



Determination 2019/051

Regarding provision of access and facilities for people with disabilities to an existing house being used to accommodate seasonal workers at 29 Ronalds Lane, Te Puke

Summary

This determination considers an authority's refusal to consent to a change of use for an existing building intended to be used as seasonal worker accommodation, on the basis that the building does not make reasonable and adequate provision for access and facilities for people with disabilities. The determination considers the authority's reasons for the refusal and the interrelationship between the change of use provisions and the requirement to provide access and facilities for persons with disabilities to and within buildings.

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ ("the Act") made under due authorisation by me, Katie Gordon, Manager Determinations, Ministry of Business, Innovation and Employment ("the Ministry"), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The parties to the determination are:
 - the owner of the building, C Limmer, as the applicant ("the applicant"), acting through a professional organisation representing New Zealand kiwifruit growers as his agent ("the applicant's agent")
 - Western Bay of Plenty District Council carrying out its duties and functions as a territorial authority or a building consent authority ("the authority"), acting through a lawyer as its agent ("the authority's agent").
- 1.3 I have also provided the Office for Disability Issues ("the ODI") with the determination documentation for comment, by way of consultation under section 170 of the Act.
- 1.4 This determination arises from the authority's refusal to consent to a change of use under section 115² for a residential dwelling, which the applicant is intending to use as seasonal accommodation for workers on his orchard. The authority is refusing to agree to the change of use because it considers that the building in its new use does not make reasonable and adequate provision for access and facilities for people with disabilities, as required by section 118 of the Act.

¹ The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.building.govt.nz.

² References to sections in this determination are to sections of the Building Act, and references to clauses are to clauses of the Building Code, unless otherwise stated.

- 1.5 Accordingly, the matter to be determined³ is the authority's exercise of its powers of decision in refusing to agree to the change of use under section 115. In determining this matter, I must also consider the application of section 118 and Schedule 2 of the Act as they relate to the building in its new classified use.
- 1.6 In making my decision, I have considered the submissions of the parties and the other evidence in this matter. I have not considered any other aspects of the Act or Building Code (Schedule 1 of the Building Regulations 1992), beyond those required to decide on the matter to be determined.
- 1.7 The relevant sections of the Act and Building Code referred to in this determination are set out in Appendix A.

2. The building work and background

- 2.1 The applicant's property is a 0.35 hectare section, located within a kiwifruit orchard in a rural area near Te Puke. The property is adjacent to the applicant's own house, which is located on a separate property.
- 2.2 The property contains a house that was constructed in 1980, and a detached three-bay garage that has a sleep-out built onto one end (constructed in 1981 and 1982 respectively).
- 2.3 The house has three bedrooms, each with its own external exit, and a large open-plan living area that incorporates a kitchen, dining area, lounge, family room and conservatory. The sanitary facilities include a bathroom, an ensuite and a separate toilet that together provide two showers, two toilets, three vanity units and one bath. There are smoke alarms in each of the three bedrooms, emergency exit signs over all external doors, fire extinguishers in the kitchen and lounge, and hose reels mounted on the outside of the house at the front and the back.
- 2.4 The sleep-out has a smoke alarm and fire extinguisher fitted within it, but I am unclear as to whether it also has its own sanitary and kitchen facilities.
- 2.5 The applicant purchased the property in December 2018, with the intention of using the main house to accommodate seasonal workers employed to work on his kiwifruit orchard. After purchasing the property, the applicant installed a heat pump, a gas hot water system and various household appliances in the house, and fully furnished it.
- 2.6 Some of the workers who the applicant plans to accommodate in the house are employed via the New Zealand Recognised Seasonal Employer (RSE) scheme. I have considered this scheme and the requirements it places on building owners in depth in a previous determination⁴. In summary, the RSE scheme allows employers in the horticulture and viticulture industries to recruit workers from overseas for seasonal work when there are not enough New Zealand workers available. Most of the workers come from specified Pacific countries.
- 2.7 Employers of RSE workers have specific pastoral care obligations under the scheme, including ensuring that workers are provided with suitable accommodation. Immigration New Zealand (a part of the Ministry) administers the scheme and has established worker accommodation standards⁵ that employers must comply with.

³ Under sections 177(1)(b) and 177(3)(f) of the Act.

⁴ Determination 2018/065, Regarding the classified use of buildings used as accommodation under the Recognised Seasonal Employer Scheme, (19 December 2018).

⁵ Immigration New Zealand. (2017). Worker accommodation standards: Recognised seasonal employer. Wellington: Immigration New Zealand.

