



## A Bridge Too Far?

The owners of a dairy farm recently challenged the decision of a council to refuse to grant an exemption from the requirement to obtain a building consent for a concrete bridge after the bridge been completed. The bridge was designed by an engineer who provided producer statements. The owner explained there been some urgency to replace the bridge and, given the involvement of an engineer, they were disappointed when the Otorohanga District Council said “no”.

We assisted the Council with this challenge to its decision. The Council was concerned that issuing a discretionary exemption after the bridge was completed undermined the requirement to obtain a building consent and would set a bad precedent.

### MBIE Reviews The Facts

In its decision of October 2023 (Determination 2023/029), MBIE recorded that the building work involved replacing an existing log bridge with a new precast concrete one. The bridge was nearly 13 m long and 3.7 m wide. It was installed onto foundations consisting of “concrete pile cap/abutment beams on concrete anchor piles, founded on rock”. There were 1.1 m high steel post and rail barriers on either side of the bridge.

A civil engineer designed the bridge and provided a producer statement – design (a “PS1”) confirming compliance with clauses B1 and B2 of the NZ Building Code (Code). The engineer forecast a durability/design life of 100 years for the concrete structure and 15 years for the railings.

The bridge was designed and constructed in some haste. The initial design was completed by 19 May 2023 with building work commencing on 29 May 2023. The foundations were inspected by the engineer and concrete was poured on 30 May 2023. The bridge structure itself was modular and was constructed in a yard and assembled on-site. The installation was completed by 6 June 2023. The next day the engineer provided a producer statement – construction review – (a “PS4”). In his producer statement, the engineer confirmed that the bridge had been constructed in accordance with the requirements of the Code and the relevant NZTA bridge manual provisions.

On 14 June 2023, the owner applied to the Council as the appropriate Territorial Authority for a discretionary exemption from the requirement to obtain a building consent for the building work under clause 2 of Schedule 1 to the Building Act 2004. Clause 2 enables an Authority to waive the requirement for a building consent where “...*the completed building work is likely to comply with the building code.*” That application was declined by the Council a few days later, relying upon the fact the bridge had been constructed on private land.

### The Parties Make Their Case To MBIE

The owner’s position was that clause 2 refers to the “completed” work complying with the Code, and

there was nothing in the Building Act that states that the owners must apply for an exemption *prior* to construction. They explained that the bridge building company was experienced, the bridge was designed by an engineer, and that the bridge components were precast and were manufactured in a yard. This would have made it very difficult to assess the integrity of the bridge components and they suggested that “...all proprietary precast components should come under an exemption”.

The Council relied upon the guidelines provided by MBIE to territorial authorities when processing discretionary exemptions, clause 2 of Schedule 1 to the Building Act, and the Building Act itself to make its case. The fact that the bridge was on private land was not referred to in the Council’s submissions.

The MBIE guidelines focus on the need to consult with a council *prior* to building work commencing.

The Building Act requires that building work is consented, or a discretionary exemption is obtained, and logically both need to happen before the building work commences. Both section 42A (2) and clause 2 are drafted on the basis that the building work has not yet taken place.

The Public Safety consideration was important to the Council. By requiring that the building work, or an exemption, is applied for before the building work commences, this ensures that building work is not dangerous or unsafe.

### **MBIE Decides**

MBIE stepped through the process in the Act for applying for building consent, with the natural sequence being that a consent was applied for before building work commences. This is most clearly set out in section 44:

“44(1) An owner intending to carry out building work must, before the building work begins, apply for a building consent ...”

MBIE referred to a decision of the District Court - *Environment Waikato v Sutherland*<sup>1</sup>- where the court emphatically stated that a building consent could not be issued after building work had commenced. The Court considered, and overruled previous decisions of MBIE that had accepted that a council could issue a retrospective consent.

As an application for an exemption was an alternative to obtaining a building consent, logic and common sense dictated that the application for a discretionary exemption also need to be made prior to the building work commencing.

MBIE found support for this conclusion in other sections of the Building Act.

Having reached this decision, MBIE declined to decide whether the bridge complied with the Code.

### **Emergency?**

The application by the landowners for a discretionary exemption was not made on the basis that there had been an emergency. Section 41(c) of the Building Act permits building work without obtaining a building consent in an emergency, but the building work must be:

“...for the purpose of saving or protecting life or health or preventing serious damage to property.”

This is a high threshold to meet.

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<sup>1</sup> Unreported, 1 March 2011, CIV – 2010-085-629, DC Wellington

The next step for the landowners would be to apply for a certificate of acceptance for the bridge.

**Thanks to Paul Robertson (Partner) for writing this article**

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