



Determination 2012/076

The authority's exercise of powers in refusing to accept an application for a certificate of acceptance for retrofitting foam wall insulation in a house at 24 Braithwaite Street, Karori, Wellington

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 and Assurance, 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 owners of the house, Mr and Mrs G and A McManus ("the applicant"), acting through an agent, Airfoam Wall Insulators (Wellington) Limited ("the insulation provider")
- Wellington 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 accept an application for a certificate of acceptance for building work that consisted of retrofitting urea formaldehyde foam insulation ("the insulation") in the external walls of the applicant's house.

1.5 The matter to be determined² is therefore whether the authority correctly exercised its powers of decision in refusing to accept an application for a certificate of acceptance for the building work.

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.

² Under sections 177(1)(b) and 177(3)(b). 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.

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 certificate of acceptance was received by the authority on 30 October 2012. The application was in respect of the installation of the insulation into the walls by 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. A building consent was not obtained prior to the building work being carried out.

2.2 The application for a certificate of acceptance included:

- a letter describing the Building Code requirements and evidence that the requirements have been met:
 - E2.3.6: Invasive moisture readings have been taken and moisture levels are now at the pre-installation level. B2.3.1 is not applicable
 - E2.3.2 and B2.3.1: The cladding is weatherboard. The installation holes have been sealed using the described process
 - C2.2(a): Is not applicable as compliance with Clause C2 is covered by the building consent
 - F2.3.1: When the insulation was installed glazing had not been installed and the home was unoccupied. No smell is detectable.
- the application form
- a report about the condition of the existing building, prior to the insulation being installed
- a report about the installation of the building work, describing the evidence that the Building Code obligations have been met.

2.3 In a letter dated 8 November 2012, the authority ‘refused’ the application, as more information was required to be provided. The authority noted:

the application is an alternative solution and the guidance contained within the [Ministry] website ... should be followed in order to provide us with the necessary information from the appropriately qualified and independent people for us to be able to consider the compliance with the Building Code ...

... This will cover the following code clauses:

- B2 – Durability, in particular in relation to performance criteria B2.3.1 which states that building elements must, with only normal maintenance continue to satisfy the performance requirements of the Building Code for the lesser of the intended life of the building.

- C1 – Outbreak of Fire. Clarification is required that components for example flues are not carried through walls that may cause a fire hazard.
- E2 – External Moisture, in particular E2.3.6. Evidence has been provided in relation to this performance criteria. Please could it be clarified that the person providing this evidence is suitably qualified and independent.
- G9 – Electricity in particular performance criteria G9.3.1. This should be addressed by a suitably qualified professional.

... Information in relation to F2.3.1 – Hazardous Building Material and E2.3.2 – External Moisture has been provided.

2.4 The agent responded to the authority in an email dated 8 November 2012, noting some points about the scope and applicability of the Building Code clauses that had been raised by the authority.

2.5 The authority responded to this email, noting that E2.3.2 is for the external injection of the insulation, B2.3.1 applies with respect to E2.3.2 and F2.3.1, the concern with respect to fire safety is that the insulation is in contact with any flue penetration through the cavity and:

E2.3.6 It is reasonable that evidence being provided to us that is specialist in nature is provided by a suitably qualified person and there is no evidence to show that the person who supplied the information is suitably qualified and that the moisture meter had a current calibration certificate.

We acknowledge that no electrical work is being carried out, but the building work must comply with the Building Code. G9 states that installations shall be safe for their intended use, in particular the performance criteria G9.3.1 which should be addressed by a suitably qualified professional such as a registered electrician.

... the main purpose for [the] checks are Building Code compliance including compatibility with the other building products already within the building that comes into contact with the [insulation] ...

2.6 An application for a determination was subsequently received on the 16 November 2012.

3. The submissions

3.1 The agent provided a copy of the application for a certificate of acceptance, and a letter noting the authority's reasons for refusing to issue a certificate of acceptance and comments in response:

- Clause B2 – compliance with respect to Clause B2 relates to the durability of the sealing of the installation holes. The agent set out the process used to seal the installation holes.
- Clause C2.2 and C3.7 – no fixed appliances or fire walls were identified.
- Clause E2.3.6 – in respect of the invasive moisture readings, the agent has undertaken training in the use of the invasive moisture meter. The photographic evidence shows the reading, and it is not necessary for an independent person

to carry out this reading. This requirement is not placed upon plumbers who provide tests that they have carried out evidence of compliance.

- Clause G9.3.1 – electrical work was not part of the building work. However, as standard practice, the existing building report covers the suitability of the house, and the house contains only PVC wiring.

