



Determination 2012/038

The application of certain conditions to an exemption issued under paragraph (k) of Schedule 1 in respect of an effluent tank at 453 Hudsons Road, Greenpark, Christchurch

1. The matters to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the current 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 that Department.
- 1.2 The parties to the determination are:
- the applicants who are the owners of the property, B and J Geddes (“the applicants”) represented by an agent, Kliptank Limited
 - Selwyn District Council (“the authority”), carrying out its duties as a territorial authority and a building consent authority
- 1.3 Kliptank Limited is considered a person with an interest in this determination on the grounds of being the proprietary system provider and installer (“the tank provider”).
- 1.4 The dispute arises from the authority’s decision to issue an exemption under paragraph (k) of Schedule 1 of the Act for the installation of an effluent tank (“the tank”). The authority issued the exemption subject to certain conditions. The condition that is in dispute (“the condition”) is that ‘The building must be removed or demolished at or before the end of August 2021 (10 years being the specified intended life of the building)’.
- 1.5 I therefore consider the matter to be determined² is whether the authority correctly exercised its powers in issuing an exemption under paragraph (k) of Schedule 1 that was subject to the condition.
- 1.6 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.

¹ The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Department are all available at ww.dbh.govt.nz or by contacting the Department on 0800 242 243.

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

2. The building work and the background

- 2.1 The applicants purchased an above ground effluent storage tank from the tank provider. The tank is 2 metres high with a diameter of 19.86 metres, placed on a level surface with 100mm of beach type sand spread for the tank to sit on. The tank is constructed of 4.5mm high density polyethylene (“HDPE”) panels to the perimeter, with vertical HDPE mullions at 1200 centres located at the joints in the HDPE panels. Twelve 8mm diameter galvanised steel cables encircle the tank, with the cables run through the vertical HDPE mullions. The tank has a 400mm wide circular frame supporting the top edge, which is made of 50x25x3 RHS aluminium. The tank is lined with 0.75mm polythene sheet and the tank is filled to a depth of 1.5 metres.
- 2.2 On 24 June 2011 the applicants applied to the authority for an exemption under paragraph (k) of Schedule 1 to the requirement to obtain a building consent.
- 2.3 The authority granted an exemption to the requirement to obtain a building consent for the construction of the tank in a letter to the owners dated 3 August 2011. The letter stated:
- This exemption has been granted based on the following considerations:
1. The building must be removed or demolished at or before the end of August 2021 (10 years being the specified intended life of the building).
 2. That the work is constructed in accordance with the drawings submitted
 3. While the work has been exempted from the requirement to obtain building consent, all building work is still required to comply with the requirements of the [Building Code]. ...
- 2.4 The owners subsequently asked the authority to amend the exemption to 15 years, however, the authority was of the view that it was unable to alter the exemption or arrange a building consent, and that a determination was required to resolve the issue.
- 2.5 An application for a determination was received on 28 February 2012.

3. The submissions

- 3.1 In the submission accompanying the application, the tank provider described the background to the dispute, and requested that either the exemption be amended to change the condition from 10 to 15 years, or if that is not possible, the exemption be reversed so a building consent could be applied for. The application included the plans and specifications for the tank and the producer statements provided by the structural engineer for the design and construction review of the tank.
- 3.2 The Department sought further information on 2 March 2012 from the authority about the reasons for the application for determination.
- 3.3 The authority responded by email on 2 March 2012 and stated:
- The exemption was based on a producer statement design and an application from the owner for an intended life of 10 years. After it was built a request from the [tank provider] was received to extend this to 15 years as the owner was withholding some

payment. It should also be noted that the applicant's supporting documentation [in respect of the application for determination] is somewhat different to the documentation the [authority] has previously seen.

The [authority] is of the opinion that the exemption letter is equivalent to a building consent and code compliance certificate and therefore can only be rescinded by the [Department] (refer Determination 2009/6).

