



Determination 2010/089

Access for people with disabilities to a landscaped garden area at 12 Hazeldean Road, Christchurch



1. The matters 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 that Department.

1.2 The parties to this determination are:

- the owner of the property (including the buildings and landscaping on it), Hazeldean Business Park Limited (“the applicant”), acting through its agent (“the agent”)
- Christchurch City Council (“the authority”) carrying out its duties and functions as a territorial authority and a building consent authority.

1.3 The Office for Disability Issues (“the ODI”) at the Ministry of Social Development has been included as being a department with which the Chief Executive must consult under section 170 of the Act.

¹ The Building Act 2004, 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

- 1.4 The dispute between the parties relates to the authority's decisions to issue a notice to fix for the site works.
- 1.5 The reason given by the authority for this decision was because a sunken garden, which formed part of the landscaping for the site works ("the sunken garden"), did not comply with the requirements of Clause D1.1 of the Building Code (Schedule 1 of the Building Regulations 1992).
- 1.6 Therefore, I take the view that the matters for determination² are:
- whether the sunken garden complies with Clause D1 of the Building Code
 - whether the authority was correct to issue a notice to fix for the building work.
- 1.7 In making my decision, I have considered the submissions of the parties and the other evidence in this matter. I have not considered any other aspects of the Act or of the Building Code.

2. The building work

- 2.1 The building work is the site works for a new business park development. It includes gardens, paved areas, access ways and car parks surrounding a number of buildings within the business park.
- 2.2 The area in dispute is a sunken garden located in the centre of the business park. The garden is adjacent to two office buildings and a cafe building. The garden was built as a design feature in an otherwise flat site, and forms a proportionally small part of the extensive gardens for the site. The garden and the site works have been constructed in accordance with the consented plans.
- 2.3 The sunken garden has a feature wall on its north-western edge and is surrounded by paved access ways at ground level, planted garden areas and timber decks. I do not have exact measurements for how far the centre of the garden is sunk below ground-level, but from photos supplied by the applicant it appears to be less than 1m. Most of the central sunken area of the garden is covered in lawn. It can be accessed by flights of steps on its southern and eastern sides. To the northwest of the sunken garden is a large lawn area at ground level with seating. The feature wall and a paved access way separate the two gardens.

3. The background

- 3.1 The authority issued a building consent (No. 10086854) for the building work on 25 August 2008 under the Building Act 2004. The building consent was stated to apply only to stage one, which was the site works for the business park.
- 3.2 The authority carried out a site inspection of the building works on 4 June 2009. The site inspection report stated that access to the sunken garden area needed to be addressed to make it compliant with Clause D1 of the Building Code and NZS 4121³.

² In terms of sections 177(a) and 177(b)(iv) of the Building Act 2004 (prior to 7 July 2010).

³ New Zealand Standard NZS 4121: 2001 Design for access and mobility – buildings and associated facilities.

- 3.3 The applicant's agent wrote to the authority on 3 July 2009 with respect to the site inspection report. Among other matters, the applicant queried whether the requirements of the Building Act applied to the garden in question as it was not 'siteworks associated with the building'.
- 3.4 A further site inspection by the authority on 13 July 2009 noted that accessibility issues with respect to the sunken garden area had yet to be rectified.
- 3.5 Various emails then passed between the parties regarding the application of section 118 of the Act to the sunken garden area.
- 3.6 On 12 October 2009, the authority issued a notice to fix for the site works. The notice stated:

Particulars of contravention or non-compliance

The associated landscaping for the above Building Consent does not meet the requirements of Section 117–119 of the New Zealand Building Act 2004 or the approved documents.

In particular Clause D1.1. Section C, states the following,

Ensure that people with disabilities are able to enter and carry out normal activities and functions within the buildings.

Associated landscaping is deemed part of the Building.

To remedy the contravention or non-compliance you must

Allow for people with disabilities to access the common landscaped areas, or you may choose to seek a Determination from the Department of Building and Housing.

