

Discretionary exemptions for flood damaged buildings

QUICK GUIDE

Additional advice on discretionary exemptions for Building Consent Authorities, Territorial Authorities and Regional Authorities





**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
HĪKINA WHAKATUTUKI

Ministry of Business, Innovation and Employment (MBIE) Hīkina Whakatutuki – Lifting to make successful

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Purpose

The purpose of this document is to provide a consistent starting point for Building Consent Authorities (BCAs), Territorial Authorities (TAs) and Regional Authorities (RAs) when considering how to plan for and apply requirements for discretionary exemptions in relation to flood damaged buildings.

In addition, this document outlines considerations for discretionary exemptions and offers specific insights into handling flood-damaged houses.

Background

There is a range of different approaches being taken by BCAs, TAs and RAs when applying the regulations around consents and exemptions to flood damaged buildings. These different approaches may lead to outcomes for stakeholders that are not consistent with the objectives of the Building Code and the 2004 Building Act.

Building consents and exemptions

Territorial and regional authorities can decide to exercise their discretion and exempt certain building work from the need to apply for building consent.

In addition to the broader provisions of Schedule 1, Schedule 1(2) allows territorial and regional authorities to use their discretion to exempt any proposed building work from the need to apply for building consent. This exemption may be granted if the work is likely to comply with the Building Code or, if the completed building work does not comply with the Building Code, it is unlikely to endanger people or any building, whether on the same land or on other property.





WHAT THE LAW SAYS

According to section 41(1) of the Building Act, a building consent is not required in the following:

- › any building work described in Schedule 1 for which a building consent is not required; or
- › any building work for which a building consent cannot practicably be obtained in advance because the building work must be carried out urgently –
 - for the purpose of saving or protecting life or health or preventing serious damage to property; or
 - to ensure that a specified system in a building is covered by a compliance schedule.

Section 42A(2) provides that building consent is not required in a building work under Schedule 1 as long as it

- › complied with the Building Code immediately before the building work began, continues to comply with the Building Code; or
- › if it did not comply with the Building Code immediately before the building work began, and continues to comply at least to the same extent as it did.

According to Schedule 1, Part 1(2) of the Building Act, any building work in respect of which the territorial authority or regional authority considers that a building consent is not necessary because the authority considers that:

- › the completed building work is likely to comply with the Building Code; or
- › if the completed building work does not comply with the Building Code, it is unlikely to endanger people or any building, whether on the same land or on other property.

Some building work in flood-damaged homes may need a building consent before the work is undertaken due to its evaluated risk while other work may be exempt from this requirement. All building work, regardless of whether it needs a building consent or not, must be carried out in accordance with the Building Code and should not reduce the level of the building's performance compared to its pre-flood condition. Any exempt work must also comply with any other relevant legislation, such as the Resource Management Act 1991.

Schedule (1)2 is the only provision under which a territorial or regional authority has discretion to make a decision about any proposed building work being exempt from the building consent requirement. For all the other exemptions, it is up to the building owner to decide whether an exemption in Schedule 1 applies. This discretionary exemption can be applied across a wide range of building work.



Application of exemptions

As a result of significant natural hazard events, such as flooding, there may be consideration of the use of exemptions as part of the repair or rebuild process. This is likely due to the discrepancy between the demand from homeowners and the capacity of consenting systems who often have significant other demands being placed on them because of the event.

While TAs are ultimately able to make their own decisions in this space, the Building Act requires the decision to be based on the risk or likelihood of the work complying with the Building Code, not on the demand or resourcing capability of the TA.

It is recommended that TAs use the same basic process for exemptions during natural hazard events, as they would take during business-as-usual events. However, specific guidance or communications may be provided to homeowners and other stakeholders so they can have clarity around requirements and ensure information is provided to allow for efficient processing by TAs.

TAs should avoid issuing blanket exemptions for works where possible and should always consider providing constraints around any exemptions that are:

- › attributed to a certain event
- › within a limited timeframe
- › within a certain geographic area
- › a certain type of building or element.

Considerations for discretionary exemptions

Based on discussion with a range of TAs (both in size and geographically) and investigation of current exemption processes in place at some TAs, territorial and regional authorities granting discretionary exemptions should consider the following:

- › Developing a clear policy and procedure for accepting, assessing, and granting discretionary exemptions under Schedule 1(2) of the Building Act. Territorial and regional authorities cannot include in their policies and procedures a list of building work where it will **not** approve a discretionary exemption.
- › Providing and communicating a clear process to anyone applying for a discretionary exemption that sets expectations, such as:
 - the criteria you expect the building work to meet (including the requirements in the Building Act, such as that it must be Building Code compliant and make the building no worse off than before – refer to **Building Act, section 42A(2)**)
 - evidence (where appropriate) that the building work will be undertaken by suitably qualified professionals.

