



Determination 2019/041

Regarding the provision of an accessible route to a cupola with an elevated viewing platform on a landscaped roof area at 2 Quayside, Whangarei



Figure 1: model of the subject building with cupola

Summary

This determination considers whether an accessible route is required to an elevated viewing platform on a landscaped roof area of a building housing an arts centre in order to meet the requirements of the Building Act for reasonable and adequate access for people with disabilities, and includes whether a lift is required. The determination discusses the definition of “storey” for the purpose of Clause D1.3.4 of the Building Code relating to Access routes and whether the cupola in which the viewing platform is housed is an “ancillary” building as defined in Clause A1 Classified uses of the Building Code.

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 building, Whangarei Arts Museum Trust (“the applicant”), represented by the applicant’s project manager (“the agent”)
- Whangarei District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

¹ The Building Act, Building Code, Acceptable Solutions, 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.

- 1.3 I have also provided the Office for Disability Issues (ODI) with the determination documentation for comment by way of consultation under section 170 of the Act.
- 1.4 The application for this determination arises from the decision of the authority to refuse to grant an amendment to a building consent in respect of the construction of a cupola with an elevated viewing platform on a landscaped roof area of a building that will house an arts centre with galleries, a learning centre and a café.
- 1.5 The applicant is of the view that the proposed cupola is an ancillary building as defined in Clause A1 of the Building Code² and therefore the limits on application apply and an accessible route is not required to the viewing platform. The applicant is of the opinion that even if the cupola is not an ancillary building, the design incorporates an accessible³ stair to the cupola viewing platform and this complies with Clause D1.3.2 of the Building Code.
- 1.6 The authority is of the view that the cupola is not separate to the main building but integral to the complex and therefore not an ancillary building in terms of Clause A1. In the authority's opinion the proposed design does not meet the requirements of Clause D1.3.2 and D1.3.3 of the Building Code.
- 1.7 The matter to be determined⁴ is therefore whether the authority was correct in deciding to refuse to grant the amendment to the building consent in respect of the compliance of the proposed design with Clause D1 of the Building Code.
- 1.8 In making my decision, I have considered the submissions from the parties and the other evidence in this matter.

2. The building work and background

2.1 The building

- 2.1.1 The proposed building is a large arts centre, comprising galleries, a café, a learning centre, and a landscaped rooftop area. The building is based on a conceptual design and drawings by renowned architect Friedensreich Hundertwasser.
- 2.1.2 There are two accessible⁵ entries to the 1075m² ground level. At ground level, the building contains the entry lobby, a gallery, a learning centre, shop and customer service counters, sanitary facilities, including accessible sanitary facilities, as well as an office, storage rooms, and plant rooms.

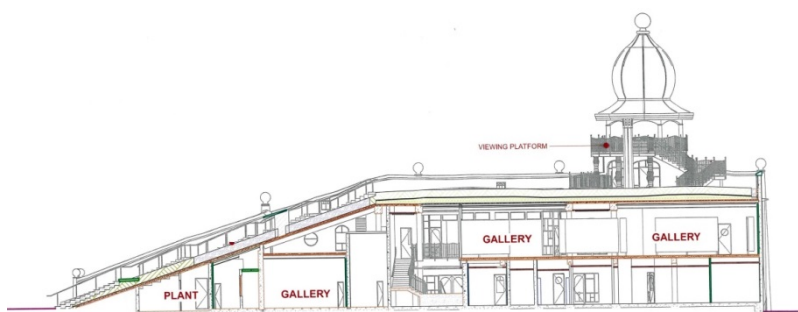


Figure 2: typical section tower access

² In this determination, unless otherwise stated, references to clauses are to clauses of the Building Code (First Schedule Building Regulations 1992), and references to sections are to sections of the Act (Building Act 2004).

³ In the Building Code 'accessible' is defined as 'having features to permit use by people with disabilities. In this context 'people with disabilities' can include people who are ambulatory. This differs from 'accessible route', the definition of which includes a requirement to provide a continuous route that can be negotiated unaided by a wheelchair user.

