

Determination 2009/90

Refusal of a building consent for the installation of a lift at Lincoln University, Ellesmere Junction Road, Lincoln

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, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of the Department. The applicant is the owner, Lincoln University (“the applicant”), and the other party is the Selwyn District Council (“the authority”) carrying out its duties and functions as a territorial authority and a building consent authority.
- 1.2. I take the view that the matter for determination, in terms of sections 177(d) and 188², is whether the authority correctly exercised its powers under section 112(2) when it declined to give written notice to the applicant and, as a consequence, refused to issue a building consent for the installation of a new lift and the removal of a stair (“the proposed lift alterations”) to an existing four-storey university building.
- 1.3. The applicant has produced a report (“the Fire Summary”) that describes the work to upgrade the fire safety provisions of the building that is in addition to the proposed lift alterations. The applicant has said that if it is required to carry out the work described in the Fire Summary report the costs associated with that work will mean that it will not carry out the proposed lift alterations.
- 1.4. In making my decision, I have considered the submissions of the parties, the reports of the independent expert commissioned by the Department to advise on this dispute (“the expert”), and the other evidence in this matter.
- 1.5. The building has a use that falls within Schedule 2 of the Act, therefore the requirements of Act with respect to the provision of access and facilities for people with disabilities apply to the building as a whole. However, there are no matters of

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

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

dispute that arise from the application of these requirements of the Act, and I have not considered this aspect in the determination.

- 1.6. I have not considered any other aspects of the Act or the Building Code. This determination considers code-compliance in terms of section 112, and my decision is not to be considered in terms of a waiver of the requirements of the Building Code as set out in section 69.
- 1.7. I have consulted with both the Office for Disability Issues (“the ODI”), and the New Zealand Fire Service (“the NZFS”) in accordance with section 170 of the Act.

2. The building work

- 2.1 The building is an existing 4-storey university building that has office and function spaces on the ground floor, a double-height exam hall, and associated amenities on the first floor, and small meeting rooms overlooking the exam hall on the third floor.
- 2.2 The proposed alterations consist of the installation of a new lift situated outside the building’s footprint, serving the ground, first and third floors. One of the two existing flights of stairs, between the ground and the first floor in the main circulation foyer, is to be removed.

3. Background

- 3.1 On 2 April 2007 the applicant applied to the authority for a building consent to carry out the proposed alterations.
- 3.2 A firm of consulting engineers (“the consulting engineers”) produced a ‘Producer Statement - Design’ dated 3 July 2008 for the structural work associated with the installation of the lift. The consulting engineers also produced a Fire Summary report dated 3 June 2008, for the future upgrade of the building’s fire safety features.
- 3.3 From the date of the consent application, correspondence passed between the parties concerning the authority’s requests for additional information.
- 3.4 The NZFS Design Review Unit (“the DRU”) provided a ‘Building Memorandum’ dated 28 August 2008 that assessed the fire protection of the amended building in terms of section 112. The DRU considered that the documentation provided with the application was incomplete and also raised the following main concerns:
 - means of escape
 - compliance of certain items with the Building Code
 - firefighting needs, with emphasis on the requirements to install fire hydrants and clarification of the NZFS vehicular access to the property.
- 3.5 On 24 November 2008, the authority declined the application for a building consent because the authority’s request for additional information had not been satisfied. The authority has earlier detailed a number of matters that required clarification which also said:

Council [was being asked] to overlook certain Building Code requirements under Section 112 (2)

- Provide an explanation as to how you have deemed that the alteration would not take place if the building were required to comply with the relevant provisions of the building code.
- Detail how the improvements you have referenced out-weigh the detriment that is likely to arise as a result of the building not compiling with other relevant provisions of the building code ...

