Determination 2005/156

Notice to fix for Unit 46, Jacques Village, Bruce Terrace, Akaroa

1 The matters to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 ("the Act") made under due authorisation by me, John Gardiner, Determinations Manager, Department of Building and Housing, for and on behalf of the Chief Executive of that Department. In this determination, unless otherwise stated, references to sections and to schedules are to those of the Act.

1.2 The applicants are M I and H J Spurway, the unit title holders of Unit 46, Jacques Village. The other parties are Jacques Village Body Corporate ("the body corporate") and the Banks Peninsula District Council ("the territorial authority").

1.3 The application arises from a dispute about the issuing by the territorial authority of a notice to fix ("the notice to fix").

1.4 I take the view that I am asked to confirm, reverse, or modify the territorial authority's exercise of its power to issue notices to fix.

2 The building and the sequence of events

2.1 The buildings concerned were originally erected in 1980 as part of a motel and restaurant complex known as the Akaroa Village Inn. The complex was on five allotments held under separate fee-simple titles. At least one of the motel units ("Unit 46") was accessible in the sense that it had features to permit use by people with disabilities.

2.2 In and after 1994 some or all of the allotments were subdivided by the deposit of unit plans under the Unit Titles Act 1972. The unit plan for the allotment now known as Jacques Village shows a complex of 11 units in 5 buildings, 1 of which has 2 storeys with 3 units on each storey, 1 has 2 storeys with 1 unit on each storey, and 3 (including Unit 46) have 1 storey with 1 unit. Land use consent under the Resource Management Act 1991 was granted for "travellers' accommodation".

2.3 The applicants purchased Unit 46 as a holiday home in 1997, and said that ". . . in the time we have owned our Unit, we have used the Unit approximately one weekend a month and allowed it to be let through [a management company]". I understand that other unit title holders have at different times not let their units at all, or let them privately, or let them through the same or a different management company.

2.4 At the time of subdivision, Unit 46 incorporated accessible toilet facilities, including a shower, but had no cooking facilities. I am uncertain as to whether the toilet facilities had already been modified before the applicants purchased the unit, but in any case the applicants accepted that the toilet facilities were accessible at the time of purchase. In 1998 and 2000 the applicants altered the toilet facilities so that they were no longer accessible. They also extended the bench containing the sink top right angles to incorporate a cooking top and space for an under-bench refrigerator, with no under-bench space but with a clear area of at least 1.5 m alongside the bench. The applicants did not seek a building consent, apparently because the new toilet facilities "were installed in the same position as existing facilities without change to the position of existing plumbing and drainage".

2.5 The territorial authority became aware of the alterations to Unit 46 in 2005 during an audit of compliance schedules, and asked the applicants to undertake further alterations that would make Unit 46 accessible again. After correspondence with the applicants and their solicitor, the territorial authority concluded that the applicants did not intend to do so. On 12 July 2005 the territorial authority issued the notice to fix to the body corporate.

2.6 The relevant parts of the notice said:

"**Particulars of contravention or non-compliance**

"Failure to notify alterations to the sole accessible unit within the 11 unit complex, which alterations have removed the capability to continue to provide the required Accessible Features and Facilities, particularly in respect of those features and facilities necessary to meet personal hygiene and food preparation.

"To remedy the contravention or non-compliance you must: Remove the additional shower cubicle walls/doors, kitchen sink and/or cupboard unit, and restore those Features and Facilities to a level of compliance which is to have prior approval by Council. . . .

"**Further particulars**

"You must contact the territorial authority . . . to confirm details of the proposed restoration work prior to the commencement of that work.

"This notice must be complied with by 31 August 2005."

2.7 On 10 August 2005 I received the application for this determination, in which the matter of doubt or dispute was identified as being the territorial authority's decision to issue the notice to fix, see 4.2 below.

3 The legislation

3.1 General

3.1.1 The relevant provisions of the Act set out below are effectively identical to the corresponding provisions of the Building Act 1991 ("the former Act"), which was in force when the applicants made the alterations.

3.2 Definition of "building"

3.2.1 The relevant provisions of section 8 are:

> "(1) In this Act, unless the context otherwise requires, **building—**
>
> > "(c) Also includes—
> >
> > > "(ii) any 2 or more buildings that, on completion of building work, are intended to be managed as 1 building with a common use and a common set of ownership arrangements."

