

Determination 2023/040

**An authority's decision to refuse a waiver or modification
of the building code for two isolated steps**

143 Kitchener Road, Auckland

Summary

This determination considers an authority's decision to refuse to grant, by way of building consent, a waiver or modification of Building Code clause D1.3.3(i) to authorise construction of two isolated steps in a retail unit.

In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Andrew Eames, Manager Advisory, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.¹
- 1.2. The parties to the determination are:
 - 1.2.1. Chemist Warehouse Ltd (“the lessee”), the company which sought building consent to undertake building work at 143 Kitchener Road (“the property”).²
 - 1.2.2. Milford Centre Ltd (“the landlord”), being the company that owns the property.
 - 1.2.3. Auckland Council (“the authority”), carrying out its duties as a territorial authority and building consent authority.
- 1.3. This determination arises from the authority’s refusal to grant, by way of a building consent, a waiver or modification of a Building Code requirement. The lessee had requested the authority consider a waiver or modification of Building Code clause D1.3.3(i) to authorise construction of two isolated steps (“the proposed isolated steps”). The lessee did so because it considered that the steps are not permitted by clause D1.3.3(i). The authority, however, refused the waiver or modification requested on the basis that “[a] waiver could not be considered... under [section 67(3)].”
- 1.4. The matter to be determined, under sections 177(1)(b) and (3)(a), is the authority’s decision to refuse to grant, by way of a building consent, the waiver or modification requested by the lessee; specifically, a waiver or modification of Building Code clause D1.3.3(i) to authorise the construction of the proposed isolated steps (each on separate access routes to an internal space within a retail unit at the property).
- 1.5. In determining this matter, I will consider whether the waiver or modification requested by the lessee should be granted under section 67(1). Additionally, to

¹ The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

² The lessee is considered an ‘owner’ for the purposes of the Act as it has a written agreement to lease the retail unit at the property where the proposed building work is to take place. See section 7 for the definition of ‘owner’.

assist the parties, I will consider the extent to which the proposed isolated steps comply with section 118 and Building Code clauses D1.3.2(c) and D1.3.4(d) which include requirements in relation to disabled people.

- 1.6. The Ministry is required to consult with the Office for Disability Issues (ODI)³ where a determination considers disabilities issues.⁴ This determination considers Building Code clauses which provide for access within buildings for disabled people. That being so, I provided ODI with information about this matter, and an opportunity to provide comments.⁵
- 1.7. In most instances this determination uses the term ‘disabled people’ because this term is preferred by the disabled community. In some instances, however, this determination uses terms from the Act and the Building Code (for example, ‘people with disabilities’ and ‘person with a disability’), but only where I discuss the meaning or application of those terms, or where they appear in direct quotes.

Matters outside this determination

- 1.8. In making this determination I consider the extent to which the proposed isolated steps comply with Building Code clauses⁶ and section 118. This determination does not, however, determine the compliance of:
 - 1.8.1. the proposed isolated steps in any other respect, or
 - 1.8.2. any other building work whether existing or proposed at the property.

2. The background

- 2.1. On 31 August 2021 the lessee applied for a building consent to carry out building work for the fit-out of a pharmacy (“the pharmacy fit-out”) within an existing retail unit at a shopping centre.
- 2.2. The proposed building work includes a 46m² dispensary area (“the dispensary area”) to be located at the rear of the retail unit and on a raised platform 150mm above the adjacent floor level.
- 2.3. The lessee sought approval in their application to construct, as an alternative solution, the proposed isolated steps at either end of the dispensary area (see Figure 1 below). The lessee noted that the proposed isolated steps did not comply with D1.3.3(i) and consequently requested a waiver or modification of that clause with no conditions.

³ On 1 August 2023 ODI was integrated into Whaikaha-Ministry of Disabled People.

⁴ Section 170.

⁵ See paragraph 3.14 below for ODI’s comments.

⁶ Clauses D1.3.2(c), D1.3.3(i) and D1.3.4(d).

