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By email: alanm@natcon.co.nz

Independent Fire Engineers Group
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Dear Alan

Fire Engineers – Building Act requirements

- 1 You have advised us that a number of Building Consent Authorities (**BCAs**) have been making the provision of a PS4 from a fire engineer a condition of the BCA issuing a Code Compliance Certificate. You have also advised that certain BCAs are also requiring a design co-ordination statement to be issued by a fire engineer.
- 2 You have asked us to review the legislative requirements and provide an opinion on whether a BCA can require a design co-ordination statement or a PS4 from a fire engineer.

Summary

- 3 A BCA is required to assess all information provided to it in order to satisfy itself on reasonable grounds that the provisions of the Building Code (**Code**) will be met. When making this assessment a BCA must make a reasonable assessment of all information provided to it.
- 4 Neither a design co-ordination statement nor a producer statement has any legal status under the Building Act 2004 (**Act**).
- 5 A BCA cannot require an applicant to provide a design co-ordination certificate or a producer statement.
- 6 Fire compliance requires input from fire engineers, consultants and contractors. Given a fire engineer's typical involvement in a project (based on the outline you have provided to us) there are unlikely to be many situations where it would be appropriate for an engineer to provide anything other than a highly qualified PS4 and only limited occasions where a BCA could rely solely or to any material extent on such a PS4.
- 7 Provision of any form of certification may increase the liability of the author and any engineer who is providing certification should ensure they are acting within their competency when doing so.
- 8 Where an applicant chooses to establish compliance with the fire provisions of the Code at building consent stage through some means other than C/VM2 a fire engineering brief cannot be required.

Fire compliance

- 9 A building's compliance with the fire provisions of the Code relies on a number of specialist consultants and contractors. It is a combination of:
- a fire performance requirements developed by a fire engineer; and
 - b the interpretation and application of those performance requirements by specialist consultants and contractors.
- 10 The fire requirements in the Code are broad. Fire compliance covers the entire building (both exterior and interior) and has a relationship with most building elements. As a result, a building's fire compliance involves a number of different specialists, not solely fire engineers.

Design co-ordination statements and producer statements

- 11 Both design co-ordination statements and producer statements are optional documents or concepts that have been developed by professional bodies and which consultants may choose to provide. Neither design co-ordination statements nor producer statements have any legal status under the Act.
- 12 Furthermore, section 18 of the Act provides that no party can be required to achieve anything greater than compliance with the Code. If Code compliance can be established without a design co-ordination statement or a producer statement there is no basis for a BCA to require these documents as part of the consent or code compliance process.
- 13 Notwithstanding this, a BCA may consider a design co-ordination statement and/or a producer statement where one is provided but it cannot require these to be provided as a prerequisite to issuing consent or Code compliance.

Design co-ordination statement

- 14 A design co-ordination statement is a concept that has been introduced in Engineering New Zealand Practice Note 22 'Guidelines for documenting fire safety design'. The design co-ordination statement is to record that the fire safety design requirements have been coordinated with and accurately transferred to the drawings, specifications and documents prepared by the other disciplines. Practice Note 22 does not require a fire engineer to issue the design co-ordination statement and it is clear that a design co-ordination statement relies heavily on input from other consultants.
- 15 A design co-ordination statement is not a legal requirement under the Act. Practice Note 22 has been published under section 175 of the Act, which expressly states that any information published under that section:
- a. is only a guide; and
 - b. if used, does not relieve any person of the obligation to consider any matter to which that information relates according to the circumstances of the particular case.

Producer statement PS4

- 16 A producer statement PS4 is for construction review and is intended for use where a suitably qualified design professional undertakes construction monitoring.
- 17 Producer statements are not a requirement under the Act. In the Building Act 1991, producer statements were listed as one mechanism that an applicant could use to establish Code compliance. Any reference to 'producer statements' has been removed in the current Act. Under the Building Act 1991, producer statements were only informative. Producer statements are not, and have never been, a statutory requirement.