3.3 Building consents for alterations

3.3.1 Section 40 provides that, subject to certain exceptions, a person must not carry out building work, including alterations, except in accordance with a building consent. None of the exceptions apply to the alterations to Unit 46.

3.3.2 The relevant provisions of section 112 are:

> "(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); and
> >
> > "(b) continue to comply with the other provisions of the Building Code to at least the same extent as before the alteration."

3.4 Access and facilities for people with disabilities

3.4.1 The relevant provisions of section 118 are:

> "(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."

3.4.2 The relevant provisions of Schedule 2 are:

"The buildings in respect of which the requirement for the provision of access and facilities for persons with disabilities apply are, without limitation, as follows:

"(j) hotels, motels, hostels, halls of residence, holiday cabins, groups of pensioner flats, boarding houses, guest houses, and other premises providing accommodation for the public."

3.4.3 Section 119 provides in effect that NZS 4121 "is to be taken as a compliance document" in respect of requirements for people with disabilities.

3.4.4 The relevant provisions of clause 14.5.2 and table 2 of NZS 4121 are to the effect that the minimum of 1 accessible unit must be provided in a complex of 1 to 10 accommodation units, and 2 accessible units in a complex of 11 to 25 accommodation units.

3.4.5 The relevant provisions of the Building Code are:

Clause A1—CLASSIFIED USES

1.0 EXPLANATION

1.0.1 For the purposes of this Building Code, buildings are classified according to type under seven categories.

1.0.2 A building with a given classified use may have one or more intended uses as defined in the Act.

2.0 HOUSING

2.0.1 Applies to buildings or use where there is self care and service (internal management). There are three types:

2.0.2 Detached Dwellings

Applies to a building or use where a group of people live as a single household or family. Examples: a holiday cottage, boarding house accommodating fewer than 6 people, dwelling or hut.

2.0.3 Multi-unit Dwelling

Applies to a building or use, which contains more than one separate household or family. Examples: an attached dwelling, flat or multi-unit apartment.

3.0 COMMUNAL RESIDENTIAL

3.0.1 Applies to buildings or use where assistance or care is extended to the principal users [including]:

3.0.2 Community Service

Applies to a residential building or use where limited assistance or care is extended to the principal users. Examples: a boarding house, hall of residence, holiday cabin, hostel, hotel, motel, nurses' home, retirement village, time-share accommodation, a work camp, or camping ground.

Clause G1—PERSONAL HYGIENE **Provisions**	**Limits on application**
OBJECTIVE **G1.1** The objective of this provision is to: (c) Ensure people with disabilities are able to carry out normal activities and processes within buildings.	Objective G1.1(c) shall apply only to those buildings to which [section 118] applies.
FUNCTIONAL REQUIREMENT **G1.2** Buildings shall be provided with appropriate spaces and facilities for personal hygiene.	
PERFORMANCE **G1.3.1** Sanitary fixtures shall be provided in sufficient number and be appropriate for the people who are intended to use them.	
G1.3.4 Personal hygiene facilities provided for people with disabilities shall be accessible.	Performance G1.3.4 shall not apply to Housing, Outbuildings, Ancillary buildings, and to Industrial buildings where no more than 10 people are employed.

Clause G3—FOOD PREPARATION AND PREVENTION OF CONTAMINATION **OBJECTIVE**	
G3.1 The objective of this provision is to: (c) Ensure that people with disabilities are able to carry out normal activities and processes within buildings.	Objective G3.1(c) shall apply only to those buildings to which [section 118] applies.
PERFORMANCE **G3.3.5** Where facilities are provided for people with disabilities they shall be accessible.	Performance G3.3.5 shall apply only to camping grounds and accessible accommodation units in Communal Residential buildings.

3.5 Notices to fix

3.5.1 The relevant provisions of section 164 are:

"(1) This section applies if a [territorial authority] considers on reasonable grounds that—

"(a) a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent) . . .

"(2) A [territorial authority] must issue to the specified person concerned a notice (a notice to fix) requiring the person—

"(a) to remedy the contravention of, or to comply with, this Act or the regulations . . ."

3.5.2 The term "specified person" is defined in section 163 as including the owner of a building.

4 The written submissions

4.1 General

4.1.1 The following account gives only an outline of the submissions. Various matters, which were mentioned in submissions, are not discussed below because after full consideration of all the circumstances those matters did not affect my decision.

