



ALTERATIONS TO EXISTING BUILDINGS GUIDANCE

Section 112 of the Building Act 2004

Introduction

When thinking about altering an existing building, there are a number of requirements you need to know about. All building consent applications for alterations to existing buildings are subject to section 112 of the Building Act 2004. If you are not familiar with building plans and compliance with the Building Act or code, we recommend engaging an experienced professional to help you with your application.

Links to the Building Act and other guidance can be found at the end of this document.

Section 112(1)

Section 112 requires that an alteration must not cause a compliant building to become non-compliant, or a non-compliant building to comply to a lesser degree. Please refer to section 112(1)(b).

It also ensures that existing buildings have good standards of fire safety and access for people with disabilities. It does this by requiring that existing buildings comply as nearly as is reasonably practicable with means of escape from fire and access and facilities for persons with disabilities (if this is a requirement in terms of section 118). Please refer to section 112(1)(a).

Section 112(2)

Section 112(2) provides an alternative compliance path. This can be used when the proposed building work provides improvements to means of escape from fire, or access and facilities for persons with disabilities and those improvements outweigh the detriment of the building not complying with the relevant provisions of the building code.

Section 112(3)

Section 112(3) is subject to section 133AT and deals specifically with alterations to buildings that are subject to an earthquake-prone building (EPB) notice.

Domestic dwellings under section 112

In the case of alterations to domestic dwellings, compliance with section 112 is typically very simple. Designers are tasked with ensuring that alterations do not cause a compliant building to become non-compliant, or a non-compliant building to comply to a lesser degree under section 112(1)(b).

Domestic dwellings are not required to provide access and facilities for persons with disabilities. To comply as nearly as is reasonably practicable with means of escape from fire, many dwellings will only need to ensure they have compliant smoke alarms installed.

Other buildings under section 112

For many other types of buildings, such as commercial buildings, apartment buildings and public buildings, complying with section 112 requires a high level of understanding. When preparing building consent documentation, it is up to the owner or their agent, to prepare a case to demonstrate that they comply with section 112. The Building Consent Authorities (BCA) role is to consider the case and determine whether the required level of compliance has been met.

Information to be provided with a building consent application

Building consent applications should include a cover letter or similar outlining how compliance with section 112 is achieved. They will often require fire and accessibility reports and details of upgrade work that will take place to bring the whole building up to the required standard.

Failure to provide comprehensive and legally compliant information is a common cause of delays and refusal of building consent applications.

Fire reports and fire safety information – what is required

The Ministry of Business, Innovation and Employment (MBIE) has developed guidance on requesting information about means of escape from fire for existing buildings. This guidance uses a building score sheet. It takes into account the building age, information already held by Council, extent of the proposed building work, building importance level and presence of sleeping facilities. This is often considered to be a risk assessment. Full information can be found here:

www.building.govt.nz/building-code-compliance/c-protection-from-fire/c-clauses-c1-c6/means-of-escape/

Existing building versus new building work

We need to keep in mind that section 112 focuses on the existing building. All alterations to existing buildings also involve new building work. New building work must fully comply as required by section 17 of the Building Act.

We can highlight this principle by considering a case where an owner replaces a window in an existing non-compliant boundary fire wall. Even though the wall may provide little or no fire resistance, the new window is considered to be new building work and must be fully compliant and provide the required fire rating.

The following link provides comprehensive guidance and resources designed to assist with the building consent application process:

www.building.govt.nz/building-code-compliance/b-stability/b1-structure/altering-existing-building/

For further information, advice or a pre-application meeting, please contact us on 03 477 4000 or email building@dcc.govt.nz.

Detailed guidance – section 112(1)

Section 112(1) is the most commonly used option for complying with section 112. Building consent applications that comply with section 112(1) are not required to comply with either sections 112(2) or 112(3). When complying via section 112(1) the application must demonstrate compliance with both sections (a) and (b).

Section 112(1)(a)

Before granting consent, the BCA must be satisfied that after the alteration the building will comply as nearly as reasonably practicable (ANARP) with means of escape from fire and access and facilities for persons with disabilities (if this is a requirement under section 118 and schedule 2 of the Building Act).

