



## Determination 2013/058

# Regarding the authority's exercise of its powers of decision in respect a notice to fix issued for work done under Schedule 1(a) at 25 Rata Street, Riccarton, Christchurch

### 1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, 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:

- Fletcher Construction – Earthquake Recovery the Project Management Office established by the Earthquake Commission (EQC), is the applicant (“the PMO”). The PMO is represented by a Chartered Professional Engineer who is a party to the determination because he is deemed to be an LPB under the Act<sup>2</sup>.
- Christchurch City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority
- the owners of the property, R and H Broughton (“the owners”).

1.3 The matter to be determined<sup>3</sup> is whether the authority correctly exercised its powers of decision when it issued a notice to fix for contravention of section 40 of the Act. In making this decision I must consider whether the building work is exempt from the need for a building consent under Schedule 1(a) of the Act.

1.4 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.

1.5 The relevant sections of the Act, the compliance document, and the Ministry’s Guidance information are set out Appendix A.

### 2. The building work

2.1 The building work consists of repairs to the foundations of an existing two-storey house that was damaged in the 2010 and 2011 Canterbury earthquakes. The building is timber framed and founded on timber piles and subfloor framing.

<sup>1</sup> The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Ministry are all available at [www.dbh.govt.nz](http://www.dbh.govt.nz) or by contacting the Ministry on 0800 242 243.

<sup>2</sup> Chartered Professional Engineers under the Chartered Professional Engineers of New Zealand Act 2002 are treated as if they were licensed in the building work licensing class Design 3 under the Building (Designation of Building Work Licensing Classes) Order 2010.

<sup>3</sup> Under sections 177(1)(b) and 177(2)(f)

- 2.2 The PMO has described the building work as ‘the removal of one pile and the installation of 9 new piles within the sub-floor area of the lounge and living rooms’. The ‘new piles were installed to reduce the "squeaking" of the floors and to allow the piles to be fixed to the bearer. The existing piles had no fixings between piles and bearers.’
- 2.3 Eight of the piles are located adjacent to existing piles under what is assumed to be load bearing walls either side of a hallway; one pile replaced an existing pile located approximately 1.0m from an external wall.

### 3. The background

- 3.1 As a result of significant earthquake activity, a ‘damage assessment’ was carried out on the house by the Earthquake Commission (“EQC”) on 27 August 2011 which identified:
- ... a 45mm dip over 4.2m from West to East in the centre of the Lounge and there is also a 40mm fall over 6.5m from North to South accross (*sic*) the Lounge and Hallway which continues on through the Living room.
- 3.2 The PMO has submitted that the physical works were then ‘scoped by the contractor and [the PMO]’ on 18 July 2012, and the works commenced on 29 October 2012.
- 3.3 A file note from the owner included with the application described the nature of the damage to the floor and foundations, the various investigations undertaken, and the repair work that was completed. The owner’s file note states that the authority carried out an inspection; however, I have seen no record of the inspection.
- 3.4 The authority wrote to the owner on 2 April 2013 stating that ‘piling repair or rebuild works’ required either a ‘building exemption’ applied for by the owner or a ‘building consent application’. If neither document was held by the owner, then the owner was advised to seek a certificate of acceptance. Repair or replacement work ‘of up to 20% of the foundation piles in a single storey residential building ... can be considered exempt work under Schedule 1(k) as predetermined by [the authority]’. The letter said a building consent was required for work that was in excess of this.
- 3.5 It appears that views between the parties differed as to whether consent for the building work was necessary. The PMO agreed, with some reluctance, to apply for a certificate of acceptance on 3 May 2012 ‘as a courtesy to resolve the impasse’, and the authority subsequently requested further information that required additional design work and which the PMO considered was unnecessary. The information sought included:
- engineers inspection/damage report
  - information to determine the ‘footing design’
  - ‘a statement from the engineer to cover the design’
- 3.6 The PMO withdrew the application for a certificate of acceptance on the grounds that the building work carried out was exempt under Schedule 1(a) of the Act.
- 3.7 The authority subsequently issued a notice to fix dated 2 May 2013 to the owners. The notice to fix stated the particulars of contravention or non-compliance as:
- Breach of section 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.

Breach of section 17 – All building work must comply with the building code.

