



Determination 2012/047

Dispute about the provisions for access and facilities for people with disabilities to a cinema complex at 2 Matakana Valley Road, Matakana

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 that Department.

1.2 The parties to the determination are:

- the Rodney Disability Advisory Group (“the applicant”)
- the Auckland Council (including its previous capacity as the Rodney District Council) (“the authority”), carrying out its duties and functions as a territorial authority and a building consent authority²
- the building owner, the Brick Bay Investment Trust (“the owner”).

1.3 This determination arises from the decision of the authority to issue a building consent and a code compliance certificate for a complex containing twin cinemas, retail tenancies, and a car parking area (“the complex”).

1.4 I therefore take the view that the matter to be determined³ is whether the authority correctly exercised its powers when it issued a building consent and a code compliance certificate for the complex.

1.5 In taking this view, I must also consider whether the elements that relate to the access and facilities for persons with disabilities to and within the complex comply with Clauses D1—Access routes and G1—Personal hygiene of the Building Code

¹ The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Department are all available at www.dbh.govt.nz or by contacting the Department on 0800 242 243

² The location in which the building work is located was formerly under the jurisdiction of the Rodney District Council. The reference to “the authority” refers to both Rodney District Council and Auckland City Council.

³ Under sections 177(1)(b), 177 (2)(a), and 177 (2)(d) of the Act

(Schedule 1 of the Building Regulations 1992)⁴ that were current at the time the building consent was issued. I note that the relevant legislation is set out in Appendix A.

- 1.6 While the complex is linked to adjoining buildings, including a farmers' market, a beer garden, and siteworks, and is adjacent to the Riverside walk, I have only considered those elements that are part of the complex covered by the original building consent (No ABA 57214).
- 1.7 In making my decision, I have considered the submissions of the parties, the report of an independent expert ("the expert") commissioned by the Department to advise on this dispute, and the other evidence in this matter.
- 1.8 I have forwarded a copy of this draft determination to the Office for Disability Issues ("the ODI"), at the Ministry of Social Development by way of consultation under section 170 of the Act.

2. The building

- 2.1 The complex in question comprises a two storey building that contains the following:
- three cinemas on the upper floor level, with direct access from street level
 - associated concourse, lobbies, and offices on the upper level
 - toilets (including accessible toilets) on the lower level
 - retail shopping spaces and eating establishments on both levels
 - access to the carpark at the lower level (two accessible carparks are located in the carpark)
 - storage and service areas.
- 2.2 The main access to the upper floor is via a set of stairs. A lift with a car having internal floor dimensions of 2000mm (deep) x 1100mm (wide) also links the lower and upper floor levels. The door to the lift has a clear opening of 900mm on the 1100mm dimension, which is in the same plan position on both levels.
- 2.3 The elements that are in contention are described in the expert's report set out in paragraph 5 and in the deliberations concerning the lift size in paragraph 6.4. I summarise the elements as:
- the cinema 1 stair handrail
 - the accessible route into the female toilets
 - the accessible cubicle in the female toilet
 - the accessible cubicle in the male toilet
 - the accessible routes from the carpark into the cinema entrance

⁴ 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 Code.

- the internal dimensions of the lift car.

2.4 In response to the second draft determination the authority raised the matter of the provision of an accessible counter to the ticketing area to the main foyer (refer paragraph 4.4.4). The counter as built is 900mm high.

3. Background

3.1 The authority issued a building consent (No ABA 57214) for the complex on 20 June 2006. The consent application was for Stage 2 of a two-stage project. The building work described on the issued consent was for a “new cinema complex” and its nature was described as being a “new commercial building”.

3.2 The original consent plans of 20 June 2006 provided for a ‘set down’ ticketing counter at 775mm high with 675mm high under-counter space. These plans are stamped as ‘superseded’ on 23 August 2006.

3.3 The owner’s architect consulted an advisor on disability access and was told that the set down was only required where people are required to fill in forms or writing of some kind is required. Amended plans, approved on 24 November 2006, show the ticketing counters to all be 900mm high. The matter of the counter height was raised by the authority with the project manager, and in an email on 17 January 2007 an advisor on disability access advised the project manager that:

Provided the counter height is no more than 900mm, which acts as a meet and greet counter and no writing is required, then there should be no need for a full accessible counter.

