

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 May 2009

Pursuant to section 188(1)(c) 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

The purpose of this Guideline is to provide guidance to the relevant building surveyor in the application of section 10(2) and clarity as to the supporting documentation that should be sought from the owner of the building or land concerned.

Section 10(1) provides that a building regulation or an amendment to a building regulation does not apply to the carrying out of any building work in accordance with a building permit existing prior to the commencement of the regulation or amendment to the regulation.

Section 10(2) relates to the application of a building regulation or an amendment to a building regulation where substantial progress on the design of the building was made prior to the commencement of the operation of the regulation or amendment to the regulation.

Section 10(3) provides that, subject to any determination of the Building Appeals Board, building work referred to in subsection (1) or (2) must be carried out in accordance with the provisions of any regulations, by-laws, local laws or enactments in force at the material times as if the building regulation or amendment had not come into operation.

Section 10(4) enables the relevant building surveyor and the owner of the building or land concerned to agree that a new regulation or amendment to a building regulation is to apply to the carrying out of building work.

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 6 of the Building Regulations 2018 (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 6 of the Regulations. Once referenced in Schedule 6 of the Regulations, section 10 of the Act may apply in relation to specifications in the planning scheme. 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, instead the building regulation immediately preceding applies.

Section 10(2) provides discretion for a relevant building surveyor to determine what constitutes substantial progress in a particular case. In exercising this duty, the building surveyor must be satisfied that based on the evidence provided that substantial progress has been made.

Application to demolished buildings

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.

Application to stock designs

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 —

- (a) the 'stock' or 'standard' design relates to the particular allotment on which the building is proposed to be constructed; and
- (b) is evidenced by—
 - (i) a contract having been signed to have the building of that design constructed on the allotment, or
 - (ii) 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 circumstances where the relevant allotment is broadly assigned, but the subdivision has not been finalised or as otherwise outlined under section 8(a) of the *Sale of Land Act 1962*, the relevant building surveyor may take the relevant allotment to be the particular allotment.

Application to one-off designs

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.

- (a) This may be evidenced by —
 - (i) the dating mechanism used by architects and draftspersons on their drawings, or
 - (ii) by a payment for a completed stage of design development.

Design changes

If a minor design change is made after the building permit is issued that does not materially impact on the relevant building surveyor's decision previously given under section 10(2), that minor design change can be accepted without further consideration.

Where a substantial design change is proposed that would facilitate the issue of a new building permit, the relevant building surveyor should reconsider if it is appropriate to apply section 10(2) to the building permit having regard to this guideline.

Builder change

Where the builder named in the domestic building contract (and where there is a building permit, named on the building permit) is proposed to be replaced, including in the case of insolvency, there is no change to the discretion of the relevant building surveyor under section 10(2).

4. CERTIFICATION UNDER SECTION 10(2)

Owner approval

The owner of the proposed building or the land concerned, or a person acting on behalf of the owner may apply to the relevant building surveyor to consider certifying in writing that a design is substantially progressed. The relevant building surveyor should not certify a request to apply section 10(2) without supporting authorisation signed from the relevant owner or applicant with authority to act on the owner's behalf which confirms they are requesting to apply section 10(2).

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