- 3.7 On 2 December 2009, the authority issued an updated notice to fix. Other than the new date, the wording of the notice was identical to the original.
- 3.8 On 4 December 2009, the agent emailed the authority with respect to the notice to fix. A drawing attached to the email highlighted the accessible routes surrounding the sunken garden and 'the proposed Disabled Access to the sunken garden area'. The agent proposed a solution of adding handrails to one of the flights of stairs leading down into the garden and queried whether 'one set meets the requirements'.
- 3.9 In reply, the authority emailed the agent later that day stating that, 'To comply with accessibility a ramp would also be required for wheelchair access'.
- 3.10 On 15 December 2009, the authority again emailed the agent confirming that a further site inspection had been carried out and that 'the sunken garden has been constructed according to the approved plans'. The authority stated that the issue was now whether the garden complied with section 118 of the Act.
- 3.11 On 22 April 2010, the authority issued a further updated notice to fix. Other than the new date, the wording of the notice was identical to the original.
- 3.12 The Department received an application for a determination with respect to the building work on 27 May 2010.

4. The submissions

4.1 In a letter dated 26 May 2010 accompanying the application for a determination, the agent asked for a determination on the following matters.

- a) Can the [authority] issue a Notice to Fix for works constructed to approved consented documents.
- b) If the answer to a) is yes, does a landscaped feature, which is not an access route, require disabled access of the type required?

4.2 The letter also stated that the sunken garden had been constructed in accordance with the approved building consent documents, and that the authority ‘accepted this’, but was still requiring ‘direct access to the sunken garden as it is a public place’. The letter reiterated the applicant’s suggestion of adding handrails to some of the steps leading to the sunken garden, but noted that the authority required ramp access.

4.3 The letter referred to an accessibility plan, dated 28 January 2010, which showed the basis for the original design concept for the sunken feature landscape garden area, and stated that:

The sunken area is a small part of the overall landscaping and was designed more as an architectural feature, as noted in the [landscape architect’s] drawing attached (who were the original designers) rather than a congregating area for the general public.

4.4 The application included copies of:

- the accessibility plan (refer to paragraph 4.3)
- the plans for the site works that formed the basis for the original building consent
- the building consent, site inspection notices and notices to fix
- correspondence between the parties about the sunken garden
- photos of the sunken garden as constructed.

4.5 The authority acknowledged the application, but did not make a submission.

4.6 A draft was issued to the parties and the ODI for comment on 16 August 2010. The parties accepted the draft without comment, and the ODI agreed with the decision reached in the draft.

5. Discussion

5.1 This determination concerns access into the sunken garden itself. There is no dispute that the access routes linking the buildings that surround the garden and the other landscaped areas are accessible, or that the garden interrupts these access routes. Instead, the dispute is entirely about whether the sunken garden needs to be made accessible for people with disabilities by providing an accessible route (i.e. a ramp) into it.

5.2 Application of the legislation

5.2.1 The applicant, in the application for a determination and earlier correspondence with the authority, has queried whether the sunken garden can be considered part of the buildings (given that it does not form part of any accessible route into or between the buildings) and hence whether the requirements of the Clause D1 apply to it.

5.2.2 The business park development (including its associated site works) is new building work and must comply with both the Building Act 2004 and the Building Code. The relevant part of the Act is sections 117 to 120, which relate to ‘Access to buildings by persons with disabilities’. Section 117 states that:

In sections 118 to 120, unless the context otherwise requires, building includes—

(a) parts of a building (including driveways, access ways, passages within and between complexes and developments, and associated landscaping (if any));

5.2.3 Section 118 sets out that when provision is being made for the construction of any building to which members of the public are to be admitted:

Reasonable and adequate provision by way of access...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.

Section 118 applies to the buildings listed in Schedule 2 of the Act, which include:

(f) commercial buildings and premises for business and professional purposes, including computer centres.

5.2.4 It is clear that, for the purposes of sections 118 to 120, the landscaping surrounding the buildings in the business park is included within the definition of building. Therefore reasonable and adequate provision for access must be made for people with disabilities. What constitutes ‘reasonable and adequate provision’ for access is to be assessed against the performance requirements set out in the Building Code, namely in Clause D1 Access routes.

5.3 Compliance with the Building Code

5.3.1 Having established that the requirements in Clause D1 of the Building Code apply to the sunken garden, the question then becomes whether the garden does in fact comply with these requirements.

5.3.2 One of the objectives of Clause D1 is to:

D1.1(c) Ensure that people with disabilities are able to enter and carry out normal activities and functions within buildings.

This objective is supported by the performance requirement that:

D1.3.2 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...

