



Determination 2018/037

Regarding the authority's exercise of its power of decision in refusing to grant an exemption from the requirement to obtain a building consent in respect of proposed seismic strengthening work at 1 Railway Crescent, Masterton

Summary

This determination considers the authority's refusal to grant an exemption from the requirement to obtain a building consent under Schedule 1(2)(a) for seismic strengthening work. The determination discusses the types of matters that an authority must turn its mind to when considering whether to grant an exemption and the information provided in this case that would allow the authority to consider an application for an exemption.

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ ("the Act") made under due authorisation by me, Katie Gordon, Manager Determinations, Ministry of Business, Innovation and Employment ("the Ministry"), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The parties to the determination are:
 - the owner of the property, Masterton Trust Lands Trusts ("the applicant"), acting through its architect ("the architect")
 - the Masterton District Council ("the authority"), carrying out its duties as a territorial authority or building consent authority.
- 1.3 The determination arises from the decision of the authority to refuse to grant an exemption from the requirement to obtain a building consent under Schedule 1(2)(a) of the Act for proposed seismic strengthening work.
- 1.4 The matter to be determined² is therefore whether the authority correctly exercised its power of decision in refusing to grant an exemption from the requirement to obtain a building consent under Schedule 1(2)(a) of the Act for proposed seismic strengthening work.
- 1.5 In making my decision, I have considered the submissions of the parties and the other evidence in this matter. I have also referred to the Ministry's guidance document, *Guidance: Building work that does not require a building consent*:

¹ The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.building.govt.nz or by contacting the Ministry on 0800 242 243.

² Under section 177(1)(b) and 177(3)(c)

Building Act 2004 [Third Edition 2014, Amended August 2017] (“the Ministry’s technical guidance”).

2. The building work and background

2.1 The building work

- 2.1.1 The building is a 1970s era building constructed on a reinforced concrete slab foundation. The building is of steel portal frame construction with central steel columns encased in reinforced concrete.
- 2.1.2 The building is clad in lightweight corrugated iron and iron roofing. There is a framed lean to on one side of the building.
- 2.1.3 A seismic assessment of the building carried out in 2011 reported the seismic capacity of the building as 62% new building standard (NBS). I have not seen a copy of this assessment.
- 2.1.4 The proposed building work comprises seismic strengthening work to improve the seismic capacity of the building to 75% NBS. The information accompanying the application for exemption states:

It is proposed to install fly bracing in the (steel) frames to reduce the rafter segment length. The installation of the fly bracing means the portals can achieve approximately 85% NBS.

In the longitudinal direction the building has tension only cross bracing. The bracing has been assessed using a force based approach with a ductility of 1. The existing roof plane bracing is sufficient, however, some of the struts are not. The central wall bracing also lacks capacity.

It is proposed to install new roof plane struts in the bracing bays, as well as two new wall bracing bays along the central line. Installation of this bracing means the longitudinal system is 75% NBS.

2.2 Background

- 2.2.1 The architect and engineer approached the authority about obtaining an exemption from the requirement for a building consent for the proposed seismic strengthening work. The architect subsequently emailed the authority on 31 October 2017 to apply for an exemption from the requirement to obtain a building consent for the proposed seismic strengthening work.
- 2.2.2 In the email, the architect:
- stated the application was under Schedule 1(2)(a)
 - described the building and proposed seismic strengthening work
 - stated the value of the work
 - named the engineer, providing her CPEng registration number
 - stated that the engineer had been engaged to undertake construction monitoring to CM3³, and that engineer site instructions and reports, along with a ‘Producer Statement PS4 - Construction review’ (“PS4”) would be provided to the authority on completion of the work.

³ Refer Engineering New Zealand guidance document entitled “Construction monitoring services (2014)” which describes monitoring services including Level CM3 monitoring.

2.2.3 The application included a design statement which summarises the methodology for the proposed seismic strengthening work, a ‘Producer Statement PS1 – Design’ (“PS1”) structural calculations and structural drawings.

2.2.4 The authority responded to the architect on 16 November 2017, stating:

All seismic strengthen (*sic*) requires a building consent.

Also the scope of the engineering Seismic Strengthen requires a high level review for (*sic*) another engineer. The findings of the review are to be added to the consent.

This is not a PS2 review just a high level review.

