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Building Act Emergency Management Proposals

Local Government New Zealand's submission to Ministry of Business
Innovation and Employment

24 July 2015

Contents

Contents	2
We are.LGNZ.	3
Introduction	3
Specific comments	4
Proposals 1, 2 and 3	4
Proposal 4	5
Proposals 5 & 6	5
Proposals 7, 8, 9 & 10	6
Proposals 11, 12, 13 & 14	6

We are. LGNZ.

LGNZ is the national organisation of local authorities in New Zealand and all 78 councils are members. We represent the national interests of councils and lead best practice in the local government sector. LGNZ provides advocacy and policy services, business support, advice and training to our members to assist them to build successful communities throughout New Zealand. Our purpose is to deliver our sector's Vision: "Local democracy powering community and national success."

This submission has been endorsed by Malcolm Alexander, Chief Executive LGNZ.

Introduction

The proposals in this discussion document simplify the management of dangerous buildings when a state of emergency is declared and provide powers for managing buildings after the state of emergency is lifted.

The key points of difference between existing regulations in the Building Act and the proposals in the discussion document are the ability for the TA to:

- Remove immediate dangers to minimise disruption (dangers to emergency services, emergency routes, and lifeline utilities) and life safety risk through a Chief Executives warrant without having to later seek confirmation by the District Court.
- Remove dangers causing significant economic disruption eg where damaged buildings are forcing the closure of undamaged buildings. No consents required. Building owners have the right to apply for a MBIE determination where they dispute the warrant.
- Remove significant and urgent dangerous buildings of National Historic Landmarks or Category 1 Historic Places with the approval of the Minister for Building and Housing and Arts Culture and Heritage AND heritage buildings listed in plans or that have a heritage order or covenant after seeking advice from Heritage New Zealand Puohere Taonga.
- Provide powers to undertake assessments, place placards, undertake further assessments and change placards after the state of emergency has ended.

LGNZ generally supports these proposals. We note however that this consultation document was developed on the premise that territorial authorities have no powers after a state of emergency is lifted other than those already enabled in the Building Act. The discussion document states that this approach is supported by the Canterbury Earthquakes Royal Commission view that '... removing the rights of property owners outside a state of emergency is not appropriate' and 'If the impact of an event warrants carrying out a building safety evaluation operation, then it is likely to be significant enough to warrant a declaration'.

Minister Kaye's announcement on 15 June discusses proposed amendments to the CDEM Act. These will extend powers "similar to state of emergency powers" through a new recovery manager role. We noted that the Ministers announcement discusses recovery beginning on day one and that the proposed recovery powers will provide for events small enough to not warrant a state of emergency or once a state of emergency has been lifted. A specific example of the proposed powers outlined by Minister Kaye is "entering onto premises to perform an assessment". How the proposed changes in this discussion document integrate with proposals to amend the CDEM Act needs to be clarified.

Specific comments

Proposals 1, 2 and 3

Proposal 1: A Civil Defence Controller may decide whether to use Building Act emergency management powers.

Proposal 2: Territorial authorities have powers to do assessments and place placards.

Proposal 3: power to assess further and change placards.

LGNZ supports the factors proposed as criteria for determining whether to use Building Act emergency management powers and the provision of the Building Act emergency management powers for 1 year to undertake assessment of buildings and work for up to 3 years.

It seems unreasonable that the initial review period for these powers is 28 days however. An extended period of 2-3 months would be more appropriate for the first review given that the emergency powers are established under the following criteria. While there is no weighting given to these factors, the frequency of a reference to scale in the criteria suggests that the scale of an event is a key consideration in the use of these powers. We support this approach.

- a) significance of the scale of the damaging events
- b) reasonably foreseeable likelihood of further related damaging events which could pose risks to life-safety
- c) distance and direction of the damaging event or hazard, or possible events or hazards, and impacts in relation to buildings in built-up areas
- d) observed scale of structural damage to buildings
- e) information available about building and ground conditions
- f) need for shelter in residential buildings
- g) likely scale of structural damage to buildings
- h) likely scale and risk to life-safety from buildings
- i) advice and information from relevant territorial authorities, suitably qualified persons, and relevant government agencies
- j) credible discoveries or disclosures about risks from buildings
- k) the territorial authority's ability to manage risks adequately without building emergency management powers.

The evidence base for making the decision to renew emergency powers (every 28 days) also requires further guidance as the longer the emergency powers are applied the more potential there is for building owners to litigate these decisions.

