



Determination 2008/111

Access and facilities for people with disabilities to a building providing kitchen and ablution facilities at an orchard in Kawarau Gorge Road, Central Otago

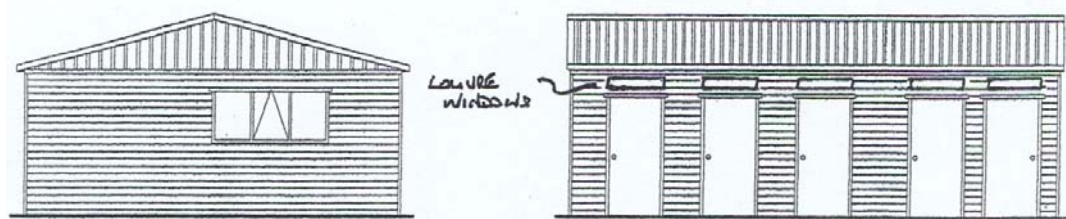


Figure 1: Building elevations

1. The matter 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, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of the Department. The applicant is the owner of an orchard business acting through its manager (“the owner”). The other party is the Central Otago District Council (“the authority”), carrying out its duties as a territorial authority or a building consent authority.
- 1.2 The determination arises from the authority’s decision that the proposed building must have access and facilities for people with disabilities. The proposed building containing kitchen and ablution facilities is intended to supplement and service the owner’s existing accommodation on the orchard.
- 1.3 I take the view that the matter for determination is the territorial authority’s decision to refuse to issue an amendment to the building consent so that the building would no longer comply with the Building Code¹ with respect to access and facilities for

¹ Schedule 1 of the to the Building Regulations 1992

people with disabilities (being Building Code Clauses D1 Access routes, G1 Personal hygiene, and G3 Food preparation and prevention of contamination).

1.4 I have copied the draft determination to the Office for Disability Issues ("the ODI"), at the Ministry of Social Development by way of consultation under section 170.

1.5 Unless otherwise stated, references below to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

2. The proposed building

2.1 The proposed building is single storey with a simple rectangular floor plan. As consented it will have a reinforced concrete floor slab and be clad with a proprietary metal weatherboard system. The roof will be clad with a proprietary longrun ribbed metal sheet system.

2.2 The proposed building will have a concrete ramp rising from one corner of the building to run outside and immediately adjacent to the building to provide wheelchair access to the entry door to the kitchen and dining space. Another ramp will rise from the same starting point and rise at right angles to the other ramp, providing wheelchair access to the entry door to an accessible combined toilet and shower room. The ramp will also assist access to the entry doors to another toilet, a shower room, and a room containing 2 sinks.

3. Background

3.1 The authority says it has issued a building consent for the proposed building work, based on documentation submitted by the owner showing that the proposed building would include access and facilities for disabled people in accordance with section 118 of the Act.

3.2 Work has not yet started on the building.

3.3 The owner now wishes to remove the ramps and accessible facilities from the proposed building work. It is that matter that triggered the owner's application for a determination.

3.4 The Department received the owner's application for a determination on 14 October 2008.

4. The submissions

4.1 The owner submitted a "Summary of Facts" with the application. In the summary the owner said:

1. [Name of orchard] operates a large summer fruit orchard . . .
2. [The orchard] has a requirement for seasonal labour and to attract seasonal labour needs to provide modern and attractive facilities.

