



Determination 2017/083

Regarding the refusal to issue a code compliance certificate for a house at 306 Pages Road, Timaru, and whether a producer statement is required for an on-site waste water treatment system

Summary

This determination considers an authority's refusal to issue a code compliance certificate for an on-site waste water treatment system because the installer had not provided a producer statement for the completed system. The determination considers the likely compliance of the completed system.

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, Katie Gordon, Manager Determinations, 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:

- Timaru District Council ("the authority") carrying out its duties as a territorial authority or building consent authority – the authority applied for the determination
- the owners of the house, L and R Brodie ("the owners")

1.3 I have also included the water tank installer, Wright Tanks Ltd ("the installer"), as a person with an interest in the matter.

1.4 This determination arises from the authority's decision to refuse to issue the code compliance certificate. The authority is of the view that without a Producer Statement PS3 – Construction ("PS3"), it cannot be satisfied on reasonable grounds that the building work carried out to install an on-site waste water treatment system is in accordance with the relevant building consent.

1.5 The matter to be determined² is therefore the authority's exercise of its power of decision in refusing to issue the code compliance certificate.

1.6 In making my decision I have taken into account the submissions of the parties and the other evidence in this matter.

¹ The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.building.govt.nz or by contacting the Ministry on 0800 242 243.

² Under sections 177(1)(b) and 177(2)(d) of the Act. In this determination, unless otherwise stated, references to clauses are to clauses of the Building Code and references to sections are to sections of the Act.

2. The background and the barrier

- 2.1 On 27 January 2015 the authority issued building consent no 2.2014.1149³ for the construction of the house and including the installation of the waste water treatment system. The building consent application was supported by an “on site wastewater disposal site investigation assessment and evaluation report” and a Producer Statement PS1 – Design from the installer.
- 2.2 The building consent was issued with a section 37 notice requiring resource consent to be obtained for the onsite disposal of waste water. The resource consent approval was granted on 29 January 2015.
- 2.3 I note that the relevant resource consent issued for the discharge of contaminants into the land included a number of specific criteria that the installed waste water treatment system had to meet. It also required a signed copy of a compliance certificate for the installation of the system, photographic evidence, an as-built plan, and stipulated service and maintenance requirements.
- 2.4 The authority carried out inspections during construction, and saw the installation of the dripper lines and the installation of the waste water treatment system by the installer. The authority carried out an inspection of the waste water treatment system on 30 July 2015. The inspection covered the installation of the waste water tank and the drip line, and was “passed”. The inspection record noted:
- [Waste water treatment] system installed with 5 lines at 103 metres and 5 lines at 53 metres totalling 780 metres. 780 metres required. Mole plowed (*sic*) into ground. Septic tank installed and connected to foulwater drain. Producer statement and as built drain plan to come. Installed as per [suppliers] design and there (*sic*) plans submitted for resource consent. [2 representatives of the supplier] onsite.
- 2.5 The as-built plans were subsequently provided, but not the producer statement.
- 2.6 The authority carried out a final inspection on 21 September 2015, which failed. The authority identified seven items requiring attention, or where documentation was required, including the PS3⁴.
- 2.7 The group home builder that was responsible for the construction of the house went into liquidation on 9 November 2015, and the installer withheld the producer statement for the waste water treatment system.
- 2.8 The owners subsequently engaged another group home builder to act on their behalf for the purpose of obtaining a code compliance certificate (“the agent”). On 27 February 2017 the authority wrote to the agent to confirm that a PS3 was required from the installer, and in an email on 31 March 2017 stated:
- ... for [the authority] to be satisfied [on reasonable grounds as to compliance] we can only really be provided with that assurance from the installer of the system or product, especially in this case with it being a product specific install.
- 2.9 Correspondence continued between the parties regarding the outstanding issues to be resolved before the authority would issue a code compliance certificate. On 4 May 2017 the authority stated:
- ... the requirement for third party verification [of the installation] is upheld and still outstanding. Had [the authority] inspected the installation of this system, we would then be in a position to issue [a code compliance certificate], however this is not the case with this consent and therefore the installation of this system can only be

³ There were no conditions listed on the consent.

