

- 1.4 The matter to be determined² is therefore whether the building without a lift would comply with Clause D1³ Access routes of the Building Code (First Schedule, Building Regulations 1992) with regard to access to the upper level.
- 1.5 In making my decision, I have considered the submissions of the parties, and the other evidence in this matter. This determination is limited to access to the upper level; I have not considered access to the ground level or any other aspect of the building work.
- 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.

2. The building work

- 2.1 The two storey building is located on the south side of a laneway that leads to the entrance of a larger development at 80 Willis Street. Pedestrian access along the laneway incorporates a number of steps (see Figure 1 below). At ground level the building is approximately 27m long and 3m wide. The upper level of the building is approximately 4.5m wide along most of its length, with the street-front balcony extending the full width of the laneway. The architect has stated that the gross floor area of the upper level is 131.4sqm (not including stairwell).

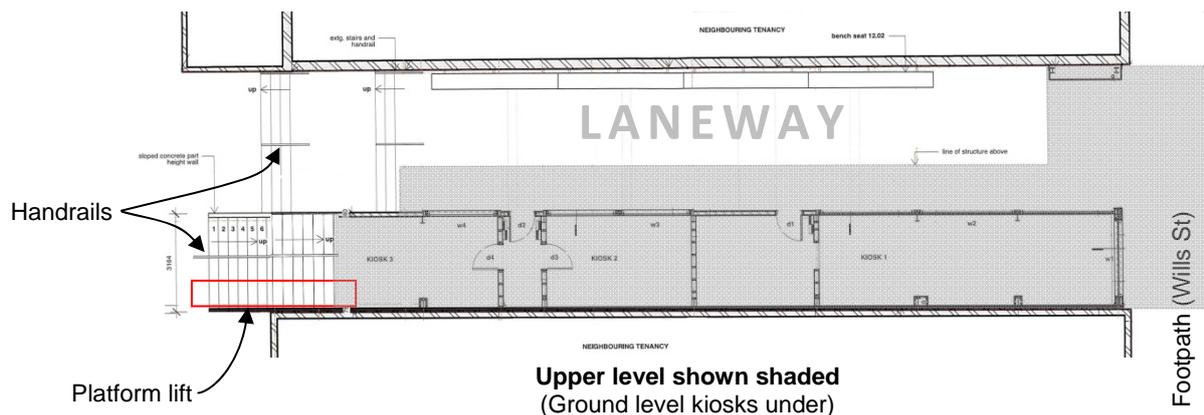


Figure 1: Site plan (not to scale)

- 2.2 The ground level incorporates three ‘kiosks’ that are separated by timber framed partitions; each kiosk has its own access to the laneway. The upper level consists of a covered terrace leading to a bar/restaurant (“the bar”) with a balcony. The bar has two unisex toilets, one of which is an accessible toilet.
- 2.3 Access to the upper level, as consented, is by way of 3m wide concrete stairs and an inclined platform lift⁴ (“the platform lift”). The stairs have a riser height of 165mm and tread depth of 310mm, which comply with NZS 4121. The platform lift is located on the right hand side of the stairs.
- 2.4 Based on the fire report supplied with the building consent, the occupancy to the bar is limited to 50 people.

² Under section 177(1)(a) of the Act.

³ In this determination, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

⁴ An inclined platform lift is a mechanical device that moves along the angle of the stairs to carry a person in a wheelchair up a staircase, or in some cases on a fold out seat on the platform. Inclined platform lifts usually fold up when the unit is not in use

3. Background

- 3.1 The original application for building consent did not include a lift to the upper level. During the consent processing, the authority sent a request for information letter (“RFI”) dated 14 July 2017 to the applicant. Amongst other questions, the authority stated:

The level 1 bar has been stated by the Fire engineer to have an occupancy limited to 50. The accessibility statement is using NZS 4121:2001 as means of compliance with the regulations of D1 Access routes. Section 119 covers the Acceptable Solution for requirements for persons with disabilities and notes that NZS 4121 is an Acceptable Solution.

However being a new structure the building with the bar over the kiosks needs to comply 100% with the Building Act and the Building Codes (*sic*)...

...The regulation D1.3.4(c) Include[s the requirement for] a lift complying with Clause 2 “Mechanical Installations for Access” to upper floors when (iii) buildings are 2 storeys high and have total design occupancy of 40 or more persons on the upper floor...

