

Determination 2006/73

Access for people with disabilities to the upper floor of a two storey warehouse and office building at 4 Daly Street, Lower Hutt

1 The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 (“the Act”) made under due authorisation by me, John Gardiner, Determinations Manager, Department of Building and Housing (“DBH”), for and on behalf of the Chief Executive of the DBH.
- 1.2 The applicant is Tewanin Properties Ltd (“the owner”) acting through a firm of architectural designers. The only other party is the Hutt City Council (“the territorial authority”).
- 1.3 The application arises from a dispute about whether a lift is required to the upper floor of a warehouse and office building in order to comply with sections 112 and 115 of the Act and clause D1 of the Building Code (the First Schedule to the Building Regulations 1992).
- 1.4 In making my decision I have not considered any other aspects of the Act or of the Building Code.
- 1.5 Unless otherwise stated, references below to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

2 The building and the sequence of events

- 2.1 The building was constructed in approximately 1960 as a warehouse and offices. It has two storeys. The lower level has a gross floor area of approximately 490 m² and the upper level approximately 480 m². The building has reinforced concrete walls and floors and a timber pitched truss roof. There are two stairways, one of which complies with the clause D1.3.4(g)-(i) requirements for an accessible stair (one that permits use by someone with ambulant disabilities).

- 2.2 In 2001 there was a change of use of the lower level for the purposes of a youth centre. The building recently changed ownership, and the new owners propose to change the use of the lower level back to a warehouse and offices. The upper level is currently empty and is proposed to be divided into three office tenancies. Proposed alterations include the provision of accessible toilet facilities on both levels but not the provision of a lift.
- 2.3 It is not disputed that the building is one to which section 118 applies and therefore that it is required to make reasonable and adequate provision for people with disabilities).
- 2.4 When the owner applied for a building consent for the proposed alterations, the territorial authority raised various concerns, including:
- “There is a requirement for a lift under The Building Act 2004. . .
- “As the upper floor has a gross floor area of 440m² it will require a lift [in order to comply with NZS 4121]. . .
- “The [territorial authority] cannot grant a waiver under section 69 of the Building Act 2004.
- “This will have to either comply, or alternatively you will have to apply for a determination from the DBH.”
- 2.5 The owner accordingly applied for this determination as to whether a lift is required.

3 The legislation and NZS 4121

- 3.1 Under sections 112 (alterations to existing buildings) and 115 (changes of use), as amended by the Building Amendment Act 2005, the territorial authority is required to be satisfied that the building, after the alteration or in its new use, will “comply, as nearly as is reasonably practicable, with the provisions of the building code that relate . . . to access and facilities for persons with disabilities”.
- 3.2 Clause D1.3.4(c) of the Building Code requires that a lift shall be provided in accessible buildings that “are two storeys high and have a total design occupancy of 40 or more persons on the upper floor”.
- 3.3 However, section 119 provides that NZS 4121 “is to be taken as a compliance document”, and section 19 provides that a territorial authority must accept compliance with the provision of a compliance document as establishing compliance with the Building Code.
- 3.4 Clause 9.1.3.2 of NZS 4121 provides that, for a two storey building in which the upper floor, as in this case, is not intended to be used for certain purposes, a lift is not required if the gross floor area of the upper floor is less than 400 m².
- 3.5 Thus the Building Code and NZS 4121 specify different circumstances in which a lift is to be provided. A building complying with NZS 4121 might not comply with the Building Code (and the other way round).

3.6 As to the use of the building, section 115 provides that an owner must not change the use of a building unless the territorial authority gives the owner written notice that it is satisfied as to compliance with the Building Code.

3.7 The Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 define “change the use” in terms of the uses specified in Schedule 2 of those Regulations. In this case, the relevant use (emphasis added) is:

Use	Spaces or dwellings	Examples
WL (Working Low)	spaces used for working, business, or storage—low fire load	Places for manufacturing, processing, or storage of non- combustible materials or materials having a slow heat release rate, cool stores, covered cattle yards, wineries, places for grading, storage, or packing of horticultural products, places for wet meat processing, banks, <u>hairdressing shops, beauty parlours, places for provision of personal or professional services</u> , dental offices, laundries (self-service), medical offices, <u>business or other offices</u> , police stations (without detention quarters), radio stations, television studios (no audience), <u>places for small tool and appliance rental and service</u> , telephone exchanges, places for dry meat processing

4 The submissions

4.1 The owner quoted extensively from the Act, the Building Code, and NZS 4121, and submitted that:

- (a) A lift was not required on the basis of the design occupancy of the upper floor, which was “38 people approx”. That was based on a superseded tenancy plan and was calculated in accordance with the superseded Table A2 of the Fire Safety Annex to Approved Documents C2, C3, and C4.
- (b) A lift was required on the basis of the gross floor area of the upper floor, which was 475.81 m2.
- (c) Installing a lift would necessitate significant structural alterations and reduce the floor areas available for warehouse and office use.

