

# ***Determination***

## ***under the***

### ***Building Act 1991***

#### **No. 95/003: Facilities for people with disabilities to be provided in a building for use by defence force personnel**

##### **1. The matter to be determined**

- 1.1 The matter before the Authority was whether sanitary facilities suitable for use by people with disabilities should be installed in a building for use by defence force personnel being erected in a complex of such buildings.
- 1.2 The applicant was the New Zealand Defence Force. The only other party was the territorial authority.
- 1.3 The applicant applied for a building consent to construct the proposed new building. The building was shown as being accessible to people with disabilities but did not contain sanitary facilities suitable for their use (“accessible facilities”). The territorial authority granted a building consent for the work to be constructed in two stages. Work on Stage 1 is understood to have been commenced. The consent for Stage 2 was expressed as being “subject to a determination from the B.I.A. in relation to disabled access and facilities”. The applicant accordingly applied for this determination.
- 1.5 The Authority accordingly takes the view that it is being asked in effect to determine whether the proposed building, without sanitary facilities suitable for use by people with disabilities, would comply with clause G1 “Personal hygiene” of the building code (the First Schedule to the Building Regulations 1992).
- 1.6 In making its determination, the Authority has not considered whether the proposed building will comply with any other provisions of the building code.

##### **2 The building**

- 2.1 The building concerned is being erected in a complex of buildings used by defence force personnel. The public has access to only two of the buildings in the complex. One of those two buildings includes access and facilities for people with disabilities.
- 2.2 The building concerned is proposed to be used only by members of a “ready reaction unit” of the armed forces.

### **3 The parties' contentions**

#### *3.1 General*

- 3.1.1 It is common ground that the building as proposed would not comply with the building code's requirements for accessible fixtures.
- 3.1.2 The parties contentions as outlined below include responses to a report by a consultant on disability matters obtained by the Authority and sent to the parties.

#### *3.3 The applicant*

- 3.2.1 The applicant contends in effect that the building code does not require the building concerned to include accessible facilities, but even if it did the requirements are satisfied by the provision of accessible facilities elsewhere in the complex.
- 3.2.2 As to there being no requirement to provide accessible facilities in the building concerned, the applicant points out that section 25(1) of the Disabled Persons Community Welfare Act 1975 (to become section 47A(1) of the Building Act when the relevant provisions of the Health Reforms (Transitional Provisions) Act 1993 come into force) refers to "reasonable and adequate provision" being made for "people with disabilities who may be expected to visit or work in" the building concerned.
- 3.2.3 The applicant contends that because the building concerned is to be used only by members of the armed forces, no people with disabilities can be expected to visit or work in it and therefore the building need not be provided with access and facilities for people with disabilities. The applicant acknowledges that if civil staff were to visit or work in the building then it would need to be provided with such access and facilities.
- 3.2.4 As to accessible facilities being provided elsewhere in the complex, the applicant also points out that section 3(2)(b) of the Act provides that "for the purposes of Part IX of this Act, a building consent, a code compliance certificate, and a compliance schedule" the term "building" also includes "[a]ny 2 or more buildings which, on completion of any building work, are intended to be managed as 1 building with a common use and a common set of ownership arrangements".
- 3.2.5 The applicant contends, therefore, that even if accessible facilities are to be provided then because all of the buildings in the complex are considered to be one building then there is no requirement for the accessible facilities to be provided in any particular building so long as they are provided elsewhere in the complex.

#### *3.3 The territorial authority*

- 3.3.1 The territorial authority contends that section 34(7) of the Building Act 1991 prevents it from issuing any waiver or modification of those requirements.
- 3.3.2 The territorial authority, through its solicitor, also contends that all the buildings in the complex cannot be considered to be treated as one building for the purpose of this

determination because section 3(2)(b) “only applies to Part IX of the Act which deals with dangerous or insanitary buildings”. It is “manifestly wrong”, says the territorial authority, for a person constructing a new structure to say that the new building does not require sanitary facilities because existing buildings contain surplus capacity.

