

# Determination 2022/013

## Regarding the authority's refusal to grant a building consent for the construction of a new dwelling

### 16 Queen Street, Ngaruawahia

#### Summary

This determination considers whether the authority was correct to refuse to grant a building consent. The determination considers whether sufficient information was included in the building consent application for the authority to be 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.

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 (“the Building Code”) of the Building Regulations 1992.

The Act and the Building Code are available at [www.legislation.govt.nz](http://www.legislation.govt.nz). Information about the legislation, as well as past determinations, compliance documents (e.g., 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

- 1.1. This is a determination made under due authorisation by me, Peta Hird, Principal Advisor Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.<sup>1</sup>

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

- 1.2. The parties to the determination are:
  - 1.2.1. the owner, A Hickey-Elliot (“the owner”)
  - 1.2.2. M Field, a licensed building practitioner<sup>2</sup> (“the designer”), who carried out the design work for the proposed building
  - 1.2.3. R Nagel, a chartered professional engineer (“the structural engineer”), who is a licensed building practitioner<sup>3</sup> and carried out the engineering design work for the proposed building
  - 1.2.4. Waikato District Council (“the authority”), carrying out its duties as a building consent authority.
- 1.3. This determination arises from the decision of the authority under section 50 of the Act to refuse to grant a building consent for the construction of a new dwelling. The authority is of the view the information provided with the building consent application is incomplete and insufficient, and the authority did not have reasonable grounds to be satisfied that the proposed building would comply with the Building Code<sup>4</sup>.
- 1.4. The matter to be determined<sup>5</sup> is therefore whether the authority was correct to refuse to grant a building consent (BLD0503/20). In deciding this matter, I will consider the reasons for refusal outlined by the authority.

## 2. The building work and background

- 2.1. A building consent application (BLD0503/20) was lodged with the authority on 29 October 2019.
- 2.2. The proposed building is a 65m<sup>2</sup>, one-bedroom, single storey dwelling, with a kitchen, bathroom, and living room. The building is to be located on a vacant site with a level building platform.
- 2.3. The building is to be constructed on timber pile foundations, with timber framing and a structurally insulated panel (SIP) system for the walls and floor. The external walls are to be clad with plywood cladding, over a drained and ventilated cavity. The roof is to be clad with metal profiled roofing panels with an expanded polystyrene (EPS) core. The joinery is to be aluminium, with double glazing.

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<sup>2</sup> LBP No. BP129326, Design.

<sup>3</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>4</sup> Section 49(1)

<sup>5</sup> Under sections 177(1)(b) and (2)(a) of the Act.

- 2.4. The authority issued a request for further information to the owner on 13 November 2019. With respect to the proposed building, the authority stated:

Not yet reviewed. [The authority] is not prepared to review this consent until they are confident the product has a BRANZ Appraisal and approved for use by [the Ministry]. [The CodeMark certificate] lodged expired in 2016.

[I note here that a product appraisal is not a mandatory requirement of a building consent application. A designer may elect to use a product appraisal to support a building consent application, and appraisals can provide authorities with information to inform their view as to the performance of the product.]

- 2.5. The SIP system, albeit under a different product name, was previously the subject of a product certificate issued under section 269 of the Act (referred to as a CodeMark certificate). That certificate expired in 2016 but it had been included in the building consent application.
- 2.6. The owner and authority had discussions during November and December 2019 about the authority's requests. The owner advised the authority the SIP system had a 'Product Compliance Certificate' dated December 2018.
- 2.7. A 'Product Compliance Certificate' is a document that provides an opinion about the Building Code compliance of the building product or system for which it is issued – it is not a certificate issued under section 269 of the Act and accordingly is accepted at the authority's discretion<sup>6</sup>.
- 2.8. At the time the building consent application was lodged, the expiry date for the product compliance certificate was December 2019. The product compliance certificate was subsequently renewed and issued on 14 December 2019 with an expiry date of December 2020. The owner provided the renewed certificate for the SIP system to the authority on 11 February 2020.
- 2.9. On 19 February 2020, the authority wrote to the owner advising it had made a decision under section 50 of the Act to refuse to grant the building consent. The authority advised that it was not satisfied on reasonable grounds that the building work would comply with the Building Code, and referred to Building Code Clauses B1, B2, and E3. This was followed up by a formal letter dated 26 February 2020, which contained the same reasons for refusing to issue the consent.
- 2.10. The parties continued to communicate regarding the building consent. On 9 March 2020 the authority stated its main reason for refusing the building consent in relation to the SIP system was due to the "lack of evidence and generally poor quality of the documentation". The authority then provided a list of issues:

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<sup>6</sup> Under section 19(1)(d) a current product certificate issued under section 269 must be accepted by a building consent authority as establishing compliance with the Building Code.

Illegible plans.

Details not covering relevant aspects of construction.

Documents still referencing the old product name even though other [building consent authorities] have requested you update this 2 years ago.

Spelling mistakes and grammatical errors along with omissions from the technical documents.

The 'Codemark' you are relying on appears to have expired in 2016.