As discussed in previous sections, the applicant is required to provide enough information for an assessment to be made. It is up to the owner or their agent to prepare a case to demonstrate that they comply with section 112. The BCA role is to consider the case and determine whether the required level of compliance has been met.

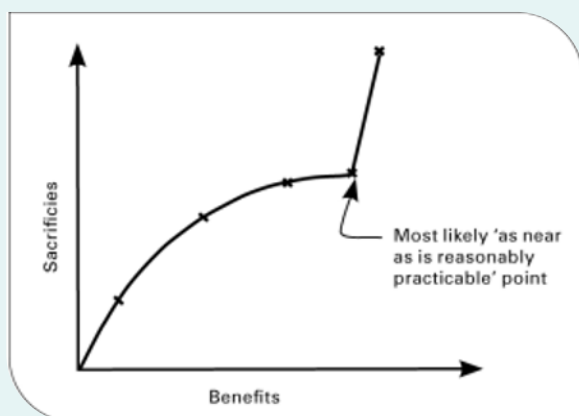
Should the building consent contain a fire report?

MBIE has developed guidance on requesting information about means of escape from fire for existing buildings. This guidance uses a building score sheet. It takes into account the building age, information already held by the BCA or TA, extent of the proposed building work, building importance level and presence of sleeping facilities. Full information can be found here:

www.building.govt.nz/building-code-compliance/c-protection-from-fire/c-clauses-c1-c6/means-of-escape/

What is considered 'as nearly as is reasonably practicable'?

This term involves a comparison between the benefits of increased compliance with the sacrifices of achieving that level of compliance. The benefits of increased compliance might be saving multiple lives during a fire or to allow people with disability to use toilet facilities. The sacrifice of achieving a higher level of compliance might be cost, time, disruption to existing building users or damage to heritage building features. The following diagram demonstrates the principle of 'as nearly as reasonably practicable'.



At the reasonably practicable point on this chart, we see that further upgrade would involve extreme sacrifice for little additional benefit.

The definition of reasonable and practicable were defined in the High Court judgement dated 19 October 1995, wherein the High Court (Mr Justice Gallen) concluded that the former Building Industry Authority 'cannot be criticised' for its opinion in respect of the meaning of the words 'reasonable and practicable' which stated that:

'The degree of risk is to be balanced against the cost, time, trouble or other sacrifice necessary to eliminate the risk.' From that judgement, it is clear that a building on completion of an alteration may not be in full compliance with the Building Code.

Where an assessment of what is 'reasonable and practicable' is required, it is incumbent on the applicant to provide specific documentation in the building consent to enable this assessment to proceed. A decision cannot be made without this information.

Section 112(1)(b)

We have dealt with means of escape and access and facilities for people with disabilities under section (a). The purpose of section (b) is to deal with the other provisions of the Building Code. Section (b) divides building alterations into two scenarios.

Scenario (1) is where the existing building complied with the provisions of the building code immediately before the building work began – the building must continue to comply.

Scenario (2) is where it did not comply with the other provisions of the building code – it must continue to comply to at least the same extent.

It should be noted that section 112(1) does not allow consent to be granted for seismic upgrade work unless the whole building meets the requirements outlined above.

Section 112(1) Examples:

Example 1

A building consent application was received for minor plumbing work on a commercial building. The applicant was asked to carry out a risk assessment using the MBIE guidance on requesting information about means of escape from fire for existing buildings. Even though the proposed work was minor, the building was older, it had never had a fire upgrade and had sleeping facilities on upper floors, the risk score came in at 19 and therefore a full fire report was required.

The fire report and accessibility information were considered. The fire report showed the building fell well short of compliance. The processing officer considered that a number of upgrades were required in order to bring the building up to ANARP – including upgrading the fire alarm from a manual type 2 to and automatic type 4 with smoke detection.

The applicant made a case that it was not reasonably practicable to install the required sprinkler system as the building had multiple fire exits and life safety would not be at risk providing a type 4 alarm was installed. They also noted that the sprinkler work could not be carried out while the building was fully tenanted and would be very expensive.

The processing officer accepted that it was not reasonably practicable to sprinkle the building. An accessible entrance was created with new signage. The existing stairs were upgraded in terms of handrails and contrasting nosings, however it was not considered reasonably practicable to bring the stair pitch and landing size into full compliance. Building consent was granted.

