



Determination 2018/036

Regarding the compliance of a new swimming pool complex at 15 Market Place, Papamoa, in relation to access for people with disabilities into the pools

Summary

This determination considers whether a hoist for two swimming pools at a new pool complex will comply with the requirements under Clause D1 of the Building Code in relation to access for people with disabilities into the pools. The determination includes discussion on whether section 118 of the Building Act applies, which turns on whether members of the public are admitted to the private pool complex.

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, Katie Gordon, Manager Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The parties to the determination are:
 - the owner of the pool complex, Pase Trust and Bartlett Swim School (“the applicant”)
 - Tauranga City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 I forwarded copies of the drafts of this determination to the Office for Disability Issues (“ODI”) at the Ministry of Social Development, by way of consultation under section 170 of the Act.
- 1.4 This determination arises from the construction of a pool complex without provision for access into the pools for people with disabilities. The applicant has proposed installation of a hoist, but the authority is not satisfied that this would comply with Clause D1 Access Routes of the Building Code² (First Schedule, Building Regulations 1992). The applicant has subsequently advised that people enrolling in swimming courses will become members of a swim school club, and therefore the pools is not a building to which members of the public are to be admitted and section 118 does not apply.

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

² In this determination, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

- 2.2 On 22 March 2017 the authority issued the building consent for construction of the pool complex. The approved plans show a ramp from the concourse into the two-lane pool (see Figure 1) but no accessible route into the four-lane pool.
- 2.3 Construction was substantially complete by 12 July 2017 when the authority carried out a final inspection, at which time it identified the ramp had not been constructed and the authority issued a site notice to that effect. The applicant then sought approval from the authority to install a hoist as the means of providing access for people with disabilities into the pools.
- 2.4 The supplier's information sheet states that the hoist is user-operated and relocatable, has a safe working load of 150kg, and has a floating hand control. The seat size is 400mm x 400mm, it has a seat back, fold-up arm rest, lap belt and removable foot rest.
- 2.5 The authority did not accept the proposal, and on 31 August 2017 the Ministry received an application for a determination.

3. The submissions

3.1 The initial submissions

- 3.1.1 With the application for determination, the applicant submitted (in summary):
- The proposal is to install two fixed base plates, allowing the hoist to be used for access to both the four-lane and two-lane pools.
 - The alternatives, a ramp or platform lift, would only service one pool.
 - A ramp would take up one lane and render 16.6% of the pool unusable, and would not provide access to both sections of the pool because of the fixed barrier between.
 - Some people with disabilities have difficulties using a ramp, particularly when exiting the pool.
- 3.1.2 Along with the submission, the applicant provided copies of photographs of the pools as constructed, information on the hoist, relevant correspondence between the parties, a statement from a member of the public regarding using ramps, and a plan showing the proposed location of the hoist providing access into the four-lane pool. (I note the plan indicates only one base plate is to be installed and still shows a ramp to the two-lane pool.)
- 3.1.3 On 25 September 2017 the applicant provided a set of plans for the pools and clarified some of the background. The applicant confirmed that an 'original set of plans'⁵ did not include a ramp but the authority had confirmed during a pre-lodgement meeting that there must be an accessible route into the pool for people with disabilities (see also paragraph 3.4.3). The applicant had carried out consultation with organisations concerned with advocating for people with disabilities and had reached the view that providing a hoist that can be used unaided would be adequate. The approved plans to the building consent⁶ however show a ramp into the two-lane pool.

⁵ The "original" ground floor plan dated 10/10/2016 does not show a ramp or other means of access into the pool for people with disabilities.

