

Determination 2006/51

Access and facilities for use by people with disabilities in St Andrews Village, Glendowie, Auckland

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 applicants are the Presbyterian Hospital Trustees (“the owners”) acting through a firm of architects. The only other party is the Auckland City Council (“the territorial authority”). At my request, the application and supporting documents were also sent to the chief executive of the Ministry of Social Development, being the department of State responsible for disability issues referred to in section 170.
- 1.3 The application arises from a dispute about whether St Andrew’s Village (“the project”), a development of up to 90 residential buildings, is required to comply with the provisions of the Building Code for access and facilities for use by people with disabilities.
- 1.4 I take the view that the matter to be determined is whether section 118 applies to the buildings in the development.
- 1.5 In making my decision I have not considered any other aspects of the Act or of the building code.
- 1.6 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 development

- 2.1 I have been given no information about the specific nature and design of the buildings in the development except that the owner initially said:
 - (a) The development is intended to comprise “up to 90 high quality ‘license to occupy’ homes” with a first stage of 21 dwellings on the same overall site as the rest home and hospital facility operated by the owners but is not intended to be “directly linked to these facilities”.
 - (b) The owners’ aim is to provide housing with:

- “Generous internal space standards to aid accessibility
- “Single level living possible in all dwellings
- “Attractive and low maintenance materials
- “Positive relationships with adjacent dwellings and open spaces. . . .”

- (c) “. . . the design allows for . . . the provision of additional grab rails in bathrooms in bathrooms at a later date.”
- (d) “The dwellings as currently planned incorporate wide doors and turning spaces for wheelchairs”

2.2 Subsequently, in response to the draft discussed in 4 below, the owner said:

“. . . initially, people making the purchase of [a residential building in the development] do not always want all the features that that disabled access gives. The houses have all been designed to be able to be converted to aid internal disabled access quite easily and quickly. That would be achieved through the addition of extra fixtures and fittings. However, certain features of the dwellings, such as extra space around doors which have been provided to aid accessibility, are of course beneficial to all people.

“Such features can only be incorporated if they re designed into dwellings from the outset, as is the approach taken for the development The intention is for all proposed dwellings on the site to be s accessible as possible to allow people to live in them as long as practicable.”

As mentioned in 5.5 below, I commend that approach.

2.3 I have not been given any information about the conditions of the licences to occupy the buildings.

3 The legislation and the acceptable solutions

3.1 The relevant provisions of the Act are:

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:

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

3.2 The relevant provisions of the Building Code are:

Clause A1—Classified Uses

2.0 HOUSING

2.0.1 Applies to *buildings* or use where there is self care and service (internal management). . . .

3.0 COMMUNAL RESIDENTIAL

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

Clause D1—ACCESS ROUTES	
Provisions	Limits on application
<p>D1.1 The objective of this provision is: (c) Ensure that <i>people with disabilities</i> are able to enter and carry out normal activities and functions within <i>buildings</i>.</p> <p>D1.2.1 <i>Buildings</i> shall be provided with reasonable and adequate access to enable safe and easy movement of people.</p> <p>D1.3.2 At least one access route shall have features to enable people with disabilities to . . .</p>	<p>Objective D1.1(c) shall apply only to those buildings to which [section 118 of the Act] applies. Requirement D1.2.1 shall not apply to Ancillary buildings or Outbuildings.</p> <p>Performance D1.3.2 shall not apply to Housing, Outbuildings Ancillary buildings, and to Industrial buildings where no more than 10 people are employed</p> <p>Performance D1.3.2 shall not apply to Housing, Outbuildings Ancillary buildings, and to Industrial buildings where no more than 10 people are employed.</p>

3.3 The relevant provisions of compliance document D1/AS1 (also found in compliance document NZS 4121) are:

9.0 Accessible Accommodation Units of Communal Residential Buildings

9.1 Number of units to be provided

9.1.1 The number of accessible accommodation units to be provided in hotels, motels and other Communal Residential buildings providing accommodation for the public shall be no less than that given in Table 9.

