

Determination 2008/58

Provision of an accessible toilet in a proposed alteration to a building containing a café at 268 Thames Street, Morrinsville

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 RLM Developments Limited (“the applicant”) acting through a firm of architects (“the architects”). The other party is the Matamata-Piako District Council (“the territorial 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 is whether alterations to an existing building (“the alterations”) without an accessible toilet on the ground floor comply as near as is reasonably practicable with Clause G1 of the Building Code² (Schedule 1 of the Building Regulations 1992).
- 1.5 In making my decision, I have considered the submissions of the parties and the other evidence in this matter. While I have not determined any other aspects of the Act or the Building Code, as set out in paragraph 7.8, I have drawn the attention of the parties to an additional matter. In particular, my decision cannot be considered in terms of a waiver as set out in section 69.
- 1.6 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 The Building Act 2004 is available from the Department’s website at www.dbh.govt.nz.

² The Building Code is available from the Department’s website at www.dbh.govt.nz.

2 The building work

- 2.1 The proposed building work consists of an alteration to an existing two-storey concrete framed building with overall plan dimensions of 4.6m (maximum) x 14.3m and with the overall area of each floor of the building being approximately 63m². At the present time, a café with an associated kitchen is situated at the ground level and a staffroom and a meeting room available for public use are situated at the upper level. The only sanitary facilities are a single toilet and shower in the upper level staff room, which are used by both the staff and the café customers. According to the applicant, the upper level is accessed by a very steep stair, which if it were constructed at the present time would not comply with the Building Code. The existing and proposed floor plans are shown in Figures 1 and 2.

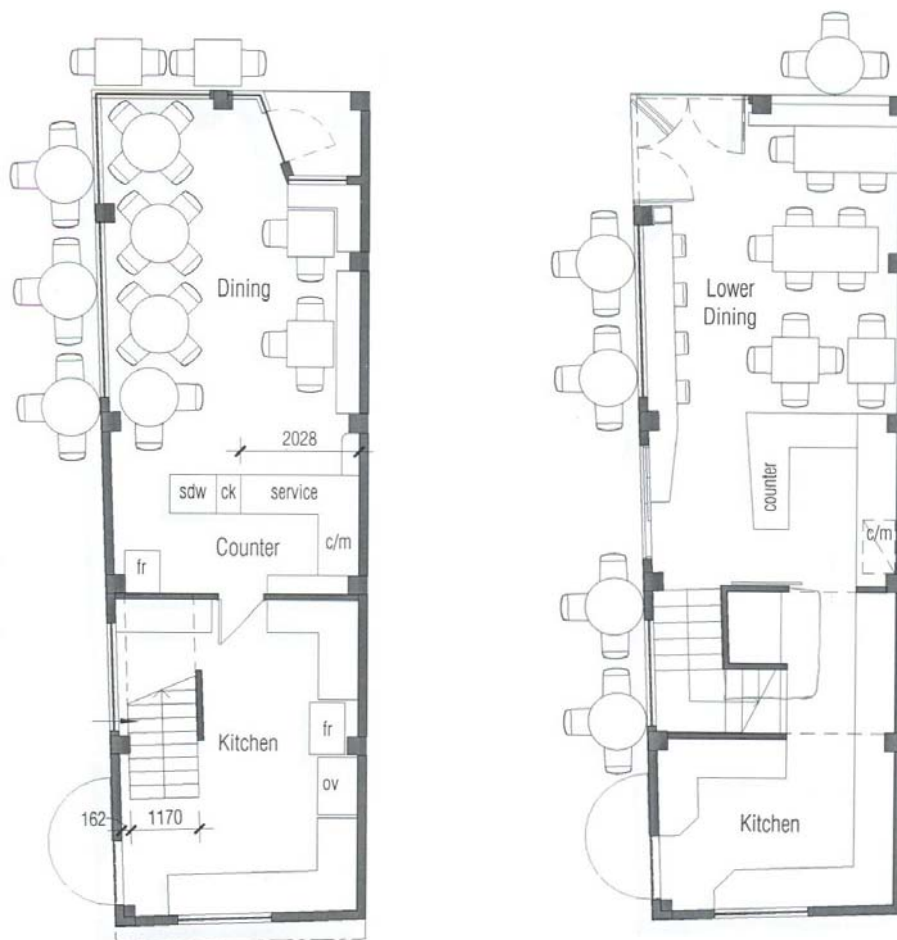


Figure 1: Ground floor plan as existing (left) and proposed (right)