⁴ The authority referred to the need for a “PS4” in some correspondence with the parties, and in making the application for determination. The authority confirmed to the Ministry that it was in fact a PS3 that was being sought.

verified via providing the PS3 Construction statement and thus [the authority] being satisfied that the system has been installed in accordance with the consent.

2.10 On 16 June 2017 the agent wrote to the authority regarding the refusal to issue the code compliance certificate. The agent noted:

... there is no legal requirement for the statement under the amended Building Act 2004 as this is non-restricted building work, with no effect on the construction of the primary structure, the external moisture management system or the fire safety design. The system has also been used for a significant period by the homeowner with no problems.

2.11 The matter remained unresolved and the Ministry received an application for determination on 25 August 2017.

3. The submissions

3.1 With a submission accompanying, the application the authority said that:

The requirement for a [PS3] construction review statement for the purpose of establishing 3rd party compliance is in accordance with the [authority's] procedures and is also identified on the design statement documentation from [the installer] dated 20/01/2015, stating that a producer statement will be provided on completion of the work. Therefore the [authority] believes that this statement is a necessary document that verifies compliance has been met.

and,

It is the opinion of the [authority] that the [code compliance certificate] cannot be issued until the relevant producer statement is provided by [the installer] and received by the [authority], thus allowing the [authority] to be satisfied the work is in accordance with the building consent and therefore issue the [code compliance certificate].

3.2 The authority provided copies of:

- the producer statement PS1 – Design from the installer, dated 20 January 2015
- the “on site wastewater disposal site investigation, assessment and evaluation report” by the installer, dated 18 December 2014
- a section 37 certificate, and resource consent for discharge of contaminants into land
- building consent No. 2.2014.1149
- inspection record – plumbing and drainage, dated 30 July 2015
- site instruction notice , dated 21 September 2015
- relevant correspondence between the authority and the agent.

3.3 On 28 August 2017 the installer provided a copy of their Plumbers, Gasfitters and Drainlayers registration, and correspondence with the authority and the agent regarding contractual issues.

3.4 On 4 September 2017 the agent set out some of the background to the matter and made a submission, noting they had sought legal advice and were informed that there is no legal requirement for the outstanding documentation and that the system has been used without problems to date.

3.5 On 5 September 2017 the owners acknowledged the application for determination but made no submission in response.

- 3.6 In a letter dated 4 September 2017 accepting the application, the Ministry asked the authority to clarify its rationale for requiring a PS3 confirming the compliance of the system given its required maintenance regime, and the legal basis for the authority requiring a PS3.
- 3.7 The authority responded in an email dated 12 September 2017 saying, in summary, that:
- The authority observed two of the installer’s named representatives onsite overseeing the installation. The authority was unable to view all the parts of the waste water system.
 - “a producer statement that verifies the work has been installed in accordance with the manufacturers installation instructions and the building consent, is a reasonable expectation and a robust process of ensuring compliance has been achieved and therefore forms the “Legal basis” for the requirement of a producer statement in this situation”.
 - “the maintenance program for this system should not be taken into consideration when issuing [code compliance certificate] as the [authority] has no control of the maintenance carried out, once [the code compliance certificate] has been issued.”
- 3.8 A draft determination was issued to the parties for comment on 9 October 2017. The applicant and the owners accepted the draft determination without comment on 20 October 2017.