Example 2

A building consent application was received for removing internal walls in an existing dwelling which removed much of the lateral bracing. The processing officer considered that bracing had not complied immediately before the alteration but that the proposed building work further reduced the level of compliance. Building consent could not be granted.

Example 3

A building consent application was received for installing a portal frame into a commercial building for the purposes of earthquake strengthening. The applicant was not willing to provide information on means of escape from fire or access and facilities for people with disabilities. The building could not be assessed for compliance with section 112(1). Building consent could not be granted.

Example 4

A building consent application was received for fire and accessibility upgrade of a simple single level shoe shop. The building had a single retail area with staff kitchen and toilets at the rear. The application contained a brief fire report. Existing and proposed accessible features were clearly shown on the plans.

The processing officer accepted that the accessible requirements were simple and that no formal report was required. The proposed work brought the building up to full compliance with current requirements for both access and facilities and means of escape from fire. Building consent was granted.

Detailed guidance– section 112(2)

Section 112(2) is essentially a separate compliance path to section 112(1). Building consents that comply with section 112(2) are not required to comply with section 112(3).

Under section 112(2) the territorial authority (TA) may allow the alteration of a building without the building complying with provisions of the building code which would otherwise be required under section 112(1). It should be noted that this still does not allow work that worsens an existing non-compliance or causes a compliant building to become non-compliant.

The purpose of section 112(2) appears to be to improve the likelihood that certain high value improvements to means of escape from fire and/or access and facilities for persons with disabilities will go ahead.

The Building Act seeks to avoid these high value upgrades being lost in cases where compliance with section 112(1) would be so onerous that the alteration would not take place.

To comply via section 112(2), the applicant must demonstrate compliance with three requirements. This can be explained as follows:

- (a) The application should have a cover letter or similar advising that it complies via section 112(2) and that if the building were required to comply with all the relevant provisions of the building code the alteration would not take place.
- (b) The alteration will result in improvements to means of escape from fire or access and facilities for persons with disabilities.
- (c) The improvements referred to in (b) must outweigh the detriment that is likely to arise as a result of the building not complying with the other relevant provisions of the building code.

Sections (a) and (b) are very simple, however the term 'outweigh' in section (c) requires an in-depth study of the building and the proposed building work. For proposals to outweigh other requirements, our starting point would be that the building consent would provide significant improvements to the building in the areas of means of escape from fire or accessibility.

It should be noted that section 112(2) does not allow consent to be granted for seismic upgrade work alone.

Section 112(2) Examples:

Example 1

A building consent application was received for a fitout and entrance alterations to a five storey commercial building. The application advised that compliance was via section 112(2). It included a case that the project would make an improvement to accessibility by removing a 25mm step at the accessible entrance and explained that the work would not go ahead if the building had to comply in other areas. The fire report showed that the building required an automatic fire alarm and emergency lighting which it did not have. The processing officer did not accept that the benefit of the improved entrance outweighed the detriment of not having a suitable fire alarm or emergency lighting. Building consent could not be granted.

Example 2

A building consent application was received for installing lifts in a number of multistorey school buildings. The school had funding for this project, but no additional funds were available. The application explained that they intended to comply with section 112(2). It explained that if all the requirements of section 112 were required to take place the project would not go ahead. Fire and accessibility reports were considered. The buildings had a number of fire and accessibility non-compliances but, apart from the lifts, these were relatively minor. They did not create significant risk to life safety and were not considered to outweigh the benefit of the lifts. Building consent was granted.

Example 3

A building consent application was received for a full seismic upgrade of a commercial building. No other work was proposed. The applicant argued that if the building was required to comply in other areas the work would not go ahead. As the work did not involve improvements to means of escape from fire or access and facilities for persons with disabilities, building consent could not be granted.

Detailed guidance – sections 112(3) and 133AT

Section 133AT

Section 112(3) simply notes that it is subject to section 133AT and contains no other clauses. In practice, section 133AT can be applied instead of section 112(1) or (2) where the application for a building consent relates to the alteration of a building or a part of a building that is subject to an earthquake-prone building (EPB) notice.

