

Determination

under the

Building Act 1991

No. 98/002: Provisions to be made for people with disabilities in community housing

1 THE MATTERS TO BE DETERMINED

- 1.1 The matter before the Authority is the refusal of a territorial authority to issue a building consent for certain proposed alterations to a house intended as a residence for people with intellectual disabilities but not mobility disabilities. Those proposed alterations did not include the provision of access and facilities for use by people with mobility disabilities.
- 1.2 The Authority takes the view that it is being asked in effect to determine whether, after certain proposed alterations, the house will comply as nearly as is reasonably practicable with the provisions of the building code for access and facilities for use by people with disabilities as required by section 38 of the Building Act 1991. That depends on whether the building is one to which section 47A of that Act applies.
- 1.3 In making its determination the Authority has not considered compliance with any other provisions of the building code or of the Building Act.

2 THE BUILDING

- 2.1 The building concerned is a detached house being altered for use as a residence for people with intellectual disabilities but not mobility disabilities. The intended use of the building was described by the applicant as follows:

The total number of people living in the property are six. The six people who live in the home are given 24 hour care and assistance by caregivers (typically one at night and two during the day). The caregivers do not sleep at the property and have no disabilities themselves.

The applicant also said:

It is intended that, in common with other Community Housing homes, [the building concerned will] be configured to enable the integration of residents into the

community, in a housing environment that resembles, as closely as possible, usual community living patterns.

The applicant said that the building concerned was typical of such homes, but in some cases there could be as many as 10 inhabitants.

- 2.2 The Authority understands, therefore, that the building will be used by the residents as their private home. The proposed alterations are intended to make the building suitable as a home for those residents.
- 2.3 The proposed alterations are not relevant to this determination, but the Authority notes that they include the installation of an automatic fire alarm system.
- 2.4 The territorial authority refused building consent for the proposed alterations unless ramp access, internal accessible routes, and accessible toilet facilities were provided.
- 2.5 That refusal was for reasons based on section 25 of the Disabled Persons Community Welfare Act 1975. That section has since been replaced by the almost identical section 47A of the Building Act. The differences between the two sections are not relevant to this determination, which is therefore written entirely in terms of section 47A from here on.

3 THE LEGISLATION

3.1 The relevant provisions of section 47A are:

(1) In any case where provision is being made for the construction or alteration of any building to which the public are to be admitted, whether on payment or otherwise, reasonable and adequate provision . . . shall be made for persons with disabilities who may be expected to visit or work in that building and carry out normal activities and processes in that building.

(4) The provisions of this section shall apply to, but shall not be limited to, buildings . . . that are intended to be used for or associated with one or more of the following purposes:

(g) Central, regional, and local government offices and facilities:

(j) Hotels, motels, hostels, halls of residence, holiday cabins, groups of pensioner flats, boardinghouses, guest houses, and other premises providing accommodation for the public:

(k) Hospitals, whether public or private, nursing homes, and old people's homes:

(m) Educational institutions, including public and private . . . schools . . .

(p) Places of assembly, including . . . clubrooms . . .

(z) Other buildings, premises, or facilities to which the public are to be admitted, whether on payment or otherwise.

(6) For the purposes of this section, the term "person with a disability" means any person who suffers from physical or mental disability to such a degree that he or she is seriously

limited in the extent to which he or she can engage in the activities, pursuits, and processes of everyday life.

4 THE PARTIES AND THEIR SUBMISSIONS

- 4.1 The applicant was the owner, Community Housing Limited, a subsidiary company of the Housing Corporation of New Zealand, which has the following mission:

To provide throughout New Zealand, suitable and well maintained accommodation and excellent service which meets the accommodation needs of community groups and individuals with disabilities.

In accordance with that mission, Community Housing Limited owns residential accommodation which it rents to people and groups with special accommodation needs, including people with disabilities, women's refugees, and so on.

- 4.2 The other party was the territorial authority.
- 4.3 Neither party wished the Authority to hold a hearing at which it could speak and call evidence.
- 4.4 The applicant made submissions, supported by several decided cases, on the meaning of the terms "public", "the public", and "household unit". Those submissions were encapsulated in the statement:

. . . the fact that individual non-residents will inevitably visit or work in the house does not mean that it is a premise to which the public is to be admitted any more than would be the case with most other private households.

- 4.5 The territorial authority's submission noted that the building would be required to be registered under Part II of the Disabled Persons Community Welfare Act. It submitted that the building was one to which section 47A applied, saying:

. . . the word "public" has been given an extended definition, both in section 47A(1) and in section 47A(4)(z) of the Building Act 1991 by the words "whether on payment or otherwise". This, no doubt, is to include situations where there may be some limitation on public access. The Council accepts that it is not intended that the public at large will have unrestricted access to the building in question. However, there will no doubt be sectors of the public who will be admitted to the building. These may include invitees of the occupants, and persons employed to work there. This would be analogous to the public's right of entry in respect of other institutions mentioned in section 47A(4), for example, halls of residence, nursing homes, and old people's homes.

5 DISCUSSION

5.1 The Authority's jurisdiction to consider the matter

5.1.1 Whether section 38 requires that a building shall be upgraded in respect of the provisions of the building code for access and facilities for use by people with disabilities depends whether those provisions apply to that building. That in turn depends on whether the building is one to which section 47A applies. That is at least partly a question of law. The Authority is not a Court, and in this case its jurisdiction is limited by section 18 of the Building Act to:

. . . whether or not, or to what extent, particular building work or proposed building work . . . complies with all of the provisions or any particular provision of the building code . . .

