



Determination 2021/023

Regarding the purported refusal by an authority to grant a building consent for proposed new timber retaining walls at 3 Hoani Lane, Pyes Pa, Tauranga

Summary

This determination considers an authority's purported exercise of decision not to grant a building consent on the basis that a producer statement design, related to the design of new timber retaining walls, which has not been signed by a registered Chartered Professional Engineer. The determination will discuss the status of a producer statement, some factors for an authority to consider when assessing a producer statement, and how these apply in this case.

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 ("the Act") made under due authorisation by me, Katie Gordon, National Manager Determinations, Ministry of Business, Innovation and Employment ("the Ministry"), for and on behalf of the Chief Executive of the Ministry.¹
- 1.2 The parties to the determination are:
 - S Bailey of Kiwi Land and Build Ltd, who is the owner of the property (the "applicant"), using the services of an engineer (the "agent"). The agent was the engineer who designed the retaining walls.
 - Tauranga City Council (the "authority") carrying out its duties as a territorial authority or building consent authority.Persons with an interest include:
 - Arete Civil Limited, specialising in civil engineering (the "peer review engineer")
- 1.3 This determination arises from the authority's purported refusal to grant a building consent under the Building Act 2004 ("the Act").
- 1.4 The purported refusal arose because:

¹ The Building Act and Building Code (Schedule 1 of the Building Regulations 1992) are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents and guidance issued by the Ministry, is available at www.building.govt.nz.

- The applicant included in its application for a building consent, for two types of timber retaining walls, a ‘producer statement design’² (“PS1”) issued by a person that is not a registered Chartered Professional Engineer (“CPEng”);
 - The authority has a policy that it: “will no longer accept a [producer statement design review (“PS2”)] – signed by a Chartered Professional Engineer (CPEng) supporting the design of specifically designed elements which are designed by an engineer who is not a CPEng”.
- 1.5 The original application for determination indicated that the matters to be considered were both whether the building work complies with the building code (section 177(1)(a) of the Act), and the purported refusal of a building consent (sections 177(1)(b) and (2)(a) of the Act).
- 1.6 I have received no evidence or information from either party that indicates the design of the retaining walls are not in compliance with the Building Code. This was confirmed in an exchange of emails between the agent and the Ministry on 1 and 2 October 2020. Therefore, it is reasonable for me to believe this is not an item of dispute between the parties, and as such the matter for determination does not consider if the proposed design of the timber retaining walls and associated safety barrier complies with the requirements of the Building Code in accordance with section 177(1)(a) of the Act.
- 1.7 The matter to be determined³ is therefore whether the authority was correct in its purported decision to refuse to grant a building consent on the basis a PS1 has been provided by a person who is not a registered Chartered Professional Engineer. In deciding this matter, I must consider the status of producer statements generally, factors that could be considered in assessing a producer statement, and how these apply to the producer statements issued in this case.
- 1.8 The relevant sections of the Act are contained in Appendix A. Unless otherwise stated, references in this determination to sections are to sections of the Act, and references to clauses are to clauses of the Building Code.

2. The building work and background

- 2.1 The building work is proposed to be undertaken at 3 Hoani Lane, Pyes Pa, Tauranga, and it is part of a larger sub-division development.

Description of building work and key features

- 2.2 In May 2020, the applicant commissioned the design for some proposed timber retaining walls for the purposes of developing the property.
- 2.3 The building work relates to the proposed design of two types of timber retaining walls (annotated as “RW1” and “RW2”). These are required in order to form a level building platform to allow for the future construction of a residential dwelling on the property. The existing land slopes approximately 2.9m from east to west (refer to Figures 1 and 3). However, the plans related to the building consent do not indicate the size or setting out of any future building to be constructed on the site.

² A producer statement is a professional opinion based on sound judgment and specialist expertise. It is not a product warranty or guarantee of compliance. Refer: <https://www.building.govt.nz/projects-and-consents/apply-for-building-consent/support-your-consent-application/producer-statements/> (accessed on 15 December 2020)

³ Under section 177(1)(b) and (2)(a) of the Act.

- 2.4 Retaining wall one (“RW1”), is described as a lower western wall used to retain compacted fill to level out the site. There is also an upper eastern retaining wall (“RW2”), designed to allow for up to a 20° sloping backfill above the wall (refer to Figures 1, 2 and 3). Figure 1 gives an indication of the orientation of the site in relation to Hoani Lane, and the general setting out of the two types of retaining wall (“RW1” and “RW2”); these are indicated by the straight red lines with equally spaced red circles. Both retaining walls vary in horizontal distance to the nearest relevant boundaries⁴ ranging from approximately 0.5m to 4.375m.



Figure 1: Description of retaining walls and loadings [not to scale]

⁴ “Relevant boundary” as defined in Building Code clause A2 – means the boundary of an allotment that is other property in relation to the building in question and from which is measured the separation between the building and that other property...

