

Determination 2008/16

Provision of lift access in the alteration and change of use of Building 35 of the Devonport Naval Base, Devonport, North Shore



1 The matters 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, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of the Department. The applicant is the Royal New Zealand Navy (“the owner”). The other party is the North Shore City Council (“the territorial authority”).
- 1.2 The matter for determination is the territorial authority’s decision to refuse to issue a building consent for the alteration of a three-storey building without a lift.

¹ The Building Act 2004 is available from the Department’s website at www.dbh.govt.nz.

- 1.3 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 Code² (the First Schedule to the Building Regulations 1992).

2 The building

- 2.1 The building is situated on HMNZS Philomel, a designated Defence Area, in effect a naval base. It was erected in the 1940s and has effectively three storeys, although some of the ground floor areas extend to the roof and others extend to the underside of the top floor. The building is currently used for various offices, workshops, and storage. The alterations are for the purpose of converting carpenters' and printers' workshops on the uppermost storey into offices, classrooms, toilet facilities, and a "parade hall".
- 2.2 The gross floor area of the upper floors is approximately 1300 m². The maximum occupant load of those floors is calculated in accordance with C/AS1 as 419 people, but the actual number of people intended to be present is 88.

3 The legislation and the compliance documents

- 3.1 Relevant provisions of the Act include:

17 All building work must comply with building code

All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

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 the provisions of a compliance document . . .

67 Territorial authority may grant building consent subject to waivers or modifications of building code

- (3) The territorial authority cannot grant an application for a building consent subject to a waiver or modification of the building code relating to access and facilities for people with disabilities.

112 Alterations to existing buildings

- (1) A building consent authority must not grant a building consent for the alteration of an existing building, or part of an existing building, unless the building consent authority is satisfied that, after the alteration, the building will—
- (a) comply, as nearly as is reasonably practicable, with the provisions of the building code that relate to—

² The Building Code is available from the Department's website at www.dbh.govt.nz.

- (i) means of escape from fire; and
 - (ii) access and facilities for persons with disabilities (if this is a requirement in terms of section 118); and
- (b) continue to comply with the other provisions of the building code to at least the same extent as before the alteration.

115 Code compliance requirements: change of use

An owner of a building must not change the use of the building,—

- (a) in a case where the change involves the incorporation in the building of 1 or more household units where household units did not exist before, unless the territorial authority gives the owner written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use, will comply, as nearly as is reasonably practicable, with the building code in all respects; and . . .
- (b) in any other case, unless the territorial authority gives the owner written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use, will—
 - (i) comply, as nearly as is reasonably practicable, with every provision of the building code that relates to either or both of the following matters:
 - (B) access and facilities for people with disabilities (if this is a requirement under section 118); and
 - (ii) continue to comply with the other provisions of the building code to at least the same extent as before the change of use.

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 Compliance document 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; or . . .

- (2) A standard specification to which this section applies is to be taken as a compliance document.

Schedule 2: Buildings in respect of which requirement for provision of access and facilities for persons with disabilities applies

The buildings in respect of which the requirement for the provision of access and facilities for persons with disabilities apply are, without limitation, as follows:

- (g) central, regional, and local government offices and facilities:

3.2 Relevant provisions of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 include:

5 Change the use: what it means

For the purposes of sections 114 and 115 of the Act, change the use, in relation to a building, means to change the use (determined in accordance with regulation 6) of all or a part of the building from one use (the old use) to another (the new use) and with the result that the requirements for compliance with the building code in relation to the new use are additional to, or more onerous than, the requirements for compliance with the building code in relation to the old use.

6 Uses of buildings for purposes of regulation 5

- (1) For the purposes of regulation 5, every building or part of a building has a use specified in the table in Schedule 2.
- (2) A building or part of a building has a use in column 1 of the table if (taking into account the primary group for whom it was constructed, and no other users of the building or part) the building or part is only or mainly a space, or it is a dwelling, of the kind described opposite that use in column 2 of the table.

Schedule 2: Uses of all or parts of buildings

Uses related to sleeping activities		
Use	Spaces or dwellings	Examples
CS (Crowd Small)	enclosed spaces (without kitchens or cooking facilities) where 100 or fewer people gather for participating in activities	Cinemas, . . . gymnasias, lecture halls, . . .
WL (Working Low)	spaces used for working, business, or storage—low fire load	places for manufacturing, processing . . . business or other offices, police stations (without detention quarters) . . .
WM (Working Medium)	spaces used for working, business, or storage—medium fire loads and slow, medium, or fast fire growth rates	places for manufacturing and processing . . .

