

Determination 2025/005

An authority's refusal to grant a building consent in relation to the conversion of one level of an existing multi-storey building

126 Vincent Street, Auckland Central, Auckland

Summary

This determination considers an authority's refusal to issue a building consent for conversion of one level of a multi-storey building from commercial to residential use.

It considers the reasons for the refusal under section 50 of the Building Act 2004, and provides comments on section 115 decision-making

In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (eg, Acceptable Solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Andrew Eames, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment (“the Ministry”).¹
- 1.2. The parties to the determination are:
 - 1.2.1. Level 5 Offices Limited, the owner of Level 5 of the building at 126 Vincent Street and the applicant for this determination (“the owner”)
 - 1.2.2. Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. Body Corporate 134199 (“the body corporate”), which represents the other owners of the building, is a person with an interest in this determination.
- 1.4. I have also consulted with Fire and Emergency New Zealand (“FENZ”) in making this determination, as required under section 170(a).
- 1.5. This determination arises from the authority’s refusal to grant a building consent for building work to convert level 5 of the building from commercial office to residential. The refusal arose because the authority considers the requirements of section 115 were not met.
- 1.6. The matter to be determined, under section 177(1)(b) and (2)(a), is the authority’s decision to refuse to grant building consent BCO10358023.
- 1.7. In deciding this matter, I have considered the authority’s reasons for refusal in its letter to the owner dated 6 June 2023.
- 1.8. The determination offers some additional commentary, for the test of ‘as near as is reasonably practicable’ test under section 115 as it relates to the provisions for fire safety.,

¹ The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

Issues outside this determination

- 1.9. In making this determination, I have not considered whether the proposed design satisfies all the requirements of section 115.
- 1.10. I have also not considered any other aspects of the Act or of the Building Code, or compliance with the Code of the proposed building work covered by the application for building consent.

2. The building

- 2.1. The building at 126 Vincent Street (“the building”) is a 17-level structure with roof-level plant rooms) and two lower levels for parking. The building’s main entrance is on Level 4, the superstructure is primarily concrete with steel beams, and the cladding is made from non-combustible materials.
- 2.2. The building was constructed in the 1980s and has unit-titled ownership with the following current layout:
 - Seven levels for residential use: Levels 7, 9, 11, 12, 13, 14, and 16.
 - Levels 1 and 2 are used for parking.
 - Part of Level 3 is used for storage.
 - The remaining levels are used for commercial office space: Levels 3 (part of level²), 4, 5, 6, 8, 10, 15, 17.
- 2.3. Of relevance to this determination, access to Level 5 is via a lift or a set of stairs³, the latter providing the only means of escape from fire for this level.
- 2.4. The building’s existing fire safety system is connected to FENZ and includes sprinklers on all levels and in the stairway, and manual call points⁴.
- 2.5. Since 2004, six levels have been converted from commercial office to residential use (Level 7 appears to have been in residential use prior to this date).
- 2.6. In 2018, Level 12 was converted from commercial office use to residential use and a fire report at the time assessed compliance of the whole building using C/VM2⁵. The report noted six levels of the building had previously been converted from

² The non-storage part of Level 3 was residential space in 2018, according to the fire report for the Level 12 conversion.

³ Referred to as Stair 1, which discharges to the ramp at the front of the property.

⁴ The fire documentation provided identifies aspects of the sprinkler system were installed at different times

⁵ C/VM2 Verification Method: Framework for Fire Safety Design (for NZ Building Code Clauses C1-C6). First edition, Amendment 5. Effective from 24 November 2017

commercial to residential use: Level 3 (2014), Level 9 (2004), Level 16 (2007), Levels 13 and 14 (2016) and Level 11 (2018).