#### **4. Discussion**

##### *4.1 Waivers or modifications*

4.1.1 The territorial authority refused building consent because it considered that section 34(7) of the Building Act prevented it from issuing any waiver or modification of the provisions of the building code for access and facilities for people with disabilities. The Authority agrees.

4.1.2 Both the territorial authority and the applicant appeared to be under the impression that, in respect of a proposed new building, the Authority could issue a waiver or modification of the provisions of the building code for access and facilities for people with disabilities, although the territorial authority, through its solicitor, subsequently withdrew from that original position. The Authority’s view is that its powers to issue such a waiver or modification by way of a determination are limited to the alteration of an existing building and do not extend to the construction of a new building.

4.1.3 In this case, therefore, the Authority has no power to issue a waiver or modification of the provisions of the building code for access and facilities for people with disabilities. The building concerned is a new building which must, as a matter of law, comply with all, if any, applicable provisions of the building code for access and facilities for people with disabilities.

4.1.4 The Authority must therefore consider whether those particular provisions of the building code apply to this particular building. If those provisions do not apply then that disposes of the matter. If those provisions do apply then the Authority must consider whether the building will comply with them. If it will not comply with them then the Authority may further consider what changes would bring it to compliance.

4.1.5 The Authority would need to take the same approach if the determination were in respect of the alteration of an existing building instead of the construction of a new building. However, in the case of an alteration the Authority would have the power to take the further step of considering whether to waive or modify the applicable provisions.

##### *4.2 Do the provisions of the building code relating to access and facilities for people with disabilities apply to the building concerned?*

4.2.1 The relevant provisions of the Building Act and the Disabled Persons Community Welfare Act are outlined in 3.2.2 above. The Authority considers that those provisions mean that the building code’s provisions for access and facilities for people with disabilities do not apply to buildings in which people with disabilities cannot be expected to visit or work.

4.2.2 The defence force employs two categories of personnel: members of the armed forces and civil staff. The Authority accepts that, as a matter of Defence Force policy in accordance

with statutory requirements, people with disabilities (or at least, with the types of disabilities with which this determination is concerned) cannot be members of the armed forces.

- 4.2.3 In its statement “Access and Facilities for People with Disabilities” published in *Building Industry Authority News* No. 23, June 1993, the Authority said that the provisions of the building code for access and facilities for people with disabilities “apply to the building as a whole but do not apply to any part or portion of the building to which the general public does not have access and in which people with disabilities, solely because of their disabilities, cannot work”.
- 4.2.4 The Authority now considers that statement was too narrow, and takes the view that the provisions concerned do not apply to the whole or to any part or portion of a building to which the general public does not have access, 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. In this case, the specific reason is that the building concerned will be visited only by members of the armed forces. There might be occasional transitory visits by others, but such visits are expected to be so unusual and so brief that the lack of accessible toilets will not materially disadvantage people with disabilities.
- 4.2.5 The statement mentioned above went on to say (and it remains the Authority’s view) that:
- In considering this question it is important not to underestimate the extent to which people with disabilities are capable of overcoming those disabilities. The clear intention of [the Building Act and the Disabled Persons Community Welfare Act] is that buildings must not be constructed in such a way as to prevent people with disabilities from undertaking work of which they are physically capable.
- 4.2.6 In this case, however, the Authority need not consider the capabilities of people with the relevant disabilities but accepts that, because of their disabilities, they cannot be members of the armed forces and therefore will not visit or use the building concerned. On that basis, the Authority concludes that the provisions of the building code for access and facilities for people with disabilities do not apply to the building concerned. The fact that the building concerned is for use by a ready reaction unit with an emphasis on mobility makes the conclusion more obvious.
- 4.2.7 It will, of course, be necessary for the building consent, and any other related documents such as the code compliance certificate and the compliance schedule, if there is one, to identify the intended use of the building as being for members of the armed forces only.
- 4.2.8 The Authority also sounds a note of caution. It is general knowledge that buildings in a complex such as the one concerned are likely to change uses to suit changing circumstances. It is, of course, for the owner of such a building to specify its intended use, but the Authority points out that upgrading under section 46 of the Building Act might be necessary before the use can be changed. In this case, a change of use from “use by members of the armed forces only” to “use by members of the armed forces and civil staff” would necessarily require the provision of accessible facilities (if they were not provided at some other convenient location within the complex as discussed below).