4 The submissions and the draft determination

4.1 The territorial authority did not make any specific submissions, but when the owners applied for a building consent an officer of the territorial authority said:

“I believe this project for a retirement village is classified under the building code clause A1 as Community Residential community services type where limited

assistance or care is extended to the principle user. Therefore we will be looking to comply with NZBC/D1 and provide a minimum of five units which will be built fully accessible.”

4.2 The owner described the project as outlined in 2.1 above and disputed that clause 118 applied or that the project should be classified as Communal Residential.

4.3 The owner submitted:

(a) “Although the scheme has been designed to be as accessible as possible, the aim is not to provide accommodation which feels institutional but an environment that you would find in a normal residential home.”

(b) “The dwellings are all individual and will not function day to day as part of a centralised organisation such as a hotel nor are there any services to be provided to the residents.”

(c) “The aim . . . is to provide a long term housing solution and housing which is liveable [*sic*] and robust. There is an intent to allow the dwellings to be accessible. However, the market for this product is primarily in the 55-70 year age bracket and from people who are in good health and with good mobility [and such people] do not want or need a dwelling that looks at all institutional or that the occupant is in ill health.”

(d) “[Under the Act] private dwellings are read as not being required to incorporate the specific range of measures described by NZS 4121:2004. The . . . dwellings will be License to Occupy where residents may occupy a unit for life and are effectively a form of leased private dwelling. The dwellings are all individual and will not function day to day as part of a centralizes organisation such as a hotel nor are there any services provided to the residents.”

4.4 In the light of those submissions, I prepared a draft determination (“the draft”) which I sent to the parties with a request that they either accept it or identify points that they wished to raise at a hearing.

4.5 I also sent a draft to the Ministry of Social Development, the department responsible for disability issues in terms of section 170(b). The Ministry took the view that, contrary to what was said in the draft, the development was “directly covered by paragraph (j) of Schedule 2 . . . [as] ‘a group of pensioner flats’”. I sent the Ministry’s comments to the parties.

4.6 The territorial authority accepted the draft. The owner accepted the draft subject to certain non-contentious amendments.

4.7 I amended the draft along the lines requested by the owner, and also in the light of the comments by the Ministry of Social Development, to arrive at this determination.

5 Discussion

5.1 This determination is essentially a matter of law. I take the view that it turns on the interpretation of section 118 and schedule 2. I also take the view that section 118 and schedule 2 are effectively identical to section 47A of the Building Act 1991 (“the former Act”).

5.2 Determination 98/002, made by the then Building Industry Authority under the former Act was about whether section 47A of the former Act applied to community housing. I consider that the following passages from that determination apply also to this determination:

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.

5.3 On that basis I conclude that, in terms of section 118, the project does not comprise buildings to which the public are to be admitted. I emphasise that in my view, whether section 118 applies depends on the use to which the building is put, not on the legal arrangement under which the building is occupied.

5.4 As to schedule 2, only paragraphs (j) and (k) appear to be relevant, but:

- (a) As to paragraph (j), the term “pensioner flats” was used in bylaws based on NZS 1900: 1964 *Model building bylaw* but it appears that the term no longer has a generally accepted meaning. In this case, there is no provision to the effect that only pensioners may purchase a residential building in the development, nor that at least one occupant of such a building must be a pensioner. I therefore consider that such buildings cannot properly be described as “pensioner flats”. I also consider that the term “providing accommodation for the public” implies short-term occupation rather than permanent residence and is therefore not applicable to such buildings.
- (b) As for paragraph (k), the project is on the same site and under the same ownership as a hospital and a rest home. However, I consider that the project cannot properly be called a nursing home because the residents will not enter into a license to occupy in order to be given nursing care but in order to live in a private home.

5.5 That disposes of the matter, but I also wish to record that I consider that the owner has taken a commendable approach to good design by facilitating future alterations to make the dwellings fully accessible as outlined in 2.3 above.

6 Decision

6.1 In accordance with section 188(1) of the Act, I hereby determine that section 118 does not apply to St Andrew’s Village.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 30 May 2006.

John Gardiner
Determinations Manager