

Determination 2025/003

Refusal to grant a building consent for the construction of a lift in an existing commercial building

R251 State Highway 2, Bethlehem, Tauranga

Summary

This determination concerns an authority's decision to refuse to grant an application for a building consent to install a new lift into an existing two-storey commercial building. The determination considers the authority's reasons for the refusal and whether the new lift complies with the Building Code clause D2 if required by clause D1.3.4. The determination will also consider whether to grant a waiver or modification in respect of those clauses.



Figure 1: north and west elevations of R251 State Highway 2

The legislation discussed in this determination is contained in Appendix A. In this determination, unless otherwise stated, references to ‘sections’ are to sections of the Building Act 2004 (“the Act”) and references to ‘clauses’ are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (eg, Acceptable Solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Andrew Eames, Principal Advisor Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.¹
- 1.2. The parties to the determination are:
 - 1.2.1. Waratah Trust Limited, the owner of the property (“the owner”) who applied for this determination
 - 1.2.2. Tauranga City Council, carrying out its duties as a territorial authority or building consent authority (“the authority”).
- 1.3. This determination arises from the authority’s decision to refuse to grant an application for a building consent to install a new proprietary platform lift into an existing two-storey commercial building. The authority refused the application because it was not satisfied the proposed building work to install the lift would comply with section 118 and the requirements of NZS 4121:2001². The owner considers the lift does comply with Building Code Clause D2 *Mechanical Installations for Access*, by way of Acceptable Solution D2/AS2³ ie compliance with NZS 4334:2012⁴.
- 1.4. The matter to be determined, under sections 177(1)(b) and 2(a), is the authority’s decision to refuse to grant building consent BC331285.
- 1.5. In determining this matter, I will consider the reasons for the authority’s decision, and the means available to the owner in establishing compliance with clauses D1 (specifically clause D1.3.4(c)(iv)) and D2. This determination also considers whether,

¹ The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

² See section 119; New Zealand Standard 4121:2001 *Design for Access and Mobility – Buildings and Associated Facilities*.

³ Acceptable Solution D2/AS2 *Platform Lifts and Low-speed Lifts*, second edition, amendment 7 (effective 1 January 2017).

⁴ New Zealand Standard NZS 4334:2012 *Platform lifts and low-speed lifts*.

in this case, it is necessary to grant a waiver or modification in respect of those clauses.⁵

- 1.6. As the matter to be determined concerns an issue relating to access for people with disabilities, I am required under section 170(b) to consult with Whaikaha – Ministry of Disabled People; its response to this consultation is summarised in paragraph 3.3 below.

2. The building work and background

- 2.1. The owner's property is in a commercial area near Tauranga and includes an existing two-storey commercial building which contains several retail spaces at ground-floor level, and two office tenancies at first-floor level (refer to figure 1)⁶. Access to the first floor is currently provided by way of an 'accessible stairwell'. The building was completed in 2018 and a code compliance certificate has been issued for this work⁷.
- 2.2. On 1 September 2023, the owner applied for a building consent (BC331285) "to install an accessible rated lift in a commercial building". The application was instigated because a central government agency was taking on the tenancy of one (or both)⁸ of the first-floor offices and required an accessible lift to be installed. The application⁹ did not specify how compliance with clauses D1 and D2 would be established.
- 2.3. The new proprietary platform lift is to be constructed adjacent to the existing stair in a space between the ground floor entrance lobby and a first-floor landing (refer to figures 2 and 3)¹⁰.

⁵ Section 188(3)(a).

⁶ Figure 1 has been reproduced from Google maps NZ 'street view' images accessed on 22 November 2024.

⁷ I have not received a copy of the code compliance certificate and it is not clear when it was issued.

⁸ It is not clear from the parties' submissions whether the government agency is intending to occupy Tenancy 1 and/or Tenancy 2, as those spaces are annotated on building consent plan L07.

