

 TaylorWessing

The Building Safety Act 2022

Building Safety Act (BSA): Higher Risk Buildings

November 2023

The publication of long-awaited secondary legislation setting out the new processes for securing building control for and the management of higher-risk buildings (HRBs) has brought much needed clarity as to how the new regime is expected to operate.

Alongside this, the Government continues to publish guidance on multiple related building safety issues, including guidance around: (i) the design and construction of HRBs; (ii) building work in existing HRBs; and (iii) the occupation phase of HRBs. Further Government guidance is expected into 2024.

As the construction sector gets up to speed with the new regulatory environment, we set out below some key points to be considered for developers, investors, purchasers and others involved in the residential sector.



What are HRBs?

Subject to various exclusions such as buildings that are entirely used as prisons and other secure residential institutions, hotels or military residential premises, HRBs are defined as buildings in England of at least 18 metres or at least 7 storeys which either:

- contain at least two 'residential units' (i.e. dwellings or any other units of living accommodation) e.g. purpose-built student accommodation, build to rent and co-living buildings; or
- are hospitals or care homes (in respect of which the rules apply prior to and during construction but not post-construction).

Key Changes

Subject to certain transitional provisions, the key changes introduced by the secondary legislation currently in effect for the: (i) construction of new; (ii) carrying out of work to existing; and (iii) registration of both new and existing, HRBs are as follows:

- The Building Safety Regulator (BSR) becomes the building control authority for HRBs;
- New HRBs will be subject to a new duty holder and competency regime;
- A gateway process comes into operation, introducing two stop/go points during the building control stage for HRBs. Gateway Two must be passed before HRBs can proceed to construction and Gateway Three must be passed before completion and occupation can occur; and
- Existing HRBs were required to be registered with the BSR by 1 October 2023 and all new HRBs will need to be registered following practical completion.

Beyond the registration requirements of HRBs, the new regulatory regime for the occupation phase is expected to come into force in readiness for BSR scrutiny of occupied HRBs and ahead of the 'calling-in' process and assessment of HRBs in April 2024.

Duty Holder and Competency Regime during design and construction

The newly-published secondary legislation establishes various new roles for duty-holders, namely the client, the principal designer, principal contractor, designers and contractors, as part of the need to improve accountability across the built-environment sector as a whole. The duty holders are familiar since the provisions are modelled on the CDM Regulations 2015. For example, the client is the person for whom a project is carried out and who, as developer, instructs the designers and contractors to perform services / works.

However, under the new regulatory environment, such duty-holders:

- adopt new roles and duties around the planning, managing and monitoring of work undertaken, with the focus on ensuring that works comply with the Building Regulations, including a duty to co-operate with one another to ensure that the works comply with the relevant requirements;
- hold new competency requirements, including obligations to take reasonable steps to satisfy themselves that, before appointing other parties to undertake work, they ensure that such other parties have the necessary competence to perform such work; and
- issue compliance declarations at completion of construction confirming that:
 - in the case of the client, to the best of the client's knowledge, the work complies with all applicable requirements of the Building Regulations;
 - in the case of the principal designer, they have fulfilled their duties as principal designer under the Building Regulations; and
 - in the case of the principal contractor, they have fulfilled their duties as principal designer under the Building Regulations.

This applies to all building works being carried out and not just works related to HRBs, although there are additional responsibilities where HRBs are involved. For instance, for HRB work, the client will also need to question and document the steps taken to determine whether, in the previous 5 years, the principal designer and principal contractor have any serious sanctions against them and whether previous misconduct affects their competence to perform the relevant works.

Those clients procuring HRB's must therefore ensure that adequate arrangements are in place to comply with the new duty holder and competency regime.

This will include:

- checking that those involved in the projects have the necessary competence;
- documenting and recording the steps taken to check previous experience and any past misconduct of the relevant principal designer and principal contractor prior to appointment;
- making arrangements for the golden thread facility; and
- signing a competence declaration as part of the building control application at Gateway 2 to confirm the steps taken to satisfy themselves as to the competence of their relevant appointees.