- 2.7. Type 6 alarm systems are installed on commercial levels 4, 6, 8, 10, 15 and 17 and the parking levels. Smoke detection systems are not currently provided on these levels.⁶
- 2.8. The current fire alarm systems on the residential levels are as follows⁷:
 - Stair 1: Type 4
 - Levels 11-14: Type 5.
 - Levels 3, 7, 9 and 16: Supplementary smoke detection.
- 2.9. Level 5 is proposed to be upgraded to a Type 5

3. Background

- 3.1. On 10 October 2022, the owner applied for a building consent [BCO10358023] to convert Level 5 from commercial office space to a single residential apartment. The application was accompanied by a notification of change of use.⁸
- 3.2. On 5 October 2022, the owner's fire engineer completed a fire engineering design report for the proposed Level 5 conversion⁹. They noted:
- 3.3. The building is provided with a sprinkler system and supplementary smoke detection in some levels. The proposed alterations to Level 5 include the installation of a new Type 5 enhanced smoke detection system. It is noted that as a result of the lack of smoke detection throughout the building, this building will not benefit from a fully compliant Type 4 or 5 detection system. In a letter to the authority dated 21 December 2022 regarding a fire engineering review of the building, the authority's fire engineer confirmed "[t]he level 12 apartment conversion appears to be near identical to the level 5 apartment conversion except that a non-smoke rated lobby is provided to the lift on the level 5 conversion".

⁶ Acceptable Solution F7/AS1 contains a full description of alarm types. There is some difficulty with aspects of the information presented in terms of the specification of the exact system which could only be known based on the standard applicable at the time installed. I draw the attention of both parties to the fact they need to consider the performance of the actual systems in place when making their as near as reasonably practicable assessment.

⁷ According to fire documentation provided with the application for building consent.

⁸ Under section 114, the owner of a building must provide written notice to the relevant territorial authority if they propose to change the use of a building or part of a building. The owner must not change the use unless notified in writing that the territorial authority is satisfied that the building in its new use will comply to the extent required under section 115.

⁹ Version A: BC Issue, 5 October 2022.

3.4. On 22 December 2022, the owner's fire engineer issued an updated version of their 5 October 2022 fire report for the proposed Level 5 conversion¹⁰, which was submitted by the owner with their building consent application. In this report, the owner's fire engineer concluded:

... the benefit of a full [building fire system] upgrade is minimal. Given this, it is proposed to upgrade the fire safety system to fitout [Level 5] only. ...Update the existing system to include type 5 components to [Level 5] as required to comply with NZS 4541:2013. (Type 7 system for [Level 5] only).

3.5. In a meeting with the owner and the owner's fire engineer on 2 March 2023 the authority advised:

... the level of smoke detection for 126 Vincent Street was still insufficient to ensure the safety of residents in a converted apartment on Level 5.

3.6. In May 2023, the authority sent the owner a series of requests for information (RFIs) advising that the smoke alarm systems on all residential levels of the building must be upgraded to 'Type 5' to comply with Building Act requirements.

3.7. On 16 May 2023, the authority advised the owner that if the fire system upgrade work was not completed and supporting documents were not provided by 23 May 2023, consent for the proposed building work on Level 5 would be refused.

3.8. In an email to the owner dated 23 May 2023, the authority advised:

... in view of the considerable time that has elapsed since our initial request of 20 October 2022 consent will be refused (cancelled) in accordance with [section] 50 of the Building Act unless the information outlined below is provided promptly and in full.

- Outstanding [body corporate] confirmation regarding the upgrade of the building smoke detection system (as per previous correspondence)
- Inadequate and incomplete assessment of the spread of fire to other property ...revision is required as per agreement with [the authority's] fire engineer.

3.9. The owner replied to the authority on 23 May 2023, stating that "the body corporate has not confirmed that they will do any work ... [but this] should not affect the outcome of this consent".

3.10. On 26 May 2023, the authority confirmed:

... [the work in question is a change of use (under section 115 of the Building Act BA04), not an alteration (section 112 BA04).

...

¹⁰ Version C: BC Issue – fire RFI. Base review, Fire connect review, 22 December 2022.

Unless a firm commitment to provide from the body corporate the information outlined in our requests of 16 and 23 May 2023 [ie confirmation from the body that the building's smoke detection system will be upgraded, and a complete assessment for spread of fire to other property] together with an indication as to when it can be expected, is received by the close of business next Wednesday, 31 May 2023, consent will be refused ...