⁹ Form 2 of the Building (Forms) Regulations 2004.

¹⁰ Figures 2 and 3 have been reproduced from building consent plans L06 and L07 respectively.

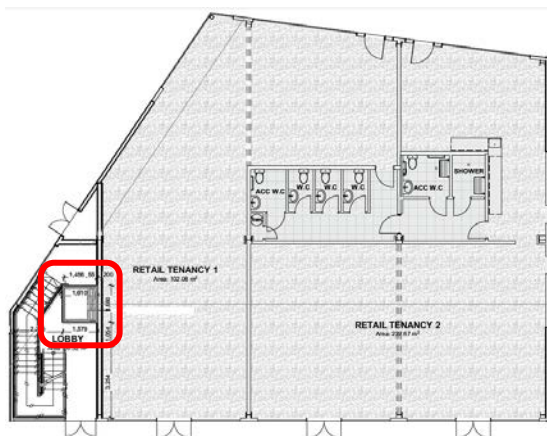


Figure 2: Proposed ground floor plan¹¹

(Not to scale)

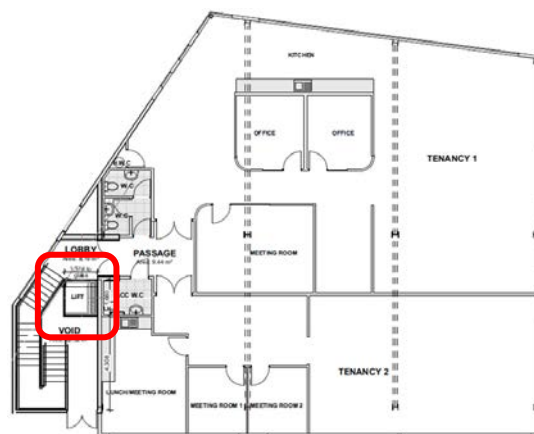


Figure 3: Proposed first floor plan

(Not to scale)

- 2.4. Between September and December 2023, the authority and the owner exchanged correspondence regarding the compliance of the proposed new lift and how this was to be established. This included several requests for information from the authority, asking for details of the lift’s compliance with NZS 4121:2001. In the authority’s view, compliance with this standard was required for an accessible lift, under section 119.¹²
- 2.5. The owner disagreed, noting compliance with clause D2 was being achieved using NZS 4334:2012. In support of its position, the owner provided a Producer Statement – Design Review (PS2)¹³ from a vertical transport consultant company (“the lift certifier”); the PS2 stated, ‘The design has been prepared in accordance with...D2/AS2 as an acceptable solution using NZS4334:2012’ and the provisions in the Building Code¹⁴ would ‘be met if the building work were properly completed in accordance with the drawings¹⁵, specifications and other documents’ that formed part of the application for building consent.
- 2.6. On 16 February 2024, the authority refused the application for building consent under section 50. The reasons for the refusal cited in the written notice were:

Failing to demonstrate compliance with the accessibility requirements of the Building Act [section] 118, citing the following discrepancies

¹¹ The location of the proposed new lift is marked by the ‘red’ squares.

¹² Although the authority’s correspondence to the owner in late 2023 referred to section 119, I note its correspondence from February 2024 referred to section 118.

¹³ Dated 24 October 2023.

¹⁴ The PS2 indicated compliance of the design with several Building Code clauses including (but not limited to) D1 and D2.

¹⁵ The PS2 referred directly to several of the plans accompanying the application for building consent, for example, plans L06 and L07.

1. The description of works for the Building consent if specifies the lift to be an 'accessible rated' then this shall comply in full with the [section] 118 of the New Zealand Building Act 2004, which cites NZS 4121:2001 as the acceptable solution to comply with the requirements (and is the only acceptable solution for an accessible lift).
2. It was not until 14 December 2023 that [the authority] were notified of the potential tenant...[a central government agency]..., which triggers the requirement to have an accessible lift as per [clause] D1.3.4(C) if accessed by the public.¹⁶
3. The proposed platform lift....does not comply with NZS 4121:2001¹⁷...

