

Determination 2023/011

Regarding the refusal to grant a building consent for alterations to an existing building

125 Manners Street, Te Aro, Wellington

Summary

This determination considers an authority's decision to refuse to grant a building consent for proposed alterations of an existing building. The determination considers the reasons given by the authority for the refusal, including the requirement for a peer review of the earthquake strengthening element of the building work.

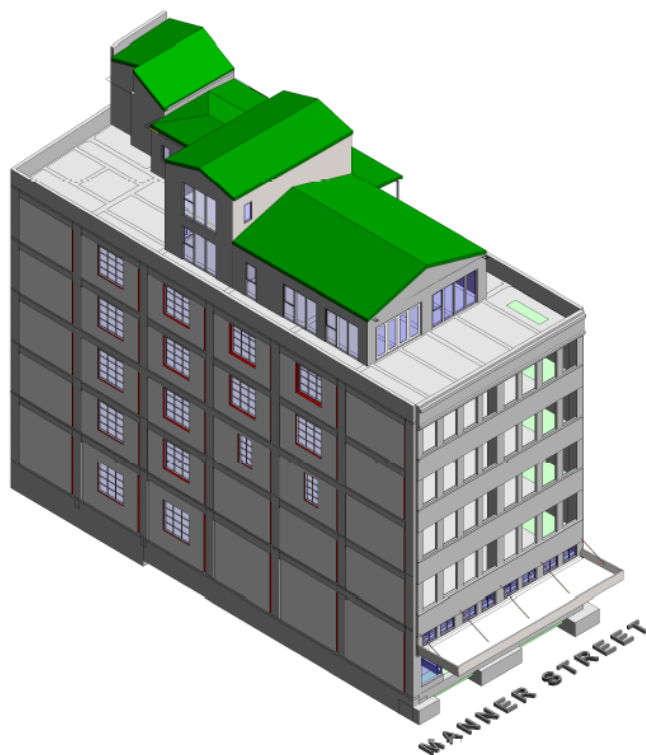


Figure 1: Three-dimensional image of the building (not to scale)¹

¹ Reproduced from the structural engineer's plan sheet S10.01 Revision C, dated 21 August 2018.

In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (eg Acceptable Solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Peta Hird, Principal Advisor, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.²
- 1.2. The parties to the determination are:
 - 1.2.1. the owner of the building, Trojan Housing Limited (“the owner”)³, who applied for the determination
 - 1.2.2. Wellington City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. I consider New Zealand Consulting Engineers Limited (“the structural engineer”) to be a ‘person with an interest’ in the matter. The structural engineer was responsible for the detailed seismic assessment, issue of a Producer Statement – Design (PS1), and revised plans and specifications for the proposed earthquake strengthening of the existing building.⁴
- 1.4. This determination arises from the authority’s decision to refuse to grant a building consent⁵ (476072) involving a change of use and alterations to an existing building at 125 Manners Street, Te Aro, Wellington. The refusal arose because the authority is not satisfied that the building work, in particular the proposed earthquake strengthening, complies with the Building Code.
- 1.5. The matter to be determined, under section 177(1)(b) and (2)(a), is the authority’s decision to refuse to grant the building consent.
- 1.6. In deciding this matter, I must consider the authority’s reasons for refusing to grant the building consent, including a requirement for the owner to obtain a Producer

² The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

³ References to “the owner” in this determination include its legal advisor and a separate project management company acting as the owner’s agent.

⁴ The original design for the proposed earthquake strengthening was undertaken by a different engineer. However, the owner opted to engage the services of New Zealand Consulting Engineers Ltd part way through the building consent application process, and it is their revised design that was considered by the authority.

⁵ Section 49 and notified under section 50.

Statement – Design Review (PS2) in support of the specific engineering design for the earthquake strengthening element of the building work.

