



Determination 2008/122

The provision of access and facilities for persons with disabilities in an alteration to a building containing a café at 49 Pretoria Street, Lower Hutt



1 The matters 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, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of the Department.
- 1.2 The applicant is one owner of the building, Mr N Check (“the applicant”). The other party is the Hutt City Council carrying out its duties and functions as a territorial authority or a building consent authority (“the authority”).
- 1.3 The Office for Disability Issues (“the ODI”) at the Ministry of Social Development has been included as being a department with which the Chief Executive must consult under section 170 of the Act.
- 1.4 I take the view that the matter for determination in terms of sections 177(b) and 188² is whether the authority is correct in refusing to issue a code compliance certificate.

¹ The Building Act 2004 is available from the Department’s website at www.dbh.govt.nz.

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

- 1.5 In making my decision, I have considered the submissions of the parties and the other evidence in this matter. In particular, my decision cannot be considered in terms of a waiver as set out in section 69.

2 The building work

- 2.1 The proposed building work consists of an alteration to an existing single storey solid brick building, which has been classified "D" under section 35 of the Historic Places Act 1980. Part of the building contains a café that is situated in three separate rooms, together with a separate food preparation area. The remainder of the building contains living accommodation.
- 2.2 The sanitary facilities for the café consist of a toilet containing a single WC pan and a single wash hand basin. The toilet, which has a 600mm wide entry door, is accessed from the café through a small annexe. The main entry to the café from the street pavement is via a set of two steps, which have handrails installed at each side. The floors of the various rooms making up the café are also set at varying levels. The floor plan after the alterations have been carried out is shown in Figure 1.

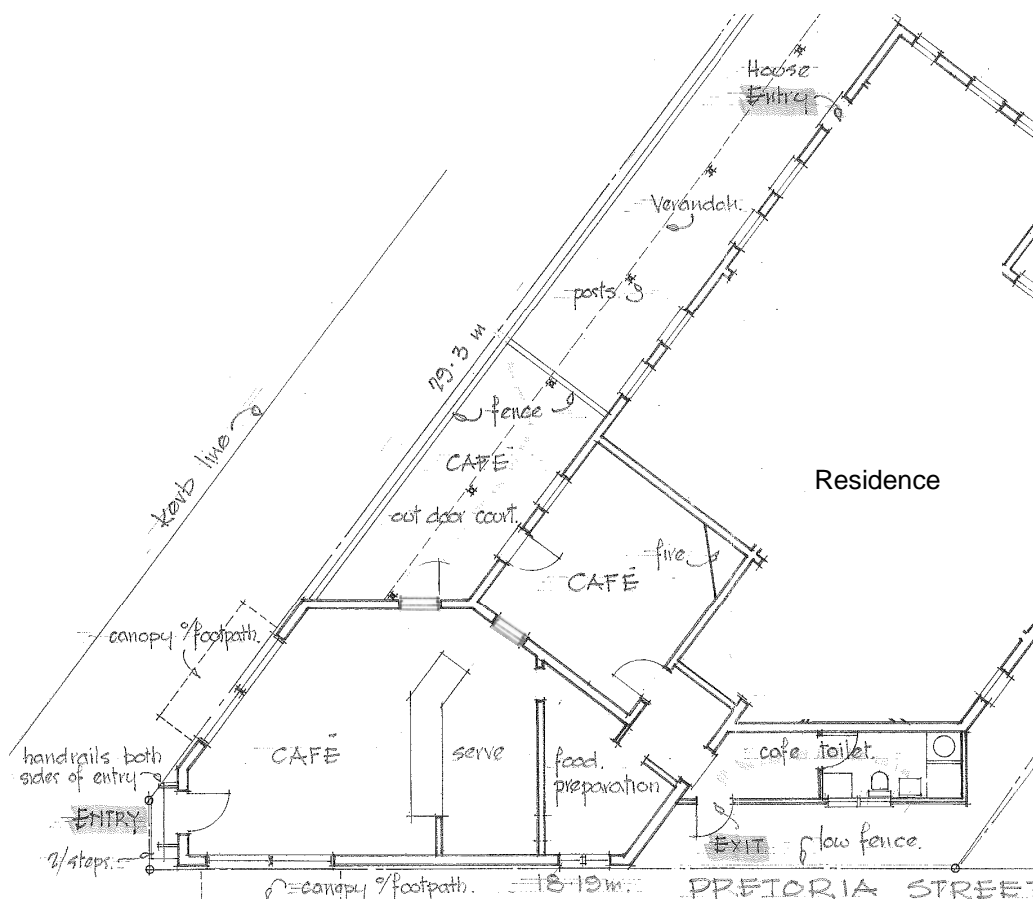


Figure 1: Ground floor plan

3. Background

- 3.1 In a letter addressed to the applicant dated 28 June 1994, the New Zealand Historic Places Trust noted that the building in question was to be classified “D” under section 35(1)(d) of the Historic Places Act 1980.
- 3.2 The applicant’s intention was to upgrade the building only to the extent that it would be removed from the authority’s Earthquake Prone Buildings Register. A building consent (which I have not seen) for the alterations to upgrade the building was issued early in 2008.
- 3.3 The authority inspected the building work during its construction and carried out a final inspection of the property on 21 August 2008. On a “Scope of Inspection Sheet” relating to this inspection, the authority noted certain documentation required and also stated:
- The accessible facilities will also need to be addressed and this has been referred to the Building Inspections Manager.
- 3.4 The applicant has apparently provided the documentation requested by the authority.
- 3.5 The application for a determination was received by the Department on 7 October 2008.