3.3 Relevant provisions of clause D1 include:

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:
 - (i) buildings are four or more storeys high,
 - (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, or
 - (iv) an upper floor, irrespective of design occupancy, is to be used for the purposes of public reception areas of banks, central, regional and local government offices and facilities, hospitals, medical and dental surgeries and medical, paramedical and other primary health care centres . . .

3.4 Relevant provisions of the compliance document D1/AS1 include:

12.0 Lifts

12.0.1 For the purposes of determining whether a lift must be provided for people with disabilities to access upper floors, the design occupancy shall be determined using C/AS1 Paragraph 2.3.7 and Table 2.2.

COMMENT:

Alternative design occupancies being less than derived from Table 2.2, must be justified with clear supporting information. Table 2.2 already takes account of effective floor area reductions for normal furnishings associated with a given activity, such as desks or workstations in offices. However, in a factory situation with fixed machinery, actual operator numbers may be acceptable as the occupant load.

12.0.2 Building size may also be used to determine the need for a lift for people with disabilities. NZS 4121 is an acceptable solution based on gross floor area.

3.5 Relevant provisions of NZS 4121:2001 include:

9.1 Provision of lifts

9.1.3.1 General

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

- (c) The upper floor(s) are designed or intended to be used as:
 - (ii) Places of public assembly for 250 or more people . . .

9.1.3.2 Two and three storey buildings

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

- (b) Buildings are three storeys high and have a gross floor area of the upper floors of less than 500 m² . . .

4 The submissions and the draft determination

4.1 The territorial authority did not make any specific submissions, but in refusing the owner's application for a building consent it had said:

. . . the application is a change of use, with requirements as per section 115 with regards to accessibility . . . NZS 4121: 2001 requires that a lift is provided to the upper floors as:

- Places of public assembly exceeding 250 people is possible . . .
- Floor area and occupancy exceed the gross floor area of 500 m² and maximum numbers allowed by D1/AS1 . . .

4.2 The territorial authority had also said:

. . . we are unable to issue waivers on accessibility requirements as per the Act. The DBH issues waivers through the determination process.

4.3 The owner conceded that the upper floors have a gross floor area exceeding the 500m² mentioned NZS 4121, but submitted that it was not reasonably practicable to install a lift because:

(a) The alteration was for the purpose of:

Relocation of HMNZS Ngaona, the Naval Personnel Resource Centre, and the headquarters of the Northern Area Cadet Forces Training and Support Unit. The intended users of the refurbished areas are almost entirely New Zealand Defence Force personnel. A unique factor of Military Service is [that] personnel . . . unable to maintain minimum fitness standards are liable for medical discharge, which would apply in the event of personal disability. It is conceded people with disabilities could be civilian staff, however, the probability that people with disabilities will be present on the upper two floors is significantly lower than in the normal run of buildings.

The building . . . has strict security requirements and is not routinely accessible to the public.

(b) Defence establishments are not listed in Schedule 2.

(c) Installing a lift would cost about \$160,000 and involve the loss of useable space.

4.4 The owner cited Determination 1997/002 and said:

It is requested that the decision and reasoning surrounding Determination 1997/002 in which it was found that a refurbishment of a Police Force building without a lift would comply as nearly as reasonably practicable with the Building Code are taken into consideration. . . .

Following the reasoning of Determination 1997/002, it is [the owner's] opinion that the dominant factor in this application is that the building will be used by the Defence Force. On this basis the disadvantages of installing a lift, i.e. cost and lost space, appear to outweigh the benefits of improving disabled access as the vast majority of users cannot be disabled.

- 4.5 In correspondence with the territorial authority, the owner's consulting engineers said:
- The term 'Parade Hall' does not describe the intended use [which is as] a large foyer associated with class rooms.
- 4.6 In the light of the above submissions I prepared a draft determination which I sent to the Office for Disability Issues ("ODI"), Ministry of Social Development, by way of consultation under section 170.
- 4.7 The draft took account of the fact that changes in the relevant legislation since 2004 meant that the building could change ownership without the territorial authority having any opportunity to consider whether a lift was needed in the new ownership. On that basis, the draft did not follow the precedents of previous determinations but concluded that a lift was required.
- 4.8 The ODI agreed with the draft.
- 4.9 I then sent the draft to the parties, together with the ODI's comments.
- 4.10 The territorial authority offered no comments. The owner did not accept the draft, but reiterated some points and said, amongst other things, that the likelihood of the building changing ownership was "virtually nil". I have responded to some of these matters in subsequent paragraphs.
- 4.11 The ODI disagreed with the owner's contentions but recognised that the matter was "finely balanced".
- 4.12 I have taken account of those responses and amended the draft accordingly.