Issues outside this determination

- 1.7. The owner has raised issues about how the authority performed its duties, including its adherence to statutory time frames⁶ and the process it followed to request further information⁷. Issues related to how the authority performed its duties, functions, and responsibilities are not included in section 177 and are therefore outside the matter for determination.
- 1.8. The owner sought “an order” from the Ministry to grant the building consent or require the authority to grant the building consent. The Chief Executive’s powers regarding determinations are limited to those set out in section 188(1)⁸, and do not include the same powers as a Building Consent Authority to grant and issue a building consent under sections 49 and 51 or to make an “order”.
- 1.9. The determination does not consider the issue of an earthquake-prone building notice⁹ by the authority for 125 Manners Street, nor whether the proposed building work amounts to a substantial alteration.¹⁰
- 1.10. The determination does not consider the proposed change of use¹¹ of the building or part thereof. The authority has confirmed that the change of use “...did not form any part of [the authority’s] decision to refuse to grant the building consent”. Although the dispute between the parties is not about the proposed change of use, any change of use is a relevant consideration for meeting the requirements of the Act and involves assessing the structural performance of the building for the purpose of section 115.
- 1.11. I have not considered any other aspects of the Act or of the Building Code, nor have I considered the Building Code compliance of the proposed building work covered by the building consent.

2. The building work

- 2.1. The owner described the existing building as a “five storey art deco building with a two-storey lightweight timber framed penthouse on top”. It was first constructed in 1937, and the two-storey roof top penthouse was added in 2005.

⁶ Section 48(1A).

⁷ Section 48(2).

⁸ A determination by the Chief Executive must (a) confirm, reverse, or modify the decision or exercise of a power to which it relates; or (b) determine the matter to which it relates.

⁹ Section 133AL.

¹⁰ Section 133AT((2)(c), and Clause 11 of Building (Specified Systems, Change of Use, and Earthquake-prone Buildings) Regulations 2005.

¹¹ Section 115.

- 2.2. The existing rectangular shaped building is constructed of concrete frames (columns and beams), reinforced concrete infill walls, floors, lift shaft and stairs, and both reinforced and unreinforced masonry, all supported on reinforced concrete foundation pads and strip footings. The penthouse is predominantly timber-framed and includes a small area of unreinforced masonry.
- 2.3. The owner confirmed the existing building is classed as earthquake-prone¹² and has a current earthquake rating¹³ of 17 percent new building standard (17%NBS¹⁴).¹⁵ The proposed building work was intended to address the earthquake prone status of the property and achieve a rating of greater than 80%NBS.
- 2.4. The building work associated with the earthquake strengthening of the building included, but was not limited to, the specific engineering design and construction of new structural steelwork and bracing, reinforced concrete ground beams, and strengthening to existing columns using a proprietary fibre-reinforced polymer system.
- 2.5. The proposed building work also included, but was not limited to, partial demolition of some existing building elements, alterations to form new commercial tenancies (at ground floor level) and residential apartments (at the floor levels above), new sanitary facilities, passenger lift, fixtures and fittings, joinery, external wall and roof cladding, protection from fire, and accessible features for people with disabilities.

3. Background

- 3.1. On 20 May 2020, the authority issued an earthquake-prone building notice under section 133AL of the Act.¹⁶
- 3.2. On 28 October 2020, the owner applied for building consent 476072 for the proposed building work.

¹² Section 133AB of the Act.

¹³ Section 133AC of the Act.

¹⁴ %NBS – The rating given to a building as a whole, expressed as a percent of **new building standard** achieved. This is based on an assessment of the expected seismic performance of an existing building relative to the minimum that would apply under the Building Code to a new building on the same site with respect to life safety. <https://www.building.govt.nz/building-code-compliance/b-stability/b1-structure/methodology-identify-earthquake-prone-buildings/introduction/#jumpto-definitions> (accessed on 3 October 2022).

¹⁵ A detailed seismic assessment dated 13 August 2021, from the structural engineer, stated the “unreinforced masonry walls” were below 34%NBS. The foundations, concrete frames, floor diaphragms, and reinforced masonry walls were assessed to be equal to or greater than 50%NBS.

