

Access and facilities for people with disabilities in the reconstruction of part of a shop

1 THE MATTER TO BE DETERMINED

- 1.1 The matter before the Authority is a dispute about whether a lift and accessible toilets are required in the reconstruction of part of a building complex functioning as a single shop.
- 1.2 The Authority takes the view that it is being asked to determine whether the proposed provisions for access for people with disabilities comply as nearly as is reasonably practicable with clauses D1.3.4(c), G1.3.1, and G1.3.4 of the building code (the First Schedule to the Building Regulations 1992).
- 1.3 In making its determination the Authority has not considered any other aspects of the Building Act 1991 or of the building code.

2 THE PARTIES

- 2.1 The applicant was the owner of the building acting through a firm of consulting engineers. The other party was the territorial authority.

3 THE COMPLEX AND THE SEQUENCE OF EVENTS

- 3.1 The shop occupies the whole of a building complex. The original building was erected before 1957, and the complex has developed over some time by way of a number of additions and alterations, most of which were done before the Building Act came into force. The result was a complex with two principal levels and a variety of small mezzanines and partial levels.
- 3.2 The upper level was razed to the ground by fire, and that level has been reconstructed with a structure of similar style and size. When the owner applied for a building consent for the reconstruction, the territorial authority raised the question of access for people with disabilities. However, so that the reconstruction could be started, and business could be recommenced, the territorial authority and the owner agreed that reconstruction could commence subject to any additional work required as a result of this determination being undertaken after the determination was issued.

3.3 On receipt of the application, the Authority asked the applicant for drawings indicating the accessible routes in and around the complex to complement the structural drawings received with the application. There was almost a year's delay before those drawings were received. In the interim, the territorial authority issued a notice to rectify that referred not only to access but also to facilities for people with disabilities. That notice appears to be suspended under section 17(4) of the Building Act, but the Authority is treating it as in effect requiring the Authority to consider the question of facilities, as well as access, for people with disabilities.

3.4 The territorial authority described the various parts of the complex as follows:

“Area A: The main lower level, being accessed directly from [a street] with a stairway link to the main upper level, Area C, towards the eastern end of the building in the rear corner. Area A was also provided with a link to the loading bay area described as Area B

“Area B: The loading bay area located to the west of Area A, with a link at the lower level and a small area of office accommodation at first floor level above the loading bay. Access to this area of office accommodation is by way of a stair.

“Area C: The main upper level which was almost independent of the main lower level, Area A, with only a small link stair towards the eastern end of the building. The link stairs between Areas A and C have a small floor area, approximately 70 m², at an intermediate level. This is the only location within the [complex] that any of the floor located in Areas A and C occur directly above each other. The western end of the Area C was also provided with a lower two floors, being the area described as Area D.

“Area D: Provides another loading bay area at the lower level of the complex, with a mezzanine floor between the loading area and the main upper level floor of Area C. There was no link between the lower levels of the Area D, and areas A and B within the complex.”

3.5 The Authority was not told the total floor area of the shop, but from the drawings it appears to be of the order of 1900 m².

3.6 The owner proposes to provide level or ramp entry into the complex at the following locations:

- (a) From the footpath to the main entrance to the lower level Area A. There is no adjacent parking area on site.
- (b) From the footpath to the lower level loading bay Area B.
- (c) From approximately 40 m along a driveway from the road to the back of the complex to the intermediate level truck dock at Area D (the driveway itself is not accessible).

- (d) From a sealed area, which is approximately 60 m along the driveway, to a rear door into the upper level Area C. There is a sloping unsealed area available for car parking in the vicinity but not adjacent to the ramp.
- 3.7 That level or ramp access serves all areas of the complex except:
- (a) A showroom with a floor area of 48 m².
 - (b) An area containing public toilets with an area of 48 m².
 - (c) Two mezzanines with areas of 50 and 70 m² respectively.
 - (d) Offices with an area of 120 m².
- 3.8 The owner proposes to provide an accessible toilet in a staff toilet block, marked for the use of staff and of people with disabilities only.