3. [The orchard] has applied for a building consent to erect a kitchen and ablutions building to supplement and service its existing accommodation and camping area. The plans of the building are attached.
4. [The orchard] has made application to [the authority] the Building Consent (sic) to erect a building. [The authority] has refused to grant the consent unless the plans are changed to provide for access and sanitary provisions for people with disabilities. The [authority] state that this is required under section 118 (1) (a) of [the Act].
5. [The orchard] disputes that such facilities are required in terms of The Act and submits the following in support:
 - 1) The facilities are solely for seasonal worker accommodation.
 - 2) By virtue of the nature of the work persons requiring wheelchairs for movement cannot carry out such work and would not be employed to carry out such work.
 - 3) [The orchard] does not employ people who are not fully fit and cannot move without a wheelchair.
 - 4) No visitors will be permitted to use the facilities.
 - 5) Existing determination numbers 95/003 and 2001/10 support this interpretation although (they) relate to a comparable section of the old Building act.
 - 6) In recent times the fruit and grape growing industries, in consultation with some government agencies and some territorial authorities, have agreed on a Code of Practice relating to this issue. The Code of Conduct supports [the orchard]'s interpretation of the Act . . . [The orchard] . . . has agreed to be bound to the terms of such Code of Practice.

We require a determination to decide whether such facilities are required to be in the building.

4.2 With the application the owner supplied:

- some plans of the proposed building
- specifications for the proposed building
- a copy of an email from the Department to the authority
- the summary of facts
- a copy of the Code of Practice referred to in paragraph 4.1.

4.3 In its submission dated 13 October 2008 the authority said:

The applicant . . . has applied for a Building Consent to erect a building to be used for agricultural staff facilities. The [authority] has issued the Building Consent in accordance with section 118 of [the Act].

The documentation supplied for the Building Consent shows access and facilities complying with Section 118.

[The authority's] view . . . is that access and accessible facilities should remain.

The applicant has stated in the supporting documentation for this determination that these facilities will only be for able bodied workers. They are inferring able bodied workers are not workers in wheelchairs. Wheelchairs are only one form of disability.

NZS 4121 . . . definitions states "people with disabilities means people whose ability to be freely mobile or to access and use buildings is affected by mental, physical, hearing or sight impairment". Twelve types of disability are then listed.

Council is not at liberty to determine if a person has one of these disabilities so are not allowing the removal of access and accessible facilities from the Building Consent. . .

. . . if a person has one of these disabilities they may still be able to work on an orchard. So therefore, the applicant needs to comply with section 118 (1) as a person with a disability may be able to visit or work in that building and carry out normal activities and processes in that building.

- 4.4 The authority's submission was accompanied by a number of drawings that formed part of the building consent application.
- 4.5 In a subsequent email dated 7 November 2008 the owner provided additional information in response to a request from the Department. The most relevant additional information was that:
- the two buildings adjacent to the proposed building are for the sleeping accommodation of the seasonal picking staff. The proposed building will provide ablutions, cooking and dining facilities for those staff
 - the nature of the work in the packhouse requires workers to be mobile and capable of lifting buckets and boxes
 - the work in the orchard requires workers to be able to walk through grass, carry and climb ladders and operate "hydraladders" (one-person "cherry-picker" type hoists)
 - The seasonal workers engaged by the owner are all workers undertaking seasonal work and would be unable to undertake the required work if they relied on wheelchairs for movement
 - The seasonal worker accommodation is intended solely to temporarily house seasonal workers who do not rely on wheelchairs for movement
 - The seasonal workers engaged by the owner are required not to be visually or aurally disabled since the ability to identify the various fruits by colour is essential to the picking or sorting tasks, and the ability to hear moving machinery, including vehicles, is essential to safety in the orchard.
- 4.6 The authority's submission was accompanied by the following drawings, all of which bore stamps showing that they were drawings that had formed part of a building consent application:
- A drawing showing the ramps described in paragraph 2.2.
 - A plan of the proposed building.
 - A drawing showing an elevation of the shower component of an accessible toilet and shower compartment, copied from the Acceptable Solution G1/AS1.
 - A drawing showing the plan and elevation of an accessible toilet compartment, copied from Acceptable Solution G1/AS1.
- 4.7 The draft determination was issued to the parties for comment on 12 November 2008. The draft determination was also sent to the ODI by way of consultation under section 170 of the Act.
- 4.8 In its response the ODI said it could accept that while the building is being used to accommodate seasonal workers it is unlikely that disabled persons will visit and work in the orchard and need to be accommodated in the building. However, it said,

that particular use would be restricted to the growing and harvesting season and the building may be used to accommodate other sections of the public including disabled people during the rest of the year. The building could be put to this use without any necessity to change the use of the building.