5.1.2 However, in the course of making any determination the Authority must inevitably take a view on one or more questions of law. Accordingly, the Authority is prepared to address whether section 47A applies to the building concerned while drawing attention to the fact that to the extent that it takes a view on a question of law this determination could be subject to appeal under section 86.

5.2 Is the house a building to which section 47A applies?

5.2.1 The Authority takes the view that the buildings to which section 47A applies come within one or both of the following categories:

Category A: Any building to which the public are to be admitted, whether on payment or otherwise.

The Authority does not attempt to define or interpret the meaning of that phrase.

Category B: Any building for one of the purposes listed in section 47A(4) whether or not the public are to be admitted.

Clearly, the public are to be admitted to some category B buildings, such as passenger transport terminals and theatres. However, the Authority does not consider that buildings such as defence facilities and private schools, for example, can properly be described as “buildings to which the public is to be admitted”.

5.2.2 The Authority recognises that access and facilities for use by people with disabilities are to be provided not only for the inhabitants or occupants of a building to which section 47A applies but also for people working in the building, see Determination 92.1103. However, if section 47A does not apply to the building concerned then there is no requirement for access and facilities for use by people with disabilities to be provided for inhabitants, invitees, caregivers, or anyone else.

5.2.3 Whatever the correct legal interpretation of the phrase “buildings to which the public are to be admitted”, the Authority takes the view that it does not apply to private homes. The Authority considers that the house concerned is intended for use as a private home for people with intellectual disabilities. Therefore the building does not come within category A.

- 5.2.4 None of the paragraphs of section 47A(4) appear to be relevant except possibly paragraphs (j) and (k).
- 5.2.5 The buildings to which paragraph (j) applies are limited to those “providing accommodation for the public”. Thus even if, which the Authority does not accept, the house concerned could properly be described as a “hostel, boardinghouse, or guest house”, it cannot properly be described as “providing accommodation for the public”.
- 5.2.6 As for paragraph (k), the building is clearly not a hospital or an old people’s home. The Authority takes the view that it cannot properly be called a nursing home because the residents will not go to the building in order to be given nursing care, they will go to the building in order to live in the community “in a housing environment that resembles, as closely as possible, usual community living patterns”. In the Authority’s view, the building cannot be properly described as a nursing home.
- 5.2.7 The Authority therefore considers that the building does not come within category B.
- 5.2.8 The Authority observes that caregivers are often employed in private homes, so that does not affect the status of the building concerned. The Authority also observes that whether a building can properly be described as a private home does not depend on the number of residents, although as the number increases it might become less likely that the building is a private home. The Authority makes no decision about whether there is a maximum number.
- 5.2.9 The Authority considers it irrelevant whether the residents themselves have a landlord-and-tenant relationship between Community Housing Limited, or whether the building is let to a community group which provides accommodation to the residents.
- 5.2.10 The Authority accordingly concludes that section 47A does not apply. Therefore the house is not required to comply with the provisions of the building code for access and facilities for use by people with disabilities.
- 5.2.11 That conclusion depends on the building’s being let for use as a private home, in this case for people who need specialised accommodation because of intellectual disabilities. To ensure that remains the case, the Authority considers it appropriate to record that intended use on the building consent and other documents issued under the Building Act which identify the intended use of the building.
- 5.2.12 That concludes the matter, but for the sake of completeness the Authority offers the following comments arising out of the applicant’s submissions.

5.3 Additional comments

- 5.3.1 Quite apart from the fact that the term “household unit” does not appear in section 47A, the Authority does not accept that the cited cases on the meaning of “household” and “household unit” are relevant to the application of any provision of the Building Act. Those

cases, which were concerned with the use of the word in district schemes under the Town and Country Planning Act 1977. The Building Act includes the following specific definition of “household unit”:

“Household unit” means any building or group of buildings, or part of any building or group of buildings, used or intended to be used solely or principally for residential purposes and occupied or intended to be occupied exclusively as the home or residence of not more than one household; but does not include a hostel or boardinghouse or other specialised accommodation.

5.3.2 The Authority accepts that the occupants of the house will be a “household” but comments that in its view the house is not a “household unit” but “specialised accommodation”. However, that is irrelevant to the application of the Building Act. For the purposes of the Act, the only difference between a household unit and specialised accommodation is in respect of protection against the spread of fire, see in particular section 6(2)(b) and the limits on the application of various provisions of clauses C2 and C3 of the building code.

5.3.3 The Authority comments that that:

- (a) In terms of the classified uses defined in clause A1 of the building code (the First Schedule to the Building Regulations 1992) the house comes within either 3.0.2 Community Service or 3.0.3(a) Community Care, depending on the extent of care provided by caregivers to the people with disabilities who will be the principal users of the building; and
- (b) In terms of the purpose groups specified in Table A1 of the Fire Safety Annex to Approved Document C4, the house comes within purpose group SC (principal users because of age, mental or physical limitations require special care) and not SH (ordinary houses) despite the fact that the principal users will live as a single household. Table B1/5 in that document calls for provisions in respect of means of escape from fire in SC buildings which are not required in SH buildings.

6 THE AUTHORITY'S DECISION

6.1 In accordance with section 20(a) of the Building Act the Authority hereby reverses the territorial authority’s decision to refuse building consent for the proposed alterations unless the alterations also included the provision of access and facilities for use by people with disabilities.

6.2 The Authority determines that a building consent is to be issued for the proposed alterations, provided that on the building consent and any other documents issued under the Building Act which identify the intended use of the building, the intended use is to be recorded as:

Private home for people who need specialised accommodation because of intellectual disabilities.

Signed for and on behalf of the Building Industry Authority on this 18th day of May 1998

W A Porteous
Chief Executive