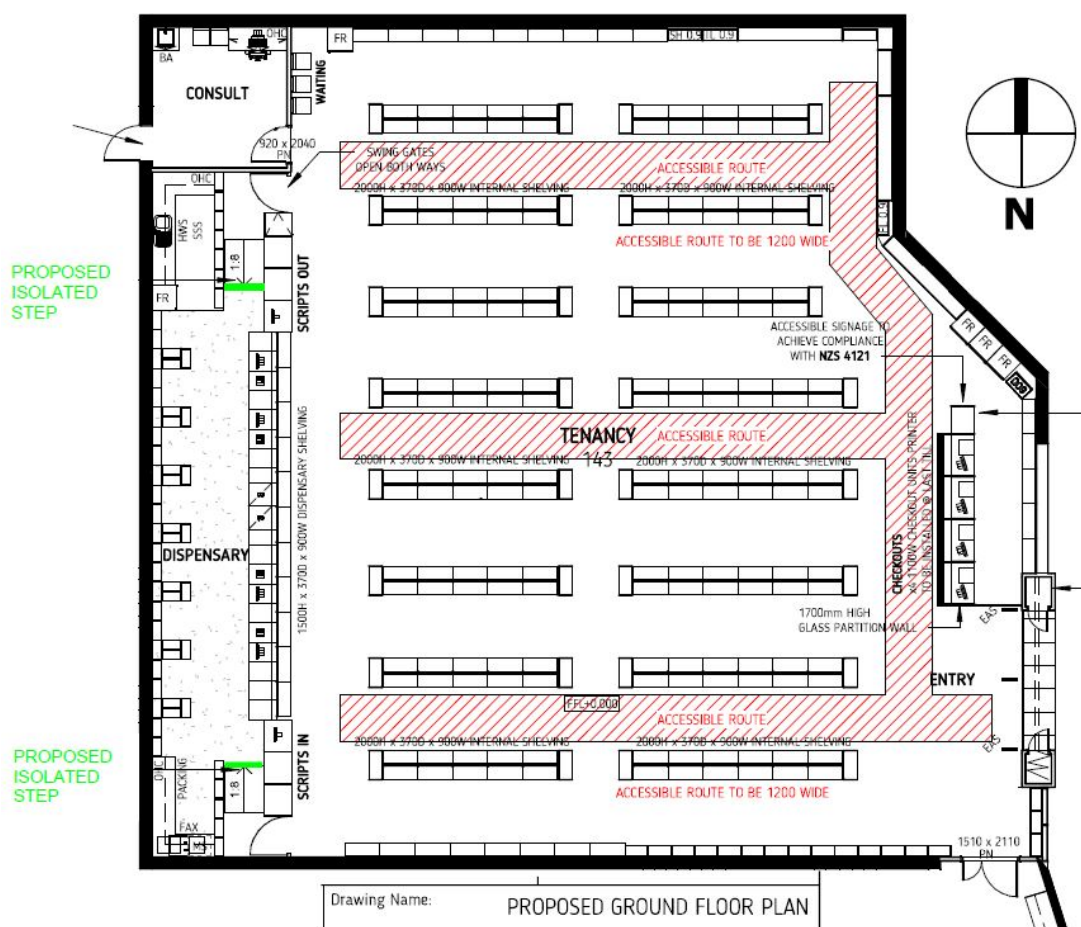


Figure 1: Isolated steps as proposed by lessee (not to scale)

- 2.4. In response to the building consent application, the authority said, “A waiver could not be considered by [the authority] under [section 67(3)], i.e. relating to access and facilities for people with disabilities.” Following subsequent correspondence back and forth, the lessee asked the authority to reconsider. The authority undertook an internal review and informed the lessee that it could not “find sufficient reasons... to approve the [proposed isolated steps]”. The authority suggested the lessee amend the proposed building work to include a ramp to the dispensary area, in order for the consent to be issued.⁷ The authority also said, “If the [lessee] wishes, they can then apply for a MBIE Determination if they wish to amend the consent later... A BC Modification would follow in the event of MBIE’s decision confirming the isolated step is compliant.”
- 2.5. On or about 14 October 2021 the lessee submitted revised plans and specifications for their building consent application, replacing both isolated steps (as shown in Figure 1) with ramps. A building consent was granted for the amended application on 21 October 2021.

⁷ The authority also confirmed that it was open to considering a waiver of D1.3.3(i) to authorise the construction of an isolated step if an accessible route (for example, a ramp) was provided to the dispensary area.

- 2.6. The Ministry received an application for a determination from the lessee on 8 November 2021.

3. Submissions

The lessee

- 3.1. The lessee seeks a determination in relation to their building consent application and the decision of the authority to refuse to grant a building consent subject to a waiver or modification of Building Code clause D1.3.3(i).
- 3.2. The lessee submits that, for the purposes of the Building Code, the proposed isolated steps constitute an 'access route' but not an 'accessible route'.⁸ Therefore, in its view, the authority is not prohibited by section 67(3) from considering a waiver or modification of clause D1.3.3(i) in relation to the proposed isolated steps.
- 3.3. With respect to those who may be expected to visit or work in the dispensary area, the lessee submits:⁹

...the only people who access the [dispensary area] will be the pharmacist and other staff who as employees will be made aware of the [proposed isolated steps] and will become very familiar with them...

...[other than for the pharmacist] there is no requirement for [any] other staff members including wheelchair users to access [the dispensary area]...

- 3.4. The lessee also submits:

...we do not consider the [dispensary area] a space to which a person with a disability would not work...

...that we are of the opinion that the access route to the [dispensary area] is not required to be an accessible route (as defined [in the Building Code]) as we are of the opinion that a wheelchair user would not be able to carry out the normal activities and processes required of a pharmacist. Normal activities and processes such as retrieving medicine (often from high shelving which requires the use of a step ladder), preparing, packaging and restocking medicine often whilst standing and using a step ladder, maintaining an overview of medicines and dispensing of medicines, and moving throughout the retail store to assist customers...

- 3.5. Further, the lessee submits:

...we acknowledge that a ramp could benefit all people including ambulant people with disabilities. However should an ambulant person with disabilities who is able to carry out the activities and processes expected of them be employed as a pharmacist, there is nothing to suggest they would not be able to safely negotiate an isolated step.

⁸ These are defined terms in the Building Code. See Building Code Clause A2 *Interpretation*.

⁹ I note that these statements contradict each other to some extent.

- 3.6. Within information provided to the authority during the consenting process and in their submission, the lessee and its expert¹⁰ (“the lessee’s expert”) refer to certain pharmacy regulations and standards which, in their view, render it not physically possible for staff in the dispensary area to be wheelchair users:

Section 42A of the Medicines Act [1981] states that: No person may operate any pharmacy that is not for the time being under the immediate supervision and control of a pharmacist...

...[Clause 5.1.6 of the Health and Disability Services Pharmacy Services Standard, NZS 8134.7:2010] requires pharmacy medicine to be sold under the supervision of a pharmacist. To meet [this clause], the supervising pharmacist must be able to physically oversee, i.e. view, the dispensing of the medicines and the subsequent transaction at the service counter...

...To comply with Section 42A of the Medicines Act and Section 5.1.6 of NZS8134[.7:2010], MedSafe^[11] (Ministry of Health) that conducts site audits to issue and maintain a pharmacy licence, and for security reasons, requires the dispensing spaces to be at a height that prevents direct line of sight between the customer and the dispensing area; therefore the dispensary area is typically raised, which in addition to a screen, allows the pharmacist to supervise sales without their actions (i.e. dispensing of medicines) being observed by the public...

...Pharmacy Board^[12] requirements impose strict controls as to the supervision of Scheduled Medicines located both in a dispensary and such medicines on display within the retail area of a pharmacy adjacent or abutting a dispensary within licenced pharmacy premises. A pharmacist must be able to survey all areas containing scheduled medicines. This mandatory Task is required to be undertaken to deter the theft of scheduled medicines by offending members of the public which, in turn, has the desired effect of reducing unfortunate instances of abuse and personal harm that may be caused by the excessive or inappropriate ingestion of these products. A non able-bodied pharmacist cannot adequately survey areas beyond the dispensary by virtue of the fact that the dispensary workbench and required privacy screen would severely impede their view not allowing them to perform this critical task...

