

Determination

under the

Building Act 1991

No. 95/006: Accessible sanitary facilities in a small shop

1. The matter to be determined

- 1.1 The matter before the Authority was whether sanitary facilities suitable for people with disabilities (“accessible facilities”) are to be provided in the proposed construction of a small shop.

2. The parties

- 2.1 The applicant is the owner of the land on which the shop is proposed to be constructed, the territorial authority is the only other party.

3. The matter to be determined

- 3.1 The Authority takes the view that it is being asked in effect to determine whether accessible facilities are required for compliance with clause G1.3.1 of the building code (the First Schedule to the Building Regulations 1992), and if so to grant a waiver of that requirement under section 34(7) and as provided by section 25(2) of the Disabled Persons Community Welfare Act 1975 in the case of an alteration to an existing building.
- 3.3 In making its determination, the Authority has not considered the other provisions of the building code.

4. The building

- 4.1 The shop is to be a building of two storeys constructed on the floor slab of a demolished building on the same site. The reason for the demolition and the new construction is so that the floor level of the new building will comply with a building height flood level restriction which has come into force since the original building was built.
- 4.2 The plans and specifications submitted to the Authority show a building approximately 5.5 m wide by 20 m long with a street entrance at each end. The ground floor has a gross floor area of approximately 110 m², the upper floor approximately 70 m². For the upper floor, a design occupancy of approximately 14 people can be calculated from the occupant density of 0.2 persons/m² given by Table A2 of Appendix A to Approved Documents C2, C3, and

C4. There is therefore no requirement for a lift to be provided under clause D1.3.4 of the building code.

4.3 The street entrance at one end is accessible, but the other is not.

4.5 There are toilet facilities on both the ground and upper floors, neither of them accessible.

5. The parties' contentions

5.1 General

5.1.1 The territorial authority made no specific submissions.

5.1.2 The owner, by its solicitor, submitted in effect that:

- (a) An accessible toilet was not required because no wheelchair bound person may be expected to work in the building.
- (b) The fact that the building was about 55 m travel distance from a public accessible toilet meant that "reasonable and adequate" provision for people with disabilities had been made in terms of the Disabled Persons Community Welfare Act 1975.
- (c) The proposed building work was the alteration of an existing building, so that under section 25(2) of the Disabled Persons Community Welfare Act the Authority had the power to waive or modify the provisions of section 25, and it would be reasonable to grant a waiver of any requirement for an accessible toilet and it was reasonable to grant such a waiver.
- (d) The proposed building work was the alteration of an existing building, so that under section 38 of the Building Act the question was whether the building without an accessible toilet complied "as nearly as is reasonably practicable" with the provisions of the building code for access and facilities for people with disabilities. Because of the proximity of the public toilet and for other reasons, the building did so comply.

5.2 Wheelchair bound people in the building

5.2.1 The owner's submission that an accessible toilet is not required because no wheelchair bound person may be expected to work in the building is understood by the Authority to be a submission that the building is not one to which section 25 of the Disabled Persons Community Welfare Act applies.

5.2.2 The relevant words of section 25, as amended by the Health and Safety in Employment Act 1992 are:

(1) In any . . . building to which the public are to be admitted . . . reasonable and adequate provisions by way of access, . . . and sanitary conveniences, shall be made for disabled persons who may be expected to visit or work in that building and carry out normal activities and processes in that building.

(4) The provisions of this section shall apply to . . . :

(r) Shops, shopping centres, and shopping malls:

(z) Other buildings, premises, or facilities where 10 or more people work, whether for gain or reward or otherwise.

5.2.2 The owner submitted that a wheelchair bound person could not be expected to work in the building because:

- (a) “The nature of the business and the tenancy is such that any staff working in the building will have to be able to access both floors - a person in a wheelchair will not be able to access the upper floor”;
- (b) Two staff members will be employed, but they will work shifts so that only one is in the building at any one time;
- (c) “To employ someone in a wheelchair would require a doubling of the staff which would be uneconomic for the business”;
- (d) “The practical and economic reality is that the premises are a one person shop and that person must be able to access both floors of the premises”.

5.2.3 Those reasons arise solely from the way in which the current tenant intends to manage the building, which the owner in effect claims to be the only realistic way. Those are management matters. The Authority has said in previous determinations¹ that it does not generally take management matters into account in considering whether a building complies with the building code.

5.2.4 Even if the Authority found those reasons persuasive, they would apply only for so long as the building was in fact managed in that way. However, the Authority considers that the Building Act requires that a building shall not only comply with the building code when constructed but shall continue to so comply throughout its life. This building is not stated to have a limited intended life in terms of section 39, so that its intended life is to be taken as indefinite but not less than 50 years. The tenant’s current intentions as to the management of the building can therefore be given little if any weight for the purposes of this determination.

5.2.5 The owner further submitted that:

in the event of any change of use from the retail use proposed for the premises, if such change of use enables the employment of more than one staff, the premises might require upgrading to provide accessible facilities.

¹ See Determinations No. 92.1102 and No. 94/001.

