

Determination 2009/70

The provision of accessible toilet facilities in an altered office building in an industrial complex at Pattie Street, Port Motueka, Motueka

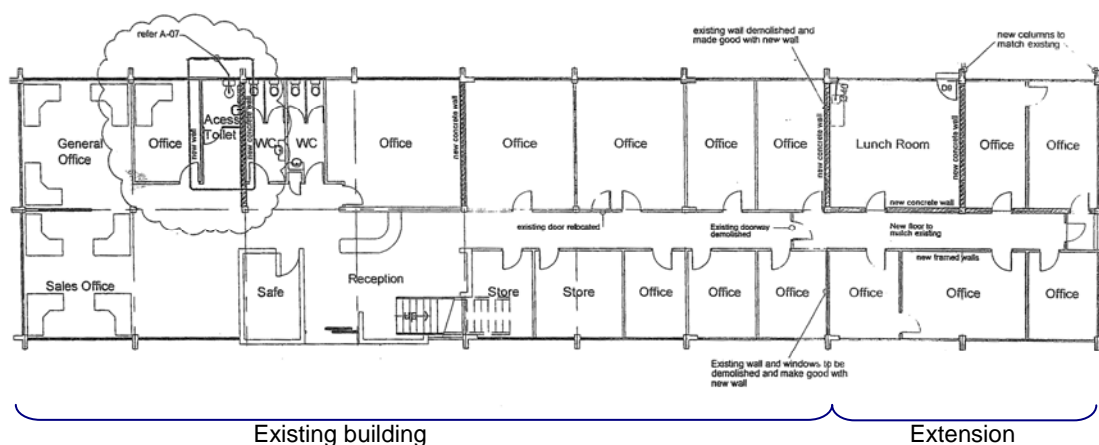


Figure 1: Ground floor plan

1. The matter 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. The applicant is the owner of the building, Talley’s Group Ltd, (“the applicant”). The other party is the Tasman District Council carrying out its duties and functions as a territorial authority and a building consent authority (“the authority”).
- 1.2 The determination arises from the decision of the authority to refuse to issue an amendment to the building consent for an extension to an office building.
- 1.3 I take the view that the matters for determination, in terms of sections 177(a), 177(b)(vi), and 188², are whether:

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.

- the extended office building complies with Clause G1 of the Building Code³ (Schedule 1, Building Regulations 1992)
- the decision of the authority to refuse to issue an amendment to the building consent was correct.

1.4 In making my decision, I have considered the submissions of the parties and the other evidence in this matter. In making my decision, I have not considered any other aspects of the Act or the Building Code.

1.5 I have also consulted with the Office for Disability Issues ("the ODI"), at the Ministry of Social Development, as I am required to do under section 170 of the Act.

2. The building work

2.1 Prior to the extension, the building was a two-storey office building containing 18 offices (of varying sizes), other related office spaces, and standard toilets on both floors. The office building is part of a fish processing facility ("the complex") that includes a number of industrial buildings such as coolstores, workshop and factory buildings.

2.2 Within the complex there are accessible toilet facilities on the ground floor of an adjoining amenities building. These facilities are approximately 55 metres away from the ramped entrance access of the office building. The route to the existing accessible toilet facilities would be through the double entrance doors of the office building, across a driveway/road, through the double doors of the amenities building, and along a corridor.

2.3 The building work in question relates to an extension of the office building at both levels ("the extension"), providing for a lunch room and additional nine office spaces. The consented plans for the extension show a ground floor accessible toilet next to the existing toilet facilities.

3. Background

3.1 The authority issued a building consent (which I have not seen) for the extension in August 2008. The plans that formed part of the consent documentation showed that accessible toilet facilities were to be installed on the ground floor of the office building.

3.2 The extension was constructed, but without the addition of the accessible toilet.

3.3 On 5 March 2009, the applicant applied to the authority for an amendment to the building consent and attached an amended layout plan. The requested amendment was to:

Delete access toilet planned for office extn. Reason being we have one on site and have less than 300 people on site at any one time. Noting this is the busiest time of the year and currently have 282 staff onsite.

³ The Building Code is available from the Department's website at www.dbh.govt.nz.

- 3.4 In an email to the applicant dated 4 May 2009, the authority described the route that a person with a disability would have to travel to reach the existing accessible toilet, noting that there was a travel distance of approximately 55 metres. The authority stated that the accessible toilets were indicated on the consented documents, section 118 applied, and Clause G1 required convenient access to toilet facilities. Based on its findings, the authority declined the request for an amendment to the building consent.
- 3.5 The application for a determination was received by the Department on 4 July 2008.