4.2 The territorial authority also quoted extensively from the Act, the Building Code, and NZS 4121, plus the Human Rights Act 1993, and submitted that a lift should be installed because:

- (a) “The upper level is greater than 400m2 and has an occupancy load of greater than 40 people (44 occupants – number retrieved from fire report) and therefore needs a lift in order to comply with both clause D2 and NZS 4121.
- (b) “There is to be a complete fit-out at both levels . . . therefore it would be reasonably practicable to install a lift at this time”

4.3 In the light of those submissions, I prepared a draft determination (“the preliminary draft”), which I sent to the Office for Disability Issues (“the ODI”) by way of

consultation as required by section 170(b). I considered the comments received from the ODI and then prepared a further draft (“the second draft”) incorporating those comments in the discussion. The second draft concluded that in the particular circumstances it was not reasonably practicable to install a lift in the building. I copied the second draft to the parties, together with the ODI’s comments, and to the ODI.

4.4 In response to the second draft, the owner advised that one of the stairways was in fact accessible, but otherwise accepted the second draft.

4.5 The territorial authority accepted the second draft.

4.6 The ODI asked me to reconsider the second draft for reasons that are incorporated in the discussion below.

5 Discussion

5.1 The Building Code and NZS 4121

5.1.1 In Determination 1995/8, made under the former Building Act 1991, the Building Industry Authority said:

10.3 [Clause D1.3.4(c) of] the building code and NZS 4121 specify different circumstances in which a lift is to be provided. Thus a building complying with NZS 4121 in that respect might not comply with the building code (and the other way round). However, . . . the Authority considers that compliance with either NZS 4121 or the Approved Documents must be accepted as establishing compliance with the building code. In some cases that will involve a legal fiction because of the differences between the provisions of NZS 4121 and those of the building code.

12.1 . . . the combined effect of clause D1.3.4(c)(iii) of the building code and clause 304 [now clause 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 400 m² or more.

5.1.2 I take the view that the provisions of the Act in that regard are substantively equivalent to the corresponding provision of the former Act, and accordingly agree with the approach taken by the Building Industry Authority.

5.1.3 The ODI took issue with that approach, saying that it was based on “strict legal analysis” and did not “address other high-level public policy considerations”.

5.1.4 In particular, the ODI referred to:

- The DBH’s Statement of Intent as to sustainable development,
- The New Zealand Disability Strategy, and
- Part 1A (headed “Discrimination by Government, related persons and bodies, or persons or bodies acting with legal authority”) of the Human Rights Act.

5.1.5 In making a determination I am required by section 186(a) to comply with the principles of natural justice. I take the view that it would be inconsistent with those principles if I took account of DBH, or even Government, policy contrary to my reading of the Act. I also take the view that, under section 20K of the Human Rights Act, Part 1A of that Act does not apply to a determination under the Building Act.

5.2 Total design occupancy of the upper floor

5.2.1 As mentioned in 4.1(a) above, the owner submitted that the design occupancy of the upper floor was “38 people approx” whereas the territorial authority understood that it would be 44 people. However, the territorial authority referred to a fire report that had been based on an upper-floor layout different from that submitted by the owner.

5.2.2 I made my own calculations based on the tenancy plan submitted by the owner and calculated in accordance with Table 2.2 of the current compliance document C/AS1, which provides:

Activity	Occupant density (Users/m ²)
Offices and staffrooms	0.1
Personal service facilities	0.2
Reception areas	0.1
Workrooms, workshops	0.2

5.2.3 My calculations gave design occupancies of:

- (a) 39 people if the tenancy areas are used as offices or reception areas.
- (b) 79 if the tenancy areas are used as personal service facilities, workshops, or workrooms.
- (c) Some intermediate figure if the tenancy areas are used partly as in (a) and partly as in (b).

