

Determination 2007/70

Facilities for people with disabilities in the self-care areas of Spring Hill Prison, Te Kauwhata

1 The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 (“the Act”) made under due authorisation by me, John Gardiner, 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 the Department of Corrections (“the owner”) acting through a firm of architects. The only other party is the Waikato District Council (“the territorial authority”).
- 1.3 The application arises from the territorial authority’s decision that the “self-care” areas of a new prison currently under construction must have features to permit use by people with disabilities (must be “accessible”).
- 1.4 I take the view that the matter for determination is the territorial authority’s decision that, the self-care areas must comply with the accessibility requirements of clauses G1 Personal hygiene and G3 Food preparation and prevention of contamination of the Building Code (the First Schedule to the Building Regulations 1992)
- 1.5 Unless otherwise stated, references below to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

2 The buildings, the submissions, and the draft determination

- 2.1 The Spring Hill Prison is a complex of buildings that includes self-care residential buildings (“the units”) to accommodate pre-release prisoners who have graduated from the more secure accommodation on site (or in other prisons). There are two

clusters of 6 units within the secure perimeter and one cluster of 8 units outside the secure perimeter, for a total of 20 units.

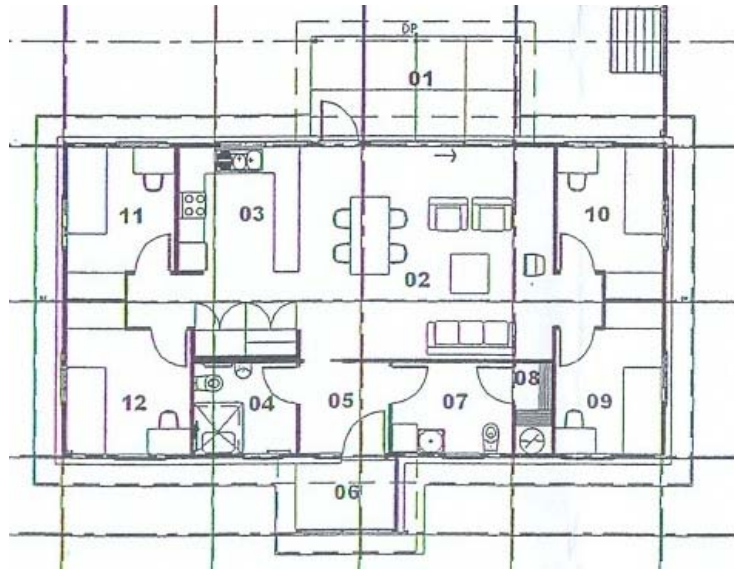


Figure 1: Floor plan of the units

- 2.2 As shown on Figure 1, each of the 20 units contains four bedrooms, a kitchen, a bathroom including a WC, a laundry also including a WC, and a living room.
- 2.3 There is no dispute that the units are buildings to which section 118 applies and must therefore make adequate and reasonable provision for people with disabilities. There is also no dispute that there is wheelchair access to and within each unit.
- 2.4 However, the owner was unwilling to provide accessible toilet, kitchen, and laundry facilities unless and until they were actually required because a wheelchair user was to be housed in a self-care area.
- 2.5 In a letter to the territorial authority dated 14 March 2007, the owner (through the firm of architects) said:

Due to the nature of the use [of the units] there is less likelihood of a wheelchair user being housed in these buildings than in the more secure accommodation.

One unit in each of these areas . . . has been designed such that access and circulation within is to an accessible standard. . . [T]he fitting-out of the kitchen and laundry . . . have not [been] designed for accessibility [because] the need is seen as very slight and when it is required it can be handled by management assistance and/or specific furniture design to suit the particular need of the disabled prisoner.

We have specifically designed the accommodation . . . to respond to the known needs and abilities of the expected population. Knowing there is an absolute minimum need for wheelchair bound prisoners, the solution chosen for accessibility requirements is to design the long term fabric, (eg. access and circulation space) to meet the standards of NZS 4121^[1]. If we design the work top kitchen fittings for wheelchair users we

¹ Section 119(2) provides that NZS 4121 *Design for Access and Mobility – Buildings and Associated Facilities* “is to be taken as a compliance document”.

would be designing for an extremely unlikely event and to the disadvantage of able-bodied prisoners. . . .