3.6 The application for a determination was received by the Department on 24 March 2009.

4. The submissions

4.1 In covering notes forwarded with the application, the applicant stated:

- The applicant was of the opinion that section 112(2) was relevant to its application and listed the critical points regarding subsections (a) to (c) of that section.
- The work detailed in the Fire Summary for improving the building's means of escape from fire was estimated to cost \$157,000. (I note the cost estimate has been prepared by a firm of quantity surveyors in June 2006.)
This cost was in addition to the proposed alterations, and (as the applicant has stated) if the work was required it would mean that the lift alterations would not take place.
- The proposed alterations will result in improvements to those attributes of the building that relate to means of escape from fire or access and facilities for persons with disabilities.
- The improvements resulting from the proposed alterations outweigh any detriment that is likely to arise as a result of the building not complying with the relevant provisions of the Building Code.

The submission concluded that the authority had made a wrong decision based on wrong measures, and the authority had not offered any explanation of the demerits that it had considered.

4.2 The applicant provided copies of:

- plans and the specifications for the proposed alterations
- the consulting engineers' 'Producer Statement - Design' dated 3 July 2008
- the consulting engineers' Fire Summary report, dated 3 June 2008³, plus marked-up drawings
- the quantity surveyors' cost estimate, dated 13 June 2006, for the work contained in the Fire Summary
- the DRU's 'Building Memorandum', dated 28 August 2008
- correspondence with the authority.

³ The expert's report notes that the Fire Summary was originally completed before this date but updated on 3 June 2008.

- 4.3 In a letter to the Department dated 23 April 2009, the authority set out the background to the dispute. The authority was not satisfied on reasonable grounds that the provisions of the Building Code would be met if the proposed alterations were carried out in accordance with the submitted plans and specifications.
- 4.4 The authority provided copies of;
- the DRU's 'Building Memorandum' dated 28 August 2008
 - correspondence with the applicant.
- 4.5 The parties made the following submissions in response to the expert's report (refer paragraph 6.9).
- 4.5.1 The authority believed the determination was about whether sufficient information had been provided by the applicant, and referred to the 'paucity of detail supplied with the building consent application', and that the applicant 'will need to take the issues raised in the expert's report into account when they re-apply for a new building consent'. The authority also said the expert's report 'did not address issues relating to access and facilities for people with disabilities such as audio loops and reception counters etc.'
- 4.5.2 The applicant reiterated its understanding of section 112(2) and restated the benefits of installing the lift would 'outweigh the building's failure to comply as nearly as is reasonably practicable with the provisions of the building code as specified by the ... authority'. The applicant also said 'the removal of ... stair is considered important to provide a more open and safer environment for, example, people in wheelchairs. However, considering the comments with regards to egress this may have to be reconsidered to increase occupancy levels in the future.'
- 4.5.3 In response I note the authority did not consider the requirements of section 112(2) in its submission and I consider whether sufficient information had been supplied, or not, is not the matter at issue.
- 4.6 Copies of a draft determination were forwarded to the parties on 8 September 2009.
- 4.7 The authority accepted the draft determination and in a covering letter to the Department dated 17 September 2009, commented on one paragraph that I have subsequently amended.
- 4.8 The applicant also accepted the draft and in a covering letter the Department dated 22 September 2009 noting that the expert was of the opinion that the building was not dangerous and that the removal of the stair was the main issue that may have had an impact on the authority's decisions. The applicant also stated that due to the time taken since its initial application to the authority and now, the work was now unlikely to proceed.
- 4.9 The NZFS responded in an email to the Department dated 30 September 2009, stating that they supported the decision reached in the draft determination without further comment.
- 4.10 In an email to the Department dated 29 September 2009, the ODI agreed with the decision reached in the determination but had concerns regarding the way the

determination applied section 112(2)(c). The ODI's concerns are discussed in paragraph 7.12 to 7.15.