- 5.2.6 The Authority does not accept that the only realistic way of running a retail shop in the building will be to employ no more than one person. The Authority is aware of shops smaller than the one concerned which have staffs of three or four.
- 5.2.7 Admittedly, in a previous determination² the Authority decided that alterations could be made without a lift on condition that the intended use of the building was identified as including a provision to the effect that no more than a certain number of people would work on an upper floor. However, that determination was prefaced by a specific statement that that it should be read as being limited to its specific circumstances. The Authority does not consider it acceptable to specify the intended use of a building in such a way as to ensure that wheelchair bound people cannot work in the building.
- 5.2.8 As to the general question of when people with disabilities may be expected to visit or work in a particular building, the Authority is still of the view set out in Determination No. 95/003 as follows:
- 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.
- 5.2.9 Thus the Authority does not accept that no wheelchair bound person may be expected to visit or work in the building concerned. Accordingly, the Authority considers that the building is one to which section 25 of the Disabled Persons Community Welfare Act applies.

² Determination No. 93/002.

5.3 *Availability of a public accessible toilet*

5.3.1 The owner drew attention to the fact that in previous determinations³ the Authority accepted that accessible facilities need not be provided in one building if they were conveniently located in another building in the same complex. However, in both those determinations the discussion of that point was in the context of section 3(2)(b) of the Building Act, which refers to a complex of “2 or more buildings . . . managed as 1 building with a common use and a common set of ownership arrangements”.

5.3.2 In this case, the Authority does not accept that existence of the public accessible toilet is relevant to the question of whether an accessible toilet is to be provided in the building concerned.

5.4 *Does the proposed building work constitute an alteration for which it would be reasonable to grant a waiver of the requirement for an accessible toilet?*

5.4.1 If the proposed building work constitutes an alteration then, as the Authority understands section 25(2) of the Disabled Persons Community Welfare Act, the Authority has a power to grant waivers from the requirements of section 25 if it determines that it is reasonable to do so. That power applies only in respect of the alteration of an existing building, it does not apply in respect of the construction of a new building.

5.4.2 Section 25 defines “alteration” as having the meaning ascribed to it by the Building Act. The definition in section 2 of the Building Act reads as follows:

“Alter”, in relation to a building, includes to rebuild, re-erect, repair, enlarge and extend; and “alteration” has a corresponding meaning”

5.4.3 The owner’s submissions refer to “the proposed rebuilt premises” but does not state whether the new building will be identical to the previous building except for the level of the ground floor. Thus it is open to doubt whether the proposed building work can properly be called “rebuilding”.

5.4.4 The Authority considers that the building work concerned must be classed as the construction of a new building and not as the alteration of an existing building. However, on the assumption that it is an alteration the Authority responds to the following submissions from the owner that it would be reasonable to grant a waiver from the requirement for an accessible toilet:

(a) Because of the size and shape of the building:

the installation of an accessible toilet reduces the width of the premises to approximately 3.0 metres over a significant length of the building

³ Determination No. 95/003. See also Determination No. 94/004.

The Authority does not consider that the building is of such a size and shape as to justify a waiver.

- (b) Because wheelchair bound people would not work in the building and because of the nearby location of the public accessible toilet.

The Authority does not accept those justifications for the reasons discussed above.

- (c) Because of section 25(4)(z) of the Disabled Persons Community Welfare Act. In the owner's words:

While it is accepted that Section 25(4)(r) specifies "shops" and therefore Section 25(4)(z) does not apply, it is submitted that there is an inconsistency between Section 25(4)(z) which provides for an exemption in other premises where ten people work . . .

The Authority notes that when section 47a of the Building Act comes into force to replace section 25 of the Disabled Persons Community Welfare Act, the present section 25(4)(z) will be replaced by a new section 47a(4)(y) which reads:

- (y) Factories and industrial buildings where more than 10 people are employed.

The Authority does not accept that apparent discrepancies between paragraphs of section 25(4) justify a waiver.

5.5 *Does the building without an accessible toilet comply with the building code as nearly as is reasonably practicable?*

5.5.1 As stated in 5.4.4 above, the Authority considers this to be a new building. However, on the assumption that it is an alteration then under section 38 of the Building Act the building, after the alteration, need only comply with the relevant provisions of the building code "as nearly as is reasonably practicable".

5.5.2 The Authority takes the view that all building work is required to comply with the building code, see section 7(1) of the Building Act, subject to any waivers or modifications under section 34(4), so that with an alteration the usual question is not whether a waiver should be granted for new work but whether any additional upgrading work is required in order to comply with section 38.

5.5.3 Even if it were accepted that the new work was required to comply with the relevant provisions of the building code only "as nearly as is reasonably practicable", the Authority considers that in this case it is reasonably practicable to comply completely with the requirement for an accessible toilet. Thus it makes no difference whether the building work is classified as the construction of a new building or the alteration of existing building.

6. The Authority's decision

- 6.1 In accordance with section 20(a) of the Building Act the Authority hereby determines that the building is required to include an accessible toilet.

Signed for and on behalf of the Building Industry Authority on this 20th day of December 1995

J H Hunt
Chief Executive