⁶ Revision 2 dated 27/02/2017 stamped as approved by the authority

3.1.4 On 11 September 2017, in response to the application for determination, the authority provided a summary of inspections it carried out during construction, which recorded that the final inspection on 12 July 2017 as “fail” due to accessible features not having been completed in accordance with the building consent. The authority submitted (in summary):

- The consent was approved with ‘ramp access as per NZS 4121’.
- The pools were constructed without a ramp, and when the final inspection failed the applicant approached the authority with the proposal to install a hoist.
- It is the authority’s view that only a ramp or platform lift would achieve the performance requirements. This is supported by Determination 2016/021⁷.

3.2 The first draft and submissions in response

3.2.1 A draft determination was issued to the parties and ODI for comment on 25 October 2017 (“the first draft”). The first draft was predicated on the view that the application of section 118 was not in dispute and the matter for determination was the compliance of the proposed hoist as a means of providing access for people with disabilities into the pools. The first draft concluded that the installation of the hoist would not be sufficient by itself to comply with Clause D1.

3.2.2 The authority responded on 31 October 2017, accepting the draft determination without further comment.

3.2.3 ODI provided comment on the draft by email on 1 November 2017, stating it agreed that access to the pools is best provided by a ramp as this accommodates most peoples’ needs in a way that is not obviously segregated or highly visible as being different. ODI noted that a hoist as the only means of access would place limitations on some disabled people’s use of the pools, and that in the view of ODI publically-accessible pools would have both a ramp for most people and a hoist for some.

3.2.4 On 13 March 2018 the applicant provided a submission prepared by a legal advisor. The submission clarified the use of the pools as for private swimming instruction to club members, inclusive of people with disabilities, and not a public facility that allows casual unattended entrance to the pools. The submission concluded:

...Bartlett Swim School Club is for members only, and its services are not expressed and are not an entitlement to members of the public. A member of the public can enter the building to the service counter, then they are required to fill out a membership form to take advantage of the benefits of the Bartlett Swim School Club. The Bartlett Swim School Club sole purpose in (*sic*) to service private members only. Due to the Bartlett Swim School Club’s private legal status, and authoritative caselaw (*sic*), section 118 [of the Act] cannot be applied to this Club’s pool structure.

3.3 The second draft and submissions in response

3.3.1 After taking into account the submissions of the parties in response to the first draft, a second draft of this determination was issued to the parties and ODI for comment on 3 May 2018 (“the second draft”). The second draft concluded that the pools are a place to which members of the public are to be admitted and that section 118 applies. The second draft maintained the view that installation of a hoist would not be sufficient by itself to comply with Clause D1, and noted that a waiver or

⁷ Determination 2016/021 Regarding the compliance of proposed access for people with disabilities to one of three swimming pools in a proposed aquatic centre (17 June 2016)

modification of the provisions concerning access and facilities for use by people with disabilities cannot be granted.

3.3.2 ODI responded on 9 May 2018, stating it agreed with the decision that section 118 applies and noting that:

- construction of facilities that cannot be used by people with disabilities would unnecessarily prevent a significant portion of the public from using the facilities and given construction will persist for many years it is not effective or efficient for new facilities to be built with access barriers that restrict current and future use
- the disabled population is very diverse, and what might work for one person may not be preferred by another; while a hoist may be preferred by some, if it is the only means of accessing the pools then it would place limitations on other disabled people's use of the pools
- ideally a publically accessible pool would have both the ramp for most people and a hoist for some.

3.3.3 On 21 May 2018, the applicant provided a submission in response to the second draft of the determination, along with a copy of a constitution for the swim club and a membership form.

3.3.4 The authority provided response to the second draft of the determination and comments on the applicant's submission on 23 May 2018. The parties then corresponded further on the matter.

