

Determination 2021/029

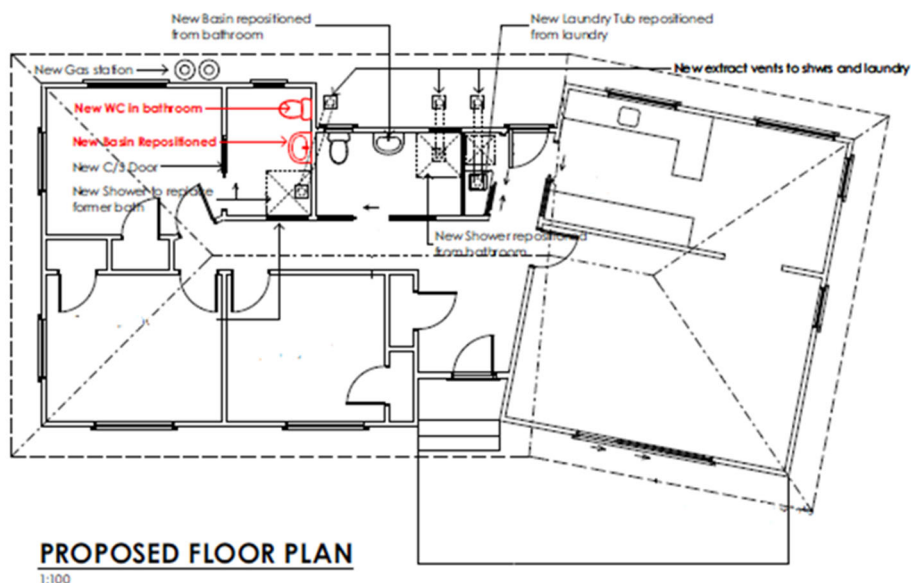
Date: 22 December 2021

Regarding the authority's refusal to grant an exemption from the requirement to obtain a building consent to install sanitary plumbing and insulation

5 Dublin Street, Martinborough

Summary

This determination considers whether the authority was correct to refuse to grant a discretionary exemption under Schedule 1(2) for additional plumbing fixtures and the installation of insulation in an external wall. The determination discusses reasons for refusal to grant a discretionary exemption under Schedule 1(2).



The legislation discussed in this determination is contained in Appendix A. In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (e.g., acceptable solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Katie Gordon, National Manager, Building Resolution, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry¹.
- 1.2. The parties to the determination are:
 - P. and A. Gray and C. and C. Webb (“the owners”), owners of 5 Dublin Street. A Licensed Building Practitioner acting as their agent is (“the agent”), who provided advice to, and applied for the discretionary exemption on behalf of, the owner.
 - South Wairarapa District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. This determination arises from the authority’s refusal to grant a discretionary exemption from the requirement to obtain a building consent to install new plumbing fixtures and fibreglass insulation in an exterior wall cavity at 5 Dublin Street, Martinborough (“the property”) under Schedule 1(2) of the Act.
- 1.4. The matter to be determined, under section 177(1)(b) and (3)(c) of the Act, is whether the authority was correct to refuse to grant a discretionary exemption to install new plumbing fixtures and install insulation in an external wall at the property.
- 1.5. The authority questioned whether a decision made on a Schedule 1(2) exemption could be the subject of a determination considering the discretion in that clause is given to the authority. Sections 177(1)(b) and 177(2)(c) of the Act provide that a determination may consider the exercise of powers by an authority relating to “an exemption from building consent requirements under clause 2 of Schedule 1².”
- 1.6. A number of previous determinations have been made on this subject, and I consider it appropriate that the exercise of the power by the authority should be reviewed where there is disagreement between parties.

¹ The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

² See Appendix A

1.7. References in this determination to sections are to sections of the Act.

2. The building work

- 2.1. The house is a 1960s timber framed dwelling with timber weather boards and windows. Internal walls are lined with a softboard product. There is building paper behind the wall linings. The existing dwelling has three bedrooms, one bathroom, a separate toilet and laundry areas, as shown in Figure 1.
- 2.2. The scope of works proposed to the existing dwelling includes dividing the bathroom, toilet and laundry to form an ensuite (with toilet, basin and shower), a separate bathroom (with toilet, basin and shower), and a laundry. The scope of works also included the replacement of internal linings, and therefore the opportunity was taken to propose installing insulation in the external walls as well as some window and door relocations.