- 2.8 The applicant also employs other seasonal workers, from the local workforce and other sources. These workers may also be accommodated in the house, along with the RSE workers. The applicant advises that the house will be used for this purpose for approximately 11 months of each year, and for the remaining month will be vacant. He does not intend to use the house for any purpose other than seasonal accommodation.
- 2.9 The applicant advises that the sleep-out is currently separately tenanted by someone who is not an RSE worker.
- 2.10 The applicant also advises that before he purchased the property he let the authority know that he intended to use it for seasonal worker accommodation. The authority advised him that a change of use would be required, and that as a result the applicant would have to obtain a building consent.
- 2.11 On 17 December 2018, the applicant and the applicant's agent attended a meeting with the authority to discuss the change of use and building consent. At the meeting, the applicant confirmed that the house, including the sleepout, could accommodate up to 14 workers, although he hoped to keep the maximum number to 12.
- 2.12 On 20 December 2018, the authority sent the applicant an email in which it reiterated the advice it had given in the meeting that using the house for seasonal accommodation would constitute a change of use under the Act, from the building's current use as a 'single household', and that as a result, 'the Building Act and Building Code provisions relating to fire safety and accessibility apply as near as is reasonably practicable'. The authority suggested that a fire engineer or designer should be engaged to show how compliance would be achieved and the building upgraded accordingly.
- 2.13 The applicant then engaged a registered building surveyor ("the surveyor") who, following a site visit on 18 January 2018, filed a report dated 1 February 2019. The purpose of the report was to advise the authority of the applicant's intention to use the house as seasonal worker accommodation, and detail whether it was 'fit for its intended purpose'.
- 2.14 The report concluded that the house and sleep-out 'generally complies' with the requirements for seasonal workers' accommodation, and gave recommendations for how it could be upgraded to address any areas of non-compliance. It noted that the applicant had undertaken to complete these upgrades and that no building consent would be required for them. With respect to access and facilities for people with disabilities, the surveyor noted that to be eligible for the RSE Scheme, workers must be fully fit and ambulant, and that in his opinion there was no requirement for any of the sanitary facilities to be made accessible for people with disabilities.
- 2.15 A further meeting was held between the parties on 11 February 2019, at which the surveyor was also present, to discuss the surveyor's report. At this meeting, the authority advised that it would decline any application for a building consent on the grounds that the requirements relating to access and facilities for people with disabilities had not been met, and that it did not accept that only able-bodied workers could be employed on the applicant's orchard, as this was a breach of the Human Rights Act 1993 ("the HRA").

- 2.16 From February to April 2019, the applicant’s agent wrote to and otherwise contacted the authority seeking to progress the matter, but received no response. The applicant’s agent also sought advice from the Ministry, which directed the applicant to the findings in Determination 2008/111⁶.
- 2.17 On 30 April 2019, the authority wrote to the applicant’s agent setting out its position with respect to the need to provide access and facilities for people with disabilities to seasonal worker accommodation. The authority drew a distinction between existing dwellings being converted for use as seasonal worker accommodation, for which a change of use is required under the Act; and purpose-built accommodation facilities for seasonal workers. In the authority’s view, Determination 2018/065 applies ‘more readily’ to the first scenario, while Determination 2008/111 applies to the second.
- 2.18 The authority also stated that it was concerned that:
- the dwellings being used to provide seasonal worker accommodation could also be used to provide other types of accommodation within the Communal Residential classified use, ‘without any further consideration required for fire and accessibility’
 - the applicant’s agent was arguing for a ‘blanket exemption’ from the requirement to provide access and facilities for people with disabilities for all providers of seasonal worker accommodation’, on the assumption that all such workers were ‘able bodied’, and that this assumption is erroneous.
- 2.19 The authority attached to the letter a “Change of use and accessibility for Recognised Seasonal Employer Scheme (RSE) accommodation position statement” that it had developed.
- 2.20 The applicant applied for a determination on 28 May 2019. The Ministry accepted the application on 30 May 2019 and requested further information from the parties on 5 June 2019.

3. The submissions

3.1 The applicant’s submission

- 3.1.1 The applicant’s agent made a submission with the application for determination. In the submission, the agent:
- describes the applicant’s property, how the applicant intends to use it and the work that he has done to it since purchasing it at the end of 2018
 - sets out the background to the dispute between the parties, including the correspondence and meetings they have engaged in, and the outcomes of these
 - describes and provides photos of the typical tasks that orchard workers undertake, and the physical capabilities required for these
 - provides links to Immigration New Zealand information about the RSE scheme, and immigration and visa requirements for seasonal employees, and guidelines from other authorities about seasonal worker accommodation requirements.

