IN THE MATTER of a dispute under the Retirement Villages Act 2003

BETWEEN [redacted]
(Applicant)

AND [redacted]
(The Respondent)

Dispute Panel Member: Nigel Dunlop

Decision.

1. The applicant and his wife are residents of the [redacted] retirement village in [redacted], operated by the respondent.

2. The applicant issued a dispute notice dated 10 December 2021 under the Retirement Villages Act 2003 (the Act).

3. The notice states that the village has been, and continues to be developed without due regard to good practice for safe pedestrian and vehicular movement. The notice referenced and attached a 29 page document setting out the applicant's concerns in detail. The document contained a great deal of technical material about the design and construction of roads and pathways in order that they cater for disabled or elderly persons, especially in relation to gradient. In putting this document together, the applicant drew on his engineering experience and expertise.

4. I was first approached by the respondent to be the dispute panel member on 24 March 2022, by which time the applicant had indicated his approval to my appointment. It seemed to me that it might be more helpful to the parties that I investigate the applicant's concerns and make recommendations, than conduct a formal adjudication process under the Act. The respondent was agreeable to this approach, but the applicant was not. On 25 March the applicant requested that the respondent proceed to engage me as a dispute panel member. I was duly appointed on 19 April 2022.

5. The following day I emailed the applicant stating:

> *It would be helpful if you would formulate the precise order which you want the disputes panellist to make. I am guessing that you may be seeking an order under section 69 (1)(b). If that is the case, then you will need to reference the precise obligation(s) in the ORA and/or two codes which you want to be complied with.*

I sent this message because it was unclear to me as to the outcome the applicant was seeking from the dispute process.

6. I did not receive a helpful response from the applicant to my message. I proceeded to set up a Zoom meeting with the parties for 29 April.

7. Formally, the meeting was a conference pursuant to regulation 13 of the Retirement Villages (Disputes Panel) Regulations 2006 ("the Regulations"). Such conferences are required to enable consultation with parties on the most appropriate procedure for resolving the dispute. But in order that I reach a view as to the appropriate procedure to follow, I needed a sound understanding of the applicant's concerns and the outcome he was seeking. I was struggling to achieve that understanding. Ahead of the Zoom meeting I emailed the applicant stating:

> *I signal, subject to what you or [redacted] have to say, that at some stage I am likely require from you a concise, comprehensive list of the past failings and current issues which in your view show that the village "has been, and continues to be developed without due regard to good practice for safe pedestrian and vehicular movement." This should enable me to identify specifically what is in dispute between you and [redacted]*

8. There then followed a series of quite lengthy emails between me and the applicant in which he endeavoured to explain his viewpoint, and I made what I hoped was helpful comment, and sought further clarification. The respondent was copied into all correspondence.

9. The Zoom meeting duly proceeded. It was attended by the applicant. His wife was present although she took no active part. The respondent was represented by its in-house counsel [redacted], and [redacted], the General Manager, Marketing and Sales of the respondent's parent company, [redacted]

10. The meeting lasted 1 ½ hours. Some clarity was achieved by me as to what was in dispute. In particular, it appeared that the applicant was seeking an order under section 69(1)(b).

11. Section 69(1)(b) provides for dispute panel members to:

> *"order any party to comply with its obligations under an occupation right agreement or the code of practice, or to give effect to a right referred to in the code of residents' rights;"*

12. The applicant appeared not to easily grasp the fact that if I was to make an order under section 69(1)(b) it had to relate to an obligation or right set out in one or both of the codes referred to, or the applicant's occupation right agreement (ORA). I therefore directed that the respondent file submissions setting out its view as to whether what the applicant was seeking (in its understanding) might conceivably relate to one of the codes or the ORA.

13. In Minute 1 issued following the Zoom meeting I set out a length my understanding as to what was in dispute gleaned from the meeting, and invited the parties to correct anything stated in the minute.

14. In response to my direction (finalised in a brief Minute 2), the respondent made submissions dated 20 May 2022. Various correspondence about these submissions ensued.

15. On 24 May I issued Minute 3. Although that minute was lengthy, I now repeat it below. I do so because it sums up the history of the dispute process to that date, and furthermore sets out my provisional thinking in detail. As will be mentioned below, my preliminary thinking as outlined in the minute has become by final thinking. The minute states:

"In response to the directions contained in Minute 2 the respondent filed submissions on 20 May. The applicant has responded to those submissions and to a series of four questions posed by the panellist in an email timed at 1.12pm on 23 May. The primary material received from the applicant since the respondent's submissions were received are a three-page document dated 23 May 2022 commenting on the submissions, and an email timed at 7.58pm the same day in response to the panellist's email referred to above.

