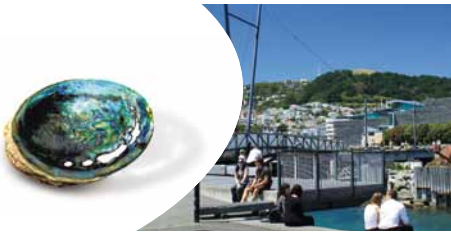
Local Government
New Zealand
te pūtahi matakōkiri



Submission to the Local Government and Environment Committee

In the matter of Building Amendment Bill (No 4)

From Local Government New Zealand
June 2012

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Introduction

1. *Local Government New Zealand* thanks Local Government and Environment Committee for the opportunity to make this submission in relation to Building Amendment Bill (No 4).

2. *Local Government New Zealand* makes this submission on behalf of the National Council, representing the interests of all local authorities of New Zealand.

   It is the only organisation that can speak on behalf of local government in New Zealand. This submission was prepared following consultation with local authorities. Where possible their various comments and views have been synthesised into this submission.

   In addition, some councils will also choose to make individual submissions. The *Local Government New Zealand* submission in no way derogates from these individual submissions.

3. *Local Government New Zealand* prepared this submission following an:

   - analysis of the Building Amendment Bill (No 4); and
   - analysis of the feedback received from councils.

4. This final submission was endorsed under delegated authority by:

   - Lawrence Yule, President, National Council; and
   - Malcolm Alexander, Chief Executive.

5. *Local Government New Zealand* wishes to be heard by the Local Government and Environment Committee to talk to the points made in this submission.

6. *Local Government New Zealand requests* the opportunity to review the draft Building Act and regulations before they are finalised.

Recommendations

7. *Local Government New Zealand* makes the following recommendations:

   - The proposed implied warranties provide insufficient consumer protection. A warranty system with surety backstop is critical;

   - Local authorities recommend that the law relating to proportionate liability be amended to achieve a rebalancing of accountability;

   - The provision for defective work in Clause 362P should be amended to "remedy of defect notified within 10 years of completion;"

   - Local authorities support the increase in the penalty for building work carried out without consent from $100,000 to $200,000 as outlined in Clause 13;

- Fines and infringements fees in Part 4A (consumer rights and remedies) are insufficient and should be increased to a minimum of $10,000 for infringement fees to ensure compliance;

- The penalty for the offence of failing to classify a dam should be increased (clause 30 new section 134C). A fine not exceeding $20,000 is inadequate to ensure compliance;

- The offence in new section 362S should be widened so it is an offence for anyone (not just a commercial on-seller) to sell any building where there is no consent completion certificate or certificate of acceptance;

- Local authorities support the proposed fine (not exceeding $200,000) for offences under section 362S;

- A number of other amendments to the Bill reflecting the experience of Christchurch City Council, are recommended, namely:

    - The power in section 124(1)(a) should be clarified to allow the local authority to put up a hoarding or fencing on other land adjoining or nearby the dangerous building, not just the land on which the dangerous building is located;
    - Cordons around dangerous buildings should be the responsibility of the building owner once they are aware their building is dangerous;
    - Local authorities recommend the new "restricted entry" notice provision under Clause 22 (1A)(e) should be deleted with the period of restriction established on a risk basis for the local authority to determine; and.
    - In respect of a section 124(1)(c) concerning a notice issued for an earthquake-prone building, the wording in the section relating to the taking of action to "reduce or remove the danger" needs to be clarified to ensure that a local authority can require an earthquake-prone building to be strengthened to the level specified in council policy;

- Local authorities oppose the amendment in Clause 38 and recommend that it be deleted;

- Local authorities support the rewriting and reformatting of Schedule 1 to aid clarity;

- Clause 29 of the Bill proposes a definition for the height of a dam presumably to overcome the difficulties with using the depth of the reservoir as one of the measures of the "size" of a dam. Local authorities request that Section 7 of the Act be amended to include a clear and unambiguous definition of reservoir depth; and.

- Local authorities support the proposed amendments in Clauses 31 and 36 requiring a certifying engineer or owner to notify the regional authority of a dangerous dam. This provision should be

coupled with an appropriate penalty against any person who commits an offence in relation to this provision.

