

Determination

under the

Building Act 1991

No. 95/008: Access for people with disabilities to an underwater viewing chamber

1. The matter to be determined

- 1.1 The matter before the Authority was whether a lift is to be provided in the construction of an underwater viewing chamber.
- 1.2 The Authority takes the view that it is being asked in effect to determine whether a lift is required for compliance with clause D1.3.4(c)(iii) of the building code (the First Schedule to the Building Regulations 1992).
- 1.3 In making its determination, the Authority has not considered the other provisions of the building code.

2. The parties

- 2.1 The applicant is the owner, the territorial authority (acting on behalf of the regional council) is the only other party.

3. The building

- 3.1 The viewing chamber is part of a tourist facility floating just offshore in a marine reserve in a World Heritage Park.
- 3.2 The facility essentially consists of five floating steel and concrete structures, with flexible connections between them, moored to the shore by flexible linking arms. Those structures are:
 - (a) The “main pontoon”, a deck approximately 26 m by 11 m, which serves as the floor of a building containing the reception area and various service areas. The reception area incorporates displays and a video screen providing live coverage from an underwater camera. The floor of the building is a concrete deck supported by floating tubes.

- (b) Two decks along two sides of the main pontoon, referred to as “docks”, one approximately 30 m by 5 m and the other approximately 11 m by 4 m, at which boats can be loaded and unloaded.
 - (c) A deck approximately 4 m by 5 m supporting two electricity generators.
 - (d) The observatory itself, consisting of two circular chambers connected by a vertical shaft. The “descending chamber”, approximately 7 m by 7 m, is at sea level. The circular “viewing chamber”, approximately 8 m diameter, is approximately 10 m below sea level. The cylindrical shaft is approximately 4.5 m in diameter. Access between the descending chamber and the viewing chamber is by two concentric sets of spiral stairs in the shaft. Those stairs are suitable for use by people with ambulant disabilities.
- 3.3 The only access to the facility is by boat (or possibly by floatplane or helicopter, although those were not mentioned in the submissions). Although the facility is moored to the adjacent shore it is not accessible from the shore. There is no adjacent road, and emergency evacuation, should it ever be necessary, would be on to a service barge.
- 3.4 A building consent was issued for the construction of the facility subject to the owner’s applying for a determination in respect of the need for a lift. The Authority understands that the facility has been completed and is in operation and that a lift will be installed if so required by this determination.
- 3.5 The Authority considers it most unsatisfactory for the facility to have been constructed and in use before the disputed question of a lift was submitted to the Authority for determination.

4. The parties' contentions

- 4.1 The owner submitted in effect:
- (a) That the viewing chamber structure is not a building for the purposes of the Building Act.
 - (b) That people in wheelchairs cannot be expected to visit the facility.
 - (c) That the requirements of clause D1 “Access routes” are not applicable to the type of structure concerned.
 - (d) That there is not sufficient space in the shaft for a “full wheelchair access lift” to be installed. A “limited disability lift can be fitted but may introduce some unwanted problems” so that it would be potentially dangerous to life as well as environmentally unacceptable to provide a lift.
- 4.2 The territorial authority contended that the viewing chamber was a building. It claimed that there were approximately 200,000 visitors to the area annually, many of them “in the more senior age group” and many with mobility difficulties.

5. Is the facility a building?

5.1 Section 3 of the Building Act (as amended by the Building Amendment Act 1993) in effect defines a building as being “any temporary or permanent movable or immovable structure” subject to a series of exceptions. The Authority considers that the facility is a “structure” in the ordinary and natural meaning of that word. Thus the facility is a “building” for the purposes of the Building Act unless it comes within one of the exceptions listed in section 3.

5.2 The only relevant exception is specified in section 3(1)(d), which provides that the term “building” does not include:

(d) Any description of vessel, boat, ferry, or craft used in navigation, whether or not it has any means of propulsion, and regardless of that means; nor does it include -

(i) A barge, lighter or other like vessel [a hovercraft or a submarine].

5.3 The Authority considers that the facility is not “used in navigation”. It also considers that, as it is permanently moored, it cannot be regarded as a vessel like a barge or lighter.

5.4 The owner said:

It is a matter of interpretation as to [whether the facility is] a two storey building [or] a single storey building with a separate viewing area. This is similar to many tourist attractions with outdoor viewing platforms where access is available to a viewing centre but specific viewing platforms do not have full access.

The facility has two distinct floor levels connected by stairs. If it is a building at all (and the Authority considers that it is) then it is clearly a two storey building.