3.3.5 I have summarised the submissions as follows:

The applicant

- The swim school club will not be admitting members of the public to the building; therefore section 118 does not apply.
- The swim school club relies on Determination 2013/029⁸ in regards to the interpretation of "members of the public". People will have to apply for membership to the swim school club, there is a screening process for selecting applicants to become members of the club, and new members will be required to sign a memorandum of understanding regarding the club's constitution.
- The screening will be based on an assessment of the prospective member's requirements against the services offered by the club.
- Individuals must meet requirements to become a member, and not all applications will be successful. Examples of previous individuals not being admitted include:
 - a. People requesting one on one classes due to a lack of available instructors.
 - b. Athletes training for triathlons due to the need for a coach to be present at all times.
 - c. Children who want to come with preschool groups who are too young and lack of ability (sic).
 - d. Disabled patrons who wish to swim in a group as our policy is one on one teaching for people with special requirements.

⁸ Determination 2013/029 Whether access and facilities for people with disabilities are required at a private campground (20 May 2013)

- e. Declined groups who want to hire our pool independently eg. Mermaid classes for children and babies in womb classes.
- Non-members entering the building, such as carers, will be covered by the principle of “visitor” as set out in Determination 2013/029. Family members will be considered as a group membership.
- References to “members of the public” in the club’s constitution concern services that the club is likely to offer at other venues, such as schools.

The authority

- The concept of a private members club did not form part of the original consent application and it does not support the intention of the provisions under sections 118 to 120.
- It appears that the club and associated constitution has been created in an attempt to circumvent the requirements of section 118 of the Act after construction – a building owner cannot opt out of the regulations by way of a contract.
- The constitution refers to provision of services to members of the public in two clauses.
- It is unclear how the club would screen for requirements of members and family members/carers.
- There appears to be no history of the swim school rejecting an applicant on the basis of disability, and to do so would be a breach of the New Zealand Bill of Rights Act and Human Rights Act.
- It appears that provisional members will almost automatically be granted access to the facilities and this is very similar to members of the public having access.

3.4 The hearing

3.4.1 In response to the applicant’s request to make an oral submission, I held a hearing by telephone conference call on 11 July 2018. The following people took part in the hearing:

- two representatives for the applicant, and the applicant’s legal advisor
- three officers of the authority
- myself accompanied by one officer of the Ministry and a Determinations Referee.

3.4.2 All parties spoke at the hearing and were of assistance to me in preparing this determination. The applicant and the authority both provided additional information regarding the background to the building consent.

The authority

3.4.3 The authority advised it had considered during the processing of the building consent that there was a replication of function between the two pools and therefore an accessible ramp was required to only one of those pools. The authority also confirmed that there was a gap between the authority’s inspection at foundation stage and the next inspection by the authority as some of the construction was subject to

engineering oversight; the fact that the construction did not accord with the approved plans was therefore not picked up until later in the construction process.

- 3.4.4 The authority reiterated its view that all of the people using the building are still members of the public regardless of any membership structure, and therefore section 118 applies to the building. The authority expressed concern that a lack of an accessible route into the pools would preclude some people from being able to use the pools and that this would not meet the objective and functional requirements of Clause D1.
- 3.4.5 In regards to potential future owners and future use of the building, the authority noted that new ownership would not of itself trigger the change of use provisions under sections 114 and 115, and that this supports the view that section 118 applies to this building as a swimming pool complex.

The applicant

- 3.4.6 The applicant provided more detailed information regarding the operation of the business and users that it catered for, and made submissions on various topics which I have summarised below:

The use of hoists generally and in contrast to the use of a ramp

- The applicant still intends to provide a hoist because they currently have members for who that is the preferred means of access, and the applicant is of the view that it is an effective mechanism for people with disabilities to get into and out of the pools. The applicant had undertaken some research and consultation with user groups in the community that showed support for the use of a hoist.
- The applicant described the operational use of the hoist, noting that the user can choose to get into the water by themselves and if they are capable of being in the water without support, the coach/instructor/“minder” (who I will refer to as “the attendant”) does not need to get into the water with them. The applicant contrasted this with a ramp where the attendant would have to enter the water if the person with the disability is using a waterproof wheelchair down a ramp.
- There are health and safety issues getting into and out of the water using a ramp. Water wheelchairs are constructed using hollow pipes that fill up with water, and this significantly increases the load for the attendant.