⁶ Determination 2008/111, Access and facilities for people with disabilities to a building providing kitchen and ablution facilities at an orchard, (December 2008).

3.1.2 The applicant's agent also states that it considers the authority's position is at odds with the advice it has received from the Ministry, and this is creating confusion within the industry in the Bay of Plenty and a shortage of seasonal worker accommodation. The agent has spent considerable time and resources attempting to resolve the matter and is of the view that 'access and facilities for people with disabilities should not be required for seasonal accommodation as only able-bodied workers can be expected to work on orchards'.

3.1.3 With its submission, the applicant's agent supplied copies of:

- a plan of the applicant's property
- correspondence between the parties
- correspondence between the applicant's agent and the Ministry
- the surveyor's report.

3.2 The authority's submission

3.2.1 The authority made a submission dated 4 July 2019.

3.2.2 In its submission the authority acknowledged that the intended new use of the applicant's building was as seasonal worker accommodation, and that in accordance with Determination 2018/065 this gave it a Community Service classified use, thereby triggering the change of use provisions in the Act. The authority considered that access and facilities for people with disabilities was a requirement for the applicant's building under section 118 of the Act, and was not satisfied that the building in its new use will comply with the provisions in the Building Code relating to means of escape from fire, protection of other property, sanitary facilities, structural performance, fire-rating performance, and access and facilities for people with disabilities.

3.2.3 In its submission, the authority also responded to the Ministry's request for further information of 5 June 2019.

- With respect to a query about the authority's intended actions in relation to a building consent, the authority advised that issuing the consent 'would be contrary to the [authority's] legislative obligations'. Later in the submission, the authority stated that because there was a change of use under section 115, the applicant was required to obtain a building consent.
- With respect to a query about what other uses the applicant's building can be reasonably used for, the authority advised that 'It is difficult to imagine that the building could be used for any other purposes other than for general residential living or seasonal worker accommodation'. However, the authority was concerned that within the Community Service classified use there were a range of other accommodation options, such as a boarding house, holiday cabin or hostel, that the applicant could adopt, and if he did, the authority would have no power to ensure that people with disabilities were adequately provided for.

3.2.4 The balance of the authority's submission reiterated the points made in its earlier correspondence. The main points can be summarised as follows:

- Seasonal accommodation can be either purpose built or a conversion of an existing building; different requirements in the Building Act apply to each.

- The situation with the applicant's building is comparable to that which arose in Determination 2018/065. This situation is different from cases where seasonal workers' accommodation has been purpose built and section 115 does not apply.
- Determination 2008/111 may still apply to purpose-built accommodation, but the Ministry may 'choose to revisit' the conclusions in this determination 'in light of changing attitudes and developed thinking in 2019'.

4. The draft determination

4.1 A draft determination was issued to the parties for comment on 12 July 2019.

4.2 The applicant accepted the draft determination on 25 July 2019. The applicant acknowledged that determinations are limited to the facts of the case they relate to, but commented that it would be useful if the determination findings could be looked at for guidance in similar cases in the future.

4.3 The authority responded on 26 July 2019 saying it did not accept the draft determination. The authority's agent advised that it intended to appeal the final determination, once issued.

4.4 The ODI's comments on the draft determination

4.4.1 The ODI commented on the draft determination in an email dated 29 July 2019. The ODI did not support the draft determination, and considered the decision could be considered a breach of the HRA. It suggested that the Human Rights Commission should be consulted over the matter.

4.4.2 The ODI also made the following points:

- the applicant's house does not comply with the accessibility provisions in NZS 4121⁷ and that it is important that all disabled people, including non-ambulatory people, have access to accessible accommodation, in line with that standard
- the New Zealand Disability Strategy 2016–2026⁸ seeks an outcome where disabled people can 'access all places, services and information with ease and dignity', and the International Convention on the Rights of Persons with Disabilities requires 'progressive realisation of accessibility improvements for disabled New Zealanders'
- all building owners are encouraged to commission building designs that ensure equity of access for disabled people from the start; it is not fair for new buildings to be constructed with access barriers in them that will restrict their current and future uses
- not all disabled people who require accessible bathrooms are non-ambulant
- it is not considered acceptable to limit access to buildings based on a pre-determined belief that the building will not be accessed by disabled people. It is feasible that developments in technology will enable people with mobility impairments to work in orchards in the future, and it is short sighted to restrict that possibility through having non-accessible accommodation.