. . . . this is the basis that has been agreed with the Authorities involved with the other recently completed prisons

2.6 In its reply dated 10 April 2007, the territorial authority said:

I have considered the matters raised in your letter and appreciate the logic behind your preferred design option.

However . . . I do not accept that providing no accessible facilities is an acceptable solution.

The Building Act 2004 states clearly that accessible facilities “must” be provided for disabled persons that “may” visit or work in the building.

Waivers or moderation of the Building Code relating to Section 118, Access and facilities for people with disabilities . . . , can only be granted by the Chief Executive (DBH) in a determination.

I recommend that you apply forthwith to the Department of Building and Housing for a determination in order to obtain a definitive ruling on this matter.

2.7 That correspondence took place while the complex was in at a late stage of construction (completion scheduled for July 2007) under a three-stage building consent for the entire complex issued by the territorial authority on 2 November 2005. Apparently, the plans and specifications in respect of which the building consent was issued did not include detailed specifications of the fit-out for the units (the plan on which Figure 1 below was based is dated 13 September 2005). Accordingly, I take the territorial authority’s letter of 10 April 2007 to record a decision to refuse to issue the code compliance certificate for the stage that includes all three clusters of self-care units unless the fit-out of the units includes accessible toilet, kitchen, and laundry facilities.

2.8 In its application for a determination, the owner said:

The matter for determination is in respect of the need to fit out two of [the] units [one inside and one outside the secure perimeter] in accordance with Section 14 of NZS 4121: 2001.

These units are for pre-release prisoners and their occupancy is determined by the Department of Corrections who have advised that a wheelchair bound prisoner is extremely unlikely to utilise these units. However, in the unlikely event that such an occupancy does occur in future, one unit in each of the three clusters has been designed with circulation space to the bedroom, kitchen, toilet, and laundry sufficient to allow wheelchair circulation. Accessible access has been provided to the unit entrance. The use of fittings would then be dealt with by management assistance and/or fittings being altered to suit the particular individual’s needs. In this way accessible provision has been catered for by responding to the actual need without undermining the security management requirements of the Prison.

2.9 After considering the application and the submissions I prepared a draft determination and sent it to the parties on the basis that if they did not accept the

draft, subject to non-controversial amendments, then a formal hearing would be necessary.

- 2.10 I also sent the draft determination to the Office for Disability Issues (“the ODI”), acting for the Chief Executive of the Ministry of Social Development by way of consultation under section 170.
- 2.11 The territorial authority and the ODI accepted the draft and the owner accepted it subject to non-contentious corrections. I amended the draft accordingly to produce this determination.

3 The legislation and the compliance documents

- 3.1 Relevant provisions of the Act are:

118 Access and facilities for persons with disabilities to and within buildings

- (1) If provision is being made for the construction or alteration of any building to which members of the public are to be admitted, whether for free or on payment of a charge, reasonable and adequate provision by way of access, parking provisions, and sanitary facilities must be made for persons with disabilities who may be expected to—
- (a) visit or work in that building; and
 - (b) carry out normal activities and processes in that building.
- (2) This section applies, but is not limited, to buildings that are intended to be used for, or associated with, 1 or more of the purposes specified in Schedule 2.

Schedule 2 Buildings in respect of which requirement for provision of access and facilities for people with disabilities applies

The buildings in respect of which the requirement for the provision of access and facilities for persons with disabilities apply are, without limitation, as follows:

- (g) central, regional, and local government offices and facilities:
- (h) courthouses:
- (i) police stations:

- 3.2 Relevant provision of the Building Code (defined terms in *italic type*) are:

Clause A1—Classified Uses

1.0 EXPLANATION

1.0.1 For the purposes of this building code *buildings* are classified according to type, under seven categories.

1.0.2 A *building* with a given classified use may have one or more intended uses as defined in the Act.

3.0 COMMUNAL RESIDENTIAL

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

3.0.3 Community Care

Applies to a residential *building* or use where a large degree of assistance or care is extended to the *principal users*. There are two types:

- (b) **Restrained;** where the *principal users* are legally or physically constrained in their movements.