3.11. In a letter dated 6 June 2023, the authority formally advised the owner of its refusal to issue the building consent. The consent was refused because:

... plans and specifications accompanying the building consent application do not satisfy [the authority] on reasonable grounds that the completed work would comply with the New Zealand Building Code.

Specific reasons for this refusal are as follows:

Despite repeated email correspondence, and the latest email of 25 May 2023 requiring a firm commitment to provide from the body corporate regarding the upgrade of the building smoke detection system, the information has not been provided.

Therefore, the application BCO10358023 is refused under section 50 of the Building Act, as [the authority] is not satisfied that building code compliance is demonstrated to the extent required by section 115 of the Act.

4. Submissions

The owner

4.1. The owner's view is that the authority's decision to refuse to issue the building consent is incorrect. This view is based on:

... [the authority's] interpretation of the Building Act, principles of consistency that a public institution should strive for, relative benefit of the requested change and the impossibility of the owner forcing the body corporate to act as the [authority] desires.

4.2. Following receipt of FENZ's comments (see paragraph 4.8), the owner reiterated their position and said they had "made every effort to design a compliant fire safety solution within the bounds of what is practicable".

4.3. The owner's submission (in summary) is:

4.3.1. They only own Level 5 of the building and cannot force the body corporate to upgrade smoke alarms on other residential floors.

4.3.2. The authority's approach is inconsistent. The new residential floorplan for Level 5 is the same as for another converted level in the building, and

consents for this latter conversion and others in the building were issued without requiring a whole-of-building fire system upgrade.

- 4.3.3. A consent should be issued for the proposed Level 5 building work unless the change of use is materially different from previous conversions or the relevant regulations have changed.
- 4.3.4. It is unreasonable to require fire system upgrades on other levels that are not changing their use when only one level (ie Level 5) is changing its use.
- 4.3.5. The building as a whole is not changing its use, as it was originally built to accommodate a mixture of commercial office and residential activities.
- 4.3.6. The consent was refused under section 115, but an authority is required to evaluate a consent against section 112. The authority's assertion that section 115 applies but section 112 does not is incorrect. Both sections apply in this situation.
- 4.3.7. Regarding means of escape from fire, sections 112 and 115 appear to have the same requirements. If a consent application meets these requirements in section 112 it must also meet the requirements in section 115.
- 4.3.8. A change of use (section 115) and alteration of an existing building (section 112) do not always go hand in hand. Section 115 "explicitly covers adding a household unit to a building that doesn't have any" rather than to a building that already accommodates a mix of uses.
- 4.3.9. According to sections 114 and 115, changes in use should only necessitate compliance upgrades for the specific area undergoing the change, not for an entire building.
- 4.3.10. The authority was apparently prepared to approve the consent despite believing it would violate section 115 requirements, so long as compliance was achieved at a later date.
- 4.3.11. Converting Level 5 to residential use does not increase the risk in other levels of the building. Each level is isolated from the others, and because "the requested alarms only alert a single level" there is negligible benefit in upgrading other levels.
- 4.3.12. When property ownership is in the form of unit titles, each property (ie unit title) constitutes a "building", rather than "part of a building", for the purposes of the legislation.
- 4.3.13. Applying the upgrade requirements to other levels of the building oversteps the requirements of the Act. The owner states:

Some may conflate “building” and “part of the building” as being the same thing. But there is a distinction that should be made in relation to unit titled property, where the change of use approval should only relate to property the applicant is the owner of, and systems within the building the owner has the benefit of.

...

The building use is not changing, it is already a mixture of Working Low and Sleeping Residential parts and it will continue to be this mix.

- 4.3.14. The change of use on Level 5 will improve fire safety compliance for the entire building because the new Type 5 smoke alarms “provide a higher level of safety” than the existing commercial alarm system”.
- 4.3.15. The authority’s request is not reasonable or practical, and so does not meet the reasonably practicable test requirements in the legislation.
- 4.4. The owner provided fire reports for the commercial-to-residential conversions of Level 11 (2017) and Level 12 (2018) of the building in support of their submission.

