

Determination 2008/47

Provision of lift access in a proposed unit–title development containing a cluster of 25 units at 45 Karepiro Drive, Whangaparaoa

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, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of the Department.
- 1.2 The applicant is AFNE Enterprises Ltd (“the owner”). The other party is the Rodney District Council (“the territorial authority”).
- 1.3 The Office for Disability Issues (“the ODI”) at the Ministry of Social Development has been included as being a department with which the Chief Executive must consult under section 170 of the Act.
- 1.4 The matter for determination is the territorial authority’s decision to refuse to issue a building consent for the construction of a proposed unit-title complex consisting of two connected buildings subdivided into a number of units without a lift between the two buildings in which the proposed unit-titles are situated.
- 1.5 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 (Schedule 1, Building Regulations 1992).

2 The building

- 2.1 The proposed complex is to be constructed on an excavated gently sloped site. It is a 25 unit-title development consisting of 5 warehouse units, 9 retail units and 11 office

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

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

units, together with a basement carpark. The proposed layout is shown in Figures 1 and 2.



Figure 1: Proposed Ground floor plan



Figure 2: Proposed Level 1 plan

- 2.2 The development is on two levels and all the units on each level are accessible by car as well as on foot. The drawings indicate that the building at the upper level (Level 1) is designated “office and industrial” and at the lower level (Ground floor) is designated “retail”. In effect the development, while two storey, can be considered as two single storey buildings with direct and separate ground access on both levels, including fully accessible parking.
- 2.3 The units in each building will be individually owned and each title will have no internal connection to another title without further subdivision and/or building consents being required. There are two sets of external stairs connecting the two levels but there is no stair connection between units on the two levels and no interconnection between the units on the same level.

3 The legislation and the compliance documents

- 3.1 Relevant sections 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.

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:

- (f) commercial buildings and premises for business and professional purposes, including computer centres:
- (y) factories and industrial buildings where more than 10 persons are employed:
- (z) other buildings, premises, or facilities to which the public are to be admitted, whether for free or on payment of a charge.

3.2 Relevant provisions of Building Code Clause D1 “Access routes” include:

D1.1 The objective of this provision is

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

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 . . .

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.

3.3 Relevant provisions of the Acceptable Solution 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.

3.4 Relevant provisions of NZS 4121³ 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 made a submission dated 11 March 2008. After describing the 25 units and the basement carpark the territorial authority went on to say:

The development or office retail complex comprises a two level development. There are carparking facilities at both levels and communal staff carparking in a basement area at lower level.

There is internal stair access between the two levels to connect the staff carpark with the upper level and two retail/office units at each level.

It is council's interpretation of the Building Code Section D 1.3.4(c)(iii) and /or NZS4121:2001 Section 9.1.3.2(a) that in order to ensure equality of accessibility, that the two levels need to be connected with a lift or complying ramp.

Accessible carparks are to be provided at both levels, however Council's interpretation of the Building Code is that this does not avoid the need for a fully accessible connection between the two floors in this case

This matter is able to be determined by the Department of Building and Housing by:

1. Determining that Council's interpretation of the accessibility requirements of the Building Code is incorrect, or
2. Granting a waiver from the requirements of the Building Code Accessibility Requirements.

The territorial authority supplied copies of 9 drawings, 8 of which were stamped as consented drawings while the other one was stamped "superseded".

4.2 The owner made a submission dated 22 January 2008 that said it:

interpreted the project to consist of twenty five unit titled commercial buildings clustered into one compact premises for the purpose of cost efficiency and convenience to the individual owners.

Conversely [the territorial authority] have perceived the building as a straight forward two story building with internal stairs and a common use.

The latter interpretation is incorrect therefore we understand [the territorial authority]'s requirement for a lift which is why we have sought a further meeting to discuss this scenario.

³ New Zealand Standard NZS 4121: 2001 Design for access and mobility – Buildings and associated facilities

Unfortunately with [the territorial authority]'s refusal to meet we are now seeking your services to determine if a lift is required or not.

