

Determination 2024/032

**Regarding compliance with Building Code Clause D1 of
a pedestrian walkway located in a retirement village**

389 Adelaide Road, Berhampore, Wellington

Summary

This determination considers whether a sloped pedestrian walkway between two levels of a retirement village is required to comply with clauses of Building Code Clause D1 that concern accessible routes. It also discusses the requirements in the Building Act for accessible routes in relation to different types of buildings within the village.



Figure 1: Photograph showing the sloped walkway

In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (eg Acceptable Solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Peta Hird, Principal Advisor, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.¹
- 1.2. The parties to the determination are:
 - 1.2.1. R Laybourn, the applicant for the determination (“the applicant”), who as a resident at the village has a direct interest in the matter concerning access for disabled people
 - 1.2.2. Wellington City Council, carrying out its duties as the territorial authority or building consent authority (“the authority”)
 - 1.2.3. Village at the Park Lifecare Limited (“the owner”), who is the registered owner of the property (“the property”) and Arvida Limited, the operator of the premises at the property, acting jointly through a legal representative.
- 1.3. This determination arises from the applicant’s concern about the provision for access for disabled people between two levels of the property, and specifically the gradient of a path.
- 1.4. This determination considers sections 117-118, which mandate the provision of access and facilities for disabled people.² Accordingly, I have consulted with Whaikaha – Ministry of Disabled People (“Whaikaha”) as required under the Building Act.³
- 1.5. The matter to be determined, in terms of section 177(1)(a) of the Act, is the compliance of the pedestrian walkway (“the walkway”⁴) between two levels of the

¹ The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

² In most instances this determination uses the term ‘disabled people’ because this term is preferred by the disabled community. However, in some instances this determination uses terms from the Act and the Building Code (for example, ‘persons with disabilities’), but only where I discuss the meaning or application of those terms or where they appear in direct quotes.

³ Section 170(b).

⁴ The parties have used different terminology throughout, including “ramp”, “footpath” and “path”. I have opted to use “walkway” to describe the subject of this determination.

property with Building Code clause D1 *Access Routes* in terms of access for disabled people.

- 1.6. In deciding this matter, I must consider whether the objective in clause D1.1(c)⁵ applies to the walkway. This turns on whether particular buildings on the property are required under sections 117 and 118 to have access for disabled people.

2. The background and building work

- 2.1. The property is located in a residential suburb in Wellington and comprises of a number of buildings on a site currently being operated as a retirement village.
- 2.2. Since 2003, the property has been progressively developed in stages. The elevated west end, which I refer to as the “upper level” of the property, is comprised of residential buildings (“villas”). The applicant resides in one of the villas located on the upper level.⁶
- 2.3. The lower level of the property contains various communal facilities, including a café, cinema, library, gym, hair salon, chapel, card room, swimming pool and spa, as well as croquet and pétanque courts. On the lower level to the east there is also a hospital with a dementia wing, rest home facilities, and childcare centre. See Figure 2.
- 2.4. The pedestrian access between the upper and lower levels of the retirement village is via two ramps to the south, as well as the walkway that is the subject of this determination.
- 2.5. The walkway was constructed at approximately 1:6 grade (or 9.46°)⁷ and is located between a vehicle accessway and a concrete retaining wall forming the courtyard of block D (see Figure 1).

⁵ To ensure that people with disabilities can enter and carry out normal activities and functions within buildings.

⁶ Having entered into a contractual agreement for a right to occupy.

⁷ Diagrams provided by the owner indicate the slope is 8°.