⁷ New Zealand Standard NZS 4121:2001 Design for Access and Mobility – Buildings and Associated Fixtures

⁸ Available at <https://www.odi.govt.nz/nz-disability-strategy/about-the-strategy/new-zealand-disability-strategy-2016-2026/>

- 4.4.3 The Ministry wrote to the ODI on 21 August 2019, requesting more information about the nature of the breach of the HRA that the ODI was referring to.
- 4.4.4 The ODI replied on 30 August 2019 that the breach was ‘the claim that [the applicant] did not need to install accessible ablutions, as only able-bodied workers could be employed at the orchard’. The ODI did not specify which provisions in the HRA it considered had been breached. However, it did state that section 29 of the HRA did not apply.
- 4.4.5 The ODI also asserted that:
- There are many disabilities where a person would be able to complete the work required by [the applicant] on the orchard but still need an accessible bathroom, and...with new developments in technologies, it is feasible that people with mobility impairments would be able to work on orchards in the not too distant future.
- 4.4.6 The ODI did not provide any specific details of the nature of the disabilities that an ambulant person could have that would enable them to work on an orchard but still require an accessible bathroom. Nor did it provide any details of the technologies that would allow non-ambulant people to carry out the tasks required of an orchard worker.

4.5 The applicant’s submission on the draft determination

- 4.5.1 The applicant engaged a lawyer (“the applicant’s lawyer”) to review the draft determination and the ODI’s comments on the draft.
- 4.5.2 The applicant’s lawyer made a submission dated 9 September 2019 and concluded that the draft determination was ‘legally correct in its conclusion that disability access and facilities are not required for accommodation at [the applicant’s] Proposed Seasonal Worker Accommodation.’
- 4.5.3 The applicant’s lawyer further submitted that:
- the Ministry did not have the jurisdiction to either consider matters under the HRA or consult the Human Rights Commission on this matter
 - ‘ODI’s comments regarding the Disability Strategy and social norms in 2019 requiring disability access and facilities in buildings do not create any obligation on [the Ministry]’
 - the Ministry is correct that determinations do not create blanket rules or policy, although they ‘do have an impact on future cases through creation of precedent’
 - Determination 2008/111 is ‘neither outdated nor discriminatory’.

4.6 The Human Rights Commission

- 4.6.1 The draft determination was provided to the Human Rights Commission for any comment the Commission might wish to make in relation to the application of the HRA.
- 4.6.2 While the Commission initially indicated an interest in commenting on the draft determination, it subsequently declined to make any comment. On 1 October 2019 the Commission advised that it was not appropriate to comment on the draft due to the Commission’s independence from Government, and in light of its functions under the HRA.

5. Discussion

5.1 General

- 5.1.1 The matter for determination is the authority's refusal to agree to a change of use for the applicant's building on the grounds that reasonable and adequate provision has not been made for access and facilities for people with disabilities.
- 5.1.2 The authority is of the view that a 'blanket exemption' from the need to provide such access and facilities cannot be made for all seasonal accommodation on the assumption that only able-bodied workers will be employed.
- 5.1.3 The applicant is of the view that because seasonal workers are required to be ambulatory in order to undertake the tasks required by their employment, there is no requirement for access and facilities for people with disabilities to be provided in these workers' accommodation.
- 5.1.4 I note here, as a preliminary matter that, although the applicant's application and submission referred to other buildings and other orchardists experiencing similar issues, this determination is limited to the applicant's property and the specific circumstances relating to it.
- 5.1.5 I note also that the authority has submitted that it is not satisfied that the applicant's building will comply with other provisions in the Building Code, including those relating to fire and protection of other property. This determination is limited to the question of access and facilities for people with disabilities and does not consider these other matters further.

5.2 The legislation that applies

- 5.2.1 The relevant legislation can be found in sections 114, 115, 118 and Schedule 2 of the Act, and in the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 ("the Regulations").
- 5.2.2 Section 114 of the Act requires the owner of a building to give an authority written notice if the owner proposes to change the use of a building. Section 114(1) specifies that change the use in this context means to change the use as described in the Regulations; with Regulation 5 of the Regulations defining what is meant by "change the use".
- 5.2.3 Section 115 states that the owner of a building must not change the use of that building unless the authority gives written notice that it is 'satisfied, on reasonable grounds' that the building in its new use will 'comply, as nearly as reasonable practicable' with every provision of the Building Code that relates to access and facilities for people with disabilities, where this is required under section 118.
- 5.2.4 Section 118 is concerned with access and facilities for persons with disabilities to and within buildings.