The membership model and definition of “members of the public”

- The applicant reiterated that the pool complex is a private facility and is not open to members of the public. Users must apply to be members of the club, and the membership must be approved and fee paid.
- No one can get into the pools without an instructor or coach with them.
- There are some services that the business does not offer and some people that the business cannot cater to (refer paragraph 3.3.5), and the applicant has had to turn down some applications for membership on the basis that the staff are not trained for the specific needs of those applicants. The applicant has also turned down people seeking one-on-one coaching as it does not offer that service.

- There is a definition of “members of the public” in case law (trust law) which the applicant relies on. Members of a club are a separate legal entity from members of the public. In this case the pools are only used by members of the club, not members of the public, and accordingly section 118 does not apply as the provision criteria that the building is one to which members of the public are admitted is not met. A previous determination (2013/029) also supports the applicant’s submission in this matter.

Other

- The provision of a ramp is not mandatory. NZS 4121 states that a ramp is the “preferred means” of access. When Parliament wants something prescriptive then it uses the word “must” – any other term is discretionary.
- Any new owner of the building would have to do their due diligence to establish how the pools (and access into the pools) would fit in with their planned operation.

4. Discussion

4.1 Section 118

- 4.1.1 The clear intention of the Building Act is that buildings must not be constructed in such a way as to prevent people with disabilities from visiting or working, and from carrying out normal activities and processes to the fullest extent that their abilities allow.
- 4.1.2 The importance that is placed on the provision of access and facilities for people with disabilities is acknowledged in the purposes and principles of the Act (sections 3(a)(ii) and 4(2)(k)), in sections 118 regarding the provision of access and facilities for people with disabilities, and the requirements under sections 112, 115 and 133AT(2) relating to alterations and changes of use. (Refer Appendix A.1). In addition, a territorial authority cannot grant an application for building consent subject to a waiver or modification of the Building Code relating to access and facilities for people with disabilities (section 67), and the Chief Executive cannot grant a waiver or modification of those clauses in respect of a new building (section 69).
- 4.1.3 The provision that is in dispute in this case is section 118 of the Act, which says:
- 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.
- 4.1.4 The applicant initially submitted that “any member of the public can enter the building of Bartlett Swim School Club to the service counter to register as a member of the Bartlett Swim School Club”. In later submissions the applicant has advised that registrations will be completed online and screened, and not all applicants will be successful in obtaining membership and the fee must be paid. The applicant argues that people using the pools will be members of the swim school club and will no longer be “members of the public”, and on that basis section 118 of the Act does not apply.

4.1.5 The applicant contends:

- The status of a member of a club changes when the member joins the club, at which point the member ceases to be a member of the public and becomes a member of the club⁹. A member of the club cannot be a member of the public;
- The principles of charitable trust law¹⁰ should be applied, as these delineate the principles for when a club provides public or private benefits: the swim club only provides private benefits to its members and so its members cannot be members of the public.

4.1.6 Section 118 is not a test of the status of club members but rather whether members of the public are admitted to the building, nor is section 118 a test of whether the club provides private benefits to its members. Section 118 focuses on the class of people who have access to the building, albeit a particularly large class comprising “members of the public”, not the nature of the benefits those people receive when in the building. Section 118 includes the phrase “whether for free or on payment of a charge”; I consider that phrase to cover those situations, such as the swim club, where members of the public become members of some organisation or group from which they may obtain benefits or services not available to non-members who have not paid the membership charge. The buildings within which such organisations or groups operate remain buildings to which section 118 applies.

4.1.7 The swim club’s pool and building are intended to be open to a wide range of members of the public. The swim club will be open to all active members of the public who want to participate in or are involved in swimming and coaching, and the club will also have a category of associate members who have an interest in swimming and coaching.