...the pharmacist is forced to either stand or be seated on a high stool to survey the act of dispensing and purchase, and these 2 aspects limit the dispensary area to the extent that high level storage is required...

...Due to the amount of medicines required [by regulations or standards] to be stored, and to best utilise often limited space, medicine is stored on shelving which can be up to

¹⁰ The lessee’s expert produced two reports which accompanied the lessee’s application for building consent.

¹¹ The Medicines Control team within Medsafe is responsible for regulating the medicine supply chain in New Zealand. As part of this function, Medsafe audits pharmacy premises to ensure that the pharmacy services to the public meet required standards.

¹² I note there is no Pharmacy Board in New Zealand; instead, we have the Pharmacy Council of New Zealand.

2m high.....for security reasons [the stored medicines are] typically kept out of view of the general public...^[13]

...the Health Information Privacy Code...prevents the public from being able to view the dispensing of medicines...

...To adhere to [the Health Information Privacy Code] the dispensing bench must be screened at a height that prevents direct line of sight between the customer and medicines and so the dispensary area is typically elevated by the additional height of the screen to allow the pharmacist to supervise without their actions being observed...

3.7. In the information provided to the authority during the consenting process, the lessee's expert discussed whether, in its view, disabled people *other than wheelchair users* would be able to undertake pharmacist work:

...The nature of the actions undertaken at the dispensary area for obvious reasons rules out people with visual impairment...

...Mental impairment... can equally be ruled out...

...When [a mental] condition is such that it becomes a disability affecting whether the person can undertake the required tasks will be at the discretion of the employer. In this respect, given the nature of the business, if a person with such a mental disability can be employed it is unlikely that the building will need to compensate...

...It is also reasonable to assume that some people with disabilities may be present [in the dispensary area] but the range of those disabilities is naturally limited by the nature of the tasks undertaken in this area, people with hearing impairments, or ambulant disabled people may reasonably be expected to be present...^[14]

3.8. The lessee's expert also noted:

Section 67(1) of the Building Act permits [the authority] to grant an application for a building consent subject to a waiver or modification of the building code. In this instance section 67(1) must be considered against 67(3) & 69(1)(a) which stipulate limitations of the [authority] referencing section 118 as being out of the [authority's] scope, (section 118 relating to access and facilities for persons with disabilities...)^[15] In this respect it is evident that this building is a section 118 building. However, D1.3.3(i) is relevant to an access route only, i.e. section 118 is not applicable. D1.3.4 does however clarify that accessible routes also have to consider the requirements of D1.3.3

¹³ The lessee does not say what regulation or standard gives rise to this obligation.

¹⁴ The lessee's expert acknowledges that clause D1.3.2 requires the dispensary area to have some features for disabled people (including the access requirements in clause D1.3.2(c)) but appears to be of the view that these requirements do not extend to wheelchair users and those with visual or mental impairments.

¹⁵ I note that the lessee states that section 67(3) explicitly references section 118; that statement is incorrect. However, section 67(3) does relate to section 118.

but in this instance we have argued that the dispensary area is on an access route only...^[16]

...Whether a space needs to be on an accessible route [for the purposes of the Building Code] considers only a small percentage of one part of [the definition of ‘people with disabilities’], people with a physical disability in a wheelchair. [The discussion in this report] discounts this situation...^[17]

3.9. The lessee’s expert went on to say:

We... have no option but to conclude that the proposed steps are isolated for the purpose of D1.3.3(i)...

...we have identified the intent of D1.3.3(i) being to ensure that the access route is free from dangerous obstructions...

...to recommend section 67(1) as an appropriate compliance path in tandem with [an alternative solution], we must determine whether the single step is a hazard that constitutes a dangerous obstruction...

...intermittently there is a risk that [staff] may come across [the single step] unexpectedly...

3.10. The lessee’s expert recommended a number of measures to counter any hazard arising from the proposed isolated steps. Those being:

- The use of visually contrasting surface finishes to the raised platform area floor area when compared to the lower floor area; and
- The use of highly visible nosing’s to both single steps; and
- The use of tactile surface indicators positioned at a suitable distance before the single step when approached from both directions; and
- The use of signage to advise people of the hazard; and
- That the employer makes each employee aware of these hazards prior to them gaining access to the area.

3.11. The lessee’s expert concluded:

Should the measures recommended [in paragraph 3.10 above]... be implemented we recommend that [the authority] acting in their capacity as a Territorial Authority issue

¹⁶ The lessee’s expert appears to be of the view that section 118 is not applicable to clause D1.3.3(i) because that clause is relevant to access routes only and, in its view, in this case there is no requirement to provide an accessible route to the dispensary.

¹⁷ The lessee’s expert appears to be of the view that clause D1.3.4 does not apply in relation to the dispensary area because its application is limited by the definition of ‘accessible route’ which must be “...a continuous route that can be negotiated unaided by wheelchair users...”. The lessee’s expert says that wheelchair users are not expected to visit or work in the dispensary area and, therefore, the lessee does not have to comply with the requirements in clause D1.3.4 in these circumstances.

the consent under section 67(1) of the Building Act 2004 modifying D1.3.3(i) without condition.

The landlord

3.12. No submissions were received from the landlord.

The authority

3.13. The authority made a submission which clarified certain matters from its perspective (in summary):

3.13.1. While it had agreed that clause D1.3.3(i) could be assessed as a possible modification in some projects, in its view insufficient mitigation evidence was provided to make that decision.