Commencement of Gateways Two and Three for HRBs

Transitional Provisions

The extent to which the existing or new regime shall apply depends on the relevant circumstances but, broadly, the transitional provisions shall apply as follows:

	Existing regime applies	New regime (including the Gateway process) applies
Initial notice submitted or full plans deposited (and accepted) before 1 October 2023. Works 'sufficiently progressed' by 6 April 2024.	Yes (so long as any approved inspector on the project is registered as a new building control approver by 6 April 2024).	No but once the works are completed, the 'Accountable Person' will need to comply with the relevant duties in occupation under the new regime under the BSA. An 'Accountable Person' is a new duty holder in the occupation phase of an HRB who: (i) holds a legal estate in possession in any part of the common parts of the relevant building; or (ii) does not hold such legal estate but is under a repairing obligation in relation to any part of the common parts of the building. This will usually be the owner or the landlord or an organisation or individual who has the responsibility to repair the common parts or structure and exterior of the building.
Initial notice not submitted or full plans not deposited (and accepted) before 1 October 2023	No.	Yes.

	Existing regime applies	New regime (including the Gateway process) applies
Initial notice submitted or full plans deposited (and accepted) before 1 October 2023.	No.	Yes.
Works not 'sufficiently progressed' by 6 April 2024.		Provisions within the regulations to enable project to be transferred to the BSR.

What does 'sufficiently progressed' mean?

For the construction of HRBs, 'sufficiently progressed' means the placement of: (i) foundations (trench, pad or raft); or (ii) piling. Where there are multiple buildings on a site, this will apply to each individual building being constructed.

Building Control

Under the BSA, building control will become a registered profession, with the private sector Approved Inspector role being replaced by a registered Building Control Approver. Where the private sector is acting as building control, a further requirement is that the Building Control Approver must have registered as such by 6 April 2024.

A further new role of Registered Building Inspector role has also been created, with such inspectors being responsible for advising local building control authorities (including the BSR) and the registered Building Control Approvers.



Gateway Process

The new procedures for the design and construction of HRBs involve 3 gateways.

Gateway 1 (Planning) has been in force since 1 August 2021 and requires those applying for planning permission of HRBs to demonstrate that fire safety has been considered (including details of emergency access) by submitting a fire statement at planning stage.

The health and safety executive is a statutory consultee at Gateway 1.

Gateway 2 applies pre-construction, and Gateway 3 applies pre-completion and occupation of an HRB. Relevant Government guidance aims to guide clients through the building control application for HRBs.

Gateway Two

Prior to construction, relevant parties must submit a building control application to the BSR, with the BSR response being 12 weeks (8 weeks for a refurbishment of an existing HRB) from application (subject to any agreement to extend).

Application Inclusions

Any such applications must include information such as:

- competence declaration signed by the relevant client;
 - This confirms client satisfaction that the principal designer and principal contractor are competent and records steps taken to be satisfied of such parties' competence; including checking on their past conduct.
- fire and emergency file;
 - This details the approach taken on building safety risk relating to the spread of fire and structural failure, and the assumptions made behind the designs. This also includes: (i) requirements for the fire and rescue services regarding access to the building and water supply; (ii) a report of how the compliance with the building regulations relating to fire spread and structural failure will be achieved; and (iii) details of the likely characteristics and behaviours of residents and users when the building is in use.
- construction control plan;
 - This describes the strategies that the client has adopted for managing and monitoring building work to maintain building regulations compliance, including the: (i) arrangements that the client has put in place for maintaining the golden thread information; (ii) strategies, policies and procedures in place to review the competencies of those involved in carrying out the work or design (including procedures followed to determine whether a serious sanction or past behaviour might call into question the suitability of the duty holder); (iii) policies and procedures in place to ensure co-operation between duty holders; (iv) details of the appointments made; and (v)

arrangements to review the construction control plan;

- change control plan;
 - This will show the strategies, policies and procedures that the client has adopted to ensure controlled changes are dealt with appropriately, including: (i) how the changes are identified and considered; (ii) how the changes will be recorded and logged; (iii) the procedure for identifying which changes would require BSR notification; and (iv) how the effectiveness of the plan will be updated;
- mandatory occurrence reporting plan;
 - This will describe the systems and procedures to be adopted for the mandatory reporting of safety occurrences during design and construction and the arrangements put in place to do so by the principal designer and principal contractor;
- Buildings Regulations Compliance Statement
 - This will show information from the principal designer and the principal contractor demonstrating how they: (i) intend to comply with their

duties; and (ii) will ensure that the relevant works will comply with the requirements of the Building Regulations and the reasons for adopting that approach. The appointment of the principal designer or principal contractor will therefore need to be in place before building control approval is sought; and

- Partial completion strategy (if appropriate)
 - This will explain any proposals for occupation of each part of the building to ensure compliance and the measures, strategies and policies in relation to the intended occupiers of the relevant part of the building, and their characteristics and behaviours, and intended management or maintenance of each part.

