



Determination 2009/79

Providing access for people with disabilities as part of proposed alterations to a takeaway bar at 35 Bow Street, Raglan

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1. About this determination

1.1. This is a determination under part 3, subpart 1 of the Building Act 2004¹ (“the Act”). It is made under due authorisation by John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”) for and on behalf of the Department’s Chief Executive.

1.2. The parties

The parties to this determination are:

- “the applicant” – G D Law, the owner of the building and who is being represented by an architecture firm (“the architect”), acting as his agent
- “the authority” – Waikato District Council carrying out its duties and functions as a territorial authority and a building consent authority.

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 2004 and the Building Code (which is set out in schedule 1 of the Building Regulations 1992) are available from the Department’s website: www.dbh.govt.nz.

1.3. The matters to be determined

With respect to proposed alterations to an existing building at 35 Bow Street, Raglan, the matters to be determined under sections 177(c)(i), 177(d) and 188² of the Act are:

- whether the authority was correct to refuse to grant a waiver of the Building Code
- whether the authority correctly exercised its powers under section 112 of the Act. To determine this matter I must consider whether the proposed alterations comply, as nearly as is reasonably practicable with the provisions of the Building Code that relate to access and facilities for people with disabilities.

This determination considers code compliance in terms of section 112, and my decision cannot be considered in terms of a waiver as set out in section 69. I have not considered any other aspects of the Act or the Building Code.

- 1.4. In making my decision, I have considered the submissions of the parties and other evidence in this matter, including photographs and plans.

2. The legislation

- 2.1 The following legislation applies in this determination. See Appendix A for the full text.

The Act:

- section 67 – territorial authority may grant building consent subject to waivers or modifications of Building Code
- section 112 – alterations to existing buildings
- section 118 – access and facilities for persons with disabilities to and within buildings
- schedule 2 – buildings in respect of which requirement for provision of access and facilities for persons with disabilities applies.

The Building Code:

- clause D1.3.2.

3. The background

- 3.1 This determination concerns a two-storey building at 35 Bow Street, Raglan. The ground floor of the building is currently being used as a takeaway bar. The top floor is a self-contained apartment. The proposed alterations, and the determination, relate only to the ground floor.

- 3.2 The building is believed to date from the 1920s. The ground floor has solid reinforced concrete exterior walls and mainly concrete internal walls, although there are also some timber-framed infill internal walls. The ground

² Unless otherwise stated, references to sections are to sections of the act, and references to Clauses are to Clauses of the Building Code.

floor is 7m wide by 9m long. The first floor is built of timber framing with light cladding.

- 3.3 At present, the floor level at the front of the building is approximately 550mm above street level and is accessed from the footpath by three steps. At the rear of the building, the floor level is approximately 700mm above ground level and is accessed by a plywood ramp leading to a fire exit and service door. At present the rear door is used solely for service and as a fire exit and there is no access for patrons to the burger bar from the rear of the building. The rear of the building opens out onto a yard measuring approximately 5m by 11.8m. The yard has two car parks (one for staff of the takeaway bar and one for residents of the upstairs apartment) and a herb garden used by the takeaway bar. The yard is used regularly by delivery vehicles and is accessed via a service lane, which is shared by several businesses.

The proposed alterations

- 3.4 The applicant wishes to upgrade the ground floor level of the building to make it 'more open and pleasant' and to 'bring the building up to fully comply where possible with the current Building Code'. The applicant has stated that this will include complying with the code and other standards 'relating to hygiene and fire'. However, the applicant is of the view that, in making the alterations, they will be unable to provide access for people with disabilities onto the property, and hence comply with the requirements of the Act.
- 3.5 The applicant supplied:
- preliminary floor plans of the current ground floor layout and proposed alterations
 - elevation and cross-section drawings of the front of the building
 - photos of the front and rear of the building
 - a Feasibility Report, prepared for the applicant by the architects.

- 3.6 The Feasibility Report looked at two options for providing access into the takeaway bar for people with disabilities. The first option involved widening the building's current front entrance and providing an internal accessible ramp from the street. In the architect's opinion this option was not feasible because:

Installation of a ramp or lift would mean removal of load bearing solid concrete partitions resulting in structural work that is beyond the scope a small business can provide for financially

...A ramp designed to meet the code would need to be 6.5m long and would occupy such a percentage of the floor area as to make the remaining space inadequate for the continuation of the business.

The second option in the feasibility report involved upgrading the current plywood ramp into the rear entrance of the building to make it suitable for use by people with ambulatory disabilities. In the architect's opinion, this option was also not feasible because:

The rear of the building... faces onto an existing service [lane] that is shared by 12 businesses. [It] is used by delivery trucks on a daily basis... and by staff vehicles for surrounding businesses. It is unsealed and in a poor state of repair with no provision for customer parking. Access...would be difficult and hazardous...

As with option one, the provision of an internal disabled access ramp would take up an unreasonably large proportion of available floor area, making the remaining area unworkable.

