

**Document type:** Practice Note

**Title:** Applying the term as near as is reasonably practicable

**Document number:** AC2226

**Version:** 7



## 1. Purpose

This guidance document has been developed to provide a clear understanding of the application of s.112 of the Building Act 2004; in particular how to apply the term reasonable and practicable.

## 2. Legislation

### Section 112(1)

A building consent authority (BCA) must not grant a building consent for the alteration of an existing building, or part of an existing building, unless the BCA is satisfied that, after the alteration, the building will-

- a) comply as nearly as is reasonably practicable with the provisions of the building code that relate to
  - i. means of escape from fire; **AND**
  - ii. access and facilities for persons with disabilities (if this is a requirement in terms of s.118); **AND**
- b)
  - 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 to comply at least to the same extent as it did then comply

### Section 112(2)

Despite subsection (1), a territorial authority (TA) may, by written notice to the owner of a building, allow the alteration of an existing building, or part of an existing building, without the building complying with the provisions of the Building Code specified by the TA, if the TA is satisfied that-

- a) if the building were required to comply with the relevant provisions of the Building Code, the alteration would not take place; **AND**
- b) the alteration will result in improvements to attributes of the building that relate to-
  - i. means of escape from fire; **OR**
  - ii. access and facilities for persons with disabilities; **AND**
- c) the improvements referred to in paragraph (b) outweigh any detriment that is likely to arise as a result of the building not complying with the relevant provisions of the Building Code

## 3. The meaning of the term '*reasonable and practicable*'

Section 112 enables Council to exercise a level of discretion to sections 112.a (i) and 112.b (ii). It is how we deal with applying this discretion, which is important.

Section 112(2) provides the owner with the opportunity to put a case to Council where the requirements of s.112 (1) are inhibitive. The owner must say which sub-section (i.e. 112(1)(b)(i) or 112(1)(b)(ii) of the Act they can meet and why.

There is considerable case precedent, which Council can use to provide guidance on this term.

These words have been 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.

We must therefore take into account previous legal precedent and relevant factors such as:

- when the building was constructed; and
- when changes to legislation occurred, which could affect the safety of the building as currently constructed

Under s.112.2(c) if the owner makes a case to the TA setting out the reasons justifying why the building should not be upgraded, the TA if satisfied on reasonable grounds may grant the consent without requiring an upgrade to be done.

Scenario	Justification
An owner intends to install a lift into an existing building to improve access. If this were a new building, the code would require that a sprinkler system be installed.	The means of escape from fire currently complies; increasing compliance by installing a sprinkler system is inhibitive and provides little improvement. However, providing a lift in the building will vastly improve access and facilities for disabled persons. The alteration therefore will result in an improvement, as the building will be more accessible to all users.

Regardless of which sub-section of the Act the application relates to, the applicant must provide fire and accessibility reports in order that the TA can make a decision. However, the extent of these requirements is weighted against the nature of the proposed works. E.g. such reports would not be required if an applicant was only installing a hand basin for example.

In all instances, when preparing building consent documentation it is up to the owner or their agent, to prepare a case to justify why it is not reasonable or practicable, to upgrade a building. Council’s role is to consider the case and determine whether it is sustainable. Please refer to page 4 which shows an example of how this information could be presented.

#### 4. What is considered ‘reasonable and practicable’

Where an assessment of what is ‘reasonable and practicable’ is required, it is incumbent on the applicant to provide specific documentation to enable this assessment to proceed.

A decision cannot be made without this information; the justification as to why the provisions of the Code cannot be complied with must be provided.

The justification must be sound and based on three key factors:

1. The work could not be undertaken without major structural alteration of the building, or there are specific site constraints
2. Sacrificing an upgrade where doing so outweighs the cost of the intended alteration (Justice Gallen)
3. Will it improve either the means of escape or access and facilities for disabled persons (refer s.112.2)

#### Example

The provision of a lift for access may require a major change to the building’s structure

- Is it reasonable or practicable to require the lift to be installed?

The installation of a sprinkler system into the building will require the installation of a riser main in the building and sprinklers on each floor.

- Is it reasonable or practicable to require this?

*Comment:*

Justice Gallen's conclusion indicates that consideration needs to be applied in relation to the cost of upgrade versus the cost of the proposed new building work

**Example**

An alteration to an existing building has identified that a lift is required (s.118). The cost of installing the lift is approximately \$300,000. The new building work for office partitioning has a construction value of \$50,000.

In the case of Auckland City Council v New Zealand Fire Service, Justice Gallen concluded that the cost in relation to compliance had to be considered. The decision requiring that a building be upgraded in terms of outbreak of fire, when weighed against the value of the proposed building work, was not reasonable or practicable, although it was physically possible.

*"The fact that it was physically possible did not mean that it was reasonably practicable".*

## 5. Building assessment

An alteration means any building work to re-build, re-erect, enlarge or extend the building.

If the building work does not need a building consent then there is no need to consider s.112; however, if a building consent is required, the assessment should be rigorous and thorough. The emphasis should be on upgrading the level of compliance rather than finding reasons not to comply. S.112 assessments should be seen as an opportunity to bring the building closer to compliance with the Code.

All **new building work** must fully comply with the Code.

Where the work is being carried out on a single building, which is part of a group of other buildings, the assessment under s.112 is only required on the building which is the subject of the new work.

- E.g., a gymnasium is being altered in a school, the s.112 report only needs to relate to the gymnasium (note the gymnasium must be freestanding and not attached to other buildings)

**Example of a compliance worksheet for D1/AS1**

Acceptable Solution requires	Existing features in building (Current state)	What features can be improved? (Future state)	Justification / reasons for argument
Handrails x 2	1	Additional handrail fitted	Improves safety of users; easy to install; cost minimal
Tread width (310mm minimum)	300mm	ASNARP	Building is 10 stories high; stairs have been cast in-situ with walls and would damage structure if removed. If new stairs were installed the building could not be occupied whilst the work was being undertaken this would result in multiple tenancies being affected. There are 4 lifts in the building; stairs are rarely used; difference is only 10mm and does not impact on safety of users
Riser height (180mm maximum)	190mm	ASNARP	
Contrasting nosing	None	Contrasting nosing fitted	Improves visibility to users of stairwell making it safer to use; easy to install; cost minimal

As can be seen by the example above, the means of escape does not comply for the existing building but can easily be upgraded to improve compliance with the Code by fitting contrasting nosing's to the stairs and installing a second handrail. In this instance, the applicant would need to justify why it is not reasonably practicable to replace the stairwell.

When it comes to assessing compliance for means of escape from fire, if the building does not comply with the Acceptable Solutions, compliance can be demonstrated using the C/VM2 process.