

# ***Access to an air traffic control tower***

## **1 THE MATTER TO BE DETERMINED**

- 1.1 The matter before the Authority is a dispute about a territorial authority's decision to refuse building consent for a new control tower at an airport unless a lift is provided.
- 1.2 The Authority takes the view that it is being asked to determine whether the tower is required to comply with clause D1.3.4(c) of the building code and if so whether it will comply with that clause without a lift.
- 1.3 In making its determination the Authority has not considered any other aspects of the Building Act 1991 or of the building code.
- 1.4 The Authority observes that it is unfortunate that the matter was not settled much earlier in the design process.

## **2 THE PARTIES**

- 2.1 The applicant was the owner of the building acting through a firm of architects. The other party was the territorial authority.

## **3 THE BUILDING**

- 3.1 The proposed building is an air traffic control tower on five main levels, which contain:
  - Level 1: Entrance, technical equipment room, and toilet facilities; gross floor area 40 m<sup>2</sup>, net floor area 25 m<sup>2</sup>.
  - Level 2: Training room; gross floor area 36 m<sup>2</sup>, net floor area 18 m<sup>2</sup>.
  - Level 3: Ready room; gross floor area 36 m<sup>2</sup>, net floor area 18 m<sup>2</sup>.
  - Level 4: Toilet facilities and chief controller's office; gross floor area 47 m<sup>2</sup>, net floor area 20 m<sup>2</sup>.

Level 5A: Control cab; gross floor area 45 m<sup>2</sup>, net floor area 37 m<sup>2</sup>. (Level 5 is an external balcony and crawl space intermediate between the office and the cab.)

3.2 Access is by one internal stairway. There is an external ladder for emergency egress.

#### 4 THE LEGISLATION

4.1 The relevant provisions of the Building Act are:

(a) Section 18:

**18. Matters before Authority**— An application to the Authority under section 17 of this Act shall be limited to whether or not, or to what extent, particular building work or proposed building work (including any actual or proposed demolition) complies with all of the provisions, or with any particular provision, of the building code, or to whether or not the exercise by a territorial authority of the powers referred to in section 17(1)(d) of this Act is unreasonable in relation to the provisions of the building code.

(a) In section 34:

(4) The territorial authority may grant a building consent subject to—

(a) Such waivers or modifications of the building code, or any document for use in establishing compliance with the building code, subject to such conditions as the territorial authority considers appropriate; and

(7) Notwithstanding subsection (4) of this section, in relation to any building to which section 47A of this Act applies, a waiver or modification relating to access and facilities for use by people with disabilities shall only be granted by the Authority in a determination issued under Part III of this Act which is in accordance with the requirements of the said section 47A.

(b) In section 47A:

**47A. Access and facilities for persons with disabilities to and within buildings**— (1) In any case where provision is being made for the construction or alteration of any building to which the public are to be admitted, whether on payment or otherwise, reasonable and adequate provision . . . shall be made for persons with disabilities who may be expected to visit or work in that building and carry out normal activities and processes in that building.

(2) Notwithstanding the provisions of subsection (1) of this section, in respect of the alteration of any existing building or premises, the Building Industry Authority may at any time by determination under Part III of this Act provide for a waiver or modification from all or any of the requirements of this section if, having regard to all the circumstances, the Building Industry Authority determines that it is reasonable to grant the waiver or modification.

(4) The provisions of this section shall apply to, but shall not be limited to, buildings, and parts of buildings . . . that are intended to be used for or associated with one or more of the following purposes:

(a) Land, sea, and air passenger transport terminals and facilities and interchanges, whether wholly on land or otherwise:

(f) Commercial buildings and premises for business and professional purposes, including computer centres:

- (g) Central, regional, and local government offices and facilities:
- (z) Other buildings, premises, or facilities to which the public are to be admitted, whether on payment or otherwise.