3.4 The authority made a submission dated 16 March 2012 in response to the application for determination, reiterating its previous position and submitting that:

- Section 177(3)(c) allows the Department to determine decisions relating to exemptions under paragraph (k) of Schedule 1
- the exemption was granted, based on supporting information provided in the application for the exemption which included a 10 year design life
- the supporting documents supplied with the determination application are different to the documents the authority used for granting the exemption
- the authority cannot now issue a building consent for work that has been exempt and is already built, nor can the owner apply for a certificate of acceptance as the exemption precluded the need for a building consent.

3.5 The tank provider made a further submission dated 16 March 2012, noting that a building consent was recently issued by the authority for a 15 year life for another tank to be constructed on a different property.

3.6 A draft determination was sent to the parties for comment on 30 March 2012.

3.7 The applicant accepted the draft determination without comment in a response that was received by the Department on 12 April 2012.

3.8 The authority did not accept the draft determination. In a response that was received by the Department on 2 May 2012 the authority submitted that:

- The exemption was not subject to any conditions, and that '... the chief executive [of the Department] has no power to direct what is, or is not, included in a letter between a territorial authority and a building owner.'
- The producer statement supplied with the application for determination is different to that applied with the exemption application.
- The recent consent referred to (see paragraph 3.5) had a condition relating to the specified intended life of the building and that 'it would seem incredulous that the documentation provided to an owner for two identical buildings, one with a building consent and one with an exemption, should not have similar wording regarding the specified intended life.'
- Section 216 of the Act requires the authority to make available any relevant information that informs its decision-making process and 'the exemption letter issued by the authority is the only logical place to record the specified intended life so that members of the public can participate effectively under the Act.'

3.9 I have considered these comments and taken them into account where appropriate.

- 3.10 With respect to the different producer statements refers to by the authority in paragraphs 3.4 and 3.8, three PS1s have been submitted to the Department; being two that were submitted to the authority dated 15 June 2011 and 19 July 2011, and one dated 15 February 2012 that was submitted as part of the application for determination. The statements contain similar details of the work covered by the statements but vary in respect of the foundation bearing pressure and the durability of the steel components.

4. Discussion

4.1 General

- 4.1.1 Paragraph (k) of Schedule 1 states:

A building consent is not required for the following building work:

(k) any other building work in respect of which the territorial authority (or, as the case requires, the regional authority) considers that a building consent is not necessary for the purposes of this Act because that building work—

(i) is unlikely to be carried out otherwise than in accordance with the building code; or

(ii) if carried out otherwise than in accordance with the building code, is unlikely to endanger people or any building, whether on the same land or on other property.

- 4.1.2 The exemption under paragraph (k) of Schedule 1 allows a territorial authority to exempt proposed building work from the requirement to obtain a building consent in the circumstances specified. Exemptions under Schedule 1 recognise that minor and low-risk building work should not be subject to the requirements of the building consent process. That is because such low-risk work presents little danger to people or property, and the compliance costs associated with consenting such work exceed the benefits obtained from the consent process.

- 4.1.3 The matter to be determined is whether the authority correctly issued the exemption under paragraph (k) of Schedule 1.

- 4.1.4 In order to determine this matter, I have considered:

- the specified intended life applied to the exemption
- the nature of the building work
- the decision to issue an exemption.

4.2 The specified intended life applied to the exemption

- 4.2.1 The authority imposed a specified intended life on the building, stating that the ‘building must be removed or demolished at or before the end of August 2021 (10 years being the specified intended life of the building).’

- 4.2.2 There are specific provisions for imposing a specified intended life of a building specifically through section 113 of the Act and those provisions can apply only in respect of the granting of a building consent. None of the provisions for imposing a specified intended life appear in Schedule 1.