3. Submissions

The owner

- 3.1. The owner submits (in summary):
 - 3.1.1. Section 118 applies as members of the public will be admitted to the building and it falls within in sub-section (g) of Schedule 2 of the Act.¹⁸ Section 119 “states the applicable standard is NZS 4121”.
 - 3.1.2. The “proposed lift complies with the requirements of NZS 4121 as near as reasonably practicable given the existing building constraints” and “should be considered an accessible rated lift”.¹⁹
 - 3.1.3. The first-floor “government tenant in respect of members of the public, operates on mostly by appointment basis and does not operate a reception desk within their tenancy”.
 - 3.1.4. The proposed lift complies with clause D1, except for clause D1.3.4(b). However, no waiver or modification to the Building Code is required.
 - 3.1.5. The configuration of the proposed lift, with a door on either side, means “there is no need for a wheelchair user to turn around inside the lift” and “an ambulant person should not need to pass” a person in a wheelchair

¹⁶ For the purposes of this determination, I have assumed the authority was referring to sub-clause D1.3.4(c)(iv) and not sub-clauses (c)(i) to (iii) inclusive.

¹⁷ The written notice included five examples of features of the new lift that the authority believed did not comply with NZS 4121. However, I have elected not to repeat those examples here as I have not been asked to consider whether particular matters comply with the Building Code (ie section 177(1)(a)).

¹⁸ Schedule 2 ‘Buildings in respect of which requirement for provision of access and facilities for persons with disabilities applies’; sub-part (g) ‘central, regional, and local government offices and facilities’.

¹⁹ Although the owner has provided commentary (in response to the authority’s views) on whether the proposed lift complies with section 9 of NZS 4121, I have elected not to summarize them here on the basis this is not the means of compliance relied upon by the owner.

using the lift. The owner notes there is also an alternative route available to ambulant people via the accessible stair.

- 3.1.6. The proposed lift complies with clause D2. It also complies fully with NZS 4334, which is the standard that applies to platform lifts.
- 3.1.7. Compliance with section 112(1)(a)(ii) is achieved “as nearly as reasonably practicable”.
- 3.1.8. The “installation of the proposed lift will improve the accessibility of the first floor to a greater extent than it currently has”.
- 3.1.9. Similar lifts have been installed “within the same local government region” (ie Tauranga) and elsewhere across New Zealand, and rated as “accessible”. Previous determinations have also “held that a platform lift can be considered ‘accessible’”²⁰.
- 3.1.10. “The building cannot accommodate a lift other than what is proposed in the existing building. Whilst other layouts may allow for a 1400mm x 1400mm lift size²¹...such layouts are highly likely to require significant structural work ...and are not reasonably practicable.”
- 3.1.11. The owner’s submission included a letter²² from an Accessibility Consultant, who advised that “platform lifts have been installed in a variety of buildings around the country and are frequently the only solution for existing buildings” and meet the ‘as nearly as is reasonably practicable’ requirement. The owner’s proposed lift is likely to be ‘low use’, will be straightforward to operate, and “readily accommodates all users’ mobility equipment that could be expected to visit the building”. The Accessibility Consultant concluded the proposed new lift “meets the accessibility and usability needs under these circumstances”.

The authority

- 3.2. The authority submits (in summary):
 - 3.2.1. The “proposed platform lift did not comply with section 17”.
 - 3.2.2. Clause D1.3.4(b) requires an accessible route to have adequate activity space to enable a person in a wheelchair to negotiate the route while permitting an ambulant person to pass, and includes a lift complying with

²⁰ The owner referred to Determination 2012/033 *Provision of lift access in the alterations to an existing two-storey administration building* (issued 2 May 2012). The owner noted the proposed new lift differs from the one considered in determination 2012/033 “as it has 2 doors and does not require a wheelchair user to turn inside the lift”.