4 THE LEGISLATION AND NZS 4121

- 4.1 For the reasons set out in Determination 95/008, the Authority takes the view that compliance with NZS 4121 is to be accepted as establishing compliance with the corresponding provisions of the building code.
- 4.2 The relevant provisions of the Building Act are:
- (a) Section 3(2):
 - (2) For the purposes of [Part IX of this Act.] a building consent, a code compliance certificate, and a compliance schedule the term “building” also includes—
 - (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.
 - (b) Section 38:

No building consent shall be granted for the alteration of an existing building unless the territorial authority is satisfied that after the alteration the building will—

 - (a) Comply with the provisions of the building code for means of escape from fire, and for access and facilities for use by people with disabilities [(where this is a requirement in terms of section 47A of this Act)], as nearly as is reasonably practicable, to the same extent as if it were a new building; and
 - (b) Continue to comply with the other provisions of the building code to at least the same extent as before the alteration.
 - (c) Section 47A(1) and (4):
 - (1) In any case where provision is being made for the construction or alteration of any building to which the public are to be admitted, whether on payment or otherwise,

reasonable and adequate provision . . . shall be made for persons with disabilities who may be expected to visit or work in that building and carry out normal activities and processes in that building.

(4) The provisions of this section shall apply to, but shall not be limited to, buildings, and parts of buildings . . . that are intended to be used for or associated with one or more of the following purposes:

- (r) Shops, shopping centres, and shopping malls.

4.3 The relevant provisions of the building code are:

D1 ACCESS ROUTES

OBJECTIVE

D1.1 The objective of this provision is to:

- (c) Ensure that people with disabilities are able to enter and carry out normal activities and functions within buildings.

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 spaces where they may be expected to work or visit, or which contain facilities for personal hygiene . . .

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:
 - (ii) buildings are three storeys high and have a total design occupancy of 50 or more persons on the two upper floors,
 - (iii) buildings are two storeys high and have a total design occupancy of 40 or more persons on the upper floor . . .
- (h) Have stair treads with leading edge which is rounded, and
- (i) Have handrails on both sides of the accessible route when the slope of the route exceeds 1 in 20. The handrails shall be continuous along both sides of the stair, ramp and landing except where the handrail is interrupted by a doorway.

F8.3.4 Signs shall be provided in sufficient locations to identify accessible routes and facilities provided for people with disabilities.

G1.3.1 Sanitary fixtures shall be provided in sufficient number and be appropriate for the people who are intended to use them.

G1.3.3 Facilities for personal hygiene shall be provided in convenient locations.

G1.3.4 Personal hygiene facilities provided for people with disabilities shall be accessible.

4.4 The relevant provisions of NZS 4121:2001 are in its clause 9.1.3.2:

... a lift is not required where:

- (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 people with ambulant disabilities.

5. THE SUBMISSIONS

5.1 Submissions from the applicant

- 5.1.1 The applicant submitted that the complex had been altered in 1996, and the fact that a building consent had been issued for those alterations “was considered to demonstrate compliance of the existing [complex] as nearly as is reasonably practicable with the requirements of clause D1 of the Building Regulations”.
- 5.1.2 On that basis, the applicant submitted that the reinstated upper level was required to, and did, comply with the provisions of the building code for access and facilities for people with disabilities, but that no changes were required to the existing undamaged parts of the complex.
- 5.1.3 The applicant also submitted that both main floor levels were constructed as slab on grade buildings and it was therefore “difficult to consider the complex as a two storey building, rather than two linked single storey buildings”.
- 5.1.4 Furthermore, it was not practicable to install a lift between the main floor levels as there was no location where the upper level was directly above the lower level, so that “the provision of a lift [is] not possible in the manner of a traditional lift installation”.
- 5.1.5 The applicant submitted a plan purporting to show adequate and reasonable access for people with disabilities from the street frontage to the lower of the main floor levels, and from the driveway to the upper main floor level.

5.2 Submissions by the territorial authority

- 5.2.1 The territorial authority did not accept that its decision about upgrading in the context of the 1996 alterations meant that it could not require additional upgrading in the context of the 2001 reinstatement.
- 5.2.2 The territorial authority submitted that:
 - (a) “ . . . because of its use, its size, occupancy load, staff numbers (14) it is a building that if it was a new building a lift would be required.”
 - (b) “ . . . it is unreasonable to expect people with disabilities to visit the lower level, enter a motor vehicle, drive up [the driveway], disembark the vehicle, and enter the upper level.”

- 5.2.3 The territorial authority also submitted a series of photographs of the complex, including photographs that showed:
- (a) The stairs between the upper and lower levels are not accessible in terms of paragraph 4.0 of Approved Document D1 or section 8 of NZS 4121.
 - (b) The accessible toilet is in an area designated “Staff only” and is itself labelled: “This toilet is for staff and paraplegics only”.

