IN THE DISTRICT COURT
AT WELLINGTON

CIV-2009-085-1156

IN THE MATTER OF	the Building Act 2004
AND	
IN THE MATTER OF	an Appeal pursuant to s 208 of the Building Act 2004 against a determination under s 188 of the Act
BETWEEN	TALLEY'S GROUP LIMITED Appellant
AND	TASMAN DISTRICT COUNCIL Respondent

Submissions: 9 February and 11 March 2010

Judgment: 19 August 2010

RESERVED JUDGMENT OF JUDGE S M HARROP

Introduction

[1] In November 2007 Talley's applied to the Tasman District Council ("TDC") for a building consent to an extension to the two-storey office building which forms part of its industrial complex at Port Motueka. The application did not include provision for an "accessible toilet" (one permitting use by disabled people). TDC insisted that it do so in order to comply with the Building Act 2004 and the building code. Talley's agreed to install such a toilet and through its engineers submitted amended plans which included one. A building consent was duly issued by TDC in August 2008.

[2] The extension was constructed without the inclusion of the accessible toilet. An office was put in its place. On 5 March 2009, Talley's applied for an amendment to the building consent deleting the requirement for one. TDC declined that application. Talley's appealed to the Chief Executive of the Department of Building and Housing. On 16 September 2009, on behalf of the Chief Executive, Mr John Gardiner determined that the extended office building did not comply *"as nearly as is reasonably practicable"* with Clause G1of the code relating to the provision of facilities for disabled persons ; therefore the stipulation in s112 of the Act did not apply. He confirmed the TDC decision to refuse to issue the amendment to the building consent.

[3] Talley's has appealed to this Court under s 208 of the Act. TDC opposes the appeal. The parties have agreed that this Court may issue a decision *"on the papers"* i.e. by considering the respective submissions of counsel and the other relevant documents including the provisions of the Act and the building code. The Chief Executive abides the decision of the Court but through Crown counsel has filed a helpful report dated 11 December 2009 under Rule 557 of the District Courts Rules 1992.

Issues

[4] Counsel agree that there are two issues to be determined:

1. Does the building in its present state comply with Clause G1 of the building code? If it does, the appeal must be allowed and the Chief Executive's decision reversed.

2. Alternatively, if it does not, should the application for an amended building consent have been granted under s 112(1) of the Act? Put another way, the question is: Does the building comply "as nearly as is reasonably practicable" with the requirements of the building code relating to access and facilities for persons with disabilities?

The approach on this appeal

[5] Although Talley's as appellant carries the burden of persuading the Court that it should come to a different conclusion from that reached by the Chief Executive, I proceed on the basis outlined by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141. This means that I am required to come to my own view on the merits of the case. There is no need for deference to the Chief Executive, especially given that Mr Gardiner also made a decision on the papers. Realistically I am in as good a position as he was to determine the issues.

[6] Section 211 of the Act sets out the powers of the District Court on appeal :

> **211 Powers of District Court on appeal**
>
> (1) On the hearing of an appeal under section 208, a District Court may—
>
> (a) confirm, reverse, or modify the determination[, direction,] or decision of the chief executive; or
>
> (b) refer the matter back to the chief executive in accordance with the rules of Court; or
>
> (c) [make or give any determination, direction, or decision that the chief executive could have made or given] in respect of the matter.
>
> (2) This section does not give the District Court power to review any part of the chief executive's determination [direction,] or decision other than the part against which the appellant has appealed.
>
> (3) Subject to any order of the District Court, every determination [direction,] and decision of the chief executive against which an appeal is made continues in force and has effect according to its tenor pending the determination of the appeal.
>
> (4) The decision of the District Court on an appeal is final.

[7] Given that there is no appeal against my decision, clearly I need to take particular care in reaching it.

[8] In its appeal notice dated 6 October 2009, Talley's seeks an order that I reverse the Chief Executive's determination and determine that the building complies with Clause G1 of the Code and that the amended consent should be

issued. Alternatively it seeks a determination that the building complies as nearly as is reasonably practicable with the code and that the amended consent be issued on that basis. As a further alternative it seeks pursuant to section 69 of the Act a waiver or modification of the code so as to delete the requirement for an accessible toilet within the extension. I note that neither counsel has referred to this further alternative in their submissions but I will consider it nevertheless.

