

# Determination 2023/029

**An authority's refusal of an application for a discretionary exemption from the requirement to obtain a building consent for the construction of a bridge**

**95 Lethbridge Road, Parawera**

## Summary

This determination considers an authority's decision to refuse an application for a discretionary exemption from the requirement to obtain building consent, under clause 2 of Schedule 1 of the Building Act 2004. The determination considers the authority's reasons for refusal, and whether a discretionary exemption is available after the building work has been completed.



**Figure 1: View of bridge looking south<sup>1</sup>**

<sup>1</sup> The photograph was included in 'Bridge Construction Report' attached to a Producer Statement – Construction Review (PS4) provided by an engineer. It is assumed the photograph was taken in June 2023.

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 of the Act.

The Act and the Building Code (Schedule 1 of the Building Regulations 1992) are available at [www.legislation.govt.nz](http://www.legislation.govt.nz). Information about the legislation, as well as past determinations, compliance documents (eg, Acceptable Solutions) and guidance issued by the Ministry, is available at [www.building.govt.nz](http://www.building.govt.nz).

## 1. The matter to be determined and the Parties

- 1.1. This is a determination made under due authorisation by me, Charlotte Gair, Manager Advisory, Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.<sup>2</sup>
- 1.2. The parties to the determination are:
  - 1.2.1. the owners of the property, J Ralph, C Ralph, and Mackrell Murcott Trustees 2014 Limited (“the owners”), who applied for this determination<sup>3</sup>
  - 1.2.2. Ōtorohanga District Council, carrying out its duties as a territorial authority or building consent authority (“the authority”).
- 1.3. The matter to be determined, under section 177(1)(b) and (3)(c), is the authority’s decision to refuse an application for a discretionary exemption from the requirement to obtain a building consent, under clause 2 of Schedule 1 of the Act (“clause 2”) for the construction of a new bridge.<sup>4</sup>
- 1.4. In deciding this matter, I will consider the reasons for refusal provided by the authority, and whether clause 2 can be applied to building work that has been completed prior to an application for a discretionary exemption being made.

### Issues outside the determination

- 1.5. The owners have made references to alleged breaches of several enactments, for example, the Goods and Services Tax Act 1985. As I have no jurisdiction under other enactments, this determination only considers matters relating to the Building Act and its regulations, and I have not considered any matters arising under any other legislation.

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<sup>2</sup> The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

<sup>3</sup> References to the owners in this determination include the agent acting on behalf of the owners; the agent is the company that manufactured and constructed the bridge.

<sup>4</sup> I note the owners and engineer have used different terminology in their submissions and documentation to describe the bridge and how elements of it were manufactured or prefabricated off site. Therefore, for the purposes of this determination, I have simplified the description to ‘new precast concrete bridge’.

## 2. The building work and background

- 2.1. The building work involved the replacement of an existing “log bridge”<sup>5</sup> on the owners’ property with a new precast concrete bridge (“the bridge”, refer to Figure 1). The owners’ property is a dairy farm in a rural area.
- 2.2. The bridge is 12.6m long and is 3.7m wide between kerbs. It has been installed onto foundations consisting of “concrete pile cap/abutment beams on concrete anchor piles, founded on rock”. The sides of the bridge have been fitted with a 1.1m high steel post-and-rail barrier.
- 2.3. The design for the bridge was completed by a civil engineer (“the engineer”) who provided a Producer Statement – Design (“PS1”) dated 18 May 2023 certifying the design work’s compliance with Building Code Clauses B1 Structure and B2 Durability. The PS1 states the bridge system has a “Durability/Design Life” of 100 years for the concrete structure and 15 years for the railings.<sup>6</sup>
- 2.4. The owners advise that the design for the bridge was carried out by 19 May 2023, and additional calculations and plans were completed by 26 May 2023. The building work commenced on 29 May 2023, and the foundations were inspected (by an engineering consultancy company) and the concrete poured on 30 May 2023. The balance of the bridge is “modular component type structures fully completed in the yard and...assembled on site”. The installation was completed by 6 June 2023.
- 2.5. On 7 June 2023, the engineer provided a Producer Statement – Construction Review (“PS4”). The PS4 confirmed that based on a review of the photographic and other evidence<sup>7</sup>, the bridge had been “constructed in accordance with the requirements of the New Zealand Building Code<sup>8</sup> and the relevant NZ Transport Agency Bridge Manual provisions”.
- 2.6. On 14 June 2023, the owners applied to the authority for a discretionary exemption from the requirement to obtain a building consent for the building work, under clause 2(a).
- 2.7. On 16 June 2023, the authority wrote to the owners stating “unfortunately we are not in a position to grant [a discretionary] exemption for a bridge on private land and you will need to apply for building consent”.

