

Determination 2005/166

Access for people with disabilities to the upper floor of the AFFCO beef processing plant, Horotiu

1 The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 (“the Act”) made under due authorisation by me, John Gardiner, Determinations Manager, Department of Building and Housing, for and on behalf of the Chief Executive of that Department.
- 1.2 The applicant is AFFCO New Zealand Ltd (“the owner”) acting through a firm of solicitors. The only other party is the Waikato District Council (“the territorial authority”).
- 1.3 The application arises from a dispute about whether a lift is required to certain upper floors of a beef processing plant in order to comply with section 118 of the Act and clause D1 of the Building Code (the First Schedule to the Building Regulations 1992).
- 1.4 In making my decision I have not considered any other aspects of the Act or of the Building Code.
- 1.5 Unless otherwise stated, references below to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

2 The situation

- 2.1 The building work consists of an addition to the existing complex of buildings that make up the plant. The owner described it as “two-storey (with split floor in parts)” and said:

“The split-level upper floors comprise the boning, slaughter rooms and associated operational rooms with store rooms, a lunchroom and other rooms providing facilities to those working in those areas [and] a small office section for support staff.”

- 2.2 The territorial authority issued a series of building consents on the basis that a lift would be provided to serve the first and second floors. The owner applied for an amendment to omit the lift. The territorial authority refused and the owner disputed that decision by way of the application for this determination.
- 2.3 I have not been informed whether the stairs serving the upper floors are suitable for use by people with ambulant disabilities.

3 The legislation

- 3.1 For the reasons set out below, the only relevant provisions of the Act are section 118 and Schedule 2.

Section 118 reads:

- “(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.”

The relevant provision of Schedule 2 is:

“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:

- “(y) factories and industrial buildings where more than 10 persons are employed”

3.2 However, the parties' submissions refer also to the following sections, and I therefore set out the relevant parts of those sections:

Section 7:

"**alter**, in relation to a building, includes to re-build, re-erect, repair, enlarge, and extend the building."

Section 8:

- "(1) In this Act, unless the context otherwise requires, building—
- "(c) includes any 2 or more buildings that, on completion of building work, are intended to be managed as one building with a common use and a common set of ownership arrangements;"

Section 17:

"All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work."

Section 67(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."

Section 69:

- "(1) This section applies to a waiver or modification of the building code that relates to—
 - "(a) an existing building to which section 118 applies; and
 - "(b) access and facilities for use by people with disabilities.
- "(2) If this section applies, the chief executive may grant a waiver or modification only in a determination issued under subpart 1 of Part 3.
- "(3) This section does not apply to a waiver or modification of the building code that relates to a new building."

Section 112:

- "(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—

- “(ii) access and facilities for persons with disabilities (if this is a requirement in terms of section 118)”

3.3 The parties also referred to the following provisions of Clause D1 of the Building Code:

“D1.3.2 At least one access route [in a building to which section 118 applies] 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

“D1.3.4 An accessible route, in addition to the requirement of Clause D1.3.3, shall:

- “(c) Include a lift complying with Clause D2 “Mechanical Installations for Access” to upper floors where:
 - “(ii) buildings are three storeys high and have a total design occupancy of 50 or more persons on the two upper floors
 - “(iii) buildings are two storeys high and have a total design occupancy of 40 or more persons on the upper floor”

4 The submissions

4.1 Each of the parties made submissions on the basis that a lift would be required if the new upper floors were required to comply completely with the provision of the Building Code for access and facilities for use by people with disabilities.

4.2 The owner provided copies of relevant correspondence and contended that the building work was an alteration to an existing building and therefore is not required to comply completely with the provisions of the Building Code for access and facilities for use by people with disabilities but only to comply “as nearly as is reasonably practicable”.

4.3 As to whether the building work should be treated as the erection of a new building or as an alteration to a building complex, the owner cited sections 7 and 8 of the Act and said:

“In terms of the complex as a whole a majority of existing buildings are being retained and so that under Section 8(c) the two-story complex can only be seen as the rebuilding enlargement and or extension of a building.

“Even looking at the two-storey (with split floor in parts) complex alone it comprises an enlargement and extension of the buildings immediately adjacent . . .”

