

Determination 2024/072

The refusal to issue a code compliance certificate due to outstanding producer statements

1024 Leigh Road, Big Omaha, Auckland

Summary

This determination considers an authority's refusal to issue a code compliance certificate due to outstanding producer statement documentation. The determination considers the reasons the authority gave for the refusal.

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 (eg 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, Peta Hird, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment (“the Ministry”).¹
- 1.2. The parties to the determination are:
 - 1.2.1. P North (“the owner”), the owner of the property who applied for this determination.
 - 1.2.2. Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. This determination arises from the authority’s refusal to issue a code compliance certificate due to outstanding documentation for particular items of the building work, specifically a number of ‘producer statements’.²
- 1.4. The matter to be determined, under section 177(1)(b) and (2)(d) of the Act, is the authority’s refusal to issue a code compliance certificate for building work carried out under building consent ABA-1009252.³
- 1.5. In deciding this matter, I have considered the reasons given by the authority for the refusal as set out in its letter dated 1 March 2023 (“the section 95A notice”).
- 1.6. 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 building work detailed in the building consent, other than as required in relation to the matter for determination.

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

² A producer statement is a professional opinion based on specialist judgment and expertise which can be issued by a range of construction professionals.

³ The final inspection and refusal letter refer to building consent number BCO10040813, and the address and description of the building work is consistent with the consent ABA-1009252. The authority’s code compliance certificate checklist refers to both building consent numbers.

2. The building work and background

- 2.1. On 17 March 2011 the authority issued building consent numbered ABA-1009252 for the construction of a 400m² single level dwelling with internal garaging. The building consent was amended on 22 November 2011 to include a swimming pool (with associated pool fencing), wind turbine, hot water solar heating system, underfloor heating and changes to chimney structure.
- 2.2. The building consent was issued with conditions requiring 25 Producer Statements⁴ from various trades and professionals involved in construction or supervision of the building work.⁵ The conditions state the Producer Statements are “required to demonstrate compliance with the New Zealand Building Code before a code compliance certificate is able to be issued” and “[f]urther inspections may not proceed in the absence of such documentation.”
- 2.3. A group home builder was engaged to build the new dwelling in 2010 and it was completed in 2012. Final inspections were carried out on 21 March 2013 and again on 15 May 2014. The owner applied for a code compliance certificate on 5 December 2018.
- 2.4. The authority undertook another final building inspection on 14 December 2018. The outcome of the inspection was recorded as a ‘pass’ but noted that a Producer Statement – Construction (PS3) was required for the membrane roof, and a Producer Statement – Construction review (PS4) for the solar heating system.
- 2.5. On 1 March 2023 the authority refused the code compliance certificate. In the section 95A notice, the authority stated its reasons for the refusal as follows:

As per the [request for further information] letter issued 05.02.2019, the following items are still outstanding:

2. Producer Statement Construction review (PS4) and site observation notes for the solar and combination water heating systems
3. Producer Statement Construction review (PS4) and site observation notes for the reinforced concrete piles
4. Producer Statement Construction review [sic] (PS3) and manufacturer’s product warranty for the roof membrane”

⁴ Some of these were incorrectly described as Producer Statements when they were in fact certificates required under other enactments such as the Electricity (Safety) Regulations 2010 or the Gas (Safety and Measurement) Regulations 2010.

⁵ The building consent conditions also required ‘producer statement agreements’ to be provided to the authority prior to the commencement of excavation or construction. The producer statement agreements are described as “agreements to supply PS4 producer statements from engineers, architects or building surveyors”, and the building consent attached the required form for the draft producer statement agreements.

- 2.6. The parties could not resolve the matter and the owners applied for this determination.

3. Submissions

- 3.1. With their application, the owner submits (in summary):

3.1.1. The group home builder was tasked with collating the various sub-contractor's producer statements and delivering them to the authority. The group home builder has had a number of personnel changes, and the owner has tried to resolve the outstanding paperwork on and off for the past 11 years.

3.1.2. The water heating system works well. A cylinder was replaced in 2023, after 11 years. The underfloor heating system is checked annually, and one of the circulation pumps was replaced in 2021. The authority has never enquired about the functioning of the system.

3.1.3. The membrane roof is in good condition with no leaks. The membrane roof was installed by a sub-contractor for the group home builder and the builder has not been able to provide the name of the sub-contractor.