It has been a feature of this case to date that the panellist has struggled to understand exactly what outcome to his complaint that the applicant is seeking, and his justification for the complaint in terms of the framework of the Act. This has been despite the panellist going to considerable length to assist the applicant provide clear information. This has caused some frustration to the panellist. That frustration is no doubt matched by frustration on the part of the applicant who considers his concerns and objectives are self-evident. Nonetheless, the fact remains that the applicant himself has been unable to formulate the wording of the order that he would like the panellist to make pursuant to section 69(1)(b). In his email referred to in the previous paragraph he states that the wording of the order he is seeking "needs discussion" with the panellist.

The respondent has been keen to have discussions with the applicant "to discuss if the dispute may be resolved more efficiently by means of an agreed outcome." To enable this to occur the panellist set up a Zoom meeting with the parties for 24 May. The panellist cancelled the meeting after the applicant stated that he want ed an agenda for the meeting and a proposal from the respondent before the meeting.

Given the applicant's reluctance to engage in an unstructured manner with the respondent, even with the involvement of the panellist, the panellist has decided that the time has arrived for an initial determination. Underlying this decision has been the panellist's wish on the one hand not to engage in a protracted hearing of uncertain scope and direction unless justified, and on the other hand not to allow the dispute process to drift.

It is clear that the applicant seeks an order under section 69(1)(b) and is not asking the panellist to exercise any other powers under section 69 or 70. That being case, then any order that the panellist might make must relate to one or more of the following:

a) *The respondent's obligations under the applicant's occupation right agreement (ORA);*
b) *The respondent's obligations under the code of practice;*
c) *A right or rights referred to in the code of residents' rights.*

Both the applicant and the respondent agree that the panellist can only make an order based on the ORA or either of the two codes. The panellist likewise agrees.

It is reasonable therefore, that before a substantive hearing take place to enable an adjudication of what is in dispute that the alleged obligations or rights under the ORA or two codes be identified.

There is some difficulty in this regard occasioned by the fact that it is not entirely clear what the applicant is seeking. It is clear, however, that he considers that access for the disabled in five areas identified by him in the respondent's village fall short of required standards on account of the steepness of the roads and paths in those areas. He wants compliance with all required standards in these areas relating to access by the disabled.

The question is, therefore, what provisions contained in the applicant's ORA or the code of practice oblige the respondent to ensure that the standards applying to access by the disabled in the five identified areas are met, or likewise what right in the code of residents' rights may be given effect to in order to ensure that the standards are met?

The question just referred to is the preliminary qualifying question which should be answered before the dispute resolution process proceeds further. Unless the required linkage between the ORA, code of practice or bill of residents' rights is established, then the disputes process should be ended because the panellist would have no power to make any order, and so a substantive hearing would be pointless.

Accordingly, the panellist is now making the directions set out at the end of this minute with a view to his deciding the preliminary qualifying question.

The panellist has hitherto been open with both parties as to his thinking about the various issues in this case. This is particularly for the benefit of the applicant, an engineer, who is not legally represented, unlike the respondent which is represented by its in-house lawyer [redacted]. *It might be noted at this point that it is open to the applicant to obtain legal representation, and that may well be desirable if he is struggling with the legal issues. He, however, exudes confidence in the correctness of his arguments.*

For the benefit of both parties the panellist now sets out his current thinking about the preliminary qualifying question. He does so in order to give the parties the opportunity to challenge or support that thinking. It must be emphasised, however, that the panellist maintains an open mind, and will not reach a concluded view on the preliminary qualifying question until after submissions now being requested are received and considered by him.

Currently, the panellist has not identified any provision in the applicant's ORA or in the code of residents' rights that requires the respondent to meet any required standards for access by the disabled in the five areas under consideration. Nor, to the panellist's understanding has either party.

There is, however, a provision in the code of practice which arguably links to access by the disabled standards. This is clause 44 of the code which reads:

> *"Construction standards for new retirement villages or units*
>
> *1 Building standards for new retirement villages or residential units within existing villages must meet the requirements of the Building Act 2004 and the Building Code.*
>
> *2 The operator must, through the disclosure statement, inform residents and intending residents how the village can meet their current and changing needs so that residents can continue to live in their village of choice. Information provided must include the extent to which the residential units, facilities, grounds, and common areas of the retirement village meet the requirements of the national standards identified in NZS 4121: 2001 Design for Access and Mobility: Buildings and Associated Facilities."*

It is doubtful that subclause 1 of clause 44 applies for two reasons. Firstly, because [redacted] *was opened in 2002, before 2008 when the code was first promulgated, in which case it cannot be regarded as a new retirement village. Secondly, if the village is an existing one in terms of clause 44(1) then it applies to residential units. The five areas about which the applicant is concerned arguably do not relate to residential units but shared to access areas between units, although equally it could be argued that any of the village's roads and pathways relate to residential units.*

Even if clause 44(1) does apply to the present case, the only relevant provision in the Building Act 2004 appears to be section 118 which reads:

> *"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."*

The panellist has serious doubt that section 118 is relevant to the present case for two reasons.

