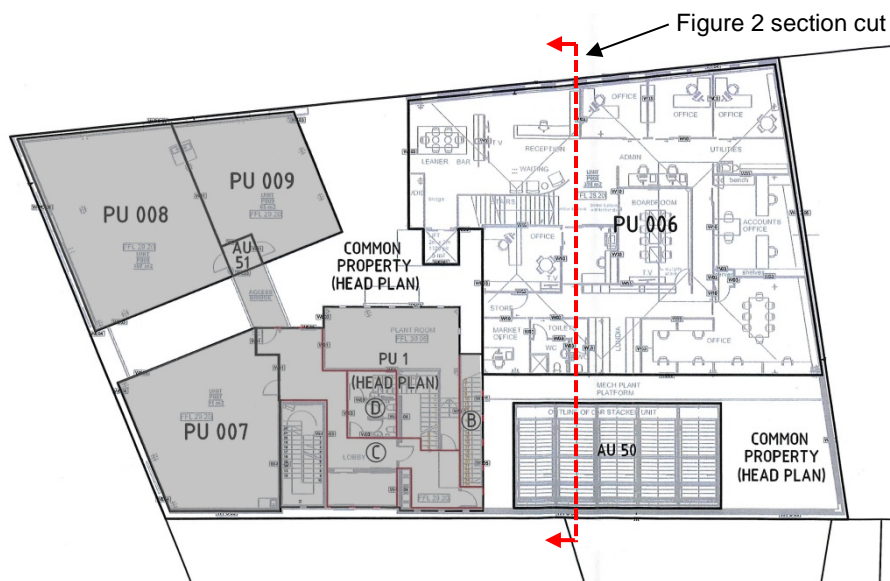


Figure 1: Level 1 plan with hotel building shown shaded (not to scale)

- 2.4 There is open space on what is the paved 'roof' of the underground carpark to provide ground floor access to both the hotel building and the office building.
- 2.5 The hotel building and the office building are joined structurally and share some walls, as well as the foundation provided by the underground carpark structure. There is no internal access between the hotel building and the office building (see Figure 2). To access one from the other requires exiting either building on the ground level to the outside. The applicant has advised that on completion the office building will be a standalone building with no commonality of use or ownership by way of the intention to establish multiple body corporates.
- 2.6 The lift required by the authority, and which is the subject of this determination, would serve only Level 1 of the office building, which is 396m² in area.

⁴ The floor plans for the work describe what is referred to in this determination as Level 1, as the 'mezzanine level'