- 3.7 The report concluded with the request that the authority consider a 'dispensation' in regards to compliance with Clause D1 Access Routes. I take that to mean that the applicant applied to the authority for a waiver from the need to comply with clause D1 of the Building Code concerning access routes.
- 3.8 In a letter to the Department dated 2 June 2009, which was copied to the applicant and accompanied the application for a determination, the authority stated that it had declined to grant the waiver. The authority's view was that the applicant's proposed alterations did not meet the requirements of section 112 of the Act, and that access for people with disabilities could be provided through the rear of the building.
- 3.9 The authority advised the applicant to seek a determination on the matter from the Department, and an application for a determination was received on 5 June 2009.
- 3.10 On 13 July, I requested further information on the potential designs and an estimate of costs for providing access ramps to the front and rear of the building. I requested this information so that I could assess the potential physical and economic impacts that installing ramps might have on the applicant's business.
- 3.11 On 22 July 2009, the architect provided a letter with further information about the front and rear access ramps, but did not provide estimates of costs or plans.
- 3.12 With respect to providing an internal access ramp at the front of the building, the architect stated that installing such a ramp would mean that the existing kitchen would have to be remodelled and reduced in size to enable access (inside the building) from and around the ramp. The area set aside in the plans for the proposed alteration as a customer waiting area would also be lost. The architect also detailed the extensive structural work that would be required to install an access ramp at the front of the building and the implication was that the cost of this would be substantial.
- 3.13 With respect to providing an access ramp from the yard at the rear of the building, the architect stated that installing such a ramp would result in the loss of one car park in the yard. The architect also made the point that if a person with disabilities arrived at the front of the shop, they would have to travel a total of 147m including up the shared service lane (described as 'an inclining gravelled service alley that is in a poor state of repair') to reach the rear access.
- 3.14 The architect concluded their letter by saying that, given the nature and location of the business, it was not feasible for the owners to invest a lot of

money in ‘substantially altering the building’. Requiring the owners to make such an investment would mean that they could not go ahead with the proposed improvements, which would effectively mean that the business could not continue.

- 3.15 Other than the letter dated 2 June 2009, no submission has been received from the authority.

The draft determination

- 3.16 Copies of a draft determination were forwarded to the parties on 19 August 2009. A copy was also provided to the ODI on 20 August 2009.
- 3.17 Both the applicant and the authority accepted the determination without making any further submissions.
- 3.18 In its comments on the draft determination dated 1 September 2009, the ODI acknowledged that ‘the approach for determinations under section 112 is to balance the benefits of accessibility against the sacrifice or costs of achieving accessibility’. However, the ODI did not agree with the draft determination, on the grounds that ‘the proposed development does not comply, as nearly as reasonably practicable, with the provisions of the Building Code that relate to access and facilities for persons with disabilities’.
- 3.19 Two points raised by the ODI require particular mention, and these are discussed further in section 4.

4. Discussion

The authority’s decision not to grant a waiver

- 4.1 The applicant has asked for a determination about whether the authority was correct to refuse to grant a waiver of Clause D1 of the Building Code with respect to proposed alterations to the applicant’s building without the provision of an accessible route for persons with disabilities.
- 4.2 Section 67 of the act gives territorial authorities the power to grant building consents that are subject to waivers or modifications of the Building Code. However, subsection 67(3) states that this power does not apply when the waiver of the Building Code relates to access or facilities for people with disabilities.
- 4.3 For this reason, the authority was correct not to grant a waiver, as it did not have the power to do so. The only person who has the power to grant such a waiver is the Chief Executive of the Department of Building and Housing under section 69 of the Building Act 2004 (refer paragraph 1.3).

Whether the proposed alterations comply as nearly as is reasonably practical with the Building Code

- 4.4 The building in which the takeaway bar is located, in accordance with section 118 and paragraphs (r) and (z) of Schedule 2, requires the provision of access and facilities for persons with disabilities. As such, the building comes within the ambit of Clause D1.3.2, which requires 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.

- 4.5 Under section 112, the authority may issue a building consent for work that does not comply completely with the accessibility requirements in the Building Code, provided that it is satisfied that after the alterations the building will comply with those requirements “as nearly as is reasonably practicable”.
- 4.6 The authority’s view, in its letter of 2 June 2009, was that the applicant’s proposed alterations did not meet the requirements of section 112 of the Act, because access for people with disabilities could be provided through the rear of the building.
- 4.7 Though an external ramp could be installed to the building’s rear door to provide access for people with disabilities, doing so will not address the broader issues with access from the rear of the building, namely the difficulty for people with ambulatory disabilities in navigating the shared service lane in order to even get to any ramp.
- 4.8 In the past, the Building Industry Authority (the Department of Building and Housing’s predecessor) established an approach for determining 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.
- 4.9 Under this approach, I must consider the advantages of upgrading the proposed alterations so that they provide access to the building for people with disabilities, as specified in Clause D1.3.2 of the Building Code and NZS 4121⁴. Having identified the advantages, I then need to balance them against the sacrifices and difficulties of upgrading the alterations in this way.
- 4.10 Taking this approach with respect to the current determination, I believe that:
- the advantages of upgrading the alterations would be to provide access to the takeaway bar for people with disabilities, which would benefit both the people concerned and the applicant’s business
 - the sacrifices and difficulties of upgrading the alterations would be a loss of useable space in the takeaway bar, in particular in the kitchen and customer waiting areas, which would affect the financial viability of the applicant’s business. The cost of providing access from the front of the building, given that extensive structural alterations would be involved, is unreasonable and this would also adversely affect the applicant’s business. Providing access through the rear of the building would create a potential safety hazard as it would require a person with an ambulatory disability to navigate a busy service lane that is in a poor state of repair and not designed for customer access.