⁴ Under sections 177(1)(b) and 177(2)(a) of the Act.

⁵ For the meaning of 'accessible' in this context, refer to footnote 3.

- 2.1.3 An accessible⁶ lift provides access to the first level and to the roof. The first level is 850m² and contains a café and exhibition space.
- 2.1.4 The landscaped roof area of 1053m² has an accessible pathway from the lift, traversing across the width of the landscaped roof, and the length of the roof. An accessible stair is provided from the end of the pathway to the ground level (see Figure 2 above).

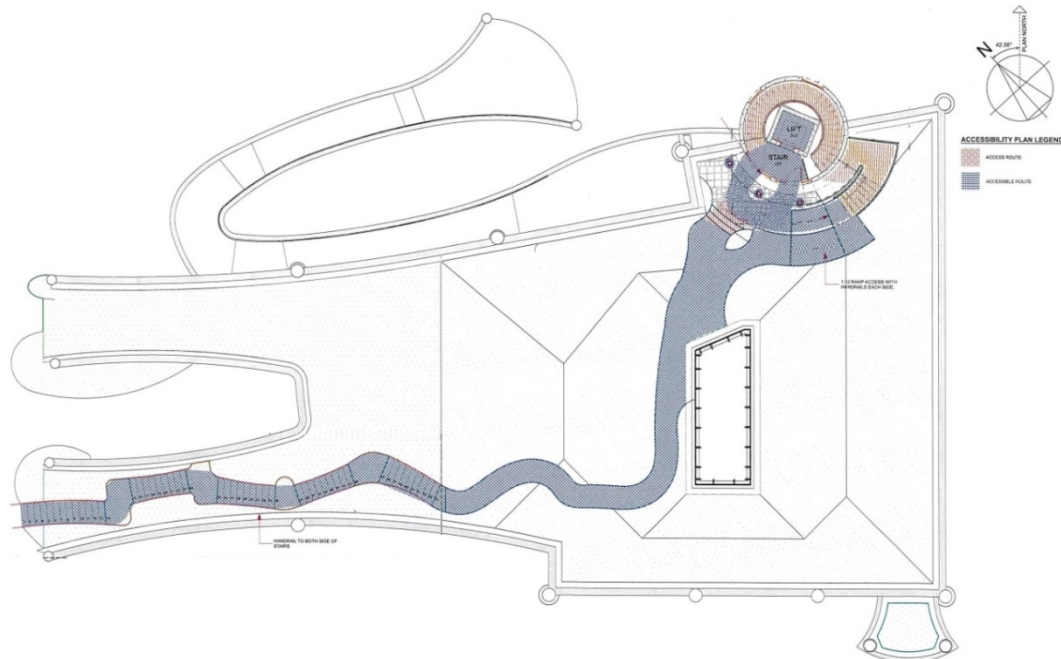


Figure 3: rooftop plan, showing access

- 2.1.5 Above the lift on the landscaped roof is the cupola, which is a particular feature of the architect's style of design and incorporates a viewing platform. The floor plan for the platform (see Figure 4) shows the lift overrun takes up a significant portion of the viewing platform, and the applicant states that the remaining "usable area" of the platform is 26m². A set of accessible stairs lead from the rooftop garden up to the viewing platform.

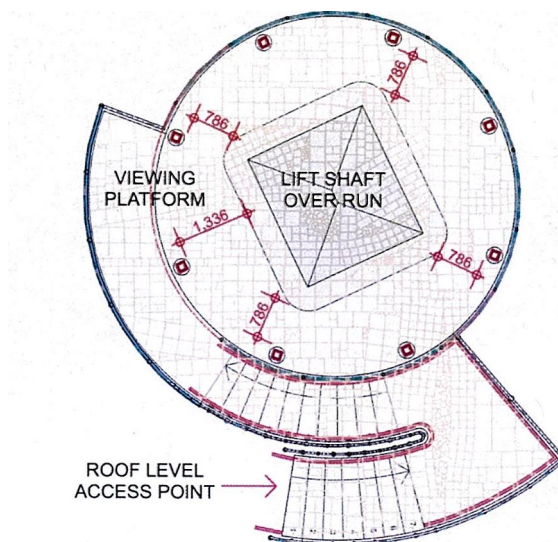


Figure 4: viewing platform plan

⁶ For the meaning of 'accessible' in this context, refer to footnote 3.