Provided the EFTPOS machine is readily reachable and detachable, then the one counter height at 900mm should meet everyone’s needs.

3.4 On 15 April 2009, the applicant carried out a *Matakana CBD Accessibility Audit* (“the Audit”). Following this audit, an illustrated report was produced that listed various items the applicant considered failed to meet the regulations relating to access and facilities for persons with disabilities in the Matakana central business district. A number of these items relate to the complex.

3.5 In an email to the authority dated 12 July 2010, the applicant noted that an inspection of the consented plans for the complex identified the lift car dimensions as ‘1000mm x 2000mm’ which did not meet the minimum lift car size described in accessibility standards. (I note that the lift car size is 1100mm by 2000mm.)

3.6 Following discussions between the authority and the project manager for the complex, certain remedial work was agreed to be carried out in the accessible toilets.

3.7 The applicant wrote to the authority on 5 October 2010, stating that it did not accept the authority’s suggestion that, due to the high costs the owner would face to alter the lift car, some leniency should apply so the authority could issue a code compliance certificate for the complex.

3.8 The authority issued the code compliance certificate on 3 November 2010.

- 3.9 Following further correspondence between the authority and the applicant, the applicant emailed the authority on 11 April 2011, expressing concern that a code compliance certificate had been issued for the complex. The applicant was of the opinion that certain disability access elements within the complex were still not code-compliant and that the certificate should not have been issued.
- 3.10 The application for a determination was received by the Department on 30 May 2011.

4. Submissions

4.1 The initial submissions

4.1.1 The applicant did not provide a written statement but forwarded copies of:

- the correspondence between the authority and the applicant
- the Matakana CBD Accessibility Audit
- the minutes of the applicant's meeting of 5 April 2011
- some of the amended and replaced plans of the complex.

4.1.2 The authority did not make a submission but forwarded copies of:

- a full set of the consented plans and specifications
- the building consent dated 20 June 2006
- the code compliance certificate dated 3 November 2010.

4.2 The first draft determination

4.2.1 Copies of a draft determination were sent to the parties and the ODI for comment on 20 September 2011. The first draft concluded that the authority erred in issuing the code compliance certificate and should issue a notice to fix; but in respect of the lift car size it considered that while the lift did not meet the requirements of NZS 4121⁵, it did comply with the Building Code.

4.2.2 The authority accepted the draft without further comment.

4.2.3 In a submission received on 3 October 2011 the applicant did not accept the draft and requested a hearing.

4.2.4 The ODI provided a response to the draft determination which agreed with the draft's decision but did not consider that the lift car adequately met the requirements of Clause D1 of the Building Code.

⁵ New Zealand Standard NZS 4121:2001 Design for Access and Mobility – Buildings and Associated Facilities

4.3 The hearing

4.3.1 On 11 April 2012 I held a hearing at Warkworth at the request of the applicant. The hearing was attended by three representatives of the applicant, a representative of the authority, a representative of the owner, a referee engaged by the Department, and two other officers of the Department. An advisor to the applicant also participated in the hearing by teleconference.

4.3.2 All the parties spoke at the hearing and the evidence presented to me enabled me to amplify or clarify various matters of fact. I also conducted a site visit, which allowed me to observe the building and inspect the issues of Building Code compliance in dispute.

4.3.3 The applicant was of the view that:

- Clause D1 requires adequate activity space, and because nearly all wheelchairs are unable to turn around in the lift, adequate activity space has not been achieved. Practices carried out in a lift normally are to enter, turn around, use the controls and exit the lift.
- Every compliance document specifies a size of 1400x1400mm.
- Only Clause D1 uses the term adequate while both NZS 4121:2001 (paragraph 9.2.2.1)⁶, NZS 4332:1997⁷ and D1/AS1 specify 1400mm x1400mm. In referring only to Clause D1 and adequate activity space, this ignores the prescriptive requirements of the compliance documents.
- The minimum width of an accessible route specified is 1200mm.
- As the lift had only doors at one end a wheelchair user has to either reverse in to or out of the lift. This was considered to be unacceptable and unsafe. A wheelchair user was more likely to tip backwards when reversing and also likely to impact with other lift users wishing to enter or exit the lift at the same time.
- Although it is not an argument for non compliance, there also was no restriction in the design of the building that prevented a lift of 1400mmx1400mm being installed.