- 4.9 The ODI went on to say that the fact that the owner has no present intention to extend the use of accommodation in this way is irrelevant. When considering whether access and facilities should be provided it is more relevant to consider the purposes for which the building is likely to be used over the whole expected useful life of the building.
- 4.10 The ODI considered the determination should take account of one of the purposes of the Act, as expressed in section 3, namely sustainable development. It seemed that sustainable use of the building might entail the building being in use all year round, and not just in the fruit harvesting season. The ODI suggested that factors such as the terrain and locality increased the risk that the building would be used to provide accommodation to the public during the period when it was not required for orchard staff accommodation.
- 4.11 The owner accepted the draft determination without comment.
- 4.12 The authority accepted the draft determination subject to inclusion of a statement clarifying the requirements for compliance in the event that the owner seeks to change the use of the building in the future. The authority pointed out that the resource consent RC040345 and Change of Condition RC080352 authorises staff accommodation, and condition 1 of the consent specifically permits “*the relocation of two buildings onto the site to be used to accommodate people working on the applicant’s orchard and/or packhouse.*”
- 4.13 The authority went on to say that if the owner wished to use the facility (which I take to include the two relocated buildings and the proposed new building that is the subject of this determination) for any other form of accommodation, a fresh application for resource consent would be required. The authority said that if a resource consent was granted authorising any other form of accommodation within the buildings, compliance with the Building Code in relation to accessible facilities and fire safety requirements would be required at that time.

5. The legislation and the compliance documents

- 5.1 Relevant provisions of the Act are:

8 Building: what it means and includes

- (1) In this Act, unless the context otherwise requires, building –
- (a) means a temporary or permanent movable or immovable structure (including a structure intended for occupation by people, animals, machinery, or chattels); and includes –
 - (b)

- (c) includes any 2 or more buildings that, on completion of building work, are intended to be managed as one building with a common use and a common set of ownership arrangements
- (3) Subsection (1)(c) only applies in relation to –
 - (a) subpart 2 of Part 2; and
 - (b) a building consent; and
 - (c) a code compliance certificate; and
 - (d) a compliance schedule.

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.
- (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.

Schedule 2 Buildings in respect of which requirement for provision of access and facilities for people with disabilities applies

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 to the public::

5.2 Relevant provisions of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations are:

5 Change the use: what it means

- (1) For the purposes of sections 114 and 115 of the Act, change the use, in relation to a building, means to change the use (determined in accordance with regulation 6) of all or a part of the building from one use (the old use) to another (the new use) and with the result that the requirements for compliance with the building code in relation to the new use are additional to, or more onerous than, the requirements for compliance with the building code in relation to the old use.

6 Uses of buildings for purposes of regulation 5

- (1) For the purposes of regulation 5, every building or part of a building has a use specified in the table in Schedule 2.
- (2) A building or part of a building has a use in column 1 of the table if (taking into account the primary group for whom it was constructed, and no other users of the building or part) the building or part is only or mainly a space, or it is a dwelling, of the kind described opposite that use in column 2 of the table.

5.3 Relevant provisions of the Building Code (defined terms in *italic type*) are:

Clause A1: Classified Uses

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.

Clause A2: Interpretation

In this building code unless the context otherwise requires, words shall have the meanings given under this Clause. Meanings given in the Building Act 1991 apply equally to the building code.

Accessible Having features to permit use by people with disabilities.

G1.3.4 Personal hygiene facilities provided for *people with disabilities* shall be *accessible*.

G2.3.4 *Accessible* facilities [for laundering] shall be provided for *people with disabilities*.