5.2.4 On two visits to the site, territorial authority officials had found the rear door to the upper level showroom to be locked.

6 DISCUSSION

6.1 General

- 6.1.1 There is no dispute that section 47A of the Building Act applies to the complex and that therefore a lift is required for full compliance with clause D1 of the building code and accessible toilet facilities are required for full compliance with clause G1.
- 6.1.2 There is also no dispute that section 38 requires the complex, after the alteration, to comply with clauses D1 and G1 as nearly as is reasonably practicable.

6.1.3 There is no dispute that there are existing routes of travel for people who cannot use accessible stairs to all floor spaces except those listed in 3.7 above. The question is whether those routes make reasonable and adequate provision for people with disabilities so that there is no need for a lift.

6.1.4 The only matters of dispute are therefore:

- (a) The effect of the previous building consent,
- (b) Whether the complex must be treated as a single building or as two separate but connected buildings,
- (c) Whether the existing routes of travel for people with disabilities are adequate and reasonable,
- (d) Whether it is reasonably practicable to install one or more lifts, and
- (e) Whether additional accessible toilet facilities are required and if so whether it is reasonably practicable to install them.

6.2 The effect of the previous building consent

6.2.1 The Authority does not accept the applicant’s submission that the issuing of a previous building consent for alterations to the complex in 1996 means that in 2002 the existing parts of the complex must be accepted as complying as nearly as is reasonably practicable with the provisions of the building code for access and facilities for people with disabilities.

- 6.2.2 If the applicant's submission were correct, then a territorial authority would not be able to take account of the size and nature of the alteration in deciding what upgrading is required. If it had only one bite at the cherry, the territorial authority would ensure that it was as big a bite as possible. The Authority expresses no opinion as to whether or to what extent territorial authorities may take account of the size and nature of the particular alteration concerned, but it is aware that they do so.
- 6.2.3 To put it in legal terms, the submission amounts to the assertion that the territorial authority is prevented (legally, "estopped") from requiring in 2002 more than it accepted in 1996. The Authority is not aware of any legal basis for that assertion, which appears to be based on contract law despite the fact that there is no contractual relationship between the owner and the territorial authority.
- 6.2.4 The Authority rejects that assertion, taking the view that the territorial authority's duty to comply with the Building Act in 2002 cannot be inhibited by its actions in 1996.
- 6.2.5 In any event, the Authority's task is to determine whether the territorial authority made the right decision when it required a lift in 2001. In making that determination, the Authority cannot conceivably be bound by the territorial authority's 1996 decision.

6.3 Is the complex to be treated as one two-storey building?

- 6.3.1 The applicant said:

Both main floor levels . . . have been considered as single floor slab on grade buildings, and it is therefore difficult to consider the complex as a two storey building, rather than two linked one storey buildings.

And subsequently explained in more detail:

[It is] our contention that the building is in fact two basically single storey buildings on ground, both with ramped access. We would note that the buildings are structurally totally independent, ie the bottom one can be totally demolished with no effect on the upper building other than the loss of a very small area of toilets. If the existing stairs, which is the only area in which these buildings are vertically stacked were open this would certainly be the case, and the enclosure of this link is the basis for considering the entire complex as a single building.

- 6.3.2 In Determination 99/003 the Authority reviewed previous determinations in which it had addressed the question of whether a floor level is to be treated as a storey for the purposes of clause D1.3.4 of the building code. As the Authority had originally said in Determination 96/004, the fact that two levels were each accessible from the outside without the use of stairs did not mean that those levels were to be treated for access purposes as if they were both at the same "ground level". In this case, as in Determination 96/004, the disparity between the external routes between floor levels

and the internal routes by stairs made it impossible for the Authority to accept that the external routes amounted to reasonable provision for access by people with disabilities.

- 6.3.3 As to the question of whether the complex is one building or two, the Authority notes that section 3 of the Building Act provides in effect that any requirement for a building as a whole applies equally to any two or more buildings which are intended to be managed as one building with a common use and a common set of ownership arrangements. The complex clearly comes within that description.
- 6.3.4 Accordingly, the complex is to be treated as one two-storey building.

