



Determination 2012/077

The refusal to grant a building consent for retrofitting foam insulation to the external walls of a house at 3 Finn Place, Titahi Bay, Porirua

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, 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 owner of the house, Mr P Cockburn (“the applicant”) acting through his agent Airfoam Wall Insulators (Wellington) Limited (“the insulation provider”). The insulation provider also represented the applicant for the purposes of the building consent application
- Porirua City Council, carrying out its duties and functions as a territorial authority and a building consent authority (“the authority”).

1.3 Airfoam Wall Insulation Limited and Airfoam Wall Insulators (Wellington) Limited are considered persons with an interest in this determination on the grounds of being the proprietary system provider and installer respectively. I have referred to both companies (and the insulation provider in its role as the applicant’s agent) as “the insulation provider”.

1.4 The determination arises from a decision made by the authority to refuse to grant a building consent for proposed building work that consisted of retrofitting urea formaldehyde foam insulation (“the insulation”) in the external walls of the applicant’s house. The authority also noted that the decision ‘should also be considered as a unilateral decision for all other application[s] of [the insulation provider’s] product/system.’

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

1.5 The matter to be determined² is therefore whether the authority has correctly exercised its decision making powers in refusing to issue a building consent for the proposed building work.

1.6 In making my decision on these matters, I have considered the submissions of the parties, and other evidence in this matter. I emphasise that each determination is conducted on a case-by-case basis.

2. The building work and background

2.1 An application for a building consent was received by the authority on 6 July 2012. The application was for proposed building work to retrofit the insulation in the external walls of the applicant's house. The building work consists of making a series of holes in the external walls and pumping insulation into the walls to improve the thermal performance of the house. The holes in the external walls are subsequently plugged and a drying regime is followed while the insulation cures.

2.2 The building consent documentation consisted of an assessment of the condition of the building and its suitability for the installation of the insulation, a 'design summary' documenting how the building work and existing building would achieve compliance with various clauses of the Building Code, and various other documents such as extracts from the products installation manual, although I have not seen a copy of the design summary for this application.

2.3 On 30 July 2012, the authority made a decision to refuse to grant a building consent. The authority noted that '...there is not undisputed evidence that Clause 49(1) of the New Zealand Building Code (Schedule 1, Building Regulations 1992) is achievable for [B1 Structure, B2 Durability, and E2 External moisture].'

2.4 On 15 August 2012, an agent for the insulation provider wrote to the authority requesting further review of the decision to refuse to grant a building consent, noting:

- under section 50 of the Act, the authority is entitled to refuse to grant a building consent, however section 50(b) requires reasons be provided for this refusal
- the reasons given do not meet the intent of section 50(b)
- the 'design summary' which sets out the Building Code obligations and evidence provided should be considered and reasons in response to this document.

2.5 In an email dated 15 August 2012, the authority responded to the agent for the insulation provider, stating:

The refusal letter ... still stands. This refusal relates to [the current building consent application] and should also be considered as a unilateral decision for all other application[s] of [the insulation provider's] product/system.

² Under sections 177(1)(b) and 177(2)(a). In this determination, unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

As advised by the [refusal letter], [the authority] considered on reasonable grounds that under clause 49(1) of the Code that full compliance can not be achieved for B1, B2 and E2, which in turn complies with [the authority's] obligations to satisfy section 50(a) and (b) of the Act.

2.6 In a further email to the agent for the insulation provider on 16 August 2012, the authority noted:

In terms of [the 15 August 2012] email, you are correct, [the authority is] required to accept and process applications for building consent, and then make a decision to either grant or refuse to issue the application for consent and provide the reasons. In refusing to grant consents [the authority] will only list high level reasons, as [the authority does] not intend on spending extensive time detailing out all technical reasons for declining it, as the time [taken] to process an application is on-charged to the applicant.

Whilst you are fee [stet] to apply for consents for your product, it's likely [the authority] will decline issuing building consents for it, as there is noting [stet] that [the authority] can inspect in order to verify compliance with the building code. Another point to note is that there is no physical examination (inspection) that [the authority] can undertake to verify the injection of foam into the cavity space in external walls and any performance gains that may be made.