- 4.3 In addition to the application the owner submitted copies of:
- the Resource Consent approval
 - the building consent application
 - the Acceptable Solution D1/AS1 “Access routes”
 - email correspondence between the owner, an adviser in the Department and the territorial authority
 - 19 drawings depicting aspects of the proposed building.
- 4.4 I prepared a draft determination which was sent to the ODI by way of consultation under section 170.
- 4.5 In response the ODI said the application for a waiver should fail because sections 67 and 69 of the Act precluded territorial authorities or the Chief Executive from granting a waiver or modification of the code requirements that relate to access and facilities for persons with disabilities in a new building to which section 118 of the Act applies.
- 4.6 The ODI noted that the plans show that some car parking spaces in the lower level basement are reserved for the occupants of the upper building offices and observed that disabled persons who are occupants of any upper level spaces will be disadvantaged in their use of the basement car park. The ODI went on to say that whether the occupiers have a need to move between the levels is not a test for whether section 118 and Schedule 2 apply.
- 4.7 The ODI questioned the relevance of Determination 99/003 to this present case, pointing out that Determination 99/003 was made at a time when the Building Act 1991 (“the former Act”) allowed the Building Industry Authority (the antecedent to the Department) to grant a waiver in relation to the new building that was the subject of that determination. (I note that in Determination 2000/2 the Building Industry Authority took the view that it could not grant a waiver in relation to a new building.) The ODI also pointed out differences in the number of businesses proposed to occupy the respective developments.
- 4.8 In its response the ODI queried the relevance of a reference to NZS 4121 which I had made to illustrate that NZS 4121 contemplated circumstances in which certain access requirements could be met by means other than the provision of a lift.
- 4.9 The ODI disagreed that the proposed access on each level is as convenient for persons with disabilities as for those without, with the exception that someone who cannot easily use stairs cannot as easily reach the café in the lower building as a person who can easily use stairs. In the ODI’s view that would only be true if the businesses operated in the lower building on the ground floor were identical to those operated in the upper building in the development. The ODI argued that a disabled user might want to visit businesses in, say, the lower building, then go to businesses in the upper building, then return to the café in the lower building, before going home or to work elsewhere (including the upper building). The ODI also disagreed

with the conclusion that a disabled person wanting to visit businesses on both levels could use the interconnecting path, but is more likely to travel from one to the other by vehicle. The ODI argued that the conclusion assumes that the path does not present a barrier to access that the provision of lifts is designed to avoid. It also assumes that all disabled persons will have access to a vehicle.

4.10 I considered the comments received from ODI and took them into account when completing a second draft determination which I issued to the parties for comment on 6 May 2008.

4.11 On 9 May 2008 the applicant accepted the draft without comment.

4.12 The territorial authority responded saying it did not accept the draft. In a submission dated 28 May 2008 it said:

The draft determination is not accepted in so far that the Department has assumed that the Council is not concerned as to the parking facilities.

There is a communal car park in the basement which serves both levels of the development.

The determination needs to acknowledge that it was Council's view that the need for a lift between the two floors was in part based on the need to provide accessibility to and from this communal car park to both floors of the development.

Please acknowledge that these points will be included in the determination.

4.13 I have taken account of the territorial authority's comments which reinforce the submission it made on 11 March 2008. I acknowledge that the territorial authority has taken account of parking facilities in forming its view on the need for a lift. I have done the same.

5 Discussion

5.1 General

5.1.1 It is not contested by the parties that section 118 applies to this building, and that the proposed new building falls into the scope of Schedule 2 of the Act (refer paragraph 3.1). That is to say, for the purposes of this determination -

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.

5.1.2 I observe that in its submission (refer paragraph 4.1) the territorial authority mentions access, but does not mention the parking provisions or sanitary facilities for persons with disabilities. I therefore assume that the territorial authority has no concerns as to code compliance in regard to the latter two matters.

5.1.3 Although in its submission the territorial authority suggests that the Department could grant a waiver of the requirements for accessibility, I note that, as this application concerns a proposed new building, section 69 precludes the granting of such a waiver.