5.2.4 Accordingly:

- (a) If the tenancy areas are used only as offices or reception areas then the building without a lift complies with the Building Code; but
- (b) If any part of the tenancy areas is used as personal service facilities, workshops, workrooms, or for any other activity having an occupant density exceeding 0.1 users/m², then the building without a lift does not comply with the Building Code.

5.2.5 The ODI commented that:

“A common criticism made by disabled people of the Code is that, over time, the actual uses to which buildings are put render them non-compliant with the Code in regard to access for people with disabilities. . . .

“[In this case], as tenants are yet to be found, the owner’s compliance with the Code requirements is so marginal as to run a significant risk that in its actual use the building will be operated in breach of code requirements for a building without a lift.”

- 5.2.6 I take the point, and also recognise that if there was a change of tenants such that part or all of the tenancy areas came to be used as personal service facilities instead of as offices or reception areas, the upper floor would still be classified as use WL in terms of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations. In other words there would be no change of use for the purposes of the Act despite the significant increase in the design occupancy.
- 5.2.7 That means that the design occupancy could be increased without the territorial authority having to be satisfied that the building, with the increased occupancy, complies as nearly as is reasonably practicable with the provision of the Building Code for access and facilities for use by people with disabilities.
- 5.2.8 I therefore consider that, when calculating the design occupancy from C/AS1 for the purposes of clause D1.3.4(c), the relevant design density is the highest that could apply to the relevant use specified in the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations. In this case, that design density is 0.2 users/m², see 5.2.2 above, which gives a design occupancy of 79.
- 5.2.9 I conclude that I cannot assume that the upper floor will be used solely for offices and reception areas, and therefore that the building without a lift cannot be accepted as complying with the Building Code.

5.3 Gross floor area of the upper floor

- 5.3.1 The gross floor area of the upper floor exceeds 400 m². Accordingly, the building without a lift does not comply with NZS 4121 and therefore cannot be accepted as complying with the Building Code.

5.4 Compliance “as nearly as is reasonably practicable”

- 5.4.1 However, because this is an existing building, the requirement is not that it must comply with the Building Code but that it must comply “as nearly as is reasonably practicable”.
- 5.4.2 I take the view that under sections 112, 115, and 116, a building consent authority has not merely a power but a positive duty to decide whether proposed upgrading will achieve compliance with the Building Code as nearly as is reasonably practicable. That decision does not amount to a waiver or modification of the Building Code. Accordingly, I do not agree with the territorial authority when it told the owner, see 2.4 above, that, because the territorial authority could not grant a waiver of the provisions of the Building Code for access and facilities for use by people with disabilities, the owner had to either upgrade the building to comply completely with those provisions or apply for a determination.
- 5.4.3 The ODI considered that it would have been “reasonable for the territorial authority (TA) to decide in favour of NZS 4121” and that it had been “proper for the TA to make a decision not to apply the Building Code rigidly and thereby to force the

owner to seek a determination". My own view is that, even if the territorial authority decided that the building without a lift did not comply completely with either or both the Building Code and NZS 4121, nevertheless the territorial authority had the power, and was required, to decide whether it complied as nearly as was reasonably practicable.

- 5.4.4 I take the view that in this case complying as nearly as is reasonably practicable with either the Building Code or NZS 4121 is sufficient, it is not necessary to comply as nearly as is reasonably practicable with both.
- 5.4.5 The question of compliance as nearly as is reasonably practicable involves balancing the benefits of any particular item of upgrading against the costs or sacrifices of installing that item. That approach has been discussed in many previous determinations and was approved by the High Court in *Auckland CC v NZ Fire Service* [1996] 330.
- 5.4.6 In this case, the benefits of installing a lift are that people with disabilities that prevent them from using stairs will be able to visit and work on the upper floor. The sacrifices are the costs of installing a lift and the loss of floor areas available for warehouse and office use.
- 5.4.7 As discussed in 5.2 above, the building must be taken to have a design occupancy of 79, approximately 100% more than the 40 at which a lift is required by the Building Code. The gross area of the upper floor is 475.81 m², approximately 20% more than the 400 m² at which a lift is required by NZS 4121.
- 5.4.8 I consider that the relevant benefits relates to the 20% rather than to the 100%.
- 5.4.9 In weighing the benefits against the sacrifices, I take account of the facts that:
- Although both levels are to be altered, I do not agree with the territorial authority's submission that "therefore it would be reasonably practicable to install a lift". My own impression from the plans is that, without significant structural alteration to the main stairs, the only practicable position for a lift would be in a stand-alone lift shaft inside the building. That would mean that a significant area of the ground floor would not be available for warehouse or office use.
 - One of the existing stairways complies with the clause D1.3.4 requirements for an accessible stair, so that the upper floor, without a lift, is useable by people with ambulant disabilities.
 - The proposed change of use is to one with a design occupancy below the 40 at which a lift is required by the Building Code, but there is no legislative control over further changes that would increase that design occupancy so long as the upper floor continues to be put to use WL.
 - Any future alteration to the building, particularly if it results in an increase in the gross floor area of the upper floor, will need a building consent and