4.1.8 In previous determinations I have considered access and facilities for people with disabilities to buildings that had a private membership¹¹ or were occupied by a club¹²; in these two cases the buildings were ones to which members of the public were admitted. These can be distinguished from Determination 2013/029, which involved a private housing community. The community had some features of a ‘campground’ where people wishing to become part of the community had to apply for provisional membership and undergo a selection process, and not all applicants were selected for provisional membership. In that determination I concluded the ablutions block at the ‘campground’ was not a building to which members of the public were to be admitted and consequently section 118 did not apply.

4.1.9 I am not persuaded by the argument put forward by the applicant that the constitution and membership structure now proposed for the swim school are akin to those considered in Determination 2013/029. The ablutions block in the ‘campground’ was part of the private housing community, and the housing community was not providing accommodation for the public but rather could only be occupied by provisional members who were seeking to become full members of the community. As private housing is not included in Schedule 2, the provisions of section 118 did not apply to this community, nor in turn to any of the facilities, such as the ‘campground’ ablutions block associated with the private housing community. The membership structure of the community was not a significant factor in the decision

⁹ *Finnigan v NZ Rugby Football Union, Moxon v The Casino Authority*

¹⁰ *Travis Trust v Charities Commission (2008) High Court of New Zealand, Strathalbyn Show Jumping Club v Mayers (2001) South Australian Supreme Court*

¹¹ See Determination 2010/028 The provision of access for people with disabilities to a gymnasium (24 March 2010)

¹² See Determination 2016/036 Regarding access of people with disabilities to the lower level of a proposed rowing club building (2 August 2016)

reached in the determination, and therefore provides little support to the applicant's argument. More relevant is the intended use of the building and the extent to which the members of the public are to be admitted to the building, even if that involves payment of a charge.

- 4.1.10 In relying on Determination 2013/029 the applicant has also argued that some people applying to the swim club will be refused membership on the basis that their requirements are not met by the club. I cannot accept the fact the club does not offer all the services sought by members of the public means that the building is not one to which members of the public are admitted. The applicant has noted that some people will not be admitted as members, but these people who were declined membership were all seeking to use the pools for activities that were not offered by the swim club. Just because the swim club cannot cater to certain groups or activities does not mean that the club no longer admits members of the public. The important point is that if a person wishes to join one of the club's existing activities they will be able to. In that respect the pool is in no way different to the variety of buildings set out in Schedule 2 of the Act to which section 118 applies.
- 4.1.11 Paragraph (p) of Schedule 2 applies to the pools considered in this case:
- (p) places of assembly, including auditoriums, theatres, cinemas, halls, sports stadiums, conference facilities, **clubrooms, recreation centres, and swimming baths** [my emphasis]
- 4.1.12 As I have concluded that the pools are a building to which members of the public will be admitted, section 118 applies.

4.2 The Building Code

- 4.2.1 As section 118 applies, reasonable and adequate provision by way of access and facilities must be made for persons with disabilities who may be expected to visit or work in that building and carry out normal activities and processes in that building. The normal activities are use of the swimming pools for swimming and recreation.
- 4.2.2 The phrase "reasonable and adequate access" is not defined in the Act. Clause A2 of the Building Code defines "adequate" as being adequate to achieve the objectives of the Building Code.
- 4.2.3 Clause D1.3.2 requires that at least one access route shall have features to enable people with disabilities to approach the building from the street boundary, have access to the internal space served by the principal access, and have access to and within those spaces where they may be expected to work or visit. Clause D1.3.3 sets out the requirements for Access Routes, and Clause D1.3.4 sets out the additional requirements for Accessible Routes¹³.
- 4.2.4 The authority noted in its submission that the building consent was approved 'with ramp access as per NZS 4121'¹⁴. For completeness I note the ground floor plans show a ramp to the two-lane pool only (see Figure 1), and I have seen no information on the width, slope, handrails, or other features of the ramp.

¹³ An accessible route, as defined in Clause A2 Interpretation, means 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.