4.2 The applicants' submissions

4.2.1 The applicant identified the matter for determination as follows:

> "6. The applicant asks the Chief Executive to review the [territorial authority's] decision to issue [the notice to fix] and seeks the following result:
>
> > "a) A determination that [the body corporate] is not in breach of the Building Act requirements properly construed; or alternatively
> >
> > "(b) That the Building Act requirements in relation to accessible facilities be waived in the particular circumstances of this case. . .
>
> "25. The applicant seeks a determination which
>
> > "(a) waives the requirement that [the body corporate] provide accessible facilities under the Building Act; or failing this
> >
> > "(b) overrules [the notice to fix]."

4.2.2 The grounds on which the applicants disputed the notice to fix were:

> "(a) Jacques Village should not be treated as akin to a motel for the purposes of the Building Act;
>
> "(b) even if Jacques Village could be treated as a motel, the Notice to Fix in relation to unit 46 cannot ensure compliance with the requirements of the Building Act and Building Code; and
>
> "(c) it is unfair and unreasonable in the circumstances to require that unit 46 be a paraplegic accessible unit."

4.2.3 As to whether Jacques Village should be treated as a motel, the applicants said:

> "11. Although the land use consent [under the Resource Management Act] for Jacques Village is for "travellers accommodation", the type of building actually present on the land is either "detached buildings" or "multi unit dwelling" under the Building Code. It is submitted that while the definition of the above terms in the Building Code refer to "residential" buildings, this is for the purpose of classifying the building type, not the land use.
>
> "12 It is also noted that the definition of "travellers accommodation" in the [land use] consent notice [under the Resource Management Act] refers to:

"*A building used for transient residential accommodation and includes motels, holiday flats, motor and tourist lodges and all rented residential accommodation offered for a daily tariff.*"

"13. It is submitted that this definition uses 'transient' to differentiate 'permanent' residential accommodation. The definition does not exclude privately owned and used holiday homes. Accordingly, it is inappropriate to treat the Jacques Village as a motel because there is no requirement under the land use consent to have the units available to the public. There is no breach of the consent notice if the units are not under management. . . .

"15 As a consequence of the above it is submitted that the Building Industry Authority determination no. 2003/9, which required that a motel complex of 22 units on individual unit titles provide accessible facilities can be distinguished on the basis that the buildings are not deemed to be commercial, and that there is no central body with whom the requirement to provide accessible facilities can rest. . . .

"17 . . . We note the Building Industry Authority determination no. 95/003 which held that:

"*The provisions concerned (the Building Act requirements) do not apply to the whole or any part or portion of the 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, ought not to be visited by people with disabilities.*"

"18 If unit 46 is withdrawn from management [for letting] or is not available [for letting] altogether, it will not be visited by people with disabilities for a specific reason. So long as there remains no requirement for members of Jacques Village to have their units managed by a single nominated management company, the same argument is true in respect of any particular unit."

4.2.4 The applicants also said that, because they (or all or any of the other unit title holders) "may at any time withdraw their unit from being available for letting purposes . . . it is illogical to maintain that unit 46 must remain as a paraplegic facility".

4.2.5 Furthermore, the applicants said in effect that in the current circumstances, with the units being owned individually and used primarily for private holiday accommodation, with no requirement for them to be let out, it was unfair and unreasonable to impose on Unit 46 requirements that had previously applied to the original motel complex.

4.3 The body corporate's submissions

4.3.1 The body corporate said:

"We . . . are fully conversant with the circumstances that have given rise to the application . . . . However we must point out that the application has been initiated by [the applicants] without consideration of the Body Corporate. Accordingly, please ensure that consideration of matters raised in the application are treated as the opinion of [the applicants], and may not represent the Body Corporate."

4.4 The territorial authority's submissions

4.4.1 A letter from the territorial authority's solicitor to the applicants' solicitor disputed the applicants' arguments. Although that letter was actually supplied to me by the applicants, I am treating it as a submission from the territorial authority.

4.4.2 As to whether Jacques Village should be treated as a motel, the letter said that clause (j) of Schedule 2 "is broad enough to encompass the units in Jacques Village". Clause G1.3.4 of the Building Code does not apply to "housing", but Jacques Village was not "housing" but "communal residential" in terms of clause A1 of the Building Code.

4.4.3 The letter also said:

"Council does understand that Jacques Village is the product of a subdivision of the pre-existing motel complex known as the Akaroa Village Inn. Whatever the current understanding of the residents regarding what the permitted use of the Jacques Village Units is, that does not alter the fact that these units are offered to rent to the travelling public and as such, must have an adequate number of accessible units available to comply with the Building Code."