[9] TDC seeks an order that the Chief Executive's determination be confirmed.

The facts in more detail

[10] There is no dispute about the relevant background facts. Before the extension the office building, referred to by Talley's as its head office, was a two-storey building containing 18 offices of varying sizes, other related office facilities and standard toilets on both floors. The application for the building consent involved an extension of the office building at both levels providing for a lunch room and an additional nine office spaces. Mr Malone in his submissions (for Talley's) says that the extension was by approximately 30%.

[11] The original building consent application was prepared by Byrne and Wanty Consultants Limited, consulting engineers acting on behalf of Talley's. That application did not include an accessible toilet and the compliance document stated that *"existing facilities for disabled people are available elsewhere on the site"*.

[12] TDC sought considerable further information which relevantly included that Talley's should address the absence of an accessible toilet facility. Byrne and Wanty replied on 2 May 2008 stating that an accessible toilet was provided elsewhere within the site and that access routes between the office building and that toilet *"are such that we believe that it meets the intent of the NZBC"*.

[13] TDC replied on 14 May 2008 disagreeing with that assertion and setting out the requirements of s118 of the Act and Clause G1 of the building code. TDC added:

> Although the requirement for wheelchair access and facilities dictates the design standard for accessibility, which unwittingly encourages the view that wheelchair bound people are the sole users, the facilities are as much for the benefit of those ambulant people with less visible impairments which are a significant section of society. Conditions such as age-related physical impairment, arthritis sufferers, people with mobility and dexterity difficulties through illness or injury who find the use of ramped access, WC grab rails, lever handles and taps and other aids necessary to normalise daily activity. When accessible facilities are not available or are inconveniently located, such as remote from the building, then affected employees or users in need are disadvantaged compared to able-bodied persons. The Building Act philosophy and direction is aimed at making buildings an inclusive environment, not exclusive.

[14] TDC therefore insisted that the alteration include an accessible toilet on the ground floor level in order to satisfy both the building code and the relevant New Zealand standard, NZS 4121.

[15] On 14 July 2008 Byrne and Wanty replied:

> Our client has agreed to install an additional accessible toilet in the ground floor of the office building. Copies of the plan showing the location, layout and sections are attached. All works will comply with G1/AS1.

[16] A building consent was duly issued in August 2008 approving the extension. The consented plans for the extension show a ground floor accessible toilet next to the existing toilet facilities.

[17] The extension was constructed without the addition of the accessible toilet and an office put in its place. This put Talley's in breach of the Building Act; s 40 provides that (with some limited exceptions) building work must not be carried out except in accordance with a building consent.

[18] On 5 March 2009 Talley's applied to TDC for an amendment to the 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 ...

[19] This meant that TDC was required to consider , pursuant to s 112 of the Act, whether the building with the completed alterations complied "*as nearly as is*

reasonably practicable" with the provisions of the building code relating to access and facilities for people with disabilities.

[20] On 4 May 2009 TDC told Talley's that it was unable to approve the amended plan because:

i. The original building consent had required an accessible toilet be installed on the ground floor of the office block to meet the requirements of s 118 of the Act and Clause G1 of the building code.

ii. Removal of the requirement to install an accessible toilet within the office block would mean that a person needing to use an accessible toilet would have to leave the reception area through the double doors, traverse the driveway/car parking area and enter a second building through double doors in order to be able to use the accessible toilet located in that building, involving a journey of approximately 55 metres.

[21] On appeal, Mr Gardiner considered a submission dated 15 June 2008 from Talley's; TDC did not make a submission. He summarised Talley's submissions at paragraph 4 of his determination (2009/70, dated 16 September 2009). He recorded that Talley's 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"*. Talley's also referred Mr Gardiner to ss 118 and 8(1)(c) of the Act in support of its submission that the whole factory complex could and should be seen as a single building. Because disabled toilets were reasonably available within the complex, then the statutory and code requirements should be seen as having been complied with. Talley's pointed out that those toilets were available and that a 55-metre travelling distance from the extension was not excessive. There were many areas of the complex where persons with disabilities had to travel further than that to reach such facilities. Because of the nature of the operations carried out at the complex, it was unlikely that there would be a significant requirement for the use of such facilities; no people with disabilities

were working at the complex and very few such people had visited the complex over the last 20 years. Talley's also referred Mr Gardiner to Determination 94/004 in support of its approach.