4.2 The relevant provisions of the building code are:

| Provisions   | Limits on application  |
|--|--|
| <p><b>D1 ACCESS ROUTES</b></p> <p><b>OBJECTIVE</b></p> <p><b>D1.1</b> The objective of this provision is to:</p> <p>(c) Ensure that people with disabilities are able to enter and carry out normal activities and functions within buildings.</p> <p><b>D1.3.2</b> At least one access route shall have features to enable people with disabilities to:</p> <p>(b) Have access to the internal space served by the principal access, and</p> <p>(c) Have access to and within those spaces where they may be expected to work or visit, or which contain facilities for personal hygiene . . .</p> <p><b>D1.3.4</b> An accessible route, in addition to the requirement of Clause D1.3.3, shall:</p> <p>(c) Include a lift complying with Clause D2 ``Mechanical Installations for Access" to upper floors where:</p> <p>(i) buildings are four or more storeys high,</p> | <p>Objective D1.1(c) shall apply only to those buildings to which section 47A of the Act applies.</p> <p>Performance D1.3.2 shall not apply to <i>Housing, Outbuildings Ancillary</i> buildings, and to <i>Industrial</i> buildings where no more than 10 people are employed.</p> |

**5. THE SUBMISSIONS**

**5.1 Submissions from the territorial authority**

5.1.1 The territorial authority made no specific submissions, but a letter to the applicant from the responsible officer said:

I have looked at the determination 95\003 approved by the Building Industry Authority and do not believe it relates to [the tower]. The Building Code clause D1.3.4(c)(i) quite clearly states that a building four (4) or more stories high shall have a lift.

The Building Act Section 34(7) states that only the Building Industry Authority can grant a waiver or modification to a building or proposed building that is subject to section 47A of the Act.

This is the major item holding up processing of the consent and approval will not be given until this is cleared up.

## 5.2 Submissions from the applicant

5.2.1 The applicant submitted that section 47A did not apply to the tower. It said:

- (a) Section 47A clearly refers to “buildings **to which the public are to be admitted** (our emphasis). The general public will not be admitted to airport traffic control towers for a variety of reasons. . . .” The major reasons were safety and security, and the applicant referred to both national and international civil aviation rules and the New Zealand National Aviation Security Programme.
- (b) The tower “does not readily fall within” any of the categories of building listed in section 47A(4).
- (c) “Section 47A(1) also refers to the provision of access for people with disabilities where [they] **may be expected to visit or work**” (applicant’s emphasis). It was “highly remote” that people with disabilities would visit or work in the tower because:
  - (i) Members of the general public would not normally be expected to visit the tower.
  - (ii) The applicant was unaware of any instance of a person with disabilities working in a control tower.
  - (iii) “It is highly improbable that a person with a disability requiring the use of a wheelchair, solely because of that person’s disability, *could* work in an airport traffic control tower.”
  - (iv) The tower “will predominantly be accessed by controllers and pilots who must pass medicals and meet physical criteria set by Civil Aviation Authority regulations. Mobility criteria are inherently necessary (to varying extents) for such work. For example, and importantly, tower controllers must have the ability to rapidly view 360 degrees of the sky, and to do so while simultaneously holding a telephone or undertaking other tasks.”

5.2.2 In response to a query from the Authority as to whether someone who could climb “accessible stairs” (as defined in the acceptable solution D1/AS1 in Approved Document D1) would be physically able to work in the tower, the applicant said:

Staff working in the control cab need full mobility in order to carry out their duties. The operation . . . is at times carried out by only one person [who] needs to have full walking mobility [because]:

- Staff working in the control cab . . . have to move rapidly from one side of the cab to the other . . . . On occasions a staff member also needs to exit the cab

onto the perimeter walkway to ascertain the position of aircraft and parachutists who may be operating in the hidden field of view directly above the cab roof.

- On-duty staff may need to use the toilet facilities . . . one level below the control cab. They can only do this between aircraft movements which at times requires a quick dash down and then up one level within the tower.
- In the case of the control tower having to be evacuated (eg during a fire alarm) there is no viable means of escape available for a disabled person.