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<sup>5</sup> I note a ‘Bridge Construction Report’ attached to the Producer Statement – Construction Review (PS4) dated 7 June 2023 includes a photograph labelled “Failing log beam bridge before removal and replacement with [new] bridge”.

<sup>6</sup> I have not been provided with copies of the design drawings noted in the PS1, or any associated structural calculations in support of the bridge design.

<sup>7</sup> The PS4 has appended to it a ‘Bridge Construction Report’. However, I note the report is not dated, and it is not clear whether it was prepared by the engineer or the agent.

<sup>8</sup> The PS4 referred to “construction review services” in respect of Building Code clauses B1 and B2.

- 2.8. On 19 June 2023, the owners sought clarification from the authority as to why a discretionary exemption could not be granted for a bridge constructed on private land.<sup>9</sup> The owners stated that the bridge complied with the requirements of clauses B1, B2 and F4<sup>10</sup> of the Building Code.
- 2.9. On 20 June 2023, the authority replied to the owners restating it would “...not grant [a discretionary] exemption for a building on private land. The bridge is a building and will require building consent.”

### 3. Submissions

#### The owners

##### 3.1. The owners submit (in summary):

###### 3.1.1. With respect to the authority’s reason for refusing the application for a discretionary exemption:

...[an] application being refused for an exemption on the basis that it is on private land does not come into it.... There was plenty of evidence provided to show there had been qualified inspections at appropriate times.

###### 3.1.2. Clause 2 refers to the “completed” work complying with the Act and Building Code. “There is nothing in the Act that states [the owners] must apply for an exemption prior to construction”.

###### 3.1.3. The company that manufactured and installed the bridge has 22 years’ experience and the bridges are designed by the engineer.

###### 3.1.4. The weather events of the past year mean that there had been a large number of urgent bridge repairs required, and it is not always possible to “have all the paperwork completed and filed before a job started”.

###### 3.1.5. As the bridge components are precast and manufactured in a yard, the only time they could be inspected is prior to casting, when the reinforcement could be viewed. However, it is not possible to assess if a precast component complies or evaluate its structural capacity. Therefore, “all proprietary precast components should come under an exemption”.

#### The authority

##### 3.2. The authority submits (in summary):

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<sup>9</sup> The owners also referred to similar bridges at other locations in New Zealand, that had been granted discretionary exemptions.

<sup>10</sup> Clause F4 Safety from falling.

- 3.2.1. It appears the bridge may have already been constructed prior to the owners' application for a discretionary exemption.
- 3.2.2. In reference to the Ministry's guidance on "Territorial and regional authority discretionary exemptions"<sup>11</sup>, the owners "did not discuss the application for exemption with [the authority] before making the application", and the authority can use its "discretion to exempt any proposed building work (not building work that has already been constructed)".
- 3.2.3. The "most likely way forward" would be for the owners to now apply for a certificate of acceptance for the building work.<sup>12</sup>
- 3.3. The authority later provided a further submission in support of its view that a discretionary exemption cannot be granted retrospectively. The authority states (in summary):
  - 3.3.1. The "natural sequence, and the lawful one" under the Act, is for a party to apply for a building consent before building work starts. A building consent cannot be applied for or granted retrospectively. Because an exemption is an alternative to a building consent, it is also required to be applied for "at the outset".
  - 3.3.2. The relevant sections of the Act also anticipate that the exemption is applied for before building work commences. Section 42A(2)<sup>13</sup> and clause 2 are both drafted on the basis that the building work has not yet taken place.
  - 3.3.3. The requirement for an authority to approve the issue of a building consent (or alternatively, an exemption), ensures building work is not dangerous or unsafe. Allowing exemptions to be applied for after building work has been completed "undoes this protection".
  - 3.3.4. As an application for an exemption cannot be considered after the building work is completed, there was no need for the authority to consider the merits of the application in this case.

## 4. Discussion

- 4.1. The owners and the authority have not disputed that the bridge is a building<sup>14</sup> or its construction was building work (as defined in section 7).

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<sup>11</sup> Ministry of Business, Innovation and Employment *Building work that does not require a building consent: Exemptions Guidance for Schedule 1 of the Building Act 2004* (Fifth edition, August 2020), at pages 10 and 14.

<sup>12</sup> Section 97 sets out how to apply for a certificate of acceptance; certificates of acceptance are issued by a territorial authority under section 96.

<sup>13</sup> Section 42A: Building work for which building consent is not required under Schedule 1.

<sup>14</sup> Section 8(1)(a), and Building Code Clause A1 Classified Uses, 8.0 Ancillary.