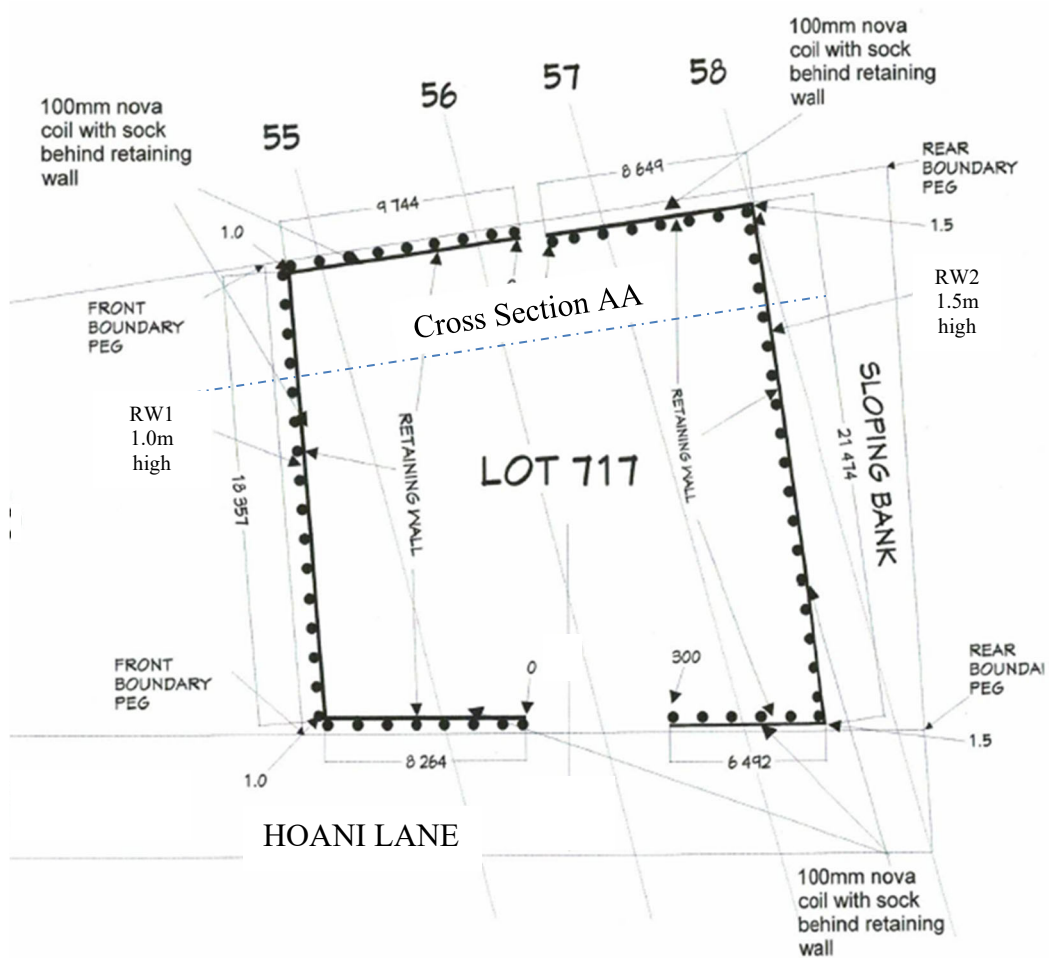


Figure 2: Site plan indicating setting out of the retaining walls [not to scale]

(The existing ground contour lines are indicated by the numbers 55 to 58. Cross section line AA indicated on Figure 2 is only shown for diagrammatical purposes.)

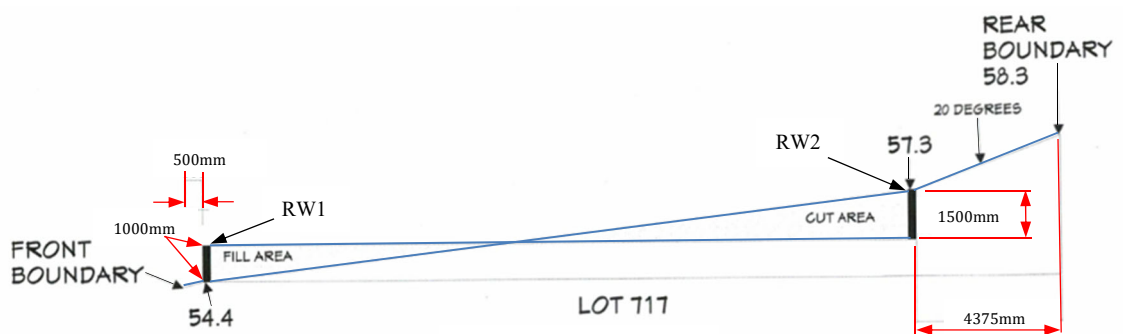


Figure 3: Cross Section AA (not to scale)

(The “front boundary” relates to the relevant boundary along the west side of property. The “rear boundary” relates to the relevant boundary along east side of property.)

2.5 The “cut area” in Figure 3 above is an indication of that part of the site that is to be excavated to construct retaining wall “RW2”. The “fill area” in Figure 3 above is an

indication of that part of the site that is to be raised in level behind retaining wall “RW1” using the material excavated from the “cut area”.

- 2.6 The specification for the design and construction of the retaining walls includes information relating to the earthworks, timber, concrete, backfilling requirements and associated drainage.
- 2.7 The building work included the design of timber pole retaining walls to meet the requirements of various New Zealand Standards:
- AS/NZS 1170: 2002 Structural Design Actions;
 - NZS 3603: 1993 Timber Structures Standard; and
 - NZBC B1/VM4⁵ SESOC⁶ Vol 10 No 2 Dec 1997.
- 2.8 The design for the retaining walls prepared by the agent incorporated a “design features report” containing the following:
- Site Plan;
 - Wall sections details (see Figure 4) and structural calculations;
 - Schedule of Inspections;
 - Timber Retaining Wall Specification;
 - Timber barrier design;
 - Geotechnical data; and
 - Producer Statements⁷.

⁵ New Zealand Building Code clause B1 - Structure: Verification Method 4 – Foundations.

⁶ SESOC is an abbreviation of the “Structural Engineering Society of New Zealand”.

⁷ There are currently four types of producer statement: PS 1 – “Design”; PS 2 – “Design review”; PS 3 – “Construction” (often used by the installers of proprietary systems); PS 4 – “Construction review”. Refer: <https://www.building.govt.nz/projects-and-consents/apply-for-building-consent/support-your-consent-application/producer-statements/> (accessed on 15 December 2020).

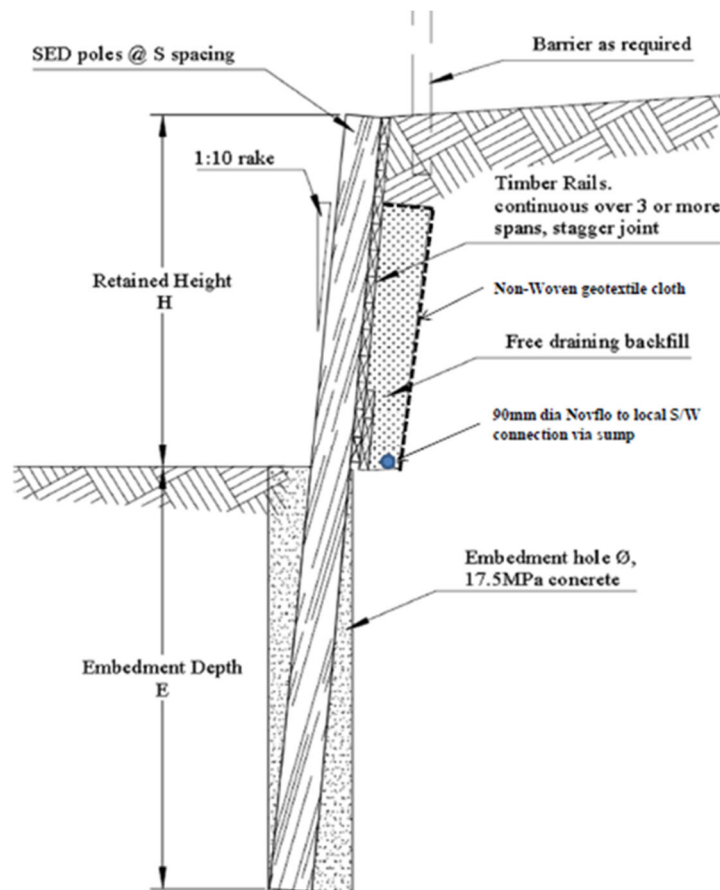


Figure 4: Wall section detail from the design features report [not to scale]