3.13.2. The authority confirmed that the refusal to grant a waiver or modification of clause D1.3.3(i) was based on section 118 (accessibility) and not because the proposed isolated steps are a trip hazard. The authority is prepared to use the risk mitigation measures provided by the lessee (refer above to paragraph 3.10) in order to assess the proposed step as an alternative solution. However, in its view, if the proposed isolated steps were allowed to remain, the accessibility requirements under section 118 would not be met.

3.13.3. The authority disagrees with the lessee's statement "that a wheelchair user would not be able to carry out the normal activities and processes required of a pharmacist... therefore the need to provide an accessible route... for the pharmacist is not required." The authority believes that not providing an accessible route directly contravenes section 118. It noted that the lessee referred to section 42A of the Medicines Act 1981 and section 5.1.6 of NZS 8134.7:2010 in support of the raised platform in the dispensary area; however, the authority says it has not been able to find specific reference to a raised platform requirement in either of these.

3.13.4. The authority considers that a 150mm raised platform does not add considerable privacy to a dispensing counter, and that privacy requirements could be met by using a well-placed screen. It appears that there are traditional reasons for having a raised platform, with the main one being the ability to see the entire pharmacy from behind the counter. However, with CCTV and smart design available today, the authority says there is no need for the platform to be elevated by 150mm to ensure the security of the pharmacy. The authority provided a number of photographs of pharmacies within Auckland and nationally without elevated dispensary areas.

3.13.5. In terms of shelving, the authority says it has “seen pharmacies where windows, screens and other features have required medicines to be stored in under-counter type storage drawers.” It has also seen an increase in the use of automatic dispensing machines and noted a pharmacy in Auckland which uses such technology.¹⁸ It noted that this type of innovation allows for more efficient storage, increased dispensing accuracy and the opportunity for accessible pharmacies to become normal practice.

3.13.6. The authority also advised that its correspondence had been quoted incorrectly regarding whether the determination would set a precedent. It confirmed that its intention was to use the determination as “one means of assessing future alternative solutions, not as a binding precedent.”

The Office for Disability Issues

3.14. ODI provided comments in relation to this determination:

[ODI] supports [the authority’s] view that not providing an accessible route in the proposed dispensary area of the pharmacy contravenes section 118 of the Building Act 2004. Contrary to the view of [the lessee] that a 150mm raised platform is required in the dispensary area to ensure privacy in dispensing medication, ODI concurs with [the authority] that the privacy requirement could be met by using other options such as a well-placed screen and smart design principles. Moreover, the availability of technology like CCTV in the twenty-first century means that there is no need for a dispensary platform to be elevated by 150mm to ensure the security of the pharmacy.

The lessee’s belief that an accessible route in the dispensary area is not required for non-ambulant persons (i.e., wheelchair users), given that they would not be able, in any case, to carry out the normal tasks required of a pharmacist is, in ODI’s view, a serious concern. The lessee is espousing ableism in the workplace, namely, discrimination in favour of able-bodied employees. For example, a practising, able-bodied pharmacist who acquires a disability (e.g., mobility impairment) as a result of an accident and becomes a wheelchair user, would no longer be able to work as a pharmacist, given an inaccessible workplace.

Finally, ensuring the accessibility of public buildings is particularly pertinent, given the feedback received from the United Nations Committee on the Rights of Persons with Disabilities (the Committee) at New Zealand’s second examination on 23 and 24 August 2022 (CRPD/C/NZL/CO/2-3). Regarding Accessibility (art. 9), the Committee expressed concern about... [t]he slow progress in implementing the Building Act 2004, which prolongs inaccessibility to public buildings and the progressive upgrade of existing buildings... In addition, the Committee recommends that New Zealand... [e]xpeditiously implement the Building Act 2004 and commit to targets and timeframes for implementation measures ...

¹⁸ The authority gave examples including the CONSIG B0 robotic dispenser and FAMA fast mover shelving system.

4. Discussion

- 4.1. The matter to be determined is the authority's decision to refuse the waiver of the Building Code that was requested by the lessee in its building consent application.
- 4.2. The lessee wanted to incorporate isolated steps on two separate access routes to a raised area which would otherwise be prohibited by D1.3.3(i). Therefore, it requested that the authority waive the requirements of D1.3.3(i) in relation to both of those steps.¹⁹
- 4.3. Building Code Clause D1 *Access Routes*²⁰ provides a general set of requirements to safeguard people from injury, for example, during movement into, within and out of buildings.
- 4.4. Clause D1.3.3(i) is one of these requirements. It says:

D1.3.3 Access routes shall:

...

(i) not contain isolated steps,

....

- 4.5. The authority refused to waive clause D1.3.3(i) in the manner requested by the lessee. It gave section 67(3) as the basis for its refusal. Section 67(3) says:

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**.

[my emphasis]

- 4.6. I note that clause D1.3.3(i) is a requirement which *safeguards people from injury*; it does not directly relate to access and facilities for people with disabilities. However, Clause D1 provides a further set of *additional requirements* which ensure that disabled people can enter and carry out normal activities and functions within buildings.²¹

¹⁹ Section 67(1) provides territorial authorities with a discretionary power to waive or modify the Building Code as part of the building consent process. This caters for situations where requiring strict compliance with the Building Code would be inappropriate or unreasonable.

²⁰ See Appendix A below for an extract of Clause D1.

²¹ See clause D1.1(c).

- 4.7. The Building Code uses two distinct terms, “access route” and accessible route”, to distinguish the general from the additional requirements in Clause D1. The interpretation clause²² in the Building Code provides:

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 route an access route usable by people with disabilities...that can be negotiated unaided by a wheelchair user...the route shall extend...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

...