We also propose amending this to a 30 day review period. It would serve the same purpose and is in line with existing provisions in the Building Act for Section 124 notices (Dangerous, affected, earthquake-prone, or insanitary buildings: powers of territorial authority) ie notices restricting entry for 30 days and then a further 30 days maximum.

LGNZ supports the provision of the proposed emergency powers in situations where a state of emergency has not been declared. Localised events such as floods, tornadoes and landslides are examples of where these powers may be required.

Proposal 4

Proposal 4: Territorial authorities have powers to restrict access including placing cordons and other protective measures (up to 3 years).

LGNZ supports the provision of powers to restrict access and place cordons and seek further guidance on how these powers should be applied. This guidance should also address requirements for the removal of placards and integrate with proposals under the Buildings (Earthquake prone buildings) Amendment Bill on what constitutes “robust evidence” on the state of a building eg state the minimum qualifications required of an engineer providing the building performance assessment.

Proposals 5 & 6

Proposal 5: Resource or building consents will not be required to remove significant or immediate dangers
Proposal 6: Heritage values will be taken into account where possible when removing significant or immediate dangers

LGNZ supports these proposals and seek further clarification on the application of these proposals through guidance.

Proposal 6 discusses the requirement for Territorial Authorities to provide “ at least 24 hours’ notice (where possible) to Heritage New Zealand Pouhere Taonga, and have particular regard to its advice in respect of heritage buildings individually listed in district plans, and buildings that are subject to a heritage order or covenant” in order to protect heritage values.

There are parallels with guidance being developed to support the Buildings (Earthquake-prone Buildings) Amendment Bill where decisions weighing up life safety against factors such as heritage will also be made eg the discussion on criteria for exemptions of low use buildings are described in the Buildings (Earthquake-prone Buildings) Amendment Bill interim report as location (streetscape and seismicity), age of the building, construction type, building use and building occupancy – risk factors albeit not stated as such. The interim report also discusses exempting buildings that are ‘not regularly used by more than 20 people’. Some of these criteria may also be applicable when making decisions on the need to remove buildings using these powers. Acknowledging the ability to cordon and restrict access under Proposal 4, the hierarchy of decision making and factors that must be considered when making a decision, must be explicit.

Clarification is also required on the requirement to “obtain the approval of the Minister for Building and Housing in consultation with the Minister of Arts, Culture and Heritage”. We assume it is the Minister for Building and Housing who is responsible for consulting with the Minister of Arts, Culture and Heritage

LGNZ would also like to see provision made for building owners to undertake demolition of dangerous buildings when the building owner and Territorial Authority have reached agreement rather than the Territorial Authority having to carry out the demolition and recover costs. This simplifies the process for Territorial Authorities. MBIE could provide a template agreement for Territorial Authorities and building owners to use in these circumstances.

Proposals 7, 8, 9 & 10

Proposal 7: Resource or building consents will not be required to remove dangers causing significant economic disruption.

Proposal 8: Heritage values will be taken into account where possible when removing danger causing significant economic disruption.

Proposal 9: Power to remove danger in other situations.

Proposal 10: Appeals

The range and weighting of factors that must be considered when making these decisions must be explicit. It is one thing to identify heritage values and economic disruption as factors to take into account when making a decision but weighing these factors against life safety and property rights requires further elaboration.

Further definition is also required on what actions are required to meet the standard for a Territorial Authority taking “reasonable steps to give notice to owners and tenants of the building, and owners and tenants of properties whose access is affected by the building” to minimise the potential for litigation of these decisions and requests for MBIE determinations.

Proposals 11, 12, 13 & 14

Proposal 11: Liability

Proposal 12: Costs

Proposal 13: Compensation

Proposal 14: Offences

LGNZ supports the proposals 11,12 and 13 as outlined. It is essential to remove liability from territorial authorities and assessors, to ensure a focus on the life safety and that adequate resources are available to undertake building assessments. This provision should apply in both a state of emergency and where buildings require assessment when there is not a state of emergency, noting that the application of these powers have already passed the test outlined in Proposal 1.

In line with other amendments to the Building Act to manage earthquake prone buildings, building owners should be liable for costs associated with undertaking assessment and removal as outlined under in Proposal 12. The ability for building owners to seek compensation in the event of actions where “the action caused disproportionately more harm than good” requires further clarification however.

LGNZ supports the offence provisions.