- 2.9 Retaining wall “RW1” has a maximum retained height (H) of between 1.0m to 1.9m high. The timber poles are spaced 1.2m apart, and vary in size between 175mm to 250mm in diameter. The embedment depth (E) ranges from a minimum of 1.2m to 2.7m. The difference in pole size and embedment depth depends on the varying height (H) of the retaining wall.
- 2.10 Retaining wall “RW2” has a maximum retained height (H) of 1.5m. The timber poles are spaced 1.2m apart, and are 200mm in diameter. The minimum embedment depth (E) is 2.2m.
- 2.11 The “timber rails” (as indicated in Figure 4) are specified to be 200mm deep x 50mm thick, albeit the structural calculations are based on a small section size of timber rails (ie 150mm deep x 50mm thick).
- 2.12 The design included geotechnical analysis of the site soil conditions dated February 2018 as is contained in the subdivision earthworks completion report.
- 2.13 The producer statement – design (“PS1”) relates to Clauses B1 – *Structure*, and B2 – *Durability*. It states that the design has been prepared in accordance with B1/VM1⁸ and B2/AS1⁹ and issued by the agent who holds the qualifications BE and NZCE¹⁰. The agent does not purport to be a Chartered Professional Engineer although they

⁸ Verification Method B1/VM1 for New Zealand Building Code Clause B1 Structure.

⁹ Acceptable Solution B2/AS1 for New Zealand Building Code Clause B2 Durability.

¹⁰ BE – Bachelor of Engineering; NZCE – New Zealand Certificate in Engineering.

were registered as one previously with Engineering New Zealand. The PS1 goes on to state that:

[The agent believes] on reasonable grounds that a) the building, if constructed in accordance with the drawings, specifications, and other documents provided or listed in the attached schedule, will comply with the relevant provisions of the Building Code and that b), the persons who have undertaken the design have the necessary competency to do so.

2.14 On 10 June 2020, a peer review of the retaining wall design was carried out by the peer review engineer who is a registered Chartered Professional Engineer. A producer statement – design review (“PS2”) was issued. The review confirmed that aspects of the design are in accordance with compliance documents B1/VM1 and B2/AS21.

2.15 A letter from the peer review engineer accompanying the PS2 states:

Retaining Wall Design

[The agent] has carried out the wall designs based on the commonly used New Zealand Building Code method of analysis and the design assumptions are typical for the location of the site.

In reviewing the soakage (sic) design, we have carried out a separate analysis using the New Zealand Building Code analysis method. Our basis of design is outlined as follows. [Calculations included]

Our analysis confirms the design prepared by [the agent] is fit for purpose and the retaining wall will be able to support the applied loading.

We did note that our analysis indicates double thickness lagging is needed where the wall is 1.9m height and supports the ROW, this differs from [the agent’s] design where single layer lagging is used throughout. The difference is due to that section of wall being analysed with 7.5kPa surcharge whereas [the agent] uses 5kPa.

In carrying out this review we have not analysed the design of the timber barrier. Therefore, this review excludes the barrier design.

Summary

[The] review of the 3 Hoani Lane timber pole retaining wall supports the design prepared by [the agent] dated 25 May 2020.

2.16 The difference in the surcharge loading is that the figure of 5kPa¹¹ is in accordance with New Zealand Standard AS/NZS 1170¹²; whereas the peer review engineer used 7.5kPa taken from Tauranga City “Infrastructure Development Code” design stand DS-10 – “Natural hazards and earthworks” – appendix G.2 Table 1 titled “Retaining Wall Surcharge Requirements” for a “boundary wall supporting a private right of way...with more traffic than a private driveway”.

¹¹ kPa: kilopascal.

¹² AS/NZS 1170.1.2002 (incorporating amendments numbers 1 and 2) – Structural Design Actions, Part 1: “Permanent, imposed and other actions”, Table 3.1, activity G – “Medium vehicle traffic areas” – “Vehicles exceeding 2500kg and not exceeding 10 000kg. Driveways, ramps, repair workshops, footpaths with vehicle access, and car parking”.

- 2.17 On 16 June 2020 the applicant submitted an application for a building consent to construct the two types of timber retaining walls.
- 2.18 The authority subsequently issued four requests for further information to the applicant during the course of processing the building consent application.
- 2.19 The first, second and third requests for further information did not relate to the Building Code compliance of the retaining walls design (refer to paragraph 1.6), and did not query the status of the producer statement design (“PS1”).
- 2.20 However, on 25 September 2020 the authority issued a fourth request for information to the applicant stating:

Retaining Wall – B1 (Producer Statement)

[The authority] require the SED¹³ elements (Desing [sic] of timber pole retaining wall) to be designed by a Chartered Professional Engineer (CPEng) who is registered with Engineering NZ. [The authority] will no longer accept a PS2 – signed by a Chartered Professional Engineer (CPEng) supporting the design of specifically designed elements which are designed by an engineer who is not a CPEng. Provide a PS1 on Engineers NZ template signed by a Chartered Professional Engineer (CPEng) for the listed specifically designed elements. Please provide supporting information to validate that the work identified on the producer statement is within the author’s scope of approval and competence.

- 2.21 The agent responded to the authority on 25 September 2020 with:
- Can you please provide and (sic) explanation of the grounds how you consider this request reasonable, in light of the requirements of section 49 (1) of the Building Act.
- 2.22 On 28 September 2020 the authority replied to the agent stating:
- ...a producer statement is to be completed by a competent design professional and you do not appear to be a [Chartered Professional Engineer].
- As per the guidance on [the] use of [a] producer statement “A competent design professional will have a professional qualification and proven current competence through registration on a national competence based register, either as a Chartered Professional Engineer (CPEng) or a Registered Architect”.
- 2.23 The authority’s correspondences dated the 25 September and 28 September 2020 did not refer to or indicate any non-compliances with the Building Code regarding the design of the two retaining walls by the agent or peer review engineer (refer to paragraph 1.6).
- 2.24 An application for a determination was received by the Ministry on 28 September 2020.

3. The submissions

- 3.1 The parties’ submissions are summarised below.

¹³ SED – specific engineer design
Ministry of Business,
Innovation and
Employment