¹⁴ Section 119 provides NZS 4121 to be taken as an Acceptable Solution.

4.3 Compliance of the hoist as a means of access

4.3.1 Reasonable and adequate access is required into both the four-lane and two-lane pools for people with disabilities to carry out ‘normal activities’ associated with the use of the pools. I must therefore consider whether ‘reasonable and adequate’ access to the pools will be achieved by the use of a hoist alone.

4.3.2 As the provision of a ramp is in accordance with the recommended means of compliance in the commentary to paragraph 12.3.1.2 in NZS 4121, it is deemed an Acceptable Solution under section 119 and therefore accepted as establishing compliance with the Building Code.

4.3.3 Section 12 of NZS 4121 describes the requirements for access to places of assembly, entertainment and recreation; the only requirement that is relevant to access into the pools is paragraph 12.3.1.2, which states:

12.3.1.2 Access to the pool

The swimming pool shall be available from an accessible route and unaided access to the water shall be possible from the poolside.

The commentary to this paragraph notes:

C12.3.1.2 A ramp that leads from the poolside into the pool is the preferred means of access to the water. A slope of 1:12 down to a water depth of 1200mm is acceptable

4.3.4 While a ramp constructed in accordance with NZS 4121 providing access to the two-lane pool would have achieved compliance with the Building Code for that pool, the ramp was not constructed. However, the ramp shown on the approved plans only provided access into the two-lane pool, meaning that there were no provisions made for access for people with disabilities into the four-lane pool. I note the authority’s view when it approved the ramp to the two-lane pool was that the function of the two pools were replicated; I make no comment on the authority’s decision as it is outside the scope of this determination which is whether a hoist able to be used for both pools will comply with Clause D1.

4.3.5 The applicant has submitted that a ramp is a barrier to use for some people. While that may be the case for some, I am of the view that a ramp, being the preferred means of access identified in NZS 4121, meets the needs of the widest range of users in line with the principles of universal access. NZS 4121 is a Standard created by Standards New Zealand that was specifically endorsed by Parliament in the Building Act as being a compliance document. Section 119 of the Act provides NZS 4121 is an Acceptable Solution.

4.3.6 However, compliance with an Acceptable Solution is not the only means of achieving compliance with the Building Code. I have therefore considered whether the proposed instalment of a hoist would be sufficient by itself to comply with Clause D1 as an alternative solution to the two pools that are the subject of this determination.

4.3.7 This issue has been considered in previous determinations concerning pools of a similar or in some cases larger size. In Determination 2014/038¹⁵, I said:

5.3.4 I am of the view that access by way of the hoist alone is possible for a broader range of people to use other than only those who use wheelchairs. However, the hoist is unlikely to be suitable for a range of people with such disabilities as defined in NZS 4121; for example, those with a lack of co-ordination, or

¹⁵ Determination 2014/038 Regarding the compliance of access for people with disabilities to a new swimming pool (8 September 2014)

manipulation disabilities. In addition the hoist can only be used by one person at a time; as well as limiting general access to the pool due to availability this would be restrictive in terms of evacuation if more than one person required the use of the hoist to leave the pool.

- 5.3.4 From the features described in Clause D1.3.4 it appears the use of a hoist is not contemplated, nor is a hoist offered as a solution in NZS 4121. The use of a hoist (or “pool lift”) is included in Australian and American Standards, It is noted that both standards base the access required on the length of the pool perimeter.

...