[22] Mr Gardiner prepared a draft determination and forwarded this to the parties on 24 July 2009. TDC accepted it without further comment but Talley's did not. Its legal advisors commented to the effect that:

- The altered building did comply because reasonable provision by way of sanitary provision had been provided.

- Sections 8(1)(c) and 117 (relating to the definition of *"building"*), together with Determination 94/004 made 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 last 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.

- 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 was unreasonable.

[23] The draft determination was also referred to the Office for Disability Issues at the Ministry of Social Development as required under s 170 of the Act. It 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 usable by all persons.

The Chief Executive's Determination

[24] I now set out the Discussion and Decision portions of Mr Gardiner's determination in full:

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 Court[6].

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 515m^2. 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

Discussion of the issues

[25] Before turning to consider the two issues to be decided, I observe that it is, at the very least, difficult to accept that Talley's was unaware of or overlooked the need to include accessible toilet facilities in the new development . This was a matter which was expressly raised by TDC prior to the grant of the building consent and Talley's' engineers expressly agreed to include provision for this both in its plans and in constructing the extension.

[26] There is, at the very least, a basis for strong suspicion that Talley's has deliberately attempted to circumvent the TDC requirements in the hope that it may get away without installing such a toilet on the application of the appropriate test for reasonable compliance under s 112 of the Act. This is particularly the case when, as it is deemed to know, s 177 of the Act allows an application for a determination of an issue like this prior to the commencement of the building work. A reasonable applicant in the position of Talley's , which contended that a condition of a building consent was unreasonable on proper consideration of the statutory regime, would have made such an application rather than gone ahead and built it anyway then endeavoured to raise the issue belatedly by way of a retrospective application for amendment to the building consent.

[27] I record however that the issue on this appeal is not whether Talley's has acted honestly, properly or reasonably. If the correct conclusion on my independent analysis of the case is that the building does comply with the building code or alternatively that it complies *"as nearly as is reasonably practicable"* with it, then the appeal must be allowed regardless of whether Talley's has acted reasonably. It is therefore important not to be distracted by any prejudice which might arise from the suspicious background.

Does the building comply with Clause G1 of the Building Code?

[28] Clause G1 of the New Zealand Building Code is as follows:

New Zealand Building Code Clause G1 Personal Hygiene

The mandatory provisions for building work are contained in the New Zealand Building Code (NZBC), which comprises the First Schedule to the Building Regulations 1992. The relevant NZBC Clause for Personal Hygiene is G1. Note that section 25 of the Disabled Persons Community Welfare Act 1975 has been replaced by section 47A of the Building Act 1991.

FIRST SCHEDULE—*continued*

Clause G1—PERSONAL HYGIENE

Provisions	Limits on application
OBJECTIVE	
G1.1 The objective of this provision is to:	
(a) Safeguard people from illness caused by infection or contamination,	
(b) Safeguard people from loss of *amenity* arising from the absence of appropriate personal hygiene facilities, and	
(c) Ensure *people with disabilities* are able to carry out normal activities and processes within *buildings*.	Objective G1.1 (c) shall apply only to those *buildings* to which section 25 of the Disabled Persons Community Welfare Act 1975 applies.
FUNCTIONAL REQUIREMENT	
G1.2 *Buildings* shall be provided with appropriate spaces and facilities for personal hygiene.	
PERFORMANCE	
G1.3.1 *Sanitary fixtures* shall be provided in sufficient number and be appropriate for the people who are intended to use them.	
G1.3.2 *Sanitary fixtures* shall be located, constructed and installed to:	
(a) Facilitate *sanitation*,	
(b) Avoid risk of food contamination,	
(c) Avoid harbouring dirt or germs,	
(d) Provide appropriate privacy,	
(e) Avoid affecting occupants of adjacent spaces from the presence of unpleasant odours, accumulation of offensive matter, or other source of annoyance,	
(f) Allow effective cleaning,	

FIRST SCHEDULE—*continued*

Provisions	Limits on application
(g) Discharge to a plumbing and drainage system as required by Clause G13 "Foul Water" when water-borne disposal is used, and	
(h) Provide a healthy safe disposal system when non-water-borne disposal is used.	
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*.	Performance G1.3.4 shall not apply to *Housing*, *Outbuildings*, *Ancillary buildings*, and to *Industrial buildings* where no more than 10 people are employed.