Having regard to the above, it will be patently obvious that if someone cannot climb 'accessible stairs then they will be physically unable to work as an air traffic controller.

5.2.3 The applicant also submitted that section 47A ought not to apply to the tower because of various disadvantages that would result from the installation of a lift. Submissions on that point have been disregarded because what the Act ought to say, as distinct from what it does say, is beyond the Authority's jurisdiction.

## **6 DISCUSSION**

### **6.1 Outline**

6.1.1 The Authority gave careful and detailed consideration to the facts and the submissions from the parties. The matter eventually turned on the points discussed in 6.2 to 6.4 below. In very broad and general outline, those points may be summarised as follows:

- (a) Can the Authority waive or modify the applicable provisions of the building code for access and facilities for people with disabilities? See 6.2.1 below.
- (b) Can the Authority determine questions of law, and specifically whether the building is one to which section 47A applies? See 6.2.2 below.
- (c) However, the Authority must necessarily take a view on that question if it is to proceed with the determination. See 6.3 below.
- (d) Is a lift needed in order to comply with section 47A?
  - (i) Because a lift is required by clause D1.3.4(c)(i) of the building code? See 6.4.1 below.
  - (ii) Because a lift is necessary to make reasonable and adequate provision for the people who may be expected to visit or work in the building? See 6.4.2 below.

- 6.1.2 Comparing the tower with the general run of buildings, the Authority notes that if the tower had been of the same height but only three storeys, with the training room and the ready room at ground level, then the tower would have had a design occupancy of fewer than 50 persons (about 10 in fact), and a gross floor area on the two upper floors of less than 500 m<sup>2</sup> (65 m<sup>2</sup> in fact). On those figures, a lift would not be required under either clause D1.3.4(c)(ii) of the building code or clause 9.1.3.2 of NZS 4121. Much the same would be the case for a three storey tower of an increased footprint so as to have the training room and the ready room on the middle floor. However, in fact the tower comes within clause D1.3.4(c)(i) of the building code, being “4 or more four storeys high”, which requires a lift to be provided irrespective of design occupancy. The Authority must apply the law to the tower as proposed in the application for building consent.
- 6.1.3 The Authority also notes that there would be serious practical problems in making the tower, including the external balcony, accessible to people who cannot use accessible stairs without making it less suitable for its function as an air traffic control tower. The Authority cannot take any account of those problems because it has no power to waive the requirements of section 47A, the only matter that it may consider is whether section 47A does in fact require the tower to be accessible.

## **6.2 The Authority’s jurisdiction**

- 6.2.1 The Authority takes the view (as did the applicant) that section 47A(2) of the Building Act gives the Authority the power, by way of determination, to waive or modify the requirements for access and facilities for people with disabilities, but only in respect of the alteration of a building. The Authority also takes the view that section 34(7) does not enlarge that power. No-one has the legal power to waive or modify those requirements in respect of a new building.
- 6.2.2 Section 18 limits the matters that may be determined by the Authority to matters of compliance with the building code. The Authority has no jurisdiction to determine questions of law. However, in many cases the Authority must first answer such questions in order to decide whether it has the jurisdiction to consider a particular application, or whether all or any of the provisions of the building code apply to the building work concerned.

## **6.3 Does section 47A apply?**

- 6.3.1 The applicant submitted that section 47A does not apply to the tower.
- 6.3.2 In Determination 95/003, the Authority took the view that section 25 of the Disabled Persons Community Welfare Act (now effectively section 47A of the Building Act) meant that the building code’s provisions for access and facilities for people with disabilities did not apply to buildings in which people with disabilities cannot be expected to visit or work.

6.3.3 In Determination 98/002 the Authority took the view that:

. . . the buildings to which section 47A applies come within one or both of the following categories:

*Category A:* Any building to which the public are to be admitted, whether on payment or otherwise.

The Authority does not attempt to define or interpret the meaning of that phrase.

*Category B:* Any building for one of the purposes listed in section 47A(4) whether or not the public are to be admitted.

