



## Determination 2013/053

# Regarding the refusal to issue a code compliance certificate due to the lack of a producer statement for drainage work to a house at 126 Abbot Street, Invercargill

### 1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“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 owner, Forrest Retirement Limited (“the applicant”), acting through an agent (“the agent”)
  - Invercargill City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 The application for this determination arises from the authority’s decision to refuse to issue a code compliance certificate for a new house, because it did not receive a producer statement for drainage work that was not built in accordance with the approved consent.
- 1.4 The matter to be determined<sup>2</sup> is therefore whether the authority was correct in its decision to refuse to issue the code compliance certificate. In deciding this, I must consider whether the authority had reasonable grounds on which to be satisfied that the drainage work complies with Clause G13 Foul Water of the Building Code (First Schedule, Building Regulations 1992)<sup>3</sup>.
- 1.5 In making my decision, I have considered the submissions by the parties and the other evidence in this matter.

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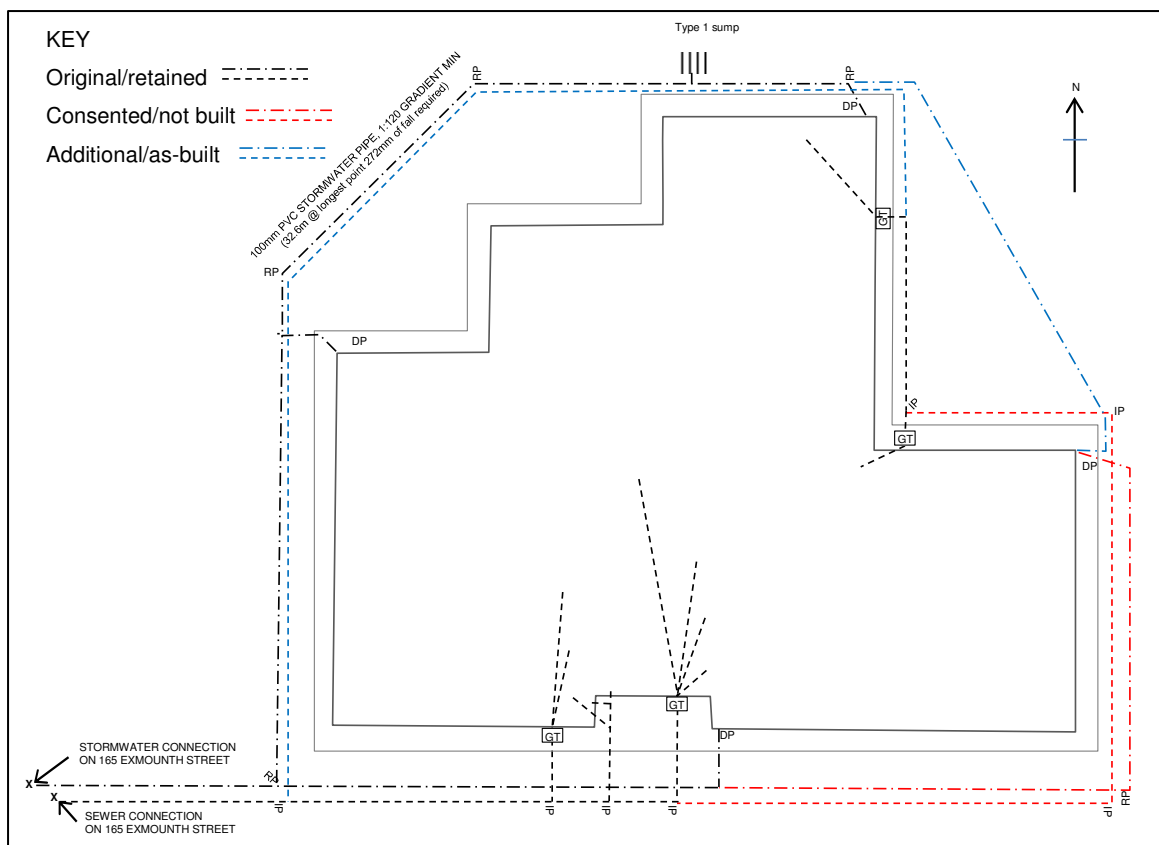
<sup>1</sup> The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at [www.dbh.govt.nz](http://www.dbh.govt.nz) or by contacting the Ministry on 0800 242 243.