- 4.3.8 In that determination I also considered whether a hoist together with a set of removable stairs would comply, and noted:
- 5.4.4 It could be argued that the hoist meets the definition of an accessible route in that it can be negotiated unaided by a person in a wheelchair, and I consider it likely that there are people who would be satisfied with this means of access into the pool. However, there will be people unable to access the pool from the concourse that for whatever reason would be unwilling to use the hoist, but where a ramp provides an unchallenging and familiar means of access.
- 4.3.9 I concluded that the use of a hoist alone to the pools considered in those determinations does not constitute ‘reasonable and adequate’ access for people with disabilities and accordingly would not be compliant with Clause D1 of the Building Code in regards to access for people with disabilities. I maintain that view and consider it applies to the circumstances in this case. I note however that this conclusion does not prevent the applicant from installing a hoist; it remains open for the applicant to install a hoist in combination with some other means of access into the pools that will achieve the requirements for reasonable and adequate access. The applicant has submitted that members of the community consulted by the applicant and some current users of the pools prefer to use a hoist. My decision does not preclude the use of a hoist.
- 4.3.10 In Determination 2016/007¹⁶ which concerned a private pool complex with three different pools, I considered whether a relocatable poolside hoist in addition to six sets of recessed step ladders would provide reasonable and adequate access to a pool designed for use as a high performance/water polo pool. The pool in that case was a uniform 2.2m deep pool that was designed and built to comply with competition rules; it was to be used for training and competition swimming for high performance swimmers and water polo players.
- 4.3.11 In that determination I reached the conclusion for that particular pool and its intended use the hoist would provide reasonable and adequate access, taking into account:
- the pool was one of three different pools in the complex, and a differentiated means of providing access to the three pools is entirely reasonable given the nature of the activities taking place in them – what constituted reasonable and adequate provision for access in the context of one design of pool and its intended use is not necessarily so in another
 - given the uniform depth of the high performance/water polo pool, the users of the pool would be confident swimmers either training or competing, and they are likely to be able to enter the water from the pool edge unaided, either from the side of the pool or using a hoist

¹⁶ Determination 2016/007 Regarding the code compliance of proposed access for people with disabilities to three swimming pools in a proposed aquatic centre (24 February 2016). See also the subsequent related Determination 2016/021 which discusses the functionality of a proposed platform lift to one of the three pools in comparison to other means of providing access for people with disabilities.

- users of that pool would, by necessity, need to be able to swim and must be capable of being in water that is over their heads.

4.3.12 I do not consider the logic in that determination can be applied in this case. The two pools considered in this determination are relatively shallow in comparison to the high performance/water polo pool. There is nothing in the design of the pools considered in this determination that would mean the users, who will be made up of members of the community, would consist of people capable of entering the pools from the pool edge unaided from the side of the pool or by using a hoist.

4.3.13 I believe a suitable compliant solution that would not adversely affect the pools' use could have been more easily achieved in this case if it had been developed at the design stage. It is clear that the need to address accessibility after the pool's construction without a ramp or other suitable means of access will present difficulties for the applicant.

4.4 Future ownership

4.4.1 During the hearing there was some discussion regarding potential future change in ownership in relation to the sustainability of the building over its expected life, and any regulatory obligations that may fall to the new owner in relation to access to the pools.

4.4.2 For completeness, I note a change of ownership would not trigger the provisions of the Act that require approval of the authority and reconsideration of access into the pools. The provisions that would be those that relate to alterations of an existing building (sections 112 and 133AT(2)) or a change of use under the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 (section 115).

4.5 Waiver or modification

4.5.1 The applicant has also requested I consider granting a waiver or modification of Clause D1 in relation to access for people with disabilities to the pools.

4.5.2 Under section 69 of the Act a waiver or modification may only be granted by the Chief Executive in relation to access and facilities for use by persons with disabilities for an existing building to which section 118 applies. Section 69(3) provides:

(3) This section does not apply to a waiver or modification of the building code that relates to a new building or that is contained in a national multiple-use approval.

4.5.3 In this case the matter concerns the construction of a new building and not the alteration of an existing building, therefore a waiver or modification of the provisions under section 118 concerning access and facilities for use by people with disabilities cannot be granted.