4.3.4 The advisor to the applicant was of the view that the definition of adequate was contained in section 118 of the Building Act and it was not a 'normal process' to back out of a lift. The advisor prepared a submission for the hearing that summarised the requirements of the Act and Building Code and provisions of the compliance documents and observed that the lift does not comply with the Building Code.

4.3.5 The authority stated that it accepted the draft determination.

⁶ New Zealand Standard NZS 4121:2001: Design for access and mobility – Buildings and associated facilities

⁷ New Zealand Standard NZS 4332: 1997 Non-domestic passenger and goods lifts

4.3.6 The owner submitted the following:

- There was no conscious decision to downsize the lift due to cost, and the building overall has been constructed to the highest standard.
- A building consent was obtained.
- The owner was not aware that the applicant was pointing out problems at the time the code compliance certificate was issued; however, the owner had fixed problems that the authority had previously identified.
- At this time there is no legal ability to fix any outstanding matters as the contractual obligations ceased once the code compliance certificate was issued.

4.4 The second draft determination

4.4.1 A second draft determination was sent to the parties and the ODI for comment on 4 May 2012. The second draft concluded that the lift car size did not comply with the requirements of Clauses D1.3.3(a) and D1.3.4(f), but that it was not required to comply with Clause D1.3.4(b).

4.4.2 In a letter dated 10 May 2012, the applicant submitted (in summary) that:

- Reversing into or out of the lift will potentially put wheelchair users in conflict with other users. Those on powered wheelchairs are less likely to be able to turn their heads to negotiate their way in and out of the lift.
- The necessity for a wheelchair user to reverse into the lift meant the lift did not comply with Clause D1.3.4(b) in respect of enabling wheelchair users to 'negotiate the route'. An ambulant person may be required to pass a wheelchair user to render assistance.
- The second draft determination did not comment on lift's non-compliance with the available acceptable solutions or standards, including NZS 4121 and NZS 4332.
- The lift did not comply with D1.3.4(c) because it did not comply with Acceptable Solution D2/AS1. Under Clause D1.3.4(c) the lift is also required to comply with Clause D2.

4.4.3 The owner responded to the second draft in a letter dated 22 May 2012. The owner accepted the draft in general and wished to clarify some of the background events leading up to the determination application. The owner submitted that:

- All requests and instructions given by the authority were responded to. The authority requested changes be made to the accessible toilets. Following completion of the work the authority had advised the owner that the toilets were compliant.
- The authority was aware of the applicant's concerns about the lift for some months prior to the issue of the code compliance certificate, however, the owner was not advised of this.

- The cost of any remedial work will be greater than it would have been had the matter been dealt with earlier.
- The owner relied on the issue of the code compliance certificate as verification that the work had been properly completed.

4.4.4 The authority accepted the second draft determination in a letter dated 25 May 2012. The authority noted, however, that the original consent plans provided for an accessible ticket counter but that those plans were subsequently amended to remove the counter. The authority asked that the counter's compliance also be considered as part of the determination.

4.4.5 Correspondence passed between the Department and the parties regarding the ticket counter. In an email dated 29 May 2012, the applicant confirmed that the counter 'is a meet and greet counter for purchasing refreshments and tickets' and 'the counter is already at a usable level'. The applicant noted that if it was a reception counter in a business requiring form filling the accessibility requirement would be different.

4.4.6 The ODI advised that it agreed with conclusion in the second draft determination, that the lift car did not meet the requirements of Clause D1. The ODI expressed the view that the determination's finding had potentially a wider applicability than the building in question. ODI also considered it would be appropriate to remove the reference that the decision relates to the current situation only and is not a general direction to other situations involving wheelchair access for lifts. The ODI noted typographical errors in the draft.