2.2 The background

2.2.1 The authority granted a building consent for the construction of the building (BC 1701438) in 2018. I have not seen a copy of the original consent. It appears from the background information provided to me that the parties could not agree on the compliance of the landscaped roof area with Clause D1 of the Building Code, and so this aspect was excluded from the original consent.

2.2.2 The applicant subsequently applied for an amendment to the building consent with respect to the provision for access to the landscaped roof area and cupola viewing platform. The application noted:

The proposed accessible stair access complies with the intention of Schedule 2 of the [Act] and also complies with [Acceptable Solutions D1/AS1⁷].

A person with a disability is not limited to non-ambulant persons and although [the] preferred accessible access is not limited to 'wheelchair access' and given the provisions Clause D1.3.4(g), (h), (i) clearly show an accessible stair is an acceptable method of an accessible route.

A lift is not required due to the proposed viewing platform [being] based on a single storey situation...

In addition to the above, the viewing platform can also be considered an Ancillary Building as defined by the Building Code and therefore [Clause] D1.3.2 as stated in the limits of application do not apply.

...

As per the description of Ancillary Building 'Platform' is specifically mentioned and is intended not for human habitation but intermittent use similar to that of a jetty. We however with this in mind still prefer to provide the accessible stair from the roof afforestation level to the Platform to ensure the safe movement of ambulant people.

2.2.3 The authority wrote to the applicant on 1 October 2018, suspending the application to amend the building consent. The authority noted:

[The authority] believes the tower viewing platform is not separate to the main building, but an integral part of the whole complex, therefore not an ancillary building in terms of Clause A1...

[The authority] believe this to be a four-storey building and the following building code requirements have not been met:...

D1.3.4(c) Include a lift complying with Clause D2 "Mechanical Installations for Access" to upper floors where:

- (i) Buildings are four or more storeys high.

2.2.4 The Ministry received an application for determination on 4 December 2018.

3. The submissions

3.1 The application for determination included:

- a submission from the agent setting out the background and reasons for disputing the authority's decision
- a copy of the authority's letter dated 1 October 2018, suspending the building consent application

⁷ Acceptable Solution D1/AS1 Access routes

- a copy of the application to amend the building consent, consisting of a summary of the situation and proposed design, accessibility plans for levels one to three of the building and a plan showing the locations for proposed accessible access.
- 3.2 In the submission accompanying the application, the applicant stated (in summary):
- The internal lift provides accessible access to the café and upper gallery, along with the landscaped roof area.
 - In respect of the cupola structure:

[The applicant] is of the opinion that the structure which is proposed to be built on top of the stair lift tower could also be termed an architectural folly and is a significant part of the afforestation to the main roof as it is an expression of the termination of the stair/lift tower. As such it is subordinate to the main building – an ancillary building/structure built over the tower of the building below.
 - The cupola structure is a two storey building and D1/AS1 allows for access to be via an accessible stair and not a lift, and in respect of this access:

Due to the sculptural status and limited available room of the [viewing] platform an accessible stair was the best option to allow people with disabilities to access this area.
- 3.3 The authority acknowledged the application for determination on 4 December 2018 and provided a copy of its letter dated 1 October 2018 suspending the application to amend the building consent, and a letter dated 26 March 2018 requesting further information in respect of the original building consent application.
- 3.4 A draft of this determination was issued to the parties and ODI for comment on 11 April 2019 and 12 April 2019 respectively. The draft concluded that the cupola was not an ancillary building and that the authority was correct to refuse to grant the amendment because the proposed design does not comply with Clause D1 in respect of access to the cupola.
- 3.5 The authority responded on 29 April 2019, accepting the draft without further comment.
- 3.6 On 1 May 2019 ODI advised it supported the conclusion reached in the draft, and noted:
- It is important that all people with disabilities, and in this particular case, wheelchair-users, are able to access and use all parts of a building. Without providing an accessible route via a lift, wheelchair users would be barred from accessing the viewing platform. This is not in line with accessibility requirements
- 3.7 On 30 April 2019, the agent sought additional time in which to make a submission. The submission was received on 5 June 2019, and the applicant disagreed with the findings in the draft determination on two grounds:
- the applicant maintains the opinion that the cupola is an ancillary building and is therefore subject to the limits on application in Clause D1.3.2; and
 - even if the cupola is not an ancillary building, persons with disabilities are still able to carry out normal activities and processes in the building and therefore it complies with section 118 of the Act.
- 3.8 The applicant’s summary also discussed the concept of “reasonable” in terms of section 118. I have summarised the points made in the applicant’s submission below:

Section 118

- The concept of reasonableness is included in section 118 and expressly provided for in the Building Code provisions for ancillary buildings, being buildings which may be exempt from some amenity provisions.
- The draft of the determination considers reasonableness of access in terms of access to the cupola; it does not consider reasonable of access in terms of the entire building.
- Access to the cupola is peripheral to the normal activity of the business – that is the galleries, shop and café, which are all accessible.
- It is not feasible to extend the lift into the cupola.

Normal activities and processes (section 118)

- The primary purpose of the cupola is to be seen from afar, and “experience of the cupola from within is not relevant to its purpose and provides no real experience”.
- The normal activities and processes in the building are: viewing the building, visiting the galleries, visiting the café, visiting the gallery shop, and enjoying the rooftop area, including the cupola. Whether or not the cupola is ancillary, persons with disabilities are still able to carry out normal activities and processes within the building when its purpose and activities are considered, and on that basis compliance with section 118 is achieved.
- As discussed in Determination 2010/089⁸, reasonable access to a building does not require access to every aspect of that building.
- The draft wrongly defines the building as being the cupola and/or the relevant activity as visiting the cupola. However the normal activities of enjoying nature in the rooftop area are fully able to be carried out in the rest of the rooftop.
- The only amenity provided by entering the cupola is a slightly raised viewing platform. The rooftop provides other opportunities to enjoy the same view from other places.

Ancillary building

- Ancillary is not defined in the legislation but rather it is defined by purpose, being a building which “may be exempted from some amenity provisions...” The cupola is a prime example of a building which ought to be exempted from some amenity provisions – it is a viewing platform and folly.
- The cupola is a very small part of the building at approximately 26m² of usable space, noting that there is 2127m² of floor space inside the building and a further 1053m² of rooftop landscaping.
- The cupola serves no material function. It is not functionally part of the rest of the building, and if there was no access to the cupola there would be no loss of amenity to the building – in this sense the cupola is ancillary in its function and purpose. It cannot be accessed from within the building and in practical terms sits on the roof as an “add on” that reflects the aesthetic of the building rather than its function.

⁸ Determination 2010/089 Access for people with disabilities to a landscaped garden area (20 September 2010)

- The building is first and foremost a work of art; it is appreciated by seeing and experiencing the building and is equally available to all as experienced from a distance, not from within. The primary purpose of the cupola is to be seen from afar.
- There is no particular experience or function of the rooftop landscape area and there is no material amenity provided by the cupola. The primary purpose of the rooftop area is for nature and humanity to interact and it is effectively a continuation of a park. The cupola is a platform in that park and is ancillary to the park and fits within the scope and purpose of the definition.
- The cupola is only 2.5m above the corresponding rooftop area, and while it can be considered a viewing platform, the views are not materially different to views available from the rooftop generally. A person who is unable to access the cupola will have access to similar experiences and views elsewhere in the rooftop area.

Number of storeys, and definition of storey

- The rooftop does not comprise a storey: it has no rooms and the natural and ordinary definition does not count a rooftop as a floor or storey and to adopt such a definition would add a storey to every building.
- Before turning to a dictionary definition, the Australian Building Code should be considered (see Appendix B.1). Using that definition the building would be two storeys.