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.

5.2.5 Schedule 2 to the Act lists the uses of the buildings that the requirement for provision of access and facilities for persons with disabilities applies to. The list is not exhaustive. Paragraph (j) of Schedule 2 includes:

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

5.3 The application of sections 114 and 115

5.3.1 The first matter that must be established, for sections 114 and 115 to apply, is that there has been a change of use. In the current case, the parties do not dispute that there has been a change of use.

5.3.2 The previous use of the applicant's building was as a residential dwelling, giving it a Detached Dwelling classified use (within the 'Housing' category of Clause A1 Classified uses, refer Appendix A.2). In the future, the applicant intends to use the building as accommodation for seasonal workers on his orchard.

5.3.3 I have previously considered the appropriate classified use for a building used to accommodate workers under the RSE scheme in Determination 2018/065 and concluded that the building came within the Community Service classified use.

5.3.4 In my opinion, the Community Service classified use is also appropriate for the applicant's building in its new intended use. All of the factors that carried particular weight in Determination 2018/065 apply equally here, and there is nothing that would make an alternative classified use more appropriate in this particular case.

5.3.5 Through his correspondence and the surveyor's report, the applicant has given the authority written notice that he proposes to change the use of his building, as required by section 114.

5.3.6 Under section 115, the applicant cannot proceed to change the use unless the authority provides written notice that it is satisfied that the building in its new use will comply, as nearly as reasonably practicable, with (among other clauses) the provisions in the Building Code relating to access and facilities for people with disabilities, if this is a requirement under section 118 (emphasis is mine).

5.4 The application of section 118

5.4.1 The authority considers that access and facilities for people with disabilities are required in respect of the applicant's building under section 118 of the Act, and that these have not been provided. As a result, the authority is declining to give written notice accepting the change of use under section 115. There is no dispute between the parties that the applicant's building in its new use will come within the types of buildings listed in paragraph (j) of Schedule 2 of the Act, and that section 118 applies.

5.4.2 Whether or not the authority is correct in its approach hinges on what is required by section 118, and in particular what will constitute 'reasonable and adequate provision by way of access, parking provisions, and sanitary facilities' for people with disabilities in relation to the applicant's building.

- 5.4.3 When considering the requirements of section 118, I acknowledge the importance of the purpose listed in section 3(a)(ii) of the Act, that buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them. Also very relevant is the principle in section 4(2)(k) of the Act, which I must take into account in making this determination, that emphasises the need to provide facilities for persons with disabilities to enter and carry out normal activities and processes in buildings to which section 118 applies. I also acknowledge the importance of the New Zealand Disability Strategy 2016-2026, which seeks the outcome that disabled persons can access all places and services with ease and dignity, but note that there is no legal obligation on the applicant to do more than is required by the Act and its regulations.
- 5.4.4 I have previously considered what is required by section 118, in relation to a building for seasonal workers on an orchard, in Determination 2008/111. That determination has been referred to by the parties in their correspondence and submissions. In my opinion, the reasoning within Determination 2008/111 still holds and can be applied to the applicant's building.
- 5.4.5 In that determination, I decided that although the building in question was one to which section 118(1) applied, reasonable and adequate provision of access and facilities did not include provision of ramps or sanitary facilities for people with disabilities. This was because people with ambulatory disabilities were unable and hence unlikely, solely by reason of their disabilities, to work in the orchard, and therefore, could not be expected to visit or work in and carry out normal activities or processes within the building.
- 5.4.6 In his submission, the applicant provided details of the typical tasks that seasonal workers are required to do on the orchard. These include picking fruit from the canopy of kiwifruit vines (which has a height of 1.8m to 1.9m), while carrying a bag, which when full weighs up to 20kg; pruning the vines; and removing unwanted buds from the vines. All of these tasks require workers to be fully ambulant and able, and at times to use ladders. This summary of the tasks required from kiwifruit orchard employees is repeated by the applicant's agent in its guidebook for people seeking work in the kiwifruit industry – *The little green and gold book: A guide to finding seasonal work in the New Zealand kiwifruit industry*⁹. The guidebook outlines the types of work that are typically required in orchard work, including picking, thinning, and winter and summer pruning, and describes each of these tasks as follows:
- Picking – ‘Picking is done by hand as the vines are set at a manageable height; no ladders are generally required. Picking is labour-intensive and may suit younger people; the picking bag can weigh up to 20kg.’
 - Pruning – ‘This work requires some training and workers need to be physically fit.’
 - Packing and processing – ‘Packhouse roles involve working shifts of 8-12 hours and there are roles [sic] a variety of people. Much of the work involves standing while working.’
- 5.4.7 The authority has submitted that not only able-bodied people can be employed on orchards. I agree with this submission. On an orchard, there may be a variety of tasks that need to be carried out, and these will require varying types of skills and abilities.