3.1.4. Regarding the piles, in the owner's opinion, the completed PS4 provided by the geotechnical engineer "combined the bored piles with the ribraft slab construction as this was all part of the foundations" and:

... in the site report the engineer states that the "slab is complete" and the "edge beam over the piles is reinforced as required"

3.1.5. The owner contacted the engineering company and was provided an email dated 7 June 2011 in which the engineering company requested the geotechnical engineer "inspect the pile reinforcing as detailed on the plans on our behalf".

3.1.6. One of the paperwork items now required was only identified several years after the building was completed.

- 3.2. On 23 February 2024 the authority confirmed the outstanding information "preventing the issuing" of the code compliance certificate are those outlined in its 1 March 2023 letter, combined with "the age of the property". The authority also noted the following "suitable alternatives to providing assurance of performance, from suitable experts":

An alternative to the outstanding [producer statement for the solar system] is you providing an engineer's observations as to the performance of the loading on the roof.

An alternative to [the producer statement for the concrete piles] is again, to obtain an engineer's observations as to performance.

In relation to [a producer statement for the roof membrane], have [the waterproofing manufacturer] attend site and confirm that in their opinion the applied membrane complies and continues to perform.”

- 3.3. The authority clarified the requirement for the producer statement for the roof membrane arose during the code compliance certificate review,⁶ as despite not being included in the building consent conditions the intention to provide one was “nominated by the applicant on the stamped plans”.

4. Discussion

- 4.1. The matter to be determined is the authority’s refusal to issue a code compliance certificate on 1 March 2023 (“the section 95A notice”). To determine the matter, I need to consider the reasons the authority gave for its decision as set out in its section 95A notice, which concern the provision of outstanding producer statements for particular aspects of the building work.

Relevant Legislation

- 4.2. Section 17 of the Act requires all building work must comply with the Building Code. Sections 19 and 20 provide several different methods to establish compliance with the Building Code that must be accepted by building consent authorities.
- 4.3. Section 49 requires 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”.
- 4.4. Section 94 provides an authority must issue a code compliance certificate if it is satisfied, on reasonable grounds that the building work complies with the *building consent*.

94 Matters for consideration by building consent authority in deciding issue of code compliance certificate

- (1) A building consent authority must issue a code compliance certificate if it is satisfied, on reasonable grounds,—
- (a) that the building work complies with the building consent; and...

- 4.5. What is required in order to issue a code compliance certificate, is the authority to be satisfied on reasonable grounds that the building work complies with the building consent.
- 4.6. Where the authority has carried out inspections it is entitled to rely on the expertise of its inspectors and the inspections are sufficient to provide the authority with

⁶ Which appears to have been carried out 12 May 2014.

reasonable grounds for concluding that the building work complies with the building consent.⁷

- 4.7. Where compliance is able to be established, and the authority is satisfied on reasonable grounds, the authority can and should issue a code compliance certificate as is required by section 94.
- 4.8. Section 95A applies where an authority refuses to issue a code compliance certificate. This requires the authority to give the applicant written notice of the refusal and the reasons for the refusal.

95A Refusal to issue code compliance certificate

If a building consent authority refuses to issue a code compliance certificate, the building consent authority must give the applicant written notice of—

- (a) the refusal; and
- (b) the reasons for the refusal.
- 4.9. Previous determinations,⁸ have considered the requirements for notices issued under section 95A, including the appropriate reasons. I hold the same views as discussed in Determination 2020/005⁹ regarding what is expected of an authority when giving reasons for a refusal.
- 4.10. In effect, the requirements of section 94 and 95A, in combination with the scheme formed by sections 17, 19 and 49, is for the authority to provide sufficiently explicit, specific, clear and valid reasons why compliance with the building consent has not been achieved so the owner can consider the work required to remedy the situation and obtain a code compliance certificate. A generalised refusal is not sufficient for an authority to meet its obligations under section 95A.

Producer statements

- 4.11. A producer statement may be building work for some purposes under the Building Act 2004. For example, a producer statement is treated as building work for the purposes of the long-stop limitation period,¹⁰ and a producer statement is building work that can give rise to liability under s 40 of the Act if building work is carried out other than in accordance with a building consent.¹¹ However, the fact that a producer statement may be building work for some purposes of the Building Act

⁷ Determination 2017/083 at paragraph 4.1.3 and 4.1.5.

⁸ For example, Determination 2022/007 *The proposed or purported refusal by an authority to issue code compliance certificates and certificates of acceptance for building work* (Dated 30 May 2022) and Determination 2013/015 *The refusal to issue a code compliance certificate and the simultaneous issue of a notice to fix for a 14-year-old house* (Dated 8 April 2013).