- 2.2 The proposed alteration to the upper level consists of enlarging the meeting room, which is shown as café seating on the plans, and the installation of a store room and new toilet facilities. The shower is to be removed and two new toilet cubicles and two wash-hand basins are to be installed. The new unisex toilet facilities will be available to both staff and customers. A new accessible stair is to be constructed adjacent to the ground floor kitchen, which will also be re-modelled. Other minor alterations will be carried out to the lower level.



Figure 2: First floor plan as existing (left) and proposed (right)

- 2.3 The entire altered building would have a proposed maximum occupancy of 65 (including 14 footpath seats) compared with the present maximum occupancy of 51 (including 15 footpath seats). Both totals include 5 staff members.

3. Background

- 3.1 An application for a building consent for the alterations will be made in the near future. However, the territorial authority has told the applicant that an accessible toilet would be required at ground level.
- 3.2 The application for a determination was received by the Department on 21 April 2008.

4. The submissions

- 4.1 In a submission, the architects described the building in both its existing and proposed forms, noted that a café had operated in the building for 15 years, and referred to what was considered to be the relevant legislation. The submission noted that the territorial authority had advised that an accessible toilet would be required at ground level in order for a building consent to be issued for the alterations. A determination was sought as to whether accessible toilets were required for the

alteration to comply with the Building Code, and if so, whether a waiver could be granted.

- 4.2 The submission set out the existing and proposed occupancy numbers and noted that the increased use of the upper level would not benefit from the installation of a ground level accessible toilet. The installation of a new accessible stair improved the existing situation but its location was restricted by the structural layout of the building. The architects had investigated two alternative locations for a ground level accessible toilet. However, both options would reduce both the size of the kitchen and the amount of seating available for the café customers and this seriously affects the viability of the business. In addition, the requirements of Clause G1.3.2(b), and (e) would not be met due to the close proximity of a toilet to the kitchen. In addition, the architects had been advised that the project would be unfeasible if the accessible toilet had to be installed. The architects concluded that the requirement to install an accessible ground level toilet would not be “reasonably practicable”. It was also noted that a number of publicly accessible sanitary facilities were located within a 200 metre radius of the building.
- 4.3 The applicant forwarded copies of:
- floor plans showing the existing and proposed the certificate of title
 - endorsements from various organisations as to the value of the café and meeting room.
- 4.4 The territorial authority did not make an initial submission. However in a letter to the Department dated 10 June 2008, the territorial authority noted that it would forward a submission once it had received the draft determination. The territorial authority’s post-draft submission is set out in paragraph 6.4

5. The legislation

- 5.1 Relevant provisions of the Act include:

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

5.2 Relevant provisions of the Building Code include:

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 13 May 2008 by way of consultation under section 170.

6.2 The ODI commented on the draft in a letter to the Department dated 21 May 2008. The ODI held the view that, in order for the alteration to comply with the requirements of Clause G1, an accessible ground-floor toilet was required. The ODI noted that the amended upstairs facilities had increased the ability of the café to cater for an additional number of patrons, which improved the viability of the café. The ODI considered that a ground floor accessible toilet would add to, rather than diminish, that viability, as all patrons would benefit from its installation.

6.3 The draft determination was sent to the parties for comment on 13 June 2008, together with the ODI's comments. The applicant accepted the draft apart from a clarification which I have taken account of.

6.4 The territorial authority did not accept the draft, and commented in a letter to the Department dated 23 June 2008. The territorial authority stated that it supported the comments made by the ODI regarding the benefits that would accrue if a lower level disability toilet was installed and the upstairs seating was increased. The territorial authority was of the opinion that these benefits had not been given an appropriate weighting when I considered the benefit/sacrifice analysis. The territorial authority supported the views made in the draft regarding the proximity of adjoining toilet facilities, the configuration of the upstairs toilets, and the approach that would be taken if the building were a new construction.

