



Determination 2015/021

Regarding the refusal to grant an exemption under Schedule 1(2) for plumbing and drainage work at 91A Hamilton Road, Hataitai, Wellington

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, 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:

- the owners of the property, R and A London (“the applicants”)
- Wellington City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

1.3 This determination arises from a dispute between the parties as to whether building work to install sanitary plumbing requires building consent or is exempt under Schedule 1(2).

1.4 The matter to be determined² is therefore whether the authority correctly exercised its powers in refusing to grant an exemption under Schedule 1(2) for installation of sanitary plumbing. In making this decision I have considered whether the proposed building work can be considered exempt under Schedule 1(2).

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

2. The building work

2.1 The proposed building work consists of alterations to the second floor of an existing building to form an ensuite, and the installation of associated sanitary plumbing.

2.2 The building work to the ensuite is proposed to include:

- construction of new internal walls
- additional plywood lining to a section of wall of an attic room adjacent the new ensuite
- installation of: a new toilet with in-wall cistern, a proprietary acrylic lined shower and base, a sink, and associated cabinetry and shelving

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 sections 177(1)(b) and 177(3)(c) of the Act. Schedule 1 was amended on 28 November 2013; however 177(3)(c) was not amended and continues to refer to Schedule 1(k).

- a new sink in the master bedroom
- installation of a 100mm diameter ventilated branch drain to an existing vertical stack, plus connection to the above sanitary fixtures
- installation of hot and cold water services to the above sanitary fixtures.

3. Background

- 3.1 On 20 October 2014 the applicants lodged a request with the authority for an exemption under Schedule 1(2) for the plumbing work. A form for ‘minor works application for a building consent – plumbing/drainage work with a value of less than \$5,000’ was completed as a means of lodging the application for exemption. The applicants provided the authority with drawings detailing the proposed building work.
- 3.2 On 22 October 2014, the authority wrote to the applicants stating that if they wished to pursue the exemption the authority would require
- Certification from a suitably qualified person (ie registered plumber). This should demonstrate that the proposed works are either; likely to comply with the Building Code or if not are unlikely to endanger people or any building on the same land or other property.
- 3.3 The applicants subsequently provided a letter to the authority from a certifying plumber, drainlayer (“the registered plumber”), dated 30 October 2014, to support the application for exemption. The letter stated that the registered plumber had reviewed the drawings and that in his opinion the design would meet the requirements of the Building Code.
- 3.4 On 4 November 2014, the authority wrote to the applicants stating that the application for an exemption was refused. The authority noted that it had ‘benchmarked’ the proposal against the relevant Building Consent Authority work instruction which defines three types of building work where ‘a building consent will add little or no value to the process’. The three types of building work defined in the work instruction were described as:
- Long term structures, either low risk simple buildings such as bus shelters or more complex structures such as motorway bridges. ...
 - Short term structures. Generally building[s] with a short life. Temporary grandstands, inflatable screens, marquees etc. ...
 - Permanent simple alterations where compliance [as nearly as reasonably practicable] has recently been demonstrated. Where there are no changes to the safety of the buildings users ...
- 3.5 The authority also noted that its assessment under the work instruction did not consider the likelihood of compliance based on assessment of plans etc. but rather only from the input, ongoing supervision and certification of a suitably qualified and experienced person.
- 3.6 In regards to the proposed work the authority considered that it did not fit within the scope of the work instruction, and that the authority had concerns that it would create a precedent that the authority was not willing to set. The authority also noted that:
- the building work was to be carried out by one of the applicants (referred to herein as “the applicant”), who was neither qualified nor experienced in the field of plumbing; and
 - the building work was to be carried out without any ongoing supervision and certification from a suitably qualified person.

3.7 The Ministry received an application for determination on 18 December 2014.

4. Submissions

4.1 The applicants made a submission in the form of a letter to the Ministry dated 18 December 2014 requesting a determination in regards to ‘the appropriateness of the [authority’s] decision, and to what extent the legislation allows a Territorial Authority to consider a building consent is not required.’

4.2 The applicants hold the view that the building work is ‘of a simple nature’ and suitable for an exemption under Schedule 1(2). The submission set out the background to the dispute and outlined the ‘practical and theoretical knowledge’ of the applicant proposing to carry out the building work as follows:

- Construction degrees in Building Science and Architecture.
- Designed and built fountains and garden water features out of copper, polybutylene and PVC.
- As an architect designed residential plumbing installations.
- Three years in the UK as a building control officer inspecting plumbing and drainage.
- Six years working for the authority as a building control officer, including approving and inspecting plumbing and drainage installations on behalf of the authority.