²¹ For the purposes of this determination, I have assumed the owner was referring to a lift car size as noted in paragraph 70.2 of NZS 4332:1997 and/or paragraph 9.2.2.1 of NZS 4121:2001.

²² Dated July 2024.

Clause D2 for access to upper floors, where the upper floor contains public reception areas for government offices (clause D1.3.4(c)(iv)).

3.2.3. Sections 112(2) and (3) do “not apply to this project”.²³

Whaikaha – Ministry of Disabled People

3.3. As stated in paragraph 1.6, I consulted with Whaikaha – Ministry of Disabled People. In an email dated 31 October 2024²⁴, Whaikaha stated:

The Ministry supports the proposed alteration. Based on advice provided by [the lift certifier] we see no reason for [the authority] to refuse the consent.

The Ministry is satisfied that the expert advice on the alteration, which is the installation of a platform lift, from [the lift certifier] that the proposed lift system ‘complies with the Performance Requirements as set out in NZBC D2’ is accurate, rigorous and provided in a way that is professional and free of ‘opinion’.

4. Discussion

4.1. The matter to be determined is the authority’s decision to refuse to grant the application for building consent BC331285 for the installation of a proprietary new platform lift within an existing two-storey commercial building. In determining this matter, I will consider the reasons for the authority’s decision, and the means available to the owner of establishing compliance with clauses D1 (specifically clause D1.3.4(c)(iv)) and D2.

Legislation

- 4.2. Section 17 provides that all building work must comply with the Building Code to the extent required by the Act.
- 4.3. Section 19 provides that a building consent authority must accept compliance with an acceptable solution as a means of establishing compliance with the Building Code.
- 4.4. Section 22 provides that a person who complies with an acceptable solution must, for the purposes of the Act, be treated as having complied with the provisions of the Building Code to which the acceptable solution relates.
- 4.5. Sections 49 and 50 concern an authority’s decision to grant or refuse an application for a building consent.

²³ The statements by the authority are noted its ‘processing audit checklist’ for building consent 331285. However, it is not clear from the checklist what decision the authority reached in respect of section 112(1)(a)(ii).

²⁴ A copy of the Whaikaha consultation was provided to the parties on 25 November 2024.

- 4.5.1. Section 49 requires a building consent authority to grant a building consent if it is satisfied on reasonable grounds that the building work will comply with the Building Code if it is completed in accordance with the documents that form part of the consent application.
- 4.5.2. Section 50 states that where an authority decides to refuse to grant an application for a building consent it must give the applicant written notice of the refusal and its reasons for it.
- 4.6. Section 112(1)(a)(ii) provides that a building consent authority must not grant a building consent for the alteration of an existing building, or part of an existing building, unless it is satisfied that, after the alteration, the building will comply, as nearly as is reasonably practicable, with the provisions of the Building Code that relate to access and facilities for people with disabilities, where this is a requirement under 118.
- 4.7. Section 118 relates to access and facilities for people with disabilities to and within buildings. It reads:
- (1) If provision is being made for the construction or alteration of any building to which members of the public are to be admitted, whether for free or on payment of a charge, reasonable and adequate provision by way of access, parking provisions, and sanitary facilities must be made for persons with disabilities who may be expected to—
 - (a) visit or work in that building; and
 - (b) carry out normal activities and processes in that building.
 - (2) This section applies, but is not limited, to buildings that are intended to be used for, or associated with, 1 or more of the purposes specified in Schedule 2.
- 4.8. As I understand it, there is no dispute between the parties regarding the owner's building being one to which section 118 applies (i.e. Schedule 2, sub-part (g)), or the lift is to be installed on part of the accessible route²⁵ (where currently the only means of accessing the first-floor offices is via an existing internal stair).
- 4.9. The dispute between the parties arises because the authority considers the proposed lift does not comply with the requirements of the Building Code for a lift on an accessible route.
- 4.10. In this respect, the authority refers to both sections 118 and 119, where section 119 refers to NZS 4121 as an acceptable solution for requirements of persons with disabilities. In this case, the authority has assessed compliance against NZS 4121 (ie section 9, "Lifts").