3.2 A draft determination was issued to the parties dated 28 November 2012 for comment.

3.3 The insulation provider, on behalf of the owner, accepted the draft determination without comment.

3.4 The authority made a submission dated 4 December 2012, noting in respect of Building Code compliance that:

- BRANZ study report 233, 234 and subsequent articles have indicated the injection of the insulation ‘to be a cause for concern and not compliant with the requirements of the Building Code’
- the process set out by the applicant for repairing the holes to the cladding does not prove the durability of the filling product for 15 years, the filling product in relation to the insulation as a filler backer for a period of 15 years, the filling product in relation to the cladding material for a period of 15 years, and the deterioration of the insulation product over a period of 50 years
- when the application is accepted, the potential heat build up where electrical wiring has been encased and the possibility of fire outbreak where the insulation has entered into electrical boxes and components will be assessed
- information has been provided for the sealing of the penetration holes. When the application is accepted, it will be assessed as to whether it meets the requirements of E2.3.2 including the building paper penetrations
- there is no report of timescales, readings, locations etc for the moisture readings and more information is required from a suitably qualified and independent person
- when the application is accepted, whether the provisions of Clause F2.3.2 have been met will be assessed, however, there is a question whether reliance on peoples sense of smell is sufficient
- an assessment of the circuits and evidence is required regarding the affects of the injected moisture with respect to Clause G9. It is unclear how it can be confirmed that UPVC is present throughout without seeing it, and whether the circuits are still performing properly after moisture has penetrated junctions, meter boxes, and fittings etc and whether there are any safety issues.

3.5 The authority also noted:

- it had not refused to issue a certificate of acceptance, it had refused to accept an application for a certificate of acceptance

- it was not given the opportunity to make a submission before a draft determination was made
- how can it issue a certificate of acceptance when it has no ability to inspect the works. It cannot be ascertained the extent of the installation nor the process in which the holes were sealed
- the draft discusses the differences in assessing a certificate of acceptance compared to a building consent in terms of the building work undertaken and not applying to the existing structure, however, we can consider the existing building's performance as being adversely affected. From the information provided, it cannot be concluded that the existing structure will be adversely affected as the effects are unknown.

4. Discussion

4.1 The basis for issuing a certificate of acceptance

- 4.1.1 Section 40 states that building work must not be carried out except in accordance with a building consent, and section 96(1)(a) provides for the issue of a certificate of acceptance where an owner has carried out building work without obtaining a building consent. In such a situation, an authority may, on application, issue a certificate of acceptance but 'only if it is satisfied, to the best of its knowledge and belief and on reasonable grounds, that, insofar as it could ascertain, the building work complies with the [Building Code]' (section 96[2]).
- 4.1.2 This requires an authority to consider all the available evidence such as plans and specifications, producer statements, the builder's records, the owner's records, any expert reports, and the authority's own experience and knowledge of the builders and designers involved in the work in order to ascertain whether the building work complies with the Building Code.
- 4.1.3 An obvious question arises as to how section 96 deals with building work that cannot be inspected and for which there is no evidence available to determine whether it complies with the Building Code. Is a certificate of acceptance meant to be silent as to the building work that cannot be inspected and for which there is no evidence available to determine whether it complies with the Building Code? In my view, this cannot have been intention behind section 96 as that could make a certificate of acceptance potentially misleading. The better approach to section 96 is that it enables a certificate of acceptance to be issued for the building work that is considered to comply with the Building Code and for the certificate of acceptance to also set out the building work that is excluded from the scope of the certificate because it cannot be inspected and for which there is no evidence available to determine whether it complies with the Building Code. I have set out my reasons for this conclusion below.
- 4.1.4 Form 9 requires an authority to list the building work that complies with the Building Code and in my view this list provides the basis for an authority to list only the building work that can be ascertained as complying with the Building Code. The description of the work covered by Form 9 could be:

- a description of the physical building work, or
 - a description of the Building Code clauses the building work complies with, or
 - a combination of both.
- 4.1.5 Where a certificate of acceptance does not cover work that is the subject of the application because it cannot be inspected and for which there is no evidence available to determine whether it complies with the Building Code, it is essential the certificate clearly set out the nature and extent of the work that is not covered by the certificate of acceptance to ensure the certificate is not misleading. This list of building work that is expressly excluded from the scope of a certificate of acceptance could appear immediately after the list of work that complies with the Building Code. In this way, the contrast between the work that complies with the Building Code and the work that is excluded from the certificate will be clearly apparent to persons reading the certificate.
- 4.1.6 Of course, an authority should always keep in mind the possible application of the minimum performance requirements of the Act relating to dangerous, earthquake prone and insanitary buildings (see sections 121-130 of the Act) to any building work that has been undertaken, but for which it has concluded that there are not reasonable grounds to ascertain compliance with the Building Code.
- 4.1.7 Section 99(2) and Form 9 both provide for a certificate of acceptance to attach a further list of the building work an authority has been able to inspect for the purpose of limiting the liability of the authority to that work it has been able to inspect. This attachment listing the building work inspected will obviously be narrower than the description of work covered by the certificate of acceptance. This is because the extent to which an authority has been able to 'inspect' work will usually be less than the extent to which an authority has been able to 'ascertain' whether building work complies with the Building Code. In ascertaining compliance, the authority will take into account all the relevant evidence available, including its knowledge and belief about the circumstances surrounding the building work and the builders and designers who undertook the work, and statements of opinion provided such as producer statements.
- 4.1.8 With respect to an application for a certificate of acceptance, the applicant must provide (if available) plans and specifications, and any other information that the authority reasonably requires. Under section 97 with respect to an application for a certificate of acceptance, it is the applicant who must provide sufficient information to the authority to establish the level of compliance achieved. I note also that the authority may inspect the building work and that this information, along with that supplied by the applicant, would assist the authority in forming a view as to compliance with the Building Code.
- 4.1.9 To ensure the scope and application of a certificate of acceptance is as clear as possible, an authority may wish to clearly note on the certificate of acceptance that it only applies to the building work that has been undertaken without a building consent and does not apply to any existing structure. The test under section 112 for alterations to existing buildings applies only when an authority is considering granting a building consent. Building work undertaken to an existing building without a building consent may affect the extent to which the existing building

complies with the provisions of the Building Code. In such a case, the authority may wish to consider whether the building's existing performance has been adversely affected, and may wish to note this on the certificate of acceptance. However, the authority does not have any powers in respect of the existing structure unless the authority considers the building meets the tests under sections 121-130 of the Act.

4.2 The decision to refuse to accept the application for a certificate of acceptance

4.2.1 As I have found in other determinations³ the relevant Building Code obligations for the building work are Clauses E2.3.2 and B2.3.1 with respect to the penetrations in the external cladding, E2.3.6 with respect to the dissipation of excess construction moisture, and Clause F2.3.1.

4.2.2 The following has been provided:

Clause E2.3.2 and B2.3.1

- The process for making good the penetrations in the external cladding has been set out in detail.
- Photographs of the sealing to the penetrations have been provided.

Clause E2.3.6

- Results of invasive testing over a period of 6 weeks have provided evidence that moisture levels have returned to pre installation levels.

Clause F2.3.1

- The building was under construction and unoccupied and the insulation provider's process for ventilation requirements post construction was followed.
- No odour has been identified during post installation inspections.

4.2.3 For the assessment of the application for a certificate of acceptance, I have considered the information provided in support of this the Building Code compliance of the building work.

4.2.4 I note the reasons given by the authority for refusing the application are about information provided to demonstrate Building Code compliance, other than the matter raised relating to the insulation provider signing a certificate and the owner signing a form, however, I understand from the submissions of the insulation provider that this has now been addressed.

4.2.5 I note that in refusing the application, the authority has required information be provided that is not directly relevant to the building work itself, but to the existing building. The authority should have ensured that the information requested in order to accept the application was confined to matters that are relevant to the scope of the building work. The authority has therefore failed to properly exercise its powers in refusing the application in seeking information that was not relevant to the test required to be applied.

³ 2012/026 and 2012/027

4.2.6 I am of the view that there was sufficient information provided in the application for a certificate of acceptance and the authority has incorrectly exercised its powers in refusing to accept the application.

4.3 The Building Code compliance of the building work

4.3.1 In order to assist the parties, I have considered the evidence that has been provided and the tests that would be required to be applied by the authority in order to issue a certificate of acceptance.

4.3.2 Based on the information provided to demonstrate the Building Code compliance of the installation of insulation into this house, I am of the view that sufficient evidence has been provided so the authority can be satisfied, to the best of its knowledge and belief, and on reasonable grounds, that the building work complies with the Building Code.

4.3.3 I note that this Determination is one of a number being currently considered. Here I have found that there is sufficient evidence to demonstrate the building work complies with the Building Code. I accept that this is a different situation as the building work has already been completed; however, I note that in a recent determination⁴, I found that there were some gaps in the information provided to support a building consent application, and there was not sufficient evidence to allow a building consent to be granted.