The authority

- 4.5. The authority believes it was correct to refuse the consent because it could not be satisfied the building would comply as nearly as is reasonably practicable with Code provisions relating to means of escape from fire after the proposed commercial-to-residential conversion of Level 5 was completed.
- 4.6. The authority’s submission (in summary) is:
- 4.6.1. The proposed building work “would present an unacceptable risk” to future Level 5 occupants.
- 4.6.2. The building was built “for the purposes of office space. It has since undergone a number of residential conversions, and can now be characterised as a mix of commercial and residential floors”.
- 4.6.3. The consent application was declined with reference to section 115, “however that should be a reference to section 112 of the Building Act 2004. Section 115 relates to the change of use, whereas section 112 relates to alterations to existing buildings”.¹¹
- 4.6.4. The consent “must not” be granted for the proposed building work because:
- 31.1 On the basis of FENZ’s advice, 126 Vincent Street requires a ‘Type 4 or 5’ fire alarm system that includes smoke detection that would automatically alert building occupants to smoke anywhere in the building;

¹¹ The correspondence leading up to the refusal made repeated references to s115 and the change of use and the refusal referenced that correspondence so I have not considered s112 in this determination.

- 31.2 [The owner] was only proposing to install Type 5 smoke detection on level 5 of 126 Vincent Street;
- 31.3 Some levels of 126 Vincent Street only have Type 6 fire alarm systems, which does not include any smoke detection (Type 6 is an automatic fire sprinkler system with manual call points);
- 31.4 The paramount consideration is the safety of future residents on level 5 of 126 Vincent Street;
- 31.5 Weighing the risk to safety of not installing active smoke detection throughout 126 Vincent Street against other considerations, [the authority] submits that providing only Type 5 fire alarm systems on level 5 cannot be considered ‘as near as reasonably practicable’ to the requirements of the Building Code.
- 4.6.5. The proposed building work includes installation of Type 5 fire alarm systems on Level 5, which is “an ‘automatic fire alarm system with modified smoke detection and manual call points’ ... [but] did not propose any further upgrades to the smoke detection systems” in the building.
- 4.6.6. The authority requested a consent application review. In a report dated 2 November 2022, FENZ advised the authority:
- ... to require the applicant to provide smoke detection throughout the building or robustly support the continued omissions of the required fire safety system in order to comply with the Building Code to the extend [sic] required by the Building Act.
- 4.6.7. At a meeting with the owner on 2 March 2023 it was agreed that:
- ... [the owner] would seek comment from the Body Corporate for 126 Vincent Street on the issue [ie the authority’s concerns “that the level of smoke detection for 126 Vincent Street” was at that time “still insufficient to ensure the safety of residents in a converted apartment on Level 5”].
- ... [the owner] was unable to provide comment or any reassurance from the Body Corporate.
- 4.6.8. Providing Type 5 smoke detection on only level 5 cannot be considered ‘as nearly as reasonably practicable’ to the Building Code requirement to provide either Type 4 or 5 smoke detection throughout the building.
- 4.6.9. Previous consent decisions for changes of use on other levels of the building are irrelevant.
- 4.6.10. The requirement that the body corporate confirm a future upgrade of all smoke detection systems in the building was:

... merely a pragmatic approach taken by [the authority] to be satisfied that 126 Vincent Street would, in the near future, comply with the applicable provisions of the Building Code. This would have given [the authority] a degree of assurance as to the safety of the occupants of level 5.

- 4.6.11. Consideration of a state of affairs that may exist in the future is irrelevant. The authority has no assurance that any future conversions would occur in the building. Consideration therefore cannot be given to how much 'closer' the proposed work brings the building to the required level of compliance.