Please be aware that [the authority] can not give a waiver for accessibility facilities and Routes. Only [the Ministry] can in the way of determination.⁵

- 3.2 The architect responded in a letter dated 24 July 2017, including the following excerpt from NZS 4121:

9.1.3.2 – 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 400sqm: provided that the ground floor complies with the requirements of this Standard and the upper floors have access for ambulant people with disabilities.

The architect stated:

Please note that the gross floor area of the upper floor is 131.4sqm (not including stairwell) – the ground floor complies with the requirements of this standard (with reference to the accessible requirement changes from this RFI)

- 3.3 The authority sent another RFI on 4 August 2017, which amongst other items, stated:

...While not providing a lift up to the bar level meets the acceptable solution NZS 4121:2001 there is still the requirement of the regulation D1.3.2. At least one access route shall have features to enable people with disabilities to:

(b) have access to the internal space served by the Principal access and

(c) have access to and within those space where they are may (*sic*) be expected to work and visit or which contain facilities for personal hygiene as required by Clause G1 ‘Personal Hygiene’.

- 3.4 The architect responded in a letter dated 11 August 2017 querying whether a lift to the upper floor is required to satisfy the provisions of Clause D1. The architect noted that a “fully compliant accessible stair” has been provided, and reiterated that NZS 4121 does not require a lift when certain criteria has been met.

- 3.5 The authority responded in a letter dated 23 August 2017 as follows:

...[the authority has] identified 2 options that would comply with this Building Code Regulation [Clause D1.3.4(c)].

i) a lift (example platform type lift)

ii) restrict the occupancy numbers on the bar level to 39 occupants max (including bar staff).

⁵ This is incorrect. Section 69 only allows the Chief Executive in certain cases to grant a waiver or modification relating to access and facilities for people with disabilities in an existing building. In this situation, the building is new and as such section 69 is not applicable.

3.6 The applicant responded in a letter dated 23 August 2017 that they would install an inclined platform lift along the stairs to provide mechanical access for wheelchair users to the first floor. The building consent was issued once outstanding issues regarding the platform lift were resolved between the parties.

3.7 The Ministry received an application for a determination on 4 September 2017.

4. The submissions

4.1 The applicant submitted with their application the following copies of:

- plans and drawings
- platform lift technical specification
- correspondence between the parties.

4.2 The authority acknowledged the determination on 19 September 2017 and submitted the following comments:

- The bar is part of a new building and is a space where persons with disabilities may be expected to visit or work.
- Compliance with Clause D1.3.4(c) has been met through the proposal of the platform lift in the consented drawings.

4.3 A draft determination was issued to the parties and ODI for comment on 18 October 2017.

4.4 Responses to the draft determination

4.4.1 On 26 October 2017 the authority responded that it did not accept the draft determination's decision, and provided a consultation report⁶ on access to buildings. The authority submitted:

- There is conflict between the Building Code, specifically the prescriptive Clause D1.3.4(c), and NZS 4121. NZS 4121 allows for a "lesser performance" than that contained within the Building Code.
- It is unclear how satisfying NZS 4121 achieves compliance with Clause D1.3.4(c).
- Confirmation is required that the relevant sections from NZS 4121 "substitute" Clause D1.3.4(c), and if this is true the authority would consider the values had been "modified", which is not in accordance with section 69(3).
- The authority referred to the report it enclosed with its submission as highlighting the inconsistencies between NZS 4121 and the Building Code.

4.4.2 In regard to Clause D1.3.2(c), the authority stated:

- Compliance with Clause D1.3.2(c) should be considered and the determination decision should acknowledge this clause.
- The authority is of the opinion that "reasonable access" for people with disabilities is required to the upper level bar. The authority noted the requirements for an accessible route and stated that it is of the view that the only way compliance with Clause D1.3.2(c) can be achieved is with a lift.

⁶ Consultation Report: Access to Buildings for People with Disabilities (June 2014)

- An amendment to the consent will be required if the platform lift is removed. The authority will require the applicant to state how compliance with Clause D1.3.2(c) is to be achieved. The authority believes this should be included within the determination.

4.4.3 On 26 October 2017 the applicant accepted the draft determination subject to following:

- Clarification that an amendment to the building consent to remove the platform lift would comply with Clause D1 and that the authority would be required to accept the removal of the lift without imposing any additional conditions on the building or wider development, such as requiring a ramp.
- Sought for the conclusion of the determination to state that a lift is not required to comply with Clause D1, rather than specifically referring to Clause D1.3.4.