4.3 The applicant proposing to carry out the building work considers the scope of work to be ‘within the reasonable scope of which [the applicant], or [their] chosen contractor, would be able to install such that when completed the works would likely meet the requirements of the Building Code’.

4.4 The application included the completed application form for exemption (as described in paragraph 3.1), the letter from the registered plumber, and correspondence from the authority.

4.5 The authority acknowledged the determination application on 16 January 2015 and requested a hearing be held to discuss the determination. The authority considered a hearing would be a better forum than providing a written submission in this case.

4.6 A draft determination was issued to the parties for comment on 2 March 2015.

4.7 The authority responded on 16 March 2015, accepting the draft without further comment.

4.8 The applicants responded on 16 March 2015 and did not accept the conclusion in the draft determination. The applicants provided photographs of previous non-potable plumbing installations (garden water features) as evidence of prior experience and submitted the following (in summary):

- The applicants consider the conclusion turned on contemplation of Schedule 1(35) as a means of comparison for exemption under Schedule 1(2); however, Schedule 1(2) test is unique in terms of likelihood of compliance.

- The likeliness test criteria should be that of ‘more likely than not’³ and can be compared to the authority’s test of ‘reasonable grounds’ when considering compliance of proposed building work before issuing a building consent.
- ‘Requiring the home owner to be competent or have a qualification’ is unlawful, as the home owner is permitted to carry out such works as an authorised person.
- Inspection competence carries ‘a higher value of likeliness’ as it is used to establish reasonable grounds to satisfy the test in section 94 before a code compliance certificate is issued.
- The reasonable grounds test is more onerous than the likeliness test.

4.9 The applicants went on to state:

Given the simple scope of the installation required, my relevant inspection experience and known employment history with [the authority], the [authority] could reasonably expect, as it has in the past, that the completed building work inspected by me, would ‘likely’ (more likely than not) when complete be compliant with the building code.

4.10 The applicants maintain the view that the authority would add little value in this instance as the design has been accepted in the draft determination as being compliant and because the applicant already has competence in inspecting such work. The applicants went on to set out factors they consider the authority should have taken into consideration in its decision, and noted that in their view the authority did not have an open mind to its full discretionary powers and in making its decision was concerned about precedent.

4.11 The applicants also noted that to allow council inspectors to inspect their own work carried out under a building consent would easily be perceived as a conflict of interest, but that ‘where the inspector is also the owner ... this is lawfully consistent with the ordinary provisions afforded to the owner’ under this exemption.

5. Discussion

5.1 General

5.1.1 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’.

5.1.2 The applicants have applied for an exemption under Part 1 which lists exempt building work that any person can carry out. Schedule 1(2) is a discretionary section for the authority to determine whether to exempt proposed building work from the requirement to obtain a building consent in the circumstances specified. The section 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

³ See *Commerce Commission v Carter Holt Harvey Ltd*, Supreme Court (NZ) 27/11/2009 [SC25/2009]

- (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.

5.1.3 The Ministry has published a guidance document on exempt building work (“the guide”)⁴. The guide states:

The purpose of Schedule 1 ... is to exempt building work that is low-risk from requiring a building consent, because the costs associated with obtaining a consent are likely to outweigh any benefits that requiring a building consent may offer.

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.

5.1.4 In regards to Schedule 1(2), the guide notes that exemptions under this clause can be applied across a wide range of building work, from low-risk, repetitive type work such as proprietary garages and bus shelters, through to complex engineered projects where the construction will be designed and supervised by chartered professional engineers. The guide provides examples of the more complex projects and goes on to state:

In these cases, the work is likely to comply, because skilled professionals are doing or supervising the work, and furthermore, council’s processing and inspecting procedures would add little value to the overall process.

5.1.5 As noted in Determination 2013/008⁵ the tests in Schedule 1(2)(a) and (b) are separate tests and will often apply in quite different circumstances. In this case the applicants’ submission supporting the determination application indicates the exemption is being sought under (2)(a).

5.1.6 I note that building work must also comply with other relevant legislation, and in this instance that would include the *Plumbers, Gasfitters, and Drainlayers Act 2006*.