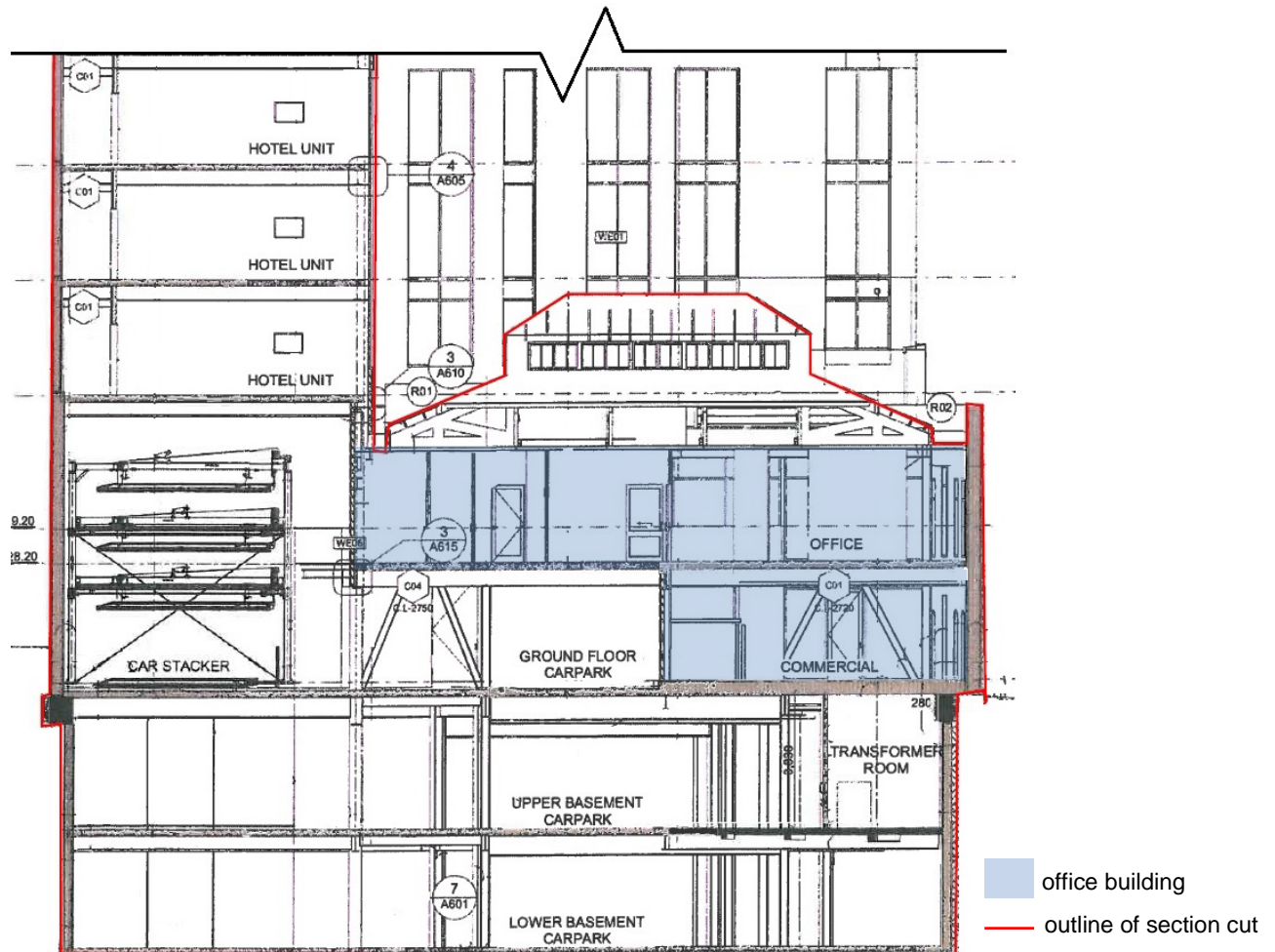


Figure 2: Section through the hotel building and the office building (not to scale)

3. Background

3.1 The applicant submitted a building consent application for construction of the development. The authority reviewed the building consent application and identified several issues, including the Level 1 access. The authority issued building consent BC 010097871-2 with certain conditions restricting work from proceeding including:

All work affecting, or affected by, provisions for access between the ground and Level 1 floors, and between separate Level 1 floors.

3.2 The basis for the authority including this condition relates to the extent of the overall building envelope. The authority is of the view that the office building and hotel building must be considered as one building, thereby justifying aggregation of Level 1 areas for the purpose of establishing requirements relating to access. The authority refers to the definitions of “building” set out in sections 8 and 117 of the Act:

The applicant refers to section 8(1)(c) of the Building Act and its definition of building. It is important to note, however, that this is prefaced by the term “includes” which, in the context considered, is used in a non-restrictive way, implying that there may be other buildings – including those of differing configuration, use and ownership – not specifically mentioned or described that are nevertheless part of the same category or group.

The fact that principal unit PU 006 might not meet the criteria described in section 8(1)(c) of the Act does not itself disqualify it from the broader meaning of building described elsewhere in this section. Section 117 of the Act extends the definition further to include, under sub-section (a), parts of a building, including access ways, and passages within and between complexes and developments, and, under sub-section (b), any premises or facilities; the definitions applying under section 117 are again prefaced by the term “includes”.