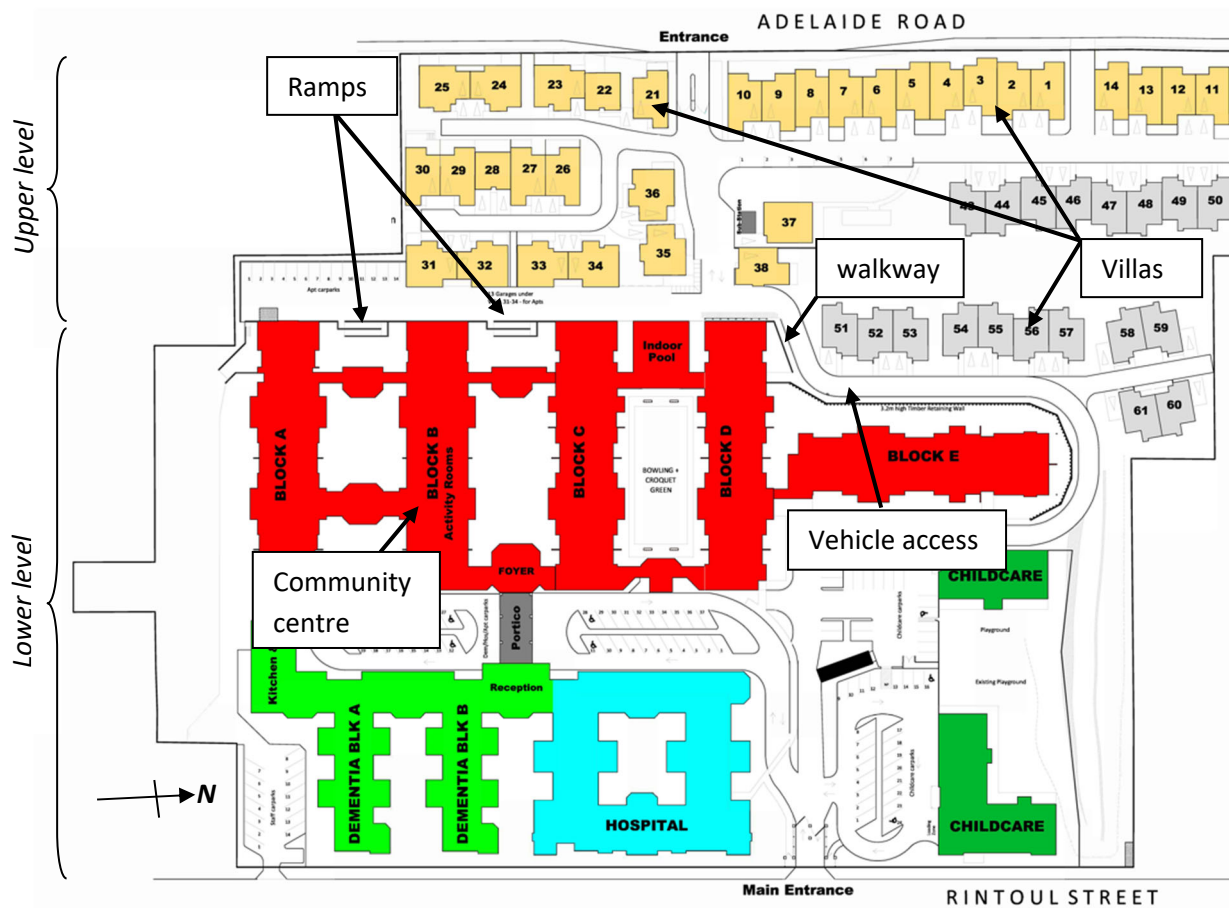


Figure 2: Site plan of buildings

3. Submissions

The applicant

3.1. The owner made a submission which stated (in summary):

3.1.1. There are no accessible routes⁸ in the retirement village between the upper-level villas and the lower-level community centre and "the only pedestrian access from the lower level community centre to upper level villas, is by steps or paths that are too steep. The paths are not in defined routes and are shared with vehicles."

3.1.2. The walkway was not detailed in the building consent for block D nor in the consent for later-constructed villas 52 to 61 which "showed the [walkway] as existing and hence was not subject to inspection by [the authority]". This meant that the walkway was constructed "without any detailed

⁸ **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*. (Building Code Clause A2 Interpretation)

drawings...hence [they] were not able to be scrutinised at consent checking.”