Performance G2.3.4 shall apply only to camping grounds.

G3.3.5 Where facilities [for the hygienic storage, preparation and cooking of food] 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*.

Clause D1: Access Routes

D1.3.2 At least one *access route* shall have features to enable *people with disabilities* to:

- (a) Approach the *building* from the street boundary or, where required to be provided, the *building* car park,
- (b) Have access to the internal space served by the principal access, and
- (c) Have access to and within those spaces where they may be expected to work or visit, or which contain facilities for personal hygiene as required by Clause G1 "Personal Hygiene".

Performance D1.3.2 shall not apply to *Housing*, *Outbuildings* *Ancillary buildings*, and to *Industrial buildings* where no more than 10 people are employed

6. Discussion

6.1 General

6.1.1 The owner has said that the proposed building is to "supplement and service its existing accommodation and camping area" (refer paragraph 4.1).

6.1.2 I have received no evidence to suggest that the proposed building will be open to the public under any circumstances. Sales of fruit to the public are apparently carried out at the road-side stall which is located quite separately from the existing workers' accommodation and from the proposed building.

6.1.3 I have received no evidence to contradict the applicant's assertion that the seasonal temporary staff employed at the orchard are all required to be physically capable in

all respects, and that, consequently, no provision is required for wheelchairs access or for persons who have an ambulant disability.

6.2 Persons who may be expected to visit or work in the building and carry out normal activities and processes that building

- 6.2.1 In respect of buildings to which section 118 of the Act does apply, the Building Industry Authority (the predecessor to the Department) in previous determinations² has taken the view that:
- (a) The provisions of the Building Code for access and facilities for use by people with disabilities do not apply to the whole or 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.
 - (b) It is important not to underestimate the extent to which people with disabilities are capable of overcoming those disabilities. The clear intention of the Act is that buildings must not be constructed in such a way as to prevent people with disabilities from undertaking work which they are capable of undertaking or from visiting buildings which they are capable of visiting.
- 6.2.2 In Determination 1997/009 it was determined that people who use wheelchairs are unlikely, solely because of their disabilities, to be able to work in a slaughterhouse and therefore cannot be expected to do so. As a consequence section 118(1) would not require provision to be made for access for those people.
- 6.2.3 In the circumstances described by the applicant it is claimed that people who use wheelchairs are unable, and hence unlikely, solely by reason of their disabilities, to work in the orchard and therefore cannot be expected to do so. The applicant argues that, as a consequence, provision for access and facilities for such people is not required.
- 6.2.4 In view of the evidence submitted by the applicant, and which is not contested by the authority, I conclude that the proposed building is one to which section 118(1) of the Act applies, but reasonable and adequate provision of access does not include provision of ramps and an accessible shower and toilet.
- 6.2.5 I refer to Schedule 2 of the Building Act, and Clauses 5 and 6 of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations with respect to discussion about possible future changes in the use of the building.
- 6.2.6 Clause 6 of the Building Regulations notes that every building, or part of a building, has a use specified in the table set out in Schedule 2. Hostels, which I consider to be the definition relating to seasonal worker accommodation, have a use allocated to subclause (j) of Schedule 2. Similarly, motels, boarding houses, and guest houses, to which off-season activities the accommodation might be put, also have a subclause (j) use.

² See Determinations 95/003 and 2001/13

6.2.7 Therefore, the change from seasonal worker accommodation to an alternative accommodation type cannot be defined as a change of use. Accordingly, as there is no change of use, then section 118 requiring access and facilities for persons with disabilities is not triggered. If there was a change from the seasonal worker accommodation scenario that required an alteration to the building, then section 112 would require consideration of access and facilities for persons with disabilities.

7. What is to be done?

7.1 As a building consent has already been issued for the proposed building the owner will need to apply for an amendment to that consent if the ramp and accessible toilet are not now to be built.

8. Decision

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

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 2 December 2008.

John Gardiner
Manager Determinations