4.5 My response to the applicant's submissions on the second draft

4.5.1 In response to the applicant's submission (refer paragraph 4.4.2) I note that paragraph 6.4.1 clearly states that the lift size does not meet the requirements of the Acceptable Solution D1/AS1, or with NZS 4121. I also note the applicant's position that as the lift size does not comply with Acceptable Solution D2/AS1 it cannot be said to comply with Clause D1.3.4(c). I reiterate that the Building Code is a performance-based document, and that satisfying an Acceptable Solution cannot be seen as the only possible method of achieving compliance.

4.5.2 I accept the applicant's arguments in respect of compliance with Clause D2, but consider that when the lift is brought into compliance with Clause D1 then the performance requirements of Clause D2, in respect of access and control, will also be satisfied.

5. The expert's report

5.1 As described in paragraph 1.7, I engaged an independent expert, who is a Registered Architect, to provide me with an assessment of the building elements that relate to access and facilities for persons with disabilities to and within the complex. This assessment did not include consideration of the lift car size.

5.2 Following a visit to the property on 20 July 2011 and an inspection of the relevant documentation, the expert provided me with a report dated 3 August 2011.

- 5.3 The expert's report described the building work, the adjoining buildings and site works, and the relevant regulatory documents. The report included the expert's opinions regarding the access to the Beer Garden, the Farmer's Market and the Riverside walk. However, as set out in paragraph 1.6, these areas are not included in the determination.
- 5.4 A summary of the expert's findings relevant to this determination is tabulated below. The document references in the summary are to Acceptable Solution D1/AS1, and to NZS 4121.

Description	Compliance references	Opinion
Stair 1 handrail		
<p>The handrail was not built in accordance with the consented documents.</p> <p>It consists of 62mm wide x 37mm deep as-built steel handrail with a barrier on the open side fabricated from steel bar.</p> <p>The clearance between the stair handrail and the barrier varies from 15 to 55mm along its length.</p> <p>The lower end of handrail extends 200mm beyond bottom riser, plus a further 130mm horizontally.</p>	<p>Figure F1 of NZS 4121 and figure 26 of D1/AS1 show handrail widths from 45 to 50mm.</p> <p>Figure F1 requires clearance of 50 to 60mm from the wall, and Figure 26 requires a 45 to 60 mm clearance.</p> <p>Figure 23 of NZS 4121 and Figure 23 of D1/AS1 show a lower rail extension of one tread width, plus 300mm horizontally.</p> <p>The performance criteria of Clause D1.3.34 (j) require handrails to be smooth, reachable and graspable.</p>	<p>There was non-compliance with NZS 4121 and D1/AS1.</p> <p>A person with a disability cannot hold on well enough, continuously or long enough. Accordingly, the use of the handrail does not meet the performance criteria of clause D1.</p>
The female toilet		
<p>The toilet was not built in accordance with the consented documents.</p> <p>The toilet is entered from a 1935mm wide corridor and past two screen walls, which are 1200mm apart. Clear openings of 770mm and 735mm are formed.</p>	<p>Paragraphs 4.5.3 of NZS 4121 and 2.2.1 of D1/AS1 require an accessible route to have a minimum width of 1200mm.</p> <p>Figures 14 and 15 of NZS 4121 and paragraph 7.0.2 and figure 9 of D1/AS1 require a clear opening to the end of the screen wall of 860mm.</p> <p>The performance criteria of Clauses D1.3.2 (c) and D1.3.4 (b) require proper access to the toilet and an access route for persons with a disability to negotiate a route while permitting an ambulant person to pass.</p>	<p>There was non-compliance with NZS 4121 and D1/AS1.</p> <p>Applying these criteria, the construction is still non-compliant.</p> <p>Although the 1200mm gap between the wall complies, the two openings provided are less than that required by the compliance documents</p> <p>Adequate activity space has not been provided and code compliance with Clause D1 has not been achieved.</p>

