



Determination 2009/117

Determination regarding access and facilities for people with disabilities for a small alteration to buildings located at a fish processing factory at 271 South Highway, Whitianga

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 the Department.
- 1.2 The parties to the determination are:
- Whitianga Fish Marketing Limited, the owner, who is the applicant for the determination (“the applicant”) and who is represented by an agent
 - Thames Coromandel District Council (“the authority”), carrying out its duties as a building consent authority or territorial authority
- 1.3 The determination arises from the authority’s decision to refuse to issue a building consent for the proposed extension because the authority was of the view that:
- access and facilities for people with disabilities were required; and
 - it was unable to grant a waiver or modification of the Building Code (Schedule 1 of the Building Regulations 1992) relating to access and facilities for people with disabilities.
- 1.4 I take the view that the matter for determination² is whether the authority was correct to refuse to issue a building consent for the proposed alteration with respect to access and facilities for people with disabilities.
- 1.5 I have also consulted with the Office for Disability Issues (“the ODI”) at the Ministry of Social Development, as I am required to do under section 170 of the Act.

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 Under section 177(b) of the Building Act. 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.

- 1.6 In making my decision, I have considered the submission of the parties and other evidence in this matter. I have not considered any other aspects of the Building Act or of the Building Code.

2 The building work

- 2.1 The proposed building work is an enlargement to two existing buildings to create a single building (“the alteration”). The two existing buildings are unconnected to, but part of, a large complex of buildings that are part of a seafood processing factory. The buildings that make up the complex have an area of close to 4000 square metres.
- 2.2 The proposed alteration is constrained by the two existing buildings, a boundary to a right of way, and an existing carpark.
- 2.3 Of the two existing buildings, one is a small storage building that is used for dry storage and as a forklift shed and the other is a water treatment shed. The proposed alteration will enclose the space in between the two buildings. Figure 1 shows a sketch of the proposed alteration.

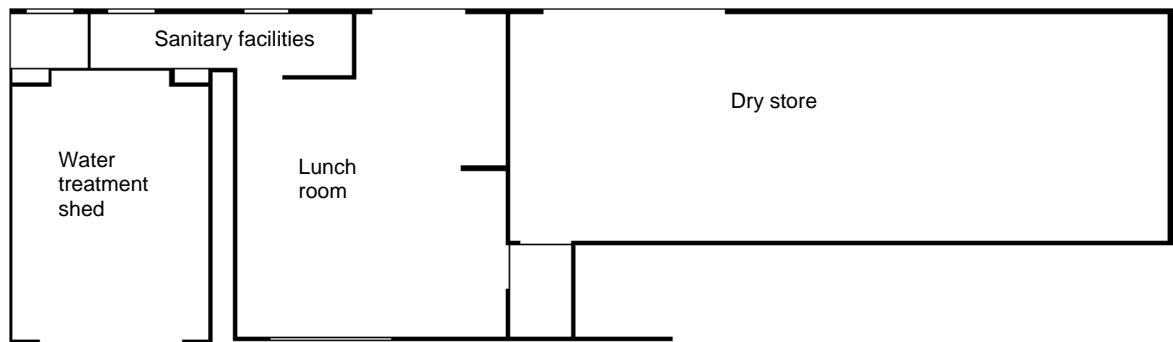


Figure 1: the proposed alteration

- 2.4 The proposed alteration has a gross area of 39 square metres to be used as a small staff facility (“the proposed staff facility”), and will contain a small lunchroom, locker areas and sanitary facilities.
- 2.5 The proposed staff facility will be used by staff working in a small kina processing operation. The operation runs two six hour shifts per week and employs 18 staff.
- 2.6 The kina processing takes place in an area within the main complex of buildings (“the kina processing area”). Building work is not being carried out to the main complex of buildings.
- 2.7 The kina processing area has sloping floors with step over nibs constructed in doorways to direct the flow of dirty water into the sewer system. Walk-through foot baths are recessed into floors at doorways separating areas where kina is processed from other areas, such as the changing room, to comply with hygiene regulations. Stairs provide the main entrance to the kina processing area. The operation is subject to the rules and regulations imposed by the New Zealand Food Safety Authority.