All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

The notice set out the remedies as:

Remove illegal building work, or apply for and have granted a certificate of acceptance.

3.8 The Ministry received an application for a determination on 27 May 2013.

## **4. The submissions and the draft determinations**

### **4.1 The initial submissions**

4.1.1 The PMO provided a submission dated 22 May 2013, which said (in summary) that:

- the new piles (other than one replacing a rotated pile) were not required for the building to meet the Building Code ‘to at least the level it did prior to the works’, and that rather than the ‘normal’ repair option of packing the bearers on top of existing piles, the new piles were installed to reduce squeaking of the floors and to allow the piles to be fixed to the bearer
- only one pile was being replaced, and additional piles augment the existing system but do not materially change it; there was no requirement to install these additional piles as the existing ones could have been packed to provide the support to the bearers
- the building work is exempt building work under Schedule 1(a) of the Act, it is the owner who determines whether building consent is or is not required. (The PMO noted that under the Earthquake Commission Act the ‘claimant’ subrogates their rights to EQC to apply for or deem exempt from the need for consent (refer Appendix A.3))
- EQC’s responsibility under the Earthquake Commission Act is to repair damage caused by events covered under that Act, and this does not include the upgrading of buildings to new building standards
- in respect of section 112 of the Act, ‘a repair that meets or exceeds the provisions of the Building Code that applied at the time the original work was constructed must comply with the Building Code to at least the extent required by the Building Act’
- the work carried out exceeds the load carrying capacity that existed prior to the work and therefore complies with the Building Code as required under the Act.

4.1.2 The supporting documentation provided with the application included:

- a drawing dated 26 April 2013 showing the locations of new piles and replacement pile
- photographs dated 11 April 2013 showing some of the existing piles

- a file note dated 19 May 2012 from one of the owners, describing the work carried out.

## **4.2 The first draft determination**

4.2.1 The first draft determination was issued to the parties for comment on 17 June 2013.

4.2.2 The authority responded to the draft in a letter dated 24 June 2013 noting:

- The authority did not agree that the building work ‘clearly’ fell within the exemption provided for under Schedule 1(a) and that ‘[w]hile the replacement of 1 pile comes within that exemption the [authority] considers the installation of the other new piles is new building work. It therefore would have required a consent, or an application for an exemption under Schedule 1 (k).’
- A Schedule 1(k) exemption cannot be granted retrospectively. It considered it would have granted a 1(k) exemption had one been sought: the authority asked that the determination confirm this position.
- A certificate of acceptance was appropriate, and the notice to fix was issued when the application for a certificate of acceptance was withdrawn by the PMO.
- The installation of the piles was new building work that required a consent, whereas if the existing piles had been ‘packed’ this would have been considered a repair that would have come within Schedule 1(a).

4.2.3 The PMO responded to the draft in a letter dated 28 June 2013. The PMO accepted the draft determination, noting:

- The authority inspected the building work prior to replacing the flooring but had not provided any documentation that indicates the building work is not compliant.
- The information the authority requested (refer paragraph 3.4) was unable to be provided retrospectively. There was also no specific design or inspections carried out by a chartered professional engineer, or someone under their supervision.

4.2.4 The owner responded in an email dated 28 July 2013. The owner expressed concern about

- whether the house was compliant with the Building Code, and whether the work was covered by insurance in a future event
- whether a building consent was required or not, as the authority had advised that one was.

4.2.5 The owner advised that the authority had inspected the work, and expressed surprise that the application for a certificate of acceptance had been withdrawn by the PMO. The owner provided a copy of the application for the certificate of acceptance, and related correspondence.

- 4.2.6 In a letter dated 31 July 2013, in response to the owner's submission, the PMO advised that
- it stood by its view that the work was compliant 'whether or not a building consent is granted'
  - the Schedule 1(k) exemption was 'not warranted' as the work fell under Schedule 1(a) and an application for a 1(k) exemption 'added no value'.

The PMO reiterated its acceptance of the draft determination.

- 4.2.7 In further emails, dated 1 and 4 August, the owner advised that if the determination confirmed that a building consent was not required then the owner would accept the findings in the determination.