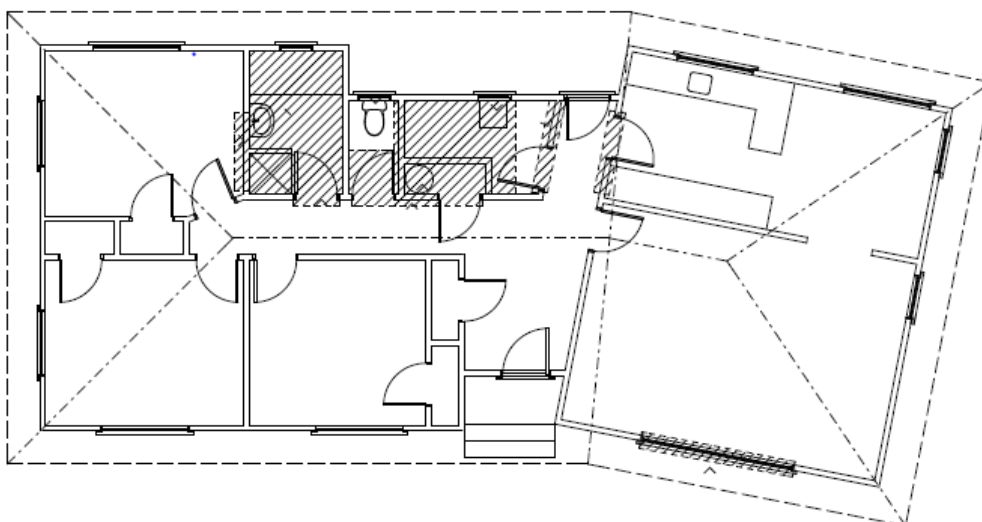


Figure 1: Existing floor plan (not to scale)

- 2.3. In summary the building work involves:
- Removal of the laundry window;
 - Replacement of internal linings;
 - Installation of insulation to exterior walls;
 - Replacement of lounge window with a sliding door;
 - Installation of extraction fans and ducting in ceiling;
 - Alteration of interior walls and doorways;
 - Replacement of plasterboard in the wet areas;
 - Removal and replacement of the hot water heating system; and
 - Removal and relocation of the existing bath, shower, hand basin and laundry tubs.

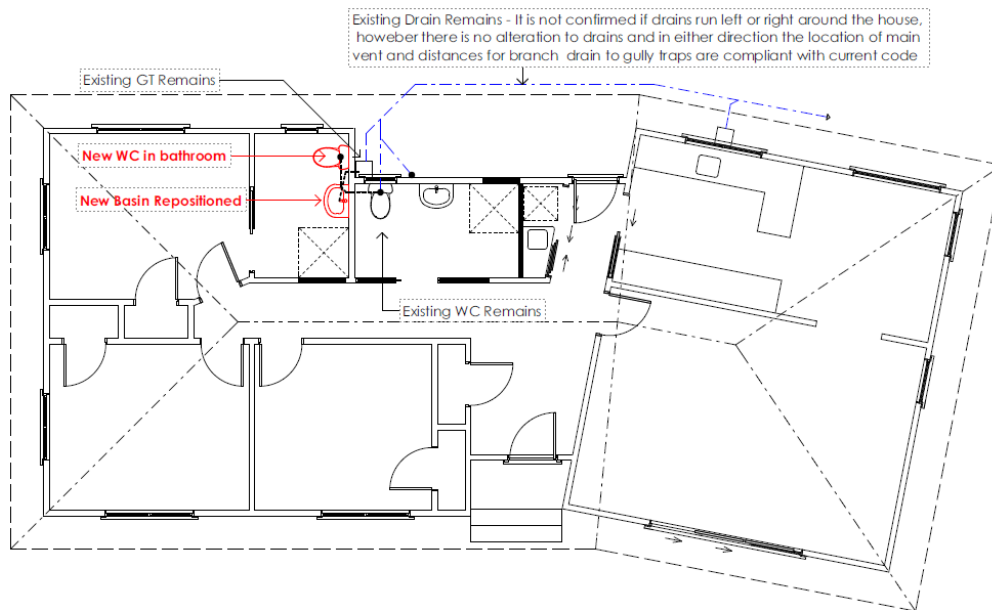


Figure 2: Proposed plumbing and drainage plan (not to scale)

- 2.4. The owner and agent identified that most of the building work proposed was covered under Schedule 1 with the exception of:
- The installation of insulation to exterior walls; and
 - Installation of a handbasin and toilet.