6. Is the facility a building to which section 25 of the Disabled Persons Community Welfare Act applies?

6.3 The relevant provisions of section 25 are:

(1) In any case where provision is being made for the construction . . . of any building to which the public are to be admitted . . . reasonable and adequate provision . . . shall be made for disabled persons who may be expected to visit or work in that building and carry out normal activities and processes in that building.

((4) The provisions of this section shall apply to . . . :

(o) Libraries, museums, art galleries, and other cultural institutions.

6.4 The Authority considers that the facility comes within section 25(4)(o) and therefore that section 25 applies.

6.5 However, the requirement of section 25(1) is not that reasonable and adequate provision shall be made for everyone with a disability of any kind, but only that such provision shall be made for those who may be expected to visit or work in the building concerned.

7 Can wheelchair users be expected to visit the facility?

7.1 It is not disputed that people with ambulant disabilities may be expected to visit the facility. Accessible sanitary facilities are provided and the stairs are suitable for use by people with ambulant disabilities (although the Authority observes that descending and ascending 10 m by stairs could well be a daunting task for some people). The only dispute is as to the provision of a lift for people who cannot use the stairs, which includes wheelchair users.

7.2 The owner submitted in effect that there was no accessible route by which wheelchair users could reach the facility. As the owner said:

Access is only possible by boat. Public access is provided by . . . tourist launches [which] do not have complying access or facilities for people with disabilities. Steps, lips, and stairs are common obstacles. Different vessels have widely varying heights to their embarkation level.

Despite difficulties a number of people do travel on the boats although they are generally restricted to one level. Wheelchairs are lifted onto and off the boats by manhandling at the . . . embarkation point.

At the observatory, similar landing facilities cannot be provided [on this] floating structure which is exposed to the sea action. Waves up to 2 metres can occur in this area Boat deck levels vary from 400 below to 400 above the landing dock. This combined with wave movement presents difficulties in lifting wheelchairs on and off.

7.3 However, the sea is not always rough, and it might well be possible for wheelchair users to visit the facility when sea conditions permit. Furthermore, the submissions relate entirely to the tourist launches currently being used. The facility has a limited intended life of 30 years in terms of section 39, and the means of access to the facility can be expected to change over that time. The Authority considers that the Building Act requires that a building shall not only comply with the building code when constructed but shall continue to so comply throughout its life.

7.4 Thus the Authority does not consider that those submissions establish that wheelchair users will never be able to visit the facility. However, they do establish that wheelchair users will always have difficulty in visiting the facility. The question is whether a lift is to be provided for those wheelchair users who are nevertheless capable of overcoming that difficulty and visiting the facility.

- 7.5 The Authority takes the view¹ that:
- (a) The provisions of the building code for access and facilities for people with disabilities apply to a building as a whole but do not apply to a building or to any part or portion of a building in which people with disabilities, solely because of their disabilities, cannot work, and which, for some specific reason, will not be visited by people with disabilities.
 - (b) It is important not to underestimate the extent to which people with disabilities are capable of overcoming those disabilities. The clear intention of the Building Act and the Disabled Persons Community Welfare Act is that buildings must not be constructed in such a way as to prevent people with disabilities from undertaking work which they are capable of undertaking or from visiting buildings which they are capable of visiting.
- 7.6 The Authority is reluctant to make judgements as to the capabilities of wheelchair users, but it considers that visits to the facility by wheelchair users will be so limited that the provision of a lift for those, if any, who do in fact make such visits is not required in order to comply with section 25 of the Disabled Persons Community Welfare Act.
- 7.7 However, the Authority must still consider whether the provision of a lift is required in order to comply with the Building Act.

8. Does the Building Act require a lift?

- 8.1 Even if the Disabled Persons Community Welfare Act does not require a lift, does the Building Act?
- 8.2 The Building Act and the building code frequently refer to “buildings to which section 25 of the Disabled Persons Community Welfare Act 1975 applies”. In effect, it is a requirement of the Building Act such buildings shall comply with the provisions of the building code for access and facilities for people with disabilities. On the face of it, a requirement to comply with the building code is a requirement to comply with all of its provisions. Some of those provisions clearly relate to wheelchair users only, not to people with ambulant disabilities. Similarly, others apply to people with hearing or sight disabilities, and so on. The Authority can find nothing in the Building Act or the building code which specifically states that a building need comply with only those provisions which relate to people with disabilities which do not prevent them from visiting or working in the building.
- 8.3 However, the Authority considers that as a matter of common sense the Building Act and the building code are not to be interpreted as requiring provision to be made for people who will not be able to use them.