The applicant

- 3.2 The agent contends that the authority's requirement to only accept producer statements from engineers who are registered Chartered Professional Engineers is arbitrary and a failure of its function under section 49¹⁴ of the Act.
- 3.3 The agent also stated, in a letter to the Ministry dated 18 February 2021 that:
- ...this determination is over the refusal to accept a PS1 on the basis that the PS1 is not from a Chartered Professional Engineer.
- Of note is that no consideration in the [authority's] submission has been given to the PS2 that was provided in the Building Consent Application, and was signed by a Chartered Professional Engineer.
- The PS2 confirmed the proposed building works will comply with the Building Code. This being sufficient evidence, if there was any doubt, to satisfy the prescribed requirement of a competent [authority] under s.49 of the Building Act, that being the pertinent requirement.
- 3.4 In a letter to the Ministry dated 10 March 2021 the agent stated:
- It is noted that this determination is in regards to the [purported] refusal by the authority to issue a building consent, on the grounds that the PS1 was issued by a person that not a Chartered Professional Engineer (CPEng). No consideration was given by the authority in its [purported] refusal to issue the building consent of the PS2 provided in the application.
- 3.5 In the same letter to the Ministry dated 10 March 2021 the agent responded to an issue originally raised by the authority in its letter dated 22 January 2021 regarding a decision reached by the Disciplinary Committee of the Chartered Professional Engineers of New Zealand in 2013. The agent confirmed that they were censured for 'failing to consider the health and safety of the public', although the actual complaint that was investigated was not upheld. The investigation did show the wall at issue "slightly moved". The agent confirmed the decision was made public at the time.
- 3.6 In an email to the Ministry dated 22 March 2021 the agent stated:
- Producer statements have been used as the industry standard for over 30 years by a range of building practitioners, not just [Chartered Professional] engineers.
 - The documentation surrounding and in support of a PS1 clearly state their use by "suitably qualified independent design professional", not just [Chartered Professional] engineers.
 - It is not unusual for suitably qualified engineers, not just [Chartered Professional] engineers, to use a PS1. PS1's are even included and used in infrastructure development codes too.
 - [The authority has] accepted PS1 for building consents from engineers that are not just [Chartered Professional] engineers.

¹⁴ Section 49 - "Grant of building consent"
Ministry of Business,
Innovation and
Employment

The authority

- 3.7 The authority provided copies of the four requests for information it issued to the applicant (see paragraphs 2.19 to 2.20). It also provided a further explanation about the fourth request for information, and its rationale for not accepting the producer statements issued by the agent. The authority stated:

The [authority] will not accept the PS1 issued by [the agent] as [the agent] is not a Chartered Professional Engineer (CPEng).

Under the (now repealed) Building Act 1991 ‘producer statements’ were a defined means of helping provide evidence of compliance with the Building Code to the territorial authorities’ building control departments.

However, over reliance on these statements without sufficient scrutiny of the author’s suitability or accuracy of the contents by councils meant many decisions based on them were not robust.

Producer statements have no statutory status under the Building Act 2004.

Producer statements are used for design and construction purposes to assist [building consent authorities] to establish compliance with the Building Code and the Building Act. As they have no statutory or formal status accepting producer statements is discretionary for [building consent authorities]...

Furthermore, the [authority’s] current producer statement guidance note requires a PS1 from a CPEng engineer who is registered with Engineering NZ. Extract below;

The PS1 should come from a Chartered Professional Engineer (CPEng) who is registered with Engineering NZ.

- 3.8 The authority also referred to producer statement guidance provided jointly by Engineering New Zealand, the Association of Consulting Engineers New Zealand, and New Zealand Institute of Architects Incorporated, in a publication titled “Guidance on use of producer statements”, which states “a competent design professional will have a current competence through regulations on a national competence-based register, either as a Chartered Professional Engineer (CPEng) or a Registered Architect”. The Ministry’s website contains a link to this document under the heading “Information needed in a producer statement”¹⁵, although the above statement goes considerably further than describing the type of information to be included in a producer statement.
- 3.9 The authority referred to the existing guidance issued by the Ministry in respect of producer statements as mentioned above. This guidance states:

A producer statement is a professional opinion based on sound judgment and specialist expertise. It is not a product warranty or guarantee of compliance.

While producer statements are well-established and widely used, they have no particular status under the Building Act 2004. They are used as one source of information which the [authority] may rely upon to determine whether there are reasonable grounds to conclude that the work complies with the Building Code.

¹⁵ <https://www.building.govt.nz/projects-and-consents/apply-for-building-consent/support-your-consent-application/producer-statements/> (accessed on 15 December 2020)

In considering whether to accept a producer statement, [an authority] will normally assess the credentials of the author to ensure that person has the appropriate experience and competence in their particular field of expertise and make their own inspections of the building work.

3.10 In response to a request for further information from the Ministry, the authority confirmed that:

If [the authority does] not receive a PS1 from a suitably qualified Chartered Professional Engineer (CPEng), the [authority] in the first instance raise a request for further information. If this is not supplied in 90 days, a reminder letter is sent with a final date. Thereafter, if no response to the [request for information] is provided, the consent will be refused as per section 50 of the Building Act 2004.

3.11 The authority also provided an explanation of the steps it undertook to assess the producer statement:

- The authority uses its own guidance note when reviewing producer statements. However, it also refers to best practice guidelines from Engineering New Zealand and the Ministry's guidance on producer statements.
- Each building consent is assessed on its merits. While there is a past work history, this does not provide reasonable grounds to issue a building consent without following due process. If an engineer has completed five designs that meet the Building Code, the authority would still assess the sixth design as if it were the first design.
- The authority has discretion whether to accept producer statements.

3.12 A draft determination was issued to the parties for comment on 15 December 2020.

3.13 The applicant responded to the draft determination on 14 January 2021. The applicant accepted the draft determination.

3.14 The authority responded on 22 January 2021 using the services of a legal advisor. The authority did not accept the draft determination, and requested that it acknowledge and take account of its comments, as summarised below:

- that at the time the PS1 was provided by the agent, the authority was aware the agent had been removed from the register of Chartered Professional Engineers in 2019, as a result of a complaint made to IPENZ (now Engineering New Zealand) regarding producer statements issued by the agent, and was "the core reason [the authority] placed little weight on [the agent's] expertise". This was further explained in another email from the legal advisor dated 2 March 2021 where it stated "A decision was made by the Disciplinary Committee of Engineering New Zealand. That decision is now the subject of an appeal to the District Court...". [I note that the appeal has since been withdrawn, see paragraph 3.22.]
- that the authority had not refused the building consent application prior to the application for determination
- the status of the PS2 has "yet to be determined"

- that the authority had “merely issued a Request for Information” (dated 25 September 2020), and then the application for determination was submitted by the applicant
- the authority referred to background information it was aware of regarding the agent. This included that at the time the decision was made, [the agent] was facing charges relating to the use of producer statements contrary to s40 of the Act in respect of carrying out building work contrary to a building consent (and was later found guilty of all six charges in December 2020)¹⁶
- it is the authority’s standard practice “to only accept PS1’s from approved persons”
- it is the authority’s standard practice that it does not accept the PS1 “provided by an unapproved author” even if it is “supported by a PS2 from a suitably qualified author”
- the authority’s approach to producer statements is on a case-by-case basis
- the authority believed it was “of limited relevance that the PS1 was peer reviewed and approved by a [Chartered Professional Engineer]” on the basis that “the PS1 was not provided by a [Chartered Professional Engineer] in the first instance”
- the authority believes the list of items [in the draft determination] to consider when “assessing compliance of a producer statement” is “helpful”, but it “is not definitive”, “nor is the list prescriptive or binding on an authority”
- the authority believes it is not obligated to consider all the factors listed, but it did consider “a number of relevant factors”
- the authority has “adopted a balancing approach” when assessing the producer statement provided by the agent, and that it has discretion when assessing various factors “to establish compliance”
- the authority stated “producer statements no longer carry any weight under [the Act]. This of course differs from the previous Act (Building Act 1991)”
- the authority referred to its decision making functions and obligations under the Local Government Act 2002, as well its “overlapping duties to the public to ensure reasonable care is exercised in respect of its duties under the Act”
- the authority referenced previous Court cases where producer statements were considered
- the authority considered “the risk if the producer statement is incorrect, including the risk to the owner and other neighbouring properties” and “the complexity of the works and the likely consequences of non-compliance”
- the height of the retaining walls varied between 1m – 1.5m minimum which the authority accepts “is relatively small”