- 5.1.4 I note that this building has occupancies that are unit titled. That is not relevant to the requirement for access and facilities for persons with disabilities, but it relevant to there being fire-rated walls and floors between occupancies on different levels and therefore no internal connection between those occupancies. In effect the fire-rating requirement controls how the building can be used. As a consequence of the layout of the building as a series of unit-titled spaces, there is no common and (for after hours) secure area on each level into which a lift could open.
- 5.1.5 It appears from the drawings that the development is in effect two buildings in a single complex, rather than a set of industrial units simply structurally connected with separate entrances. If that is correct then, on the basis of occupant density and area, it is a building that would normally require a lift in order to comply with Clause D1 and NZS 4121.
- 5.1.6 There are two sets of external stairs connecting the two buildings. It is arguable that these stairs are not fundamental to the way the buildings operate. Only if a business in the upper building is operated in conjunction with one in the lower building would people have a clear need to go from the lower building to the upper building and vice versa. That is unlikely to be the case as the lower building is designated “retail”, while the upper level is designated “office and industrial” (refer paragraph 2.2).

5.2 Previous determination

- 5.2.1 In Determination 99/003 the Building Industry Authority, the antecedent to the Department, considered a two-level building with connecting stairs between the levels and determined that there would be a flow of people between the floors and that a lift must be installed in order to comply with the Building Code.
- 5.2.2 The circumstances in this present case can be distinguished from those in Determination 99/003. In the case of Determination 99/003 the building was a film and television production facility specifically designed for the one tenant organisation. Although various parts of the organisation had designated parts of the building in which they predominantly worked, it was clear that there would be essential movement of people between levels of the building, because all parts of the tenant organisation were working to the same business purpose. That clearly contrasts with the present case where the occupants of each of the 25 units are not expected to have any common business purpose (refer paragraph 2.2).
- 5.2.3 In the present case it could be argued that people with disabilities are catered for by making access on each level as convenient for disabled people as for non-disabled people. The only disadvantage is that someone who cannot use stairs cannot easily descend to the ground floor café, should that person wish to do so. However the convenience of a café in the same building is not a code requirement.

6 Conclusion

- 6.1 It appears to me that this development has been designed to provide a number of office and warehouse spaces that will be separated by fire-rated walls and floors and have no purpose in common, whether commercial or otherwise. Each space will be

owned separately, and the absence of inter-connecting doors, or sharing of hot-water services emphasises the separateness of each space.

- 6.2 This is a development containing two buildings which a person with disabilities may be expected to visit or in which such a person may be expected to work. I must therefore consider whether there is reasonable and adequate provision by way of access (see paragraph 5.1.1).
- 6.3 There is level access to each row of units from the adjacent access pathway and carpark. The requirements of Clause D1.3.2 are thus satisfied. A person with disabilities who is visiting either one of the buildings in the development will experience no barriers to that access. Such a person wishing to visit the upper building and then the lower building could use the interconnecting path, but is more likely to travel from one to the other by vehicle, if only to have the vehicle conveniently placed when that person departs. A person with disabilities who works in one of the buildings would park on the level on which their workplace is located. There is provision for parking on both levels.
- 6.4 It is possible, but unlikely, that any person, disabled or otherwise, would want to go to a unit in each of the two buildings in the development in the course of one visit, or that such a person would need to go to more than one unit to work.
- 6.5 I conclude that “adequate provision of access to visit or work in the building and carry out normal activities and processes in the building”, as required by section 118 of the Act is achieved by having “ground floor” access to both buildings.
- 6.6 I conclude that the development is not a two storey building for the purposes of Clause D1.3.4(c)(iii), but is in fact two buildings that each comply with the requirements of section 118 of the Act, as well as meeting the requirements of Clause D1.1(c) of the Building Code.
- 6.7 The parties should note that in the event of further subdivision of the spaces in this proposed complex the requirements of Clause D1 of the Building Code will need to be reviewed.

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 proposed building unless a lift is provided.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 6 June 2008.

John Gardiner
Manager Determinations