3 Background

- 3.1 The applicant lodged a building consent application for the alteration with the authority in mid 2009 (ABA 2009/292). From the information in the application, it appears the authority requested further information about a range of issues, including the provision of access and facilities for people with disabilities. There was further discussion and correspondence between the agent and authority on the issues the authority had raised.
- 3.2 On 3 August 2009, in an email to the agent, the authority stated 'Section 67(c) of the [Act] does not allow a Territorial Authority to grant an application for a building consent subject to a waiver or modification of the Building Code relating to access and facilities for people with disabilities'. The authority stated:
- The designer may satisfy section 112 of the [Act] by presenting a case to [the authority] demonstrating why it would be unreasonable or impractical for the building to have facilities for people with disabilities.
 - A waiver or modification can be obtained from [the Department]. Section 69 of the [Act] allows waiver and modification to this requirement however can only be granted by the Chief Executive of [the Department].
 - Another option is to seek a determination from [the Department].
- 3.3 The applicant presented a case to the authority about the unreasonableness and impracticality of providing access and facilities for people with disabilities. It appears the authority subsequently recommended the applicant seek a determination.
- 3.4 The application for a determination was received by the Department on 17 August 2009.

4 The submissions

- 4.1 The application contained copies of correspondence between the agent and authority and copies of the plans that were submitted as a part of the building consent application. In a letter to the Department accompanying the application, regarding why the provision of facilities for people with disabilities would be impractical, the agent provided information about the nature of the work and the facility, and noted the operation and work areas are subject to the rules and regulations imposed by the New Zealand Food Safety Authority.
- 4.2 The authority made no submission.
- 4.3 A draft determination was issued to the parties for comment on 15 October 2009.
- 4.4 Both the applicant and the authority accepted the draft determination. The authority requested that additional instruction to the parties as to what to do as a result of the decision be included in the determination.
- 4.5 The draft determination was also sent to ODI by way of consultation under section 170 of the Act.

4.6 In its response to the draft determination, ODI said:

- Section 118 and Schedule 2 of the [Act] presume that all people with physical, neurological, or intellectual impairments, or experience of mental illness are likely to be employed in or have reason to visit any and all buildings to which the public may be admitted. That presumption may be rebutted but only by evidence that establishes on the balance of probabilities that there can be no reasonable expectation that persons with disabilities could be employed there or have occasion to visit there...
- The evidence needed to rebut the presumption must be evidence-based and not conjecture. In the present case, where it is asserted that that mobility-impaired people cannot work there, the evidence needs to demonstrate a proper assessment and analysis by independent persons with professional experience and knowledge of the work capabilities of people with mobility impairments and an understanding of the workforce and workplace requirements in the industry of kina processing.
- In this case, it is unlikely that the cost of providing access and facilities for universal use would be significant and, in any event, this cost is likely to be considerably less than it will be if the building needs to be retrofitted for access later. Additionally, the improved access and facilities will render the building more useable, and contribute to health, safety, and injury prevention for everybody who works there.

4.7 In response to the comments made by ODI, the applicant provided a set of photos that show the kina processing operation. The photos detail features of the building where the kina is processed and the way the work is carried out.

5 Legislation

5.1 The relevant provisions of the Act are:

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—
 - (ii) access and facilities for persons with disabilities (if this is a requirement in terms of section 118)

118 Access and facilities for persons with disabilities to and within buildings

- (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.

6 Discussion

The proposed building work

6.1 As the complex of buildings is a factory where more than 10 people are employed, in accordance with Schedule 2, this requires the provision of access and facilities for people with disabilities. As such, the building comes within the ambit of Clauses D1.3.2(b) and (c), which require a building to have at least one access route with features to enable people with disabilities to have access to the internal space served by the principal access and provide access to spaces where they may be expected to visit.

6.2 In this case, two existing buildings are being enlarged to create one single building. This enlargement is an alteration to an existing building, and is constrained by the two existing buildings and their entrances, a boundary to a right of way, and a carpark. The existing buildings are a water treatment shed, and a building that consists of a dry store area and a forklift shed.