¹⁶ *Tauranga City Council v Cancian CRI-2018-070-003348 [2020] NZDC 25470, dated 10 December 2020*
 Ministry of Business,
 Innovation and
 Employment

- the authority believed that the length of the retaining walls, which are on four sides of the site, means “that the implications of failure would be significant. Particularly in the event that a dwelling (or similar) is erected on site”
- the authority agrees in principal that producer statements may be issued in various formats and/or by a range of construction professionals
- the authority confirmed that “while an author’s lack of registration as [a Chartered Professional Engineer] is not determinative, it will affect the reliability and weight placed on the producer statement. If an author’s competence cannot be demonstrated, [the authority] will not subject itself to additional risk by accepting the author’s statement – even where it is supported by a PS2”
- the authority believed that the agent had failed to satisfy the authority of the agent’s credentials and competence to provide the producer statement
- “Authors who are registered with a professional body such as [Engineering New Zealand] are bound by rules and code of conduct of that organisation”
- the authority believes “it is unusual for a PS1 to be submitted by a New Zealand engineer who is not a [Chartered Professional Engineer]”, but did describe a process whereby it had “previously accepted producer statements from non-[Chartered Professional Engineer] authors where the PS1 is provided by a registered professional outside of New Zealand, and that producer statement is in respect of low risk product”
- the authority referred to its “own policies and practices to guide consideration of producer statements”, and those of another (separate) authority
- the authority described its process for considering producer statements, including referring to its own guidance note, the guidelines from Engineering New Zealand and the Ministry, assessment of the risk of failure and scope of the design, the suitability and accuracy of the information provided, and then exercising its discretion on whether to accept producer statements
- the authority expressed a view that it could expose itself to potential liability if it failed to scrutinise the suitability of the author of a producer statement.

3.15 In an email dated 17 March 2021, the authority, using the services of a legal advisor stated that in response to the agent’s letter to the Ministry dated 10 March 2021:

...[the authority] had not refused the building consent application at the time [the applicant had] applied for a determination. It had only requested further information. As set out in [the authority’s] substantive response dated 22 January 2021, it is highly unusual for a PS1 to be submitted by a New Zealand engineer who is not a [Chartered Professional Engineer] and it is [the authority’s] standard practice not to accept producer statements where this is the case. The expertise, qualifications and experience of the author are also relevant considerations in assessing whether to accept a PS1, particularly where [the authority] has concerns about that particular author.

- 3.16 On 8 July 2021 the authority, using the services of a legal advisor, provided additional information it had obtained about the agent, specifically in regard to a decision reached by the Disciplinary Committee of Engineering New Zealand and subsequent appeals to Chartered Professional Engineers Council (“CPEC”) and the District Court.
- 3.17 The decision reached by the Disciplinary Committee of Engineering New Zealand is dated 25 June 2019¹⁷. It upheld a complaint by the authority made under the Chartered Professional Engineers of New Zealand Act 2002 against the agent related to residential property developments in the Tauranga area between 2015 and 2016. The Disciplinary Committee considered 33 different examples of services the agent had provided which included, but was not limited to, the design of some residential retaining walls.
- 3.18 The Disciplinary Committee stated the agent:
- [4] did not meet the standard to be reasonably expected of a Chartered Professional Engineer
 - [28] [demonstrated] a serious and worrying pattern of poor professional practice, rigour, and attention to quality practice that, cumulatively, are of significant concern to [the Committee]
 - [266] frequently...provided insufficient information in support of his PS1 certificates
 - [297] upon receipt of [requests for further information, had] not worked with [the authority] to resolve the issues...raised
 - [313] breached his professional obligations to act competently and behave appropriately.
- 3.19 In exercising its delegated powers the Disciplinary Committee ordered that:
- the agent’s registration as a Chartered Professional Engineer is removed, and they may not re-apply for re-registration before the expiry of a two-year period (from 25 June 2019)
 - the agent is to pay towards some of the costs incurred by the Registration Authority
 - Subject to any appeal by the agent, notify the Registrar of Licenced Building Practitioners appointed under the Building Act 2004, and publish the Committee’s final decision.
- 3.20 The decision issued by the Disciplinary Committee also raised other matters that are relevant in this case:
- [251] On 20 June 2018...[the authority] wrote to [the agent] and advised him that it would no longer accept PS1s from him without his work being peer reviewed by another Chartered Professional Engineer...
 - [260] Once an engineer has completed their design, they will usually sign a PS1. The PS1 is a statement from the design engineer that they believe on reasonable grounds that their design complies with the Building Code. Their intent is to signal to the BCA that certain design work has been done (or

¹⁷ <https://www.engineeringnz.org/news-insights/tauranga-engineer-struck/> (internet link accessed on 20 September 2021)

overseen/supervised) by a practitioner who is competent to perform the defined work (**most usually**, a Chartered Professional Engineer). The PS1 has no legal status under the Building Act 2004 nor the Building Code but is part of the package of information a BCA will consider when deciding whether to issue a building consent [my emphasis].

- [323] ...the removal or suspension of a Chartered Professional Engineer’s registration does not prevent the individual practising as an engineer but does prevent use of the Chartered Professional Engineer title.

- 3.21 The agent also sought an appeal on matters related to the Disciplinary Committee’s decision to the Chartered Professional Engineers Council (“CPEC”)¹⁸. The appeal was declined, and the decision of the Disciplinary Committee was upheld.
- 3.22 The agent then appealed to the District Court but this was subsequently withdrawn. In a communication dated 3 September 2021 the agent stated an intention to file for a judicial review to the High Court “to consider...procedural issues” associated with the decision reached by the Disciplinary Committee¹⁹.
- 3.23 The person with an interest did not provide a response to the draft determination.

4. Discussion

- 4.1 The dispute arises because of the purported refusal of a building consent by the authority on the basis a PS1 has been provided by the agent who is not a registered Chartered Professional Engineer (CPEng), and the agent had failed to satisfy the authority of its credentials and competence.
- 4.2 It is clear that the authority has not refused the building consent application prior to the application for determination²⁰, but that it has merely issued a request for further information (refer to paragraph 2.20)²¹. However, as described in paragraph 3.10, the authority has stated that “If [the authority does] not receive a PS1 from a suitably qualified Chartered Professional Engineer...the consent will be refused as per section 50 of the Building Act 2004”. This is a clear indication of an exercise of a decision that is a purported refusal of a building consent for the purposes of sections 177(1)(b) and (2)(a) of the Act. The fact that the applicant has chosen to apply for a determination in lieu of seeking to obtain a PS1 from a “suitably qualified Chartered Professional Engineer” is within its rights to do so.