⁹ See <https://www.nzkgi.org.nz/wp-content/uploads/2019/02/Little-Green-and-Gold-Book-Digital.pdf>

The issue I need to consider here, though, is what are the abilities that will be required from the seasonal workers that the applicant intends to accommodate in his building? Determinations are specific to the context in which they arise, and I am not required to consider all potential workers on all orchards.

- 5.4.8 In the current case, the applicant intends to use his building to accommodate workers who will be doing the heavy physical work on the orchard, particularly picking and pruning. This is hard physical work, and many people who do not experience any form of disability would find it taxing. The difficulty of finding sufficient people capable of doing the work within New Zealand is one of the main reasons that the RSE scheme was established, and is why the applicant recruits workers from outside New Zealand. It is not work that everyone is physically able to do.
- 5.4.9 In this instance, because seasonal workers on the applicant's orchard are required to be able-bodied and ambulant in order to fulfil the tasks of their employment, 'reasonable and adequate' in the case of the applicant's building does not require the provision of access and sanitary facilities for people with disabilities. This is because people with disabilities will not be able to be employed in this capacity, and hence be accommodated in the building.
- 5.4.10 Determination 2008/111 is not the only previous determination where I have taken this approach. For example, in Determination 2005/166¹⁰, the issue was whether a lift was required to upper floors of a beef processing plant in order to comply with section 118 of the Act and Clause D1 of the Building Code. My predecessor concluded that:
- ...because people who have disabilities such that they cannot reach the upper floors unless a lift is provided cannot be expected to work on or visit those floors. For that reason, lift access is not required for compliance with section 118.
- In other words, the nature of the work to be carried out on the upper floors was such that someone who was not sufficiently ambulant to access the floors without the assistance of a lift would not be capable of performing the work. That determination itself referred to two other determinations where this approach had also been taken.¹¹
- 5.4.11 One of these determinations, Determination 97/009, made the additional important point that 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 ...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.
- 5.4.12 In the current determination, the ODI has stated that there are 'many disabilities' where a person would be able to complete the work required on the applicant's orchard, but still require an accessible bathroom. The ODI has not specified what types of disabilities it has in mind. However, I consider that, as stated in Determination 97/009, if a person with disabilities is able to sufficiently overcome these disabilities, or is not restricted by them to the extent that they can work on the applicant's orchard, then it is probable that they will also be capable of accessing the applicant's building and using the bathroom in it without any alterations to accommodate that facility being required. In my opinion, the level of physical dexterity required to access and use the spaces within the building is far less than is

¹⁰ Determination 2005/166, Access for people with disabilities to the upper floor of the AFFCO beef processing plant (December 2005).

¹¹ Determinations 97/009, Access for people with disabilities in the alteration of a factory (15 September 1997); Determination 2001/13, Access for people with disabilities in a new fish processing factory (19 December 2001).