The owner applied to the authority for an exemption under Schedule 1(2) for these two items of building work.

3. Background

- 3.1. The owners sought to renovate the existing dwelling as described in paragraphs 2.3 and 2.4.
- 3.2. The owners engaged the agent to assist in reviewing the scope of works, as well as identifying the work that did and did not require building consent. The agent advised which work was exempt under Schedule 1 of the Act and which work would require a building consent. The agent advised a Schedule 1 exemption applied to all work except for those works listed at paragraph 2.4, which were identified as requiring building consent. The agent advised the owners to seek a discretionary exemption³ from the authority to carry out these works.
- 3.3. Before submitting an application, the agent claims to have spoken with an officer of the authority to discuss the scope of the proposed discretionary exemption. During the telephone discussion, the officer of the authority indicated the discretionary

³ Schedule 1, clause 2 of the Act: Territorial and regional authority discretionary exemptions.

exemption was likely to be refused because the building work required a building consent. The agent countered that they understood a building consent was required and that was the reason for applying for a discretionary exemption.

- 3.4. On 23 November 2020, the agent followed up with an email outlining the building work and stating their belief that the work was low-risk, was to be carried out by qualified and experienced tradespeople, and that it did not include restricted building work.
- 3.5. On 30 November 2020, the authority requested the agent submit the application on a form. The agent submitted an application for discretionary exemption to complete the work described in paragraph 2.4.
- 3.6. The application included:
 - Architectural drawings detailing all building work;
 - Detailed descriptions of the exempted works;
 - Detailed descriptions of the works requiring a building consent;
 - Details of the Licensed Building Practitioner responsible for designing the works requiring building consent (including their registration number); and
 - Details of the plumber and gasfitter responsible for construction requiring building consent (including their registration).
- 3.7. As the proposal included the installation of new sanitary plumbing, the authority decided the discretionary exemption was not intended to cover this scope of work and declined the exemption application.
- 3.8. The Ministry received an application for a determination on 16 December 2020.

4. Submissions

The owners

- 4.1 The owners are of the view:
 - 4.1.1. any building project or building work can be considered for a discretionary exemption from requiring a building consent
 - 4.1.2. the authority incorrectly assessed the application for discretionary exemption and a territorial authority must consider whether the completed building works are likely to comply with the Building Code
 - 4.1.3. both the installation of bathroom fixtures and installation of insulation are minor in nature, low risk, and are likely to comply. They believe that both building works are within the scope of the discretionary exemption provisions of the Act. They consider the authority's assessment was not

based on the application and was not carried out on the merits of the information contained in the application but a pre-determined position not to grant discretionary exemptions

- 4.1.4. the authority incorrectly holds the view that installing the insulation in exterior walls was not part of the application for discretionary exemption
- 4.1.5. the authority's decision does not align with the Ministry's guidance *Building work that does not require a building consent*. They point to an example in the guidance that specifically references "Retrofitting or installing thermal insulation in external walls of a standalone dwelling under certain conditions".⁴

The authority

- 4.2. The authority submits the refusal was appropriate.
- 4.3. The authority believes the inclusion of Schedule 1(35) that specifically excludes exemption of increasing the number of sanitary fixtures in a building applies to this case. It submits this requirement must have been included in the provision because the government considers that the addition of bathroom fixtures, as in this case, poses an undue risk to people. The authority is of the view that this risk is removed by the building consent process.
- 4.4. The authority applied this thinking to the owners' discretionary exemption application and found that the requirements of Schedule 1(2)

cannot be met because if the work is done in a way that does not comply with the Code it is likely that people will be endangered by, in this case, the risk of foul air and gases entering the building.

In this respect, the application for discretionary exemption was refused.

Draft determination

- 4.5. A draft determination was issued to the parties for comment on 2 September 2021.
- 4.6. The owner accepted the draft without comment.
- 4.7. The authority did not accept the draft and provided comment as follows:
 - 4.7.1. The draft determination incorrectly considered the refusal to issue a schedule 1(2) exemption for the installation of insulation in an external wall. This is because it was not a consideration in refusing the exemption application, nor was it referenced in the authority's refusal letter, and the

⁴ MBIE, Building work that does not require a building consent, (accessed 30/08/2021) - <https://www.building.govt.nz/assets/Uploads/projects-and-consents/building-work-consent-not-required-guidance.pdf> - at page 17

building work (as described in the exemption application), was to “install new WC and handbasin within existing residence”. For these reasons, the authority disputes its inclusion in the application.