¹ See Determinations Nos 95/003 and 95/006, and also the Authority's "Access and Facilities for People with Disabilities" published in *Building Industry Authority News* No. 23, June 1993.

8.4 The Authority therefore concludes that the provisions of the building code requiring lifts to be installed in buildings do not apply to this facility.

9. Application of the building code

9.1 General

9.1.1 Although the Authority has concluded that those provisions do not apply, it nevertheless considers it appropriate to consider the application of the building code on the assumption that the facility must comply with all of its provisions for access and facilities for people with disabilities.

9.2 The relevant provisions of the building code

9.2.1 The relevant provisions of the building code are:

Clause A2 “Interpretation”

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

Accessible Having features to permit use by *people with disabilities*.

Clause D1 “Access routes”

D1.1 The objective of this provision is:

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

Limits on application: Objective D1.1(c) shall apply only to those *buildings* to which section 25 of the Disabled Persons Community Welfare Act 1975 applies.

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

- (a) Safely and easily approach the main entrance of *buildings* from the apron or *construction edge* of a *building*.

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 carpark.

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

- (c) Include a lift complying with Clause D2 “Mechanical Installations for Access” to upper floors where:

- (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 [various specified purposes not applicable to the building concerned].

9.3 *The interpretation of the relevant provisions of the building code*

9.3.1 The Authority recognises that the interpretation of the words of the building code is a matter of law.

9.3.2 The Authority also recognises that the words of the building code are more appropriate to the general run of buildings than to special cases such as this facility. In particular, the relevant performance criteria of clause D1.3 are written in terms of a building which is entered at ground level and contains upper floors. The criteria specify circumstances in which a lift is required between the ground floor and the upper floors.

9.3.3 However, as a matter of common sense, the Authority considers that in such special cases the words in which performance criteria are specified in the building code are to be interpreted so as to achieve the corresponding objectives (which correspond to the purposes and principles set out in section 6 of the Building Act) and functional requirements of the building code.

9.3.4 Accordingly, in the special case of the building concerned the Authority considers that the criteria are to be read in terms of access from the floor at which the building is entered to any other floor. Similarly, the Authority considers that reference to the street boundary is to be taken as a reference to the edge of the floating structure. Thus the Authority does not accept the owner's submission that clause D1 is not applicable to the facility.

9.3.5 The Authority considers, subject to reconsideration in the light of any particular case that might come before it for determination, that the same interpretation of both the building code and NZS 4121 should be applied to such cases as underground shopping malls, car parks, and the like.

9.3.6 The owner does not dispute that the design occupancy of the viewing chamber is more than 40 persons. Thus, on the Authority's interpretation of clause D1 of the building code a lift would be required if that clause did in fact apply to the facility.

9.3.7 However, that is not the end of the matter because it is also necessary to consider the corresponding provisions of New Zealand Standard 4121 "Code of practice for design for access and use of buildings by disabled persons" ("NZS 4121").

10. The status of NZS 4121

10.1 Section 25(3)(a) of the Disabled Persons Community Welfare Act 1975 provides that, for matters subject to the Building Act, NZS 4121 shall be deemed to be "one of the documents establishing compliance with the building code for the purposes of section 49 of

[the Building Act]’. Thus the Authority understands section 25 of the Disabled Persons Community Welfare Act to give the provisions of NZS 4121 a status equivalent to the corresponding provisions of the Approved Documents issued by the Authority under section 49 of the Building Act.

- 10.2 Section 50(1)(d) of the Building Act provides that a territorial authority shall accept compliance with “the provisions of a document prepared or approved by the Authority under section 49” as establishing compliance with the provisions of the building code. The Authority regards the requirement to accept such documents as applying not only to territorial authorities for the purposes of issuing building consents and code compliance certificates but also to the Authority for the purposes of making determinations.
- 10.3 As detailed in 9.2.1 above and 11.1.1 below, the building code and NZS 4121 specify different circumstances in which a lift is to be provided. Thus a building complying with NZS 4121 in that respect might not comply with the building code (and the other way round). However, for the reasons given above the Authority considers that compliance with either NZS 4121 or the Approved Documents must be accepted as establishing compliance with the building code. In some cases that will involve a legal fiction because of the differences between the provisions of NZS 4121 and those of the building code.
- 10.4 Of course, NZS 4121 and the Approved Document are not the only means of establishing such compliance. The coming into force of section 47A of the Building Act to replace section 25 of the Disabled Persons Community Welfare Act will not affect what the legislation means in practice, which is described in 12.1 below as regards the requirement to provide a lift in a building having two storeys.