consequent reconsideration of access and facilities for use by people with disabilities.

- Although I have been given no specific information as to the cost of installing a lift, I understand that it would be of the order of \$50-100,000.

5.4.10 Commenting on the above discussion as it appeared in the second draft, the ODI drew attention to sections 3(b), 3(d), and 4(2)(k), which read:

3 Purpose

The purpose of this Act is to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings, to ensure that—

- (b) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them;
- (d) buildings are designed, constructed, and able to be used in ways that promote sustainable development.

4 Principles to be applied in performing functions or duties, or exercising powers, under this Act

- (2) In achieving the purpose of this Act, a person to whom this section applies must take into account the following principles that are relevant to the performance of functions or duties imposed, or the exercise of powers conferred, on that person by this Act:
 - (k) the need to provide, both to and within buildings to which section 118 applies, facilities that ensure that reasonable and adequate provision is made for people with disabilities to enter and carry out normal activities and processes in a building:

5.4.11 I recognise the importance of the purposes and principles of the Act. In particular, I accept that in making this determination I must take account of the need for buildings to be accessible. Nevertheless, I must recognise that the Building Code and NZS 4121 both specify that certain new two-storey buildings may be erected without lifts, and that the Act allows existing buildings, which would require lifts if they were new buildings, to be altered without the installation of lifts where that is not reasonably practicable. I therefore consider that I have complied with the purposes and principles of the Act by weighing the benefit that people with disabilities that prevent them from using stairs will be able to visit and work on the upper floor against the sacrifices involved in installing a lift, see 5.4.6 above.

5.4.12 As to that weighing exercise, the ODI considered that:

. . . increased weight should be given to consideration of the likelihood that disabled people may wish to enter and carry out normal activities within the building . . .

Factors to be taken into account in assessing this would include the proximity of the building to the central business district of the locality and to public transport and other facilities that enhance the ability of disabled people to participate in the ordinary activities of life carried on in the area.

5.4.13 I have carefully reconsidered the second draft in the light of those comments. In particular, I note that the building is very close to, if not actually in, the central business district and appears to be reasonably well served by public transport.

- 5.4.14 I accept that the location of the building can be a factor, see Determination 95/008 (building accessible only by boat), but I consider that in assessing the weight to be given to the location of the building it is also necessary to note that:
- (a) A building in the central business district might be easily reached by public transport, but the corresponding building in the suburbs might have more convenient parking and be more easily reached by private car.
 - (b) Buildings can have very long lives during which the nature of the locality might change.
 - (c) Considerations of location might be seen as opening the door to inappropriate consideration of other buildings in that location, for example: “This hotel need not be made accessible because there are already three accessible hotels nearby”.
 - (d) As to whether people with disabilities are likely to visit or work in any particular building, I consider that the use of the building is far more important than its location.
- 5.4.15 Having reconsidered the matter in the light of the ODI’s comments, I remain of the opinion that, on balance, the sacrifices of installing a lift outweigh the benefits and it is therefore not reasonably practicable to install a lift. However, I emphasise that the balance was a fine one, depending on the particular circumstances of the building and particularly on the fact that the layout of the building is such that installing a lift would make a significant area of the ground floor unavailable for warehouse or office use.

6 Decision

- 6.1 In accordance with section 188(1) of the Act, I hereby:
- (a) Determine that it is not reasonably practicable to install a lift.
 - (b) Reverse the territorial authority’s decision to refuse to grant the building consent.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 14 August 2006.

John Gardiner
Determinations Manager