- 4.8. I understand that the authority considers that one or other of the routes to the dispensary area must be an ‘accessible route’ for the purposes of the Building Code, and, consequently, that one or other of the proposed isolated steps does not comply with clause D1.3.4(d).²³ It seems that the authority refused the requested waiver because section 67(3) prohibits it from waiving the requirement in clause D1.3.4(d).
- 4.9. The lessee accepts that the Building Code requirements for ‘access routes’ apply to both proposed routes to and from the dispensary area. It, however, disagrees with the authority that one or other of these routes is an ‘accessible route’ for the purposes of the Building Code.²⁴
- 4.10. I note that the lessee requested a waiver in relation to both routes, each with its own isolated step. The accessibility requirements, if applicable, would apply only to one *or other* of those routes. That being so, I am of the view that it is more appropriate (ie, better practice), in these circumstances, to *first* consider whether the waiver is appropriate or reasonable with respect to both routes. By taking this approach, the focus is on access routes; specifically, the prohibition by clause D1.3.3(i) of isolated steps.
- 4.11. For completeness, however, I also consider later whether the requested waiver affects Building Code requirements *beyond* clause D1.3.3(i); specifically, the additional requirements in clause D1 which require at least one accessible route to be provided for wheelchair users.
- 4.12. In order to determine whether the requested waiver should be granted, I use the framework set out below.

²² Clause A2.

²³ Clause D1.3.4(d) prohibits thresholds or upstands forming a barrier to an unaided wheelchair user on accessible routes.

²⁴ I discuss this matter of dispute below from paragraph 4.30.

Factors to consider when granting a waiver or modification

- 4.13. I consider that Building Code requirements may be waived or modified under section 67(1) where there are compelling reasons to do so, and it is appropriate and reasonable in the circumstances.²⁵
- 4.14. Determination 2015/010 describes general factors to consider and balance when deciding whether to waive or modify the Building Code.²⁶ These are (in summary):
- 4.14.1. Whether the related objective and functional requirements in the Building Code are met despite the proposed building work not complying with performance criteria.
 - 4.14.2. The extent to which the proposed building work does not comply with the Building Code and the consequences of such non-compliance.
 - 4.14.3. Whether there are any other reasonably practicable solutions which would result in the proposed building work complying fully with the Building Code.
 - 4.14.4. Any special or unique circumstances which justify the waiver or modification.
 - 4.14.5. The extent to which the waiver or modification is consistent with the purposes and principles of the Act.

Whether the related objective and functional requirements are met despite the waiver

- 4.15. The objective for clause D1.3.3(i) is set out in clause D1.1(a); this is to safeguard people from injury during movement into, within and out of buildings. The functional requirement for clause D1.3.3(i) is set out in clause D1.2.1; that buildings shall be provided with reasonable and adequate access to enable safe and easy movement of people.
- 4.16. Having considered the isolated steps (in light of the hazard mitigation measures proposed by the lessee),²⁷ I am of the view that they fall short of meeting the objective and functional requirements for clause D1.3.3(i). The steps are on routes to a busy part of the pharmacy. Pharmacy staff would be frequently moving back and forward to perform their functions, often carrying items or communicating with other staff or customers. I consider it inevitable that sooner or later a person would trip on either of the steps despite the mitigations proposed, and an otherwise

²⁵ Previous determinations have taken this approach. For example, see Determination 2015/010 *Regarding the authority's refusal to grant a modification of Clause C3.4(a) of the Building Code in respect of materials used for internal surface linings at a new school hall.*

²⁶ Determination 2015/010 at paragraph 7.3.3.

²⁷ The lessee has put forward several design features to counter the issue of an employee coming across an isolated step unexpectedly (see paragraph 3.10 above).

avoidable injury would occur. If the waiver was granted, people would not be safeguarded from injury or provided with safe and easy movement.

Extent and consequences of non-compliance with the Building Code

- 4.17. Clause D1.3.3(i) explicitly prohibits the use of isolated steps. The requested waiver would negate that prohibition. In effect the lessee is requesting that the Building Code requirement is waived in its entirety. If granted, the requested waiver results in tripping hazards where, in the usual course of events, they would not exist.
- 4.18. As already noted, the lessee has put forward mitigations to address the risk of tripping over the steps. Despite those mitigations, I consider that the non-compliance in these circumstances will likely give rise to tripping injuries that are otherwise avoidable and could result in significant negative consequences to a person's health and wellbeing. Being aware of the presence of a stair is an essential part of reducing the risk of injury. This is a particular problem with single steps which are often not seen.
- 4.19. Further, it is appropriate in this case to take account of Building Code requirements beyond clause D1.3.3(i). I consider that one or other of the proposed isolated steps contravenes clauses D1.3.2(c) and D1.3.4(d).²⁸ These are clauses which require, in specified circumstances, for at least one access route to be accessible for wheelchair users. The requested waiver is therefore not appropriate or reasonable because it would give rise to further non-compliances with the Building Code which are not addressed by the lessee.²⁹

Other reasonably practicable solutions

- 4.20. The lessee says it specified a raised platform for the dispensary area in its building consent application in order to comply with certain regulations which apply to the operation of a pharmacy (for example, section 42A of the Medicines Act). The lessee specified isolated steps at either end of the platform (see Figure 1). The only access to the dispensary area is via either of these steps.
- 4.21. Having viewed the regulations referred to by the lessee, I consider they do not prescribe the use of a raised platform in a dispensary area. In this regard, therefore, I agree with the authority (refer above to paragraph 3.13.3).
- 4.22. I understand that the use of a raised platform for a pharmacy dispensary is not the only design which complies with pharmacy related regulations. It has been brought to my attention that there are existing pharmacies in New Zealand with dispensary areas at the same floor level as their retail areas. The use of such a design in this case would do away with the proposed isolated steps and the resulting non-

²⁸ Below from paragraph 4.30 to 4.59, I set out my reasoning for clauses D1.3.2(c) and D1.3.4(d) applying and giving rise to non-compliances in these circumstances.

²⁹ I note that the lessee considers that clauses D1.3.2(c) and D1.3.4(d) do not apply in the circumstances and, therefore, do not give rise to further non-compliances.

compliance with clause D1.3.3(i) and, in my view, is a reasonably practicable solution which would not contravene D1.3.3(i).

- 4.23. Even were the raised platform to remain, I note that a ramp is an alternative to an isolated step as a means of access. In these circumstances I consider the use of ramps (instead of isolated steps) to access the dispensary area on a raised platform is a further reasonably practicable solution which would not contravene D1.3.3(i).