4. Discussion

4.1 Section 118

4.1.1 There is no dispute that the proposed building is one to which section 118 of the Act applies under Schedule 2(n). It is a new building containing galleries, a café, a learning centre and a rooftop landscaped area that incorporates the cupola structure with its viewing platform. The matter in dispute is whether the proposed cupola as designed with its viewing platform accessed via an accessible stair complies with Clause D1 of the Building Code to the extent required by section 118 of the Act.

4.1.2 Section 118 of the Act provides:

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.

4.1.3 Buildings must not be constructed in such a way as to prevent people with disabilities who may be expected to visit or work from carrying out normal activities and processes to the fullest extent that their abilities allow. Section 4(2)(k) requires me to have regard to the principles in section 118 when making a determination and considering the purpose of the Act, for example, section 3(a)(ii), which requires “buildings [to] have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them”.

4.1.4 Section 118 requires reasonable and adequate provision by way of access for people with disabilities to carry out ‘normal activities’ associated with working in or visiting the proposed building, and the objective provision Clause D1.1(c) is “to ensure that people with disabilities are able to enter and carry out normal activities and functions within buildings”.

4.1.5 The people to whom section 118 refers are members of the public, which includes persons with disabilities who may be expected to visit or work in the building and carry out normal activities and processes.

Normal activities

4.1.6 The applicant contends that visiting the viewing platform is not a “normal activity”, in the sense that the normal activities are those that occur within the building and visiting the cupola is peripheral to those normal activities. I disagree with the applicant in this matter. In my opinion, with reference to section 118 and Clause D1.1(c), the normal activities and processes in a building are those that persons visiting or working in the building can reasonably be expected to undertake. In this case the normal activities and processes persons with disabilities can be expected to undertake occur both inside the building and in the rooftop area, and include:

- working or visiting the galleries, café, and learning centre within the building; and
- visiting the landscaped rooftop area and the viewing platform within the cupola on top of the building.

4.1.7 In respect of the cupola specifically, the viewing platform provides members of the public the ability to enjoy a 360° view of the surrounding landscape which is not available from the landscaped rooftop area – I discuss this further in paragraph 4.1.15. Members of the public with disabilities who visit the building and the landscaped rooftop can therefore be expected to visit the cupola for this purpose, and access has been proposed to the viewing platform within the cupola by way of a set of stairs. The cupola is also a distinctive architectural feature that visitors may want to experience from both outside and in.

4.1.8 I am not persuaded by the applicant’s argument that “normal activities” should be interpreted to mean only some activities, i.e. those that occur within the building, and not all of the available activities both within the building and in the landscaped rooftop and cupola. In my opinion visiting the viewing platform in the cupola is one activity available as part of the overall experience of visiting the building and is one that persons with disabilities can reasonably be expected to want to undertake. Visiting the cupola is just as much a normal activity as is, for example, visiting the café as a part of the overall experience of visiting the building.

Reasonable and adequate access

4.1.9 The question then becomes what is “reasonable and adequate” provision of access for those people with disabilities who can be expected to visit the cupola, and whether the proposed design achieves this. This question requires consideration of whether an accessible route is required to the cupola.

4.1.10 The definition of an accessible route in the Building Code is:

Clause A2 – Interpretation

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.