4. Discussion

4.1 The requirement to provide a producer statement

- 4.1.1 The authority’s refusal to grant the code compliance certificate turns on the provision of a producer statement for the installation of the on-site waste water treatment system. There is no basis in the Act for an authority to demand a producer statement as a condition for establishing compliance and for issuing a code compliance certificate. Accordingly, the request to provide a producer statement cannot be enforced in terms of a refusal to issue the code compliance certificate. What is required is the authority to be satisfied on reasonable grounds that the building work complies with the building consent.
- 4.1.2 I note that an authority accepts a producer statement at its discretion in the belief that the author of the producer statement is creditable. An authority accepts any producer statement if it believes it is reasonable to do so and an authority is liable for that decision. A producer statement is not a product warranty or guarantee of compliance; it is a professional opinion on compliance. An authority remains solely responsible for deciding it is satisfied on reasonable grounds that any building work complies.
- 4.1.3 While a producer statement may form part of evidence used to establish the compliance of various elements in a building, it is not the only evidence that can be considered. Though an authority is entitled to accept a producer statement if it is offered, it should not rely on it to the exclusion of other evidence that demonstrates compliance.

- 4.1.4 There are instances, such as the current situation, in which the owners are not able to provide a producer statement due to the age of the construction or for reasons of contractual nature.
- 4.1.5 Where compliance is able to be established without the provision of producer statements for the subject elements, the authority can and should issue a code compliance certificate. 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 reasonable grounds for concluding that the building work complied with the Building Code, without the need for further documentation.

4.2 The compliance of the waste water system

- 4.2.1 The same waste water system was installed as approved in the building consent. The system was installed by recognised experts for this make of system; the authority witnessed the installation of the dripper lines and the installer carrying out the installation of the tank and its associated equipment.
- 4.2.2 The waste water treatment system uses active biological processes that treat domestic waste water. While the process that treats the waste is affected by variations in the material and volume being treated, any defects in the system that would prevent it working as intended would soon become apparent. The control panel for the treatment system includes a number of alarm conditions whereby any failure of the system (i.e., a break down in the treatment process, or an equipment malfunction) will cause an audible alarm alerting the owners to faults needing to be addressed.
- 4.2.3 The system requires regular 6-monthly inspections in order to meet resource consent requirements and as part of its normal maintenance regime: this is typical of on-site waste water treatment systems which require regular servicing and monitoring to ensure they continue to operate correctly.
- 4.3 I have seen no evidence to suggest the system as installed is not performing as intended since its installation in mid-2015, and taking account of the maintenance regime, there is a reasonable expectation it will continue to perform as intended. Given the above I consider there are reasonable grounds on which to be satisfied that the work carried out to install the waste water treatment system complies with the provisions of the Building Code.
- 4.3.1 I am therefore of the view that the authority has reasonable grounds on which to be satisfied that the work complied with the building consent; the provision of a PS3 for the installation would add little to what is known about the system.

4.4 Durability considerations

- 4.4.1 “Septic tanks” are described as having a minimum 15-year durability period⁵ in Table 1 of B2/AS1. I take this period as also being appropriate to the on-site waste water treatment system, however, some readily-accessible components would have a shorter required durability period.
- 4.4.2 The authority contends that it should not take into account any maintenance program when issuing the code compliance certificate, and that it has no control of maintenance once the code compliance certificate has been issued.
- 4.4.3 The minimum durability periods for building elements stated in Clause B2.3.1 are based on the elements concerned receiving “only normal maintenance”. An

⁵ Septic tanks “built into or under the structure of a building” are required to have a minimum 50-year durability period.

authority bases any decision to issue a code compliance certificate not only on compliance of the work at the time the certificate is issued, but also on the reasonable expectation that the building elements concerned will be subject to normal maintenance throughout their required minimum durability period(s). An authority typically has no control over a building owner undertaking normal maintenance.

- 4.4.4 In this case the waste water treatment system is subject to 6-monthly inspections and servicing as part of its normal maintenance. In my view it is unreasonable for the authority not to take into account the documented and ongoing need for the system to be maintained.

5. The decision

- 5.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority incorrectly exercised its powers of decision in refusing to issue the code compliance certificate on the grounds that a PS3 had not been provided by the waste water treatment system installer, and I reverse that decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 20 November 2017.

Katie Gordon
Manager Determinations