The 'Codemark' has been issued by [a certifying body] who has had their 'Codemark' accreditation revoked.

Based on the notice of revocation due to [the certifying body] not meeting 'Codemark' scheme accreditation requirements, it would not be unreasonable to assume that the testing behind the product compliance certificate is also not up to standard.

The product compliance certificate expires in Dec 2019 (Please note: this was acceptable at the time of lodgement but will not be for future consents).

The Designers (sic) [certificate of work] explicitly mentions covering internal walls only which means the [SIP system] product is not being covered (again raising concerns)

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2.11. The authority then advised the owner of options to assist with a future building consent application. These included providing a current BRANZ appraisal for the product, a current product certificate issued by an accredited product certifier, or a project specific endorsement from a suitably qualified engineer that includes engineering calculations covering all relevant Building Code clauses.

2.12. The Ministry received an application for a determination on 11 May 2020.

### **3. The submissions**

3.1. The owner is of the view:

3.1.1. all issues raised by the authority in its request for further information were addressed; in particular the 'Product Compliance Certificate' was a suitable and valid form of evidence of Building Code compliance, and a renewed certificate was provided to address the concerns about its expiry. The certificate was supported by both the structural engineer and designer's work and sign offs for the project, and provides reasonable grounds about Building Code compliance

- 3.1.2. the authority incorrectly interpreted guidance published by the Ministry for building consent authorities about processing applications (“the Ministry’s accreditation guidance”<sup>7</sup>) by refusing to grant the building consent. The information provided by the owner in response to the authority’s request for further information was not materially insufficient and addressed the issues. The owner considers that compliance with Building Code Clauses B1, B2, and E3 has been demonstrated and the documentation was not poor
  - 3.1.3. the product information for the SIP system was provided as additional information on the product use, including installation guidance, and was not developed by the structural engineer
  - 3.1.4. the authority should have reconsidered the building consent application with additional information provided, as issues identified by the authority are not significant and could have been addressed by requesting further information.
- 3.2. The authority is of the view there were several issues in the building consent application and failings in the quality control of the application. The authority followed the Ministry’s accreditation guidance, and the decision was made to refuse the building consent as there was insufficient information to satisfy the authority on reasonable grounds that the SIP walls would comply with the Building Code.
- 3.3. The authority was of the view that the building consent application was poor quality because:
- 3.3.1. there are illegible plans
  - 3.3.2. incorrect details are provided, for example, the wet area details show timber framed wall construction rather than SIP wall construction
  - 3.3.3. incorrect product names are used for the SIP walls in some pages of engineer’s calculations, an elevation drawing, and the certificate of work
  - 3.3.4. the SIP walls design guide is incomplete and includes out of date information. It is missing technical detail, for example about breathability, links are incorrect, and the expired CodeMark certificate is still included
  - 3.3.5. the certificate of work mentions covering internal walls only, which means the SIP wall construction is not being covered
  - 3.3.6. the details provided for wet areas do not demonstrate compliance with Clause E3. No details have been provided to demonstrate compliance with Acceptable Solution E3/AS1 in terms of the floor to wall junction and no

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<sup>7</sup> Detailed regulatory guidance on the BCA accreditation scheme <https://www.building.govt.nz/building-officials/bca-accreditation/detailed-regulatory-guidance/7-perform-building-control-functions/>

form of sealing has been indicated. The plans indicate moisture resistant gypsum board to be used, but this is not detailed for the SIP walls

- 3.3.7. the BRANZ appraisal for the external wall cladding only applies to timber construction to NZS 3604:2011<sup>8</sup>, so it does not apply to the proposed building.
- 3.4. The authority also noted the inclusion of the product compliance certificate provided for the SIP walls does not remedy the inconsistencies and poor quality of information provided in the building consent application. The authority considered the certificate is only a means to support the building consent and does not carry the same weight as a product certificate issued under section 269 of the Act.
- 3.5. I did not receive any submissions from the other parties.
- 3.6. A draft determination was issued to the parties for comment on 15 June 2021.
- 3.7. On 22 June 2021 the owner responded to the draft and requested the determination identify specific issues with the building consent documentation.
- 3.8. On 21 July 2021 the authority responded accepting the draft determination and made no further comments.
- 3.9. The other parties did not respond to the draft determination. On 23 August 2021 the Ministry again contacted the structural engineer and designer.
- 3.10. On 23 August 2021 the structural engineer's lawyer responded that they did not agree or disagree with the determination and would not be commenting on the determination.

## 4. Discussion

### General

- 4.1. To consider the authority's decision to refuse to grant a building consent for the proposed building work under section 50, I must consider the authority's reasons for refusing to grant the building consent and the level of documentation required for a building consent authority to be able to form a view about compliance of the proposed building work with the Building Code if that building work were to be completed in accordance with the plans and specifications.

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<sup>8</sup> NZS 3604:2011 Timber framed buildings.

4.2. Section 45 of the Act states:

- (1) An application for a building consent must—
  - (a) be in the prescribed form; and
  - (b) be accompanied by plans and specifications that are—
    - (i) required by regulations made under section 401; 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; ...