7. Discussion

- 7.1 In summary, the applicant has submitted that it would not be reasonably practicable to install an accessible toilet on the ground level of the building, mainly because of the lack of space and the construction of the building. Both the kitchen and the main café area would be reduced in area and this would, in all probability, seriously affect the viability of the business. Reference was also made to the improved access that would be provided by the new fully accessible stair, which is replacing the current non-compliant and non-accessible one.
- 7.2 There is no question that if the building were a new construction section 118 would require that an accessible toilet be installed at the ground level. A similar approach might be taken by a territorial authority if this were a new café located in an existing building. In the current case, I have been asked by the applicant to consider whether it is reasonably practicable not to install the accessible toilet.
- 7.3 In previous determinations issued by the Building Industry Authority (the antecedent of the Department), an approach was established and discussed regarding the question of whether a building complies as nearly as is “reasonably practicable” with particular provisions of the Building Code. This approach involved the balancing of the sacrifices and difficulties of upgrading against the advantages of upgrading and follows the approach of the High Court³.
- 7.4 I continue to hold the views expressed in the previous relevant determinations, and therefore conclude that:
- (a) The benefits would be accessibility for people with disabilities and I consider that people with disabilities will be disadvantaged by the lack of an accessible toilet at the ground level.
 - (b) The sacrifices would be the loss of useable space in both the café and the kitchen and the cost of installing such a facility within the confines of a relatively small building.
- 7.5 I note the narrow width of the building and that the reduced space brought about by the installation of ground level facilities also threatens the viability of the café business as a whole. A new accessible toilet would be 2020mm x 1720mm outside framing on plan, which would prove difficult to fit into what is a relatively small building. The architects have considered this issue and were unable to arrive at a solution. The Department has also investigated whether an accessible toilet could be installed in the recessed area adjacent to the accessible stairway, which seems to be the only area that could be used. However, the problems relating to hygiene, the functioning of the kitchen, and wheelchair access make this particular approach untenable.
- 7.6 In addition, I note that the re-designed front entrance has greatly improved the access for people in wheelchairs and the proposed accessible stair also improves the access to the upper level for able-bodied and people with ambulant disabilities. This stair also provides an enhanced means of escape in the case of a fire breaking out in the building.

³ *Auckland City Council v New Zealand Fire Service*, 19/10/95, Gallen J, HC Wellington AP 336/93.

I am also of the opinion that the architects have fully examined the options regarding the installation of a ground floor accessible toilet.

- 7.7 I have noted the concerns of the ODI, who believe that a ground floor toilet should be installed and that these concerns are supported by the territorial authority. However, taking all of the above considerations into account, I am of the opinion that the benefits of installing an accessible toilet are outweighed by the adverse effects the installation would have on the operation of the café. My decision could well be different if this were a proposal to install a new café in this particular building, rather to alter an existing café.
- 7.8 While it is outside the matter to be determined, I also note for the benefit of the parties that the layout of the upper floor toilet, which is the only such facility in the building, may require a revision. The plans that I have been given shows the basins positioned outside the individual compartments. However, Paragraph 1.1.5 of Approved Document G1/AS1 requires that each self-contained compartment must contain a basin where unisex toilets are provided. I accept that G1/AS1 is only one way that Building Code compliance can be achieved and that a territorial authority can consider an alternative solution. In this case, I believe that the territorial authority should carefully consider the upper-floor toilets layout as submitted as the layout is a major departure from the requirements of G1/AS1.
- 7.9 The applicant has referred to the close proximity of public toilets to the building in question. However, I consider that the proximity of public toilets is not relevant to this type of building and the use to which it is put.

8 The decision

- 8.1 In accordance with section 188 I hereby determine that the alteration of the café does not require an accessible toilet in order for it to comply as near as is reasonably practicable with the requirements of Clause G1 of the Building Code after the alteration.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 8 July 2008.

John Gardiner
Manager Determinations