

Determination 2023/013

Date: 31 May 2023

Regarding the refusal to grant an amendment to a building consent to allow a substitute roofing membrane at 56 Seacliffe Avenue, Belmont, Auckland

Summary

This determination considers whether the authority was correct to refuse to grant an amendment to the building consent for the substitution of one roofing membrane product for another. This determination also considers whether this substitution would have constituted a minor variation to the building consent.



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. 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.

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Katie Gordon, National Manager Building Resolution, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry¹.
- 1.2. The parties to the determination are:
 - 1.2.1. the owner of the house, the Chenggang Zhang Family Trust (“the owner”), using the services of an agent; and
 - 1.2.2. Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority. The authority applied for this determination.
- 1.3. This determination arises from the authority’s refusal to grant an amendment to a building consent. The amendment sought to allow a substitute roofing membrane to the one specified in the building consent. The authority initially refused to grant the amendment as a minor variation to the consent, because it considered there were significant differences between the original and substitute membrane, and it had insufficient information about the substitute membrane’s code compliance. The authority subsequently refused to grant the amendment, after a formal application for amendment was lodged, as by that stage the substitute membrane had already been installed.
- 1.4. The matter to be determined, under section 177(1)(b) and (2)(a), is therefore the authority’s decision to refuse to grant an amendment to the building consent. In deciding this matter, I will also consider whether the substitution of the roofing membrane constituted a minor variation to the consent.

Matters outside this determination

- 1.5. I have not considered any other aspects of the Act or of the Building Code, nor have I considered the Building Code compliance of the substitute roofing membrane used in the building work, including any product certification processes related to it.

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

2. The building work

- 2.1. The owner's property is a flat waterfront section in a residential area in northern Auckland (Lot 49 DP 37086).
- 2.2. This determination relates to just one aspect of the consented work: the membrane used on the house's roof.
- 2.3. The building consent issued included the use of a sheet membrane roofing product ("the original membrane") to be used across all areas of the house's roof. The original membrane was a polyester reinforced thermoplastic polyolefin sheet product, which is installed by adhering the sheets to the substrate (in this case H3²-treated 17.5mm structural plywood) using a solvent-based contact adhesive, and heat welding the joints. The finished membrane has a consistent thickness of between 1.14mm and 1.52mm. The original membrane was both CodeMark³ certified (Certificate No. 30058) and BRANZ appraised (Appraisal No. 656).
- 2.4. However, the original membrane (as consented) has not been installed on the house. Instead, a liquid-applied membrane product was installed ("the substitute membrane"). The substitute membrane is a water and rubber-based product, which is applied using a sprayer or brush. The installed membrane is seamless, with a dry-film thickness of around 1.5mm.
- 2.5. It is the use of this substitute membrane, and the authority's refusal to grant an amendment of the building consent in respect of it, that is being considered in this determination. The authority considers that both the original and substitute membranes are alternative solutions to clause E2 of the Building Code.

3. Background

- 3.1. On 30 May 2017, the owner applied for a building consent for 'Construction of a new two storey six bedroom home with three car garage and swimming pool' on the property. The authority granted a building consent (BCO10094145) on 15 November 2017 for the construction of the owner's house
- 3.2. Most of the work covered by the consent is now complete and was passed as compliant at a final inspection on 3 March 2022.
- 3.3. Prior to this, during construction, it was decided to change the roofing membrane to be used from the original membrane to the substitute membrane.

² Timber treated to hazard classification H3 is described in New Zealand Standard NZS 3640:2003 Chemical Preservation of Round and Sawn Timber.

³ CodeMark is a product certification scheme in line with Subpart 7 of the Act. It is a means of compliance with the Building Code that must be accepted by Building Consent Authorities.