4.7.2. The draft determination incorrectly suggests the criteria set out in the Ministry’s guidance on exempt building work⁵ “must” be applied when deciding on a Schedule 1(2) application.

4.8. The owner responded to the authority’s submission:

4.8.1. Asserting the insulation of the external wall was included in the application. Stating, “it was clearly described on page 4 of the application form, was also described on the schedule of work in drawings with photograph on page 1 and detailed description on page 2”

4.8.2. Repeating their assertion that the authority “made no attempt to process or assess the application on its content or merits and rejected it out of hand from a predetermined position”.

5. Discussion

General

- 5.1. Sections 41 and 42A sets out those situations where a building consent is not required and includes “any building work described in Schedule 1”.
- 5.2. Schedule 1 provides for exemptions from the requirement to obtain a building consent, not from the requirement to comply with the Building Code. 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.
- 5.3. Schedule 1 contains a list of building work that does not require building consent. It includes Schedule 1(2), which is a discretionary exemption that requires authorities to determine whether to exempt building work from the requirement to obtain a building consent where it would otherwise not be covered by the other exemptions in Schedule 1:

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

⁵ See criteria set out at paragraph 5.5

- (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.
- 5.4. Schedule 1(2) is the only exemption that requires a decision from a territorial authority. This exemption requires the authority to exercise their discretion in exempting any type of building work from requiring a building consent. This is provided the authority considers that the building work is likely to comply with the Building Code, or, if the completed work did not comply, that it is unlikely to endanger people or buildings.
- 5.5. The Ministry's guidance on exempt building work⁶ suggests authorities take into account the following when considering a discretionary exemption:
- any substantial previous demonstration of competence in carrying out similar work
 - the complexity of the work relative to the competence of the people who will carry it out
 - any independent quality assurance systems or checks that will be applied in the course of the work
 - the location of the building work
 - how close it will be to any property boundary and/or other buildings.
- 5.6. There are many situations where it will be justifiable for an authority to refuse to grant a discretionary exemption. However, the authority must have particular reasons for doing so that relate to a specific assessment of the application against the tests set out in Schedule 1(2).

Refusal of the exemption under Schedule 1(2) of the Act

- 5.7. The owners' submission indicates the exemption was being sought under Schedule 1(2)(a) and (b). In the following paragraphs I consider whether the authority's reasons for refusal align appropriately with Schedule 1(2).
- 5.8. The building work proposed under the Schedule 1(2) application was for the:
- installation of insulation to exterior walls; and
 - installation of a handbasin and toilet to form the new ensuite bathroom.
- 5.9. The application presented to the authority provided drawings describing the work, details of the personnel involved, and arguments as to why the work should be exempt from the requirement to obtain a building consent.

⁶ MBIE, Building work that does not require a building consent, (accessed 30/08/2021) - <https://www.building.govt.nz/assets/Uploads/projects-and-consents/building-work-consent-not-required-guidance.pdf> at page 15