11 Compliance with NZS 4121

11.1 The relevant provision of NZS 4121

11.1.1 The relevant provisions of NZS 4121 are:

304.1

Lifts shall be installed [except] that in the case of a two-storey building where the gross floor area of the upper floor is less than 400 m² . . . a lift need not be provided if the ground floor complies with the requirements of this Standard and the upper floors have access for the ambulant disabled.

304.2

Notwithstanding the requirement of 304.1 lifts shall be installed in all two- and three-storey buildings where the whole or any part of the upper floors are designed or intended to be used for [various specified purposes not applicable to the building concerned].

11.2 The interpretation of the relevant provisions of NZS 4121

11.2.1 The Authority considers that in this case the words of NZS 4121 should be interpreted on the same basis as the words of the building code, as discussed in 8.3 above.

11.3 Application of those provisions to the special case of the viewing chamber

11.3.1 The gross floor area of the viewing chamber is much less than 400 m² so that the building without a lift complies with NZS 4121.

12. The combined effect of the building code and NZS 4121

12.1 For the reasons set out above, the combined effect of clause D1.3.4(c)(iii) of the building code and clause 304 of NZS 4121 is that a lift is required in a building having two storeys if the floor served by the lift has both a total design occupancy of 40 or more persons and a gross floor area of 400 m² or more.

13. Would a lift be potentially dangerous to life or environmentally unacceptable?

13.1 Although it was not strictly necessary to do so, the Authority also considered various submissions by the owner to the effect that a lift would be potentially dangerous to life and environmentally unacceptable.

13.2 The owner submitted that a lift would cause the following difficulties and dangers:

(a) In the owner's words:

A full wheelchair access lift to the viewing chamber cannot be fitted. The area available is limited by design considerations for maintaining stability and buoyancy of the chamber.

The Authority does not accept that submission. If access for people with disabilities had been one of the design criteria in the first place then the Authority is firmly of the opinion that the facility could have allowed for such access without compromising stability and buoyancy. The "design considerations" mentioned by the owner arise only because the facility was designed and constructed without such access.

(b) Any lift would have to be of the hydraulic type and the owner submitted that:

The presence of hydraulic oil is a potential environmental hazard in an area where contamination is prohibited.

The Authority rejects that submission because a properly maintained lift would be no more of an environmental hazard than a properly maintained diesel- or petrol-driven generator, than the lubricant for the moorings to the shore, or than any of the various boats that frequent the area.

- (c) In a power failure a hydraulic lift would not return to sea level but would descend under gravity to the viewing chamber. In the owner's words:

Buildings would normally use gravity to escape to a lower ground level. Without power the lift does not automatically return to the top.

The Authority does not accept that submission. A lift of the type envisioned should be comparatively easy to winch to the upper level. That would be unacceptable in a fire of course, but a lift is never regarded as a means of escape from fire for the purposes of the Building Act. Furthermore, the Authority notes that the Fire Safety and Evacuation of Buildings Regulations 1992 take the same approach, providing in regulation 21 that:

No problems of fire safety and evacuation from a building shall be a cause to limit or prevent any person with disabilities from entering and carrying out normal activities and processes within the building

- (d) The owner also submitted that:

The viewing chamber is restricted in the area available. The presence of people of limited mobility could impede other people's means of escape in the emergency situation.

The Authority rejects that submission, which could be made of almost any building. If the Building Act requires that all or a particular part of a building shall be accessible to people with disabilities then that requirement is not to be contravened on the grounds of some perceived danger which, presumably, must have been overlooked by those responsible for drafting the Act, the building code, and NZS 4121.

14. Conclusion

14.1 The Authority concludes that:

- (a) The facility without a lift complies with the requirements of the Disabled Persons Community Welfare Act because visits to it by wheelchair users, if any, will be very limited.
- (b) The provisions of the building code requiring lifts to be installed do not apply to the facility.
- (c) If those provisions did apply then a lift would be needed in order to comply with them.
- (d) The facility without a lift complies with NZS 4121 and is therefore deemed to comply with the building code as a matter of law even though it does not do so as a matter of fact.

14.2 The Authority therefore concludes that the facility without a lift complies with the Disabled Persons Community Welfare Act and the Building Act and is deemed to comply with the building code.

15. The Authority's decision

15.1 In accordance with section 20(a) of the Building Act the Authority hereby determines that the facility is not required to include a lift.

Signed for and on behalf of the Building Industry Authority on this 22nd day of December 1995

J H Hunt
Chief Executive