Local Government New Zealand policy principles

8. In developing a view on the clauses in the Building Amendment Bill (No 4) we have drawn on the following high level principles that have been endorsed by the National Council of *Local Government New Zealand.* We would like the Local Government and Environment Committee to take these into account when reading this submission. The principles are:

    - **Local autonomy and decision-making:** communities should be free to make the decisions directly affecting them, and councils should have autonomy to respond to community needs;

    - **Accountability to local communities:** councils should be accountable to communities, and not to Government, for the decisions they make on the behalf of communities;

    - **Local difference = local solutions:** avoid one-size-fits-all solutions, which are over-engineered to meet all circumstances and create unnecessary costs for many councils. Local diversity reflects differing local needs and priorities;

    - **Equity:** regulatory requirements should be applied fairly and equitably across communities and regions. All councils face common costs and have their costs increased by Government, and government funding should apply, to some extent, to all councils. Systemic, not targeted funding solutions;

    - **Reduced compliance costs:** legislation and regulation should be designed to minimize cost and compliance effort for councils, consistent with local autonomy and accountability. More recognition needs to be given by Government to the cumulative impacts of regulation on the role, functions and funding of local government; and.

    - **Cost-sharing for national benefit:** where local activities produce benefits at the national level, these benefits should be recognised through contributions of national revenues.

Comments

1. Local authorities carry out administrative functions pursuant to the Building Act 2004 (the Act) under delegation from the Crown. Day to day administration of the Act occurs, with only a few exceptions, under national policy and national building code/standards, not local policy.

2. In general local authorities agree that reform of the building system is necessary but emphasise that this cannot happen by tinkering with current law or changing the whole basis of the regime overnight. It is critical that all parties keep an eye on the strategic long term objective, i.e. a building regulatory system that will result in cost effective, quality buildings that:

- are designed and built by skilled, capable people who stand behind their work;
- meet or exceed minimum requirements that are clear and widely known;
- are constructed according to clear, upfront, contracted agreements between all parties about what is going to be built, how any faults will be fixed and how arguments will be resolved; and
- are appropriately maintained by well informed owners.

3. Proposals will only achieve these objectives if they are progressed in combination. In particular, the warranty system with surety backstop is critical. It is also our strong preference to amend the law in respect of proportionate liability to ensure an effective rebalancing of accountability. If local authorities continue to carry the duty of care as under current law, there is insufficient incentive for other parties to be more accountable.

4. Reflecting local authorities' commitment to getting this right we are currently working with the Department of Building and Housing to identify an appropriate approach to the delivery of nationally consistent and efficient building administration.

CONSUMER RIGHTS AND REMEDIES IN RELATION TO RESIDENTIAL BUILDING WORK

5. The provisions in the Bill fall short of providing meaningful protection for consumers. Local authorities have consistently expressed the need for a warranty system with surety back-up. The proposed consumer protection measures do little to remove the risk that local authorities will be left to pick up more than their share of the cost for defective building claims.

6. For many the decision to build or buy a new home is the biggest financial commitment they will make. Implying warranties into residential building consents may be a pragmatic solution to address consumer protection but does not provide sufficient guarantee should anything go wrong.

7. Consumer NZ also is of the view that a government-backed home warranty insurance system, such as that available in Queensland, should be introduced in New Zealand[1]. It would provide better consumer protection than private guarantees. The Queensland system of home-warranty insurance acts much like a private building guarantee. It covers loss of deposit, defects and non-completion of work. The Queensland system goes further to require builders – not consumers – to obtain warranty insurance from the Building Services Authority (BSA) for residential building work worth more than $3300.

8. Private building guarantees are designed to plug this gap in consumer protection. According to Consumer NZ the Certified Builders Association of New Zealand and the Registered Master Builders Federation provide the main guarantees although some independent companies, such as Signature Homes, also offer guarantees to cover their own work.

[1] http://www.consumer.org.nz/reports/building-guarantees/our-view. Last updated May 2012.

While the details of the guarantees vary, generally they include terms around defects, (non-structural / structural) of $100,000 for periods of two to 10 years. Local authorities believe that the provision for defective work in Clause 362P should, at a minimum, reflect what appears to be industry best practice.

9. Amendment of Clause 362P to 10 years after completion of the building work would better represent a timeframe in which a new homeowner might expect to be able to determine if the service they were provided was "performed with reasonable care" and that the goods are "safe and durable"[2]. A 10 year timeframe would also align with the existing limitation period in the Act (Section 393 Building Act 2004).

10. As stated previously, it is our strong preference to amend the law in respect of proportionate liability. While local authorities continue to carry the duty of care as under current law, there is insufficient incentive for other parties to be more accountable.