[29] The key provisions for present purposes are obviously G1.3.1, G1.3.3 and G.1.3.4, i.e. sanitary fixtures must be provided in sufficient number and be appropriate for the people who are intended to use them, they must be provided in convenient locations and they must be accessible for people with disabilities.

[30] Mr Malone submitted that Mr Gardiner had erred in proceeding on the basis that Clause G1 was not complied with and that he needed to consider s 112 i.e. the *"as near as is reasonably practicable"* level of compliance. This seems a pointless submission since it is inconceivable that Mr Gardiner would have come to a different conclusion had he proceeded as Mr Malone says he should have. He applied a lesser standard of compliance but still found that was not met.

[31] Be that as it may, I will consider the issues in the way that both counsel have isolated them. The first question therefore is whether the building as it currently stands complies with Clause G1.3.1, G1.3.3 and G1.3.4. As I have observed earlier, if it does , there is no need to go on and consider whether s 112 applies. Before addressing the two key issues, it is necessary to set out in some detail the statutory framework within which they must be considered, because it provides critical flavour and context which consideration of the plain words of Clause G1 in isolation does not.

[32] In this regard I have found particularly helpful the Rule 557 report filed on behalf of the Chief Executive by Ms Chan of Crown Law. The submissions of counsel take no issue with her statements of the statutory position.

The Statutory Framework

[33] The building code comprises the first schedule to the Building Regulations 1992. Those regulations were made pursuant to the Building Act 1991 which was replaced by the Building Act 2004 as a consequence of a review initiated by the *"leaky building crisis"*.

[34] One of the key features of the 1991 Act which was carried through to the 2004 Act is the emphasis placed on the reasonable and adequate provision of access and facilities for people with disabilities in respect of buildings in which people with disabilities could be expected to visit or work and carry out normal activities and processes. Sections 117 to 120 of the Act provide:

> **117 Definition for sections 118 to 120**
>
> In sections 118 to 120, unless the context otherwise requires, building includes—
>
> (a) parts of a building (including driveways, access ways, passages within and between complexes and developments, and associated landscaping (if any)); and
>
> (b) any premises or facilities.
>
> **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
>
> **119 Compliance document for requirements of persons with disabilities**
>
> (1) This section applies to—
>
> (a) the New Zealand Standard Specification No 4121 (the code of practice for design for access and use of buildings by persons with disabilities), together with any modifications to that standard specification in force immediately before the commencement of this section; or
>
> (b) if an Order in Council is made under subsection (3),—

(i) the standard specification referred to in paragraph (a) incorporating an amendment that is adopted by the order; or

(ii) a standard specification that is in substitution for the standard specification referred to in paragraph (a) that is adopted by the order.

(2) A standard specification to which this section applies is to be taken as a compliance document.

(3) The Governor-General may, by Order in Council made on the recommendation of the Minister, adopt—

(a) an amendment to the standard specification referred to in subsection (1)(a); or

(b) a standard specification that is in substitution for the standard specification referred to in that subsection.

(4) The Minister must, no later than 6 months after the date on which an amendment or a standard specification is promulgated by the Standards Council,—

(a) make a recommendation under subsection (3) in relation to the amendment or standard specification; or

(b) decide not to make a recommendation.

(5) In this section, Standards Council means the Standards Council continued in existence under section 3 of the Standards Act 1988

120 [Symbols of access] must be displayed

If any provision required by section 118 is made at a building in compliance with that section, a notice or sign that indicates in accordance with the international [symbols of access] that provision is made for the needs of persons with disabilities must be displayed outside the building or so as to be visible from outside it.

[35] The phrase *"person with a disability"* is defined in s 7 of the Act as meaning:

... A person who has an impairment or a combination of impairments that limits the extent to which the person can engage in the activities, pursuits, and processes of everyday life, including, without limitation, any of the following:

(a) A physical, sensory, neurological or intellectual impairment:

(b) A mental illness

[36] As Ms Chan points out this is a broad definition and is not limited to people in wheelchairs or indeed to people with physical disabilities. It supports the point made by TDC to Talley's in May 2008 : see [13] above.