²⁵ As defined in Clause A2 – Interpretation.

Building Code requirements

4.11. Clause D1.3.3 sets out the performance criteria for access routes, with clause D1.3.4 providing additional requirements for accessible routes.

4.12. Clause D1.3.4 states:

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

...

(c) include a lift complying with Clause D2 **Mechanical installations for access to upper floors** where:

(i) ...

(iv) an upper floor, irrespective of design occupancy, is to be used for the purposes of public reception areas of banks, central, regional and local government offices and facilities, hospitals, medical and dental surgeries, and medical, paramedical and other primary health care centres,...

4.13. Clause D1.3.4(c) only requires an accessible route include [my emphasis] a lift complying with Clause D2. Therefore, for the purpose of meeting the requirement of section 17, clause D2 is relevant in assessing compliance of a lift and whether it is 'accessible'²⁶. To put it another way, clause D1 is limited to whether a lift is required, as set out in sub-clauses D1.3.4(c)(i) to (iv).

4.14. With respect to the owner's building, the upper floor will be used in part as the public reception area of a central government agency. Whether or not people will be attending the office by appointment or on a walk-in basis is not a relevant consideration under clause D1.3.4(c)(iv). Members of the public are to be admitted and reasonable and adequate provision by way of access must be made for persons with disabilities who may be expected to visit or work in the building. Therefore, in order to meet the requirement of clause D1.3.4(c)(iv) a lift complying with clause D2 is required on the accessible route from the ground-floor lobby to the first-floor offices.

4.15. Clause D2 relates to mechanical installations for access and, for the purpose of section 17, clause D2.3.5 is applicable; this sets out the performance criteria related to the functionality and configuration of a lift included on an accessible route.

4.16. I note that some of the parties' discussion has been about the application of clause D1.3.4(b) to the proposed lift. However, this clause is not relevant here. As stated above, all that is required to achieve compliance with clause D1 is the existence of

²⁶ As defined in Clause A2 – Interpretation.

the lift under D1.3.4(c). Once this is established, the performance requirements of the lift are as set out in clause D2.

Means of establishing compliance

- 4.17. The proposed building work is to install a lift on an accessible route. For the purposes of clause D1, the performance requirements in clause D1.3.4(c) are satisfied, as a lift is to be included on the route. No further clause D1 performance requirements arise.
- 4.18. Pursuant to sections 19 and 22, one means of compliance with clause D2 is Acceptable Solution D2/AS2: *Platform Lifts and Low Speed Lifts*; this in turn cites NZS 4334 as 'an Acceptable Solution for platform and low-speed lifts'.
- 4.19. NZS 4334 (among other matters):
- specifies the requirements for platform lifts that are installed as part of a building and that provide access to and within the building
 - states that where the Building Code requires a lift to be installed, it shall be on an accessible route
 - sets out the requirements for platform lifts in public buildings.
- 4.20. Although the owner has provided some conflicting information²⁷, it is clear reliance is being placed on D2/AS2 and NZS 4334 as the means of establishing compliance of the proposed lift. For example, this is evident from the PS2 provided by the lift certifier, which states the design of the lift 'has been prepared in accordance with NZBC D2/AS2 as an acceptable solution using NZS4334:2012'.
- 4.21. Although the authority has assessed compliance against NZS 4121, this is not the standard relied upon by the owner. I will therefore leave it to the authority to consider this matter further and reach its own decision as to whether the lift complies with D2/AS2.
- 4.22. If the authority decides the proposed lift complies with D2/AS2, it is required by section 19(1)(b) to accept the lift complies with the Building Code, and pursuant to section 49, grant the building consent for the proposed building work.²⁸

²⁷ For example, when also referencing New Zealand Standard NZS 4332:1997 *Non-domestic passenger and goods lifts*.