- 5.3.3 The requirements for access for people with disabilities set out in both the Act and the Code are very important and their intention is clear. Section 16 states that ‘The [Building Code] prescribes functional requirements for buildings and the performance criteria with which buildings must comply in their intended use.’ The issue is whether the building’s design and construction enables people with disabilities to ‘work or visit’ and ‘carry out normal activities and functions’ within it. In making this assessment I must consider the activities and experiences that people might be seeking when they use the gardens in the business park.
- 5.3.4 Determination 2004/13, which considered the access and facilities for people with disabilities, found that:
- The seating areas of the tavern are spaces where people with disabilities may be expected to work or visit. ...
- The territorial authority submitted that there was no suggestion in clause D1.3.2 that access need be provided to only parts of the spaces in which people with disabilities may be expected to work or visit. In this case, there was “neither reasonable or adequate provision for access by wheelchairs to the raised seating areas that form a significant portion of the public part of the building.”
- The [Building Industry Authority, the predecessor to the Department] disagrees, and notes that NZS4121 requires only a certain number of “wheelchair spaces” to be provided in places of assembly or entertainment. Accordingly, the Building Industry Authority takes the view that not all parts of a space within a building needs to be accessible provided that people with disabilities are able to carry out normal activities and processes in the building. In this case, the raised seating areas are not separate areas but parts of the seating area. People with disabilities must have access to the seating area, but not necessarily to every seat.
- ... The [Building Industry Authority] concludes that the seating space complies with clause D1.3.2 despite the fact that some parts of that space are not accessible.
- 5.3.5 Applying the requirements of the Act set out in paragraphs 5.3.2 and 5.3.3, and the approach of Determination 2004/13, I note the lack of a ramp to the sunken garden does not prevent people with disabilities who are unable to negotiate stairs unaided from visiting and enjoying the business park’s garden areas, or from fully enjoying the experiences that are available within them. The sunken garden is not a separate area, but part of a larger landscaped area, and I am of the view that the people with disabilities who are unable to negotiate stairs unaided can carry out normal activities and functions in the garden areas.
- 5.3.6 I am of the opinion 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 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.
- 5.3.7 I note however, that the stairs down to the sunken garden must meet the requirements of Clause D1.3.3, including the provision of handrails. These stairs, which are intended to be used by the public, provide access between spaces of the park and therefore constitute access routes, including Clause D1.3.3(j) which requires access routes to ‘Have smooth, reachable and graspable handrails to provide support and to assist with movement along a stair or ladder’.

- 5.3.8 I also note in respect of the timber and concrete areas on the accessible route, it appears that there are some areas, particularly next to gardens, where there is a fall to the adjacent garden area of greater than 25mm. Paragraph 2.3.1 of D/AS1 requires protection to be provided from falling and states 'Where the surface of an accessible route is more than 25mm above the adjacent ground, protection is to be provided by either a 75mm upstand (kerb) or a low barrier rail. While not mandatory, D/AS1 provides good guidance on dimensions for these matters.

5.4 The authority's decisions

- 5.4.1 Although I consider that a ramp to the sunken garden is not required, the sunken garden does not meet the Building Code requirements as the stairs to the sunken garden are required to have handrails to comply with Clause D1.3.3. Therefore, I consider the authority was correct to issue the notice to fix.

5.5 Other matters

- 5.5.1 The applicant has sought a determination about whether the authority could issue a notice to fix for building works that had been completed in accordance with a building consent.

- 5.5.2 In previous determinations, (for example Determination 2009/110), an approach was established for the correct procedure for issues relating to building work that has been completed in accordance with a building consent, but does not comply with the Building Code. With respect to the issue of a building consent and code compliance certificate for building work that did not comply with the Building Code, I found:

Given that the building work has now been completed and the authority's decision to issue the building consent relied upon, I consider it would be impractical to reverse the authority's decision to issue the building consent. I am of the view that a practical solution is for the authority to issue a notice to fix requiring the building work be brought into compliance with the Building Code.

As the building consent was incorrectly granted using the wrong legal test, I am of the opinion the decision to issue the code compliance certificate was predicated on a mistake of law. Therefore, the code compliance certificate was also incorrectly issued.

I accept that the task of achieving compliance at this stage may be more difficult than might have otherwise been the case, however, the fact that the work has been completed cannot, of itself, change my view of how the Building Act and the Building Code should have been applied to the situation.

- 5.5.3 I have followed this approach and consider that as the building work does not comply with the Building Code, the authority was correct to issue a notice to fix.

6. The decision

- 6.1 In accordance with section 188 of the Building Act 2004, I determine that the sunken garden does not comply with Clause D1.3.3 of the Building Code, and according I confirm the decision of the authority to issue a notice to fix.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 20 September 2010.

John Gardiner
Manager Determinations