[37] The Act requires through s 118 that access and facilities for persons with disabilities must be provided in any building to which members of the public are to be admitted, whether for free or on payment of a charge. The relevant category of buildings includes commercial premises such as factories and industrial buildings where more than ten people are employed and offices. There is no question that this requirement applies to the office building with which this appeal is concerned.

[38] When existing buildings such as the office at the Talley's complex are altered the Act effectively provides that the alterations will trigger an upgrade to the building in relation to access and facilities for persons with disabilities. As Ms Chan points out this means that , over time, New Zealand's building stock will eventually be upgraded to comply with the requirements for people with disabilities.

[39] Ms Chan also highlights the wide-ranging emphasis on the requirement to provide such facilities throughout the Act: See ss 3, 4, 67, 69, 112, 115, 170 and 176 (and ss 117 to 120 of course).

[40] Ms Chan points out that , aside from provisions relating to the protection of people and property from the effects and spread of fire, no other building code provisions are emphasised to the same extent.

[41] The purpose of the Act as set out in s 3 and the principles to be applied under the Act as set out in s 4 both give prominence to the requirements of people with disabilities. In particular s 4(k) provides that one such principle is:

> The need to provide, both to and within buildings to which s 118 applies, facilities that ensure that reasonable and adequate provision is made for [persons] with disabilities to enter and carry out normal activities and processes in a building.

[42] Section 67 allows a territorial authority to grant an application for a building consent subject to a waiver or modification of the building code (including the fire

provisions) *except* those provisions relating to access and facilities for people with disabilities. Under s 69 only the Chief Executive may grant a waiver or modification of the building code in that respect, but only if it relates to an existing building. The Chief Executive is prohibited from granting such a waiver or modification if the application for consent relates to a new building.

[43] Under s 112 a building consent authority must not grant a building consent for building work that will alter an existing building or part of an existing building unless it is satisfied that, after the alteration, the building will comply *"as nearly as is reasonably practicable"* with the provisions of the building code in relation to fire and disability issues. By contrast, for all other provisions of the code the Building Consent Authority need only be satisfied that, after the alteration, the building will comply to *"at least the same extent as before the alteration"* – see s 112 (1)(b).

[44] In summary, the need to provide appropriate access and facilities for people with disabilities is clearly given particular emphasis throughout the Building Act and more so than compared with most other matters referred to in the building code.

[45] Section 119 is important for the purposes of this appeal because it deems New Zealand Standard 4121 ("NZS4121") to be a compliance document under the Act. A compliance document is typically an instrument issued by the Chief Executive under s 22(1). Indeed I note that in 2006 the Chief Executive issued a compliance document which includes Clause G1 and goes on to set out details of how this may be complied with. Compliance documents may contain solutions for how a person doing particular building work can establish compliance with the building code, or a verification method to test that proposed building work will comply with the code. If a person chooses to use a compliance document, that person must be treated as having complied with the provisions of the building code to which the compliance document relates (s 22(2)).

[46] NZS4121 as a deemed compliance document sets out standards that, if followed, will ensure that a building has sufficient access and facilities for people with disabilities to meet the building code. It is the only New Zealand Standard that is incorporated by reference into the Act and is the only deemed compliance

document. The key provisions of NZS4121 are Clauses 10 and 10.2 which provide respectively that *"all accessible toilets shall be provided on an accessible route"* and *"accessible toilet facilities shall be provided on the main entry level to all buildings"*. While compliance with NZS4121 is, as both counsel agree, not compulsory, I accept the submission of Mr Ironside for TDC that it is able to be referred to as a guideline or benchmark for the Court in deciding what is required to comply with the code.

[47] A further provision highlighting the prominence given by the Act to disability issues is s 170(b) which provides that in performing his or her functions the Chief Executive must consult with *"in the case of disability issues, the Chief Executive of the Department of State responsible for disability issues"*. In this case Mr Gardiner did consult with the Office of Disability Issues and the response of that office is recorded above in paragraph [23].

Does the extension comply with Clause G1 of the Code?