FINES AND INFRINGEMENT FEES

11. Local authorities support the increase in the penalty for building work (construction, alteration, demolition or removal) carried out without consent from $100,000 to $200,000 as outlined in Clause 13, amendment to section 40(3). Fines and infringements are an important mechanism to incentivise "getting the job right the first time".

12. Fines and infringements fees in Part 4A (consumer rights and remedies) are insufficient to incentivise compliance. These include:

- Clause 362D(2) requirements for a building contractor to provide prescribed information (an infringement offence fine not exceeding $2,000, or on conviction a fine not exceeding $20,000);
- Clause 362E(4) - minimum requirements for residential building contract over certain value (a fine on conviction not exceeding $2,000)
- Clause 362R requirements for a building contractor to provide prescribed information and documentation on completion of residential building work (infringement fee fine not exceeding $2,000).

We note that nothing in Part 4A limits or derogates from the provisions of the Fair Trading Act 1986 or the Consumer Guarantees Act 1993 (Clause 362C). Viewed in conjunction with Consumer NZ's opinion on the need for a more robust process to enforce warranties for shoddy building work and improved legal protections to guarantee that any building work on houses is "fit for purpose," it is arguable that the proposed new regime will make little meaningful difference.

13. Clause 30, new section 134C, offence of failing to classify a dam, a fine not exceeding $20,000, is also inadequate.

[2] http://www.consumer.org.nz/reports/consumer-guarantees-act/the-guarantees

14. The offence in new section 362S should be widened so it is an offence for anyone (not just a commercial on-seller) to sell any building (not just a household unit) where there is no consent completion certificate or certificate of acceptance for building work that required a consent and has been undertaken since the Building Act 2004 came into force. If this offence provision is widened it may provide a greater incentive for building owners to promptly obtain consent completion certificate for their work. We support the proposed fine (not exceeding $200,000) for offences under this section.

AT RISK BUILDINGS CLAUSES 121A – 132A

15. A number of other amendments to the Bill, reflecting the experience of Christchurch City Council, are recommended. These include:

- The power in section 124(1)(a) should be clarified to allow the local authority to put up a hoarding or fencing on other land adjoining or nearby the dangerous building, not just the land on which the dangerous building is located (or public road and footpaths over which a Council can already exercise powers);

- Cordons around dangerous buildings should be the responsibility of the building owner once they are aware their building is dangerous. If a cordon has to be erected by a local authority the cost should clearly be recoverable from the building owner. Currently the cost of any work required following the issue of a section 124(1)(c) notice can be recovered but it is not as clear whether the costs related to the exercise of powers under section 124(1)(a) can be recovered;

- Clause 22 of the Bill sets out the new requirements for Section 124 notices. The new "restricted entry" notice (which can be used for all categories of building, including the new "affected building") may be issued for a maximum period of 30 days and may be reissued once only for a further maximum period of 30 days, i.e. a maximum of 60 days for restricting entry to dangerous buildings. Local authorities believe it is unrealistic to expect all issues related to a dangerous building (that may require restriction of entry as opposed to prohibition of entry) to be addressed in a maximum of 60 days. Christchurch City Council's experience demonstrates that owners of both affected or dangerous buildings requiring a restricted entry notice, may need to be kept out of their buildings for much longer than the proposed maximum of 60 days.
  The provision under Clause 22 (1A)(e) should be deleted with the period of restriction established on a risk basis for the local authority to determine; and.

- In respect of a section 124(1)(c) notice issued for an earthquake-prone building, the wording in the section about taking action to "reduce or remove the danger" needs to be clarified to ensure that a local authority can require an earthquake-prone building to be strengthened to the level specified in council policy (required under section 131).

COMPLAINTS ABOUT BUILDING CONSENT AUTHORITIES

16. Clause 38 proposes an amendment to Section 200 of the Building Act which currently requires the Chief Executive of the Ministry to, as soon as practicable, inform a building consent authority of a complaint and to decide whether to accept or decline the complaint. Under the proposed amendment a building consent authority is not entitled to proffer any information or submission at this stage. Local authorities oppose this amendment. An entitlement to provide information before a decision is made on whether to accept or decline a complaint is a simple mechanism to reduce inefficiencies and reduce the risk of the Chief Executive having to act on vexatious complaints.