Statutory requirements

- 18 Under section 49 of the Act, a BCA must grant a building consent if it is satisfied on reasonable grounds that the provisions of the Code would be met if the building work were properly completed in accordance with the plans and specifications accompanying the application.
- 19 Under section 94 of the Act, a BCA must issue a Code Compliance Certificate if it is satisfied on reasonable grounds that the building work complies with the building consent.
- 20 The Act does not require a design co-ordination statement or a producer statement from a fire engineer, and a BCA cannot refuse to issue a consent or code compliance certificate where other information establishes on reasonable grounds that the provisions of the Code will be, or have been, met.
- 21 The BCA is not limited in what information it can assess in order to be satisfied that the work will meet the Code, and the BCA must reasonably assess all information provided to it. A limited exception to this position is where the Governor-General has made an order under section 401 of the Act that a specific acceptable solution or verification method must be complied with in order to establish compliance with the Code (refer sections 20, 21 and 401 of the Act). We are not aware of any such order in relation to fire compliance.
- 22 The fact that a BCA may have requested a producer statement as part of the consent document does not change this position. The issuing of a Code Compliance Certificate is focused on compliance with the Code, and this position was reaffirmed in recent Supreme Court decision *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council*¹

... there is no valid distinction between the issuing of a certificate of code compliance and council's other functions such as the granting of a building consent or inspections. All of these functions, including the issuing a code compliance certificate, are directed at ensuring buildings comply with the relevant building code.

Suitability of PS4 from a fire engineer

- 23 The Act requires a BCA to satisfy itself as to compliance with the Code. It cannot delegate this obligation to any third party and it cannot rely on any document provided by a third party without also making its own independent assessment of the position.

¹ *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* [2017] NZSC 190.

- 24 Where a producer statement is provided, a BCA will need to satisfy itself that the producer statement is appropriate and reliable before it chooses to place any weight on it. This process should involve a consideration of the skills, experience, expertise and role of the person providing the statement and of the basis for the opinion.
- 25 A producer statement should only be issued where the author has the required competency and where reasonable grounds exist for issuing one. Fire compliance relies on the involvement of the fire designer as well as a number of other consultants and contractors. Given the limited involvement that a fire engineer traditionally has throughout a project (based on the outline you have provided to us), there are unlikely to be many situations where it would be appropriate for a fire engineer to provide anything other than a highly qualified PS4.
- 26 There would be very limited occasions where a BCA could rely solely or to any material extent on a PS4 (qualified or not) issued by a fire engineer when assessing compliance.

Liability arising from the issue of a design co-ordination statement or a producer statement

- 27 By issuing any form of certification the author is exposing themselves to increased liability. The extent of any such liability will depend on the scope of the certification or statement and the circumstances. Examples of potential areas of liability include breach of contract, negligent misstatement, negligence and/or breach of the Fair Trading Act.
- 28 Recent case law has largely removed the distinction between residential and commercial buildings and where certification was negligently provided. A claim could conceivably be brought in relation to commercial, residential and 'mixed use' buildings.
- 29 In addition to the above, Chartered Engineers are bound by the Code of Ethical Conduct which requires all Chartered Engineers to only undertake engineering activities that are within their competency. Chartered Engineers would need to keep this obligation in mind when providing any certification.

Fire engineering brief

- 30 You have also asked us to review whether a fire engineering brief (FEB) can be required by a BCA.
- 31 A FEB is part of verification method C/VM2. C/VM2 is a verification method that an applicant can choose to use during the consent application process in order to establish compliance with the Code in relation to fire. The benefit of using a verification method is that a BCA is required to accept a verification method as establishing compliance with the relevant section of the Code.
- 32 Subject to any specific order from the Governor-General under section 401 of the Act (refer paragraph 21 above), an applicant cannot be required to use a particular verification method to establish Code compliance, and an applicant is free to establish compliance through any other means. Such other means includes the provision of an alternate solution (which may or may not be based on a verification method). The BCA must assess any information provided in order to determine whether it is satisfied on reasonable grounds that the provisions of the building code would be met.

- 33 Where an applicant chooses to establish compliance with the fire provisions of the Code through some means other than C/VM2 then there is no requirement for the applicant to provide a FEB.

Yours faithfully
Kensington Swan



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