4.4.4 The territorial authority itself asked me to confirm that I had jurisdiction to determine the dispute before it prepared submissions, saying that the matter "generally lies in the confirmation of the approved use of land (and building use) which is considered to be a matter for the Environment Court". I advised that in my view I had jurisdiction under section 177(b)(iv) to make a determination in respect of the territorial authority's decision to issue the notice to fix.

4.4.5 The territorial authority gave me information about the original Akaroa Village Inn and the subsequent subdivisions (outlined in 2.1 and 2.2 above). The territorial authority claimed that "approx 30 of the units (including the 11 known as Jacques) are currently under central on-site management" and asked me to determine:

(a) "the correct basis on which the number of Accessible units required to achieve compliance with the Building Code should be calculated for the complex known as Akaroa Village Inn".

(b) "The correct basis on which Council should identify the parties responsible for the restoration and/or installation of accessible units if it is assessed that more units are required to achieve compliance with the Building Code than the two presently existing."

4.5 The draft determination

4.5.1 I prepared a draft determination and sent it to the parties with a note to the effect that if all parties accepted it (subject to non-controversial corrections) then it would be issued as a final determination, but otherwise there would be a formal hearing of the matter. The territorial authority accepted the draft subject to certain amendments. The applicants did not accept the draft and requested a hearing.

5 The hearing

5.1 General

5.1.1 The hearing was held on 18 November 2005. The applicants appeared on their own behalf. The body corporate was represented by its chairman, B Willcox. The territorial authority was represented by its environmental services manager, T Harris, who called evidence from K James, senior building official, and S Brandish, building officer/manager DBH determinations. In attendance were J Hill, a Referee acting for and on behalf of the Chief Executive by delegated authority under section 187(2) of the Building Act 2004, and officers of the Department.

5.1.2 I shall not set out all of the evidence and discussions at the hearing. The parties clarified the history of the transition from the original hotel/motel complex known as the Akaroa Village Inn to the current series of smaller independent complexes. The parties also clarified the nature of the alterations to Unit 46.

5.1.3 The applicants felt that they had been unfairly treated by the territorial authority. That is not a matter that I can take into account in considering whether the notice to fix was properly issued.

5.1.4 The applicants also explained that when they purchased Unit 46 they had realised that it was in fact an accessible unit. However, they had not realised that one such unit was required in the Jacques Village complex. They felt that they had been misinformed, or at least not properly informed, as to their obligations in that respect.

5.1.5 The applicants said that at the time the notice to fix was issued (see 2.5 above) they had not in fact formed an intention not to do the required rectification work but were uncertain whether they were legally obliged to do such work. They therefore felt that the territorial authority had misunderstood their position and acted prematurely in issuing the notice. Furthermore, the notice required rectification work to be done within an unrealistic time frame.

5.1.6 The applicants considered that if rectification were in fact required, it would be unfair for them to have to meet all of the costs involved.

5.1.7 The territorial authority assured the applicants that it had not treated them any differently from others in a similar situation.

5.1.8 The territorial authority asked me to make certain amendments to the draft, and I have incorporated those, which I consider to be non-controversial. The territorial authority also asked me to comment on certain matters, and although I consider

those matters are not strictly relevant to the determination, I have done so to the extent I consider appropriate.

5.1.9 The body corporate outlined its relevant rules and said that it was obliged to follow them.

6 Discussion

6.1 General points arising from the applicant's submissions

6.1.1 I have no jurisdiction in respect of the Resource Management Act and therefore take no account of the conditions of the land use consent under that Act. However, under section 177(b)(iv) I do have jurisdiction in respect of the territorial authority's decision to issue the notice to fix.

6.1.2 The building work involved in the alterations made by the owners and described in 2.4 above was required by section 17 to comply with the Building Code "to the extent required by this Act". In other words, to comply with the Building Code subject to any waivers or modifications. That is a separate requirement from section 112, which requires the building as a whole, after any alteration, to comply "as nearly as is reasonably practicable" with certain provisions of the Building Code. The same will apply to any building work required by the notice to fix.