4. The submissions

- 4.1 In a submission dated 15 June 2008, the applicant described the background to the disputed matter. In reference to the accessible toilet facilities shown in the consented plans the applicant stated that they ‘were unaware of the inclusion of such facilities at the time the plans were filed and did not have them constructed as disabled toilet facilities are provided in our main Amenities Building’. The applicant also referred to sections 118 and 8(1)(c) and was of the opinion that within the meaning of the Act, the whole factory complex can be seen as a single building. Accordingly, as disabled toilets were reasonably available within the complex, then the Act and the Building Code would be complied with.
- 4.2 The submission noted that disabled toilets were available and that the 55 metres travelling distance from the extension was not excessive. There were many areas of the complex where persons with disabilities had to travel further than 55 metres to reach accessible facilities. Because of the nature of the operations carried out at the complex, it was unlikely that there would be a significant requirement to use the facilities. Currently, no persons with disabilities were working at the complex and very few persons with disabilities had visited the complex over the past 20 years.
- 4.3 The applicant also referred to Determination 94/004⁴, and was of the opinion that it supported its approach to the matters at issue.
- 4.4 The applicant forwarded copies of:
- the original consented plan and site layout
 - the amended layout plan
 - the building consent application
 - the relevant correspondence.
- 4.5 The authority did not make a submission.

⁴ Determination 94/004: Access for people with disabilities by way of a lift in an adjacent building

5. The legislation and the compliance documents

5.1 Relevant provisions of the Act are:

17 All building work must comply with building code

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.

67 Territorial authority may grant building consent subject to waivers or modifications of building code

- (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.

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—
 - (i) means of escape from fire; and
 - (ii) access and facilities for persons with disabilities (if this is a requirement in terms of section 118); and
 - (b) continue to comply with the other provisions of the building code to at least the same extent as before the alteration.

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:

- (f) commercial buildings and premises for business and professional purposes, including computer centres:

5.2 Relevant provisions of the Building Code include:

CLAUSE A2—INTERPRETATION

In this building code unless the context otherwise requires, words shall have the meanings given under this Clause. Meanings given in the Building Act 1991 apply equally to the building code.

Accessible Having features to permit use by people with disabilities.

G1.1(c) The objective of this provision is to ensure *people with disabilities* are able to carry out normal activities an process within *buildings*.

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

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

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

Limits on application Performance G1.3.4 shall not apply to *housing, outbuildings, backcountry huts, ancillary buildings*, and to *industrial buildings* where no more than 10 people are employed

5.3 The relevant provisions of NZS 4121⁵ include:

10 Toilet and shower facilities

All accessible toilets shall be provided on an accessible route.

10.2 Location

Accessible toilet facilities shall be provided on the main entry level to all buildings...

6. The draft determination

6.1 Copies of a draft determination were forwarded to the parties on 24 July 2009 and the authority accepted the draft without further comment.

6.2 The applicant did not accept the draft determination and in a letter to the Department dated 3 August 2009, the applicant's legal advisors commented as summarised below:

- The altered building does comply because reasonable provision by way of sanitary provision is provided.
- Sections 8(1)(c) and 117, together with Determination 94/004, “make it clear that where such facilities are provided in a complex then compliance exists even though the actual facilities may be in a separate building.
- The “reasonable and adequate” provisions must be considered in light of the existing factual circumstances
- The low numbers of persons requiring disabled facilities that have visited the plant in the past 20 years
- All persons, including visitors, must pass the amenities building where disabled facilities are located
- The 55 metre travel distance from the office complex to the disabled facilities is significantly less than the 100 metres referred to in Determination 94/004.

⁵ New Zealand Standard NZS 4121: 2001 Design for access and mobility – Buildings and associated facilities

- The travel distance is less than persons working in many areas would need to travel.
- The cost of installing the disabled facilities in the office building initially would have been in the order of \$30,000.
- Given the facts set out above, the construction and holding costs of making disabled facilities available for the life of the building is unreasonable.

6.3 In an email to the Department dated 14 August 2009, the ODI also commented on the draft decision. The ODI agreed with the conclusion reached in the draft and noted that, in its opinion, when new building work involves an extension and includes personal hygiene facilities for use by persons, they should always be accessible and that this recognises that accessible facilities are useable by all persons.

7. Discussion

7.1 The extended office building is defined under paragraph (f) of Schedule 2 as being a premise for business. For a building of this type section 118 requires that if provision is being made for the construction or alteration of the building, reasonable and adequate provision by way of sanitary facilities must be made for persons with disabilities who may be expected to visit or work in that building.

7.2 As such, the building comes within the ambit of Clauses G1.1(c), which requires that people with disabilities are able to carry out normal activities and processes within the building. The performance requirements for Clause G1 are such that the sanitary facilities must:

- be in sufficient number and appropriate for the people who are intended to use them
- be provided in convenient locations
- be accessible for people with disabilities.

7.3 As I consider that the extension is an alteration, it is subject to section 112, and that the authority may issue a building consent for work that does not comply completely with the accessibility requirements of the Building Code, provided that it is satisfied that after the alteration the building will comply with those requirements “as nearly as is reasonably practicable”.