The legislation

- 4.3 The legislative purposes that apply are described in section 3 of the Act, including the provision for the regulation of building work and the setting of performance standards for buildings to ensure that people who use buildings can do so safely and without endangering their health²².
- 4.4 Section 3(b) of the Act also states the purpose to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the Building Code.

¹⁸ CPEC Appeal Number 01/19, Appeal Ruling #52: 26 February 2020. <https://www.cpec.org.nz/77-appeal-ruling-52-26-february-2020> (internet link accessed on 20 September 2021)

¹⁹ As at the date of this determination, I have not received confirmation from either of the parties that an application for Judicial Review has been filed with the High Court.

²⁰ Section 50 of the Act

²¹ Section 48(2) of the Act

²² Section 3(a)(i) of the Act.

- 4.5 The principles to be applied in performing functions or duties, or exercising powers, under section 4 of the Act include the importance of standards of building design and construction in achieving compliance with the building code²³, and ensuring plans and specifications are sufficient to result in building work that (if built to those plans and specifications) complies with the Building Code²⁴.
- 4.6 In accordance with section 17 of the Act, all building work must comply with the Building Code to the extent required by the Act, whether or not a building consent is required in respect of that building work.
- 4.7 The responsibility of a building consent authority under section 14F(a)(i) of the Act is to ensure that an application for a building consent complies with the Building Code, regardless of the format and presentation of the information to which the building work relates. However, an application for a building consent must be in the compliance with section 45 of the Act including, but not limited to, plans and specifications²⁵ that are required by regulations made under section 402 of the Act.
- 4.8 In accordance with section 49(1) of the Act, the test for the authority is that it 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 that accompanied the application.

The status of producer statements

- 4.9 Producer statements do not hold any particular status under the Act, unlike the former Building Act 1991. An authority may request a producer statement, but it cannot require that one is to be provided. Likewise, an authority is not obligated to accept a producer statement just because one has been provided.
- 4.10 It is well established in previous determinations²⁶ that a building consent authority cannot insist on the production of a producer statement. It follows from that statement that the format in which the producer statement is presented is at the discretion of the author.
- 4.11 In practice a ‘producer statement design’ (PS1) and a ‘producer statement design review’ (PS2) are widely relied upon by building consent authorities when granting building consents, and form an important part of the consenting and compliance processes.
- 4.12 Producer statements can be issued by a wide-range of construction professionals, and there are no particular restraints around the qualifications or registrations held by those professionals. Producer statements can be accepted from people other than registered Chartered Professional Engineers.
- 4.13 The Ministry’s guidance on producer statements²⁷ reinforces the Engineering New Zealand guidelines²⁸ that authorities must use their judgement in deciding whether to accept producer statements and how much weight to place on them. This will

²³ Section 4(2)(f) of the Act.

²⁴ Section 4(2)(q) of the Act.

²⁵ Section 7 of the Act: Plans and specifications – (a) means the drawings, specifications, and other documents according to which a building is proposed to be constructed, altered, demolished, or removed.

²⁶ For example, Determination 2017/083 on an authority’s refusal to issue a code compliance certificate and whether a producer statement is required; and Determination 2019/030 regarding the refusal to issue a building consent for invasive investigation of structural steel.

²⁷ <https://www.building.govt.nz/projects-and-consents/apply-for-building-consent/support-your-consent-application/producer-statements/> (accessed on 6 October 2021)

²⁸ Engineering New Zealand, Practice Note 1, Version 3, dated January 2014 ISSN 1186-0907, titled “Guidelines on Producer Statement”.

include, but may not be limited to, looking into the credentials, experience and competence of the author of that producer statement.

- 4.14 Further, if the author of the producer statement is not registered with, or references membership of, a relevant independent professional body (for example, Engineering New Zealand), this may affect the degree of reliance that authorities could place on the producer statement and its overall assessment of compliance. This is a factor to consider as the absence of any adherence to a code of ethics or similar obligations may suggest the potential for a shortfall in professional practice standards. Regardless, it does not affect the ability of a person to issue a producer statement in the first place.
- 4.15 The question of whether or not to accept a producer statement is one that authorities should turn their minds to for every producer statement. This was recognised by the *High Court in Body Corporate 326421 v Auckland City Council* [2015] NZHC 862²⁹ where the court stated:

[115] It would not be appropriate for a territorial authority to accept any producer statement without question. The extent to which a particular producer statement should be relied on in considering whether code requirements had been met would depend on all relevant circumstances. These would include, for example, the skill, experience and reputation of the person providing the statement, the independence of the person in relation to the works, whether the person was a member of an independent professional body and subject to disciplinary sanction, the level of scrutiny undertaken and the basis for the opinion. The territorial authority would also need to consider any other information relevant to whether the works had been carried out to an appropriate standard and could be expected to meet code requirements. This would include the skill, experience and reputation of the party carrying out the works, the complexity of the works, the likely consequences of non-compliance and whether any concerns had arisen regarding the quality of the works.

- 4.16 A useful list emerges of the types of matters that authorities may consider, from the High Court judgment, the Ministry's guidance, and Engineering New Zealand's guidance, when it has doubts about a particular producer statement. The list below is not intended to be definitive or binding on authorities, but is a good starting point that authorities can consider and add to depending on the circumstances where an assessment is required. Further, no one item is intended to be determinative; fair and equal consideration should be applied to all the relevant items as they apply to a particular case so a proper and balanced view can be reached by the authority taking into account all of the available information. An authority should not reject a producer statement outright (or the compliance of the design work it certifies), merely because of a perceived flaw in the statement or issue with its author. Instead, what is required is a consideration of everything that is known about the producer statement, its author and the underlying work, including (but not necessarily limited to):
- the credentials of the producer statement's author, including their qualifications, professional memberships and registrations, experience, competence, skills and areas of expertise;

²⁹ *Body Corporate 326421 v Auckland City Council CIV 2009-404-008136* [2015] NZHC 862, dated 29 April 2015.

- other information about the author, including any concerns, as well as positive examples of their work, their reputation and independence in relation to the certified work;
- the reasons for any disciplinary action, where this is a factor and is known;
- the form, content, and completeness of the producer statement;
- the information issued in conjunction with the producer statement, such as a design features report, calculations, plans and specifications etc;
- the risk if the producer statement is incorrect, including risk to the owner, the authority and persons using a building etc;
- the availability of a peer review;
- the author’s quality assurance procedures and records, the level of scrutiny undertaken and the basis for the opinion;
- the nature and complexity of the works, and the likely consequences of noncompliance and whether any concerns have arisen regarding the quality of the works;
- the skill and experience of the other professionals and building practitioners involved with the building works if these persons are known at the time the authority conducts its assessment;
- details of any proposed on site construction monitoring; and
- guidance and practice notes regarding producer statements from Engineering New Zealand and other professional bodies as they may relate to persons registered with such organisations.