SCHEDULE 1 AMENDMENTS

17. Local authorities support the rewriting and reformatting of Schedule 1 to aid clarity.

18. Proposed Schedule 1, Clause 30, demolition of damaged building. Any work that has the potential to affect local authorities public utility services, such as water supply, drainage systems etc should be notified to the relevant local authority ahead of the general notification it might receive through a change in the rating status for the land. We note also that the word 'damaged' will be removed from Clause 7 of proposed Schedule 1. In line with the need to ensure local authorities have sufficient notification of demolition activity we would oppose any suggestion that the word 'damaged' be removed from Clause 30.

DAM SAFETY SCHEME

19. Regional councils, in particular the Otago Regional Council will provide more detailed submissions on proposed amendments to the Dam Safety scheme. *Local Government New Zealand* supports the Otago Regional Council submission.

20. Clause 4(5) of the Bill proposes introducing "classifiable dam" and "referable dam", as defined in regulations that are yet to be promulgated. The definitions are critical to the effectiveness and efficiency of the dam safety scheme. Furthermore Clause 30 of the Bill proposes that regional authorities be given the powers to require the owner of a "referable dam" to classify it if the regional authority has reasonable grounds for believing that the dam should be classified as a high or medium potential impact dam. The "reasonable grounds" will be defined in regulations that are yet to be promulgated. It is poor regulatory practice to expect local authorities to make informed submissions on a Bill when the actual requirements that are proposed to be placed on them are largely unknown.

21. Clause 30, new section 134 requiring owners of dams to classify their dam will only work if there is sufficient deterrent to ensure compliance. A fine of $20,000 is not sufficient. The previous Section 134 was clearer in that all dam owners had to have their dams classified. Local authorities oppose this amendment.

22. Clause 29 of the Bill proposes a definition for the height of a dam, presumably to get around the difficulties with using the depth of the reservoir as one of the measures of the "size" of a dam. However, those difficulties will remain because the Act will continue to use reservoir volume as the other measure of dam size, and reservoir volume utilises the depth of the reservoir as one of its components. Local authorities request that Section 7 of the Act be amended to include a clear and unambiguous definition of reservoir depth.

23. Local authorities support the proposed change (Clause 31 and 36) requiring a certified engineer or owner to notify the regional authority of a dangerous dam. This provision should be coupled with an appropriate penalty against any person who commits an offence in relation to this provision.

Conclusion

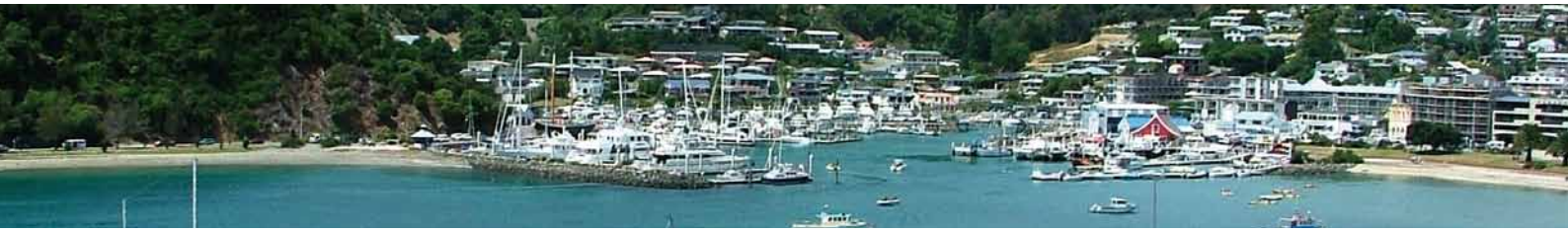
24. *Local Government New Zealand* is generally not supportive of the changes proposed. The provisions in the Bill fall short of providing meaningful protection for consumers and therefore do little to remove the risk that local authorities will be left to pick up more than their fair share of the cost for defective building claims.

25. While local authorities are supportive of the increase in the penalty for building work done without consent from $100,000 to $200,000, fines and infringements fees in Part 4A, consumer rights and remedies are insufficient to ensure compliance.

26. The proposed amendments to the dam safety scheme leaves the definitions of "classifiable dam" and "referable dam" and what constitutes "reasonable grounds" for requiring a dam to be classified to regulations that are yet to be promulgated. It is poor regulatory practice to expect local authorities to make informed submissions on a Bill when the actual requirements that are proposed to be placed on them are largely unknown.

27. In general local authorities agree that reform of the building system is necessary but emphasise that this cannot happen by tinkering with current law or changing the whole basis of the regime overnight.

28. *Local Government New Zealand* thanks Local Government and Environment Committee for the opportunity to comment on this Building Amendment Bill (No 4).



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