3. The submissions

3.1 The Ministry received an application for a determination on 14 May 2018. The application included:

- a letter from the engineer dated 3 May 2018, describing the structure, proposed seismic strengthening work, and stating:

In terms of [the Ministry’s] Earthquake Prone Building Methodology dated July 2017, the building is not included in the profile categories requiring an engineering assessment, and it lacks any features that would lead to it being identified at any time, ie no heavy concrete piles.

- a copy of guidance issued by the Christchurch City Council about work that does not require a building consent
- the application for an exemption that was submitted to the authority.

3.2 The authority made a submission on 14 June 2018. In respect of its decision-making process, the authority stated:

[It] has clear procedures for making formal decisions on exemptions under schedule 1(2) of the [Act] that meets the criteria of any building work in respect of which the [authority] considers that a building consent is not necessary for the purposes of this Act...

The procedure is as follows:

1. The applicant completes an application on the prescribed form...
2. The [authority] makes a formal decision against [the authority’s exemption process] and [the authority’s structural policy]
3. Notification to the applicant for the reason to approve or decline the application on the prescribed form.

3.3 In its submission, in respect of the decision made in this case, the authority stated:

The applicant ... made the application via an email not on the [application form]

The [authority] followed procedure making a decision against [the authority’s exemption process] and [the authority’s structural policy]

Notified via email to the applicant ...that the [authority] considers that a building consent is required under [the authority’s structural policy] and [the authority’s exemption policy]

3.4 The authority provided copies of:

- its policy document about structural work entitled ‘Structural policy’ (“the authority’s structural policy”), which states
 - When a Structural engineer item B1 applies and any one or combinations of the following apply; ...
 - Structural Strengthening to existing buildings require a building consent. Engineering methodology has ascertained and reviewed that adequate construction details have been provided to be satisfied the provisions of the Building Code will be met.
- its document setting out its process for making decisions about exempt building work under Schedule 1(2) entitled ‘Guidance when making a formal decision for Exempt building work under schedule 1 (Exemption 2)’ (“the authority’s exemption process”)
- its application form for exemptions under Schedule 1 entitled ‘Application for a discretionary exemption from building consent’ (“the application form”).

3.5 A draft determination was issued to the parties for comment on 5 July 2018.

3.6 The authority accepted the draft determination on 19 July 2018, and made the following comments, noting:

- the draft determination failed to recognise the history associated with building control and the deficiency associated with reliance on producer statements
- the Courts have made it clear that building consent and territorial authorities cannot rely on producer statements solely as a means to establish Building Code compliance.
- concern that it was being criticised for following Ministry guidance, as it had followed the process set out by the Ministry by developing a policy and an application form
- the draft determination comments on the reasons why the work is being done, however, this is not a factor in the Building Act (or covered in guidance or previous determinations).

3.7 The applicant accepted the draft determination on 20 July 2018, and made the following comments:

- the proposed building work is minor and unlikely to endanger people or any building or other property in accordance with Schedule 1(2)
- the producer statement provided is important and the fact that a producer statement does not have statutory force is not relevant. It is a professional opinion that an authority may choose to rely on
- the authority regularly accepts one page producer statements with no supporting documentation and this producer statement clearly states the engineer believes the work will comply with the Building Code, included supporting design detail and calculations, and is by an engineer well known to the authority
- the applicant was not aware of the authority’s structural policy and it is not published, and the authority did not provide this when advising the applicant the application for an exemption was refused, and there is no definition of the term “high level” review referred to in the policy

- the authority’s structural policy appears to not allow consideration of Schedule 1(2) and the authority’s statement that all seismic strengthening work requires a building consent is at odds with the obligation to consider Schedule 1.

3.8 I have taken these comments into account and amended the determination as appropriate.

4. Discussion

4.1 Under section 17 of the Act, all building work must comply with the Building Code to the extent required by the Act, whether or not a building consent is required in respect of that work. Section 41 sets out those cases in which consent is not required and includes ‘any building work described in Schedule 1’.

4.2 In essence, the purpose of Schedule 1 is to exempt low-risk building work from the need for a building consent. The Ministry’s technical guidance states that this is because the costs associated with obtaining a building consent in these situations are likely to outweigh any benefits that requiring consent may offer.