[48] Against all of that background, the first question is whether in terms of Clause G1.3.1 there is a sufficient number of facilities for disabled persons in the complex. When the complex is considered as a whole, and I accept that is the correct way to look at the matter, the numbers of facilities do seem to be sufficient. TDC did not argue otherwise but submits that there is not compliance with either Clause G1.3.3 or G1.3.4, respectively dealing with the need for a convenient location and accessibility.

[49] As to G1.3.3 , Mr Malone's point is that the location of the disabled toilet in the Amenities Building at the Talley's complex is sufficiently convenient. I accept that the code (and Determination 94/ 004) does not require that toilets be in the same building. Nevertheless I have come to the clear view, as indeed did TDC and the Chief Executive, that a disabled toilet that is 55 metres away from the office and involves a visitor leaving that building through automatic doors is not in a *"convenient location"*. I do accept the submission of Mr Malone that the toilet does not have to be in the *most convenient* location but rather in what is objectively a convenient location, but my finding is on that basis.

[50] Mr Malone submitted that a disabled person might be working anywhere on site and that having the disabled toilet within the Amenities Block where they clock in and out and where the cafeteria is situated was clearly convenient, indeed arguably the most convenient location for it. In my view this is not the correct or at least not the only way to look at the matter. There needs to be adequate provision for visitors as well as workers .Visitors to the main office building are entitled to expect that there is an accessible toilet facility on the ground floor of that building , as indeed NZS4121 expressly contemplates.

[51] Considerable guidance in this regard can and must be taken from NZS4121. As both Mr Ironside and Mr Gardiner have pointed out, able-bodied persons visiting the main block do have toilet facilities on both floors for their use. While obviously there are many more able-bodied than disabled people, a major purpose of the Act is to ensure with new buildings and any extensions to existing buildings that disabled people have equally convenient toilet facilities regardless of how often they may be used.

[52] In short, in relation to Clause G.1.3.3, having independently considered the matter, I uphold Mr Gardiner's conclusion at paragraph 7.14 of his determination:

> 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.

[53] In terms of Clause G.1.3.4, the same considerations effectively apply. Convenience and accessibility are clearly closely-related concepts. The presence of the disabled toilet in the Amenities Block is not in my view "accessible" in the sense that that word has to be read against the statutory background. I reiterate that the obvious purpose of the legislation is to ensure so far as possible that those with disabilities have the same level of access as those who are able-bodied. Given that able-bodied persons are not required to go to another building, why should those who are disabled?

[54] I therefore conclude that the extension does not comply with Clause G1.3.4.

[55] In summary, I conclude that the extension, as built, does comply with Clause G1.3.1 but does not comply with Clauses G1.3.3. and G1.3.4 of the building code.

Does the extension comply "as near as is reasonably practicable" with Clause G1 of the Building Code?

[56] Counsel agree , as do I, that the correct approach to this issue was that taken by Mr Gardiner and recorded at paragraph 7.6 of his determination:

> 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 Court.

[57] The High Court judgment to which Mr Gardiner was referring is *Auckland City Council v New Zealand Fire Service* (High Court Wellington, AP 336/93, 19 October 1995, Gallen J).

[58] To this I would add that the balancing exercise, occurring as it does in the context of interpreting a statutory provision, must be undertaken with a clear focus on the purpose of that statute. That is why I have gone into some detail in setting out the relevant provisions.

[59] In her Rule 557 report Ms Chan put it this way:

> [It] requires the decision-maker to undertake a benefit/burden analysis, assessing the burden of compliance against the benefit of achieving that compliance.

[60] Mr Malone submits that the estimated cost of now constructing the accessible toilet, which is apparently in the order of $30,000, coupled with the loss of an office space, is a disproportionate burden in relation to the benefit that would be obtained. He points out that the disabled toilet in the Amenities Block reasonably nearby means that the benefit to disabled persons in having a further toilet in the main office is not much greater than that already provided by the existing disabled toilet. He adds that there has never been a disabled person either working or applying to work at the Talley's complex in the last 20 years and only a handful of disabled visitors

within that period so that any future demand is likely to be modest and adequately met by the existing toilet. Mr Malone highlights that the cost of the permanent loss of the office, if now replaced by the disabled toilet, would be substantial over the 50-year life of the building which the building code contemplates.