If the building is recorded as an earthquake-prone building and is subject to an earthquake-prone building notice, you will need to undertake seismic work within the legislative time frames so that the building is no longer earthquake-prone.

If the building being altered is earthquake-prone and the alteration is a substantial alteration (see definition below), section 133AT requires the alteration to include the necessary seismic work so the building is no longer earthquake-prone.

Section 133AT includes many of the same requirements as section 112 but enables the BCA to exercise a level of discretion when granting building consent if certain requirements are 'unduly onerous'. It is how we deal with applying this discretion which is important.

What does unduly onerous mean?

The test that is applied to section 133AT(3)(b) 'unduly onerous' is different to that used in section 133AT(2)(a) 'ANARP'. There is considerable information available via MBIE guidance, determinations and case law to assist the BCA when making an ANARP decision. However there does not appear to be any information that provides guidance in relation to making an 'unduly onerous' decision.

Because the Government chose to use a different standard of measure for section 133AT, we can assume that it also intended that the threshold for 'unduly onerous' was different to ANARP and given that section 133AT is intended to make seismic upgrade work easier to do it also follows that 'unduly onerous' was intended to be a lower threshold than ANARP.

Section 133AT(3)(b) says 'if the building were required to comply with the specified provisions, it would be unduly onerous for the owner in the circumstances'. This wording suggests that the Government intended councils to take the owners circumstances into account when making the 'unduly onerous' decision.

In the absence of MBIE guidance or case law our approach when assessing 'unduly onerous' will be:

1. If the owner makes a case to the BCA setting out the reasons they believe the building should not have to comply ANARP with the specified provisions of the NZBC, and instead makes an 'unduly onerous' argument, the BCA may grant the consent without requiring an upgrade to fire and accessibility to be carried out.
2. Regardless of which subsection of the Act the application relates to, the applicant must provide fire and accessibility information so that the BCA can make a decision. However, the extent of these requirements is weighted against the nature of the proposed works. For example, a comprehensive report may not be required if an applicant was only installing a single seismic steel frame as a prelude to doing further work in the building.

3. In all instances, when preparing building consent documentation, it is for the owner or their agent to prepare a case stating why they believe it is 'unduly onerous' to be required to upgrade a building.
4. The BCA's role is to consider the case and determine whether it is unduly onerous. Please also note section 133AT(3)(c). The permitted non-compliance should be no more than is reasonably necessary. We take this to mean that easily achievable upgrade work such as exit signage should often be required to take place while major upgrade work such as a new fire alarm is more likely to be considered unduly onerous.

Substantial alteration

A substantial alteration to an earthquake-prone building or part thereof is defined as work that:

1. needs a building consent;
2. together with other work consented in the past two years has an estimated value of at least 25% of the building's value and is more than \$150,000.

Section 133AT Example:

A building consent application is received for seismic upgrade of a commercial building subject to an earthquake-prone building notice. The application made a case that the lift and sprinkler system required to bring the building up to full compliance were unduly onerous for financial reasons. The fire and accessibility reports were considered. The processing officer requested upgrade of exit signage and a minor improvement to the accessible entrance because this work was not considered to be unduly onerous. Building consent was granted.

Additional information can be found at:

New Zealand legislation/Building Act section 112:
legislation.govt.nz/act/public/2004/0072/latest/DLM306875.html

New Zealand legislation/Building Act section 133AT:
legislation.govt.nz/act/public/2004/0072/latest/DLM7333567.html

MBIE guidance on Building Act sections 112 and 133AT:
www.building.govt.nz/building-code-compliance/b-stability/b1-structure/altering-existing-building/managing-building-alterations/#jumpto-requirements-of-sections-112-and-133at-of-the-building-act

MBIE guidance on Council's discretion to proceed:
www.building.govt.nz/building-code-compliance/b-stability/b1-structure/altering-existing-building/using-the-decision-making-framework/#jumpto-scenario-2__003a-building-consent-application-does-not-demonstrate-compliance-and-territorial-authority-uses-discretion-to-proceed

MBIE guidance on earthquake-prone buildings, substantial alterations:
building.govt.nz/assets/Uploads/managing-buildings/earthquake-prone-buildings/epb-substantial-alterations.pdf