- 4.2. All building work must comply with the Building Code<sup>15</sup> and cannot be carried out without a building consent, except in certain cases as set out in sections 41 and 42A.<sup>16</sup> These cases include (but are not limited to) the types of “exempted building work” set out in Part 1 of Schedule 1 of the Act, which covers some low-risk building work. Territorial and regional authorities can also make a decision regarding a discretionary exemption under clause 2.
- 4.3. Section 40(1) provides that a person must not carry out any building work except in accordance with a building consent. Section 44 specifies the time when a building consent must be applied for, ie “before the building work begins”.
- 4.4. Section 41(1)(b) states that, despite section 40, a building consent is not required for any building work described in Schedule 1 for which a building consent is not required. Section 42A(1)(a) reiterates that a building consent is not required for the building work described in Part 1 of Schedule 1, subject to certain conditions, including that the building work must comply with the Building Code to the extent required by the Act.
- 4.5. Therefore, a building consent was required for construction of the bridge in this case, unless the building work was exempt under Schedule 1<sup>17</sup>. Clause 2 of Schedule 1 is the category of exempt work being considered in this determination. It provides:

#### **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.

### **The reasons for refusing the application for a discretionary exemption**

- 4.6. In its correspondence with the owners, the authority refused to grant a discretionary exemption under clause 2, because the bridge is on private land.

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<sup>15</sup> Section 17.

<sup>16</sup> Refer to section 40: Buildings not to be constructed, altered, demolished, or removed without consent, and section 41: Building consent not required in certain cases.

<sup>17</sup> Although, in submissions, the parties did not consider if clause 47 (“short-span bridges on private land”) of Schedule 1 could have applied, in this case the span of the as-built bridge at approximately 12.6m long exceeded the requirements of clause 47(1)(a), ie for a span of less than 6m. Therefore, this exemption is not available to the owners.

4.7. In its correspondence with the Ministry, the authority raised two further reasons for its refusal:

- 4.7.1. the owners had failed to follow the correct process in applying for the discretionary exemption because they did not discuss the application with the authority before they made it, and
- 4.7.2. the building work was already complete at the time that the discretionary exemption was applied for and clause 2 could not be applied retrospectively.

#### **The bridge is on private land**

4.8. In its correspondence to the owners on 16 June and 20 June 2023, the authority was of the view it was not in a position to grant a discretionary exemption “for a bridge on private land”.

4.9. The use by authorities of discretionary exemptions has been considered in several previous determinations, including in Determination 2021/029:<sup>18</sup>

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).

4.10. In my view, the same approach applies in this case. The reason given by the authority for its refusal, at the time the refusal was made, did not meet the tests in clause 2.<sup>19</sup> Clause 2 does not limit or impose any restrictions on whether the building work can be undertaken on private land.

#### **Had the owners failed to follow the correct process?**

4.11. The authority is of the view the owners had failed to follow the correct process in applying for a discretionary exemption, as they had not consulted with the authority before they did so.

4.12. In making this point, it appears the authority was referring to the Ministry’s guidance “Territorial and regional authority discretionary exemptions”, which states:

You can apply for a discretionary exemption through your local council. We recommend you talk to your council before applying.

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<sup>18</sup> Determination 2021/029 *Regarding the authority’s refusal to grant an exemption from the requirement to obtain a building consent to install sanitary plumbing and insulation* (22 December 2021) at paragraph 5.13.

<sup>19</sup> I note that Determination 2021/029, at paragraph 5.14, gave examples of “relevant considerations” an authority could use to assess if building work would satisfy the clause 2 tests.

4.13. However, the text referred to is simply a suggested approach for parties to take when considering a discretionary exemption. There is no statutory obligation on the owners to seek early engagement with the authority, and the failure to do so is not a reason for refusing an application for a discretionary exemption.

**Does clause 2 apply to building work that has already been carried out?**

4.14. In this case, the building work to construct the bridge had already been completed prior to the owners applying to the authority for a discretionary exemption.

4.15. The owners are of the view that nothing in clause 2 requires the application for a discretionary exemption to be made prior to the building work being undertaken. Conversely, the authority is of the view that a discretionary exemption is in respect of “any proposed building work” and not for building work that has already been undertaken.

4.16. I agree with the authority that the discretionary exemption in clause 2 is intended for proposed building work and cannot be applied retrospectively once the work has already been carried out. I note that this issue has arisen in several previous determinations, and my position is consistent with the conclusion reached there.<sup>20</sup>

4.17. Further, I note the Ministry’s guidance referred to by the authority (see paragraph 3.2.2) states:

This is the only exemption in Schedule 1 which requires a territorial or regional authority to make a decision about any **proposed** building work [my emphasis].