Firstly, the section relates to buildings. "Building" is defined in section 8 of the Building Act, fundamentally as a structure. The roads and paths about which this case is concerned are clearly not buildings.

Secondly, section 11 appears to relate to buildings to which members of the public have access to for one reason or another. Retirement villages are places of private residence, not places in which in the terms of section 118 the public is expected to have access to. This interpretation is reinforced by the extensive listing of various types of usage in Schedule 2 of the Building Act. Notably, private residences do not appear on the list, nor do retirement villages. The applicant has drawn my attention to clause (j) of the schedule as supporting his case, but in my view it does not do so. That clause relates to "premises providing accommodation to the public". Retirement villages do not "provide accommodation to the public" just as private homes do not "provide accommodation to the public". Retirement villages are in essence collections of private residences sharing common space and facilities.

The applicant has referred to subclause 2 of clause 44 of the code of practice set out in paragraph 16 above. He alleges that the respondent has failed to provide the required information in its disclosure statement. Whether or not there has been such a failure is irrelevant to the dispute at hand. The dispute notified by the applicant is alleged failure of the respondent to meet standards, not alleged failure to provide information. The dispute notice does not allege a failure to provide information in the disclosure statement, and so it is not a matter the panellist has authority to determine. A failure to supply information in the disclosure statement does not necessarily mean that there has not been compliance with required standards. Furthermore, the mention of NZS 4121 clause 44(2) does not reveal the source of any requirement to comply with NZS 4121. Clause 44 (2) is not in itself a requirement to comply with NZS 4121. The subclause does not say that the respondent must apply NZS 4121. It simply says that the respondent must include reference to NZS 4121 in its disclosure statement. It is acknowledged, however, that clause 44(2) suggests the existence of a requirement that the respondent comply with NZS 4121. Neither the applicant nor the respondent, however, has so far been able to the satisfaction of the panellist point to a clear and specific authority requiring compliance with NZS 4121 in the five areas of the village identified by the applicant. This is not to say that the authority does not exist, simply that it is not apparent to the panellist. The key point remains, however, that there appears not to be such a requirement in the ORA or two codes.

The panellist now makes the following directions:

i. *The applicant and respondent are each invited to make submissions as to how the preliminary qualifying question as set out in paragraph 10 above should be answered.*
ii. *Should the applicant or respondent choose to make such submissions, they must be received by the panellist and copied to the other party no later than 7 days from the date hereof.*
iii. *The applicant and respondent may provide submissions in reply to those made (if any) by the other party no later than 14 days from the date hereof.*
iv. *The submissions referred to above must be contained in one document (or two if reply submissions are made).*
v. *Neither party is from this date onwards to provide any information or comment to the panellist falling outside the above submissions.*
vi. *Should either party seek a change to the above directions then a request in that regard must be made no later than 3 days from the date hereof.*

The panellist reserves the right to make such further or other directions as he sees fit.

The panellist advises that following the conclusion of the submissions process he intends to determine how the qualifying preliminary question should be answered.

Should the panellist determine that the preliminary qualifying question be answered in the negative (in other words, that there is no linkage in the ORA or two codes with what is sought by the applicant) then the panellist will thereupon decide the dispute in favour of the respondent, bringing the dispute resolution process to an end without a hearing.

Should the panellist determine that the preliminary qualifying question be answered in the positive (in other words, that there is linkage in the ORA or two codes with what is sought by the applicant) then the panellist will make further directions as to the future conduct of the dispute process."

16. By email dated 26 May the respondent submitted, in essence, that it agreed with the preliminary thinking I had set in Minute 3.

17. By email dated 27 May the applicant stated that he would not be making any further submission on the complaint, but confusingly said that he reserved the right to respond to the respondent's submissions. I therefore issued Minute 4 stating:

> *"Minute 3 invited the parties to provide submissions within 7 days. The respondent provided submissions on 26 May. They were copied to the applicant.*
>
> *On 27 May, after having received the respondent's submissions, the applicant advised in an email that he "will not be making any further submission on the complaint."*
>
> *Minute 3 provided each party with the opportunity to comment on the submissions of the other. Given the applicant's advice that he will not be making submissions, there are no reply to submissions for the respondent to make.*
>
> *Confusingly, however, the applicant says that he reserves the right to comment on the respondent's submissions within the time frame set out in Minute 3. This suggests that the applicant might want to make submissions in reply to those of the respondent despite his advice that he "will not be making any further submission on the complaint."*
>
> *In these circumstances, the panellist hereby amends the directions in Minute 3, to provide the applicant with the opportunity to make submissions in reply to those of the respondent* ***seven days from the date hereof.*** *This is the same time-frame as is referred to in Minute 3. In effect, he is being given an extra day to reply to the respondent's submissions should he want to do so.*
>
> *It is the panellist's intention to decide the preliminary qualifying question referred to in Minute 3 at the conclusion of that seven day period, or earlier should the applicant advise that he does not intend to make submissions in reply.*

Should, however, the applicant choose to make submissions and in them introduce points which have not previously been made by him, then it may be appropriate in the interests of fairness to provide the respondent opportunity to comment.