The body corporate

- 4.7. The body corporate's view is that the authority's refusal of consent for the Level 5 building work is unreasonable. Its submission (in summary) is:
- 4.7.1. It is unreasonable to require all building levels to be "fully compliant with the latest regulations as a condition for consenting work that allows improvements or upgrades to be made on individual [levels]".
- 4.7.2. Legal title for each unit in the building is held in different ownership. The authority cannot compel owners of other units to undertake fire system upgrades as a condition of approving consent for work on Level 5.
- 4.7.3. Any changes to specified systems on other levels would require owners to obtain consent for that work. The body corporate has no authority to compel owners to undertake those upgrades.
- 4.7.4. The all-of-building upgrade work required by the authority "[does] not meet the definition of 'as nearly as reasonably practical'".
- 4.7.5. The authority's refusal of consent for the Level 5 conversion "will have the effect of deferring further improvements within the building that may require building consent", including safety improvements.

FENZ Consultation

- 4.8. As noted in paragraph 1.4, I have consulted with FENZ.
- 4.9. FENZ does not consider compliance has been demonstrated by the owner, and supports the authority's refusal of the consent. FENZ state (in summary):
- 4.9.1. Smoke detection throughout the building needs to be included in the Level 5 design, or its omission justified.
- 4.9.2. Assessment of external fire spread is incomplete in the proposed design.
- 4.9.3. The Level 5 design needs to either prevent smoke spread via the building's lifts or to demonstrate this is not required.

- 4.9.4. “Complete documentation” is needed to demonstrate compliance with the Building Code.
- 4.9.5. The building’s hydrant system may need upgrading to comply with NZS 4510.
- 4.9.6. Adding more sleeping occupants to the building needs to be robustly considered, as they need more time than awake occupants to respond to fire.
- 4.9.7. A fire on any level could allow smoke spread into the single vertical stair. Early smoke detection devices should be provided throughout the building.
- 4.9.8. In the proposed design, if a fire starts on a level that is not provided with smoke detection, sleeping occupants will not benefit from early detection. This risk has not been fully acknowledged by the owner. Until this risk has been acknowledged, and feasibility of options to mitigate this risk have been explored, compliance with ‘as nearly as reasonably practicable’ has not been demonstrated.
- 4.9.9. A technical review of the modelling files may raise additional concerns.
- 4.10. FENZ also provided commentary on acceptable solutions and verification methods in relation to fire safety systems.

5. Discussion

- 5.1. The matter to be determined is the authority’s decision to refuse to grant a building consent for the conversion of level 5 of the building to a residential apartment.

Legislation

- 5.2. The test for granting a building consent is set out in section 49(1), which provides:
 - (1) A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.
- 5.3. Section 50 provides that if an authority refuses to grant an application for a building consent, it “must give the applicant written notice of – (a) the refusal; and (b) the reasons for the refusal”.
- 5.4. In this case, the authority gave the owner written notice of the refusal in its letter of 6 June 2023 (“the letter of refusal”). The issue is whether the authority has fulfilled its obligation under section 50(b) to give reasons for the refusal.

Reasons for refusal

- 5.5. The authority's letter of refusal states that it "is not satisfied that building code compliance is demonstrated to the extent required by section 115" because it has not been provided with "a firm commitment to provide from the body corporate regarding the upgrade of the building smoke detection system".
- 5.6. The authority has subsequently stated (in submissions in respect of this determination) that its reference to section 115 in the letter of refusal should instead have been to section 112. However, as the reason for refusal referred to in the letter of refusal is in relation to section 115, I must consider this section in this determination rather than section 112.
- 5.7. Section 115 relates to code compliance requirements for change of use to an existing building. Section 115 states:

115 Code compliance requirements: change of use

An owner of a building must not change the use of the building –

- (a) In a case where the change involves the incorporation in the building of 1 or more household units where household units did not exist before, unless the territorial authority gives the owner written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use, will comply, as nearly as is reasonably practicable, with the building code in all respects; and
- (b) In any other case, unless the territorial authority gives the owner written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use, –
- (i) will comply, as nearly as is reasonably practicable, with every provision of the building code that relates to the following:
- (A) means of escape from fire, protection of other property, sanitary facilities, structural performance, and fire-rating performance:
- (B) access and facilities for persons with disabilities (if this is a requirement under section 118); and
- (ii) will, –
- (A) if it complied with the other provisions of the building code immediately before the change of use, continue to comply with these provisions; or
- (B) if it did not comply with the other provisions of the building code immediately before the change of use, continue to comply at least to the same extent as it did then comply.