Description	Compliance references	Opinion
The female toilet accessible cubicle		
<p>The consented plans did not show a hand basin in this area</p> <p>The wash hand basin is not reachable by a person sitting on the WC pan. The grab rail is located too far away from the pan, and the toilet roll dispenser is too close to the ground.</p>	<p>The relevant performance criteria are set out in Clause G1.3.1, which requires sanitary fixtures to be appropriate for the persons using them. Also, Clause G1.3.4, requires a person with a disability to be able to use personal hygiene facilities.</p>	<p>The locations of the fixtures at issue are inappropriate for people with disabilities. As they are unable to be used by such persons, code-compliance with Clause G1 has not been achieved.</p> <p>Even if the cubicle had been built in accordance with the consented plans, code-compliance would still not have been achieved.</p>
The male toilet accessible toilet		
<p>The details are similar to those described for the female cubicle</p>	<p>The performance requirements are the same as for the female cubicle.</p>	<p>The comments made concerning the female cubicle are relevant for this male toilet.</p>
The accessible routes from the accessible car parks to the cinema entrance		
<p>Two accessible carparks are situated in the parking area adjacent to the complex. One is situated at the river end of the area and the other three spaces from the opposite end of the area. There are no construction plans or details produced that show the route from these to the complex.</p> <p>The carpark at the river end passes onto a brick paved area over a timber-framed bridge. The access from the second carpark has no direct access to the bridge, and in order to reach it, a user has to go onto the carpark manoeuvring area.</p>	<p>The requirements of paragraph 2.2.1 and 2.3.1 of D1/AS1 and paragraphs 6.1, 6.4.2.5 and 6.4.2.2 of NZS 4121 are relevant to these accessible routes.</p>	<p>The expert was of the opinion that the access route from the river end carpark, while having a rather "uncomfortable" surface, complied with the requirements of both D1/AS1 and NZS 4121. There was also a relatively short distance to travel.</p> <p>However, as the access route from the second car park virtually does not exist, the expert considered it to be non-compliant in terms of Clause D1.</p> <p>The consented plans did not show sufficient detail as to how adequate access was to be achieved. There was also conflict between the architectural and site drawings. Additional information should have been obtained before the building consent was issued.</p>

5.5 Based on the decisions that he had reached regarding disabled access and facilities, the expert was of the opinion that the code compliance certificate should not have been issued. I note also his concerns regarding the consented documentation.

5.6 The report included the expert's opinions regarding the access to the Beer Garden, the Farmer's Market and the Riverside walk. However, as set out in paragraph 1.6, these areas do not feature in the determination decisions.

5.7 A copy of the expert's report was provided to the parties on 3 August 2011.

6. Discussion

6.1 The legislation

6.1.1 One of the key features of the Act is the emphasis placed on the reasonable and adequate provision of access and facilities for people with disabilities, in respect of buildings in which people with disabilities could be expected to visit or work and carry out normal activities and processes (section 118). The Act's requirements ensure that any new building to which section 118 applies (that is a building that falls within Schedule 2 of the Act) is built with reasonable and adequate access and facilities for persons with disabilities.

6.1.2 It is not disputed that the complex is one to which section 118 applies, and is a building that falls within Schedule 2 of the Act. Therefore, adequate provision must be made for persons with disabilities to carry out 'normal activities and processes' in the building.

6.1.3 Section 49 states that an authority can only grant a building consent if it is satisfied, on reasonable grounds, that the provisions of the Building Code would be met if the building work were properly completed in accordance with the plans and specifications accompanying an application.

6.1.4 Under section 94, a building consent authority must issue a code compliance certificate if it is satisfied on reasonable grounds that the completed building work complies with the building consent. However, I have previously concluded (as in Determination 2008/30) that, in addition to compliance with the building consent, confirmation of a building's compliance with the Building Code is also required before an authority can issue a code compliance certificate. I am still of that opinion, and as such I must decide whether the complex as constructed complies with both the building consent and the Building Code.

6.2 Matters other than the lift car size

6.2.1 The expert has based most of his observations regarding code-compliance on the criteria set out in Acceptable Solution D1/AS1 Access Routes, and G1/AS1 Personal Hygiene, and also on NZS 4121 that in terms of section 119 is to be taken as being a compliance document. While section 23 of the Act states that compliance with compliance documents is not the only means of complying with the Building Code, I am prepared to accept the expert's reliance on them, given that no alternative means of compliance were presented.