¹⁶ The authority assessed the earthquake rating to be between 0 to 15 percent of new building standard (NBS). The owner was required to complete seismic work by 9 December 2024.

- 3.3. Between 7 December 2020 and 5 March 2021, the authority requested additional information¹⁷ and the owner responded accordingly.¹⁸
- 3.4. Between April and August 2021, the owner “undertook a complete redesign” using the services of the structural engineer.
- 3.5. On 13 August 2021, revised structural engineering plans and specifications, structural calculations, a detailed seismic assessment, design features report¹⁹, and Producer Statement – Design (“PS1”) dated 12 August 2021²⁰, were provided to the owner by the structural engineer. The PS1 stated it was in respect of “seismic strengthening to 80%NBS” and compliance with Clause B1 Structure.²¹
- 3.6. On or about 24 August 2021, the owner submitted to the authority the revised structural design information and associated geotechnical report (dated August 2021).
- 3.7. Between 20 September 2021 and 12 November 2021, the authority requested additional information²² and the owner responded accordingly.²³
- 3.8. On 17 December 2021, the authority received written advice from a specialist engineering company it had engaged to assess the building consent application for compliance with clause B1 regarding the proposed strengthening. The specialist engineer:
 - 3.8.1. recommended a peer review is undertaken
 - 3.8.2. confirmed the proposed building work was intended to strengthen the building to a minimum of 80%NBS

¹⁷ Section 48(2).

¹⁸ The requests for additional information dated 7 December 2020 and 5 March 2021 did not include, at that time, a requirement of the owner to obtain a peer review associated with the specific engineering design for the proposed earthquake strengthening.

¹⁹ The report stated the goal of the seismic strengthening was to achieve a rating of 80%NBS and provide low risk to life safety, rather than damage prevention, in the event of an earthquake (refer to *The Seismic Assessment of Existing Buildings – Technical Guidelines for Engineering Assessments* dated July 2017, Assessment Objectives and Principles – Part A, Table A3.1 Assessment outcomes (potential building status)).

²⁰ The PS1 included confirmation of level CM3 construction monitoring by a Chartered Professional Engineer.

²¹ The stated means of compliance was *Ministry of Business, Innovation and Employment Acceptable Solutions and Verification Methods for New Zealand Building Code Clause B1 Structure*, first edition, amendment 19, effective from 28 November 2019. Verification Method B1/VM1 “General” and B1/VM4 “Foundations”.

²² The fourth round of requests for further information (“RFI”), raised by the authority on 10 November 2021, were all related to structural design issues only (reference numbers 138 to 145). The requests for additional information dated 20 September 2021 and 10 November 2021 did not include, at that time, a requirement of the owner to obtain a peer review associated with the specific engineering design for the proposed earthquake strengthening.

²³ The owner responded on 12 November 2022.

- 3.8.3. stated that the work to strengthen the primary structure involved “selected demolition, sawcuts to frame infill, carbon fibre wrap and foundation improvements. This is a strategy of reducing strength at selected locations to increase the overall displacement capacity of the building. It relies upon the 1930’s reinforced concrete frame performing well.”
- 3.8.4. stated the strengthening strategy is an alternative solution for which the analysis is complex
- 3.8.5. stated the “proposed strengthening changes the structural form from a stiff reinforced concrete frame with infill walls to a slender moment resisting frame structure...[and] what is proposed creates a new structural system”
- 3.8.6. was unable to confirm whether the proposed strengthening complies to the extent required by the Act²⁴, which requires that the building after the alteration, if it did not comply with the provisions of the Building Code immediately before the building work began, “continue to comply at least to the same extent as it did then comply”
- 3.8.7. listed certain aspects of the design that the specialist engineer considered were required to be included in the peer review.²⁵
- 3.9. On the 23 December 2021, the authority wrote to the owner stating:
- [it] no longer believes [it] can progress any further with this [building] consent without a structural peer review.
- [the authority has] considered [the owner’s] last response to the [requests for further information] in [its] decision, but they have not altered the need for the peer review.
- 3.10. In January 2022, the parties continued to exchange correspondence on the issue, with the authority remaining of the view a peer review was necessary.
- 3.11. On 9 February 2022, the owner wrote to the authority stating:
- 3.11.1. building consent authorities are encouraged to “be clear about when they expect to receive producer statements during the building consent process”²⁶

²⁴ I note the specialist engineer referred to section 112. The building in this determination is the subject of an earthquake-prone building notice, and section 133AT applies to the proposed alterations rather than section 112.