- 4.1.11 What is reasonable and adequate provision by way of access, parking provisions, and sanitary facilities under section 118 and whether an accessible route is required has been discussed in a number of previous determinations. Some previous determinations have reached a conclusion that an accessible route is not required to a building or is not required to certain parts of a building because of certain characteristics of the building, its use, or of the members of the public expected to visit the building.
- 4.1.12 Examples of such determinations are:
- Determination 2005/166⁹ concluded that a lift to an upper floor in a meat processing plant was not required because people with disabilities could not be expected to work on or visit that part of the building.
 - Determination 2010/089¹⁰ considered access for people with disabilities to a sunken garden within a larger landscaped area in the centre of a business park, and concluded that a lack of a ramp to the sunken garden would not prevent people from disabilities who were unable to negotiate the stairs to the sunken garden from fully enjoying the experiences available within the garden.
 - Determination 2016/007¹¹ considered access to three pools in an aquatic centre. That determination concluded that what was reasonable and adequate access to each pool was dependent on the attributes of each of the pools and their intended use, and that an accessible route need not necessarily be provided to each pool in the complex.
 - Determination 2016/036¹² considered whether an accessible route was required to the lower level of proposed rowing club building, and found that an accessible route was not required because people with disabilities could carry out normal activities and processes as spectators by accessing the street level viewing deck.
- 4.1.13 The applicant has put forward a view that the circumstances in this case are akin to those in 2010/089, in that the experience to be had from the viewing platform is comparable to the experience available in other areas of the rooftop garden, noting that reasonable access does not require access to every aspect of the building.
- 4.1.14 Determination 2010/089 concluded that “there is no experience or advantage that would be gained by a person being able to access the sunken garden that is not readily available elsewhere in the landscaped areas”. The determination went on to note that “The gardens and landscaped areas within the business park are extensive. Activities or experiences that people may seek to have in the gardens would all be available in the immediate proximity of the sunken garden.”
- 4.1.15 I acknowledge that reasonable access does not necessarily mean access is required to every area of a building, what is required is reasonable access for members of the public with disabilities to carry out normal activities, which in this case includes enjoying the views and experiences afforded by the viewing platform as one of a number of activities.

⁹ Determination 2005/166 Access for people with disabilities to the upper floor of the AFFCO beef processing plant (19 December 2005)

¹⁰ Determination 2010/089 Access for people with disabilities to a landscaped garden area (20 September 2010)

¹¹ Determination 2016/007 Regarding the code compliance of access for people with disabilities to three swimming pools in a proposed aquatic centre (24 February 2016)

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

- 4.1.16 I do not consider the situation in this case, with regard to the viewing platform and the rooftop garden, is comparable to the landscaped areas considered in Determination 2010/089. In reaching this view I have taken into account the areas of the rooftop garden that are shown on the plans as being accessible, the solid wall around the perimeter of the rooftop area, the forestation of the rooftop area, that the viewing platform is some 2.5m above the highest point of the rooftop garden and the 360° view available from the platform. I am of the view that not providing an accessible route to the viewing platform would disadvantage people with disabilities who want to enjoy the views afforded by the viewing platform and experience the architectural features of the cupola.
- 4.1.17 In conclusion, it is my view that reasonable and adequate access requires the provision of an accessible route to the cupola. There are no characteristics of the use of the cupola or of the members of the public that can be expected to visit the cupola that would mean something less than an accessible route can be considered reasonable and adequate. Anything less than an accessible route would not be reasonable and adequate access for persons with disabilities who can be expected to visit the building and carry out normal activities in that building, of which the cupola is only one feature of a number in the building.

4.2 The application of Clause D1

- 4.2.1 As provided in section 16, the Building Code prescribes functional requirements for buildings and the performance criteria with which buildings must comply in their intended use. The relevant performance requirement in this dispute is Clause D1.3.2(c) which requires

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.

- 4.2.2 The limit on application for Clause D1.3.2 states it does not apply to buildings with the following classified uses:

housing, outbuildings, backcountry huts, ancillary buildings, and to industrial buildings where no more than 10 people are employed.

- 4.2.3 The applicant is of the view that the cupola falls within the limits on application of Clause D1.3.2 on the basis that the cupola is an ancillary building (refer paragraphs 3.2 and 3.8).

- 4.2.4 An ancillary building is defined in Clause A1 of the Building Code as:

... a building or use not for human habitation and which may be exempted from some amenity provisions but which are required to comply with structural and safety related aspects of the building code. Examples: a bridge, derrick, fence, free-standing outdoor fireplace, jetty, mast, path, platform, retaining wall, tank, tunnel or dam.

