

Exercise of Discretion When Applying a New Building Regulation or an Amendment to a Building Regulation

This updates previous Minister's Guideline MG/13 issued June 2006

Pursuant to section 188(1)(a) of the Building Act 1993 (the Act) I hereby issue the following guideline concerning discretion under section 10 of the Act to apply to new building regulations or an amendment to a building regulation. Section 188(7) of the Act provides that municipal building surveyors and private building surveyors must have regard to a relevant guideline in carrying out a function under the Act.

1. SECTION 10 AND THE PURPOSE OF THIS GUIDELINE

Section 10(2) relates to the application of a building regulation or an amendment to a building regulation where substantial progress in the design of the building was made prior to the commencement of the operation of the regulation or amendment. The purpose of this Guideline is to provide guidance to the relevant building surveyor in the operation of section 10(2).

2. SECTION 10 IN RELATION TO SCHEDULES TO PLANNING SCHEMES

Section 11 of the Act gives primacy to a provision of a planning scheme over a building regulation that regulates the same matter. Where a planning permit has been issued, the relevant building surveyor is not required to assess those regulations that are equivalent to, or are "the same matter" as contained in the planning scheme.

Schedules to planning schemes are adopted under Schedule 5 of the Building Regulations 2006 (the Regulations). A schedule to a zone in a planning scheme does not have to be complied with in the building system until it is referenced in schedule 5 of the Regulations.

Once referenced in Schedule 5 of the Regulations, section 10 of the Act may apply. One of the effects of section 10 is that if the relevant building surveyor is satisfied and certifies in writing that substantial progress was made on the design of the building before the amendment commenced, the regulations, as they existed before the amendment will apply to that building work.

3. SECTION 10(2)

Section 10(2) provides that if a building surveyor is satisfied and certifies in writing that substantial progress was made on the design of a building prior to a building regulation or amendment commencing, then the building regulation or amendment does not apply to the carrying out of the relevant building work. Section 10(2) provides discretion for a relevant building surveyor to determine what constitutes substantial progress in a particular case. In exercising that discretion regarding the

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application of the regulation, the relevant building surveyor must be satisfied that the design relates to the proposed building on a particular allotment.

Section 10(2) is not intended to apply to a design for a building on an allotment which was previously built but has since been demolished or otherwise destroyed. In the case of a design which has been the subject of a building permit or other prior building approval, and where the building subject of that design was built, section 10(2) does not apply to any proposal to reuse the original design. Where the original design is reproduced for reuse in a new building permit application, there is no new design which has been substantially progressed for the purpose that application. Therefore, section 10(2) of the Act will not apply.

In the case of 'stock' or 'standard' designs commonly offered by volume builders, the relevant building surveyor should not certify that substantial progress has been made on the design unless the 'stock' or 'standard' design relates to the particular allotment on which the building is proposed to be constructed. This may be evidenced by:

- (a) a contract having been signed to have the building of that design constructed on the allotment, or
- (b) by a deposit having been paid for the construction of a building of that design on the relevant allotment prior to the commencement of the regulation or amendment.

In the case of an individual 'one off' design, the relevant building surveyor must be satisfied that the design relates to the proposed building to be constructed on the relevant allotment and that substantial progress was made on the design prior to the coming into operation of the new regulation or amendment to the regulations. This may be evidenced by the dating mechanism used by architects and draftspersons on their drawings or by a payment for a completed stage of design development.

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