Clearly, the public are to be admitted to some category B buildings, such as passenger transport terminals and theatres. However, the Authority does not consider that buildings such as defence facilities and private schools, for example, can properly be described as “buildings to which the public are be admitted”.

6.3.4 The Authority accepts the applicant’s arguments that security requirements mean that the tower is not a building to which the public are to be admitted.

6.3.5 As to whether the tower is used for one of the purposes listed in section 47A(4):

(a) The tower clearly comes within the description “air passenger transport terminals and facilities” in section 47A(4)(a). The Authority takes the view that those words cannot be read as referring to buildings that serve as facilities for passengers as distinct from buildings that serve as facilities for air transport.

(b) The terms “commercial building” and “premises used for business and professional purposes” used in section 47A(4)(f) are not defined in the Act. The Authority recognises that the tower appears to come within the classified use “Commercial” defined in clause A1 of the building code, but takes the view that the definitions in the building code do not apply to words used in the Building Act. If a term is not defined in the Act, then the Authority takes the view that it is to be given its ordinary and natural meaning in context. The Authority considers that an air transport control tower would not ordinarily and naturally be described as either a commercial building or an industrial building, despite the fact that for the purposes of the building code it might have to be put in the purpose group that includes one of those classifications.

6.3.6 The Authority concludes that the tower comes within section 47A(4)(a) and is therefore a building to which section 47A applies.

6.3.7 The basic requirement of section 47A for buildings to which it applies is that:

reasonable and adequate provision . . . shall be made for people with disabilities who may be expected to visit or work in the building and carry out normal activities and processes in that building.

6.3.8 The question, therefore, is whether a lift is necessary to fulfil that requirement.

## **6.4 Is a lift required?**

### *6.4.1 General*

6.4.1.1 The Authority now takes the view that a better way of putting the point made in Determination 95/003 mentioned in 6.3.2 above is:

The provisions of the building code for access and facilities for people with disabilities apply only to the extent necessary to make reasonable and adequate provision for the people who may be expected to visit or work in the building concerned.

Thus, although clause D1.3.4(c)(i) of the building code requires a lift to be provided, the real question is whether a lift is necessary to make reasonable and adequate provision for the people who may be expected to work in the tower.

6.4.1.2 The Authority concludes that whether a lift is required depends on whether people who may be expected to work in the tower need a lift in order to carry out the normal activities of such work. In other words, whether people who cannot use accessible stairs may be expected to work in the tower. (Because the application was confined to the need for a lift, the Authority assumes that the tower will comply with the requirements of clause D1.3.4(g), (h), and (i) for “accessible stairs”.) That question is discussed in 6.4.2 below.

6.4.1.3 In the light of the discussion in 6.4.2 below, the Authority does not need to express an opinion about the argument that, for this particular building, the provision of accessible stairs amounts to reasonable and adequate provision for access by people with disabilities. That seems to be the case with small two- and three-storey buildings that are not required to have lifts under either clause D1.3.4(c)(ii) and (iii) of the building code and the corresponding provisions of NZS 4121 as discussed in 6.1.2 above. However, there are difficulties in applying that argument to new buildings that the building code and NZS 4121 specifically required to have lifts. The Authority has no power to waive or modify those requirements.

### *6.4.2 Are people who cannot use accessible stairs to be expected to work in the tower?*

6.4.2.1 The relevant words of section 47A are “reasonable and adequate provision . . . shall be made for persons with disabilities who may be expected to visit or work in that building and carry out normal activities and processes in that building”. Obviously, people who, because of their disabilities, cannot carry out normal activities in a building cannot be expected to work in that building. In this case, people who cannot climb accessible stairs cannot carry



out any activities on the upper storeys of the tower unless a lift is provided. However, that is not to say that if a lift is provided those people will be able to carry out the normal activities involved in working in the tower.