4.3 *If the relevant provisions of the building code did apply, would they be satisfied by the provision of accessible facilities elsewhere in the complex*

- 4.3.1 On the view the Authority takes it is not strictly necessary to consider the applicant's argument that if the requirements for accessible facilities apply they are satisfied by the provision of such facilities elsewhere in the complex. However, as the applicant made the submission the Authority is prepared to discuss it.
- 4.3.2 The Authority accepts that two or more buildings may be treated as one building for certain purposes as provided by section 3(2)(b) of the Act. Indeed, that was the basis of a previous determination (No. 94/004) in relation to providing access for people with disabilities by way of a lift in an adjacent connected building. The Authority also accepts that the buildings on the complex concerned come within that provision.
- 4.3.3 The Authority does not accept the territorial authority's argument that section 3(2)(b) applies only in respect of dangerous or insanitary buildings under Part IX. The phrase "Part IX," (note that the comma is part of the quotation) was inserted by the Building Amendment Act 1993, and the Authority reads that insertion as having extended the application of section 3(2)(b) to include the purposes of the provisions in respect of dangerous, insanitary, and earthquake prone existing buildings and the other matters coming within Part IX. The Authority does not read the insertion as having limited or otherwise affected the application of the section for the purposes of a building consent, a code compliance certificate, or a compliance schedule. This determination is about a building consent for a new building.
- 4.3.4 As to the erection of new buildings without sanitary facilities being "manifestly wrong" as contended by the territorial authority, the Authority regards that as a normal occurrence in building complexes such as schools and the like where sanitary facilities are provided in other buildings or separate toilet blocks within the complex. Indeed, the Authority would have considered it surprising if the Building Act had forbidden such complexes.
- 4.3.5 However, in the Authority's view it is not sufficient that accessible facilities for those using one building are provided in another building in the same complex. It is also necessary that the accessible facilities should be "provided in convenient locations" as required by clause G1.3.3 of the building code.
- 4.3.6 In this case, it appears that the nearest accessible facilities are in a building over 300 metres away from the building concerned. The Authority has no information about the route between the two buildings, but even if the route were completely level and protected by the elements it would not be reasonable to expect a person with disabilities to make a round trip of more than 600 metres. Thus the existing accessible facilities are not in a convenient location.
- 4.3.7 The Authority notes that, as mentioned in a previous determination (No. 94/001) in relation to sanitary facilities in a restaurant, the only quantified requirement for the distance that must be travelled to reach sanitary facilities is the maximum of 75 metres relating to camping grounds that is required by paragraph 3.4.2 of acceptable solution G1/AS1 in Approved Document G1. A distance of 50 metres would frequently be exceeded in office buildings of

any size. However, a distance of 300 metres is clearly inconvenient even within a building let alone between buildings. In deciding whether a particular location is convenient account needs to be taken not only of the distance but also of the nature of the route of travel, and in particular whether it is smooth and level and whether it is exposed to the weather.

## **6. The Authority's decision**

- 5.1 In accordance with section 20(a) of the Building Act the Authority hereby determines that a building consent is to be issued for the proposed building without accessible facilities provided that the building consent, and any other related documents such as the code compliance certificate and the compliance schedule, if there is one, are to identify the intended use of the building as being for members of the armed forces only.
- 5.2 If the applicant does not wish to limit the use of the building concerned in that way, then accessible facilities are to be provided in a convenient location, which may be in the building itself or in another building in the complex that is convenient for people using the building concerned.

Signed for and on behalf of the Building Industry Authority on this 8<sup>th</sup> day of August 1995

J H Hunt  
Chief Executive