5.2 The authority’s refusal

5.2.1 In its letter of 4 November 2014, the authority stated that the proposed work did not fit within the scope of the work set out in the authority’s work instruction and that the authority was concerned that it would create a precedent should it grant an exemption in this case (refer paragraphs 3.4 to 3.6).

5.2.2 There are no exclusions in Schedule 1(2) that would preclude the authority from granting an exemption for the proposed building work. Schedule 1(2) is a discretionary section for the authority to determine whether to exempt proposed building work from the requirement to obtain a building consent in the circumstances specified. There are no exclusions in Schedule 1(2) in terms of the scope of work that can be carried out, or that are additional to those set out in the Act in terms of the person who can undertake the work.

5.2.3 Although the authority’s work instruction may assist the authority in the efficiency of its decision making process, each application for an exemption under Schedule 1(2) must still be considered on a case-by-case basis.⁶

5.2.4 In a previous determination⁷ I discussed the range of building work for which an authority may exercise its discretion under Schedule 1. In that determination I said

⁴ Building work that does not require a building consent (third edition, December 2014)

⁵ Determination 2013/008: Regarding the refusal to issue an exemption under Schedule 1(k) for a proposed farm implement shed

⁶ See also 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) (*Ministry of Business, Innovation and Employment*) 23 September 2013.

⁷ Determination 2013/008 Regarding the refusal to issue an exemption under Schedule 1(k) for a proposed farm implement shed (*Ministry of Business, Innovation and Employment*) 2 April 2013.

(at paragraph 4.2.6):

A Schedule 1(k)(i)⁸ exemption may be considered for a range of building work, from simple to complex and from minor to major. There may be cases where an authority considers its involvement in the process for complex or major building work may not be necessary to ensure compliance with the Building Code because of the competence of the people carrying out the work and the quality assurance processes in place, both at design and construction stage. The applicant for an exemption may have a good track record of carrying out similar exempt work in compliance with the building code.

5.2.5 I do not consider the authority's decision to refuse the exemption because of the precedent it might set is, of itself, a valid reason for making such a decision. I reiterate that applications for an exemption under Schedule 1(2) must be considered on a case-by-case basis, with each application requiring an individual assessment of the proposed work and the likelihood of compliance. I have discussed the assessment undertaken by the authority in paragraph 5.3 below.

5.2.6 I consider the authority's reasons relating to the scope of the work and any possible perception of precedence are not grounds for refusing to grant an exemption under Schedule 1(2).

5.3 Assessment in relation to compliance

5.3.1 In its letter of 4 November 2014 (refer paragraph 3.6), the authority noted that the applicant proposing to carry out the building work is 'neither qualified nor experienced in the field of plumbing' and proposes to carry out the work 'without any ongoing supervision and certificate from a suitably qualified person'. The authority concluded that it was unable to establish grounds as to the likelihood of compliance and was not willing to grant an exemption on that basis.

5.3.2 In order for an exemption to be granted under Schedule 1(2)(a) an authority must consider whether the completed building work is likely to comply with the Building Code. The guide suggests that the authority take a number of factors into account when determining the likelihood of compliance when a Schedule 1(2) exemption is being sought, including:

- any substantial previous demonstration of competence in carrying out similar work by the people who will carry out this work (eg a history of previous building work in the council's district)
- the complexity of the building work relative to the competence of the people who will carry it out, and
- any independent quality assurance systems or checks that will be applied in the course of the work.

5.3.3 I have evaluated the likelihood of compliance in terms of each of those factors in the paragraphs below.

Substantial previous demonstration of competence in carrying out similar work by the people who will carry out this work

5.3.4 An exemption granted under Schedule 1(2) for an alteration that included an increase of the total number of sanitary fixtures in the building may appear to be in conflict with Schedule 1(35); that clause preventing alterations carried out by authorised persons if the total number of sanitary fixtures in the building is increased. However, as noted in paragraph 5.2.4 the discretionary provision under Schedule 1(2) allows

⁸ Note Schedule 1(k)(i) was amended to the current Schedule 1(2) in December 2010

authorities to take into account the competencies of the people carrying out the work and the quality assurance processes in place.