- 3.4. The owner's construction project manager advises the substitute membrane was applied in May 2020.
- 3.5. In August 2020, the authority was contacted by a building product certification company ("the certification company"), which had issued an appraisal certificate for the substitute membrane, as supporting evidence of its compliance with the Building Code⁴.
- 3.6. This initial contact was followed on 12 August 2020 by an email from the certification company providing information about the company and its certification process, as the authority was unfamiliar with the company. Correspondence between the authority and the certification company around the evidence required to establish the code compliance of the substitute membrane product ensued.
- 3.7. On 20 August 2020, during an inspection of the building work, the owner's construction project manager proposed that a minor variation could be made to the building consent to approve the change from the original membrane to the substitute membrane. The inspector refused to allow the minor variation. I have not seen the site inspection record confirming this refusal. However, the authority advises it was made on the grounds that the inspector had not heard of the certification company, which had issued the product assurance information supplied in support of the variation.
- 3.8. On 4 September 2020, the authority emailed the owner to confirm its decision that the roof membrane change could not be processed as a minor variation; stating that it was unfamiliar with the substitute membrane system, and that without 'recognised product certification' the membrane would require 'specific assessment by [the authority's] technical expert'. The authority suggested the owner liaise with its specialist staff before lodging an application for a building consent amendment.
- 3.9. On the same day, in a letter to the certification company, the authority confirmed its advice that it was 'not in a position at this time' to accept the company's appraisal as evidence of the substitute membrane's code compliance.
- 3.10. On 8 September 2020, the owner applied for an amendment to the building consent described as a "change to specified waterproofing product from [the original membrane] to [the substitute membrane] and additional small entry canopy.' With the application, the owner submitted a:
 - 3.10.1. 'Memorandum from licenced building practitioner: Certificate of design work: Section 45 and section 30C, Building Act 2004' from their builder and dated 7 September 2020, which certified that the builder had supervised the installation of the substitute membrane
 - 3.10.2. 'Producer statement construction (PS3): Waterproofing' and a 'Memorandum: record of building work: Section 88, Building Act 2004' dated 30 August 2020 from

⁴ Appraisal issued by AccreditedMark, appraisal number: AML0002NZ; version: v1.1; issue date 13 February 2020; expiry date 28 February 2021

the installer of the substitute membrane, confirming that the installer had supervised the building work to install the substitute membrane and the work complied with clauses B2 and E2 of the Building Code

- 3.10.3. safety data sheet for the substitute membrane, from the supplier of the membrane and dated 18 October 2018.
- 3.11. On 16 September 2020, the authority issued a 'Request for further information' in which it advised that it was unable to grant the amendment to the building consent. The reason given was that the PS3 and record of work supplied with the application indicated that the building work to install the substitute membrane had already been completed before an amendment approving the change had been granted. The authority advised that the owner would now have to apply for a certificate of acceptance for the work instead.
- 3.12. On 18 September 2020, the authority confirmed in a letter to the certification company that it did not consider the evidence in the appraisal certificate and its supporting documentation was 'strong enough for [it] to be satisfied on reasonable grounds that compliance with the building code has been demonstrated'.
- 3.13. A site meeting was held on 9 December 2020, following which the authority, in its inspection report, confirmed that the application to accept the substitute membrane by way of a minor variation to the building consent had been rejected, and that the owner had been instructed to apply for an amendment to the consent.
- 3.14. The authority subsequently applied for a determination.

4. Submissions

Authority

- 4.1. The authority made a submission with its application for a determination. The submission set out the background to the building work and dispute as summarised below:
- 4.1.1. The authority refused to amend the building consent because the substitute membrane had already been installed. The authority is unable to approve an amendment to a building consent for work that has already been completed. The authority referred to determinations 2018/011 and 2013/30 to support this interpretation of section 40.
- 4.1.2. Despite the authority's refusal, it has entered into extensive discussions with the certification company and the supplier of the substitute membrane around establishing the membrane's code compliance and the certification company's credentials to certify that compliance.
- 4.1.3. The CodeMark certification scheme is the only scheme that the authority must automatically accept as demonstrating code compliance. For all other schemes, the authority must "look behind them and determine whether they provide

sufficient information to enable the council to confirm [Building Code] compliance of this product, on reasonable grounds, in the future". The authority acknowledged that the substitute membrane had previously received CodeMark certification, but that this had expired.

- 4.1.4. The certification company was previously unknown to the authority, and the authority considered its appraisal of the substitute membrane to be "under-developed" with "gaps in the evidence" at the time the applications to amend the building consent were made. However, the certification company may be able to provide sufficient information to enable the authority to confirm the compliance of the substitute membrane in the future.
- 4.1.5. The authority considers the substitution of the roofing product was a "substantive change to the roofing material". The two membranes used different systems and methods for compliance, and in the authority's view were therefore "not compatible products". The original membrane is adhered to the substrate and heat welded, with a consistent thickness. The substitute membrane is liquid applied, with no guarantee that a consistent thickness will be achieved and no means of measuring this.
- 4.1.6. The authority referred to the principles in determination 2016/046 and concluded that:

It is questioned whether a substantive change to the roofing material could ever be [regularised] by a [minor variation] and it is the council's view that such a material change should always be approved by a formal amendment application. In this event where the work has already been [carried] out and the different product installed, it could only be [regularised] by a certificate of acceptance

- 4.1.7. The authority acknowledged the difficult position the owner was now in and suggested this could be resolved by either removing the substitute membrane and installing the original membrane instead; or by applying for a certificate of acceptance accompanied by 'sufficiently robust' compliance information so that the authority can be reasonably satisfied that code compliance will be achieved.
- 4.2. On 8 December 2022 the authority accepted the draft determination without comment.