5 The site meeting

- 5.1 On 8 February 2008, I arranged a meeting at the naval base, in order to examine the building in question and to give the parties an opportunity to discuss the various matters. I was accompanied by a Referee engaged under section 187(2) of the Act. Also in attendance was a naval officer representing the applicant and two representatives from the territorial authority. A consultant to the Department was also present.
- 5.2 The naval officer gave a general description of the layout and functions of the base and the group inspected the building in question. It was noted that the interior is at present cleared ready for the new work. A discussion took place inside Building 35 and I summarise the points raised as follows:
- There is some overlap between the civilian operations and the naval operations that are carried out on the base.
 - Refurbishment will allow for the relocation of RNZS Ngapona, the Naval Personal Resource Centre, and the headquarters of the Northern Area Cadet Forces Training and Support Unit. There are to be some classrooms associated with these activities.

- The ground floor area will be used exclusively for those responsible for ship maintenance at the adjacent dry dock. The nature of this work is such that it will only be performed by able-bodied people.
- At present, only 2 civilian staff are employed in relation to the proposed activities, with the possibility that a third civilian will also be employed. All the remaining staff will be Defence Force personnel. It was conceded that disabled staff could work in civilian/military capacities.
- While there is a relatively large area designated for a parade ground this will be used in relation to the immediate activities taking place in the building. Any parade or similar function involving relatives or friends of the participants can be held at two other external venues, both of which have disabled access.
- There are no catering facilities in the building, apart from a kitchen used by the dockworkers.
- The likelihood of disabled workers working in the building is less than those in similar circumstances. In addition, there are adjoining facilities able to accommodate disabled persons as they have disabled access. Therefore, a disabled person would not be barred from working in conjunction with the new facility.
- A fully accessible stair will be installed making it easier for partially disabled workers to access the upper floors.
- Defence personnel who suffer temporary disability (such as a broken leg) are sent on sick leave until they are fully recovered.
- It was accepted that the Defence Forces, as a part of the government, are required to set examples over and above similar circumstances involving private organisations.
- The upper floors are not “designed or intended to be used” for public assembly exceeding 250 persons. However, this number of persons could be present on the floors from time-to-time.
- There was no necessity to provide a lift for the transport of materials as there were always numerous staff available to carry materials up the stairs of the building.
- The cost of the lift would be in the region of \$160,000 and the benefits of installation are far outweighed by this cost factor.

5.3 These discussions enabled me to amplify or clarify various matters of fact that were of assistance to me in preparing this determination.

6 Discussion

6.1 General

6.1.1 The territorial authority said in effect (see 4.2 above) that it could not issue a building consent for the alterations because that would involve a waiver or modification of the Building Code relating to access and facilities for people with disabilities.

6.1.2 In Determination 1997/001, made under the Building Act 1991 (“the former Act”), the Building Industry Authority (the antecedent of the Department) said:

5.3 The Authority agrees that a territorial authority does not have the power to waive or modify the provisions for access and facilities for use by people with disabilities in a new building, but takes a different view in respect of the upgrading required by section 38 when an existing building is being altered. On the basis of a legal opinion from the Crown Law Office, the Authority has issued a statement (see *Building Industry Authority News* No. 23, June 1993) which includes the following:

“A territorial authority may lawfully issue a building consent for the alteration of a building if it is satisfied that after the alteration the building will comply as nearly as is reasonably practicable with the provisions of the New Zealand Building Code for access and facilities for use by people with disabilities even though it will not comply in all respects.”

6.1.3 That was repeated in Determinations 1999/001 and 2003/5. I take the view that the relevant provisions of the Act are substantively identical to those of the former Act so that, in the absence of decided cases, I take the same view as did the Authority.

6.1.4 The territorial authority also said that “public assembly exceeding 250 people is possible”, apparently referring to clause 9.1.3.1(c)(ii) of NZS 4121. I recognise that there is enough space in the “parade ground” for 250 people, but I do not agree that “public assembly” would occur and accept that the “parade ground” is in fact a foyer associated with the classrooms and offices on the floor concerned.

6.1.5 I take the owner’s basic submission to be that Determination 1997/02 applies and should be followed. That submission is discussed in 6.2 below.

6.2 Previous determinations

6.2.1 The owner cited Determination 1997/002, concerning a police station, and there was a similar result in Determination 1995/003, concerning a building to be used only by members of a “ready reaction unit” of the armed forces.

6.2.2 In Determination 1997/002:

(a) In terms of NZS 4121, the gross area of the upper stories of the three-story building was approximately 700 m² compared with approximately 1300 m² in this case. I note that both parties essentially discussed the matter in terms of NZS 4121.

- (b) In terms of clause D1, the total design occupancy of the upper floors was approximately 100 compared with 88 in this case. I accept that the owner is entitled to apply NZS 4121 rather than clause D1.