<sup>2</sup> Under sections 177(1)(b) and 177(2)(d)

<sup>3</sup> In this determination, unless otherwise stated, “sections” are sections of the Act and “clauses” are clauses of the Building Code.

## 2. The building work and background

- 2.1 The building work considered in this determination consists of the sewer and surface water drainage system (together: “the drainage system”) for a new detached house. The house was built on the rear of an existing property and the system connects to existing sewer and surface water pipes running along the south elevation of the house from the street frontage to the east through to an adjacent property at the rear (west).
- 2.2 On 20 June 2008 the authority issued building consent BDG/2008/166 under the Building Act 2004 for the construction of the house. The system as set out in the original consent included two foul water outlets and downpipes to the east elevations joining the existing sewer and surface water drains at the southeast corner (refer Figure 1). The remaining foul water connected along the southern elevation, and the surface water from the north and west was connected at the southwest corner.
- 2.3 On 15 October 2009 the authority issued amended building consent BDG/2008/166/A for ‘Change in Builder to [name of group builder]. Revised Plans and Specifications’. (The amendment was sought on 17 August 2009.)
- 2.4 At some time during construction the drainage system was reconsidered and it was decided to run the foul and surface water around the north and west of the building to connect at the southwest corner (refer Figure 1).



**Figure 1: drainage plan (not to scale)**

- 2.5 On 19 February 2010 the authority carried out a drainage inspection, noting:
- Viewed foul sewer and stormwater drainage installed around dwelling in an approved manner

- 2.6 The authority then issued a notice of failed inspection the same day which stated:
- S/W not approved – not installed in easement.
  - Amendment required for redesign of foul sewer drainage on site.
  - Not approved – reinspection required
- 2.7 I note there is dispute between the parties as to whether the drainage was inspected after work was carried out as a result of the failed inspection notice. The trench was backfilled on the understanding of the agent that the only further “approval” required was by way of an amendment of the consent based on the as-built drainage plan to be provided.
- 2.8 The authority also carried out the following inspections:
- 22 February 2010: Inspection mainly to confirm new s/w drain and new s/w connection in easement. Whilst on site viewed F/S dry chamber, not completed. Approved PVC saddle used to make new connection ...
  - 24 February 2010: [approves the concrete placed around the sump] Drainage asbuilt required and amendment still required
- 2.9 It appears the issues around the changes to the drainage and resulting inspections were discussed between the agent and the authority in March 2010, as the agent had intended to seek a code compliance certificate at that time. In an email on 25 March 2010 the authority noted that:
- The drainlayer chose not to follow the approved plans and re-routed the drains in the opposite direction, not just changing from going under the garage. This affected compliance as far as rodding points and venting is concerned. ...
  - The plans showing the drains running around the east of the house complied with the [Building Code] and could have been followed.
- 2.10 On 7 April 2010 the authority issued amended building consent BDG/2008/166/B for ‘Amend: Change Sewer & S/Water Direction.’ (The amendment was sought on 12 March 2010.)
- 2.11 A signed ‘Construction Producer Statement’ (“the producer statement”) dated 19 April 2010 for plumbing/drainage was provided to the authority by the drainage contractor. The statement included:
- Altered drain positions as per [authority] inspections and have had [authority] inspections cared (*sic*) out before backfilling
  - all drains have been laid to Standards and water tested on Completion. laid at 1/100 on level base.
- 2.12 It appears that the authority did not accept the producer statement, on the grounds that it was issued by a limited liability company and not the drainage contractor as an individual. The drainage contractor re-signed the producer statement on 7 July 2010 and annotated the statement to indicate he was representing the contracting company. (I note the signatory is currently a registered certifying drainlayer).
- 2.13 A ‘final plumbing and drainage inspection’ dated 29 June 2011 was failed due to a number of items requiring attention, including ‘Approved producer statement from drainlayer as requested in letter dated 14 May 2010’. (I have not seen this letter.)