²⁵ For example, this includes (but is not limited to) a review of the structural calculations, plans, details, design statements and specifications, the primary gravity and seismic load resisting systems of the building, and confirmation the building will comply to at least the same extent as it did prior to strengthening.

²⁶ Available at <https://www.building.govt.nz/projects-and-consents/apply-for-building-consent/support-your-consent-application/producer-statements/> (accessed on 28 September 2022).

- 3.11.2. producer statements have no particular legal status under the Act
- 3.11.3. accepting producer statements is discretionary for building consent authorities
- 3.11.4. there is no provision for authorities to require a producer statement as of right²⁷
- 3.11.5. a building consent authority may reasonably request a Producer Statement – Design Review (PS2) to accompany an independent design review, if it is to accept that review, the authority cannot refuse to issue a building consent simply because it cannot be provided with a producer statement. In this situation the authority will need to assess compliance in another way (eg engage its own engineer to undertake a review)²⁸
- 3.11.6. the authority should confirm the issue of the building consent on the basis of the documentation provided to date.
- 3.12. On 11 February 2022, the authority wrote to the owner stating:
- [The authority] is not in a position to grant the building consent based on the documentation you have provided to date. Accordingly [the authority] is refusing to grant the building consent under section 50 of the Building Act 2004. The reason for the refusal is due to the current application being materially insufficient to demonstrate compliance with the Building Code....
- If you wish to undertake the proposed work you will need to make a new [building consent] application that shows a compliance pathway to meet the requirements of the Building Code.
- 3.13. On 17 February 2022, the authority issued a written notice titled “refusal of building consent” 476072, under section 50 of the Act. The notice stated:
- The application for building consent for the proposed seismic strengthening does not satisfy the [authority] 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.
- Adequate documentation has not been provided that the proposed alterations will not worsen the performance of the existing building and thereby satisfy the requirements of [section] 133AT of the Act.
- 3.14. The issue remained unresolved, and the owner applied for a determination.

²⁷ The owner was referring to the Association of Consulting Engineers [ACE] New Zealand / Engineering New Zealand, Practice Note 1, Version 3, dated January 2014, “Guidelines on Producer Statement”, at page 5. Available at <https://www.engineeringnz.org/engineer-tools/engineering-documents/practice-notes-and-guidelines/> (accessed on 28 September 2022).

²⁸ As above, at page 9 of the practice note.

4. Submissions

The owner

4.1. The owner is of the view:

- 4.1.1. the building consent application met the requirements of section 49 of the Act²⁹ and there were reasonable grounds to issue the building consent. Therefore, the owner seeks to reverse the authority's decision to refuse to issue the building consent
- 4.1.2. in the absence of a peer review the authority was required to assess compliance in another way
- 4.1.3. the building is not a complex structure
- 4.1.4. the authority did not formally respond to the owner's request of 27 April 2021 to confirm whether a peer review was required and did not provide any meaningful feedback or recommend that a PS2 be completed
- 4.1.5. the authority provided no substantial reasons as to why the documents submitted (whether on application or as part of the request for further information processes), or the design proposed, were deemed insufficient
- 4.1.6. the authority's statement of "the current application being materially insufficient to demonstrate compliance with the Building Code" does not stand scrutiny given the number of requests for further information raised by the authority and duly responded to by the owner.