- 5.3.5 The applicants' submission of 21 January 2015 states that 'at the time of application [for exemption] I did not have a "chosen contractor" and indicated I would be able to do the work under the provisions of the *Plumbers, Gasfitters, and Drainlayers Act 2006*'.
- 5.3.6 The applicant has relevant knowledge and experience in design of plumbing and drainage, and also experience as a building control officer carrying out inspections of plumbing and drainage for the authority. However, I consider the applicant's knowledge and experience of itself does not translate directly to establishing the likelihood of the applicant undertaking the building work himself in a manner that will achieve compliance with the Building Code.
- 5.3.7 In my view there was insufficient evidence in the application to indicate that the competencies or quality assurance in this case would be any different to that contemplated in Schedule 1(35) (which by virtue of an exemption under the Plumbers, Gasfitters, and Drainlayers Act 2006 allows an owner to do sanitary plumbing on their own home provided the total number of sanitary fixtures is not increased and no specified system is modified or affected).
- 5.3.8 Plumbing and drainage is a specialist trade that could well be considered complex to someone not experienced in carrying out that work, accordingly for an exemption to be granted under Schedule 1(2) it would be expected that those involved in the design, construction, and supervision would be able to demonstrate a level of competence such that the authority would consider the proposed building work would be likely to comply with the Building Code.
- 5.3.9 I do not consider the examples of garden water features submitted by the applicant (refer paragraph 4.8) to be adequate in terms of demonstrating substantial previous experience of similar work to that proposed.

The complexity of the building work relative to the competence of the people who will carry it out

- 5.3.10 In considering the likelihood of compliance I have considered the applicant's competency in relation to the proposed building work in respect of the complexity of the design and the actual installation work.
- 5.3.11 The applicant advised the authority of previous experience in the design of plumbing and drainage and also provided a letter from a Certifying Plumber/Drainlayer to the effect that the work set out in the plans when completed is likely to meet the Building Code. I consider this to have been adequate in terms of establishing the compliance of the design.
- 5.3.12 In this case while the proposed building work is relatively simple and straightforward to someone experienced in installing plumbing and drainage work, it is more likely to be considered complex to someone who was not. Plumbing and drainage work is a specialist building trade. As noted in the paragraphs above, I do not consider the applicant has demonstrated competency in terms of the actual installation of the plumbing.

Any independent quality assurance systems or checks that will be applied in the course of the work.

- 5.3.13 I am of the view that the need for any independent quality assurance systems or checks for work granted exemption under Schedule 1(2) will be determined by the nature and complexity of the work carried out and the relative competencies of those carrying out the work.
- 5.3.14 In this case, given the plumbing work proposed and that I consider the applicant has not demonstrated competency in terms of similar plumbing work, I am of the view that there is value in having an independent quality assurance system or checks. As one has not been proposed by the applicant this will fall to the authority by way of inspections carried out for work done under a building consent.

5.4 Conclusion

- 5.4.1 Taking into account the above, I consider the authority correctly exercised its powers of decision in refusing to grant the exemption in relation to the likelihood of compliance being achieved.

6. The decision

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority correctly exercised of its powers in refusing to grant the exemption under Schedule 1(2) for the proposed building work and I confirm the authority's decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 12 May 2015.

John Gardiner
Manager Determinations and Assurance

Appendix A: The Legislation

A1 The relevant section of the Act says:

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

- (1) ...
- (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.

A2 The relevant Clauses of Schedule 1 include:

Part 1 Exempted building work

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.

Part 2 Sanitary plumbing and drainlaying carried out by person authorised under Plumbers, Gasfitters, and Drainlayers Act 2006

35 Alteration to existing sanitary plumbing (excluding water heaters)

- (1) Alteration to existing sanitary plumbing in a building, provided that—
 - (a) the total number of sanitary fixtures in the building is not increased by the alteration; and
 - (b) the alteration does not modify or affect any specified system.
- (2) Subclause (1) does not include an alteration to a water heater.

A3 Relevant section of the *Plumbers, Gasfitters, and Drainlayers Act 2006*.

Specific sanitary plumbing exemptions

15 Exemption for householders

- (1) The owner of any premises situated in a place to which this subsection applies and occupied, or intended to be occupied, by that person as a residence for that person, or for that person and members of that person's family, may do any sanitary plumbing in those premises.
- (2) The sanitary plumbing done under subsection (1) may be done—
 - (a) with or without the assistance of any member of the person's family living with the person; but
 - (b) without the assistance of any other person.
- (3) For the purposes of subsection (1), owner, in relation to any premises, means the person who (whether alone or as a joint tenant or tenant in common) would for the time being be entitled to receive the rack rent of the premises on his or her own account if the premises were let to a tenant at a rack rent.
- (4) Subsection (1) applies in the places that the Minister, after consultation with the appropriate local authority, specifies by notice in the Gazette.

...