- 4.2.5 I accept the applicant's viewpoint that the cupola is an "architectural feature" experienced from afar as part of the overall aesthetics of the building. However, this is clearly not its only function because it also affords an activity – that of viewing the surrounding area from an elevated height and experiencing the architectural features of the cupola. In this respect I do not agree with the applicant's contention that the cupola is "subordinate to the main building" and for that reason an ancillary building.

- 4.2.6 Nor do I accept that the cupola can be considered an ancillary building as a separate structure in its own right in the way the applicant contends. The cupola is a part of the building; the landscaped rooftop is accessed via the lift from within the building, and with its viewing platform the cupola is a significant component of the design of the landscaped rooftop area that provides one of a number of activities available to members of public visiting the building.
- 4.2.7 In support of the applicant's contention that the cupola is an ancillary building, the applicant submitted that the cupola is "a prime example of a building which ought to be exempted from some amenity provisions" (refer Appendix A1.2 for definition of amenity). Clause A1 of the Building Code states that an ancillary building "may" be exempted from some amenity provisions. However, this is not a requirement of the definition of ancillary building in Clause A1.
- 4.2.8 In summary, I am of the view the cupola is a part of the building and cannot itself be considered an ancillary building. Therefore Clause D1.3.2 applies in respect of the access route to the cupola.

4.3 Compliance

- 4.3.1 Clause D1.3.2 establishes the requirement that at least one access route shall have features to enable people with disabilities to approach the building, 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.

Is a lift required?

- 4.3.2 Clause D1.3.4 sets out a number of additional requirements for accessible routes¹³, including the requirement of Clause D1.3.4(c) for a lift to upper floors in certain circumstances, where:

- (i) buildings are four or more storeys high,
- (ii) buildings are three storeys high and have a total design occupancy of 50 or more persons on the two upper floors,
- (iii) buildings are two storeys high and have a total design occupancy of 40 or more persons on the upper floor

...

- 4.3.3 With respect to the application of Clause D1.3.4 and whether a lift is required to provide access to upper floors, the applicant is of the view that the cupola structure is a separate two storey building. The authority has stated it considers the building comprises four storeys and therefore the requirement of Clause D1.3.4(c) to include a lift applies.
- 4.3.4 Neither the Building Code nor the Acceptable Solution include a definition of the word "storey" and accordingly the word must be given its ordinary and natural meaning in the context in which it is used. In relation to a building, "storey" means "each of the sections of a building comprising all the rooms that are on the same level; the room or set of rooms which comprises one such level; a floor."¹⁴
- 4.3.5 The applicant has submitted that the definition provided in the Australian Building Code should be considered over the natural and ordinary definition. Under that definition the rooftop would not constitute a storey as there is no ceiling or roof

¹³ Refer paragraph 4.1.9 for the definition of an accessible route.

¹⁴ "storey | story, n.". OED Online. December 2018. Oxford University Press. <http://www.oed.com/view/Entry/190982?redirectedFrom=storey> (accessed January 28, 2019).