5. The Decision

- 5.1 In accordance with section 188 of the Building Act 2004 I hereby determine that proposed installation of the hoist as a means of providing access for people with disabilities into the two pools would not be sufficient by itself to comply with Clause D1 of the Building Code.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 6 August 2018.

Katie Gordon
Manager Determinations

Appendix A

A.1 The relevant sections of the Act are:

3 Purposes

This Act has the following purposes:

(a) 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—

...

(ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and ...

(iv) 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 persons with disabilities to enter and carry out normal activities and processes in a building:

7 Interpretation

person with a disability means a person who has an impairment or a combination of impairments that limits the extent to which the person can engage in the activities, pursuits, and processes of everyday life, including, without limitation, any of the following:

(a) a physical, sensory, neurological, or intellectual impairment:

(b) a mental illness

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 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:

p) places of assembly, including auditoriums, theatres, cinemas, halls, sports stadiums, conference facilities, clubrooms, recreation centres, and swimming baths

119 Acceptable solution 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 an acceptable solution

Sections 112, 115 and 133AT mentioned in paragraph 4.1.2 can be viewed at <http://www.legislation.govt.nz/>

A.2 Relevant provisions of the Building Regulations 1992 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.

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.

Adequate means adequate to achieve the objectives of the building code

Clause D1—ACCESS ROUTES**Objective**

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.

Functional requirement

D1.2.1 Buildings shall be provided with reasonable and adequate access to enable safe and easy movement of people.

Performance

D1.3.1 Access routes shall enable people to: ...

(c) move into spaces within buildings by such means as corridors, doors, stairs, ramps and lifts, ...

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

(c) have access to and within those spaces where they may be expected to work or visit, or which contain facilities for personal hygiene as required by Clause G1 Personal hygiene.

D1.3.4 An accessible route, in addition to the requirement 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, ...

(d) contain no thresholds or upstands forming a barrier to an unaided wheelchair user,

- (e) have means to prevent the wheel of a wheelchair dropping over the side of the accessible route,
- (f) have doors and related hardware which are easily used,
- (g) not include spiral stairs, or stairs having open risers,
- (h) have stair treads with leading edge which is rounded, and
- (i) have handrails on both sides of the accessible route when the slope of the route exceeds 1 in 20. The handrails shall be continuous along both sides of the stair, ramp and landing except where the handrail is interrupted by a doorway.

A.3 The relevant New Zealand Standard NZS 4121:2001:

1.5 Definitions interpretation

1.5.1 Definitions

ACCESSIBLE means having features that permit use by people with disabilities.

PEOPLE WITH DISABILITIES means people whose ability to be freely mobile or to access and use buildings is affected by mental, physical, hearing or sight impairment, such as:

- (a) An inability to walk;
- (b) Walking difficulties;
- (c) Reliance on walking aids;
- (d) Partial sightedness or total blindness;
- (e) Hearing disabilities;
- (f) Lack of co-ordination;
- (g) Reaching disabilities;
- (h) Manipulation disabilities;
- (i) Lack of stamina;
- (j) Difficulties in interpreting and reacting to sensory information;
- (k) Extremes of physical size;
- (l) Learning difficulties.

4.2 Accessible route

4.2.3 The accessible route includes paths, car parks, ramps, at least one public entrance, corridors, stairs, doorways and lifts within the building. For non-ambulatory people, the accessible route shall not incorporate any step, stairway, turnstile, revolving door, escalator or other impediment that would prevent it from being safely negotiated.

4.3 General

In order to achieve the objective of 4.1, people with disabilities shall be able to:

...

- (d) move freely inside and to use the facilities within the building or facility, except as provided for in this part of the Standard;

12 – Places of assembly, entertainment and recreation

12.3.1.2 Access to the pool

The swimming pool shall be available from an accessible route and unaided access to the water shall be possible from the poolside.

C12.3.1.2 A ramp that leads from the poolside into the pool is the preferred means of access to the water. A slope of 1:12 down to a water depth of 1200mm is acceptable.