5. The legislation

5.1 The relevant section of the Act is section 112 and provides:

112 Alterations to existing buildings

- (1) A building consent authority must not grant a building consent for the alteration of an existing building, or part of an existing building, unless the building consent authority is satisfied that, after the alteration, the building will—
 - (a) comply, as nearly as is reasonably practicable... , with the provisions of the building code that relate to—
 - (i) means of escape from fire; and
 - (ii) access and facilities for persons with disabilities (if this is a requirement in terms of section 118); and
 - (b) continue to comply with the other provisions of the building code to at least the same extent as before the alteration.
- (2) Despite subsection (1), a territorial authority may, by written notice to the owner of a building, allow the alteration of an existing building, or part of an existing building, without the building complying with provisions of the building code specified by the territorial authority if the territorial authority is satisfied that,—
 - (a) if the building were required to comply with the relevant provisions of the building code, the alteration would not take place; and
 - (b) the alteration will result in improvements to attributes of the building that relate to—
 - (i) means of escape from fire; or
 - (ii) access and facilities for persons with disabilities; and
 - (c) the improvements referred to in paragraph (b) outweigh any detriment that is likely to arise as a result of the building not complying with the relevant provisions of the building code.

6. The experts' report

- 6.1 As stated in paragraph 1.4, I commissioned a fire safety engineer, who is a chartered professional engineer with specialist expertise in fire matters, to provide me with a report relating to the building documentation provided with the building consent application and the submissions made by the applicant. The expert also visited the building on 15 June 2009 and prepared a report dated 30 June 2009.
- 6.2 The report detailed the expert's opinion regarding the existing building, the impact of the proposed lift alterations, and the proposed upgrade work detailed in the Fire Summary.
- 6.3 The existing building has a heat detection system and manual call points. It has emergency lighting to the main stairs. While the building does not meet current Building Code requirements, the expert does not consider the building dangerous.

- 6.4 The majority of the expert's report relates to the work detailed in the Fire Summary. With the exception of occupancy numbers, I consider the question of the adequacy of the fire design contained in Fire Summary is not directly relevant to whether the proposal lift alterations should be granted under section 112(2), as discussed in paragraph 7. However, I have included the expert's comments here for completeness, and to assist the parties should this work be contemplated in future.
- 6.5 The expert noted that the consulting engineers had justified the Fire Summary using an "as nearly as is reasonably practicable" approach. The expert was of the opinion that there were matters in the Fire Summary that required more information or justification. In the expert's opinion it was not possible to conclude that, with the Fire Summary in its current form, the building will comply "as nearly as is reasonably practicably" with the Building Code to the extent required by the Act.
- 6.6 The Fire Summary assessed the building's means of escape as being adequate should the single flight of stairs be removed. However, in the expert's opinion, if the apparently low occupancy numbers set out in the Fire Summary were to be exceeded, the adequacy of the means of escape would be drawn into doubt. Accordingly, it was likely that the removal of the single flight of stairs would lead to a situation that was not acceptable in terms of fire safety.
- 6.7 The expert considered that it would have been reasonable for the authority to provide acceptance under section 112, had the applicant not proposed to remove the single flight of stairs adjacent the lift in the ground floor lobby.
- 6.8 In summary, the expert considered the Fire Summary required the following matters to be clarified:
1. Calculations that established the occupancy of the separate areas detailed in the Fire Summary had not been provided.
 2. The exam hall occupancy appeared to be low based upon the area of the hall. The use of the exam hall needed to be clarified and justification was required of the low occupant load and the ability to police this. Alternatively, the Fire Summary needed to take into account a higher occupant load to the exam hall.
 3. Justification of the 50 person limit in the northwest lounge on the ground floor was required, as this area had the ability to accommodate more than 50 people. Details on how this limit will be policed were also required. Alternatively, the Fire Summary needed to cater for an occupancy in excess of 50 people.
 4. Further justification, or analysis, was necessary for many of the design decisions that had been based on an "as nearly as is reasonably practicable" approach. These included, but were not limited to:
 - a. Not upgrading to a smoke detection system as required by Table 4.1 of C/AS1.
 - b. Whether emergency lighting should be installed to comply with Clause F6.
 - c. The argument for no-smoke lift lobbies could be further justified by installing smoke detection which will give earlier warning than the existing heat detection.
 5. Further information was necessary to establish the non-compliance of the existing heat detection and emergency lighting systems