The authority

4.2. The authority confirmed:

- 4.2.1. the building is earthquake-prone
- 4.2.2. the reason for refusal was in respect of section 133AT(2)(b) of the Act, and the authority was not satisfied the building after the alteration would continue to comply to the same extent as before the proposed alteration
- 4.2.3. it had engaged the services of a specialist engineer to assess "the building consent application for compliance with Building Code clause B1 Structure".

²⁹ Section 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.

The structural engineer

- 4.3. On 16 November 2022, in an email to the Ministry, the structural engineer outlined the process they had followed in the development of the detailed seismic assessment for the building. The structural engineer stated:
- 4.3.1. It was necessary to reconfigure the building (not weaken it) to make the columns and the beams work more effectively.
 - 4.3.2. One of the key aspects to the seismic upgrade of the building was the spandrel panels were cut down alongside the column faces to ensure the columns become more slender and would act in a better structural fashion.
 - 4.3.3. The building is surprisingly well reinforced for its age and the anchorage of longitudinal steel is well designed.
 - 4.3.4. The building is quite different from most other buildings of its era and has...some inherent ductility in the reinforced concrete frames and walls.
 - 4.3.5. The resulting remediation design was peer-reviewed by another Chartered Professional Engineer. The only change resulting from that review was the provision of a restraint channel along the head of some of the masonry walls which had been cut along the top to free up them as non-structural elements.
 - 4.3.6. The building went through a really stringent check as a result of the peer review process.

5. Discussion

- 5.1. This determination arises from a decision by the authority to refuse to grant a building consent for alterations to an existing building. The proposed building work included earthquake strengthening of the building which is the subject of a specific engineering design by a Chartered Professional Engineer.
- 5.2. In determining the matter, I need to consider the reasons given by the authority for that decision, including a requirement for the owner to provide a Producer Statement – Design Review (PS2) in support of the specific engineering design.

Legislation

- 5.3. Section 3 “Purposes” of the Act states:

This Act has the following purposes:

.....

(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.

5.4. Section 4 “Principles to be applied in performing functions or duties, or exercising powers, under this Act” states:

.....

(2) In achieving the purposes of the 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:

.....

(q) the need to ensure that owners, designers, builders and building consent authorities are each accountable for their role in ensuring that –

.....

(ii) plans and specifications are sufficient to result in building work that (if built to those plans and specifications) complies with the Building Code;

.....

5.5. Section 49 concerns the ‘grant of building consent’ and states:

(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.

(2)

5.6. Section 50 “Refusal of application for building consent” states:

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.

5.7. Section 133AT “Alterations to buildings subject to EPB notice”³⁰ states:

³⁰ EPB – Earthquake-prone building.

(1) This section applies instead of section 112 in relation to an application for a building consent for the alteration of a building or a part of a building that is subject to an EPB notice.

(2) A building consent authority must not grant a building consent for the alteration of the building or part unless the building consent authority is satisfied that, -

(a) ...^[31]

(b) after the alteration, the building will, -

(i) if it complied with the other provisions of the building code immediately before the building work began, continue to comply with those provisions; or

(ii) if it did not comply with the other provisions of the building code immediately before the building work began, continue at least to the same extent as it did then comply;

The reasons for refusal of the building consent

5.8. The obligation to provide reasons for decisions made under the Act have been discussed in previous determinations. Various court decisions have also discussed statutory provisions requiring reasons, noting that:

- the extent of the obligation to give reasons is dependent on the function and the purpose for which reasons are required³²
- reasons provided must be “proper, adequate and intelligible”³³
- the reasons must be appropriate to the nature of the decision-making³⁴
- the reasons must be adequate to enable proper consideration of the decision on appeal or review³⁵.

5.9. The obligation to give reasons for refusing to grant a building consent also needs to be considered in respect of the authority’s obligations under section 22(1) of the Local Government Official Information and Meetings Act 1987 (“LGOIMA”).

³¹ Section 133AT(2)(a) has not been included since the authority did not reference means of escape from fire or access and facilities for persons with disabilities in its written notices to the owner dated 11 February 2022 and 17 February 2022. Refer to paragraph 4.2.1.