Examples: a borstal or drug rehabilitation centre, an old people's home where substantial care is extended, a prison or hospital.

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.

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

G2.3.4 *Accessible* facilities [for laundering] shall be provided for *people with disabilities*.

Performance G2.3.4 shall apply only to camping grounds.

G3.3.5 Where facilities [for the hygienic storage, preparation and cooking of food] are provided for *people with disabilities* they shall be *accessible*.

Performance G3.3.5 shall apply only to camping grounds and *accessible* accommodation units in *Communal Residential buildings*.

- 3.3 The compliance documents D1/AS1, G1/AS1, and G3/AS1 specify requirements for accessible facilities. In particular, paragraph 9 of D1/AS1 reads:

9.0 Accessible Accommodation Units of Communal Residential Buildings

9.1 Number of units to be provided

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

Table 9: Accessible accommodation units Paragraph 9.1.1

Total number of guest units	Number of accessible to be provided
0 – 9	1
10 – 25	2
Plus 1 unit for every additional 25 guest units provided.	

9.2 Facilities to be provided

9.2.1 Accessible accommodation units shall have:

- a) Toilet and bathroom facilities complying with G1/AS1.
- b) Kitchen facilities complying with G3/AS1.
- c) Bedrooms, sitting and dining areas with sufficient floor area for a 1500 mm diameter wheelchair turning circle.

3.4 Similar but not always identical requirements are specified in NZS 4121, which also has the status of a compliance document.

4 Discussion

4.1 General

4.1.1 There is no dispute about what accessible provisions are required the only dispute is about whether they must be provided when the units are constructed or later when they are actually required because a wheelchair user is to be housed in a self-care area. However, I note that:

- (a) The parties both referred to laundry facilities, but as I read the limits on application of clause G2.3.4 such facilities are not required to be accessible in the units.
- (b) Given that the three clusters of self-care units covered by the disputed code compliance certificate may be regarded as a “building” in terms of section 8(1)(c), both table 9 of D1/AS1 and table 2 of NZS 4121 will be satisfied by making two units accessible, one inside and one outside the secure perimeter.

4.1.2 On the face of it, the matter for determination is the interpretation of the Act as distinct from whether particular building work complies with the Building Code. The interpretation of the Act is a question of law which would normally be for the Courts to decide.

4.1.3 However, I take the view that I must accept the owner’s application for a determination in respect of the territorial authority’s decision to refuse to issue a code compliance certificate (see 2.6 above), even though the reason for that refusal was the territorial authority’s interpretation of the Act, subject only to my power to refuse an application under section 179. I take the view that I do not have grounds for a refusal under section 179 and that therefore I must make the determination applied for. Of course, my determination is subject to appeal under section 208.

4.1.4 I mention the point to draw attention to the fact that my jurisdiction under the Act is wider than that of the then Building Industry Authority under the former Building Act 1991, in which section 18 provided that the matters for determination were:

... limited to whether or not, or to what extent, particular building work or proposed building work (including any actual or proposed demolition) complies with all of the provisions, or with any particular provision, of the building code, or to whether or not

the exercise by a territorial authority of the powers referred to in section 17(1)(d) of this Act [relating to alterations, changes of use, etc] is unreasonable in relation to the provisions of the building code.

4.2 Waivers and modifications

4.2.1 The territorial authority said in effect that waivers or modifications of the Building Code's provisions for access and facilities for people with disabilities "can only be granted by the chief executive", see paragraph 2.5 above.

4.2.2 In my view, that comment is only partially true. As I read sections 67 and 69, it is correct that the chief executive has the power to grant such waivers or modifications, but only in respect of an existing building, see section 69(1)(a). For a new building, such as the Spring Hill Prison in general and the units in particular, the Act requires full compliance with the provision of the Building Code that relate to access and facilities for people with disabilities, with no provision whatsoever for the granting of waivers or modifications.