6.1.3 As regards access and facilities for use by people with disabilities, I take the view that any waiver or modification must be granted by me under section 69, but only in respect of an existing building and only if it is reasonable to do so. In this case, as discussed below, I consider that it is reasonable to require the owners to make Unit 46 as accessible as it was at the time of subdivision. Accordingly, I hereby grant such waivers or modifications, if any, as are necessary to authorise:

(a) No further alterations to the kitchen, and

(b) Only such alterations to the bathroom as are necessary to make it as accessible as it was at the time of subdivision.

6.1.4 I take the view that I must decide on the basis of the actual use to which the building concerned is being put and whether that use means that section 118 applies. I also take the view that the defined uses specified in clause A1 of the Building Code are relevant only in relation to the limitations on application of the other clauses of the Building Code.

6.1.5 I take the view that if section 118 does apply because the building is being used to provide accommodation to the public in terms of Schedule 2 then it is irrelevant whether or not that use is managed by a central body. The decision that the body corporate would not manage the letting of units has been adopted by each of the current unit title holders, whether or not as a requirement of their individual agreements for sale and purchase of their units. I take the view that their decision cannot alter the application of section 118.

6.1.6 I take the view that I cannot take account of any perceived or actual unfairness to the applicants on the part of the territorial authority or others.

6.1.7 There was no dispute that, after the alterations, the toilet facilities were not accessible.

6.1.8 There was no dispute that at the time of subdivision there was a sink and sink bench but no cooking facilities in Unit 46. Part of the alteration was the installation of an extension at right angles to the sink bench containing a cooking top and providing for an under-bench refrigerator. After the alteration the kitchen layout complied with the intent of Figure 51(3) of NZS 4121 except that there was no angled portion in the interior corner of the bench top. I consider that the alteration is acceptable because:

(a) For the reasons set out in 6.5.2 below, after the alteration Unit 46 is required to comply with the provisions of the Building Code for access and facilities for use by people with disabilities to at least the same extent as it did at the time of subdivision. At that time, there were no cooking facilities. The addition of cooking facilities, whether or not they were accessible, would therefore not make the unit any less accessible than it was at the time of subdivision.

(b) However, because the extension to the bench was new work, it was required to comply completely with the Building Code subject to any properly granted waiver or modification.

(c) The kitchen as altered complies with the compliance document NZS 4121 (and therefore with the Building Code) except for the omission of the angled portion in the corner. Taking account of the fact that the kitchen is now at least as accessible as it was at the time of subdivision, I consider it reasonable for me, under section 69, to grant a waiver or modification of the Building Code so that the kitchen as altered is to be accepted for the purpose of the code compliance certificate that will need to be issued when the rectification required by the notice to fix, as amended, is completed (see 6.5.3 below).

6.1.9 Accordingly, setting aside matters that I consider to be irrelevant or beyond my jurisdiction, I take the view that this determination turns on the following questions:

(a) For the purposes of the determination, is Unit 46 to be considered as a separate building or as part of a building complex? In other words, is the building concerned Unit 46 or the Jacques Village complex as a whole?

(b) Does section 118 apply to the building concerned so that it is required to include access and facilities for people with disabilities?

(c) Was the notice to fix properly issued?

(d) Should the territorial authority's decision to issue the notice to fix be confirmed, modified, or reversed?

6.2 The building concerned

6.2.1 Section 8(1)(c)(ii) provides in effect that a complex of 2 or more buildings may, not must, be considered as a single building if the complex is "managed as 1 building with a common use and a common set of ownership arrangements". I consider that the 11 units in 5 buildings that comprise Jacques Village have a common use and common ownership arrangements. They are managed by the body corporate as 1 building, although not in respect of letting them out for short-term accommodation. Thus the building concerned may be either Unit 46 or Jacques Village as a whole.

6.2.2 The application of section 3(2)(b) of the former Act, which corresponds to section 8(1)(c)(ii), was discussed by the Building Industry Authority ("the Authority") in determinations under the former Act. In Determination 96/005 the Authority said that it:

> ". . . takes the view that other buildings in the same complex may be taken into account when deciding whether the building concerned complies with particular provisions of the Building Code (see Determinations 94/004, 95/003, and 96/003)."

6.2.3 Section 3(2) of the former Act was also discussed in Brookers Building Law, which said:

> "It is suggested that in circumstances where a provision [of the Building Code] can be taken to apply to a building as a whole, and also to either or both part of that building and the other buildings in the same complex as that building, then the provision should be applied to whichever is the more reasonable of the part, the whole, or the complex, taking account of the purposes and principles of the BA91 as set out in s 6 [now sections 3 and 4]."