6.2.3 More importantly, Determination 1997/002 includes the following:

5.10 The territorial authority asked “What legislation could be brought to bear on a new owner wanting to put the building to a similar use?” The Authority replies that there are very few uses similar to the current use as a Police station, except possibly use by one of the armed forces. Any other occupant will wish to change the use of the building. Under section 46 of the [former Act], the reasonable practicality of installing a lift will need to be addressed in the different circumstances which will exist at that time.

6.2.4 However, the former Act did not contain any definition of “change of use”. Accordingly, that term was given its ordinary and natural meaning in context, so that there was no doubt that there would have been a change of use if a Police station became a private office building. That is no longer the case under the Act because whether there is a change of use depends on whether there is a change from one to another of the uses specified in the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations. Under those Regulations, both “business or other offices” and “police stations” come within use WL so that a change from one to the other would not be a “change of use” for the purposes of the Act. The same applies to a change from a naval base to a private manufacturing and office complex.

6.2.5 The change of legislation means that there is a very significant difference from Determination 1997/002 (and also from Determination 1995/003), both of which have been overtaken by events so that they can no longer be seen as useful guidance on changes of use.

6.2.6 In response to those points as they were made in the draft, the owner said:

. . . the chance of a change of ownership has not been discussed. . . . Given that Philomel . . . is the only long term base for RNZN ships and is where the home of the RNZN will remain the possibility of a change of ownership is impossible without a major redefinition of New Zealand Defence Policy.

The owner gave reasons, which I accept, that such a change of policy is “highly unlikely”.

6.2.7 The matter therefore comes down to:

- (a) Whether section 118 applies in that people with disabilities “may be expected to visit or work in” the building.
- (b) If section 118 does apply, whether it is reasonably practicable to install a lift.

6.2.8 I take the view that the words “expected to” in section 118 do not imply something that could possibly happen as distinct from something that is likely to happen. I consider that for so long as Philomel is used as a naval base people with disabilities cannot be expected to work in or visit the building (as was the case in Determination 2001/10). I base this consideration on the following criteria:

- Naval personnel unable to maintain minimum fitness standards are liable for medical discharge, which would apply in the event of personal disability. Accordingly, no such persons would be expected to work in the building.
- There are only a minimal number of civilians who will be employed in the building, the proposed maximum at present being 3 only.
- Given that there are adjoining buildings with disabled access, no disabled person would be deprived of the ability to carry out work associated with the activities taking place in the building.
- When parades or other similar events take place there are at least two external venues where these can take place.

I therefore conclude that section 118 does not apply to the building.

6.2.9 That concludes the matter, and I do not need to consider whether it is reasonably practicable to install a lift.

6.2.10 However, in case I am wrong about the application of section 118, I record that if section 118 did apply then I would have applied the usual balancing exercise between sacrifices and benefits. In previous determinations issued by the Building Industry Authority (refer paragraph 6.1.2) an approach was established and discussed regarding the question of whether a building complies as nearly as is reasonably practicable with particular provisions of the Building Code. This approach involved the balancing of the sacrifices and difficulties of upgrading against the risks and disadvantages of not upgrading and follows the approach of the High Court³.

6.2.11 I continue to hold the views expressed in the previous relevant determinations, and therefore conclude that:

- (a) The benefits would be accessibility for people with disabilities. I recognise that the benefit will be irrelevant to what the owner called “the vast majority of users”, see paragraph 4.4 above. I have also established that alternative appropriate venues and buildings are available should people with disabilities wish to work in conjunction with, or take part in functions associated with, this particular building. I therefore consider that people with disabilities will not be unreasonably disadvantaged by the lack of a lift.
- (b) The sacrifices would be the cost of approximately \$160,000 and loss of useable space. While no details have been provided to verify this cost, I accept that the installation of a lift in this particular building would be a costly undertaking because the lift would go to two upper levels.

Accordingly, if section 118 did apply, I consider that, on balance, the disadvantages of not having a lift do not outweigh the sacrifices, namely the cost of, installing a lift.

³ *Auckland City Council v New Zealand Fire Service*, 19/10/95, Gallen J, HC Wellington AP 336/93.

6.3 The status of the building

- 6.3.1 The owner also submitted that defence establishments are not listed in Schedule 2 as buildings in respect of which requirement for provision of access and facilities for persons with disabilities apply. However, taking into account my findings in paragraphs 6.1 and 6.2, I am of the opinion that it is not necessary for me to express a view on this particular matter at this time.

7 The decision

- 7.1 In accordance with section 188 I hereby reverse the territorial authority's decision to refuse to issue a building consent for the alterations unless a lift is provided.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 20 March 2008.

John Gardiner
Manager Determinations