Special or unique circumstances

- 4.24. I consider that there are no special or unique circumstances in this case which support waiving D1.3.3(i) in the manner requested by the lessee.

Consistency with purposes and principles of the Act

- 4.25. The purposes and principles in the Act are relevant when considering whether to waive clause D1.3.3(i) under section 67(1).
- 4.26. A key principle of interpreting legislation is that provisions should be understood in light of the purpose of the relevant Act.³⁰ When ascertaining the meaning of section 67(1) – which provides territorial authorities with a discretionary power to waive or modify the Building Code – authorities should take into account the purposes in section 3 of the Act. Further, the Act explicitly requires territorial authorities to take the principles in section 4 into account whenever they consider whether to waive or modify the Building Code.³¹
- 4.27. Having considered the purposes in the Act, I find that this specific requested waiver is inconsistent with section 3(a)(i). That section says the Act has the purpose of setting performance standards for buildings to ensure that people can use buildings safely and without endangering their health. I have noted at paragraphs 4.16 and 4.18 the risks to people’s health and safety from these isolated steps.
- 4.28. Further, I consider that the requested waiver is inconsistent with the principle in section 4(2)(b). That principle, as it appeared at the time the building consent was applied for, required territorial authorities and other specified entities to “ensure that any harmful effect on human health resulting from the use of particular building methods or products or of a particular building design^[32], or from building work, is prevented or minimised.” Even with the mitigations proposed, I consider that the isolated steps (which in my view are a type of building design) would likely, on the basis of the activities in the space, have a harmful effect on human health in the form of injuries from tripping.

³⁰ This principle is enacted in section 10(1) of the Legislation Act 2019 which says, “The meaning of legislation must be ascertained from its text and in light of its purpose and its context.”

³¹ See section 4(1)(c).

³² The current section 4(2)(b) was amended on 7 Sep 2022 and currently reads “...from the use of particular building products, building methods, or building designs...”

Conclusion (whether requested waiver is appropriate)

4.29. Applying the factors above to the circumstances in this case, it is clear to me that the requested waiver is not appropriate. That being so, I confirm the authority's decision to refuse to grant the waiver requested by the lessee (albeit for different reasons than those given by the authority).³³

A further disputed matter

4.30. Although I have already determined that the requested waiver should not be granted, I consider it useful to address a related matter of doubt and dispute between the parties.

4.31. The authority considers that section 118, and clauses D1.3.2(c) and D1.3.4(d), apply in these circumstances. More specifically, that section 118 and clause D1.3.2(c) require access to be provided for wheelchair users³⁴ to the dispensary area (via at least *one* of the two access routes at either end of the dispensary counter), and that clause D1.3.4(d) prohibits the use of upstands or thresholds forming a barrier to an unaided wheelchair user. In refusing the requested waiver, the authority said, "A waiver could not be considered... under Section 67 (3) of the Building Act 2004, i.e. relating to access and facilities for people with disabilities."

4.32. The lessee, however, maintains that section 67(3) does not apply in these circumstances because, for the purposes of section 118, wheelchair users are not expected to work in the dispensary area.³⁵ On that basis, the lessee considers that the proposed isolated steps comply to the extent required by section 118 and that the Building Code requirements which provide access for wheelchair users do not apply.

4.33. To assist the parties, I consider how section 118, and Building Code clauses D1.3.2(c) and D1.3.4(d), apply to the proposed isolated steps which are on separate access routes at either end of the dispensary counter (see Figure 1 above).

4.34. The lessee and authority agree that:

4.34.1. the building at the property is one to which section 118 applies³⁶

4.34.2. the proposed building work is:

³³ Section 188(1) provides that a determination must confirm, reverse, or modify that decision, or determine the matter to which it relates.

³⁴ This determination has focused on wheelchair users as the primary dispute between parties. There are other type of disabilities which should be taken account of and the concentration here should not detract from any recognition of those other disabilities.

³⁵ The authority and ODI consider that, for the purposes of section 118, wheelchair users are expected to work and carry out normal activities and processes in the dispensary area.

³⁶ The Building Code limits the application of requirements for 'accessible routes' to buildings to which section 118 applies. See the "Limits on application" column for Clause D1.

- an “alteration of a building” for the purposes of section 118
- new building work and must comply fully with the applicable Building Code clauses as required by section 17, subject to any waiver or modification granted by the authority.³⁷

4.35. The lessee and authority disagree on whether section 118 and clause D1.3.2(c) require an ‘accessible route’ (notably in this particular dispute, for wheelchair users) to be provided to the dispensary.

4.36. Section 118 provides:

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.

4.37. Section 117 provides that, for the purposes of 118, the term ‘building’ includes parts of a building.

4.38. The Act contains the following principle in section 4(2)(k):

- (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...

4.39. Further, the purpose listed in section 3(a)(ii) is relevant, being the need for buildings to have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them. This purpose signals

³⁷ Therefore, section 112 (with its “as near as reasonably practicable” assessment) does not apply in relation to the dispensary area including the proposed isolated steps.

Parliament's core aims for people who use buildings, including those with disabilities, which are achieved through the requirements in section 118 and a range of other provisions in the Act.