4.3. Section 49 of the Act states:

A building consent 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.

4.4. Section 50 of the Act states:

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.

## Building consent applications

- 4.5. For the authority to issue the building consent, it must be satisfied that if the building work were to be completed in accordance with the plans and specifications it will comply with the Building Code. Therefore, the plans and specifications in the building consent application must provide sufficient detail for the authority to make that assessment.
- 4.6. Section 45 therefore requires there to be enough information within the building consent application to enable an authority to make a decision under section 49. Section 45 also permits an authority to set reasonable requirements for the documentation that accompanies building consent applications.
- 4.7. The Ministry has issued guidance<sup>9</sup> under section 175 that describes the minimum documentation that should be supplied with an application to demonstrate compliance with relevant clauses of the Building Code (“the Ministry’s guidance”).
- 4.8. The Ministry’s guidance provides details on what is required in terms of the quality drawings. The guidance describes that:

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<sup>9</sup> <https://www.building.govt.nz/assets/Uploads/projects-and-consents/guide-to-applying-for-a-building-consent.pdf>

- 4.8.1. building consent application drawings should be 'clear, correct and complete, and include a suitable level of detail'
  - 4.8.2. all drawings should contain a drawing number and title, the designer's and owner's name and the job address, scale, and version control dating
  - 4.8.3. drawings should meet normal drawing conventions and generally conform to NZS/AS 1100 Technical Drawing, including conventions for line types and widths, lettering type and size, symbols for building features and elements, designation of spaces, representation of materials, and cross-referencing conventions, and drawing sheet sizing should generally be consistent
  - 4.8.4. hand-drawn or CAD drawings are acceptable.
- 4.9. Determination 2011/096<sup>10</sup> considered what can be reasonably required in terms of the standard of the documentation, as follows:
- In my view, plans and specification submitted in support of a consent or alterations to a consent, must:
- (a) provide a compliant solution; and
  - (b) must also be sufficiently clear to describe how that solution is to be achieved through the construction process
  - (c) detail critical features.
- 4.10. Where a building consent application contains inadequate documentation, the authority is entitled to refuse to grant the building consent under section 50 of the Act. This is on the basis that without adequate documentation, the authority cannot be satisfied on reasonable grounds that the building work will be properly completed in a manner that will meet the provisions of the Building Code, as per section 49.

### **The refusal to grant the building consent application**

- 4.11. I have considered the building consent application and documentation accompanying the application, and the reasons given by the authority for refusing to grant the building consent in its correspondence dated 9 March 2020.
- 4.12. With respect to the plans and details submitted to the authority up to 19 February 2020, I am of the opinion these do not cover all relevant aspects of construction relating to the identified Building Code clauses. I note for example, the fixing and installation details for the cladding to the SIP system are not provided. This would mean the authority could not establish how the SIP system would support the cladding or how it would be made weathertight to achieve the requirements of the Building Code.

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<sup>10</sup> Determination 2011/096: The refusal to grant an amendment to a building consent for proposed remedial work, and the issuing of a notice to fix for a 13-year old house with monolithic cladding at 54 John Rymer Place, Kohimarama, Auckland (16 November 2011).



- 4.13. Regarding the product information for the SIP system and Building Code Clauses B1 and B2, I consider there are illegible plans and details. This does not make it possible for the authority to establish how the SIP system was to be constructed to achieve compliance with the Building Code. Therefore, the drawings do not meet the minimum required standard, especially for specifically designed elements or alternative solution proposals.
- 4.14. The product information for the SIP system contains errors and omissions, as well as references to the outdated product name used for the SIP system. A product certificate that had expired in 2016 was included in the product information. I note the owner has stated that the SIP system, formerly known under a different brand name, has simply changed names and is the same product, implying that the names can be used interchangeably.
- 4.15. Information from product manufacturers about products proposed to be used in the building work is reasonable information for the authority to require. I also consider this product information should be current and accurate. The SIP system product information provided with the application does not have these attributes.
- 4.16. The 'Product Compliance Certificate' (refer to paragraph 2.4) is a document that provides an opinion about the Building Code compliance of the SIP system. In this case, the certificate itself contains several errors including incorrect statements, for example the inclusion of a non-existent website. It does not have the status of a product certificate issued under section 269 of the Act. Therefore, there is no requirement that it must be accepted by a building consent authority as establishing compliance with the Building Code. On that basis, while it can support the building consent application, its inclusion does not address the errors, omissions, and inconsistencies in the building consent application.

## **Conclusion**

- 4.17. Considering the issues identified above, I am of the view that the building consent application does not contain adequate documentation showing the building work can be properly completed in accordance with the plans and specifications to meet the requirements of the Building Code. Therefore, the authority was correct to refuse to grant the building consent under section 50 of the Act.

## **5. The decision**

- 5.1. In accordance with section 188 of the Building Act 2004, I hereby determine that the authority was correct to refuse to issue a building consent (BLD0503/20) under section 50 of the Act. Accordingly, I confirm the authority's decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 5 July 2022.

**Peta Hird**

**Principal Advisor Determinations**