



20 August 2020

Determinations
MBIE
PO Box 1473
Wellington

Via email to Determinations@mbie.govt.nz

Dear Sir/Madam

NZKGI is sending this letter with regards to the Western Bay of Plenty District Council v Limmer decision issued by the Tauranga District Court on 10 August 2020.

To provide background, Mr Limmer purchased a house in 2018 to provide seasonal worker accommodation for his kiwifruit orchard and applied for a change of use building consent from Western Bay of Plenty District Council (Council). Council declined to issue the consent as it considered there was not reasonable and adequate provision for disability access and facilities in the house.

In May 2019, NZKGI applied for a determination from MBIE. MBIE found that disability access and facilities were not required at Mr Limmer's property, reversed Council's decision and required Council to issue a new decision taking into account MBIE's findings.

Council appealed MBIE's determination to the District Court, which heard the case in July 2020. A decision was issued on 10 August 2020 dismissing the appeal. The Judge ruled on two other matters which we ask MBIE to consider.

Definition of worker accommodation

The Judge assessed the requirements contained in section 118 of the Building Act to provide access and facilities for persons with disabilities, noting that section 118 applies to 'any building to which members of the public are to be admitted'. The Judge considered whether seasonal worker accommodation fell within section 118 and found that the proposed use of the house was for a small group of orchard workers only and that therefore the building is not a building 'to which members of the public are to be admitted'. Accordingly, the Judge found that the Building Act did not apply to Mr Limmer's proposed change of use, and the proposed use will not involve the admission to the building of members of the public.

The consequences of this conclusion are that there is no requirement for the provision of access and facilities for persons with disabilities in this building, and no reason for Council to decline the change of use application on such grounds. We note this is contrary to MBIE's

previous approach in relation to seasonal worker accommodation, which has been that section 118 applies. This view has resulted in each accommodation facility requiring assessment of whether disability access and facilities are required under section 118.

Precedent Setting

The Judge noted that MBIE determinations are specific to individual buildings however noted that the decision provides precedent in the following ways:

- That kiwifruit picking, pruning, and vine tying cannot presently, or for the foreseeable future, be considered to be safe and practicable employment options for wheelchair bound people; and
- A requirement for wheelchair accessible toilet facilities in accommodation for workers engaging in kiwifruit tasks is not required under section 118.

The Judge noted that:

It follows that a requirement for wheelchair accessible toilet facilities in accommodation for workers engaged in comparable work of an equally physically demanding nature, might in appropriate cases be found to either slip through the legislative net of S118 of the Building Act 2004 as a justified exception on reasonableness grounds, or perhaps to lie entirely outside the operation of S118, as I have concluded in this case here

NZKGI have interpreted this to mean that seasonal worker accommodation needs to have its own definition that sits outside the Building Act and that the conditions applied to the accommodation would apply across all seasonal worker accommodation (not just specific to a particular building).

Next Steps

To provide a way forward for not only the kiwifruit industry but other industries that require worker accommodation, NZKGI respectfully asks that MBIE consider the Judge's rulings and consider:

- Providing a definition of worker accommodation that sits outside section 118 of the Building Act;
- Note the Judge's ruling on precedent and apply this across worker accommodation; and
- Provide updated policy to Councils.

NZKGI welcomes any opportunity to work with MBIE on an appropriate definition for worker accommodation.

Yours sincerely



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