6.2.4 Applying that approach to this case, I consider that if the provisions of the Building Code for access and facilities for use by people with disabilities do in fact apply then it is more reasonable to apply them to Jacques Village as a whole than to Unit 46. Otherwise, whenever any of the 5 buildings making up the complex was being altered the mandatory upgrading provisions of section 112 would apply to that building rather than to the complex as a whole.

6.2.5 At the hearing there was some suggestion that all of the buildings of the original Akaroa Village Inn complex should continue to be treated as a single building for the purposes of deciding numbers of accessible units. I disagree, taking the view that after the original complex had been subdivided the buildings that had previously been in that complex no longer had "a common set of ownership arrangements", because there was no longer a single body corporate, and therefore could not be treated as one building under section 8(1)(c)(ii).

6.3 Does section 118 apply to the building concerned?

6.3.1 The applicants, and according to them other unit title holders, make their units available to the general public for short-term accommodation.

6.3.2 I therefore agree with the territorial authority's solicitor that Jacques Village comes within clause (j) of Schedule 2 in that it is "providing accommodation to the public" so that section 118 applies. That means that, after any alteration to any of the units, Jacques Village as a whole must comply as nearly as is reasonably practicable with the provisions of the Building Code for access and facilities for people with disabilities.

6.3.3 Of course, if all of the unit title holders refrained from making their units available to the general public for short-term accommodation then section 118 would not apply. I offer no opinion as to whether that would have any implications under the Resource Management Act.

6.4 Was the notice to fix properly issued?

6.4.1 Section 164 applies if the owner of a building is "failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent)".

6.4.2 The alterations to Unit 46 were made without a building consent. Under the former Act, a building consent was not required for work that came within paragraph (ab) of the Third Schedule to the former Act (corresponding to Schedule 1) as being "replacement with a comparable component or assembly in the same position", commonly referred to as "like for like replacement". However, I do not consider that facilities that do not have features to permit use by people with disabilities can properly be called "comparable" with facilities that do have such features.

6.4.3 I therefore take the view that a building consent was required for the alterations, and that therefore section 38 of the former Act (now section 112) applied.

6.4.4 If a building consent had been applied for it would have been refused unless the territorial authority was satisfied that after the alteration the building concerned would comply as nearly as was reasonably practicable with the provisions of the Building Code that relate to access and facilities for people with disabilities. The territorial authority accepted that the building complied with those provisions to the required extent at the time of subdivision, and I consider that it is "reasonably practicable" for it to comply to at least the same extent after the alterations.

6.4.5 Under section 164(2)(a), a notice to fix may require the owner to "remedy the contravention". The contravention (failure to obtain a building consent) meant that Jacques Village no longer included an accessible unit. I therefore take the view that the notice to fix properly required in effect that the unit be made accessible again. Of course, Jacques Village could be made accessible to the same extent as it was at the time of subdivision if one of the other units were altered to make it accessible, but that is a matter between the body corporate and the unit title holders concerned.

6.5 Should the notice to fix be confirmed, modified, or withdrawn?

6.5.1 I take the view that even if the notice to fix was properly issued in terms of the Act it should be modified or withdrawn if it is unreasonable. I take the view that in

considering whether the notice is unreasonable I must consider not only the interests of the applicants but also the interests of people with disabilities.

6.5.2 As to what was "reasonably practicable", I take the view that when it issued a section 224(f) Resource Management Act certificate to authorise the subdivision without any alteration to the access and facilities for use by people with disabilities, the territorial authority decided that the resulting Jacques Village complex already complied to the required extent and no upgrading was required. In Determination 2002/5 the Authority took the view that if a territorial authority required certain upgrading when issuing a building consent for one alteration it was not prevented from requiring additional upgrading when it issued a building consent for a further alteration. However, I consider that the reasons for the Authority's decision do not apply in this case. I take the view that it would have been unreasonable of the territorial authority to require additional upgrading when Unit 46 was altered. However, it could well be different in future if upgrading needs to be considered under sections 112 (alterations, for example if additional units are constructed), 115 (change of use), or 116 (further subdivision). Accordingly, I consider that a reasonable requirement is that Jacques Village must continue to be accessible to the same extent as it was at the time of the subdivision.

6.5.3 Accordingly, I consider that the notice to fix (see 2.6 above) went too far when it:

(a) Required the extension to the sink top (incorporating a cooking top and space for an under-bench refrigerator) to be removed, see 6.1.8 above.