- 3.1.3. Sections 117-119 of the Act detail provisions related to disability access. The section 117 definition for buildings is broader than the usual definition in the Act, including features external to building that connects complexes and developments. Building consent documents for block D shows that it falls within the scope of Schedule 2 of the Act.
- 3.1.4. Building Code clause D1 and the associated Acceptable Solution D1/AS1 requires access routes to give direct access to the principal entrance to a building. There are two road frontages for the village, with Rintoul Street being the principal entrance. However, the Acceptable Solution states that where a site has separate buildings, the accessible route should not deviate substantially from the convenient or direct route commonly used. The walkway currently forms the most natural, visible and direct route between the community centre and the villas and the Adelaide Road entrance. Also, D1/AS1 requires accessible routes to connect areas in community service buildings, and retirement villages are community service buildings.⁹
- 3.1.5. Residents visiting each other in their homes within the village is made more difficult as a result of the steep walkway. It is expected that a retirement village should fully comply with access requirements.

The owner and operator

- 3.2. The owner and operator made a submission which stated (in summary):
 - 3.2.1. Village at the Park is private property comprised of private residential homes and is not a public site nor provides public facilities.
 - 3.2.2. Agreement with the authority that the walkway is a “footpath that has been constructed as part of the roading network and does not form part of the accessible routes to enter buildings.”
 - 3.2.3. The walkway is not part of a building within the definition of section 8. Parts of the village are separate with different uses, ie villas for residential housing and clubhouses provide communal facilities. “The retirement village isn’t considered as ‘one building’ under section 8(1)(c) of the Act.”¹⁰
 - 3.2.4. The walkway is not part of a building under section 117 of the Act, as it is not an accessway or passage within a building, or between parts of a building, nor is it attached to a building within the village.

⁹ As defined in Clause A1 Classified uses.

¹⁰ Section 8 Building: what it means and includes. (1) In this Act, unless context otherwise requires, building– (c) includes 2 more or more buildings that ... are intended to be managed as one building with a common use and a common set of ownership arrangements.

- 3.2.5. “Section 118 of the Act, which requires particular buildings to have access and facilities for persons with disabilities, does not apply to the [v]illage. Retirement villages are places of private residence not places in which, in the terms of section 118 of the Act, the public has access to. This is reinforced by... Schedule 2, notably it does not list private residences or retirement villages.”
- 3.2.6. Clause D1.1(c) does not apply because the requirement is that persons with disabilities must be able to enter and carry out normal activities and functions **within** buildings, whereas the walkway is located between separate buildings in the village. [owner’s emphasis]
- 3.2.7. If the Building Code did apply, the walkway is not required to meet clause D1.3.2(a) and (c) because the walkway is a path between the community centre and private residential housing, not a route from the street boundary or the carpark and is not a route enabling persons with disabilities to have access to and within spaces they may be expected to work or visit.
- 3.2.8. There is “no obligation on the [o]perator, or indeed any entity, under the Building Act or Code, to ensure ‘barrier free’ access or to ensure there are no non-disability access routes or options at all”.

The authority

- 3.3. The authority’s views, expressed in a submission as well as previous correspondence with the applicant, were (in summary):
- 3.3.1. The construction of a footpath is not building work or a building under the Building Act, and the authority has no power to take action. The village has since added handrails to either side and provided signage advising of unsuitability for people with limited mobility.
- 3.3.2. “The walkway does not form part of an accessible route for the buildings within the village for the purposes of the objective of clause D1.1(c) of the Code because:
- (1) it is not a ‘structure’, it is a footpath that is part of the roading in the village.
 - (2) it is not an accessible ramp
 - (3) the walkway is not a part of a building under section 117, it is not an accessway or passage within or between parts of a building, nor is it attached to a building within the village.”

- 3.3.3. The objective of D1.1(a)-(c) are being met within the village and there is reasonable and adequate access to enable safe and easy movement of people. We do not believe there is a breach of the Building Code.
- 3.3.4. The village has installed safety features to improve the footpath, but due to the topography of the ground, it would not be possible to achieve a slope prescribed in the Acceptable Solution D1/AS1.
- 3.3.5. D1.1(c) does not apply to the walkway in question.