- required to work on the orchard; if a person is capable of doing the latter, then they should be capable of the former.
- 5.4.13 In its correspondence and submission, the authority has stated that Determination 2008/111 does not provide a blanket rule or policy that every building used for RSE accommodation purposes does not need to comply with the accessibility requirements in the Building Code. This is correct. What is required is that in every set of circumstances where section 118 is triggered, the parties involved must consider what constitutes reasonable and adequate provision. This will vary from building to building, and situation to situation, depending on whether people with disabilities can be expected to visit or work in the building.
- 5.4.14 However, the authority has also stated that Determination 2008/111 is outdated and discriminatory. I do not agree. Determination 2008/111 is based on current law; section 118, which it considers, came into effect on 31 March 2005 and has not changed since the determination was issued.
- 5.4.15 The authority has also raised concerns about the other uses within the Community Service classified use that the applicant could use his building for. The authority is correct that when considering the intended use of a building, the reasonably foreseeable occasional or future uses of that building should also be taken into account.
- 5.4.16 Given the nature and location of the applicants' building, the likely future uses are limited to those considered by this determination – namely as a residential dwelling, accommodation for seasonal workers, or similar. It is hard to conceive that the building would be used as a boarding house, hall of residence, hotel, motel, nurses' home, retirement village, time-share accommodation, or camping ground – being some of the examples listed for the Community Service classified use listed in Clause A1, subclause 3.0.2.
- 5.4.17 However, if the circumstances surrounding the building altered drastically, and a future owner wanted to use the building in such a manner, it is very probable this would constitute building work requiring building consent which itself would trigger the upgrading requirements under sections 112 and 118. I note that the requirements in section 118 do not apply to private dwellings, so if the building revert to this use there will be no requirement to upgrade to the reverted use.
- 5.4.18 In its submission on the draft determination, the ODI contended that future developments in technology may enable people with disabilities to work on orchards, and that as a result, it is 'short sighted' to say that access to the applicant's workers accommodation does not need to provide access for these people now.
- 5.4.19 While I agree with the ODI that technology is likely to change the nature of people's work and who can carry out particular tasks in the future, I do not consider that this possibility comes within the reasonably foreseeable or occasional future uses that I am required to take into account. As far as I am aware, there are no initiatives or developments underway that would enable people with disabilities to carry out the tasks required from employees on the applicant's orchard, and as such, it is not reasonably foreseeable that such people will be required to be accommodated within his building.
- 5.4.20 In making these comments, the ODI is taking a principled approach. The ODI recognises that the Building Act 'does not compel any building owner from doing more than that prescribed by the Building Code'. However, it encourages owners 'to choose to commission building designs that ensure equity of access to all areas by

disabled people from the start'. I acknowledge that there may often be cases where building owners and designers would wish to go beyond the minimum standards required for access and facilities for people with disabilities, for reasons of equity or appropriateness of provision in the circumstances. This may especially be the case where it is a new building that is being considered. However, this is not what is required by section 118 in relation to the applicant's building, and there is no legal obligation on the applicant to do more than is required by that section.

5.5 Conclusion

- 5.5.1 I conclude that there is no requirement to provide access and facilities for people with disabilities in respect of the applicant's building, in order for section 118 to be satisfied. Accordingly, I also conclude that the authority should not have withheld agreement to the proposed change of use on the grounds that such access and facilities were required.
- 5.5.2 In reaching this conclusion, I wish to reiterate that this decision is limited to the applicant's building and its intended use as seasonal accommodation for workers on his orchard. As discussed above, the authority has expressed concerns that this determination decision will create a 'blanket exemption' from the need to provide access and facilities for people with disabilities for all providers of seasonal worker accommodation. This cannot be the case.
- 5.5.3 In all situations, the question of whether or not access and facilities for people with disabilities is required to worker accommodation must be assessed on the individual circumstances of the case, and will depend on whether people with disabilities can be expected to visit or work, and carry out normal activities and processes in that building. Seasonal workers are employed, from both within New Zealand and overseas, in many different industries. These industries will encompass a multitude of different tasks and roles requiring differing types and levels of physical and other skills. In addition, individual businesses and farms within these industries will use differing approaches and processes. It is possible that some of these roles and processes will be capable of being carried out by people with disabilities. Where this is the case, reasonable and adequate provision under section 118 will involve something more than is the case with respect to the applicant's buildings. Exactly what it will constitute will need to be assessed in the circumstances of each case where the issue arises.

5.6 Additional matters

- 5.6.1 I have responded below to other matters raised by the authority and the ODI in their correspondence and submissions.
- 5.6.2 The first of these is the authority's submission that because there has been a change of use a building consent is required. I note that the need for a building consent does not flow automatically from a change of use. A building consent would only be required where the change of use triggered the need for additional building work under section 115, and this work itself required building consent.
- 5.6.3 The second matter relates to the ODI's assertion that the applicant's house does not comply with the provisions in NZS 4121. The applicant's building is not required to comply with this standard, it is required to comply with the Building Code to the extent required by the Act. As I have already decided that "reasonable and adequate" provision for access and facilities for people with disabilities (as required by section