4.4.4 On 1 November 2017 ODI submitted the following comments:

- The New Zealand Disability strategy should influence decisions relating accessibility for disabled people. Also, international law requires realisation of accessibility improvements for disabled New Zealanders, through the United Nations Convention on the Rights of Persons with Disabilities.
- ODI acknowledges that the Building Act does not compel a building owner from doing more than that prescribed by the Building Code.
- ODI commends the building owner for agreeing to install a platform lift to allow people who cannot use the accessible stairs to reach the upper level.
- Generally, ODI does not agree that it is acceptable to limit access to upper stories of a building based on the floor size or occupancy, but notes that the draft decision follows existing legislation and previous determinations “in fairly reaching its conclusion”.

4.4.5 The submissions have been taken into consideration and the determination amended as appropriate.

5. Discussion

5.1 The relevant 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 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.

5.1.2 What constitutes ‘reasonable and adequate provision’ for access is to be assessed against the performance requirements set out in the Building Code, namely in Clause D1 Access routes.

5.1.3 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: ...

- (c) 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,...

5.1.4 Section 19 of the Act states:

- (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

5.1.5 Under section 119, NZS 4121 is to be taken as an Acceptable Solution.

5.1.6 NZS 4121 states:

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

5.2 The Building Code and NZS 4121

5.2.1 Under section 119, NZS 4121 is deemed to be an Acceptable Solution. Acceptable Solutions are prescribed methods that under section 19 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 performance requirements of Clause D1 of the Building Code.

5.2.2 The authority is of the view that NZS 4121 allows for “lesser performance” than the Building Code, and questioned whether NZS 4121 substituted Clause D1.3.4(c).

5.2.3 NZS 4121 does not “substitute” Clause D1.3.4(c) and NZS 4121 does not allow for a lower standard of compliance. NZS 4121 simply has different criteria than Clause D1.3.4(c). The combined effect of Clause D1.3.4(c)(iii) and paragraph 9.1.3.2 of NZS 4121 is that a lift is required in a building having two storeys if the floor served by the lift has both a total design occupancy of 40 or more persons and a gross floor area of 400m² or more.

5.2.4 Consequently, when NZS 4121 is used as the means of compliance a lift is required when the occupancy numbers and floor size area will be exceeded.

5.3 Establishing compliance with the Building Code

- 5.3.1 The upper level of the building has an occupancy of 50 people, which exceeds the occupancy number stated in Clause D1.3.4(c) to require a lift. However, the gross floor area of the first floor is approximately 132m² and the stairs are accessible for ambulant users with disabilities; accordingly the requirements of paragraph 9.1.3.2 of NZS 4121 are met without a lift. The building without a lift to the upper level would satisfy NZS 4121 with regard to access to the upper level and therefore would be deemed to comply with the Building Code.
- 5.3.2 I acknowledge the opinions of ODI and that the authority has a desire to see best practice implemented. While it is desirable to implement best practice, and this should be encouraged, building work is not required to achieve above the performance criteria prescribed in the Building Code.
- 5.3.3 The authority has submitted that should an amendment be sought by the applicant to remove the lift from the consent, the access route will no longer comply with Clause D1.3.2(c).
- 5.3.4 Clause D1.3.2(c) sets out the performance requirement that at least one access route shall have features to enable people with disabilities to have access and within those spaces where they may be expected to work or visit – that is an “accessible route”. Clause D1.3.3 lists the performance requirements that access routes must have, and Clause D1.3.4 lists the additional performance requirements that an accessible route must have on top of the requirements of Clause D1.3.3.
- 5.3.5 I am of the view that as the access route without a lift would satisfy NZS 4121 and therefore would comply with Clause D1.3.4(c), which sets out the accessible performance requirements, it follows that it would comply with Clause D1.3.2(c).
- 5.3.6 I note that there will be individual people with disabilities who will be disadvantaged by the lack of a lift in this building. While that disadvantage must be accepted in terms of the legislation, I strongly urge the applicant to retain the platform lift as consented.

6. The decision

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the building without a lift to the upper level would satisfy NZS 4121 and would therefore be deemed to comply with Clause D1 with regard to access to the upper level.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 22 November 2017.

Katie Gordon
Manager Determinations