4. The submissions

- 4.1 In a covering letter to the Department, the applicant described the background to the alterations and the building’s construction. The applicant was of the opinion that the question of access for persons with disabilities had been overlooked when the consent was issued.
- 4.2 The applicant forwarded copies of:
- floor plans showing the building layout
 - some construction detail sketches
 - some of the authority’s inspection records
 - a PS4 construction review producer statement
 - certificate of compliance for the fire alarm system
 - the letter from the New Zealand Historic Places trust dated 28 June 1994
 - some photographs showing the exterior of the building and aspects of the construction processes.
- 4.3 The authority did not make a submission in response to the application for a determination nor did they file the standard document acknowledging that the determination had been applied for. This failure to respond or submit does not help the efficient conduct of a determination.

5. The legislation

5.1 Relevant provisions of the Act include:

Section 4 Principles to be applied in performing functions or duties, or exercising powers, under this Act

- (2) In achieving the purposes of this Act, a person to whom this section applies must take into account the following principles that are relevant to the performance of functions or duties imposed, or the exercise of powers conferred, on that person by this Act:
- (l) the need to facilitate the preservation of buildings of significant cultural, historical, or heritage value:

Section 112 Alterations to existing buildings

- (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)

Section 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

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:

- (r) restaurants, bars, cafeterias, and catering facilities:

5.2 Relevant provisions of the Building Code include:

D1.3.2 At least one *access route* 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...

G1.3.1 Sanitary fixtures shall be provided in sufficient number and be appropriate for the people who are intending to use them.

G1.3.2 Sanitary fixtures shall be located, constructed and installed to:

- (b) Avoid risk of food contamination
- (d) Provide appropriate privacy,
- (e) Avoid affecting occupants of adjacent spaces from presence of unpleasant odours, accumulation of offensive matter, or other sources of annoyance.

G1.3.3 Facilities for personal hygiene shall be provided in convenient locations.

G1.3.4 Personal hygiene facilities provided for people with disabilities shall be accessible.

6. The draft determination

- 6.1 I prepared a draft determination, which I sent to the ODI on 1 December 2008 by way of consultation under section 170.
- 6.2 I received a response from ODI in a letter dated 12 December 2008. The ODI accepted that the owners should not be required to provide access and facilities for disabled persons at this stage. However, the ODI did not consider it appropriate to apply section 112 to this particular determination. The ODI was of the opinion that, as the authority did not require such access and facilities at the consent stage, it was prevented from requiring them at this stage.
- 6.3 I have carefully considered the comments made by the ODI, and have amended the draft determination in accordance with those considerations.

7. Discussion

- 7.1 I note that the authority issued a building consent for the alterations that did not require any improvement of the provisions for access and facilities for persons with disabilities. Section 94(1) requires a building consent authority to issue a code compliance certificate if it is satisfied on reasonable grounds that “the building work complies with the building consent”. In addition, section 112(1)(a) states that a building consent authority must not grant a building consent for an alteration unless it is satisfied that after such an alteration, the building will comply a nearly as is reasonably practicable with provisions of the Building Code relating to access and facilities for persons with disabilities.
- 7.2 In view of the provisions described in paragraph 7.1, and in the absence of any other evidence, it could be argued that the authority in issuing the consent decided that it met the requirements of section 112 (1)(a) and therefore that reviewing access and facilities for persons with disabilities was not required.
- 7.3 In my opinion, as the authority did not require any upgrading of disabled access and facilities at the consent stage, it is prevented from requiring these facilities at this later

stage. In addition, the code compliance certificate is required by the Act to be issued in accordance with the original building consent.

- 7.4 If I had not reached this conclusion, I would have to consider the question of whether a building complies as nearly as is “reasonably practicable” with particular provisions of the Building Code. This approach would involve the balancing of the sacrifices and difficulties of upgrading against the advantages of upgrading.
- 7.5 The difficulties in this case would include the requirement to accommodate the 425mm high rise between the pavement and the floor of the building by means of a ramp approximately 4800mm long. As there is only a 5 metre length from the entrance to the counter the ramp would occupy the whole width of the main café room. This would have a major effect on the useable space within the main café area. The varying floor levels within the building would also require the provision of suitable ramps.
- 7.6 However, as noted in paragraph 7.4, any analysis taking into account these difficulties is not required in this instance. There is no question that, if the building were a new construction, section 118 would require that appropriate access for persons with disabilities plus an accessible toilet be installed in the building.

8 The decision

- 8.1 In accordance with section 188 I hereby determine that the authority should issue a code compliance certificate in accordance with the original building consent.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 22 December 2008.

John Gardiner
Manager Determinations