- 4.4 As to whether it was “reasonably practicable” to provide a lift, the owner said that relevant factors included:
- (a) Cost.
 - (b) The facilities for people with disabilities in other areas of the building or other buildings in the complex.
 - (c) “The provisions of the building code for access and facilities for use by people with disabilities apply to a building as a whole but do not apply to a building or to any part or portion of a building in which people with disabilities, solely because of their disabilities, cannot work, and which, for some specific reason, will not be visited by people with disabilities. However the extent by which people with disabilities can overcome the same should not be underestimated [see Determination 2002/8].”
 - (d) “The fact that disabled people may be significantly less likely to access the upper floors by virtue of operational or other restrictions [see Determination 97/002].”
- 4.5 The owner estimated the cost of installing the lift as \$100,000, and there would also be “on going maintenance and certification costs”.
- 4.6 The owner also said:
- “The nature of the work . . . makes it impossible for a person with a mobility restriction to work in [the operational] areas.
- “Further the plant includes a large number of conveyors that run throughout the floor; these are bridged by stairways . . . For this reason it would not be possible to employ a disabled person even in a support role if they were required to access the second floor.
- “In addition, the hygiene requirements . . . are such that . . . wheelchairs would not be allowed to be used as they are not sterilised [and] a disabled person would be unlikely to be able to use the footbaths which are at each entry point. . . .
- “The danger inherent in the operations . . . is such that there is no access to the general public and visitors are not allowed in the operational areas.”
- 4.7 As to people working in the office, the owner said that “their jobs will necessarily involve constant movement throughout the floor (e.g. checking stock, uplifting forms; checking production and processes)”.

4.8 The owner recognised “the remote chance” that a Ministry of Agriculture and Forestry (“MAF”) inspector might have a disability but said that had never been the case in the past and such an inspector would not “suffer any real disadvantage in carrying out their duties [if] there was one area in this one plant where another inspector was required to undertake the inspection required”.

4.9 I asked the owner to provide a statement from MAF as to its policy and practice regarding the use of inspectors with disabilities in meat processing plants. In fact, MAF itself no longer provides such inspection services, but the contractor which does so said:

“As a contractor to [the owner] I can confirm that our current staff do not require lift access in the new Horotiu plant.

“In relation to future staff, this is also likely to be the case. Recognising our obligations under the Human Rights Act 1993, it is likely that we would be unable to employ as a meat inspector an applicant for a meat inspection position who required lift access due to a disability. This is because the nature of the meat inspector position (which requires standing and physical movement for long periods of time on the plant slaughterfloor) is such that the aid of special services or facilities would be required to enable such a person to perform the duties satisfactorily, and it would not be reasonable to expect [the contractor] to provide those services or facilities.”

4.10 The owner discussed several previous determinations relating to alterations and the “as nearly as is reasonably practicable” test.

4.11 The territorial authority made no specific submissions, but when the owner applied for the amendment to the building consent, the territorial authority’s building control manager had said:

“I do not accept that this project is an alteration. I believe it to be a new building that is connected to existing structures forming part of an industrial complex.

“I do not believe that [the territorial authority] has the power to grant this amendment.

“New buildings are required to comply with Section 118 This building is covered by Schedule 2(y).

“In your letter you state the Building will not comply with Clause D.1.3.4, New Zealand Building Code, unless an elevator (lift?) is installed.

“I draw your attention to Section 67(3) . . . which removes the power of Territorial Authorities to grant a waiver or modification of the Building Code that relates to access and facilities for use by people with disabilities.”

