

1. Purpose

The purpose of this practice note is to provide guidance on the application of s.115 of the Building Act 2004, which relates to a change of use.

A change of use occurs when:

- a building's (or part of a building's) use, as defined in the Regulations, changes from one use (the old use) to another (the new use), **and**
- the new use has more onerous or additional Building Code requirements than the old use

The new use of a building might have additional Code requirements than the old use if, for example it increases the fire hazard, the risk to life, or requires an accessibility upgrade.

2. What is a change of use?

Every building or part of a building has a 'use' that has been categorised by law. For the purposes of the Building Act, that use is specified in Schedule 2 of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 (the Regulations).

Schedule 2 divides the uses for all or parts of buildings into four broad activity groups; crowd activities, sleeping activities, working, business or storage activities, and intermittent activities.

Use groups

| Use group | Description (activities) |
|-----------|--------------------------------|
| CS | Crowd small |
| CL | Crowd large |
| CO | Crowd open |
| CM | Crowd medium |
| SC | Sleeping care |
| SD | Sleeping detention |
| SA | Sleeping accommodation |
| SR | Sleeping residential |
| SH | Single household |
| WL | Working low |
| WM | Working medium |
| WH | Working high |
| WF | Working fast |
| IA | Intermittent activity (low) |
| ID | Intermittent activity (medium) |

Risk groups

The Acceptable Solutions that support the Building Codes clauses for Protection from Fire changed in April 2012. There are now seven Acceptable Solutions, C/AS1 to C/AS7. Each one applies to a specific **risk group**, based on the **risk presented by the activities** carried out in a building or part of a building.

Risk Groups are limited to the particular Acceptable Solution, but do not necessarily align with the Use Groups (defined in the Regulations) which should be used to decide if a change of Use Group has occurred

3. Legislative requirements

A building consent is not required solely because the building's use is changing although; the owner must provide written notification to Council. An example of this is where a doctor's surgery, which has some specified systems and is changing to residential use.

Changing the use from WL to SH is less onerous; therefore in this instance there is no need for a building consent unless new building work that requires a building consent is undertaken. However, the applicant must apply for an amendment to remove the specified systems that are no longer required. (Refer to AC2109 Application for an amendment to a compliance schedule).

If however, building work will take place as part of the change of use (for example, the building in its new use may be required to have new fire safety features or to have some of its existing features upgraded) and that building work requires a consent, the owner must apply for one.

Council will consider the intended change of use and the proposed building work to see if it agrees that the building, in its new use, will comply 'as nearly as is reasonably practicable' with the Building Code to the extent required by the Building Act.

S.115 (a) states that if the change of use involves incorporating one or more household units into the building where there were none before, Council must be satisfied on reasonable grounds that the building (in its new use) will comply as nearly as is reasonably practicable with the Code in all respects.

Note: If changing from SR to SH this is not a change of use. This is because the Code requirements are no more onerous where a household already existed.

S.115 (b) states that in all other cases, the Council must be satisfied on reasonable grounds that the building in its new use:

Auckland Council 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 either or both of the following matters:-
 - a. means of escape from fire, protection of other property, sanitary facilities, structural performance and fire rating performance;
 - b. access and facilities for people with disabilities (if this is a requirement under s.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 those 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 the same extent as before the change of use

To determine the extent of any Building Code upgrade requirements, the Council must apply the 'as nearly as is reasonably practicable' test. This was tested in a High Court judgement¹ and involves a costs and benefits assessment where the sacrifices and difficulties of achieving full compliance are balanced against the advantages of upgrading.

The High Court approach

'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 those considerations must be given an appropriate weight.'

The requirements for building alterations are set out in section 112 of the Building Act. However, the requirements of s.115 are more onerous. Therefore, if both a change of use and alterations are going to occur, the requirements of s.115 will usually apply and take precedence over s.112.

The consideration of 'as nearly as is reasonably practicable' must be applied on a case-by-case basis after considering the cost and benefits analysis.

Once the difference between current provisions and requirements for a new building are established, Council must then decide to what extent the existing building must be upgraded. In order for Council to consider a change of use application, it is recommended that a compliance worksheet (gap analysis) be provided together with a cost benefit analysis and plans.

Matters for consideration:

When determining the level of upgrade required, Council will apply a risk-based approach, particularly where public safety or health may be affected.

Risk factors include but are not limited to:

- the nature and types of risk that can occur and any resulting consequences
- how to mitigate the risk
- the likelihood of risk (for example, a fire is more likely to occur in a domestic setting than a commercial one)
- the timeframe(s) i.e. temporary versus permanent, likelihood of the temporary use becoming permanent
- the level of risk the proposed use may cause
- the level at which risk becomes acceptable or tolerable
- the building size
- the building complexity
- the location of the building in relation to other buildings and public places
- how often members of the public visit the building
- disruption to business operations / occupants during the upgrade
- any other relevant matters

Costs

The costs are the tangible and intangible costs the owner will meet in achieving certain benefits. This can include obvious things such as the direct cost of carrying out upgrades – for example, installing a lift or sprinkler system - but can also include factors such as time constraints, business interruption and loss of amenity values. These costs are generally upfront, and can be ongoing.

Benefits

The benefits are meeting the Building Code objectives under consideration, such as those that relate to fire safety and access and facilities for people with disabilities

¹ Auckland City Council v New Zealand Fire Service [1996] 1 NZLR 330

Benefits can be expressed and evaluated in terms of

- reduced fire safety risk
- improved structural stability
- the number of persons with disabilities that will have access to the building; and
- the quality of the access and facilities for people with disabilities
- etc

For further guidance, refer to

- The Ministry of Business Innovation and Employment's publication, Change of Use, A guide for Christchurch City Council, which can be found on their website at <http://www.dbh.govt.nz/UserFiles/File/Publications/Building/Building-Act/change-of-use-guidance-CCC.pdf>

Example of compliance worksheet:

| Provisions of the Building Code under s.115 | Current status of compliance | Full compliance features | Upgrade required Y/N |
|--|-------------------------------------|---------------------------------|-----------------------------|
| Means of escape from fire | | | |
| Protection of other property | | | |
| Sanitary facilities | | | |
| Structural performance | | | |
| Fire-rating performance | | | |
| Access and facilities for people with disabilities (if applicable) | | | |
| Other Building Code aspects (for new uses that are SH or SR) | | | |