4.3.4 As I described in paragraph 4.1.9, the certificate of acceptance only applies to the building work that has been undertaken without a building consent and does not apply to any existing structure. However, as building work undertaken to an existing building may also affect the extent to which the existing building complies with the provisions of the Building Code, and whilst it is not a requirement, it is useful to consider (and note on any certificate of acceptance) whether the building's existing performance has been adversely affected.

4.3.5 I accept that sufficient evidence has been provided to demonstrate that post construction moisture levels have returned to pre-installation levels, and that the structural performance of the framing is not reduced, with respect to the accumulated moisture causing damage to the framing and linings. I accept that in this case, the person carrying out the readings of the moisture levels was appropriately trained and these readings can be relied upon, and I am of the view that the level of information and photographs provided is sufficient.

4.3.6 The insulation provider has provided evidence in the existing building inspection and the post installation inspection about the form and condition of the external envelope. I am satisfied that the insulation provider has adequately considered the effect of the proposed building work on the external envelope in this case, that it is a low weathertightness risk building that is well maintained and therefore that the ability of the system to prevent moisture penetration and moisture accumulation or transfer has not been reduced.

4.3.7 The insulation provider observed that no fixed appliances or fire walls were identified and the electrical wiring was PVC therefore, I accept this provides

⁴ Determination 2012/073

sufficient evidence to conclude that there was no impact on fixed appliances or firewalls and the compliance and continued safety of the electrical wiring was not detrimentally affected.

- 4.3.8 I accept that sufficient evidence has been provided to demonstrate that the thermal performance of the building envelope has not been reduced.
- 4.3.9 It is my view that this evidence is satisfactory. Accordingly, I am of the view that there is sufficient evidence provided to demonstrate that the existing building was not adversely affected in this case. I note that other determinations and cases relating to the retrofitting of urea formaldehyde foam insulation that are currently being considered have found that the information provided in support of the building consent has been insufficient; however, this is a different situation as the building work has already been completed, and there is therefore a different evidence base in order to make a decision.
- 4.3.10 I believe this determination should provide a framework to assist the authority in considering further applications for certificates of acceptance 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 accept the application for a certificate of acceptance, and therefore I reverse that decision.
- 5.2 I am also of the view that there is sufficient evidence in this case that the authority can be satisfied, to the best of its knowledge and belief, and on reasonable grounds, that the building work complies with the Building Code.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 14 December 2012.

John Gardiner
Manager Determinations and Assurance

Appendix: The legislation

The relevant provisions of the Building Act are:

- 7 Interpretation**
building work—
 (a) means work
 (i) for, or in connection with, the construction, alteration, demolition, or removal of a building
 (ii) on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code;...
- 40 Buildings not to be constructed, altered, demolished, or removed without consent**
 1. A person must not carry out any building work except in accordance with a building consent.
- 96 Territorial authority may issue certificate of acceptance in certain circumstances**
 1. A territorial authority may, on application, issue a certificate of acceptance for building work already done —
 (a) if —
 (i) the work was done by the owner or any predecessor in title of the owner; and
 (ii) a building consent was required for the work but not obtained...
 2. A territorial authority may issue a certificate of acceptance only if it is satisfied, to the best of its knowledge and belief and on reasonable grounds, that, insofar as it could ascertain, the building work complies with the building code.
 3. This section —
 (a) does not limit section 40 (which provides that a person must not carry out any building work except in accordance with a building consent); and
 (b) accordingly, does not relieve a person from the requirement to obtain a building consent for building work.
- 97 How to apply for certificate of acceptance**
 (a) An application for a certificate of acceptance must—
 (a) be in the prescribed form; and
 (b) if available, be accompanied by plans and specifications that are—
 (i) required by regulations made under section 402; or
 (ii) if the regulations do not so require, required by the territorial authority; and
 (c) contain or be accompanied by any other information that the territorial authority reasonably requires; and...
- 99 Issue of certificate of acceptance**
 (b) A certificate of acceptance may, if a territorial authority inspected the building work, be qualified to the effect that only parts of the building work were able to be inspected.
 (c) A territorial authority's liability for the issue of a certificate of acceptance is limited to the same extent that the territorial authority was able to inspect the building work in question.

Form 9 Certificate of Acceptance **Acceptance of compliance**

The territorial authority named below is satisfied, to the best of its knowledge and belief and on reasonable grounds, that, insofar as it can ascertain, the building work described below complies with the building code: [insert details]

‡The territorial authority was only able to inspect the following parts of the building work and this certificate is qualified as follows: [insert details]