The producer statements issued in this case

- 4.17 In this case, the ‘producer statement design’ (PS1) was issued by the agent who is not registered with an independent professional body as a Chartered Professional Engineer. I note the agent was previously registered with Engineering New Zealand but “resigned [their] membership...on 13 March 2018”³⁰, notwithstanding that a subsequent decision made by the Disciplinary Committee of Engineering New Zealand on 25 June 2019 that removed the agent’s registration for a period of two years from that date (refer to paragraph 3.19).
- 4.18 However, a ‘producer statement design review’ (PS2) has been issued in respect of the same building work by a person who is a registered Chartered Professional Engineer with Engineering New Zealand.
- 4.19 The fact that the author of the PS1 is not registered as a Chartered Professional Engineer means it is not bound by any independent professional body’s code of ethics or conduct, policies, or guidelines on the format or use of producer statements. For this reason it may be appropriate to place more weight on a PS1 that has been provided by a Chartered Professional Engineer.
- 4.20 Regardless, in my view, the agent in the current case can provide a PS1 even though it is not a registered Chartered Professional Engineer (refer to paragraph 4.12).

³⁰ Engineering New Zealand Disciplinary Committee Decision, dated 25 June 2019, paragraph 12
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- 4.21 In paragraph 3.7 the authority referred to its “current producer statement guidance” that states “The PS1 should come from a Chartered Professional Engineer (CPEng) who is registered with Engineering NZ”. In light of my conclusion in the paragraph above, the authority may wish to consider amending its guidance to remove the requirement that a PS1 should be provided by a Chartered Professional Engineer.
- 4.22 As stated in paragraph 3.14, the authority was aware the agent had been removed from the register of Chartered Professional Engineers in 2019 (refer to paragraphs 3.16 to 3.22 inclusive). The decision reached by the Disciplinary Committee of Engineering New Zealand stated it had serious and significant concerns about the conduct, competence and professionalism of the agent and concluded it did not meet the standard to be reasonably expected of a Chartered Professional Engineer.
- 4.23 The authority also confirmed that “while an author’s lack of registration as [a Chartered Professional Engineer] is not determinative, it will affect the reliability and weight placed on the producer statement” and that the agent had failed to satisfy it of their credentials and competence to provide the producer statement.
- 4.24 At the time the authority drafted its request for further information, it had information available to it that would appear to justify placing little weight on the assurances given in the producer statement provided by the agent.
- 4.25 The authority also referred to other information it knew about the agent (see paragraph 3.14), including being aware of some significant adverse findings against the agent, who was convicted in December 2020 in the District Court at Tauranga of six charges of contravening section 40 of the Building Act in relation to carrying out building work contrary to a building consent³¹. While the charges related to the issue of PS4s, most of the charges related to reinforced concrete blockwork walls, with several particularised as ‘retaining walls’ and so are quite relevant to the work at issue in this determination.
- 4.26 However, I also note that the six charges laid against the agent did not relate to any PS1s issued in association with any design of the retaining walls as part of the relevant building consents, and none were in relation to any timber retaining walls (as in this case).
- 4.27 The authority also referred to a Disciplinary Committee decision made by the Chartered Professional Engineers of New Zealand in 2013 (see paragraph 3.5). I agree with the authority, in-so-much as this is relevant information that it would be expected to consider as part of its decision making process (refer to paragraph 4.16). This information is important, but of itself it is not determinative; the authority would still need to give equal and fair consideration to the other relevant factors in this case.
- 4.28 The authority has not indicated that the producer statement itself is incorrect or incomplete, including the stated means of compliance with the Building Code, only that it is concerned it is not signed by a Chartered Professional Engineer with the appropriate competence and credentials to do so.
- 4.29 Further, the authority has provided no evidence to suggest that the design of the retaining walls prepared by the agent, or indeed the peer review engineer, does not meet the requirements of section 17 of the Act.

³¹ District Court decision CRI-2018-070-003348 [2020] NZDC 25470, dated 10 December 2020

- 4.30 In response to the draft determination, the authority referred to risks **if** (my emphasis) the producer statement is incorrect, including the risk to the owner and other neighbouring properties, as well as complexity of the works and likely consequences of non-compliance. The authority has provided no evidence to suggest the PS1 is incorrect, it only stated “if” that was the case. However, I note that the authority has not completed its compliance assessment of the plans and specifications that accompanied the building consent application, but it has raised a number of requests for further information (refer to paragraphs 2.19 and 2.20).
- 4.31 Retaining walls of the type designed in this case are common place in New Zealand, and are not overly complex; indeed provided certain criteria are met, some retaining walls are able to be constructed without the requirement of first obtaining a building consent³². In this case, however, the close proximity of the retaining walls to the relevant boundaries, their height (in part), and additional surcharge loading, means that a building consent is required.
- 4.32 Further, in response to the draft determination, the authority did refer to the varied height of the retaining walls, but because of the length and setting out the walls, it stated “that the implications of failure would be significant. Particularly in event that a dwelling (or similar) is erected on site”. This statement implies an assessment of possible risk, and not an assessment of compliance of the plans and specifications with the Building Code which the authority has yet to complete. I have not been presented with any design information to confirm what future building is proposed, and presumably neither has the authority. For example, in the absence of any such information, there is no data that suggests any additional surcharge loading would be applied to any of the retaining walls over-and-above that which has already been allowed for in the current design.
- 4.33 All building work carries an element of risk, but for the authority to simply place reliance on an opinion of possible risk is not appropriate. The tests the authority has to turn its mind to are sections 17 and 49(1) of the Act, and its responsibilities under section 14(F)(a)(i) of the Act.
- 4.34 I am of the view that just because the author of a PS1 may not be a registered Chartered Professional Engineer with Engineering New Zealand, or other similar organisation, does not of itself mean that compliance with the Building Code is not demonstrated or achieved. There are explicit provisions in the Act where some restrictions are placed on particular persons who can do certain types of building work (for example, restricted building work, and exemptions under Part 3 of Schedule 1 of the Act) but these do not apply in this case.
- 4.35 I note that on 25 June 2018 “[the authority] wrote to [the agent] and advised him that it would no longer accept PS1s from him without his work being peer reviewed by another Chartered Professional Engineer” (refer to paragraph 3.20).
- 4.36 However, the authority stated in its letter dated 25 September 2020 that it “will **no longer** [my emphasis] accept a PS2 signed by a Chartered Professional Engineer (CPEng) supporting the design of specifically designed elements which are designed by an engineer who is not a [Chartered Professional Engineer]”. There is a clear indication that the authority did previously accept this practice, but for whatever reason, no longer does so.