Owner

- 4.3. The owner made a submission dated 14 October 2021 in response to the authority's application for a determination, the main points of which are as follows:
 - 4.3.1. The substitute membrane was previously known by another brand name. The owner's construction project manager has previously used it on construction projects in Auckland, including large scale commercial projects, which were

granted code compliance certificates. The membrane has complied on these projects, so it is surprising the authority refused the minor variation.

- 4.3.2. There have been no issues with water ingress through the substitute membrane since it was applied to the owner's house in May 2020.
 - 4.3.3. The issues around the substitute membrane delayed the owner's house construction by 6 months.
 - 4.3.4. The decision to use the substitute membrane was made for aesthetic reasons and because the owner's project manager had used it without problems in the past. The project manager had first sought the advice of the owner's architects who confirmed that the substitute membrane was an 'acceptable substitute' and prepared the minor variation application.
- 4.4. The owner also provided a joint letter from the supplier of the substitute membrane and the certification company. The letter, dated 14 October 2021, expressed frustration at the authority's process for establishing the compliance of the substitute membrane, and refusal to accept the substitute membrane as a comparable product for the purposes of granting the minor variation. The majority of the letter relates to the adequacy of the certifying company's product assurance information, and is not relevant for the purposes of this determination. Other points made are as follows:
- 4.4.1. The substitute membrane is simply a rebranded version of an existing membrane, with no other changes made to the product. This previous product had a CodeMark certificate, and has been used on a number of commercial and residential construction projects in New Zealand, including within Auckland, over the past 8 years, with no issues.
 - 4.4.2. The substitute membrane has a 'dry film thickness' of 1.5mm, which is more than the minimum thickness of 1.14mm that the authority would accept for the original membrane.
 - 4.4.3. The testing laboratory used by the certifying company for the substitute membrane's certification is registered, known to the authority and they are engaged by other companies issuing CodeMark certificates.
 - 4.4.4. The information that the certifying company has supplied to the authority to establish the compliance of the substitute membrane is 'above common standards for such appraisal documents'.
 - 4.4.5. The substitute membrane has now been installed on the owner's house for 15 months and there has been no water ingress.
- 4.5. On 16 March 2023 the owner responded to the draft determination noting that they were able and willing to provide further information to the authority regarding the substitute membrane's compliance. They also indicated that the substitute membrane now has a

CodeMark certificate. While this may be the case, it does not affect the matter being determined in relation to the authority's decision at the time.

5. Discussion

- 5.1. The matter to be determined is the authority's decision to refuse to issue an amendment to the building consent for the substitute roofing product. This decision was based on the authority's belief that the use of the substitute membrane could not be dealt with as a minor variation and that a formal application to amend the building consent was required; but that a formal amendment could not be granted as the building work to apply the membrane had already been carried out when the application was made.

The legislation

- 5.2. The relevant legislation relating to minor and other amendments to building consents can be found in sections 40, 44 and 45A of the Building Act 2004.
- 5.3. Section 40 specifies that a person must not carry out building work except in accordance with a building consent. Not all building work requires a building consent, and in these situations sections 41 and 42A apply.
- 5.4. Where building work does require a building consent, and where that building work will constitute a change to an existing building consent, as is the case here, then an amendment to the building consent must be applied for. There are two potential ways of amending a building consent, either as a minor variation or as a formal application to amend the consent, with the method to be used dependent on the nature of the building work involved.
- 5.5. Section 45 sets out how to apply for a building consent. Subsection 45(4) applies to applications for amendments:

45 How to apply for building consent

- (4) An application for an amendment to a building consent must,—
- (a) in the case of a minor variation, be made in accordance with section 45A; and
 - (b) in all other cases, be made as if it were an application for a building consent, and this section, and sections 48 to 51 apply with any necessary modifications.