- 5.8. The authority has provided an explanation for the reason for their refusal in their letter of refusal. In this case, it is the validity of that reason that is at issue. In their submission, the authority states:

Seeking an undertaking from the Body Corporate was merely a pragmatic approach taken by [the authority] to be satisfied that 126 Vincent Street would, in the near future, comply with the applicable provisions of the Building Code. This would have given [the authority] a degree of assurance as to the safety of the occupants of level 5.

- 5.9. However, section 115 requires the authority to be satisfied “that the building, **in its new use**, will comply as nearly as is reasonably practicable, with the building code ...” [emphasis added]. This means that at the time the building starts to function in its new use (or at some point in time when the building will be “in its new use”) it must comply with the Code to the extent required by section 115. This is not a requirement that can be deferred to some distant point in the future, meaning that compliance of the building cannot be reliant on loosely specified future works after the change of use has occurred. The test applies when the building or part of the building operates in its new use, so cannot rely on deferred timeframes to complete upgrades.
- 5.10. Therefore, a commitment to carry out work to achieve compliance with the requirements of section 115 in the future and not as part of work related to the building consent, whether committed to by the owner or by others (eg the body corporate), is irrelevant to establishing compliance for the building work for the proposed Level 5 conversion.
- 5.11. As a result, I consider the authority’s reasons for refusal of the building consent are not valid and do not satisfy the requirement set out in section 50(b).

6. Decision

- 6.1. In accordance with section 188 of the Building Act 2004, I reverse the decision of the authority to refuse building consent BCO10358023.

- 6.2. The authority can make a new decision in respect of the owner’s building consent application.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 31 January 2025.

Andrew Eames

Principal Advisor, Determinations

7. Additional Commentary

The section 115 test

- 7.1. The building consent authority and territorial authority functions related to compliance assessments under sections 112 and 115 were discussed in Determination 2015/070¹²:
- 5.3.3 The function required of a building consent authority under section 112 is for the purpose of granting a building consent to an applicant for a prescribed amount of building work. The function required of a territorial authority under section 115 is to give the owner written approval that it is satisfied that the building (or part of the building if the change of use is to part of the building) will comply in its new use to the extent set out in that section. Those functions are discrete.
- 5.3.4 Where a change of use incorporates building work for which consent is required, the authority has two separate functions to perform: give notice under section 115 and grant the building consent for the prescribed building work subject to section 112. The assessment under one may support the assessment under the other – but the functions remain separate and the authority must consider both section 115 and section 112 as discrete requirements.
- 7.2. In this case, the proposed alteration involves work for which consent is required, and this is associated with a change of use to part of the building. For the owner to be given approval to change the use of Level 5, section 115 requires the authority to be satisfied, on reasonable grounds, that the building in its new use will comply as nearly as is reasonably practicable with the provisions of the Code relating to “means of escape from fire ...” (in addition to the other clauses, as mentioned above).
- 7.3. Determination 2015/070 considered the change of use provisions only applied to that part of the building undergoing a change of use and not the building as a

¹² Determination 2015/070 *Regarding the refusal to issue a building consent for the change of use from commercial to residential of one level in a multi-level building at 72C France Street South, Eden Terrace, Auckland* (6 November 2015).

whole. The findings of Determination 2015/070 apply equally in this case in that only part of the building has undergone a change of use as noted above.