Whaikaha

- 3.4. Whaikaha did not comment on whether the ramp is subject to the provisions in sections 177 or 118, but stated:

... Whaikaha agrees with MBIE's analysis that the main consideration is whether this retirement village is run as one complex necessitating accessible routes between buildings (i.e., is a group of pensioner flats, rest home, or other building under Schedule 2 of the Act) and notes:

- 389 Adelaide Road is part of the Village at the Park development that provides rest home care, geriatric, medical, and dementia care services for the Ministry of Health [link]
- from a lay perspective a "retirement village" would likely be considered synonymous with a "rest home" or "group of pensioner flats" (see Building Act 2004, Schedule 2. (j),(k)), and suggests MBIE's determination should clearly articulate why the Village at the Park retirement village is/is not considered as being "buildings in respect of which requirement for provision of access and facilities for persons with disabilities applies".

- 3.5. Whaikaha also noted the issue of building accessibility for people of retirement age is particularly pertinent given the:

- high rates of disability they experience compared to the population as a whole [link]
- feedback received from the United Nations Committee on the Rights of Persons with Disabilities (the Committee) at New Zealand's second examination in August 2022 expressing concern about the slow progress in implementing the Building Act 2004, which prolongs inaccessibility to public buildings and the progressive upgrade of existing buildings [link]

- 3.6. Whaikaha also commented on footpath gradients, noting the New Zealand Transport Agency's Pedestrian network guidance for footpath design is that a "footpath through zone should be treated as a ramp if the mean gradient is greater than five percent. A maximum gradient of 1:14 (7%) should be used wherever achievable but a ramp shall not be steeper than 1:12 (8%)".

4. Discussion

- 4.1. The matter to be determined is whether the walkway between the villas and the other buildings at the property providing communal facilities, is required to be accessible to people with disabilities under section 118 of the Act.

Legislation

- 4.2. A key principle in section (4)(2)(k) of the Act is the “need to provide, both to and within buildings to which section 118 applies, facilities that ensure that reasonable and adequate provision is made for persons with disabilities to enter and carry out normal activities and processes in a building”.
- 4.3. The provisions concerning access and facilities for persons with disabilities are set out in sections 117 to 120.
- 4.4. Section 117 provides that for the purposes of sections 118-120, the term “building”¹¹ includes:
- (a) parts of a building (including driveways, access ways, passages within **and between** complexes and developments, and associated landscaping (if any)); and
 - (b) any premises or facilities. [my emphasis]
- 4.5. This definition broadens the meaning of building under section 8. However, it is limited in its application by section 118, which states:

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.

- 4.6. Section 118(1) of the Act defines the general class of buildings to which it applies, namely buildings to which members of the public are to be admitted, whether for free or on payment of charge. Subsection (2) refers to Schedule 2 of the Act, which

¹¹ Sections 8 defines the meaning of “building” and section 9 sets out exclusions.

lists buildings for specific purposes to which the provisions of the section apply. The purposes which may be relevant in this case are:

...

(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

(k) hospitals, whether public or private, and rest homes

4.7. Reading section 117 in context of the provision in section 118, it is my view that it concerns those paths of travel within and between buildings subject to accessibility requirements in section 118. Meaning that the requirements for reasonable and adequate access to buildings where members of the public visit or work or carry out 'normal processes and activities' is extended to include driveways, accessways and passages, within and between those buildings.

4.8. I note that section 118 states that "reasonable and adequate provision by way of access...must be made", which means that not all routes are required to be accessible to enable persons with disabilities to carry out normal activities and processes within the building.

4.9. Building code clause D1.1(c) states:

Clause D1—Access routes

D1.1 The objective of this provision is:

...

(c) ensure that people with disabilities are able to enter and carry out normal activities and functions within buildings.