6.2.2 Taking into account the matters identified by the expert, I accept that the following building work did not comply with clauses of the Building Code at the time that the

code compliance certificate was issued. I also note that this non-compliance should have been apparent to the authority at the time it issued both the building consent and the code compliance certificate.

- The cinema 1 stair handrail in terms of Clause D1.
- The accessible route into the female toilets in terms of Clause D1.
- The accessible cubicle in the female toilet in terms of Clause G1.
- The accessible cubicle in the male toilet in terms of Clause G1.
- The accessible routes from the carpark towards the end of the parking area opposite from the river into the cinema entrance in terms of Clause D1.

6.2.3 I also accept the expert's opinion, in respect of those items listed in paragraph 5.3 that were not constructed in accordance with the consented documents.

6.3 The ticket counter

6.3.1 In response to the second draft determination the authority raised the matter of accessibility of the ticket counter. The counter is used for the purchase of tickets, food and beverages, and is 900mm high.

6.3.2 Clause G5.3.4 requires that 'where reception counters or desks are provided for public use, at least one counter or desk shall be accessible.' Paragraph 11.1.1 of NZS 4121 also describes the requirement for public reception counters and desks to be accessible, and the commentary to that paragraph states '[r]equirements for reception counters and desks need to ensure that people with disabilities are able to carry out the normal processes and activities expected at that counter or desk'.

6.3.3 In my view the public ticket counter should be accessible, but the degree to which it is required to be accessible is determined by how the counter is intended to be used.

6.3.4 In this case the counter is a 'point of sale' counter, and not one that users would linger at, or would be required to write on, or consume food at. People with a disability are therefore unlikely to be placed at any disadvantage when using the counter when compared with other users. An accessible counter, as it is described in Figures 36 and 37⁸ of NZS 4121, is not considered necessary.

6.4 The lift size

6.4.1 The relevant provisions of D1/AS1 describe a means of compliance with the performance requirements of Clause D1 of the Building Code. The lift size of 2000mm x 1100mm does not meet the requirements for an accessible lift as described in D1/AS1 or NZS 4121. I am therefore of the opinion that the lift car must be considered to be an alternative solution.

6.4.2 One way of evaluating compliance of an alternative solution with the Building Code is to compare the design with the Acceptable Solutions and to consider the objectives

⁸ Figure 36 describes 'public counters and desks' being a maximum of 775 mm high with a minimum of 675mm clear space beneath. Other public counters are described in Figure 37.

of the relevant Building Code clause(s). In this instance, the approach in determining whether the design complies with Clause D1 of the Building Code is to examine the design features that are intended to ensure that people with disabilities are able to enter and carry out normal activities and functions within the building.

6.4.3 In previous determinations, the Department has made the following general observations about Acceptable Solutions and alternative solutions:

- Some Acceptable Solutions are conservative and cover the worse case so they may be modified in less extreme cases and the resulting alternative solution will still comply with the Building Code.
- Usually, when there is non-compliance with one provision of an Acceptable Solution, it will be necessary to add some other provision to compensate for that in order to comply with the Building Code.

In my view, the above observations remain valid and are significant in the evaluation of the code compliance of the lift car.

6.4.4 According to the Audit, the lift car is 1100mm wide, which means that the car width is 300mm less than the 1400mm shown in NZS 4121. The width is less than the 1200mm minimum clear width for an accessible route described in paragraph 2.2.1 of D1/AS1.

6.4.5 In deciding whether the proposed lift complies with Clause D1 as an alternative solution, I need to consider:

- the attributes of the complex in which the lift is installed
- the nature of the building's occupants and use
- whether a person using a wheelchair can use the lift without assistance
- whether a person using a wheelchair can use the lift while permitting an ambulant person to pass.

6.4.6 There is no dispute that this building is one to which the performance requirements of D1.3.2 apply as follows:

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 ...

6.4.7 The lift in the complex serves to provide access for the public and an accessible route for people with disabilities between a number of principal spaces, namely the accessible parking in the carpark at the lower level, the cinemas at the upper level, and the toilets at the lower level. The layout of the building means it would be reasonable to assume that a person visiting the building would be expected to visit both the upper and lower levels of the building.