4.18. I acknowledge that both subclause (a) and (b) of clause 2 refer to the “completed building work” and its likely compliance. However, this is referring to the assessment of future compliance that the authority must make in exercising its discretion. An indication of when the exemption must be considered is given in the opening words of clause 2, where it states that the exemption is for “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...”.

4.19. A building consent cannot be granted retrospectively and must be obtained by an owner before any building work is carried out. This is made clear by section 44, which specifies that “An owner intending to carry out building work must, **before the building work begins**, apply for a building consent” [my emphasis]. This is reinforced by section 40, which makes it an offence to carry out building work without a consent.

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<sup>20</sup> See for example: Determination 2022/020 *Regarding the issue of a notice to fix and the refusal to issue two discretionary exemptions under schedule 1(2) for building work to an outbuilding* (dated 28 October 2022) at paragraph 5.37; and Determination 2023/014 *The requirement for a building consent for building work to a related building* (dated 31 May 2023), at paragraph 4.24.



4.20. This requirement for a building consent to be issued before building work begins has also been considered and upheld by the District Court in *Environment Waikato v Sutherland*.<sup>21</sup> In that case, the court stated (in the context of an authority's decision to issue a building consent after building work on a dam had been carried out):

[22] The obvious purpose of the building consent provisions is to provide assurance that building work will meet the provisions of the building code. It is equally clear that in order to achieve that purpose, **Parliament intended that building consents had to be applied for and granted before the work was carried out and not after.**

...

[23] I consider that **the wording and the scheme of the building consent provisions do not allow for the issue of building consents after the work has been carried out.**

[my emphasis]

4.21. It follows that an authority can only make a decision in respect of an application for a building consent or a discretionary exemption before the building work is undertaken.

4.22. This interpretation is consistent with other provisions of the Act relating to the building consent process, including (but not limited to):

4.22.1. Section 4, which sets out the principles that apply when performing functions or duties, or exercising powers, under the Act. Section 4(2)(q)(i) states that owners are accountable for ensuring that “the necessary building consents **and other approvals** are obtained for **proposed building work**” [my emphasis].

4.22.2. Section 14B(a), which provides that an owner is responsible for obtaining any necessary consents, approvals, and certificates.

4.22.3. Section 96, which enables authorities to issue certificates of acceptance, providing them a mechanism for assessing work that has already been done when a “building consent was required for the work but not obtained”.<sup>22</sup>

4.23. In summary, an authority must assess and decide whether to grant a building consent for particular building work before that work is carried out. Likewise, it is required to make a decision in respect of a discretionary exemption from the requirement to obtain a building consent before the building work is carried out.

4.24. In the former scenario, once the authority is satisfied on reasonable grounds the work has been completed in accordance with the building consent it must issue a

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<sup>21</sup> *Environment Waikato v Sutherland* DC Wellington CIV-2010-085-629, 1 March 2011.

<sup>22</sup> In *Environment Waikato v Sutherland*, the court stated at [30]: “...the introduction of the certificate of acceptance scheme can be seen as a recognition by Parliament that there was otherwise no process for certifying works carried out without a consent”.

code compliance certificate<sup>23</sup>. In the latter scenario, there is no building consent, so no code compliance certificate is possible or required (regardless, the completed building work must still comply with the Building Code).

- 4.25. There is a third scenario, which is where building work is carried out without either a building consent or a discretionary exemption first being obtained. In this situation, the only avenue for an owner seeking to regularise the building work is to apply for a certificate of acceptance under section 97. An authority may decide to issue a certificate of acceptance where the requirements in section 96 are met.
- 4.26. Accordingly, I conclude that, as the owners applied for a discretionary exemption after the building work on the bridge was complete, the authority could not exempt the building work under clause 2. I note that the authority has already suggested the owners apply for a certificate of acceptance for the building work, and I will leave it for the parties to resolve the issue accordingly.
- 4.27. Given my conclusion in this determination, it has not been necessary for me to assess whether the completed building work is likely to comply with the Building Code (in terms of the test in clause 2(a), which was the basis on which the owners applied for a discretionary exemption).

## 5. Decision

- 5.1. In accordance with section 188 of the Building Act 2004, I determine:
- 5.1.1. The authority could not rely on the bridge being located on private land as a reason for refusing the application for a discretionary exemption.
- 5.1.2. The authority could not exempt the building work to construct the bridge from the requirement for a building consent, under clause 2 of Schedule 1, because the building work had already been completed. Therefore, I confirm the authority's decision to refuse the application for a discretionary exemption (albeit for a different reason than that relied on by the authority at the time it refused the application).

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 26 October 2023.

**Charlotte Gair**  
**Manager Advisory, Determinations**

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<sup>23</sup> Section 94(1)(a).