6. Information on the means of escape with respect to the following was required:
 - a. The two egress stairs from the 3rd floor were not separated by 8 metres. Therefore, as per paragraph 3.8.3 of C/AS1, they should be considered as a single means of escape. This requires occupant limitation and smoke detection.
 - b. Details regarding loose seating in the exam hall had not been provided as required by paragraph 3.9.10 of C/AS1.
 - c. Egress through adjoining buildings was also a component of this building's means of escape. However, details of compliance with paragraph 3.6 of C/AS1 had not been provided with respect to this.
7. Further information was required regarding spread of fire in respect to the following:
 - a. New Georgian-wired glazing was to be provided between the third floor and the exam hall. However, Georgian-wired glazing did not provide an insulation rating and, given the building has no sprinklers, insulated glazing would be required. Further justification was necessary regarding the proposed glazing.
 - b. Existing Georgian-wired glazing is present in many areas in the building. Justification was necessary for using this type of fire rated glazing (with no insulation rating), in a non-sprinklered building.

6.9 The expert's report was forwarded to the parties for comment on 1 July 2009. Both parties made submissions in response, refer paragraphs 4.5.1 and 4.5.2.

7. Discussion

The lift installation

- 7.1 I note that if this was a new building, Building Code Clause D1.3.4(c)(ii) would normally require the installation of a lift.
- 7.2 The provisions of section 112 are directly relevant to the applicant's proposed alterations. The application of section 112(1) must be considered first before the application of section 112(2).
- 7.3 Section 112(1) states that an authority must not grant a building consent for the alteration of part of a building unless it is satisfied that, after the alteration, the building will comply to the same extent it did prior to the alteration and that it must comply as nearly as is reasonably practicable with the provisions of the Building Code relating to access and facilities for people with disabilities and means of escape from fire.
- 7.4 The authority accepts that the building will comply as nearly as is reasonably practicable with the Building Code with respect to access and facilities for people with disabilities.
- 7.5 However, the applicant has submitted (refer paragraph 4.1) that the proposed alterations will not take place if 'full compliance' with the Building Code is required for means of escape from fire. (In this instance I take 'full compliance' to mean

compliance with the Building Code to the extent required by the Act under section 112(1).) The applicant accepts that the proposed lift alterations, including the removal of the stairs, mean the building will not comply ‘as nearly as is reasonably practicable’ with the Building Code with respect to means of escape from fire.

- 7.6 The applicant has sought to invoke section 112(2). Section 112(2) provides for the situation where an owner decides not to undertake proposed alterations because the upgrade requirements of section 112(1) relating to means of escape from fire and access and facilities for persons with disabilities, and the need for the building to continue to comply with the other provisions of the building code to the same extent as before the alteration, are considered to be too onerous or costly. Section 112(2) enables an authority to approve alterations where it is considered by the authority that the benefits of partial compliance with the requirements of section 112(1) will outweigh the detriment of not fully complying with all of those requirements.
- 7.7 Under section 112(2) an authority may, in general terms, allow an alteration to part of an existing building if it is satisfied that:
- (a) if the building has to comply as nearly as is reasonably practicable with the provisions of the building code relating to the means of escape from fire and access and facilities for persons with disabilities, and has to continue to comply with the other provisions of the building code to the same extent as before the alteration, the alteration would not take place; and
 - (b) the alteration will result in improvements to attributes of the building that relate to means of escape from fire or access and facilities for persons with disabilities; and
 - (c) any improvements referred to in (b) above outweigh any detriment that is likely to arise from non-compliance with the requirements of section 112(1) (i.e., the upgrade requirements relating to means of escape from fire and access and facilities for persons with disabilities, and the building continuing to comply with the other provisions of the building code to the same extent as before the alteration).
- 7.8 I am of the opinion that all three of the above criteria must be met for an authority to allow an alteration in terms of section 112(2). With respect to this situation, I note the following:
- (a) The applicant has indicated that the proposed alterations will not take place if full compliance with the Building Code is required in terms of the requirements of section 112(1); and
 - (b) The addition of the lift will improve the access for people with disabilities; and
 - (c) The applicant has provided an estimate of \$157,000, completed in June 2006, for the cost of bringing the building into compliance as nearly as is reasonably practicable with the means of escape from fire. This is additional to the cost of the proposed lift alterations.
- 7.9 I accept that the proposed alterations will result in improvements relating to access and facilities for persons with disabilities. However, the removal of the stair would have a detrimental impact upon the fire safety features of the building.