³² *Hollander v Auckland Council* [2017], Heath J, CIV 2016-404-2322 NZHC 2487, dated 11 October 2017.

³³ *Chan v Minister of Immigration* HC Auckland CP80/89, 08 May 1989 at 14.

³⁴ *R v Awatere* [1982] 1 NZLR 644 (CA) at 649.

³⁵ *Singh v Chief Executive, Department of Labour* [1999] NZAR 258 (CA) at 263.

- 5.10. I hold the same view as discussed in Determination 2021/010³⁶ regarding what is expected of an authority when giving reasons for refusing to grant a building consent. In this respect, I reiterate the following key points:
- 5.10.1. The authority will need to consider those aspects of the design that it believes do not comply with the Building Code or the Act.
 - 5.10.2. An authority is required to provide reasons in writing for refusing to grant a building consent, so that an owner is made aware of any shortcomings with the plans and specifications to obtain that building consent.
 - 5.10.3. It is important that an owner is given sufficiently explicit, specific, clear, and valid reasons why an authority believes compliance has not been achieved, so the owner can consider what is necessary to remedy the situation.
- 5.11. A generalised refusal which does not identify sufficiently explicit, specific, clear, and valid reasons why the design work may not comply with the Building Code, or those aspects of the design that do not comply as nearly as reasonably practicable with respect to section 133AT of the Act (in this case), is not sufficient for an authority to meet its obligations under section 50.
- 5.12. The building was subject of an earthquake-prone building notice. As such, it was appropriate for the authority to consider the relevant provisions of section 133AT in respect of the proposed alterations to the building, including the necessary seismic work to strengthen the existing structure. This is notwithstanding the provisions of section 115 which also needed to be considered (refer to paragraph 1.10).
- 5.13. The most recent requests for further information were raised by the authority on 10 November 2021, and the owner responded on 12 November 2021. These requests for further information were all related to structural design issues. However, it is not clear if the authority reached any compliance decisions in respect of the additional information provided by the owner.³⁷
- 5.14. Further, the authority's letter dated 17 February 2022 stated adequate documentation had not been provided to demonstrate the proposed alterations will not worsen the performance of the existing building, and thereby satisfy the requirements of section 133AT of the Act. However, it did not clearly identify which part of section 133AT was at issue or clarify the reasons why it had reached that view. It was on 27 October 2022, in response to a request from the Ministry, that the authority confirmed the issue related to section 133AT(2)(b).

³⁶ Determination 2021/010, "Regarding the refusal of a building consent for alterations to an existing students' hall of residence at 217 Willow Park Drive, Masterton", issued 31 May 2021. Refer to paragraphs 6.12 to 6.18 inclusive.

³⁷ I note the authority's records for the preceding 137 requests for further information had a status of "acknowledged" against each item, unlike items 138 to 145. It is not clear what the authority meant by "acknowledged", so for the purposes of this determination, I have assumed the authority had reached compliance decisions for the preceding 137 items even if the outcomes are not clear.

- 5.15. I discuss the issue of a peer review below, though I note here that neither of the written notices issued by the authority on 11 February 2022 and 17 February 2022 refer to a peer review being required or that it was a reason for refusing to grant the building consent.
- 5.16. Taking into consideration the information available, I agree with the owner that the reasons given by the authority for refusing to grant the building consent were not sufficiently explicit, specific, or clear.
- 5.17. I acknowledge the authority raised a significant number of requests for information. This suggests the absence or lack of some information in the building consent plans and specifications may have influenced the decision by the authority to refuse to grant the building consent.
- 5.18. However, the reasons for the refusal given by the authority did not clearly articulate those aspects of the design that it believed did not comply with the Building Code, or identify any specific shortcomings with the plans and specifications so the owner could consider what was necessary to remedy the situation (notwithstanding the additional information the owner provided to the authority on 12 November 2021).