[The authority] can neither verify that the product complies with or does not comply with the requirements of the Building Code. This in it self provides a problem as when granting consents [the authority is] required to be satisfied that the provisions of the building code will be met, or that the building work will continue to comply to at least the same extent as before the alteration (injection of foam).

2.7 An application for a determination was received on 30 October 2012.

3. Submissions

3.1 The application included the building consent documentation and a letter supporting the application commenting on the decision making process carried out by the authority.

3.2 The authority did not make a submission prior to a draft determination being issued, however, the authority did not receive the documentation until 29 November 2012.

3.3 A draft determination was issued to the parties for comment on 29 November 2012.

3.4 The authority made a submission dated 11 December 2012. The authority did not accept the draft determination, and noted:

- the authority acknowledges the requirements of section 50 of the Act and the need to provide applicants with clear and appropriate reasons if a building consent is refused. These requirements were met by means of a follow up email to the applicant dated 16 August 2012, in relation to the previous letter dated 20 July 2012

- recent determinations and BRANZ reports continue to support the view that there is insufficient information to demonstrate compliance with the Building Code. Given this information, the authority initially refused the application at a higher level without detailed analysis in order to limit any further expense to the applicant. This is consistent with the approach of other building consent authorities and decisions that have been confirmed in determinations.
- the authority is of the view that its refusal letter met the requirements of the Act, however, have included further information to supplement this as follows:
 - insufficient information was provided in order to establish on reasonable grounds that the building work will comply with the Building Code
 - insufficient information was provided in order to establish on reasonable grounds that the existing building as altered will comply with the Building Code to the extent required by the Act
 - the relevant clauses of the Building Code that require site specific evidence of compliance are: Clause B1.3.1, Clause B2.3.1, Clause C1.3.2 Clause C3.3.4, Clauses E2.3.2, E2.3.5, and E2.3.6, Clause F2.3.1, Clause G6.3.1, Clause G9.3.1, G9.3.2, Clause H1.3.1, H1.3.2E and H1.3.3
 - the authority does not consider it appropriate to rely upon the assurances of the insulation provider that the finished product is compliant given the variables that exist, the findings of BRANZ, and the overseas studies
 - given this, it would be of great benefit to the industry if the Ministry were to confirm the compliance or otherwise of the product in a determination.

3.5 The insulation provider responded to the submission in a letter dated 11 December 2012, noting that it was the insulation provider's view that a blanket policy had been applied, that it acknowledged that the documentation was incomplete, but improved documentation had now been produced in response to other determinations, that the BRANZ reports nor overseas studies did not conclude that the product does not comply with the Building Code.

3.6 The authority responded to the insulation provider's submission in a letter dated 12 December 2012, noting that it disputed that it has applied a blanket policy, the insulation provider accepts the authority's view that the application documentation was insufficient, and the determination decision should be revised accordingly, and that the Ministry should confirm compliance of the product.

4. Discussion

- 4.1 In order to consider the authority's decision to refuse to issue the building consent, I need to take into account the requirements for building consent applications in terms of section 45 and section 49 of the Act.
- 4.2 Section 49 states that an authority 'must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application'.
- 4.3 In terms of the basic information required to support an application for a building consent, section 45 of the Act states:
- 45 How to apply for a building consent
- (1) An application for a building consent must–
- (a) be in the prescribed form; and
- (b) be accompanied by plans and specification that are –
- (i) required by regulations made under section 402; or
- (ii) if the regulations do not so require, required by a building consent authority; and
- (c) contain or be accompanied by any other information that the building consent authority reasonably requires; and
- ...
- 4.4 The Act provides for an authority to set reasonable requirements for the documentation that accompanies applications for building consents. An authority is entitled to set minimum requirements to ensure that the proposed building work is clearly documented and to require designers to clearly demonstrate and document how Building Code compliance is to be achieved.
- 4.5 That said, the Act makes specific requirements of both an applicant and an authority when a building consent is being sought; the applicant is required to provide sufficient relevant information to clearly describe the proposed work, and if the application is not adequate, the authority must clearly articulate the reasons for an application being refused. Section 50 of the Act requires that 'If a building consent authority refuses to grant an application for a building consent, the building consent authority must give the applicant written notice of – (a) the refusal; and (b) the reasons for the refusal.'
- 4.6 The application for consent included a significant amount of information. This included:
- an assessment of the condition of the building covering issues including an assessment of the weathertightness of the existing building, internal moisture, an electrical wiring and fixed appliances
 - a generic 'design summary' documenting how the building work would meet the requirements of Clause E2.3.6, E2.3.2, C2.2(a), B2.3.1, and F2, and the existing building would meet the requirements of section 112 of the Building Act for alterations of existing buildings with respect to Clause B1.3.1, B2.3.1, C1.3.2, C3.3.5, E2.3.5, F2.3.1, G9.3.1, G9.3.2, H1.3.1 and H1.3.2E.