- 6.4.8 The lift has to comply with the requirements of Clause D1.3.3(a), which requires that ‘Access routes shall have adequate activity space’. In this instance, and as the lift forms part of the accessible route, I consider the term ‘adequate activity space’ to be the ability to enter and exit the lift and operate it unaided. In addition, Clause D1.3.4 requires that ‘[a]n accessible route, in addition to the requirement of Clause D1.3.3, shall ... (f) have doors and related hardware which are easily used, ...’
- 6.4.9 The applicant has submitted that ‘nearly all wheelchairs are unable to turn around in the lift’. A sign located adjacent the lift call buttons on both levels also says ‘Wheelchair users should reverse into lift for ease of operation and exiting’.
- 6.4.10 Providing dual controls within the lift car would enable a wheelchair user to operate the lift without the need to back into the lift. However, it would still necessitate the user to reverse out of the lift when exiting. While I accept the applicant’s argument that a wheelchair is more likely to tip over backwards when reversing, I do not accept that a conflict between wheelchairs users and others using the lift is a likely outcome.
- 6.4.11 It was noted that during the visit to the site as part of the hearing (refer paragraph 4.3) the lift car doors remained open for approximately 7 seconds. This did not appear to be sufficient time to allow a wheelchair user to negotiate entering the lift by reversing into it before the lift doors started to close.
- 6.4.12 I consider the depth of the lift, at 2000mm, to be sufficient to allow an attendant and other persons to use the lift at the same time as a person using a wheelchair. I also note that the building is two stories in height meaning that lift passengers completely vacate the lift at both levels. This avoids the need for passengers to move around those remaining in the lift as would be the case if the lift served more than two levels.
- 6.4.13 While I acknowledge the applicant’s argument that the lift should be wide enough to allow ambulant people to render assistance to those in wheelchairs, I do not consider the limited movement of people in such instances is directly comparable with, say, those moving in opposite directions along a 1200mm wide accessible route as described in D1/AS1. I am therefore of the view that the lift car itself is not required to comply with Clause D1.3.4(b).
- 6.4.14 I accept that the lift car dimensions restrict the ability of a significant proportion of people using a wheelchair to turn within the lift and that a wheelchair user is almost certainly required to back into the lift in order to operate the lift controls when facing forward. In this respect I am of the view that, as the controls to operate the lift are likely to be inaccessible to a person using a wheelchair, the lift does not comply with Clause D1 of the Building Code.
- 6.4.15 Finally, I consider that the decision that I have reached in this determination relates to the current situation and may not apply to other situations involving wheelchair access for lifts where the circumstances may be different⁹.

⁹ For example Determination 2012/033: Provision of lift access in the alterations to an existing two-storey administration building at the National Training Centre for the New Zealand Fire Service

6.5 The building consent and the code compliance certificate

- 6.5.1 Based on the decisions I have reached in paragraphs 6.2 and 6.4, I am of the opinion that the authority was in error when it issued a code compliance certificate for the complex. This is on the basis that the elements in question do not comply with either the building consent or the Building Code and that these anomalies were present when the authority carried out its inspections.
- 6.5.2 I am of the opinion the authority did not have sufficient evidence when it issued the building consent that the provisions of the Building Code would be met if the building work were properly completed in accordance with the plans and specifications accompanying the application for a building consent.
- 6.5.3 However, as I have noted in previous determinations (See Determination 2009/15), the granting of a building consent is a statutory decision authorising particular building work to be undertaken. Also, where that decision has been relied and acted upon, I would require compelling evidence before me, along with persuasive reasons before I would reverse that consent.
- 6.5.4 I still hold to that opinion and consider that in this instance it would be unreasonable to now reverse the statutory decision made by the authority to grant building consent.