As with Minute 3, the panellist reserves the right to make further of other directions.

In his email of 27 May the applicant queries whether there is a conflict between, on the one hand, the panellist's intentions to conclude the complaints process in the event of the preliminary qualifying question being answered in the negative, and on the other hand, clause 24 of the Retirement Villages (Disputes Panel) Regulations 2006.

Clause 24 sets out requirements in the event of the panellist refusing to hear the dispute pursuant to section 66 of the Act. The panellist is not, however, proposing to refuse to hear the dispute. He is indicating that he might substantively determine the dispute should the qualifying question be answered negatively by him. The panellist would simply finalise the dispute by declining to make any order (on the grounds that he has no power to make such an order.) In such a situation a hearing would have taken place, albeit based on submissions. It is noted that section 64 provides that subject to the Act or regulations made thereunder the panellist may conduct the dispute resolution in any manner he sees fit. The panellist is not required to conduct an in-person hearing at which evidence is given (as the applicant may be envisaging), if it has already been established that the panellist does not have the power to make an order.

The position remains that the panellist has not yet decided how to answer the preliminary qualifying question, and will not do so until he has received all submissions that the parties intend to make under his directions…."

18. Shortly after sending that minute to the applicant I received a message from him stating:

    I have an alternative opinion to [redacted] submission. However I give in. Otherwise it will continue for ever. A hearing would have had the form required by the regulations.

19. I take from the above response that the applicant has nothing further to say on the preliminary qualifying question, namely what provisions contained in the applicant's ORA or the code of practice oblige the respondent to ensure that the standards applying to access by the disabled in the five identified areas are met, or likewise what right in the code of residents' rights may be given effect to in order to ensure that the standards are met.

20. I have continued to reflect on the qualifying question to the last, but have finally decided that it must be answered in the negative.

21. My view is, in other words, that there is no provision contained in the applicant's ORA or the code of practice which obliges the respondent to ensure that the

standards applying to access by the disabled in the five areas identified by him are met, nor likewise is there a right in the code of residents' rights which may be given effect to in order to ensure that the standards are met.

22. My reasoning remains as set out in Minute 3.

23. Accordingly, I finally determine the dispute at hand by declining to make an order.

24. I do so because in my view I have no power to make any order which the applicant might want me to, and so to continue the dispute resolution process would be pointless.

25. The dispute process is now therefore at an end.

26. It is important that I record that I have not made any findings as to whether or not in the five areas identified by the applicant the roads and paths comply with the standards which the applicant says are applicable. I simply do not know. They may or may not comply.

27. Furthermore, I have not made any finding as to whether the standards which the applicant says are applicable to those areas are in fact applicable. They may or may not be. My findings have been limited to deciding **whether the applicant's ORA and the two code**s mentioned above require the application of the standards, and I have decided that they do not.

28. It is conceivable that the law *does* apply the standards identified by the applicant to the five areas which are of concern to him. If that is the case (and I do not know whether it is or not) then there is conceivably some other avenue by which the applicant can achieve his end goals. What I have decided in this case is that *should* the standards apply, they cannot be enforced **through the Retirement Village complaint process.**

29. If the standards do not apply in the five areas, nothing that I have decided should be taken as an indication that improvements should not be made to them. Whether improvements are justified I do not know, but it may be that ongoing discussion about the five areas between the applicant and respondent would be helpful. What I do know from my knowledge of [redacted] is that the topography in the area in which the village is situated is challenging. I understand both parties to be in agreement about that. I have therefore been disappointed that the applicant has not agreed to pick up the proposals by the respondent to reach agreement with him outside the rigid complaints adjudication process. I note that the applicant declined to attend mediation which the respondent was prepared to attend. It is not necessarily too late for

mediation. I hope that the parties will eventually reach agreement, and wish them well in that regard.

30. I make no award of costs under section 69. At the Zoom meeting on 29 April I told the applicant and his wife that I would not make such an award unless I first warned of the possibility that I might make such an award. I have not given any such warning. My costs will therefore be paid in full by the respondent.

31. Finally, I thank both parties for the courtesy and cooperation they have extended to me.

DocuSigned by:
Nigel Dunlop
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NJ Dunlop
Dispute panel member.

27 May 2022 | 5:32 PM NZST

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