- 4.7 It is important that should a building consent be refused, the applicant be given clear and appropriate reasons why. It is not the authority's role to make value judgments about a products efficacy and cost effectiveness and to prevent owners from undertaking building work that they wish to carry out. It is the authority's role to apply the statutory tests in the Act, and ensure that building work that is carried out complies with the requirements of the Act and the Building Code.
- 4.8 I note that section 48(3) refers to specific matters that an authority must take into account, being any memorandum from the New Zealand Fire Service Commission, and any warning or ban on building products or methods to be used when considering the application. If a ban has been imposed, a building consent cannot be granted.
- 4.9 In my view, the particular aspects of the proposed building work should be identified that do not comply or for which there is insufficient evidence to demonstrate compliance. The owner can either then take the appropriate action, or apply for a determination if the reasons are disputed.
- 4.10 In addition, the authority has referred to full compliance with Clauses B1, B2, and E2 being unable to be achieved (with respect to section 49 of the Act). It is unclear the issues being referred to by the authority. I note that with respect to Clause B1, there is no Building Code obligation that applies to the building work itself. With respect to Clauses E2 and B2, I note that the building work requires holes to be formed in the exterior cladding, and the work done to make good the penetrations in the cladding. This in itself is not a particularly complex process, and whilst the applicant may need to provide additional information in order to satisfy the authority, it does not appear to me to be an insurmountable issue that should lead to a refusal to grant a building consent.
- 4.11 The authority has also referred to being unable to inspect the cavity, and therefore confirm performance of the building work. However, it is my view that this is immaterial. The Building Code obligations that relate to the building work itself are fairly limited in scope. The penetrations to the external cladding can be inspected, and the existing building inspected if it is considered necessary.
- 4.12 The authority's response would indicate it had not turned its mind to the compliance of this building work and its impact on the existing building. No reasons were provided by the authority that considers the compliance of the building work in detail, identifies specific areas of non-compliance or seeks verification of the impact on the existing building, rather the authority appears to be applying a blanket policy.
- 4.13 Although it does not change my view of the matter and the refusal to issue the building consent, I note that the authority subsequently provided a submission to me that included a more detailed list of Building Code Clauses, and noted that the authority was of the view that insufficient information was provided to provide reasonable grounds the building work and existing building would comply with the Building Code, to the extent required by the Act. However I note the authority has still only provided a general list of Building Code Clauses and has not referenced the particular aspects of the building work or affect on the existing building that it believes are at issue.

- 4.14 I have not formed a view on the compliance with the requirements of the Act in this case and therefore the decision should not be taken as a view on whether there is sufficient evidence to demonstrate compliance for the proposed building work, or compliance of the existing building to the extent required by the Act. The authority is required under the Act to consider this proposal from the applicant, and consider any other proposals relating to this product, rather than apply a blanket or ‘unilateral’ refusal to issue building consents. The power to issue a unilateral decision to refuse to grant building consents for particular products or systems is not within the ambit of powers of a building consent authority under the Act.
- 4.14.1 Previous determinations including Determination 2012/026, Determination 2012/027, and Determination 2012/076, as well as guidance issued by the Ministry with regard to retrofitting insulation should provide a framework to assist the authority in considering and making decisions about this and further applications for building consents for the retrofitting of the insulation.

5. Decision

- 5.1 In accordance with section 188 of the Act, I hereby determine that the authority incorrectly exercised its powers in refusing to grant a building consent for retrofitting the insulation to the house. Accordingly, I reverse that decision and direct that the authority should reconsider the building consent application.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 18 December 2012.

John Gardiner
Manager Determinations and Assurance