- 4.40. Where 'people with disabilities' will neither visit or work in a building, then section 118 does not require the provision of access and facilities for them. The same applies to a part of a building where they will neither visit nor work.³⁸
- 4.41. I understand the lessee considers that no one other than its own employees (being a pharmacist and other staff members), will carry out normal activities and processes in the dispensary area.³⁹ The lessee told the authority this is "[due to] the sensitive nature of the Pharmacies operation and [to comply] with the Pharmacy Board which has strict controls on the supervision of scheduled medicines."
- 4.42. The lessee goes on to submit that "we do not consider a person with disabilities is unable to carry out the work expected of a pharmacist", however, they also say:
- ...due to the nature of the work, we are of the opinion that a wheelchair user would not be able to carry out the normal activities and processes required of a pharmacist; therefore, the need to provide an accessible route (which is an access route able to be negotiated unaided by a wheelchair user) for the pharmacist is not required and as there is no requirement for other staff members including wheelchair users, to access the space the route to and within the dispensary is an access route.
- 4.43. In *Western Bay of Plenty District Council v Limmer* [2020] NZDC 12902, the judge was of the view that a worker so disabled as to require wheelchair access could not realistically be expected to carry out thinning, picking, pruning or tying work in the kiwifruit industry. In that case the judge considered "the realities of the kiwifruit industry and its general operation in the Bay of Plenty, in order to assess whether there is a realistic possibility that a wheelchair bound person could undertake such work now, or at any time in the reasonably foreseeable future."⁴⁰ The judge noted that the relevant factors were many and included the nature of the work, the hours and circumstances in which the work must be carried out, the occupational safety and health requirements for induction training and worker supervision, and the variable terrain and working conditions that kiwifruit workers engaged in picking, pruning and tying must meet.
- 4.44. In this case it is appropriate to consider the realities of pharmacy practices. In doing so, I consider factors similar to those considered relevant in *Western Bay of Plenty*

³⁸ For example, see Determination 2005/166 *Access for people with disabilities to the upper floor of the AFFCO beef processing plant, Horotiu* (Issued 19 December 2005) at paragraph 5.1.3.

³⁹ I note a seemingly contradictory statement by the lessee regarding who will work in the dispensary area. See paragraph 3.4 above.

⁴⁰ At [53].

District Council v Limmer; particularly the nature of the work and the circumstances in which the work is carried out.

4.45. I understand that in this case the normal activities and processes of the pharmacist will be:

- retrieving, preparing, packing and restocking medicines
- maintaining an overview of medicines and transactions
- ensuring the privacy of health records of customers
- assisting customers in the retail area and from the dispensary.

I also understand that other employees may assist the pharmacist with some of these activities and processes (for example, pharmacy technicians).

4.46. The lessee considers that pharmacy workers must be ambulant so that they can carry out these activities and processes. They note features in the work environment such as high shelving (which requires the employee to stand or use a step ladder), and the workbench and screen (which only allow for those who can stand to survey areas beyond the dispensary). They say that features such as these are necessary due to pharmacy regulations and standards, the sensitive nature of pharmacy operations, and the limited availability of space.

4.47. I have not, however, received evidence that pharmacy regulations prescribe or require the use of features which prevent wheelchair users from undertaking pharmacy work (for example, they do not specify that high shelving or a raised platform must be used).

4.48. Additionally, I am not satisfied that the lessee has no other realistic option but to design the dispensary in a manner which precludes wheelchair users. I note the authority's submission (summarised above at paragraphs 3.13.4 and 3.13.5), where they describe new technologies and designs which are used in existing pharmacies and provide "the opportunity for accessible pharmacies to become normal practice".

4.49. Further, I note that ODI "concur[s] with [the authority] that the privacy requirement could be met by using other options such as a well-placed screen and smart design principles" and that "the availability of technology like CCTV in the twenty-first century means that there is no need for a dispensary platform to be elevated by 150mm to ensure the security of the pharmacy."

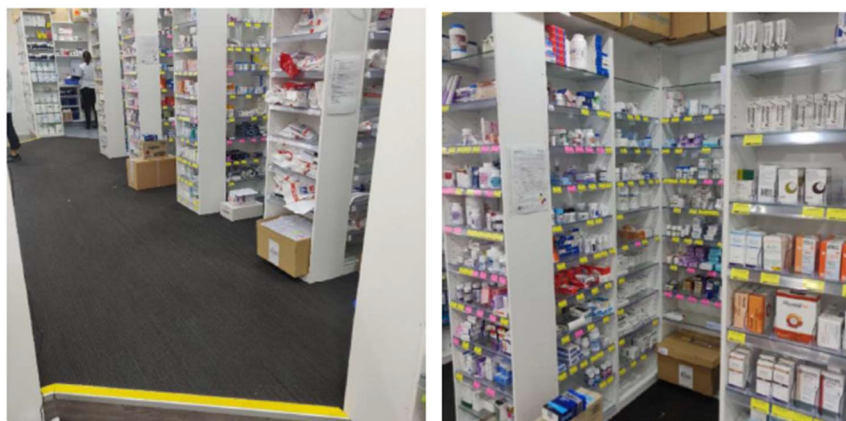


Figure 2: Examples of shelving similar to that proposed⁴¹

- 4.50. I am satisfied that it is reasonable a wheelchair user could undertake work of the nature described above in a pharmacy. Therefore, for the purposes of section 118, I conclude that wheelchair users may be expected to work and carry out normal activities and processes in the dispensary area. That being so, according to section 118 they must be provided reasonable and adequate access to that area.
- 4.51. Although I have already determined that section 118 in this set of circumstances requires reasonable and adequate access for wheelchair users, for completeness, there is a further issue that I will consider.
- 4.52. The inclusion of the term ‘visit’ in section 118(1)(a) widens the application of section 118⁴² beyond disabled *employees*. This gives rise to the question of whether wheelchair users *other than employees* may be expected to visit and carry out normal activities and processes in the dispensary area.
- 4.53. I consider that people other than the pharmacy’s employees are likely to visit and carry out normal activities and processes in the dispensary area. For example, pharmaceutical sales representatives may visit the dispensary area from time to time to inform and educate the pharmacy employees about their products. Therefore, I conclude, for the purposes of section 118, that wheelchair users may be expected not only to work in the dispensary area, but also to *visit*.
- 4.54. As section 118 requires wheelchair users to have ‘reasonable and adequate’ access to the dispensary area, the lessee cannot put aside the Building Code requirements which ensure such access. In these circumstances, Building Code clauses D1.3.2(c) and D1.3.4(d) apply and must be complied with.
- 4.55. Building Code clause D1.3.2(c) requires “at least one access route [to] have features to enable people with disabilities to... have access to... those spaces where they may be expected to work or visit.” Clause D1.3.4(d) requires such a route (being an

⁴¹ Sourced from a report provided to the authority in support of the lessee’s building consent application.