4.3 Compliance with the Building Code

4.3.1 The owner said:

. . . one unit in each of the three clusters has been designed with circulation space to the bedroom, kitchen, toilet, and laundry sufficient to allow wheelchair circulation. Accessible access has been provided to the unit entrance. The use of fittings would then be dealt with by management assistance and/or fittings being altered to suit the particular individual's needs.

4.3.2 The question of management practices was considered by the then Building Industry Authority in Determination 92.1102, which concerned the safety of young children in an Assembly Service building, in which the Authority said:

1.5 The applicant does not dispute that the building is likely to be used by young children, but contends that the conditions in the building concerned are such that "children under the age of six will be under constant supervision and surveillance" either by the staff of the building or by accompanying adults.

2.3 The Authority does not consider a waiver is justified in this case. As regards the question of supervision of children, the Building Act does not cover the management of buildings in that respect, and assurances as to future management practices will rarely be enforceable under the Act.

4.3.3 That approach has been taken consistently in subsequent determinations. For example, Determination 1996/03, which concerned the need for a lift for the accessibility of a new classroom block in a primary school complex, said:

6.3.6 In effect, the [Department of Education's] submission invites the Authority:

(b) To accept the school's assurance that accessible classrooms will be available for people with disabilities.

6.3.8 As to the assurance that classes will be relocated to accommodate the needs of any people with disabilities, the Authority generally treats such assurances as to future management practices with some caution (see Determination 92.1102). Furthermore, the question in this case is not simply whether it is possible for the

school's staff to make arrangements for people with disabilities, the question is whether the new building complies with NZS 4121. . . .

- 4.3.4 Determinations 92/1102 and 1996/03 were made by the Building Industry Authority under the former Building Act 1991 and not under the Act, and Determination 1996/03 was made in terms of NZS 4121: 1985 and not in terms of NZS 4121: 2001. Nevertheless, I agree with the Authority's approach to assurances as to future management practices. Applying that approach to the units, I consider that the owner's assurance as to "management assistance and/or fittings being altered to suit the particular individual's needs" does not amount to reasonable grounds on which I can be satisfied that the units will comply with the provisions of the Building Code for access and facilities for people with disabilities.
- 4.3.5 Furthermore, section 94 says in effect that a building consent authority cannot issue a code compliance certificate unless it is satisfied that the building work concerned "complies with the building consent". It does not say "will comply when the need arises".
- 4.3.6 I conclude that the owner's proposed fit-out does not comply with the Building Code.

4.4 Procedure

- 4.4.1 As I read the Act:
- (a) Under section 45 an application for a building consent must be accompanied by plans and specifications, defined in section 7 as "documents in accordance with which a building is to be constructed". Section 45(5) provides for amendments to a building consent.
 - (b) Under section 49, the building consent authority must grant an application for building consent if satisfied as to compliance with the Building Code, subject to any waivers or modifications granted under section 67.
 - (c) When construction is completed, the building consent authority must issue a code compliance certificate under section 94 if it is satisfied on reasonable grounds that the building work complies with the building consent.
- 4.4.2 In this case, the plans and specifications on which the building consent was granted did not show details of the fit-out of the units, see 2.6 above. In terms of section 49, therefore, the original building consent did not cover the fit-out of the units.
- 4.4.3 That being so, the owner needs to apply for an amendment to the building consent to include plans and specifications for the fit-out of the units complying with the Building Code. If that amendment is issued, then when the fit-out is completed the territorial authority will be able to issue a code compliance certificate in respect of the completed units.

5 Decision

5.1 In accordance with section 188 of the Act, I hereby:

- (a) Determine that the owner's proposed fit-out of the units does not comply with the accessibility requirements of clauses G1 and G3.
- (b) Confirm the territorial authority's decision to refuse to issue a code compliance certificate for the complex unless the required units under the building code are fitted out with accessible toilet and kitchen facilities.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 29 June 2007.

John Gardiner
Manager Determinations