- above. The applicant is of the view that to use the ordinary and natural meaning (as described above) would have implications for every building.
- 4.3.6 In my view, whether or not a rooftop will constitute a storey for the purpose of Clause D1.3.4 of the Building Code, which concerns access routes, will depend on whether it is intended that people will access the rooftop to carry out normal activities and processes.
- 4.3.7 In this case, the external landscaped roof area starts at ground level at one end of the building and as it rises forms the roof of levels below it that house the gallery. The rooftop area is accessed either by the stairs and pathway from ground level or from the interior of the building by way of the lift. Despite the fact that it does not comprise of walled-in spaces, the rooftop garden is intended to be accessed by members of the public and the activities carried out form part of the normal activities for this building, and in this way it is similar to a rooftop café or restaurant or bar. For this reason I consider the external landscaped roof area is a “storey” for the purpose of Clause D1.3.4.
- 4.3.8 I am not persuaded that this approach would have wider implications as suggested by the applicant. I note that the rooftops of most buildings are typically only accessed for purposes related to maintenance and the like, and would therefore not require an accessible route. Nor do I see any reason for adopting the definition of “storey” from the Australian Building Code, which defines that term specifically for the purposes of the Australian building regulatory system.
- 4.3.9 Clause D1.3.4(c)(ii) requires a lift to upper floors for buildings that are three storeys high and have a total design occupancy of 50 or more persons on the two upper floors. If the building in this case is a three-storey building, then the provision of a lift to the rooftop satisfies that requirement.
- 4.3.10 However, the authority is of the view that the cupola, with its viewing platform elevated above the rooftop area, comprises another storey to the building and therefore the building is four-storeys and lift access must be provided to the cupola as per Clause D1.3.4(c)(i). The applicant disagrees.
- 4.3.11 Clause D1.3.4(c)(i) requires a lift “where buildings are four or more storeys high”. This subclause differs from (ii) and (iii) because the requirement for a lift is not conditional on design occupancy of the upper floors. Accordingly, although the viewing platform in this case has a relatively small floor area, the question of whether a lift is required turns on whether the viewing platform is another storey of the building and whether access other than a lift constitutes reasonable and adequate access for people with disabilities.
- 4.3.12 I am of the view that the cupola with its viewing platform as proposed constitutes the fourth storey of this building. The viewing platform is on a higher level than the rooftop garden, being elevated some 2.5m above the rooftop, and I note in comparison that is little different to the average height of residential spaces. The cupola provides a space that will be occupied by people who wish to enjoy the views from that elevated position and experience the architectural features of the cupola.
- 4.3.13 I have concluded that reasonable and adequate access includes provision of an accessible route to enable access for people with disabilities to the viewing platform. I note it could be argued that reasonable and adequate access for people with disabilities can be achieved by some means other than a lift, but that is not what has been presented in this case.

- 4.3.14 I acknowledge the applicant's concerns regarding the desire to maintain the aesthetic of the original design and that incorporating a compliant accessible route in keeping with the aesthetic presents a design challenge. However, the desire to achieve a particular appearance or aesthetic cannot outweigh the requirement to provide access – no person with a disability should be deprived of the ability to carry out normal activities and processes due to the design of the building.
- 4.3.15 I note also for completeness that under section 67(3) the 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, and under section 69(3) I cannot grant a waiver that relates to access and facilities for persons with disabilities where it relates to a new building.

5. The decision

- 5.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the proposed design does not comply with Clause D1 of the Building Code and therefore I confirm the authority's decision to refuse to grant an amendment to the building consent for the proposed design.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 22 August 2019.

Katie Gordon
Manager Determinations

Appendix A: The legislation

A1.1 The relevant sections of the Act are:

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.

A1.2 The relevant sections of the Building Code are:

Clause A1 Classified uses

8.0 Ancillary

Applies to a *building* or use not for human habitation and which may be exempted from some amenity provisions but which are required to comply with structural and safety related aspects of the *building code*. Examples: a bridge, derrick, fence, free-standing outdoor fireplace, jetty, mast, path, platform, retaining wall, tank, tunnel or dam.

Clause A2 Interpretation

accessible route an *access route* useable 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 *people with disabilities* to carry out normal activities and processes within the *building*.

amenity means an attribute of a building which contributes to the health, physical independence, and well being of the building's users but which not associated with disease or specific illness

Clause D1

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

- (a) Approach the building from the street boundary or, where required to be provided, the building carpark,
- (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".

Limits on application

Performance D1.3.2 shall not apply to housing, outbuildings, backcountry huts, ancillary buildings, and to industrial buildings where no more than 10 people are employed.

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,
 - (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.

Appendix B: The Building Code Australia

B.1 Excerpts of the Building Code Australia referred to by the applicant:

NCC2015 Building Code of Australia - General Provisions A1.1 Definitions, Page 30

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“Storey means a space within a building which is situated between one floor level and the floor level next above, or if there is no floor above, the ceiling or roof above, but NOT -

(a) a space that contains only -

(i) a lift shaft, stairway or meter room; or

(ii) a bathroom, shower room, laundry, water closet, or other sanitary compartment;
or

(iii) accommodation intended for not more than 3 vehicles; or

(iv) a combination of the above; or

(b) a mezzanine