³² Sections 41(1)(b) and 42A(1) of the Act, and Schedule 1, clause 20 – Retaining walls – that retain not more than 1.5m depth of ground and does not support a surcharge and any load additional to the load on that ground, and clause 41 – Retaining walls (building work for which the design is carried out or reviewed by a chartered professional engineer).

- 4.37 I have not been provided with any evidence or information that disputes the completeness or validity of the PS2. Indeed the authority confirmed, in response to the draft determination that the status of the PS2 has “yet to be determined”. This implies the authority has not yet properly considered the accuracy or completeness of the PS2 or its accompanying structural calculations.
- 4.38 Notwithstanding the concerns the authority had about the competence and credentials of the agent who provided the PS1, the same has **not** been stated in respect of the peer review engineer who provided the PS2. In this case the author of the PS2 is a Chartered Professional Engineer, and weight should be placed on the fact the design has been formally peer reviewed. It confirmed “[the] review of the 3 Hoani Lane timber pole retaining wall supports the design prepared by [the agent] dated 25 May 2020” and “...is fit for purpose and the retaining wall will be able to support the applied loading” (refer to paragraph 2.15).
- 4.39 In response to the draft determination, the authority stated it only accepted PS1s from “approved persons”, and that it is “the authority’s standard practice that it does not accept” a PS1 “provided by an unapproved author” even if it is “supported by a PS2 from a suitably qualified authority”. The authority also stated it was “of limited relevance that the PS1 was peer reviewed by a” Chartered Professional Engineer on the basis that “the PS1 was not provided by a [Chartered Professional Engineer] in the first instance”. I disagree with the authority. In this case the peer review of the design the PS2 that has been provided to the authority is a relevant factor (see paragraph 4.16), and should not be dismissed out of hand just because a PS1 has not been completed by a Chartered Professional Engineer. If indeed the authority has adopted, as “standard practice”, such a narrow view on this issue, this appears at odds to its responsibilities under section 14(F)(a)(i) of the Act, and notwithstanding the actual test to be met under section 49(1) of the Act.
- 4.40 In this case, and in light of the responses received from the authority on 30 October 2020 and 22 January 2021, it did not adequately consider all the relevant factors as described in paragraph 4.16. I do agree with the authority that the acceptance of a producer statement is discretionary for building consent authorities, as is the list of factors that could be considered which are not binding on the authority.
- 4.41 However, in this case, the authority has provided no evidence to suggest that they considered several factors that I believe are relevant. This includes, and is not limited to, the provision of a peer review by a Chartered Professional Engineer, the relatively simple nature of the building works involved, as well as the form, content and completeness of both the PS1 and PS2, and the compliance of the plans and specifications with the Building Code (albeit the authority has yet to complete its processing of the building consent).
- 4.42 It is worth reiterating that these factors are case specific, noting the type of retaining walls being proposed and the relatively low risk nature of the building work. As such, the decision reached in this case might be different if the design of the building work was considered more complex and other factors could not be substantiated to the same degree.
- 4.43 In paragraph 3.11 the authority has stated it won’t necessarily consider “past work history” of the author of a producer statement and even “if an engineer has completed five designs that meet the Building Code, the authority would still assess the sixth design as if it were the first design”, and just because there is “a past work history, this does not provide reasonable grounds to issue a building consent without

following due process”. However, having regard to past work history, particularly where compliance with the Building Code can be demonstrated, is one factor to be considered. This applies equally to where past work history demonstrates areas of non-compliance.

- 4.44 I have seen no evidence to suggest that the authority has made its own assessment of the matters described above prior to issuing its letter dated 25 September 2020, and nothing to suggest that compliance with sections 17 and 49(1) have not been met.
- 4.45 From the evidence before me, it’s clear that the authority did not correctly assess all the other information it had available to it, and instead focused on the issue that the agent who provided the PS1 was not a Chartered Professional Engineer (notwithstanding their concerns with the agent’s competence and credentials).
- 4.46 Whilst not directly related to the matter for determination, I note that the surcharge load and the thickness of the lagging on the agent’s design for the Type 1 retaining wall that is 1.9m high differs from that of peer review engineer (refer to paragraphs 2.14, 2.15 and 2.16). I see this difference as a matter for the respective engineers and authority to review and resolve in terms of consistency of the information. It does not necessarily demonstrate compliance with the Building Code has not been met.

5. The decision

- 5.1 In accordance with section 188 of the Building Act 2004, I determine that the authority was incorrect to purportedly refuse to grant a building consent on the basis that the author and signatory of a producer statement design was not a registered Chartered Professional Engineer. I reverse that decision, thus requiring the authority to make a new decision, which is to take into account the information contained in this determination.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 6 October 2021.

Katie Gordon
National Manager Determinations

Appendix A

The relevant sections of the Act are:

3 Purposes

This Act has the following purposes:

- (a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—
 - (i) people who use buildings can do so safely and without endangering their health; and
 - (ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and
 - (iii) people who use a building can escape from the building if it is on fire; and
 - (iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development:
- (b) to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.

4 Principles to be applied in performing functions or duties, or exercising powers, under this Act

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- (2) In achieving the purpose of this Act, a person to whom this section applies must take into account the following principles that are relevant to the performance of functions or duties imposed, or the exercise of powers conferred, on that person by this Act:
 -
 - (f) the importance of standards of building design and construction in achieving compliance with the building code
 -
 - (q) the need to ensure that owners, designers, builders, and building consent authorities are each accountable for their role in ensuring that—
 - (i) the necessary building consents and other approvals are obtained for proposed building work; and
 - (ii) plans and specifications are sufficient to result in building work that (if built to those plans and specifications) complies with the building code
 -

14F Responsibilities of building consent authority

A building consent authority is responsible for—

- (a) checking, in accordance with the requirements of this Act for each type of building consent, to ensure that—
 - (i) an application for a building consent complies with the building code;
 - (ii) building work has been carried out in accordance with the building consent for that work:

- (b) issuing building consents and certificates in accordance with the requirements of this Act.

17 All building work must comply with building code

All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

45 How to apply for building consent

- (1) An application for a building consent must—
 - (a) be in the prescribed form; and
 - (b) 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 a building consent authority: _____

48 Processing application for building consent

- (1) After receiving an application for a building consent that complies with [section 45](#), a building consent authority must, within the time limit specified in subsection (1A),—
 - (a) grant the application; or
 - (b) refuse the application.
- (1A) The time limit is—
 - (a) if the application includes plans and specifications in relation to which a national multiple-use approval has been issued, within 10 working days after receipt by the building consent authority of the application; and
 - (b) in all other cases, within 20 working days after receipt by the building consent authority of the application.
- (2) A building consent authority may, within the period specified in subsection (1A), require further reasonable information in respect of the application, and, if it does so, the period is suspended until it receives that information.

49 Grant of building consent

- (1) A building consent 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 that accompanied the application.
- _____

50 Refusal of application for building consent

If a building consent authority refuses to grant an application for a building consent, the building consent authority must give the applicant written notice of—

- (a) the refusal; and
- (b) the reasons for the refusal.