### **4.3 The second draft determination**

- 4.3.1 The first draft determination was amended to take account of the party's submissions and a second draft determination was issued for comment on 15 August 2013.
- 4.3.2 The owners and the PMO accepted the second draft determination without further comment in emails on 2 September and 16 September 2013 respectively.
- 4.3.3 The authority responded in an email on 16 September 2013, noting its concerns about the approach to assessing building work for exemption under Schedule 1(k), (refer paragraphs 5.3.1 and 5.3.2), and that this would preclude the authority from making decisions on exemptions in a way that it has over several years. The authority described what it termed 'generic exemptions' and 'blanket exemptions' as follows:

An example of a generic exemption is the construction, installation, alteration, replacement, or removal of any dish antennae attached to a building, where

- i. the dish diameter does not exceed 2.5 meters, and
- ii. the dish is mesh (not solid), and

When making this specific generic decision we considered the risk in comparison with work that was already exempt in Schedule 1.

We have also given blanket exemptions to individual organisations for specified work where they have appropriate people carrying out the work, and/or quality systems in place.

- 4.3.4 The authority went on to state in making a decision about generic and blanket exemptions it considers
- the nature of the work
  - the personnel undertaking it
  - the likelihood of it not being completed in accordance with the Building Code
  - the consequences of the work not being carried out in accordance with the Building Code in some cases, and
  - the level of risk that is shown to be 'acceptable' in other Schedule 1 clauses.

## 5. Discussion

### 5.1 General

5.1.1 The matter to be determined under section 177 of the Act is the authority's exercise of its powers in respect of the issue of the notice to fix. The notice to fix was issued as the authority was of the view that, in contravention of section 40 of the Act, building work had been carried that required consent. The PMO is of the view that the building work is exempt under Schedule 1(a) of the Act, and accordingly the notice was incorrectly issued.

### 5.2 Is the work exempt from the need for a building consent under Schedule 1(a)?

5.2.1 Section 41(1)(b) of the 2004 Act states that a building consent is not required for any building work described in Schedule 1. The matter in dispute concerns the interpretation of paragraph (a) of Schedule 1, which states that consent is not required in respect of:

- (a) any lawful repair and maintenance using comparable materials, or replacement with a comparable component or assembly in the same position, of any component or assembly incorporated or associated with a building, including all lawful repair and maintenance of that nature that is carried out in accordance with the Plumbers, Gasfitters, and Drainlayers Act 2006, except—
  - (i) ...
  - (ii) complete or substantial replacement of any component or assembly contributing to the building's structural behaviour or fire-safety properties; or
  - (iii) ...

5.2.2 Schedule 1(a)(ii) specifically excludes the complete or substantial replacement of any component or assembly contributing to the building's structural behaviour or fire safety properties. In this case only one pile has been removed and replaced; the remaining new piles are in addition to existing piles.

5.2.3 The authority contends that the installation of the additional piles is 'new building work' and cannot therefore be exempt under Schedule 1(a). I note that Schedule 1(a) is set out in terms of repair and maintenance with comparable materials or replacement with comparable components or assemblies; it does not specifically exclude the use of a new building element in undertaking repairs.

5.2.4 I do not agree that repair or maintenance will necessarily be so limited and not include new 'building work', as the definition of 'building work' in s 7 of the Act specifically includes 'repair'. See the definition of 'building work' in s 7 that includes 'work for, or in connection with the alteration of a building' and 'alter' (also defined in s 7) includes 'to repair, enlarge, and extend a building'. If something can be repaired without carrying out building work then a building consent will not be required. Maintenance, repair, and replacement of components and assemblies are included in Schedule 1 because while they usually involve building work there are some types of maintenance, repair and replacement that it is considered should be exempt from the requirement for a building consent. For this reason I do not accept the authority's view that a repair in this case is limited to the 'packing' of the existing piles and excludes new 'building work' such as the installation of a pile.

- 5.2.5 In my view the foundation system, of which the piles are one component, is a building assembly that provides support to the structure, and accordingly I consider the additional piles that sit adjacent the existing piles constitute the ‘repair and maintenance’ of the foundation assembly for the purposes of Schedule 1(a).
- 5.2.6 I am of the view that the work to the pile foundations does not constitute a substantial replacement for the purposes of paragraph 1(a)(ii). In my view the piling work was exempt under Schedule 1(a) of the Act and building consent was not required. Therefore the authority was incorrect in the exercise of its powers of decision in issuing a notice to fix in respect of a contravention of section 40 of the Act.