- 3.3 The authority supports its position by reference to Determinations 2000/005, 2005/049 and 2006/040⁵, further stating an inability to separate the use of the buildings due to access being via ground floor common space.
- 3.4 Considering the total floor area, the authority refers to the definition of gross floor area in paragraph 1.5.1 of NZS 4121 as that relating to the extent of the building envelope:
- the superficial area on the plan of a floor of a building measured over its outside dimensions including walls.
- 3.5 The authority deemed that the requirements of Clause D1.3.4(c)(iii) or paragraph 9.1.3.2(a) of NZS 4121 apply to the building work as a result of aggregating the Level 1 areas across the hotel building and the office building as exceeding the threshold of 40 or more occupants, or 400m² respectively. The authority used this as a basis for requiring installation of a lift to access Level 1 of the office building.
- 3.6 The authority subsequently lifted the condition on the building consent with the addition of the following requirements:
- a lift in the hotel building to serve Level 1 of that building
 - an interconnecting bridge between the common area and the unit titles PU 008 and PU 009 in the hotel building (two separate sets of stairs had previously been used to gain access to PU 008 and PU 009)
 - a lift serving Level 1 only in the office building.
- 3.7 The applicant refers to the determinations referenced by the authority, outlining that in those scenarios there is no question of common use. As outlined in paragraph 2.5, the applicant has advised the office building will be a standalone building with no commonality of use or ownership. In the applicant’s view, when considered as a standalone building, Level 1 of the office building does not exceed the 400m² threshold, and therefore does not trigger the access requirements outlined in NZS 4121 as an Acceptable Solution to Clause D1.
- 3.8 In email correspondence on 19 September 2017, the applicant challenged the authority’s decision to consider both the hotel building and the office building as one building, and thereby the decision to aggregate the Level 1 areas to establish the level of compliance relating to access required by the office building. The authority did not alter its position.
- 3.9 Subject to the outcome of this determination, the applicant seeks to proceed with the original design submitted with the application for building consent.
- 3.10 The Ministry received an application for determination on 16 February 2018.

⁵ Determination No. 2000/5 Installation of a small lift in an airport terminal building (3 October 2000). Determination 2005/49 Access for people with disabilities to mezzanine floors in a supermarket (8 April 2005). Determination 2006/040 Requirement for a lift in Building 4 (17 May 2006)

4. Submissions

- 4.1 The applicant submitted with its application copies of plans and drawings, and correspondence between the parties.
- 4.2 The authority acknowledged the application for determination on 1 March 2018 and on 6 March 2018 submitted marked up plans and drawings and supporting information.
- 4.3 A draft of this determination was issued to the parties and ODI for comment on 3 April 2018.
- 4.4 The applicant and the authority accepted the draft without further comment in responses received on 16 April 2018.
- 4.5 ODI provided comment on 18 April 2018, noting that while the Act did not compel building owners to do more than as required by the Building Code, ODI encouraged public and private building owners to commission building designs that ensure equity of access to all areas in line with the New Zealand Disability Strategy⁶.

5. Discussion

5.1 The legislation

5.1.1 Section 118 states:

- (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 provisions 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.

There is no dispute that the provisions of section 118 apply in this case.

- 5.1.2 The matter turns on whether the Level 1 floor areas of the office building and hotel building should be aggregated to establish whether the threshold exceeds the measure set out in Clause D1.3.4(c)(iii) and NZS 4121 (see Appendix A).

5.1.3 Section 8 of the Act sets out that a building:

- ...
- (c) includes any 2 or more buildings that, on completion of the building work, are intended to be managed as one building with a common use and a common set of ownership arrangements...

5.1.4 Clause A2 of the Building Code sets out that:

- (1) For the purposes of Part 9 of this Act, a *building consent*, a *code compliance certificate*, and a *compliance schedule* the term *building* also includes:
 - (a) any part of a *building*; and
 - (b) any 2 or more *buildings* which, on completion of any *building work*, are intended to be managed as 1 *building* with a common use and a common set of ownership arrangements.