7. What happens next?

- 7.1 The authority should now inspect the building elements in question and issue a notice to fix that requires the owner to bring the complex into compliance with the Building Code, taking into account the items described in paragraphs 6.2 and 6.4, but not specifying how those defects are to be fixed. It is not for the notice to stipulate how the defects are to be remedied and the complex brought to compliance with the Building Code. That is a matter for the owner to propose and for the authority to accept or reject.
- 7.2 I suggest that the owner and the authority adopt the following process to meet the requirements of paragraph 7.1. Initially, the authority should inspect the complex and issue the notice to fix. The owner should then produce a response to this in the form of a detailed proposal as to the rectification or otherwise of the specified issues. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.
- 7.3 The expert has identified some variations between the complex as constructed and the consent documentation; the building consent should be amended to reflect those changes to the satisfaction of the authority.

8. The Decision

8.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:

- the complex does not comply with the requirements of Clauses D1 and G1 of the Building Code
- the authority incorrectly exercised its powers when it issued building consent No ABA 57214 and the subsequent code compliance certificate for the complex
- accordingly, I reverse the decision of the authority to issue the code compliance certificate.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 22 June 2012.

John Gardiner
Manager Determinations

Appendix A: The relevant legislation

A.1 Relevant provisions of the Act are:

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.

94 Matters for consideration by a building consent authority in deciding issue of a code compliance certificate

- (1) A building consent authority must issue a code compliance certificate if it is satisfied, on reasonable grounds, --
- (a) that the building work complies with the building consent...

117 Definitions for sections 118 to 120

In sections 118 to 120, unless the context otherwise requires, building includes--

- (a) parts of a building (including driveways, access ways, passages, within and between complexes and developments, and associated landscaping(if any); and
- (b) any premises or facilities.

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.

Schedule 2

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:

- (p) places of assembly, including auditoriums, theatres, cinemas, halls, sports stadiums, conference facilities, clubrooms, recreation centres, and swimming baths:
- (q) shops, shopping centres, and shopping malls:
- (z) other buildings, premises, or facilities to which the public are to be admitted, whether for free or on payment of a charge.

A.2 Relevant provisions of the Building Code are:

CLAUSE A2—INTERPRETATION

In this building code unless the context otherwise requires, words shall have the meanings given under this Clause. Meanings given in the Building Act 1991 apply equally to the building code.

Access route A continuous route that permits people and goods to move between the apron or construction edge of the building to spaces within a building, and between spaces within a building.

Accessible Having features to permit use by people with disabilities.

Accessible route An access route usable by people with disabilities. It shall be a continuous route that can be negotiated unaided by a wheelchair user. The route shall extend from street boundary or carparking area to those spaces within the building required to be accessible to enable people with disabilities to carry out normal activities and processes within the building.

Clause D1—ACCESS ROUTES

PERFORMANCE

D1.3.2 At least one access route shall have features to enable *people with disabilities* to:

- (a) Approach the building from the street boundary or, where required to be provided, the building car park,
- (b) Have access to the internal space served by the principal access, and
- (c) Have access to and within those spaces where they may be expected to work or visit...

D1.3.3 Access routes shall:

- (a) Have adequate activity space,
- (j) Have smooth, reachable and graspable handrails to provide support and assist with movement along a stair or ladder...

D1.3.4 An accessible route, in addition to the requirements of Clause D1.3.3, shall:

- (b) Have adequate activity space to enable a person in a wheelchair to negotiate the route while permitting an ambulant person to pass...

D1.3.6 Vehicle spaces for use by people with disabilities shall, in addition to the requirements of Clause D1.3.5, be:

- (b) Located to avoid conflict between vehicles and people using or moving to or from the space, and...

Clause G1—PERSONAL HYGIENE

OBJECTIVE

G1.1 The objective of this provision is to:

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

PERFORMANCE

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

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

A.3 Relevant provisions of the New Zealand Standard are

NZS 4121: 2001 Design for Access and Mobility – Buildings and Associated Facilities

9.2.2.1 Size

Lifts serving an accessible route shall have a minimum interior clear space of 1400 mm by 1400 mm as shown in figure 26.

(Commentary Clause)

C9.2.2.1 The minimum dimensions of the lift car as shown in this Standard allow an attendant and other passengers to use the lift at the same time as a wheelchair user. This size does not allow many wheelchairs to turn through 180°.