(b) Required the rectification to achieve "a level of compliance which is to have prior approval by Council".

6.5.4 I take the view that the required extent of accessibility should not be to the approval of the territorial authority but to the objective standard set by the Act.

6.5.5 I also take the view that it was unreasonable for the notice, issued on 12 July 2005, to require compliance by 31 August 2005. There was no special urgency about the rectification and the applicants should have been allowed a longer time.

6.6 Other queries

6.6.1 As mentioned in 5.1.3 above, the applicants felt that they had been unfairly treated by the territorial authority. That related in particular to:

(a) Their treatment in comparison to unit title holders in other complexes that had originally been part of the Akaroa Village Inn.

(b) The issuing of the notice to fix.

6.6.2 At the hearing I gained the impression that any perceived unfairness arose from the territorial authority's attempts to ensure that all of the accessible units in the Akaroa Village Inn continued to be accessible in their new ownerships. Some confusion

appears to have arisen because several additional accessible units would have been required if each of the newly subdivided complexes had been required to comply completely with the relevant provision of the Building Code.

6.6.3 As to the issuing of the notice to fix, I consider that communication difficulties arose because of the applicants' unfamiliarity with the building control system. I do not doubt that they honestly believed that they were entitled to make the alterations without a building consent, but I think they now realise that they would have been wise to obtain expert advice as to the consequences of purchasing a motel unit having features to permit use by people with disabilities. I do not think that the applicants realised that the territorial authority itself was constrained by the need to comply with the Act.

6.6.4 I offer no opinion as to whether there will be any unfairness arising out of the question as to who should pay for the remedial work required by the notice to fix. That is a matter of private law between the applicants and the body corporate.

6.6.5 The territorial authority queried:

(a) Whether the applicants were entitled to require a hearing after stating in the application form that they would not.

6.6.6 I take the view that any party to a determination is entitled to request a hearing at any time before the determination is issued.

(b) The different requirements of D1/AS1 (1 accessible unit for "0 - 9" total units) and NZS 4121 (1 accessible unit for "1 - 10" total units).

6.6.7 I take the view that D1/AS1 and NZS 4121 have equal status as compliance documents and compliance with either of them must be accepted as establishing compliance with the corresponding provisions of the Building Code.

7 Conclusions

7.1 In terms of the applicants' submissions as to the matter for determination, set out in 4.2.1 above, I conclude that (referring to the numbering of the applicants' submission):

6(a) The applicants or the body corporate or both were in breach of the Act in respect of carrying out building work without a building consent, see 6.4 above.

6(b) and 25(a) I do not have reasonable grounds on which to waive the requirements for access and facilities for use by people with disabilities, see 6.1.3 above.

25(b) The territorial authority's decision to issue the notice to fix must be modified, see 6.5 above and 8.1 below.

7.2 In terms of the territorial authority's submissions, I conclude that:

(a) I do have the jurisdiction to make a determination in respect of the notice to fix.

(b) As to the number of accessible units "required . . . for the complex known as the Akaroa Village Inn", see 4.4.5(a) above, there is no such number because that complex no longer exists. The various complexes into which the previous Akaroa Village Inn has now been subdivided will need to be considered individually on their own merits if and when the question of upgrading arises under sections 112, 115, or 116, see 6.5.2 above.

7.3 In more general terms, I conclude that:

(a) For the purposes of the determination, the building concerned is the Jacques Village complex as a whole.

(b) The Jacques Village complex as a whole is required to include access and facilities for people with disabilities.

(c) The notice to fix was properly issued.

(d) The notice to fix should be modified as discussed in 6.5.3 above.

8 Decision

8.1 In accordance with section 188 of the Act, I hereby modify the territorial authority's decision to issue the notice to fix to the effect that the notice is amended to provide:

(a) To remedy the contravention the toilet facilities must be restored to have the same extent of accessibility as at the time of the subdivision.

(b) The notice must be complied with by:

(i) Applying for a building consent for the building work concerned within three calendar months of the date of this determination or such further period as the territorial authority may reasonably allow,

(ii) Commencing work under the building consent within three calendar months of the date of the amendment or such further period as the territorial authority may reasonably allow, and

(iii) Properly completing the work within two calendar months of commencement or such further period as the territorial authority may reasonably allow.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 9 December 2005.

John Gardiner
Determinations Manager