⁶ For more information on the New Zealand Disability Strategy, see <https://www.odi.govt.nz/nz-disability-strategy/about-the-strategy/new-zealand-disability-strategy-2016-2026/>

5.2 Does the development contain more than one building?

- 5.2.1 The authority considers both the hotel building and the office building as one for the purpose of aggregating the Level 1 areas to establish whether the access requirements of Clause D1.3.4(c)(iii) or NZS 4121 apply.
- 5.2.2 In citing Determination 2005/049 in support of its position, the authority neglected paragraph 5.6.7 of that Determination. Determination 2005/049 considered a building containing a supermarket – the building included two mezzanine levels that were both accessed by a stair from the ground floor of the building – the two mezzanine levels contained activities directly related to the supermarket’s use (office and staff facilities). Paragraph 5.6.7 of the Determination said:
- However, people with disabilities may be expected to visit or work in both the office mezzanine floor and the staff mezzanine floor and carry out normal activities and processes. I therefore consider that the aggregates of their design occupancies and gross floor areas must be taken into account.
- 5.2.3 Determination 2005/049 came to the view there was a common use of the mezzanine areas in the building subject to that determination, in that people working or visiting the supermarket could be expected to visit both mezzanine spaces.
- 5.2.4 I do not consider the same expectation applies here. The development contains two buildings intended to have separate ownership and management arrangements.
- 5.2.5 In the submission received on 6 March 2018, the authority refers to two further determinations (2006/040 and 2000/005) to support its contention that the hotel building and the office building are one. The authority set out that in Determination 2006/040 that ‘A lift was required for a two-storey building, despite each floor being held under separate unit title.’
- 5.2.6 Determination 2006/040 considered whether a lift was required in a two-storey building undergoing a first-use fitout. The upper level (being one title) had a design occupancy and floor area that exceeded the thresholds for a lift under both Clause D1.3.4(c)(iii) and NZS 4121. The consideration of floor areas across multiple buildings or across different levels in the building was not discussed in the determination, and the determination’s decision did not rest on such considerations.
- 5.2.7 The authority set out that in Determination 2000/005:
- ... the-then Building Industry Authority expressed at [paragraph] 6.2.4 the view that, where a building has two or more upper floor areas separate from each other, then those areas are to be treated as a single floor unless it would be clearly unreasonable to do so.
- Aggregation of floor areas and design occupant loads were ultimately required under this Determination, despite the fact that those areas were separated by some 80 m, and served completely different purposes.
- 5.2.8 Determination 2000/005 considered the extension to an existing airport terminal building. A proposed additional upper floor containing a passenger lounge was to be constructed in addition to, but separate from, an existing upper floor. A lift was to serve the new upper floor, but the size of the proposed lift was disputed. The two upper floors were contained within the same terminal building. The determination did not consider the terminal building other than as one building with a single use.
- 5.2.9 Paragraph 6.2.4 of Determination 2000/005 said ‘where a building has two or more upper floor areas separate from each other, then those areas are to be treated as a single floor unless it would be clearly unreasonable to do so.’ The determination

concluded in that instance that it was not unreasonable to aggregate the upper floor areas.

- 5.2.10 I do not consider the discussion in Determination 2000/005 is relevant to the development in this determination: as noted above, the Level 1 areas of the hotel building and the office building are intended to have different ownership and management and cannot be considered a single building with one use.
- 5.2.11 The authority also contends the definition of ‘building’ set out in section 8(c) of the Act is applicable to this scenario. Section 8(c) applies where a complex of buildings is “intended to be managed as one building with a common use” where the facilities provided in one building can be used by the complex as a whole so that the complex of buildings satisfy the requirements of the Building Code. For example, a school complex may not have accessible toilets in every building but compliant facilities may be located in an adjacent school building.
- 5.2.12 I do not accept the authority’s interpretation of section 8(c) for the reasons set out above: in this instance there is no common use between the hotel building and the office building. In respect of Clause D1, the compliance of the office building does not depend in any way on the facilities provided in the hotel building, and vice versa.
- 5.2.13 I conclude therefore the authority was not correct in aggregating the Level 1 floor areas of the hotel building and the office building. The hotel building and office building are separate buildings for the purpose of determining compliance with Building Code Clause D1.3.4(c)(iii) or NZS 4121.