6.4 Are the existing routes of travel for people with disabilities adequate and reasonable?

- 6.4.1 In Determination 96/004, the Authority said:
 - 6.4.2 Whether any particular route of travel for wheelchair users can be accepted as adequate and reasonable is a matter to be decided in the light of all the circumstances of the case.
 - 6.4.3 The mere fact that a route of travel for wheelchair users is longer and more exposed to the weather than the corresponding route for others does not necessarily establish that the wheelchair route is unreasonable. . .
 - 6.4.5 In this case the lengths of the wheelchair routes and the gross disparities between the wheelchair routes and the other routes (see 3.4 above) make it impossible for the Authority to accept that the wheelchair routes are reasonable. For that reason also, the Authority concludes that the proposed complex does not comply with the building code.
- 6.4.2 A similar gross disparity exists in the present case, and similarly makes it impossible for the Authority to accept that the routes for people with disabilities are either adequate or reasonable.

6.5 Is it reasonably practicable to install one or more lifts?

- 6.5.1 The applicant said:

“ . . . there is no location within the existing building, or in fact the original building fabric in which a vertical movement will result in an occupant moving from the lower to the upper level, or vice versa.
- 6.5.2 The Authority does not understand what the applicant means by “the existing building” as distinct from “the original building fabric”, but takes the applicant to be asserting that it is not reasonably practicable to install a lift within the walls of the existing complex. No reasons have been given in support of that assertion. Indeed, from its submissions the applicant does not appear to have given any consideration to what would be involved in installing a lift.

- 6.5.3 From the drawings it has been given, the Authority cannot see any compelling reasons why a lift should not be installed in a new link alongside the existing link between Area A and Area C, the two main floor levels.
- 6.5.4 A lift in that location would not appear to give access to all of the 336 m² of floor space listed in 3.7 above, to which reasonable and adequate access is also required. However, the total floor area that would not be served by a lift between Areas A and C is less than the 400 m² at which a lift is required by NZS 4121. That floor area is not sufficient to justify an additional lift or lifts to service those spaces. However, it appears from the territorial authority's submissions and photographs that the stairs to some if not all of those areas do not comply with the requirements of the building code for accessible stairs. In the absence of evidence to the contrary, the Authority considers that it would be reasonably practicable to make those stairs accessible in accordance with clause D1.3.4(h) and (i) of the building code.
- 6.5.5 However, those remarks are by way of discussion only, it is not for the Authority to decide how or where a lift is to be provided, that is for the owner to propose and the territorial authority to consider. Suffice it to say by way of determination that, from the drawings submitted, and in the absence of any evidence to the contrary, the Authority considers that it is reasonably practicable to install a lift.

6.6 Accessible toilet facilities

- 6.6.1 Accessible toilet facilities are available in the staff toilet block.
- 6.6.2 The territorial authority submits that they do not comply with the acceptable solution G1/AS1 and that they are not acceptable as an alternative solution. However, the territorial authority does not identify the respects in which it considers they do not comply, and that is not immediately evident from the submitted photographs of the facilities in the course of construction.
- 6.6.3 However, the photographs clearly show that when they were taken the signs used to identify the accessible toilet facilities were inappropriate, and should be replaced by more appropriate signs incorporating the international access symbol.
- 6.6.4 In Determination 94/001 the Authority determined that the toilet facilities provided for patrons in a restaurant need not be physically separated from the toilet facilities provided for staff. Equally, the Authority considers that the same applies to toilet facilities in a shopping complex. In this case, therefore, the Authority has no objection to accessible toilet facilities for both customers and staff being provided in a block otherwise intended for the use of staff only, provided that appropriate signs are installed.
- 6.6.5 The Authority concludes that accessible toilet facilities are already provided. Whether they comply with the building code is not clear, and that is a matter that will need to be addressed by the territorial authority before it issues a code compliance certificate for the alterations.

7 THE AUTHORITY'S DECISION

- 7.1 In accordance with section 20 of the Building Act, the Authority hereby determines that, in order to comply as nearly as is reasonably practicable with clause D1 of the building code as required by section 38 of the Building Act:
- (a) A lift is to be installed between the main lower level and the main upper level (areas A and C);
 - (b) The stairs to those upper levels not served by the lift are to be made accessible; and
 - (c) The accessible toilet facilities and associated signs are to comply with the relevant provisions of the building code.

Signed for and on behalf of the Building Industry Authority on this 7th day of June 2002

W A Porteous
Chief Executive