- 5.6. Section 45A applies where an amendment to a building consent is being dealt with by way of a minor variation.

45A Minor variations to building consents

- (1) An application for a minor variation to a building consent—
- (a) is not required to be made in the prescribed form; but

- (b) must comply with all other applicable requirements of section 45.
 - (2) Sections 48 to 50 apply, with all necessary modifications, to an application for a minor variation.
 - (3) A building consent authority that grants a minor variation—
 - (a) must record the minor variation in writing; but
 - (b) is not required to issue an amended building consent.
- 5.7. Where a minor variation is being applied for, the Building (Minor Variations) Regulations 2009 (“the Minor Variations Regulations”) will also apply.

Does the building work constitute a minor variation?

- 5.8. The first question I must consider is whether the use of the substitute roofing membrane constituted a minor variation to the consented building works.
- 5.9. If the substitution did constitute a minor variation then no formal amendment to the building consent was required. If it did not, then an amendment should have been applied for before the work was carried out.
- 5.10. I note that the proposal to treat the use of the substitute membrane as a minor variation was first made at a building inspection on 20 August 2020. The membrane had already been installed at that point and this was the first time the authority had been notified of its use. The inspector refused to allow the minor variation at that meeting. The authority then confirmed this decision in correspondence dated 4 September and 9 December 2020.
- 5.11. The Ministry’s guidance recommends agreement to minor variations be sought before building work is carried out⁵. However, for the purpose of this determination, this does not preclude consideration of whether the membrane substitution constitutes a minor variation.
- 5.12. The owner considers that the use of the substitute roofing membrane constitutes a minor variation, because it is a comparable product to the original consented membrane and has been used in numerous other building projects within the authority’s area.
- 5.13. The authority considers that there are significant differences between the original and substitute membrane, and that it had insufficient information about the substitute membrane’s compliance to accept it as a minor variation.
- 5.14. The question of whether particular building work constitutes a minor variation is one of fact, dependent on the circumstances of each case. The process that an authority should follow in making its decision has been discussed in numerous determinations, including in

⁵ *Minor variations to building consents: Guidance on definition, assessment and granting* (1st edition, 1 January 2020). Retrieved from: <https://www.building.govt.nz/projects-and-consents/build-to-the-consent/making-changes-to-your-plans/minor-variations-guidance/>

Determination 2020/002⁶. The Ministry’s guidance, referenced in paragraph 5.11, sets out a three-step process for authorities to follow when considering whether a change from consented building work is a minor variation or not:

- Step 1: “Does the proposed change involve building work that is required to comply with the Building Code?” If not, the authority does not need to approve the work.
- Step 2: Does the proposed change come “within the definition of ‘minor variation’ contained in the [Minor Variations Regulations]”.
- Step 3: Does the proposed change:
 - comply with the Building Code
 - reflect common appropriate industry practice or standards
 - not significantly increase the likelihood of a building element’s performance failure.

5.15. Applying this process to the owner’s building work, the first step is to ask whether the work to install the substitute membrane was work that was required to comply with the Building Code.

5.16. The answer to this question is ‘yes’. The work to install the membrane is building work, and as such must comply with the Building Code (section 17), regardless of whether or not it required a consent.

5.17. The second step is to ask whether the use of the substitute membrane was a sufficiently minor change from the consented plans to fall within the definition in Clause 3 of the Minor Variations Regulations.

3 Minor variation defined

- (1) A minor variation is a minor modification, addition, or variation to a building consent that does not deviate significantly from the plans and specifications to which the building consent relates.
- (2) The following are examples of minor variations and do not constitute an exhaustive list:
 - (a) substituting comparable products (for example, substituting one internal lining for a similar internal lining);
 - (b) minor wall bracing changes;
 - (c) a minor construction change (for example, changing the framing method used around a window);

⁶ *Determination 2020/002: Regarding the consented alterations to the walls and roof of a house and its compliance with Building Code Clause B1 at 25 Sturrocks Road, Redwood, Christchurch (17 March 2020)*