- 4.2.3 I note that the authority is of the view that the exemption was not subject to any ‘conditions’ as the letter granting the exemption uses the term “considerations” to refer to the basis on which the exemption was granted. I am of the view that regardless of whether the term “considerations” or “conditions” is used the effect is the same, as the exemption was granted subject to a certain requirements.
- 4.2.4 The authority has purported to impose a specified intended life on a building using a process for exempting a building from the requirement for a building consent. I do not believe this is the correct approach, and accordingly, I am of the view that an authority has no power to impose a condition or requirement in this way.

4.3 The nature of the building work

- 4.3.1 The tank provider submitted information that covers the performance of the components and materials, including a Producer Statement PS1 - Design that cites compliance with NZS 1170, and covers the structural steel components, steel cables and aluminium components. The manufacturer of the HDPE components has provided information about the material and test results on material samples from an independent testing laboratory.
- 4.3.2 The materials used in the construction of the tank are commonly available with known performance in use and proven durability. The tank is constructed in such a way that enables the structural components of the tank be readily observed and maintained, and in the worse case, enable the tank to be disassembled and individual components replaced.

4.4 The decision to issue the exemption

- 4.4.1 The test under paragraph (k) of Schedule 1 requires that the building work ‘is unlikely to be carried out otherwise in accordance with the building code’ or ‘if carried out otherwise in accordance with the building code, is unlikely to endanger people or any building, whether on the same land or on other property’.
- 4.4.2 The Department’s Guidance document ‘Building work that does not require a building consent’ (Second edition December 2010) suggests the following matters be taken into account:
- any substantial prior demonstration of competence in undertaking similar work by the people who will carry out the work ...
 - the complexity of the work relative to the competence of the people who will carry out the work ...
 - any independent quality assurance systems or other checks and balances that will be applied in the course of the work
 - the location of the building work (e.g. high density urban versus remote rural)
 - the proximity of the building work to the property boundary and/or other buildings.

4.4.3 The guidance also refers to the Australian/New Zealand Standard AS/NZS 1170: Structural Design Actions – Part 0: 2002 ‘General Principles’ (“NZS 1170”) as follows:

[NZS 1170] provides for five different levels of building ‘importance’, with level 1 being the least important and level 2 being regarded as a ‘normal’ level of importance. ... [NZS 1170] indicates that level 1 buildings present a ‘much lower than normal risk to life and property’ (i.e. failure is not likely to endanger human life and there would only be small or moderate economic, social or environmental consequences). The Standard also notes that such buildings will usually be ‘almost expendable’, minor, isolated, non-habitable, and not required as part of normal utility infrastructure (e.g. not having reticulated potable water and wastewater services).

4.4.4 Taking account of the matters described in paragraphs 4.4.2 and 4.4.3, I note:

- the tank is constructed by a specialist company, with expertise in the installation of these tanks
- the design is supported by a producer statement by a structural engineer, and construction monitoring has been carried out by the engineer in terms of the relevant requirements of verification methods B1/VM1 and B1/VM4
- although the tank is in reasonably close proximity of other farm buildings on the property, the tank is more than 50 metres from the boundary and the tank is located in a remote rural area surrounded by farmland
- using the framework set out in NZS 1170, the tank is an importance level 1 building.

4.5 Conclusions

4.5.1 I am therefore of the view that the building work is unlikely to be carried out otherwise than in accordance with the performance requirements of the Building Code.

4.5.2 I also note that because of its location, the nature of the construction, and the type of building, if the building work is carried out otherwise than in accordance with the Building Code, it is unlikely to endanger people or any building, whether on the same land or on other property.

4.5.3 Therefore, I am of the view that the authority made the correct decision to issue an exemption under paragraph (k) of Schedule 1. However, for the reasons described in paragraph 4.2, the exemption cannot be issued with conditions.

5. Decision

- 5.1 In accordance with section 188 of the Act, I hereby determine that the authority incorrectly exercised its powers in issuing an exemption under paragraph (k) of Schedule 1 that included conditions.
- 5.2 I therefore determine that the authority's decision to issue the exemption is modified to remove the conditions from the exemption.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 21 May 2012.

John Gardiner
Manager Determinations