- 5.10. I consider the application form submitted did include the proposed installation of insulation in an external wall despite the authority's submission. The authority has concentrated only on a description provided on Page 3 of the application form. Page 4 of the application form contains a description of the installation of the insulation. The provision of this description and an outline of how the work was to be carried out, and by whom, demonstrates it was intended to be included in the application. The insulation is also noted on both of the drawings provided with the application.
- 5.11. The authority refused the application and gave the following reason:
- As the proposal is to install new sanitary plumbing work, it is this [authority's] opinion that the discretionary exemption was not intended to cover this scope of work, therefore the decision has been made to decline the exemption application.
- 5.12. The authority also submits that the work proposed is not covered by the existing exemptions under Schedule 1 of the Act. I consider building work that met the requirements of any other clause of Schedule 1 would be exempt already and would not require a decision from the authority. This reasoning does not align with the tests in Schedule 1(2) as a reason for refusal.
- 5.13. If an authority refuses to grant a discretionary exemption, its particular reasons for doing so must relate to the facts of the application and the tests set out in Schedule 1(2). In this case, the authority did not provide reasons for refusal at the time which related to the tests in Schedule 1(2).
- 5.14. The decision could have included an assessment of the information presented and whether it was of appropriate quality and detail. This could have included an assessment of the relevant experience, track record, and qualifications of the designer, builder and plumber involved in the building work. It could have considered whether the work was of a regular or standard nature, or whether it was in some way unique or unusual. It could have considered the location and complexity of the works, and any specific risk of endangerment. These are examples of relevant considerations an authority could use to determine whether the completed building work will satisfy the schedule 1(2) test and are not exhaustive.
- 5.15. I note that an authority may wish to seek clarity from an applicant about whether a Schedule 1(2) exemption is being sought in reliance on Schedule 1(2)(a) or 1(2)(b) to help it make its assessment, if this is not already made clear through its application form. In this case, I note that the applicant has submitted as part of the determination process that the exemption was sought under both 1(2)(a) and 1(2)(b).
- 5.16. I consider as there is no other relevant information in the refusal, the authority has not provided a decision against the criteria set out in Schedule 1(2).

6. Conclusion

- 6.1. I consider the authority incorrectly refused the Schedule 1(2) application for the reasons given above and its decision should be reversed.
- 6.2. As I have reversed the decision by the authority, it will need to reconsider the application taking into account the findings of this determination, ask for any additional information it considers is required, and make a new decision.

7. Decision

- 7.1. In accordance with section 188 of the Building Act 2004, I determine that the authority was incorrect to refuse to grant an exemption under Schedule 1(2) for the reasons provided. I reverse the authority's decision, requiring it to make a new decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 22 December 2021.

Katie Gordon

National Manager, Building Resolution

Appendix A: Building Act 2004

40 Buildings not to be constructed, altered, demolished, or removed without consent

- (1) A person must not carry out any building work except in accordance with a building consent.
- (2) A person commits an offence if the person fails to comply with this section.
- (3) A person who commits an offence under this section is liable on conviction to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$10,000 for every day or part of a day during which the offence has continued

41 Building consent not required in certain cases

- (1) Despite [section 40](#), a building consent is not required in relation to—
 - (a) a Crown building or Crown building work to which, under [section 6](#), this Act does not apply; or
 - (b) any building work described in [Schedule 1](#) for which a building consent is not required (see [section 42A](#)).

42A Building work for which building consent is not required under Schedule 1

- (1) Despite section 40, subject to the conditions set out in subsection (2) and whether or not a building consent would otherwise have been required, a building consent is not required for building work in the following categories:
 - (a) building work described in Part 1 of Schedule 1; or
 - (b) building work described in Part 2 of Schedule 1 that is carried out by an authorised person (see subsection (3)); or
 - (c) building work described in Part 3 of Schedule 1 if the design of the building work has been carried out or reviewed by a chartered professional engineer and the building work has been carried out in accordance with that design.
- (2) Subsection (1) is subject to the following conditions:
 - (a) the building work complies with the building code to the extent required by this Act;
 - (b) after the building work is completed, the building,—
 - (i) if it complied with the building code immediately before the building work began, continues to comply with the building code; or
 - (ii) if it did not comply with the building code immediately before the building work began, continues to comply at least to the same extent as it did then comply;
 - (c) the building work does not breach any other enactment;
 - (d) the building to which the building work relates is not a hazardous substance location that is required to be authorised under the Health and Safety at Work Act 2015 or any regulations made under that Act.
- (3) In subsection (1)(b), authorised person means a person who is authorised under the Plumbers, Gasfitters, and Drainlayers Act 2006 to do the work, except for a person who is authorised under section 15, 16, 19, or 25 of that Act.

S177 Application for determination

- (1) A party may apply to the chief executive for a determination in relation to either or both of the following:
- (a) whether particular matters comply with the [building code](#);
 - (b) the exercise, failure or refusal to exercise, or proposed or purported exercise by an authority in subsection (2), (3), (4), or (4A) of a power of decision to which this paragraph applies by virtue of that subsection.
- (3) Subsection (1)(b) applies to any power of decision of a territorial authority in respect of, or under, all or any of the following:
- (c) an exemption from building consent requirements under [clause 2](#) of Schedule 1:

Schedule 1 Building work for which building consent not required**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.