4.3 The Ministry’s technical guidance also states that Schedule 1 exemptions “are generally for building work that will not affect the building’s structure or fire safety and that do not pose a risk to public safety”. I note in this case that while the work involves the structural performance of the building, the building currently meets the regulatory minimum (i.e. the building is not earthquake-prone) and the building owner is proposing to carry out the work to improve the structural performance of the existing building.

4.4 The applicants have applied for an exemption under Schedule 1(2)(a) of the Act. Schedule 1(2) provides for the authority to determine whether to exempt proposed building work from the requirement to obtain a building consent in the circumstances specified. Clause 2 of Schedule 1 states:

(2) Territorial and regional authority discretionary exemptions

Any building work in respect of which the territorial authority or regional authority considers that a building consent is not necessary for the purposes of this Act because the authority considers that—

- (a) the completed building work is likely to comply with the Building Code or
- (b) if the completed building work does not comply with the Building Code, it is unlikely to endanger people or any building, whether on the same land or on other property.

4.5 Previous determinations have considered the types of matters that an authority must turn its mind to when considering whether to grant an exemption. Determination 2013/058⁴ considered this in relation to house foundations under what was Schedule 1(k) (the predecessor of the current Schedule 1(2)) and stated:

... when considering whether to grant such an exemption an authority must turn its mind to the nature of the proposed work, the personnel who will be undertaking it, and the likelihood of it being completed other than in accordance with the Building Code...

⁴ Determination 2013/058: Regarding the authority’s exercise of its powers of decision in respect of a notice to fix issued for work done under Schedule 1(a) (23 September 2013)

- 4.6 In its refusal (refer to paragraph 2.2.4), the authority stated, in reference to its policy, that all seismic strengthening work required a building consent.
- 4.7 It is my view that work that may be exempt under Schedule 1(2) cannot be prejudged in such a manner. When considering whether to grant an exemption, an authority must apply the relevant legislation and turn its mind to the facts of the specific application, and not rely on a general policy position.
- 4.8 I note that an authority could justifiably refuse to grant an exemption, however, must have particular reasons for doing so that relate to the facts of the application and the tests set out in Schedule 1(2).
- 4.9 I note that the authority has submitted that it is following the Ministry's technical guidance by developing a policy and an application form (refer to paragraph 3.6). It is my view that the Ministry's technical guidance is clear that this exemption is intended to cover a wide range of building work, provided the work meets the requirements of Schedule 1(2). The guidance provides some examples of the range of work that could be considered, and states that 'this exemption can be applied across a wide range of building work.'
- 4.10 An authority's policy and procedures for making decisions under Schedule 1(2) should set out how applications for exemptions will be considered by the authority, rather than general blanket positions about the type of building work that does and does not comply. In this case, the authority's policy does not allow for the provisions of the legislation that expressly enable an exemption from the need for a building consent to be granted in certain circumstances.
- 4.11 I am therefore of the view that the authority incorrectly exercised its power of decision by refusing the application for an exemption for the reasons given.
- 4.12 In order to assist the parties, I note the documentation provided covers the following information that would allow the authority to consider an application an exemption under Schedule 1(2)(a) (with reference to the factors set out in paragraph 4.5):
- the design of the proposed strengthening work was carried out by a CPEng
 - a PS1 has been provided, along with supporting documentation
 - the proposed work involves a relatively simple structure, and the solution for improving the seismic capacity of the building is relatively straightforward (the addition of fly bracing, roof plane struts, and wall bracing bays)
 - the engineer has experience in the assessment and design of similar structures
 - the engineer will monitor construction to CM3, and provide a PS4
 - the nature of the work is such that it is very unlikely to be carried out not in accordance with the Building Code
 - the nature of the work is also very unlikely to adversely impact on the performance of the existing building.
- 4.13 I note that the documentation does not describe who would be carrying out the building work.
- 4.14 I note the authority has stated in its submission that the application was not on the correct form (refer to paragraph 3.3). I note the authority did not refer to this as a reason for refusing to grant an exemption under Schedule 1(2): I consider this to be a straightforward matter for the parties to resolve.

5. The decision

- 5.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority incorrectly exercised its power of decision in refusing to grant an exemption under Schedule 1(2)(a) for the reasons provided by the authority, accordingly I reverse the authority's decision.
- 5.2 The authority should now make a new decision on this matter taking into account the findings of this determination.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 13 August 2018.

Katie Gordon
Manager Determinations