- 118) in the current case is fulfilled through there being no provision being made, compliance with the relevant provisions of the Building Code is also not required.
- 5.6.4 The final point relates to the HRA and its application in this situation. The ODI has asserted that the Determination “could be considered to be a breach of the [HRA]”, although no specific breach of any provision is identified by the ODI.
- 5.6.5 The HRA establishes certain prohibited grounds of discrimination; and contains various provisions that make it unlawful to discriminate on those prohibited grounds in areas such as employment, education, provision of goods and services, and within partnerships and other types of association.
- 5.6.6 There are several provisions that are potentially applicable to buildings, but they have quite limited application in comparison to the provisions of the Building Act. For example, section 42 of the HRA provides that it is unlawful to refuse to allow a person to access or use a place that members of the public are allowed to access or use by reason of one of the prohibited grounds of discrimination. This would not apply to worker accommodation on an orchard, as that is not a place to which members of the public are entitled or allowed to enter or use.
- 5.6.7 Section 43(2) of the HRA sets out when such discrimination will not be unlawful and states that nothing in section 42 requires a person to provide special facilities to enable a person with a disability to access or use such a place if it would not be reasonable to require the provision of such facilities. Linking the provision of facilities for persons with disabilities to when it is reasonable to require such facilities to be provided is similar to the ‘reasonable and adequate provision’ requirement in section 118(1) of the Act, and could be read as limiting the circumstances under the Act when facilities for a person with a disability to access a place must be provided. However, section 43(3) of the HRA clarifies that section 43(2) is not to be read in a limiting way as “[N]othing in subsection (2) limits section 118 of the Building Act 2004”.
- 5.6.8 Section 53(1)(c) of the HRA takes a similar approach to section 43(2) in that it prohibits treating a person who is seeking to acquire or has acquired residential or business accommodation differently from other persons in the same circumstances by reason of one of the prohibited grounds of discrimination. Similarly, section 56(3) further defines when such discrimination will not be unlawful and states that nothing requires special facilities for a person with a disability if it would not be reasonable to provide those facilities in the circumstances.
- 5.6.9 In comparison to sections 42 and 53 of the HRA, the obligations in section 118 of the Act to provide reasonable and adequate provision for persons with disabilities in respect of buildings are considerably broader. Section 118 applies to a wider range of buildings, and the provisions of the Building Code specify not just the types of access that must be provided, but also the parking and sanitary facilities that must be provided for persons with disabilities.
- 5.6.10 I do not agree with the ODI’s suggestion that there is anything in this Determination that would mean the applicant would be discriminating unlawfully against a person with a disability in not providing access and facilities for persons with disabilities in his accommodation for RSE workers.

6. What happens next?

- 6.1 Even though I have concluded that there is no requirement for the applicant to provide access and facilities for people with disabilities in relation to his building, the authority must still be satisfied that the applicable Building Code requirements in section 115(b)(i) have been met “as nearly as is reasonably practicable” before it provides written notice that the change of use is accepted. This will include the other matters raised by the authority in its submission.
- 6.2 These are matters for the parties to resolve between themselves. Once the authority is satisfied, it can provide written notice that the change of use is accepted.

7. The decision

- 7.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority has incorrectly exercised its powers of decision in refusing to agree to the change of use of the applicant’s building under section 115. I hereby reverse that decision, requiring the authority to make a new decision taking into account the findings of this determination.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 16 October 2019.

Katie Gordon
Manager Determinations

Appendix A

A.1 The relevant sections of the Building Act 2004 include:

114 Owner must give notice of change of use, extension of life, or subdivision of buildings

(1) In this section and section 115, change the use, in relation to a building, means to change the use of the building in a manner described in the regulations.

(2) An owner of a building must give written notice to the territorial authority if the owner proposes—

(a) to change the use of a building; or...

115 Code compliance requirements: change of use

An owner of a building must not change the use of the building,—

(a) in a case where the change involves the incorporation in the building of 1 or more household units where household units did not exist before, unless the territorial authority gives the owner written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use, will comply, as nearly as is reasonably practicable, with the building code in all respects; and

(b) in any other case, unless the territorial authority gives the owner written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use,—

(i) will comply, as nearly as is reasonably practicable, with every provision of the building code that relates to the following:

(A) means of escape from fire, protection of other property, sanitary facilities, structural performance, and fire-rating performance:

(B) access and facilities for people with disabilities (if this is a requirement under section 118); and

(ii) will,—

(A) if it complied with the other provisions of the building code immediately before the change of use, continue to comply with those provisions; or

(B) if it did not comply with the other provisions of the building code immediately before the change of use, continue to comply at least to the same extent as it did then comply.

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 persons 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:

(a)...

...

(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:

...

A.2 The relevant clauses of the Building Code include:

A1 Classified Uses

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 dwelling

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.

2.0.4 Group dwelling

Applies to a building or use where groups of people live as one large extended family.

Examples: within a commune or marae.

3.0 Communal residential

3.0.1 Applies to *buildings* or use where assistance or care is extended to the *principal users*.

There are two types:

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, *backcountry hut*, hostel, hotel, motel, nurses' home, retirement village, time-share accommodation, a work camp, or camping ground

3.0.2 Community care

...