4.10. The limit on application of the objective in clause D1.1(c) is that it only applies to "those buildings to which section 47A of the Act applies."¹²

Section 118 in relation to the retirement village

4.11. The property contains a number of buildings with different purposes and uses. Some of the buildings located on the property, such as the hospital (regardless of it being public or private) and childcare centres, are buildings of the kind listed under Schedule 2, for which accessible routes are required to enable people to enter and move within them.¹³

4.12. In considering access between the villas and other buildings on the property, I first consider whether the villas are buildings that come under any of the purposes listed in Schedule 2.

¹² Section 118 in the current Act is the equivalent of Section 47A in the 1991 Building Act.

¹³ I have not accessed the accessible routes to or between these buildings.

- 4.13. The two most analogous terms to a retirement village, are clauses (j), which refers to “groups of pensioner flats” and (k) which refers to “rest homes”.
- 4.14. Clause (j) lists a number of different types of public accommodation, including “groups of pensioner flats”. I consider the term “pensioner flat” has a distinct meaning, being social housing provided by central government agency or a local authority for occupation by retired people on low incomes.
- 4.15. In contrast, the villa buildings located at this site are owned by the private sector and residents live in them on a “licence to occupy” basis. In my opinion, the villa buildings are not “pensioner flats” as that term is used in Schedule 2 for the purpose of section 118.
- 4.16. Turning to “rest homes” in clause (k), these are listed alongside other facilities such as hospitals that provide a high degree of care and assistance. I do not consider that the villas fit within this description for the purpose of Schedule 2, because they are stated to be occupied on the basis of ‘independent living’¹⁴ with very limited to no care or assistance.
- 4.17. Considering the above, in my view the villas are not used as pensioner flats or rest homes as those terms are used in Schedule 2 but are more akin to private residential housing in their intended use and purpose. Accordingly, they are not buildings included under section 118(2).
- 4.18. Also, because they are occupied as private residential homes the villas are not buildings to which members of the public are to be admitted in order to visit or work, and to carry out normal activities and processes under section 118(1).

Is the walkway required to be accessible?

- 4.19. Returning to the section 117 definition, “driveways, accessways, passages” are buildings to which the provisions concerning access for disabled people apply if they are within or between “complexes and developments”. I take the reference to “complexes and developments” to be to buildings that fall within section 118. This means that where access is provided between section 118 buildings, then the Building Code requirements that relate to access for disabled people are extended to include those means of access between the buildings.
- 4.20. The walkway is not used as a route to any specific building. It serves as part of the pedestrian access between the upper level of the village at its west end or the Adelaide Road entrance, to the lower levels of the village containing communal buildings such as the community centre (and vice versa).
- 4.21. The community centre and other buildings that provide communal facilities and the paths of travel between them would be required under sections 118 and 117 to

¹⁴ As stated on the operator’s website under the villa living option.

meet accessibility requirements. However, there is no such requirement for the villas.

- 4.22. As the villas are not buildings to which section 118 applies and so do not attract accessibility requirements, the route between the villas and the community centre is therefore not a building as defined under section 117. For that reason, the walkway is not required to meet accessibility requirements under the Building Code.

Conclusion

- 4.23. Under sections 117 and 118 of the Act, the walkway does not serve as access between those buildings required to be accessible under section 118, therefore the objective in Building Code Clause D1.1(c) does not apply.

5. Comment

- 5.1. I acknowledge Whaikaha's comments regarding the pertinence of accessibility for occupants of retirement villages. I also note the views of the applicant and Whaikaha regarding accessibility within retirement villages, including between residential buildings and communal buildings, are likely to be reflected more widely in the community.
- 5.2. In all situations, the question of whether access and facilities for people with disabilities is required by legislation must be assessed on the individual circumstances and will depend on the context and specific uses of particular buildings.

6. Decision

- 6.1. In accordance with section 188 of the Building Act 2004, I determine the walkway is not a building to which the provisions in section 118 apply and so it is not required to meet the objective of Building Code Clause D1.1(c) in relation to access for persons with disabilities.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 14 June 2024.

Peta Hird

Principal Advisor