For work on existing HRBs, the required information will depend on:

- the extent of the work to be undertaken; and
- whether the work is category A (e.g. work which changes the height or width of the relevant building or number of floors of flats) or category B (i.e. any work that

is not category A). For category A work, similar information as for new HRBs will be required so competence declarations, construction control plan, change control plan, mandatory occurrence reporting plan, building regulations compliance statement, fire and emergency file and partial completion strategy. For category B work less detail is formally required, but fire safety design principles, concepts and standards to show compliance with Part B of the Building Regulations must be included, together with as much other information as the client considers appropriate.



BSR Assessment

Early dialogue between the relevant applicant and the BSR is encouraged prior to submission of a building control application to mitigate any delay to build plans, with two weeks' advance notice to the BSR prior to submission recommended.

Prior to the BSR's formal assessment of a relevant application, the BSR shall determine whether the relevant application is valid and shall consider whether all relevant information has been provided. Where an application is invalid, the BSR will notify the applicant and include the steps that need to be taken prior to a re-application. This validation process is intended to facilitate the building control approval process but the extent to which this will shorten the relevant time frame for BSR approval remains to be seen.

Following that process, the BSR must either approve (with or without conditions) or reject the building control application. If the BSR fails to respond within the required timeframe or any agreed extension of the time limit, the BSA introduces a new procedure allowing an applicant to opt to apply (within six weeks) to use the non-determination procedure to secure a decision from the Secretary of State. The applicant

should give the BSR 2 working days' notice of the intention to apply to the Secretary of State. Where the applicant has not applied to use the non-determination procedure, there will be a deemed BSR refusal.

In addition, the BSR requires:

- five working days' notice of the intention to start construction and an anticipated start date;
- notice not more than 5 working days after work is deemed commenced, that work has commenced; and
- during the construction process:
 - a record of all controlled changes (recordable, notifiable and major) to be kept, as there will be strong BSR oversight of the change control process for HRBs; and
 - any major changes, such as changes in the height, layout of the building, evacuation routes, cladding, insulation and fire breaks or the introduction of large panel systems, to be subject to BSR approval, with such approval taking up to six weeks.

Golden Thread Information

This is essentially information about the relevant building to enable those managing it to understand the design intent and how that information is managed so as to enable the operation and maintenance of the building once in occupation during its life-cycle.

The client must establish the facility and systems for the golden thread information but with others' assistance.

The golden thread information must be: (i) kept in electronic form; (ii) capable of being transferred electronically; (iii) accurate and up to date; (iv) available in readable format; (v) capable of being transferred electronically without any data corruption; and (vi) secure from unauthorised access. Guidance around the categories and specific information that needs to be stored in the golden thread is promised by Government.

The client must upload details of the design submitted to the BSR to the facility before construction begins, together with the relevant fire statements submitted at Gateway 1 and building control approval applications. In addition, the golden thread will need to be updated with building control approvals, change control documents, compliance declarations, any mandatory occurrence report, completion certificate applications and the completion certificate as construction progresses.

There are exemptions from the golden thread requirements for existing HRBs for: (i) emergency work; (ii) work of a minor nature specified in the regulations; and (iii) work under self-certification schemes.

Change control

As noted above, during construction, the new regime sets out a new change-control process for notifiable, recordable and major changes.

Notifiable changes include such matters as changes to the: (i) construction control plan; (ii) change control plan; or (iii) layouts of residential units, which cannot be carried out until the BSR has been notified of the change. Once the BSR has been notified, the notifiable change can be carried out.