- 7.10 Accordingly, I am of the opinion that if the stair is removed as part of the proposed lift alterations, section 112(2)(c) will not be satisfied. I consider the improvements in access and facilities for persons with disabilities will not outweigh the detriment that is likely to arise as a result of the building not complying with the provisions of the Building Code relating to means of escape from fire to the same extent as before the alterations.
- 7.11 As the building consent application includes the removal of the stair, I consider that the proposed alteration does not comply with the requirements of section 112(2), and that the authority was correct in refusing to issue a notice under that provision approving the proposed lift alterations. I would have reached a different view had the stair remained in place.

The ODI submission regarding section 112(2)(c)

- 7.12 The ODI considers section 112(2)(c) simply requires any improvements to access and facilities for persons with disabilities to outweigh the detriment of not fully complying with the relevant access provisions of the building code. Similarly, any improvements to means of escape from fire must outweigh the detriment of not fully complying with the relevant means of escape from fire provisions of the building code. The ODI rejects any suggestion that improvements to access and facilities for persons with disabilities can be weighed against the detriment likely to arise as a result of the building not complying with means of escape from fire or not continuing to comply with other provisions of the building code to the same extent as before the alteration.
- 7.13 As the ODI's suggested approach would confine section 112(2)(c) to considering whether improvements to access outweigh the detriment of not fully complying with the relevant access provisions of the building code, the ODI's approach would introduce a new test for alterations that is inconsistent with the purpose of section 112(1). The ODI's suggested approach would allow a wide range of alterations including those where there were no improvements to the means of escape from fire and the building did not continue to comply with the other provisions of the building code to the same extent as before the alteration. All that would be required for the alterations to be allowed under section 112(2)(c) would be for the improvements to access and facilities for persons with disabilities to outweigh the detriment of not complying as nearly as reasonably practicably with the provisions of the building code relating to access.
- 7.14 I am unable to agree with the ODI's suggested approach to section 112(2)(c). The provision requires the improvements in section 112(2)(b) to be weighed against the detriment of not complying with "the relevant provisions of the building code". The ODI's suggested approach requires these words to be read narrowly as a reference to the provisions of the building code that only relate to the improvements themselves. However, the words in section 112(2)(c) have a specific meaning and are wider than that. The identical phrase is used earlier in section 112(2)(a) to refer to section 112(1) and to the requirements that an alteration must satisfy before a building consent can be granted. I consider that where the same phrase is used within the same provision it must be given the same meaning. Thus, section 112(2)(c) requires the improvements referred to in section 112(2)(b) to be balanced against the

detriment of not fully complying with the requirements for an alteration in section 112(1).

- 7.15 This approach is consistent with the purpose of section 112(2), which confers a limited discretion on an authority to allow certain alterations to proceed notwithstanding they do not comply with the requirements of section 112(1). Pursuant to section 112(2) the improvements to access and facilities for persons with disabilities or means of escape from fire must outweigh the detriment of not fully complying with the requirements of section 112(1).

8. What is to be done now?

- 8.1 It is for the applicant to decide whether it wishes to amend the proposed alterations so they comply with section 112. If the applicant wishes to proceed with the installation of the lift and is prepared to retain the stair, then it should provide the authority with relevant amended documentation and apply for a building consent in accordance with those amendments.
- 8.2 Should the applicant wish, in the future, to carry out the fire upgrading work as proposed in the Fire Summary, I strongly suggest the applicant consider the findings of the expert as summarised in paragraph 6.8.

9. The decision

- 9.1 In accordance with section 188 of the Act I determine that the decision of the authority in exercising its powers under section 112(2) in declining to give written notice to the applicant and, as a consequence, refusing to issue a building consent for the installation of a new lift and the removal of a stair, is confirmed.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 15 October 2009.

John Gardiner
Manager Determinations