[61] Mr Gardiner proceeded on the basis, relying on Determination 2008/60 relating to the installation of a lift (see paragraph 7.10 of his Determination) that because ordinarily a determination would have been sought before construction of the office was commenced, the cost of installation should be assessed on the basis of what it would have been prior to construction rather than what it is now.

[62] Mr Ironside submitted that this was the correct approach:

> The Chief Executive correctly approached the assessment of the burden that would fall on the appellant by considering what the burden would have been if the appellant had complied with the building consent from the start. It was not appropriate to consider the extra burden incurred by constructing the alteration without the accessible facilities in contravention of the building consent, and then having to undo the work.

[63] Mr Malone does not address this issue in his submissions but by implication his point is that, regardless of when the assessment is made, the balance must come down in favour of Talley's not now having to install the toilet.

[64] There is no information before me as to what the cost of installing the toilet as compared with the office space would have been but I can safely conclude that it would have been very much less than the $30,000 required for the office now to be converted into a disabled toilet.

[65] I accept that the correct approach is to consider the situation prior to the construction of the building, as both Mr Gardiner did and as Mr Ironside submits he was right to do. On this basis, in my view the cost burden - in terms of the direct cost of installation - is likely to be relatively modest. As to the benefit of installing the toilet, the level of demand in my view is not as easy to assess as Mr Malone suggests. As the wide definition in s 7 effectively highlights, there is a danger that it is only those with visible and obvious disabilities who are taken into account. There are many more disabilities beyond those which cause a person to be

wheelchair-bound. There is no suggestion that Talley's has made any sort of study of those visitors (or indeed workers) who may have had a less visible and obvious disability. Even if there were information about this, past evidence would not necessarily provide a safe basis for assessment of future need.

[66] In my view the simple fact that there will undoubtedly be occasions when disabled persons will visit, or work at, the complex is enough to require that the toilet be installed unless there would be a clearly disproportionate cost incurred. As Mr Gardiner noted, the fact the extension involves an office building which is far more likely to have visits from persons with disabilities than would most of the other buildings in the complex reinforces the point.

[67] It is also important not to overlook, as part of the overall benefit, the wider benefit represented by the addition of a further disabled toilet to the country's building stock.

[68] In reaching a conclusion on the balance of these factors, it is easier to quantify the burden than the benefits. The cost of installing a disabled toilet and the cost represented by the loss of the office is easier to quantify than the benefit of convenience and accessibility which the installation of a disabled toilet on the ground floor of the office block will produce. Having looked at the matter thoroughly and independently I have come to the same view as Mr Gardiner as to where the balance lies. The benefits , so far as one can assess them, of providing an accessible toilet facility for anyone with a disability within the main office building which contains 27 offices and other rooms, clearly outweighs the costs, both direct and indirect, of providing an accessible toilet within the office space when those costs are assessed on a pre-construction basis. The statutory framework requires that the interests of disabled persons be given full weight; in the present context that means that the balance is a difficult one for Talley's to tilt in its favour. In my judgment it has failed to do so.

[69] I conclude that the extension does not "as nearly as is practicable" comply with Clause G1 of the building code.

Section 69 waiver

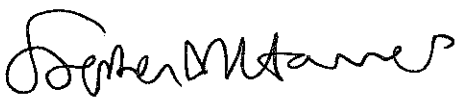
[70] In my view there is no jurisdiction for me to grant a waiver under s69. Only the Chief Executive may do so. While under s211(1)(c) of the Act I may make any decision the Chief Executive could have made in respect of the matter, s211(2) makes it clear that does not permit me to review any part of the Chief Executive's decision other than that part which is appealed against. Here there was no refusal by Mr Gardiner to grant a waiver; he was not asked by Talley's to grant one. Waiver is therefore not an issue on this appeal.

Conclusion

[71] I therefore conclude that Mr Gardiner's determination on behalf of the Chief Executive must be confirmed and the appeal dismissed.

[72] TDC is entitled to costs on this appeal. I would urge the parties to endeavour to resolve that issue between themselves but if that is not possible memoranda are to be filed and served by 15 September 2010.

[73] I thank counsel for their thorough and focussed submissions.



S M Harrop
District Court Judge

Signed at 9-32 am/pm on 19 August 2010