- (d) changing a room's layout (for example, changing the position of fixtures in a bathroom or kitchen).
 - (3) The examples in subclause (2) are only illustrative of subclause (1) and do not limit it. If an example conflicts with subclause (1), subclause (1) prevails.
 - (4) To avoid doubt, a minor variation does not include any building work in respect of which compliance with the building code is not required by the Building Act 2004.
- 5.18. Clause 3(1) states a minor variation is one that “does not deviate significantly from the plans and specifications” relating to the building consent. The Minor Variations Regulations do not define what is intended by ‘plans and specifications’. However, section 7 of the Act defines the terms as:
- plans and specifications—**
- (a) means the drawings, specifications, and other documents according to which a building is proposed to be constructed, altered, demolished, or removed; and ...
- 5.19. Accordingly, I must look at the drawings, specifications and other documents that formed part of the original building consent to determine if the substitute membrane deviated significantly from these.
- 5.20. The construction details for the substitute membrane are different to those of the original membrane. The two membranes involve different components, with different methods of application and material properties. The original membrane is a polyester reinforced thermoplastic polyolefin sheet product, which uses solvent-based contact adhesive and heat-welded joints. Whereas the substitute membrane is a liquid-applied water and rubber-based membrane, applied using a sprayer or brush to create a seamless finish.
- 5.21. In my view, the variation between the specifications for the two membranes, including their composition, properties, and application, is more than negligible. The membrane is also used in several different contexts across the building work, meaning a large number of details need to be updated in the plans and specifications to reflect the change.
- 5.22. In addition, section 45(1)(b)(ii) of the Act states that plans and specifications can include plans and specifications required by the authority. For the owner’s house, the authority has relied on the CodeMark certificate and BRANZ approval relating to the original membrane. These certifications constitute ‘other documents’ and an issue between the parties was whether the appraisal information relating to the substitute membrane has equivalent status in demonstrating code compliance. The owner considers it does; the authority disagrees. Either way, there is a significant deviation between the compliance documents supplied for the original membrane and those supplied for the substitute membrane.
- 5.23. In my opinion, the variation in the roofing membrane used on the owner’s house involves changes to several details, the updated specifications, and the additional compliance documentation relating to the substitute membrane. The cumulative effect of these

changes means there is a significant deviation from the consented plans, specifications and other documents. Therefore, the change is not a minor variation.

- 5.24. I note that the owner considered that the substitute membrane was a comparable product, as allowed for in Clause 3(2) of the Minor Variations Regulations. However, for the reasons given above I do not consider the two membranes to be comparable: their chemical composition, means of application and finished state are all different. Put another way, the appraisal approach and analysis used to establish the code compliance of the original membrane, as a sheet-applied membrane, could not equally have been applied to the substitute membrane, as a liquid applied one. I consider this, together with the compliance documentation needed to assess compliance with the Building Code of the product that was not known to the authority at the time, to be particularly relevant.

The decision to refuse an amendment to the building consent

- 5.25. Having found that the use of the substitute membrane did not constitute a minor amendment, I must consider the authority's decision to refuse to issue a formal amendment to the building consent to allow the membrane to be used.
- 5.26. Section 45(4)(b) provides that an application to amend a building consent must be made as if it were an application for a building consent. This means that applications to amend building consent must be made on the prescribed form, and be accompanied by plans and specifications etc.
- 5.27. It also means that section 44, which deals with when to apply for a building consent, applies. Section 44(1) states that an owner intending to carry out building work must apply for a building consent before the building work begins. In situations where this has not occurred, an authority is unable to retrospectively issue a building consent for the commenced or finished building work. This approach was confirmed in the case of *Environment Waikato v Sutherland*⁷ and has since applied in subsequent determinations⁸.
- 5.28. The evidence shows that building work to install the substitute membrane was carried out before the application was made to amend to the building consent. Accordingly, the authority was correct in its decision to refuse that amendment.

Conclusion

- 5.29. The substitution of the membrane used on the owner's roof did not constitute a minor variation. The amendment to the building consent could not be issued as the building work was complete before the application was made.
- 5.30. I confirm that the authority was correct in its decisions to both refuse a minor variation to the building consent and to refuse an amendment to the building consent.

⁷ *Environment Waikato v Sutherland* District Court Wellington CIV-2010-085-629, 1 March 2011

⁸ See determinations 2016/046, 2017/020 and 2019/016.

- 5.31. I note that both parties have made significant submissions on the code compliance of the substitute membrane and the documentation required to establish this. My decision is not based on the compliance, or otherwise, of the membrane. It rests on the nature of the variation in the building work, and the stage at which an amendment was applied for.

6. Decision

- 6.1. In accordance with section 188 of the Building Act 2004, I determine that the authority was correct in its decisions to refuse to allow a minor variation or grant an amendment to the building consent.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 31 May 2023.

Katie Gordon

National Manager – Building Resolution