³ *Auckland City Council v New Zealand Fire Service*, 19/1095, Gallen J, HC Wellington AP 336/93.

⁴ New Zealand Standard NZS 4121: 2001 Design for access and mobility – Buildings and associated facilities

- 4.11 Taking the above considerations into account, I am of the opinion that the sacrifices and difficulties of providing access for people with disabilities outweigh the advantages of providing such access. Of particular relevance is the proportion of the overall floor space that would be required in order to provide access, and the impact that this would have on the viability of the applicant's business.
- 4.12 There is no question that, if the building were a new construction, section 118 would require installation of both appropriate access for persons with disabilities and an accessible toilet in the building.
- 4.13 In its comments on the draft determination, the ODI stated that, while the determination identified the benefits of providing access for people with disabilities, it failed to acknowledge the benefits that improving accessibility would create for other people in the community, such as the elderly, people carrying shopping, parents with young children etc.
- 4.14 I consider that these benefits are implicit in the benefits accruing to people with disabilities and as such were taken into account when weighing up the advantages, sacrifices and difficulties. However, it is correct that, in general, improving accessibility to buildings for people with disabilities brings with it broader flow on benefits, in terms of accessibility, for the community as a whole.
- 4.15 The ODI also stated that in analysing the benefits of access I should have taken into account other factors, including 'the sustainability of use for its intended purpose over the rest of the life of this building', which would include looking at other potential future uses for the building. In the ODI's opinion, the determination as drafted would 'lock-in this building's unsuitability for its intended public, commercial and retail use for a further generation'.
- 4.16 In my opinion, it is not correct that the current determination will lock the building into its present form (or the form it will take after the current alterations). Any future alterations or changes of use would themselves activate the provisions of section 112 and 115, and the "nearly as is reasonably practicable" test would then need to be considered. There is nothing to say that, in future circumstances, the benefits versus sacrifices equation would yield the same result. A good example is where, if in future the shared service lane to the back of the building was sealed or otherwise upgraded, it may become feasible to provide meaningful access for people with disabilities through the rear door.
- 4.17 I note here that photographs supplied with the application show a handrail to the right of the stairs at the front entrance. I also note that the handrail does not extend down to the lowest step and that access to it may be being obstructed with placement of pot plants.

5. The decision

5.1 Under section 188 of the Act I hereby determine that

- the authority was correct not to grant a waiver under section 67 of the Building Act 2004, as it did not have the power to do so
- the proposed alterations comply, as nearly as is reasonably practicable with the provisions of the Building Code that relate to access and facilities for persons with disabilities.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 17 September 2009.

John Gardiner
Manager Determinations

Appendix A: The legislation

The relevant provisions of the Act:

67 Territorial authority may grant building consent subject to waivers or modifications of building code

- (3) The territorial authority cannot 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.

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—
- (i) means of escape from fire; and
- (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.

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

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:

- (r) restaurants, bars, cafeterias, and catering facilities:
- (z) other buildings, premises, or facilities to which the public are to be admitted, whether for free or on payment of a charge.

Relevant provisions of the Building Code include:

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.

Access route A continuous route that permits people and goods to move between the apron or construction edge of the building to spaces within a building, and between spaces within a building.

Accessible Having features to permit use by people with disabilities.

Accessible route An access route usable by people with disabilities. It shall be a continuous route that can be negotiated unaided by a wheelchair user. The route shall extend from street boundary or carparking area to those spaces within the building required to be accessible to enable people with disabilities to carry out normal activities and processes within the building.

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...

5.3 The relevant provisions of NZS 4121⁵ include:

4.3 General

In order to achieve the objective of 4.1, people with disabilities shall be able to:

- (b) Approach the accessible main entrance (or entrances) to the building or facility by footpath on an accessible route;
- (c) Enter the building or facility at an entrance, which has a level threshold, or which is approached via an incline or ramp with an appropriate gradient;

5.7.2

People with disabilities shall not have to pass behind parked cars when moving to an accessible route or when approaching an entrance.

6.4.2.2 Gradient

The maximum gradient of a ramp other than a kerb or step ramp shall be 1 in 12.

⁵ New Zealand Standard NZS 4121: 2001 Design for access and mobility – Buildings and associated facilities