- 2.14 A further inspection was carried out on 19 December 2011, with the inspection record noting one item of non-compliance and states:
- Approved producer statement from drainage still required - Not approved
  - Drainage issues still to be resolved - Not approved
- 2.15 The re-inspection record dated 21 February 2012 notes items now completed with “Inspection pass”.
- 2.16 In an email to the drainage contractor on 13 August 2012 the authority noted that the only outstanding item preventing the issue of a code compliance certificate was the Producer Statement from the drainage contractor ‘for the drainage work which was covered without [the authority’s] approval’. The authority also noted that it required ‘a statement under your name, not a limited liability company name.’
- 2.17 Correspondence continued between the parties regarding the Producer Statement and the authority’s refusal to issue a code compliance certificate. The drainage contractor and agent maintained the view that a further Producer Statement from the drainage contractor was not required. The authority continued to require a Producer Statement and also requested it be ‘without reference to [the authority’s] inspectors’.
- 2.18 The Ministry received an application for a determination on 17 May 2013.

### **3. The submissions**

- 3.1 The agent provided copies of correspondence between the parties and amended drainage plans dated 10 September 2009. In response to a request for further information the agent provided copies of:
- the original drainage plan dated 28 July 2008
  - amended ‘drainage plan’ that formed part of the building consent amendment application dated 10 September 2009
  - an undated building control ‘process card’ issued by the authority indicating the aspects of the amended consent that required inspection
  - inspection records
  - further correspondence between the parties.
- 3.2 In response to a request from the Ministry, the authority made a submission dated 18 June 2013 noting that the issue of concern was that drains were installed not as per the approved plans and which required an amendment for both foul sewer and surface water, and that:
- The issue is the [drainage contractor] is not signing as a certifying Drainlayer. He is signing on behalf of a Limited Liability Company. [The authority] requested a producer statement. It is not for the [authority’s] inspector to make an assessment of drains on-site if they are not to the approval (*sic*) plans and specification. Failed notice is given – Amendment required.
- 3.3 The authority provided copies of:
- the building consent and amendments
  - the issued consent and approved amendments

- the as-built drainage plan, stamped ‘Approved For Issue 7 April 2010’
- the producer statement that had been annotated by the authority ‘9/1/12 Not accepted’
- the drainage inspection records.

3.4 In response to further queries, the authority wrote in an email to the Ministry dated 25 July 2013 stating that:

A producer statement is required because there is a section of drain not inspected by [the authority]. This is the section of drain which [the agent] states in his email he made the decision to have backfilled.

The email noted that the authority considers the issue to be that ‘the contractor did not follow the approved plans, made changes without applying for an amendment as required by the [Act]’.

3.5 A draft was issued to the parties for comment on 29 August 2013. Both parties accepted the draft without further comment.

## **4. Discussion**

### **4.1 The compliance of the drainage system**

4.1.1 The inspection records show that the site was visited on several occasions with several failed notices issued. The inspection records identify non-compliant items and outstanding documentation required and also record when these items and documents were approved or provided.

4.1.2 The authority has stated in the email correspondence dated 13 August 2012 that it has concerns that not all the required inspections of the drainage system were undertaken.

4.1.3 I note that the inspection record dated 21 February 2012, in response to the failed final plumbing drainage inspection, records the items that had been completed and that the inspection was passed. There do not appear to be any outstanding items of non-compliance: the authority has not issued any notice to fix in relation to matters that it considers are not compliant.

4.1.4 Given the inspections completed, and the effect of the alteration to the drainage system as noted in paragraph 4.2.3, I am of view that the authority has sufficient evidence to establish on reasonable grounds that the drainage system was compliant with Clause G13 of the Building Code.