5 Discussion

5.1 The application of section 118 to the new upper floors

- 5.1.1 It is not disputed that section 118 applies to the processing plant as a whole. However, does that necessarily mean that all parts of the plant must be accessible to all people with disabilities?
- 5.1.2 There is no specific provision in the Act corresponding to section 3(2)(a) of the Building Act 1991 (“the previous Act”), which provided that the term “building” also includes any part of a building. However, sections 8 and 9 refer to the word “building” as including or not including various specific parts of buildings and therefore I take the view that in this case the new upper floors may be considered separately in terms of section 118.
- 5.1.3 Accordingly, I take the view that, for the purposes of this determination, the specific question under section 118 is whether people who have disabilities such that they cannot reach the upper floors unless a lift is provided may be expected to visit or work on those floors; and carry out normal activities and processes on them.
- 5.1.4 I take the view that the provisions for access and facilities for use by people with disabilities in the Act are so closely similar to those of the previous Act that determinations on those provisions made under the previous Act are still relevant. In Determination 97/009¹ the then Building Industry Authority (“the Authority”) said:
- “It is not for the Authority to adjudicate what people can or cannot achieve in a work environment, that will depend on the abilities of the individuals concerned. The Authority takes the view that:
- “(a) The provisions of the Building Code for access and facilities for use by people with disabilities apply to a building as a whole but do not apply to a building or to any part or portion of a building in which people with disabilities, solely because of their disabilities, cannot work, and which, for some specific reason, will not be visited by people with disabilities.
- “(b) It is important not to underestimate the extent to which people with disabilities are capable of overcoming those disabilities. The clear intention of the 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.”
- 5.1.5 In Determination 2001/13, concerning access and facilities for use by people with disabilities in a new fish processing factory, the Authority did not accept that disabilities that prevent people from reaching the upper floors unless a lift is

¹ See also Determinations 95/003, 95/006, and 95/008, and the Authority’s statement “Access and Facilities for People with Disabilities” published in *Building Industry Authority News* No. 23, June 1993.

provided also prevent them from working as office staff and kitchen staff. However, I understand that in the present case all of the people working on the upper floors will need to be able to move throughout those floors, including operational areas.

- 5.1.6 I agree with the Authority's approach in Determinations 97/009 and 2001/13, and consider that the owner's submissions establish that:
- (a) People who have disabilities such that they cannot reach the upper floors unless a lift is provided, solely because of those disabilities, cannot work on the floors concerned.
 - (b) The floors concerned will not be visited by people who have such disabilities for specific reasons of safety and hygiene.
- 5.1.7 Accordingly, I conclude 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.
- 5.1.8 This determination is made on the basis of the owner's description of the work that is to be undertaken on the new upper floors. The territorial authority has not disputed that description and I have no other information on the matter.
- 5.1.9 I emphasise that if in future there is any change to that work then, for the purposes of section 112, careful consideration will need to be given to whether it is still true to say that the work cannot be done by people who have disabilities such that they cannot reach the upper floors unless a lift is provided.
- 5.1.10 That disposes of the matter. However, I comment on points raised by the parties as follows:

5.2 Is the building work concerned the construction of a new building or an alteration to an existing building?

- 5.2.1 The owner submitted in effect that the building work concerned should be seen as an alteration of an existing building and therefore section 112 required the new upper floors to comply with the relevant provisions of the Building Code only "as nearly as is reasonably practicable".
- 5.2.2 I disagree, taking the view that section 17 applies to the building work comprising the alteration, and requires that work to comply completely with the Building Code (subject to any waivers or modifications granted under sections 67 or 69). Section 112 applies to the building as a whole after the alteration. In this case, it has not been suggested that any alterations to the existing building are needed in order to make it comply as nearly as is reasonably practicable with the provisions of the Building Code for access and facilities for use by people with disabilities.

- 5.2.3 In other words, I consider that it is irrelevant to this determination whether the building work concerned should be seen as the construction of a new building or the alteration of an existing building.

5.3 Waivers and modifications

- 5.3.1 The territorial authority said that section 67(3) “removes the power of Territorial Authorities to grant a waiver or modification of the Building Code that relates to access and facilities for use by people with disabilities.” The power to grant waivers or modifications of the Building Code is different from the power to decide whether an existing building complies as nearly as is reasonably practicable with certain provision of the Building Code. I do not accept that territorial authorities had the power to grant waivers or modifications of the provisions of the Building Code for access and facilities for use by people with disabilities under the previous Act, when it was reserved to the Authority, or under the Act. I take the view that under the Act, I, as the chief executive, am the only person who has the power to grant such waivers or modifications, and then only in respect of existing buildings and if it is reasonable to do so.

6 Decision

- 6.1 In accordance with section 188(1) of the Act, I hereby:
- (a) Determine that the upper floors concerned are not required to have lift access but are required to have stairs suitable for use by people with ambulant disabilities where necessary for access to and within those floors.
 - (b) Reverse the territorial authority’s decision to refuse to amend the building consent to omit the lift provided that the building consent is also amended, if necessary, to make stairs suitable for use by people with ambulant disabilities where necessary.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 19 December 2005.

John Gardiner
Determinations Manager