Compliance to as nearly as is reasonably practicable

6.3 As the building work is considered to be an alteration, it is subject to the following criteria:

- under section 69 the Chief Executive may, by way of a determination, grant a waiver or modification of the accessibility requirements
- under section 112, the authority may issue a building consent for work that does not comply completely with the accessibility requirements of the Building Code, provided that it is satisfied that after the alteration, the building will comply with those requirements ‘as nearly as is reasonably practicable’
- under section 177, the Chief Executive may make a determination in relation to a building consent issued, or refused to be issued under section 112, and under section 188 such a determination may incorporate waivers or modifications of the accessibility requirements.

6.4 In previous determinations issued by the antecedent of the Department, an approach was established and discussed regarding the question of whether a building complies ‘as nearly as is reasonably practicable’ with particular provisions of the Building Code. This approach involved the balancing of the sacrifices and difficulties of upgrading against the advantages of upgrading and follows the approach of the High Court³.

6.5 I continue to hold the views expressed in the previous relevant determinations, and therefore conclude that:

- the benefits of upgrading the existing buildings to comply fully with the Building Code provisions for access and facilities for people with disabilities would be that the small staff facility, the water treatment shed, and the forklift and dry store building would be accessible and usable by all people with disabilities
- the sacrifices would be the relatively high cost of complying fully with the Building Code provisions for access and facilities for people with disabilities, relative to the cost of the building work, given the constraints of the existing buildings, and the loss of space to the already confined alteration.

6.6 The cost of providing fully compliant accessible sanitary facilities in the available dimensions and possible arrangements is relatively high because of the restrictions to the proposed staff facility, which are the boundary to the right of way and existing buildings. I accept that given these constraints, it would be very difficult to provide fully compliant accessible sanitary facilities. I consider the sacrifices outweigh the benefits and therefore it is not reasonably practicable to provide fully compliant accessible sanitary facilities in this case.

³ *Auckland City Council v New Zealand Fire Service*, 19/10/95, Gallen J, HC Wellington AP 336/93.

The building consent application

- 6.7 I have considered this case carefully, and although I have come to the view that it is not reasonably practicable to provide accessible sanitary facilities, I note that in this case, the sacrifices and benefits are reasonably evenly weighed.
- 6.8 In terms of the extent of compliance required, my considerations in paragraph 6.6 have been in terms of absolute accessibility. I consider that, while it is not reasonably practicable to provide fully compliant accessible sanitary facilities for wheelchair users, it is possible to provide a design solution that maximises the principles of accessibility.
- 6.9 I also note that the plans for the building work show a new ramp and new doors to the proposed staff facility. The plans do not show sufficient detail in terms of the design of these features, however, I note that there are no restrictions to full compliance of these features, with the provisions of the Building Code relating to access, and the compliance of these features will maximise the accessibility and usability of the altered building.

Future building work

- 6.10 As discussed in paragraph 6.1, I note the building is a building to which section 118 requires reasonable and adequate provisions for access and facilities for people with disabilities. In the context of this situation, only the staff working in the kina processing area will have access to the proposed staff facility. The kina processing area, where the staff that have access to the proposed staff facility work, is not accessible for wheelchair users due to; the layout, features such as the nibs at the doorways, and recessed walk-through foot baths. The proposed building work does not include any alterations to the kina processing area and therefore does not trigger an upgrade to the main complex of buildings or the kina processing area. I note this context has affirmed my decision as discussed in paragraph 6.3 to 6.9.
- 6.11 The complex as a whole is a large operation, and I note that the main complex of the buildings consists of various fish processing areas, store rooms, and offices. The two existing buildings and proposed alterations are less than 2% of the building footprint of the whole complex. The isolated building does not seem a logical place to provide accessible facilities in the context of the complex. I note that future alterations to the main complex of buildings will require full consideration to be given to providing access and facilities for people with disabilities.

7 What is to be done now

- 7.1 I note that the documentation provided with the application showed there were other items of compliance with the Building Code, for which the authority requested further information.
- 7.2 The authority should ensure that it is satisfied that the building work will comply with the remaining relevant Building Code provisions before the building consent is issued.
- 7.3 I also note that the new ramp and new doors to the proposed staff facility will need to be detailed to comply with the provisions of the Building Code relating to access.

8 The decision

- 8.1 In accordance with section 188, I reverse the authority's decision to refuse to issue the building consent with respect to the provision of access and facilities for people with disabilities.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 24 December 2009.

John Gardiner
Manager Determinations