### **4.2 The authority’s requirement to amend the consent**

4.2.1 The altered drainage layout could have been formalised as either a minor variation or as an amendment to the consent. Minor variations to building consents are described in Building (Minor variations) Regulations 2009 (“the Regulations”), and in the Ministry’s guidance document ‘Minor variations to building consents<sup>4</sup>’. The Ministry’s guidance document notes:

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<sup>4</sup> Minor variations to building consents: Guidance on definition, assessment and granting; dated February 2010

A proposed minor variation should not escalate into an amendment to the building consent merely because the on-site inspector cannot approve it there and then. The key question is whether the proposed change meets the definition of a minor variation or whether it meets the threshold for an amendment to the building consent.

- 4.2.2 The authority has treated the altered drainage as more than a minor variation and required the consent be amended. In my view it should have been considered a minor variation. The work was completed around February 2010, yet the amended consent was issued in April 2010. The requirement for a building consent to be amended by its nature assumes that the change is significant and requires consideration and approval by an authority before it is undertaken.
- 4.2.3 In this case the altered drainage system used the same compliance method as that consented (G13/AS2), it uses the same materials and components, it is of the same complexity, it covers the same distance, it is located in the same trench as the surface water drainage, and provides a greater fall. It is my view therefore that the altered drainage should have been considered by the authority as a minor variation and agreed to onsite. The change would have, and has been, formalised via the provision of the as-built drainage plan.
- 4.2.4 Changes to drainage systems during construction are not uncommon, and the provision of an as-built plan is sufficient without the requirement for an application to amend the consent.
- 4.2.5 If the altered work as inspected by the authority had not been compliant, then a notice to fix should have been issued following its inspection.

### **4.3 The provision of a producer statement**

- 4.3.1 The authority's inspection records state that the reason that it would not issue a code compliance certificate was because of an outstanding approved producer statement for the altered drainage system. It appears the authority is requiring a producer statement to confirm the compliance of drains that were backfilled, but that were not located in the same position as shown on the consented plans. The inspection records show the backfilled drains were inspected by the authority (and passed).
- 4.3.2 A producer statement was provided by the drainage company. The statement was amended (by annotation) with a signature and identification of the individual representing the contracting company following the authority's concern that a producer statement could not be issued by a limited liability company. Neither statement was accepted by the authority.
- 4.3.3 There is no basis in the Act for an authority to demand a producer statement as a condition for establishing compliance for issuing a code compliance certificate.
- 4.3.4 An authority accepts any producer statement at its discretion if it believes it is reasonable to do so: 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. The authority remains solely responsible for deciding it is satisfied on reasonable grounds that any building work complies with the Act. In my view the receipt of a producer statement does not lessen the authority's liability in establishing compliance with the Building Code.

4.3.5 Although the authority is entitled to accept a producer statement if one is offered, it should not rely on that to the exclusion of other evidence that demonstrates code compliance. I note that in this instance the inspection reports show several re-inspections that were required of work that had been completed which does not indicate that compliance would have been achieved without the authority's oversight. It is unclear on what basis a producer statement would have been accepted by the authority. It is also unclear what purpose the producer statement is intended to serve in this instance.

#### **4.4 Conclusions**

4.4.1 The authority has reasonable grounds on which to be satisfied that the drainage system satisfies the requirements of Clause G13.

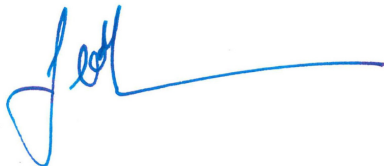
4.4.2 The altered drainage system amounts to a minor variation to the consent.

4.4.3 The authority cannot require that a producer statement be provided in order to issue a code compliance certificate. In circumstances where it believes work is not compliant then it is to issue a notice to fix to have the non-compliance remedied.

### **5. The decision**

5.1 In accordance with section 188 of the Building Act 2004 I determine that there are reasonable grounds on which to be satisfied that the drainage system complies with Building Code Clause G13, and accordingly I reverse the decision of the authority to refuse to issue a code compliance certificate.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 17 September 2013.



John Gardiner  
**Manager Determinations and Assurance**