²⁸ Although the focus of the determination has been on compliance with clauses D1 and D2, I accept there may be other Building Code clauses to consider in this case (eg B1 *Structure* and B2 *Durability*) in order to meet the requirements of sections 17 and 49(1). I will leave this for the parties to consider.

The authority's refusal

- 4.23. The authority's reasons for refusing to grant the application for the building consent are included in its written notice to the applicant dated 16 February 2024 (refer to paragraph 2.6).
- 4.24. The reasons given in the written notice include that an accessible lift is required under clause D1.3.4(c), and pursuant to section 118, the only acceptable solution for accessible lifts is NZS 4121. The authority is of the view the proposed lift does not comply with NZS 4121.
- 4.25. However, the authority is mistaken in its contention that section 118 refers to NZS 4121 (it is section 119(1)(a) that states NZS 4121 is an acceptable solution for requirements of people with disabilities), or that NZS 4121 is the only acceptable solution that can be used to establish compliance of the lift.
- 4.26. As previously discussed, clause D1.3.4(c) provides for a lift complying with clause D2, and pursuant to section 22, the Chief Executive has issued two acceptable solutions ie D2/AS1 and D2/AS2.²⁹ In this case the owner has chosen and relied on compliance with D2/AS2; consequently, the authority was required to assess the proposed building work against NZS 4334. As such, there were no grounds to refuse to grant the application for building consent based on an assessment of the proposed building work against NZS 4121.
- 4.27. Therefore, the reasons cited in the authority's written notice of 16 February 2024 do not constitute grounds for refusing to grant the application for building consent.

Other matters

- 4.28. The parties have raised several other matters in their correspondence and submissions. Although these matters are not part of my reasoning with respect to the matter to be determined, I will discuss them briefly here to provide clarity for the parties.

Waivers or modifications

- 4.29. The owner has raised the possibility of requiring a waiver or modification of clause D1.3.4(b), with respect to the size of the proposed lift car.
- 4.30. However, as stated in paragraph 4.16, this performance criteria does not apply to the proposed lift. The existence of the lift is required by clause D1.3.4(c), but the performance criteria the lift is required to comply with is clause D2.3.5.

²⁹ However, this does not limit other means of establishing compliance with clause D2 using NZS 4121, or several European standards (eg EN-81-20:2014), or consideration of an alternative solution pursuant to section 23.

4.31. As neither of the parties has raised the possibility of a waiver or modification from clause D2.3.5, there is no need for me to comment on this matter further.

Application of section 112

4.32. Section 112 applies to the code compliance of the 'building' as a whole or in part, not to the 'building work'.

4.33. The proposed lift, being building work, is required by section 17 to comply with the Building Code.

4.34. After such code-compliant building work is completed, the existing building is permitted by section 112(1)(a)(ii) to comply with the accessibility provisions of the Building Code "as nearly as is reasonably practicable" (if this is a requirement in terms of section 118).

4.35. The parties do not dispute provision is being made for the alteration of the owner's building to which members of the public are to be admitted, and therefore, reasonable and adequate provision by way of access must be made for persons with disabilities who may be expected to visit or work in that building.

4.36. Currently, access between floors is provided by an existing stair, and the inclusion of the proposed lift (in accordance with clause D1.3.4(c)(iv)) provides a means of meeting the requirements of section 112(1)(a)(ii). I will therefore leave it for the parties to consider this further when applying for and granting the application for building consent.

5. Decision

5.1. In accordance with section 188 of the Building Act 2004, I hereby reverse the decision by the authority to refuse to grant the application for building consent BC331285.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 28 January 2025.

Andrew Eames

Principal Advisor Determinations