Major changes include: (i) material change of use; (ii) change to carpark arrangements; (iii) increases in height or width of the building or the numbers of storeys; (iv) change to structural design or loading or the number or width of staircases; and (v) changes to the external wall, fire safety measures or construction

products which have a lower fire classification. Securing BSR approval for a major change will require a change control application and the collation and submission of prescribed documentation. The time period for BSR determination for a major change is set at 6 weeks. Given the additional scrutiny by the BSR and the time impact for major changes, it is likely that design will need to be significantly advanced before a HRB building goes through the gateway process.

Any other change will be a recordable change. These do not need to be notified to the BSR but all changes will need to be recorded in the change control log by the principal contractor. This log must be sent to the BSR as part of the application for completion.

Mandatory occurrence reporting

The principal designer and principal contractor need to establish a system to enable reporting of safety occurrences and maintain that system throughout the construction phase.



Gateway Three

Application Process

Completion of the building requires BSR sign-off following the application for a completion certificate. The timeframe for BSR approval is 8 weeks. Owners and developers of purpose-built student accommodation in particular will need to factor in the elongated approvals process to the construction programme given the need for student accommodation to be ready for occupation prior to the start of the relevant academic year.

As with applications for building control approval at Gateway 2 and applications for major changes, various documents will need to be provided to the BSR for Gateway 3. The client must also provide compliance declarations and a statement confirming that the specified golden thread information and fire safety information (known as the BFLO information) has been handed over to the relevant person. For purpose-built student accommodation, build to rent and co-living projects the relevant person will be the Accountable Person under the BSA. Where the building falls outside the scope of a HRB in occupation, the relevant person is

the Responsible Person with control over the premises who assumes fire safety duties under the Regulatory Reform (Fire Safety) Order 2005, so the owner, landlord, building manager, or managing agent. Those relevant persons will also need to confirm that they have received and can access the information provided.

It is an offence for a new HRB to be occupied without BSR sign-off and the issue of a completion certificate granted for the HRB under the BSA. Without such completion certificate, the relevant HRB cannot be legally occupied or registered.

Post-Application

Once the BSR decision has been obtained and Gateway Three has been satisfied, the 'Accountable Person' or, where there is more than one 'Accountable Person', the 'Principal Accountable Person' (PAP), will be required to register the building with the BSR prior to any occupation, unless the building is a care home or hospital when the occupied building is not considered to be an HRB. We understand that the BSR registration process may take up to 15 working days although that is not included in any secondary legislation.

For new HRBs, this time-frame may be reduced in practice since the BSR will have had sight of all relevant documentation prior to the issue of a Completion Certificate, but this will be a particularly important factor for those involved in purpose-built student accommodation.

The PAP or the 'Accountable Person' will then have responsibility for complying with the 'in-occupation' duties in terms of management of building safety going forward. While the duties in occupation can be delegated to managing agents or operators, compliance with the statutory duties will remain with the PAP or Accountable Person.



Registering existing buildings

It is now an offence for an HRB to be occupied without being registered under the BSA. This offence will be committed by the PAP, punishable by fine or imprisonment. Where the offence is committed by a corporate body with the 'consent or connivance of a director, manager, secretary or other similar officer' of that corporate body, or is attributable to their neglect, that person will be liable to be prosecuted as well as the corporate body. It is anticipated that the BSR will take a proportionate approach so that warning notices etc. would be issued prior to prosecution except where the law is being deliberately flouted.

It is the PAP's responsibility to register a HRB online and to provide the BSR with the necessary key building information. In order to help PAPs and those who are responsible for the management of HRBs, the Government has published guidance on the criteria that are used to determine whether an occupied building constitutes an HRB.

In-occupation duties

Once an HRB has been registered, other in-occupation duties need to be considered, such as:

- continuous assessment and management of building safety risks using safety management systems;
- preparation of safety case reports;
- compliance with mandatory occurrence reporting;
- operation of a residents' engagement strategy and a complaints handling procedure; and
- updating of the golden thread information.