Producer Statement – Design Review (“PS2”)

- 5.19. The dispute has arisen in part because the authority considers a peer review of the specific engineering design for the proposed earthquake strengthening of the existing building was necessary.

The status of producer statements

- 5.20. Producer statements do not hold any status under the current Act, unlike the former Building Act 1991. An authority may request a producer statement, but it cannot require one to be provided. Likewise, an authority is not obligated to accept a producer statement just because one has been provided.
- 5.21. It is well established in previous determinations³⁸ that a building consent authority cannot insist on the production of a producer statement.
- 5.22. In practice, a Producer Statement - Design (PS1) and a Producer Statement - Design Review (PS2) are widely relied on by building consent authorities. They are used as one source of information which an authority may rely on to form a view on whether there are reasonable grounds to be satisfied that the building work complies with the Building Code.

³⁸ For example, 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”, issued 20 November 2017.

5.23. The Ministry's guidance on producer statements³⁹ reinforces the Engineering New Zealand guidelines⁴⁰ that authorities must use their judgement in deciding whether to accept producer statements and how much weight to place on them. This will include, but may not be limited to, looking into the credentials, experience, and competence of the author of that producer statement in their practice field.

Peer review requirements in this case

- 5.24. In this case, the authority reached the view it would not accept the PS1 without a peer review. Regarding the guidance described above, it is not clear what the authority considered to reach that decision.
- 5.25. Nevertheless, the authority engaged the services of another specialist engineering company to assist it in assessing compliance of the specific engineering design with clause B1 as part of the building consent process. This work included raising multiple requests for further information, and assessing the associated responses provided by the owner.
- 5.26. It appears the subsequent advice the specialist engineering company gave to the authority on 17 December 2021 (refer to paragraph 3.8) led to the authority insisting on a peer review following receipt of the most recent information from the owner on 12 November 2021.
- 5.27. It is clear the owner approached the authority at an early stage in the building consent process to ascertain if a peer review was required, and the parties attempted to promote a way forward, however, this did not eventuate.
- 5.28. The owner maintains the authority cannot refuse to issue a building consent simply because it cannot be provided with a producer statement and that it will need to assess compliance in another way such as engaging its own engineer to undertake a review.
- 5.29. I agree in principle with the proposition put forward by the owner. In this case, the authority did engage the services of another specialist engineer to assist it in undertaking a compliance assessment of the design in respect of clause B1. However, this is not the same as a peer review that would be recorded in a Producer Statement – Design Review (PS2). Just because a peer review may not be provided by the building consent applicant, it does not follow that the authority is required to perform that function or provide that service on behalf of the applicant.

³⁹ <https://www.building.govt.nz/projects-and-consents/apply-for-building-consent/support-your-consent-application/producer-statements/> (accessed on 28 October 2022).

⁴⁰ Engineering New Zealand, Practice Note 1, Version 3, dated January 2014, titled "Guidelines on Producer Statements", available at <https://www.engineeringnz.org/engineer-tools/engineering-documents/practice-notes-and-guidelines/>.

- 5.30. The roles and responsibilities of an authority described in the Act⁴¹ do not include performing a formal peer review of a specific engineering design by others. To suggest otherwise would discourage building consent applicants from obtaining a peer review, on those occasions when one may be appropriate, on the presumption the authority would perform the task on their behalf.
- 5.31. Regardless, I am aware the owner has now obtained a peer review and associated Producer Statement – Design Review (PS2) from a Chartered Professional Engineer and the owner applied for a new building consent to undertake seismic strengthening of the existing building. I have not considered any aspects of the PS2 or the new building consent in this determination.

6. Decision

- 6.1. In accordance with section 188 of the Building Act 2004, I determine the reasons for the authority's refusal to grant building consent 476072 were not sufficiently explicit, specific, or clear. However, I have elected not to reverse the authority's decision because the owner has already applied for a new building consent.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 25 May 2023.

Peta Hird

Principal Advisor Determinations

⁴¹ For example, sections 4(q) and 12.