- 7.4. However, when assessing certain aspects of building code compliance, elements of the building beyond the part undergoing the change of use must be reviewed. For example, assessing the compliance of the means of escape from fire requires an assessment of the passive and active safety features throughout the building which would contribute to the Building Code performance of the part of the building undergoing the change of use. This is supported when you consider certain Building Code Clauses relating to fire safety, Performance C4.3 and C4.5 state:

C4.3 The *evacuation time* must allow occupants of a building to move to a *place of safety* in the event of a *fire* so that occupants are not exposed to any of the following:

- (a) *fractional effective dose* of carbon monoxide greater than 0.3:
- (b) a *fractional effective dose* of thermal effects greater than 0.3:
- (c) conditions where, due to smoke obscuration, visibility is less than 10 m except in rooms of less than 100 m² where visibility may fall to 5 m.

C4.5 Means of escape to a *place of safety* in *buildings* must be designed and constructed with regard to the likelihood and consequence of failure of any *fire safety systems*.

- 7.5. This requires you to consider all of the features of the building that would have an influence on the time required for occupants to move to a place of safety. These features and fire safety systems will exist throughout the building.

‘As near as is reasonably practicable’

- 7.6. To determine the extent of any Building Code upgrade requirements under sections 112 or 115, the authority must apply the ‘as nearly as is reasonably practicable’ test. This test was expressed by the High Court (in the case referred to below) as a weighing exercise and involves a costs and benefits assessment where the sacrifices and difficulties of achieving full compliance are balanced against the advantages of the upgrade.
- 7.7. The matter of whether it would be considered ‘reasonably practicable’ to upgrade an entire building to bring one level of the building into compliance with section 115 was previously considered in Determination 2015/070¹³:

5.5.2 The reference to compliance “as nearly as is reasonably practicable” recognises that it may be both unreasonable and impractical to require an existing building to be made to comply to the extent a new building would.

¹³ Determination 2015/070, *Regarding the refusal to issue a building consent for the change of use from commercial to residential of one level in a multi-level building at 72C France Street South, Eden Terrace, Auckland*. Issued 6 November 2015.

5.5.3 The application of the ‘as nearly as is reasonably practicable’ test has been considered extensively in previous determinations. These determinations have established an approach for deciding if a building complies as nearly as is reasonably practicable with the Building Code that follows the approach taken by the High Court¹⁴. The approach involves weighing the benefits of requiring compliance (such as life safety¹⁵) against the sacrifice of doing so (such as disproportionate cost¹⁶).

- 7.8. In *Auckland City Council v New Zealand Fire Service* [1996] 1 NZLR 330, the High Court stated:

In the end, what the cases say is that the obligation is not absolute. It must be considered in relation to the purpose of the requirement and the problems involved in complying with it, sometimes referred to as “the sacrifice”. A weighing exercise is involved. The weight of the considerations will vary according to the circumstances and it is generally accepted that where considerations of human safety are involved, factors which impinge upon these considerations must be given an appropriate weight.

- 7.9. It is outside the scope of this determination to consider if it would be reasonably practicable to require upgrading of the entire building. It is for the authority to reach a conclusion on those matters. When applying the test, we recommend the authority apply a risk-based approach.

Previous authority decisions as precedents

- 7.10. The owner considers that because the authority has previously approved other conversions the building consent should be issued, except if the proposed change of use is “materially different or there has been a pertinent change in the regulations the authority should be approving the consent”.
- 7.11. Previous decisions by an authority do not set a precedent for subsequent decisions. Each decision should be made on its own merits and on a new assessment based on the legislative requirements.

Different ownership of the rest of the building

- 7.12. The owner also considers that any notification of a change of use should only relate to the owner’s property, in this case the single unit titled property, rather than to the whole building.
- 7.13. Previous determinations have considered the impacts of changes of use and alterations to parts of buildings under 115. They have been consistent in the view that performance of the entire building should be taken into account.¹⁷

¹⁴ *Auckland City Council v New Zealand Fire Service*, 19/1095, Gallen J, HC Wellington AP 336/93.

¹⁵ See for example Determinations 2010/043, 2008/006 and 2006/078.

¹⁶ See for example Determinations 2010/028, 2009/027.

¹⁷ See for example Determinations 2021/001, 2015/070, 2015/064.

7.14. Compliance of the building, regardless of its ownership structure, is the critical factor in determining whether written approval to change the use under s115 should be given.