### **5.3 Exemption under Schedule 1(k)**

- 5.3.1 The authority’s letter dated 2 April 2013 (refer paragraph 3.4) set out its general view of the repair work to the house including the basis on which a schedule 1(k) exemption would be granted. The advice to the owner was in the form of statement of policy and was not based on any specific information about the proposed work to this particular property.
- 5.3.2 In my view work that may be exempt under Schedule 1(k) cannot be prejudged in such a manner. 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: such an assessment is discussed in greater detail in Determination 2013/008<sup>4</sup>.
- 5.3.3 The authority advises that it would have considered issuing an exemption under Schedule 1(k) had this been sought, and asks that the determination confirm this position. While this is a matter I can decide under section 177(3)(c), no Schedule 1(k) exemption has been sought or refused in this case. However, if an appropriately documented application for a Schedule 1(k) exemption had been made by the PMO, the authority would be within its powers to grant such an exemption.
- 5.3.4 The authority has advised that it has a policy that provides for exemptions to be predetermined as either ‘generic exemptions’ or under a ‘blanket exemption’ (refer paragraph 4.3.3). It is my view that such a policy can assist the efficiency of the authority’s decision-making process and can provide the decision maker with guidance as to the building work the authority considers is exempt.
- 5.3.5 However, each application for an exemption under Schedule 1(k) must still be considered on a case-by-case basis: each application still requires an individual assessment of the proposed work to establish whether it fits within the parameters the authority has set out in its policy, whether the work should still be exempt even though it falls outside the authority’s guidelines (as the scope of the exemption power under Schedule 1(k) is quite broad), and whether any particular features of the property or its location make it unsuitable for an exemption. The authority’s submission outlined the matters it takes into account when it considers granting such an exemption (refer paragraph 4.3.4). As long as the authority does not allow its policy to be the determinant of whether building work is exempt or not, considers the particular circumstances relating to each application for an exemption alongside its policy, and considers the application of Schedule 1(k) even where the work falls

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<sup>4</sup> Determination 2013/008: Regarding the refusal to issue an exemption under Schedule 1(k) for a proposed farm implement shed

outside its guidelines, I am of the view that there is nothing inappropriate in the use of such a policy by the authority.

#### **5.4 Section 112**

- 5.4.1 The PMO contends that in respect of section 112 of the Act, ‘a repair that meets or exceeds the provisions of the Building Code that applied at the time the original work was constructed must comply with the Building Code to at least the extent required by the Building Act’.
- 5.4.2 Section 112 prevents a building consent authority from granting a building consent unless a building will satisfy the standards set out in s 112(a) and (b) after the building work has been carried out. Section 112 has no application where a building consent is not required, such as when building work is exempt under Schedule 1 of the Act
- 5.4.3 In this case as I have found that the building work is exempt under Schedule 1(a), section 112 does not apply as no building consent is required.

#### **5.5 The remedies in the notice to fix**

- 5.5.1 The remedies required in the notice to fix included ‘Remove illegal building work, or apply for a certificate of acceptance’. My view of this has been discussed in previous determinations, in particular Determination 2000/1<sup>5</sup>. I consider that the removal of building work which is neither dangerous nor insanitary is unreasonable in this case, and should only be sought if there are compelling reasons to do so.
- 5.5.2 The appropriate remedy was for the owners ‘to apply for and have granted a certificate of acceptance’ for the completed building work. Such an application is to stand or fall on its own merits. It was not reasonable for the notice to fix to require that the application for the certificate of acceptance to be successful.

#### **5.6 Conclusions**

- 5.6.1 I consider the work amounted to repairs and maintenance of the existing pile foundations to the house, and as such falls within the work described in Schedule 1(a) of the Act. Accordingly, no building consent was required to be sought in order to undertake the work.
- 5.6.2 The repair work to the piles has been completed under the supervision of the PMO who has submitted documented evidence of the completed work. The authority has inspected the work and not raised any specific matter of non-compliance in relation to the completed work. There are reasonable grounds to conclude that the repair work satisfies the requirements of the Building Code.
- 5.6.3 The authority was within its powers to grant an exemption for the work under Schedule 1(k) had such an exemption been sought.