6.4.2.2 In Determination 97/009<sup>1</sup> the Authority said:

It is not for the Authority to adjudicate what people can or cannot achieve in a work environment, that will depend on the abilities of the individuals concerned. The Authority takes the view that:

- (a) The provisions of the building code for access and facilities for use by 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 . . . 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.

6.4.2.3 The Authority recognises that some people with disabilities might possibly be able to work in the tower, whether as pilots or as air traffic controllers. That includes people who cannot climb accessible stairs. An obvious example is Sir Douglas Bader, who continued to work as a pilot after losing both legs. It is always possible that a pilot or a controller might become unable to climb accessible stairs because of injury or disease.

6.4.2.4 However, section 47A(1) does not use the term “might possibly work in the building”, it uses the term “may be expected . . . to work in the building”. The Authority takes the view that those words do not apply to the subjective expectations of any particular person but must be applied objectively.

6.4.2.5 The *Concise Oxford Dictionary* defines “expect” as “regard as likely; assume as a future event or occurrence”. In the *Weldon Properties* case<sup>2</sup>, it was held that in the context of s 64 of the Building Act, “likely” does not mean “probable”, as that puts the test too high. On the other hand, a mere possibility is not enough. What is required is “a reasonable consequence or [something which] could well happen”.

6.4.2.6 The Authority takes the view that the relevant words of section 47A are to be interpreted by applying those definitions.

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<sup>1</sup> See also Determinations 95/003, 95/006, and 95/008, and the Authority’s statement “Access and Facilities for People with Disabilities” published in *Building Industry Authority News* No. 23, June 1993.

<sup>2</sup> *Auckland CC v Weldon Properties Ltd* 8/8/96, Judge Boshier, DC Auckland NP2627/95.

6.4.2.7 Adopting an objective approach, applying those definitions, and taking account of what people working in the tower must do in the course of their work, as indicated 5.2.1(c) and 5.2.2 above, the Authority notes that:

- (a) It is undoubtedly possible that some people who cannot climb accessible stairs are, or are capable of being, pilots or air traffic controllers.
- (b) However, pilots and air traffic controllers form a small proportion of the population as a whole. Those who cannot climb accessible stairs form a small proportion of that small proportion.

Accordingly, if the tower did have a lift, pilots or air traffic controllers who could not climb accessible stairs would not be sufficiently likely to work in the tower for that to be assumed as a future event or occurrence, see 6.4.2.5 above.

6.4.2.8 The Authority therefore considers that people who cannot climb accessible stairs cannot be expected to work in the tower.

## **6.5 Conclusion**

6.5.1 The Authority concludes that:

- (a) As to the Authority's jurisdiction:
  - (i) It has no power to waive or modify the applicable provisions of the building code for access and facilities for people with disabilities.
  - (ii) It cannot determine questions of law, and specifically whether the building is one to which section 47A applies.
  - (iii) However, it must necessarily take a view on that question if it is to proceed with the determination.
  - (iv) It takes the view that section 47A does apply.
- (b) As to whether a lift is needed in order to comply with section 47A:
  - (i) A lift is required by clause D1.3.4(c)(i) of the building code only if a lift is necessary to make reasonable and adequate provision for the people who may be expected to visit or work in the building.
  - (ii) A lift is necessary for that purpose only if people who cannot climb accessible stairs may be expected to work in the building.
  - (iii) People "may be expected" to work in the building only if they are pilots or air traffic controllers and only if their working in the building is a likely event or occurrence.

- (iv) People who cannot climb accessible stairs cannot be expected to work in the tower because so few of them will have the necessary skills and abilities to do so.

6.5.2 It follows that a lift is not required in order to make adequate and reasonable provision for people with disabilities who may be expected to visit or work in the tower.

## **7 THE AUTHORITY'S DECISION**

7.1 In accordance with section 20 of the Building Act, the Authority hereby reverses the decision of the territorial authority to refuse building consent, and determines that the Building Act does not require a lift to be provided in the tower.

Signed for and on behalf of the Building Industry Authority on this 5<sup>th</sup> day of September 2001

W A Porteous  
Chief Executive