7.4 In respect of providing accessible facilities within a complex of buildings, I refer to Determination 96/003 that was issued by the antecedent of the Department, the Building Industry Authority (“the Authority”), which stated:

6.3.7 The Authority agrees that the other buildings in the complex may be taken into account for some purposes. The Authority has previously taken the view that the facilities available in the other buildings in the complex may be taken into account when deciding whether the building concerned complies with particular provisions of the building code: see Determination 94/004 in relation to providing access by way of a lift in an adjacent connected building, and Determination 95/003 in relation to providing accessible sanitary facilities in another building. The Authority therefore considers that the other buildings in the complex may be taken into account when considering whether the building concerned complies with Schedule D of NZS 4121.

- 6.4.2(d) If the building is part of a complex of buildings then the other buildings may be taken into account when one contains facilities not present in another.
- 7.5 While it was decided in relation to lift access, I accept that I can take into consideration the approach taken by the Authority in Determination 96/003 and its application to clauses G1.3.1. However, in this instance, and in the context of Determination 96/003, I note that there are toilet facilities present in the building to which the extension has been added. I also note that the decision in Determination 95/003 turned on the fact that persons with disabilities would, because of their disabilities, not be visiting or using the building as it was solely dedicated for the use of defence force personnel, which is not the case for this building.
- 7.6 In previous determinations 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 Court⁶.
- 7.7 I continue to hold the views expressed in the previous relevant determinations, and therefore conclude that:
- (a) The benefits would be the provision of accessible facilities for people with disabilities within this particular building.
 - (b) The sacrifices would be the cost of providing accessible facilities in a building that has been constructed and the loss of an office space.
- 7.8 Accordingly, I must weigh any cost, which is the main sacrifice, against the benefits of providing disabled toilet facilities within the extension.
- 7.9 I note that the consented drawings clearly show that an accessible toilet was to be installed within the new work. In this respect I am surprised that the applicant in its submission state that it was ‘unaware of the inclusion of such facilities at the time the plans were filed’.
- 7.10 Regarding the cost of installing accessible toilets to the extended office building, in Determination 2008/60 relating to the installation of a lift, I stated:
- 7.13 However, I note that the lift in question was part of the original consent and the cost of its installation would have been part of the original cost to alter the building. If that is the case, then the financial burden is only increased by having to install the lift after the other building work has been completed and having to perhaps close the accommodation on a temporary basis. These are factors that would not have occurred had the lift been installed in the first place.
- I am of the opinion that this is a similar situation as regards the matter in question.
- 7.11 The applicant has noted that a relatively small number of persons with disabilities have visited the complex over a reasonably long period of time. However, the fact that there are occasions that disabled persons will visit or work at the complex requires the provisions of the Act for disabled persons to be implemented. I also

⁶ *Auckland City Council v New Zealand Fire Service*, 19/10/95, Gallen J, HC Wellington AP 336/93.

note that the extension involves an office building that is more likely to have persons with disabilities in attendance than would most of the other buildings that make up the complex. I note here that the Act would not require accessible toilet facilities for the industrial buildings of the complex where less than 10 persons are employed.

- 7.12 Taking into account all of the above factors; I believe that the benefits obtained from providing accessible toilets within the building would not be outweighed by the sacrifices of providing such facilities. The benefits include the provision of accessible toilets in a relatively large office building containing 27 offices and other rooms that at present lacks such facilities.
- 7.13 I therefore find that the extended building as a whole without the addition of an accessible toilet does not comply as nearly as is reasonably practicable with Clause G1 of the Building Code.
- 7.14 I have reached this decision after careful consideration of the submission made on behalf of the applicant with regard to the draft determination (See paragraph 6.2). The arguments presented mirror most of the points raised in the applicant's earlier submissions, with an emphasis on the infrequent visits to the plant by persons with disabilities and the existence of adjoining facilities. In addition, and with consideration to Clause G1.3.3, I do not consider it to be "reasonable and adequate" to expect persons with disabilities to use toilet facilities in adjacent buildings when able bodied persons have such facilities available within the office building itself. Accordingly, I am not persuaded by this latter submission to amend my original decision as set out in the draft determination.
- 7.15 I note that the extension will increase the occupancy of the existing building and will give an overall upper floor area of some 515m². This brings into question whether a lift should be installed. In this determination I have not considered the capacity of the existing toilet areas to cope with the additional persons using the building nor whether a lift should have been installed in the building.

8. The decision

- 8.1 In accordance with section 188 I hereby determine that
- the extended office building does not comply with Clause G1 of the Building Code
 - the decision of the authority to refuse to issue an amendment to the original building consent is confirmed.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 16 September 2009.

John Gardiner
Manager Determinations