### **6. The decision**

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority incorrectly exercised its powers of decision in issuing the notice to fix in

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<sup>5</sup> Determination 2000/001: Notice to rectify work done without building consent



relation to contravention of section 40 of the Act, and accordingly I reverse the authority's decision to issue the notice.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 23 September 2013.

John Gardiner  
**Manager Determinations and Assurance**

## Appendix A

A1 The relevant provisions of the Building Act are:

### **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 to a fine not exceeding \$100,000 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—
  - ...
  - (b) any building work described in Schedule 1; or

### **164 Issue of notice to fix**

- (1) This section applies if a responsible authority considers on reasonable grounds that—
  - (a) a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent); or
  - ...
- (2) A responsible authority must issue to the specified person concerned a notice (a notice to fix) requiring the person—
  - (a) to remedy the contravention of, or to comply with, this Act or the regulations; or
  - ...

### **Schedule 1 Exempt building work**

- 1 A building consent is not required for the following building work:
  - (a) any lawful repair and maintenance using comparable materials, or replacement with a comparable component or assembly in the same position, of any component or assembly incorporated or associated with a building, including all lawful repair and maintenance of that nature that is carried out in accordance with the Plumbers, Gasfitters, and Drainlayers Act 2006, except—
    - ...
    - (ii) complete or substantial replacement of any component or assembly contributing to the building's structural behaviour or fire-safety properties; or
    - ...

A2 The relevant guidance information and previous determinations issued by the Ministry

### **Guide for building work that does not require a consent**

(published by the then Department of Building and Housing, December 2010)

#### *Schedule 1 – Exempt building work*

...

The primary purpose of Schedule 1 is to exempt building work that is minor and low-risk in nature and where the benefits of requiring a building consent do not exceed associated compliance costs. Work exempt under Schedule 1 is generally building work that will not

significantly affect public safety or the structural integrity or fire safety components of the building.

*Repairs, maintenance and replacement guidance*

This exemption enables building owners to repair and maintain their buildings without having to get a building consent, provided they use comparable materials, components or assemblies in the same position.

Additional guidance is available about this exemption in the Ministry's past Codewords publications.<sup>6</sup>

There have also been a number of determinations that discuss the use of comparable materials.<sup>7</sup>

EXAMPLES WHERE THIS EXEMPTION COULD APPLY	EXAMPLES WHERE THE WORK IS NOT EXEMPT AND A BUILDING CONSENT IS REQUIRED
<ul style="list-style-type: none"> <li>Replacing 30-year old corrugated iron roof cladding, where that cladding has achieved its Building Code durability requirement (lasted more than 15 years) and the replacement cladding is a <i>comparable material</i>.</li> <li>Replacing a few (but not all) old rotten wooden piles under a house with new treated timber piles in the same positions.</li> <li>Replacing a low pressure, open-vented electric hot <i>water storage heater</i>, not connected to a wetback, with another</li> </ul>	<ul style="list-style-type: none"> <li>Replacing exterior wall cladding that has failed within 15 years of the cladding being installed, resulting in damage to the wall framing.</li> <li>Rebuilding a room in a house that has been substantially damaged by fire. Although the building may have met its durability requirements, the proposed building work would involve complete and substantial replacement of structural components, so a building consent is required.</li> </ul>

A3 The relevant section of the Earthquake Commission Act referred to in this determination:

**Earthquake Commission Act 1993**

**Schedule 3: Conditions applying to insurance under this Act**

11 Subrogation of rights

The insured person shall at the expense of the Commission, and whether before or after the Commission settles any claim under this Act, do and permit to be done all such acts and things as may be necessary or reasonably required by the Commission for the purpose of enforcing any rights and remedies, or of obtaining any relief or indemnity from other persons, to which the Commission is or would upon its settling any such claim be entitled or subrogated.

<sup>6</sup> For example, refer to Codewords publications issue 17 from January 2007, issue 27 April 2008, issue 30 August 2008 and issue 34 from August 2008 (the latter was specific to roofing re-claddings). Both are available at [www.dbh.govt.nz/codewords-index](http://www.dbh.govt.nz/codewords-index)

<sup>7</sup> See determination 2006/116 and 2008/62 available online at [www.dbh.govt.nz/determinations](http://www.dbh.govt.nz/determinations)