- › While you may decide to indicate that certain types of building work may be considered for a discretionary exemption, you should make it clear to anyone intending to do such work that:
 - They still need to apply for discretionary exemption on each occasion, provide supporting evidence for the proposal and pay any fees required.
 - You will then review the application and decide on each case individually (ie these are not blanket or broad exemptions as territorial and regional authorities must choose to exercise its discretion on each specific application).
- › If you choose to specify certain types of building work that may be considered for a discretionary exemption, you should include:
 - A clear description of the type of work being considered.
 - List the evidence and documentation required to support an application.
- › In determining the likelihood of Building Code compliance, it is recommended that you consider:
 - any substantial previous demonstration of competence in carrying out similar work by those undertaking the project,
 - the complexity of the building work relative to the competence of those carrying it out, and
 - any independent quality assurance systems or checks that will be applied in the course of the work.
- › In determining the likelihood of risk, you should consider the location of the building work and its proximity to the property boundary and/or other buildings.



- › Note that an exemption under Schedule 1(2) – or any clause of Schedule 1 – does not only mean the building work does not need a building consent but also that you would forgo any associated inspections except where in agreement with the building owner. Despite this, even if the council and the building owner agree to inspections or other requirements (eg evidence for assurance via a PS4 (**producer statement – construction review**) to be provided to the council on completion of the work), those additional requirements imposed may not be enforceable, and, the failure to provide that documentation would not invalidate the exemption decision.
- › Make it clear that Schedule 1(2) is for building work that would otherwise need a building consent. It is not intended for building work that falls under another Schedule 1 exemption.
- › Clearly communicate to homeowners the liability they retain for works carried out under an exemption and that a Code Compliance Certificate will not be provided by the council on completion of the work.
- › Provide a means for homeowners to place a record of the exempt work on the property file.

Additional considerations include:

- › Any discretionary exemption process is likely to exist in parallel with:
 - works required to allow for safe reoccupation and removal of any rapid building assessment placarding, that may or may not be distinct to those covered under an exemption or consent.
- › It is worth noting that the original intent of Schedule 1 was not intended to cover complete or substantial replacement which is likely to be required because of events such as flooding.
- › What may seem like a simple repair (such as replacing wet plasterboard) may not be sufficient to ensure the longer-term habitability and Building Code compliance of flood-damaged houses. Careful consideration is needed to ensure that repair work carried out does not create an unhealthy environment (eg mould growth which will only become evident at a future date).
- › Flood-damaged homes need careful checking to ensure there is no wider damage affecting the structural stability of the house, such as:
 - silt between cladding and the building wrap clogging cavities
 - silt in the subfloor space which may affect subfloor framing and contribute to raising damp
 - corroding bottom plate fixings
 - raised moisture levels affecting the framing so it becomes swollen, mouldy and loses structural integrity
 - bracing elements damaged.
- › The extent of reinstatement and repair is likely to be greater than originally contemplated (eg cleaning out cladding system cavities, reinstalling insulation in the walls and subfloor, etc).
- › Plasterboard wall linings that were removed because of water damage may have had a bracing function and will need to be reinstated properly to ensure the structural stability of the house is not decreased. Until they are reinstated, temporary solid timber diagonal wall braces should be installed in sufficient quantity and at appropriate locations to restore the bracing capacity the structure requires.
- › Restricted building work (RBW) may be involved such as where wall linings are part of a fire rated system and therefore an LBP is required) – consider carefully whether it would be appropriate to exempt under a discretionary exemption this as RBW is considered as work which has higher risk associated with it. As such, if the work does not require consent, it is not RBW.

RECORDING YOUR DECISIONS

In all cases, it is important that you record your decision, the reason for it and the outcome, and include this information on the property file relating to the building work.

Relevant MBIE resources

- › **Building consent exemptions – comprehensive guidance document for Schedule 1**
- › **Building consent exemptions for damaged buildings – quick guide to clauses in Schedule 1 relevant to North Island severe weather events 2023 remediation and repair** (under the heading ‘Building consent exemptions’)
- › **Good practice relating to the use of exemptions under Schedule 1(2) exemptions (known as Schedule 1(k) when this was written) and some suggested policy and procedures – contained in a technical review document**
- › **Building Act 2004 No 72 (as at 24 August 2023), Public Act 41 Building consent not required in certain cases – New Zealand Legislation**
- › **Building Act 2004 No 72 (as at 24 August 2023), Public Act Schedule 1 Building work for which building consent not required – New Zealand Legislation**



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