⁴² For the wording of section 118, see paragraph 4.36 above.

‘accessible route’) “contain no thresholds or upstands forming a barrier to an unaided wheelchair user.”

4.56. It is clear to me that one or other of the ‘access routes’ to the dispensary is required by clause D1.3.2(c) to also be an ‘accessible route’. As both proposed isolated steps are ‘thresholds or upstands forming a barrier to an unaided wheelchair user’, one or other of these steps does not comply with clause D1.3.4(d).

4.57. In summary, I consider that section 118 requires reasonable and adequate access to be provided for wheelchair users to the dispensary area because it is an area in the building where they may be expected to work and carry out normal activities and processes. That being so, the proposed building work does not comply with:

4.57.1. Building Code clause D1.3.2(c) because there is no access route to the dispensary area with features to enable ‘people with disabilities’ *including wheelchair users* to have access to and within that area (being a space where they may be expected to work), and

4.57.2. Building Code clause D1.3.4(d) because both access routes to the dispensary area contain thresholds or upstands that form a barrier to an unaided wheelchair user *when at least one of those routes must not*.

5. Decision

5.1. In accordance with section 188(1)(a) of the Building Act 2004, I determine that a waiver or modification of Building Code clause D1.3.3(i) is not appropriate in these circumstances, and I confirm the authority’s decision to refuse to grant building consent subject to the requested waiver.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 11 December 2023.

Andrew Eames

Manager Advisory

Appendix A: Relevant Building Code Clauses

Clause D1—Access routes^[43]

Provisions	Limits on application
<p>Objective</p> <p>D1.1 The objective of this provision is:</p> <ul style="list-style-type: none"> (a) safeguard people from injury during movement into, within and out of <i>buildings</i>, (b) safeguard people from injury resulting from the movement of vehicles into, within and out of <i>buildings</i>, and (c) ensure that <i>people with disabilities</i> are able to enter and carry out normal activities and functions within <i>buildings</i>. 	Objective D1.1(c) shall apply only to those <i>buildings</i> to which section 47A of the Act applies.
<p>Functional requirement</p> <p>D1.2.1 <i>Buildings</i> shall be provided with reasonable and adequate access to enable safe and easy movement of people.</p> <p>D1.2.2 Where a <i>building</i> is provided with loading or parking spaces, they shall be constructed to permit safe and easy unloading and movement of vehicles, and to avoid conflict between vehicles and pedestrians.</p>	Requirement D1.2.1 shall not apply to <i>ancillary buildings</i> or <i>outbuildings</i> .
<p>Performance</p> <p>D1.3.1 <i>Access routes</i> shall enable people to:</p> <ul style="list-style-type: none"> (a) safely and easily approach the main entrance of <i>buildings</i> from the apron or <i>construction edge</i> of a <i>building</i>, (b) enter <i>buildings</i>, (c) move into spaces within <i>buildings</i> by such means as corridors, doors, stairs, ramps and lifts, (d) manoeuvre and park cars, and (e) manoeuvre and park delivery vehicles required to use the loading space. <p>D1.3.2 At least one <i>access route</i> shall have features to enable <i>people with disabilities</i> to:</p> <ul style="list-style-type: none"> (a) approach the <i>building</i> from the street boundary or, where required to be provided, the <i>building</i> 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, or which contain facilities for personal hygiene as required by Clause G1 Personal hygiene. <p>D1.3.3 <i>Access routes</i> shall:</p> <ul style="list-style-type: none"> (a) have <i>adequate</i> activity space, 	Performance D1.3.2 shall not apply to <i>housing</i> , <i>outbuildings</i> , <i>backcountry huts</i> , <i>ancillary buildings</i> , and to <i>industrial buildings</i> where no more than 10 people are employed.

⁴³ Extract from Schedule 1, Building Regulations 1992 (Version as at 24 August 2023).

Provisions

- (b) be free from dangerous obstructions and from any projections likely to cause an obstruction,
- (c) have a safe cross fall, and safe slope in the direction of travel,
- (d) have *adequate* slip-resistant walking surfaces under all conditions of normal use,
- (e) include stairs to allow access to upper floors irrespective of whether an escalator or lift has been provided,
- (f) have stair treads, and ladder treads or rungs which:
 - (i) provide *adequate* footing, and
 - (ii) have uniform rise within each flight and for consecutive flights,
- (g) have stair treads with a leading edge that can be easily seen,
- (h) have stair treads which prevent children falling through or becoming held fast between treads, where open risers are used,
- (i) not contain isolated steps,
- (j) have smooth, reachable and graspable *handrails* to provide support and to assist with movement along a stair or ladder,
- (k) have *handrails* of *adequate* strength and rigidity as required by Clause B1 **Structure**,
- (l) have landings of appropriate dimensions and at appropriate intervals along a stair or ramp to prevent undue fatigue,
- (m) have landings of appropriate dimensions where a door opens from or onto a stair, ramp or ladder so that the door does not create a hazard, and
- (n) have any automatically controlled doors *constructed* to avoid the risk of people becoming caught or being struck by moving parts.

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

- (a) be easy to find, as required by Clause F8 **Signs**,
- (b) have *adequate* activity space to enable a person in a wheelchair to negotiate the route while permitting an ambulant person to pass,
- (c) include a lift complying with Clause D2 **Mechanical installations for access** to upper floors where:
 - (i) *buildings* are four or more storeys high,

Limits on application

Performance D1.3.3(h) shall not apply within *industrial buildings, outbuildings* and *ancillary buildings*.

Performance D1.3.3(i) shall not apply with *detached dwellings* or within *household units of multi-unit dwellings*, or to *outbuildings* and *ancillary buildings*.

Performance D1.3.3(j) shall not apply to isolated steps.

Provisions

- (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,
- (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.

Limits on application