⁹ Determination 2020/005 *Regarding the refusal to issue a code compliance certificate for a 22-year-old house* see paragraphs 5.2.4 to 5.2.14 (dated 7 May 2020)

¹⁰ *Kwak v Park* [2016] NZHC 530 at [50].

¹¹ *Solicitor-General's Reference (No 1 of 2022) v From CRI 2021-463-55 ([2022] NZHC 556) [2024] NZCA 514* at [46].

does not mean that a producer statement will be subject to all of the provisions of the Building Act relating to building work.

- 4.12. This is the situation with the provision of producer statements included as conditions of a building consent. The producer statements are not building work in the sense that if the producer statements are not supplied this automatically means the building work does not comply with the building consent and a code compliance certificate cannot be issued.
- 4.13. The producer statements are not physical building work that is contained in the plans and specifications that accompany the building consent. The producer statements are statements of evidence of the compliance of building work with the building consent and, most importantly, they are not the only evidence available to authorities. Other evidence regarding the compliance of the building work will be available in the form of the building work itself, an authority's own records of inspection, and the authority's own experience of the performance of the type of building work that is being assessed. If further evidence is required, this may involve further inspections or investigations to assess the compliance of the building work for which a producer statement was requested but has not been supplied.
- 4.14. Sections 19(1) and 20(1) provide for a number of different methods of complying with the Building Code, and some of the methods of compliance under those provisions are mandatory and some are deemed to comply with the Building Code. Sections 21(2) and 23 make it explicit that these different methods of compliance are not the only means of complying with the applicable provisions of the Building Code. It would not be consistent with these provisions of the Act for a building consent condition requiring a producer statement to be treated in the same way as physical building work contained in the building consent plans and specifications, as this would elevate a producer statement to be a mandatory form of evidence that must be supplied by an owner and allow a building consent authority to refuse to issue a code compliance certificate even if there is other evidence establishing the compliance of the building work. Such an outcome would be possible only if regulations were made under section 20 requiring the use of producer statements in certain circumstances.
- 4.15. If a producer statement is not available, this is not a failure to comply with the building work set out in a building consent, but a failure to comply with the conditions of the building consent regarding inspections and the evidence that will be required in order for the authority to properly assess the compliance of the building work. The effect of the failure to supply a producer statement is simply that other evidence of compliance will need to be produced by the owner in order to compensate for the absence of the producer statement.

- 4.16. In summary, a producer statement does *not* hold any particular status under the Act,¹² and an authority cannot require that a producer statement (as the only outstanding matter) be provided for issuing a code compliance certificate.¹³
- 4.17. An authority may accept a producer statement if it is offered as part of the evidence used to establish compliance of the building work but cannot limit an owner to only this means of establishing compliance or rely on it to the exclusion of other evidence that demonstrates compliance.

The authority's refusal

- 4.18. It is clear from the latest final building inspection the authority has not identified any non-compliance with the consent. Rather, the authority refused the code compliance certificate due to outstanding producer statements.
- 4.19. In my view, considering the requirements of a section 95A notice combined with producer statements holding no particular status under the Act, the authority's section 95A notice does not fulfil the authority's obligations to provide sufficiently explicit, specific, clear and valid reasons to demonstrate the building work does not comply with the building consent, which are required so that the owner can consider the work required to remedy the situation and obtain a code compliance certificate.
- 4.20. It follows, in respect of the authority's section 95A notice, that the authority's reasons for outstanding producer statements does not provide sufficiently specific reasons about the compliance of the building work with the building consent, as is the test set out section 94.

¹² Refer to Determination 2021/023 *Regarding the purported refusal by an authority to grant a building consent for proposed new timber retaining walls* at paragraph 4.9 onwards (Dated 6 October 2021).

¹³ Refer to Determination 2017/083 *Refusal of code-compliance certificate for house and producer statement for on-site waste water treatment system* at paragraph 4.1.1 onwards (Dated 20 November 2017)

5. Decision

- 5.1. In accordance with section 188 of the Building Act 2004, I determine that the authority did not meet the requirements of section 95A(b) when refusing to issue the code compliance certificate on 1 March 2023. I reverse the authority's decision, requiring it to make a new decision taking into account the findings of this determination.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 24 December 2024.

Peta Hird

Lead Determinations Specialist