Recent draft secondary legislation (i.e. The Higher-Risk Buildings (Keeping and Provision of Information etc.) (England) Regulations 2023) outlines the required information that must be stored in the golden thread during occupation, such as:

- registration information for the building and key building information;
- completion certificate application and certificate (and any partial completion application and certificate);
- building assessment application and certificate (and any refusal);
- information required under the Fire Safety (England) Regulations;
- a list of fire safety management measures information and where those measures are located in the building;
- evacuation strategy;
- information and documents relating to structural safety and structural risks, such as structural safety measures in the building (i.e. those items that put in place to prevent or reduce the severity of any structural failure in the relevant building);
- schedule of planned maintenance and repairs to equipment, device or materials and latest reports on any inspections made for building safety risks;
- information relating to mandatory occurrence reporting;
- building safety risk assessments;
- safety case report, record a maintenance undertaken to equipment, devices or materials;
- contravention notices;
- resident engagement strategy and other information provided to residents and owners of residential units; and
- summary of any complaints.

Second staircase

Running alongside the provisions in the BSA and other secondary legislation are the proposals to mandate a second staircase on all new residential buildings over 18 metres, rather than the 30 - metre threshold previously proposed.

This rule will not come into effect for 30 months from the publication of the revised Approved Document B which will confirm the change. During that transition period, new residential developments over 18 metres will be able either to conform to the new Approved guidance which when published will require a second staircase, or to follow the current guidance in Approved Document B which does not mandate a second staircase. For applications for developments made in the transitional period using the current guidance, construction will need to have 'sufficiently progressed' by the end of the 30-month period, failing which a new application will need to

be made. 'Sufficiently progressed' in this context will mean the pouring of concrete for the: (i) permanent placement of trench, pad or raft foundations; or (ii) commencement of permanent placement of piling. When those 30 months have elapsed, all applications will need to conform to the new guidance.

It remains unclear when revised Approved Document B will be published but the BSR is working to agree these revised design details and further Government announcements are expected in the near future.

While the detail around this remains to be confirmed, we anticipate that the second staircase rule will apply to all HRB's, for consistency with the BSA and the 18 metres height threshold. In the meantime, the previously anticipated requirement for buildings of 30 metres is already in effect in London.

Policy Considerations

One matter that deserves a watching brief are those buildings that are excluded from being categorised as HRBs. These include prisons and other secure residential institutions, barracks for armed forces and hotels. We anticipate that these were excluded due to policy implications affecting government buildings and also the hotel sector, for various reasons and presumably following industry consultation. Given recent public building closures due to reinforced autoclaved aerated concrete (RAAC) and also that fire safety continues to be an overriding policy objective, it is conceivable that these exclusions are reviewed at some point.

In the meantime, we are cautious that hotels are not exhaustively defined and that there needs to be careful consideration whether a building is categorised as such and excluded – or whether a building is in fact an HRB, for instance in respect of serviced accommodation or any short-term residential letting.

Finally, we are also alert to adverse consequences of the new regime. While the industry is undoubtedly fully supportive of enhanced fire safety, there is evidence that we are seeing

that there is reluctance by some industry participants to assume new duty holder roles and the impact of the regime in terms of compliance is being assessed in terms of time and cost, as well as decisions whether to participate in HRBs. That needs to be carefully monitored and industry continue to have open and constructive dialogue to manage the transition and also to meet complementary policy objectives on delivering new housing.

Final Comments

Both industry and government are now working hard to understand adequately and implement the new statutory regime.

Key takeaways are:

- 1.** The new building control regime and enhanced scrutiny by the BSR for HRBs undoubtedly now requires greater clarity at the outset for those involved in the construction process. The approvals process at Gateways 2 and 3, major changes and the registration requirements of HRBs, will need to be factored into transaction timetables and building programmes. Without the necessary approvals from the BSR, an HRB

cannot be occupied. This will be of importance to all HRB developments but particularly those that are sensitive to delay, such as student accommodation.

2. Timely engagement with the BSR ahead of the building application process will be essential since the failure to: (i) issue relevant information on time; (ii) issue the correct notices; or (iii) notify and record major changes, is likely to lead to delays in securing the necessary permissions,

approvals and certificates.

3. Any clients acquiring existing HRBs or newly built HRBs will need to undertake thorough legal and technical due diligence. This will include confirming the registration details of the HRB and establishing that the Golden Thread information and any other required information is complete, has been handed over to the Accountable Person or the Responsible Person under the FSO and is being properly maintained.

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