5.3 The Building Code and NZS 4121

- 5.3.1 What constitutes ‘reasonable and adequate provision’ for access is assessed against the performance requirements set out in the Building Code, namely Clause D1 (Access routes).
- 5.3.2 The relevant performance requirements of Clause D1 are as follows:
- Clause D1.3.2** At least one access route shall have features to enable people with disabilities to:
- (a) approach the building from the street boundary or, where required to be provided, the building car park,
 - (b) have access to the internal space served by the principal access, and
 - (c) have access to and within those spaces where they may be expected to work or visit, or which contain facilities for personal hygiene as required by Clause G1 Personal hygiene.
- Clause D1.3.4** An accessible route, in addition to the requirement of Clause D1.3.3 shall:...
- (3) 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, ...
- 5.3.3 Section 19 of the Act states a building consent authority must accept compliance with an Acceptable Solution as establishing compliance with the Building Code, and section 119 of the Act states NZS 4121 is to be taken as an Acceptable Solution.
- 5.3.4 Acceptable Solutions are prescribed methods that under section 19 of the Act are deemed to comply with the Building Code and must be accepted by the authority as establishing compliance with the Building Code. When a solution is proposed that is

in accordance with NZS 4121, the authority must accept it as having established compliance with the relevant performance requirements of the Building Code, including Clause D1.

- 5.3.5 Paragraph 9.1.3.2 of NZS 4121 provides a lift is not required when ‘buildings are two storeys high and have a gross floor area of the upper floor less than 400m²; ... provided that the ground floor complies with the requirements of this Standard and the upper floors have access for ambulant people with disabilities.’
- 5.3.6 NZS 4121 does not “substitute” Clause D1.3.4(c), nor does it allow for a lower standard of compliance. NZS 4121 has different criteria than Clause D1.3.4(c)(iii).
- 5.3.7 I have concluded it is not the aggregated floor areas of the office building and the adjacent hotel building that is relevant to the assessment of compliance with regard to access to Level 1 of the office building. As the floor area of the office building is 396m², I therefore conclude the office building constructed in compliance with the original design submitted with the building consent application will comply with Clause D1.3.4 by way of NZS 4121.

6. The decision

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the office building constructed in accordance with the original design submitted with the building consent application will comply with Clause D1 regarding access to the Level 1 of the office building.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 9 May 2018.

Katie Gordon
Manager Determinations

Appendix A

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

19 How compliance with building code is established

- (1) A building consent authority must accept any or all of the following as establishing compliance with the building code: ...
- (b) compliance with an acceptable solution.

117 Definition for sections 118 to 120

In sections 118 to 120, unless the context otherwise requires, building includes—

- (a) parts of a building (including driveways, access ways, passages within and between complexes and developments, and associated landscaping (if any)); and
- (b) any premises or facilities.

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.

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; ...

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

A.2 The relevant paragraph of New Zealand Standard NZS 4121

9. Lifts

9.1 General

9.1.3 Provision of lifts

9.1.3.1 General

An accessible route shall include a lift to upper floors where:

- (a) Buildings are four or more storey's high;
- (b) The upper floor(s) of any building are to be used as the public reception areas [for buildings with specific uses]
- (c) The upper floors are designed or intended to be used as:

- (i) Public areas of hospitals, ...
- (ii) Places of public assembly for 250 or more people
- (iii) Public libraries.

9.1.3.2 Two and three storey buildings

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

Buildings are two storeys high and have a gross floor area of the upper floor of less than 400m²;... provided that the ground floor complies with the requirements of this Standard and the upper floors have access for ambulant people with disabilities.