

# The Building Safety Act 2022

The Gateway process and its effect on  
purpose built student accommodation  
and co-living buildings

December 2022

**Following receipt of Royal Assent for the Building Safety Act 2022 (BSA) on 28 April 2022, the government has been working through its programme of related secondary legislation. As part of this various consultations were organised, including one on the proposed Gateway regime for the design and construction of higher-risk buildings.**

**Following the recent closure of these consultations, the government's full response on this and other proposals should be released by the end of the year.**



## The story so far

**It's understood that the government's original intention had been for the Gateway process to be in place between April-October 2023. Whether that'll change remains to be seen.**

In the meantime, the Health and Safety Executive's (HSE) operational timetable has been updated to provide that from 1 October 2023:

- the Building Safety Regulator (BSR) will become the new building control authority for higher-risk buildings
- developers will need to apply to the BSR for building control approvals both before commencement of any works on and during the design and construction of higher-risk buildings.

It's understood that the BSR shall scrutinise those applications using three Gateways:

- **Gateway one (Planning) (in force as of 1 August 2022):** This requires any planning applications for buildings in scope to be accompanied by a 'fire statement'. This is a statement given by the developer setting out relevant building information and the fire safety aspects and precautions of the development.
- **Gateways two and three:** These are stop/go points during the building control stage that have to be passed before a higher-risk building can proceed to construction (Gateway two) or completion and final inspection/sign off by building control before occupation is permitted (Gateway three).

## What are higher-risk buildings?

**Higher-risk buildings are expected to be defined as buildings of at least 18 metres (seven storeys) which either:**

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

Various exclusions to the above are also expected. These are likely to include secure residential institutions, temporary leisure establishments (eg hotels) and military premises.

It's also likely that the scope of the higher-risk buildings definition may be widened by the Secretary of State should the need arise.

## Commencement of Gateways two and three

### **Proposed transitional provisions**

Proposed transitional provisions within the 'Consultation on implementing the new building control regime for higher-risk buildings and wider changes to the building regulations for all buildings' provide for a six-month transitional period from the existing regime to the new regime. It's understood that whether the new regime shall apply to any higher-risk individual building within a development shall be determined in accordance with the table opposite.

### **What does commencement of work mean?**

It's understood that a definition of commencement of work won't be marked by elements such as excavation of strip or trench foundations or piling work. Instead, a more prescriptive definition is likely to be used, including, for instance the 'completion of the substructure of a building up to and including the foundations and basement levels' and/or the installation of the 'ground floor structure'.

	<b>Existing regime applies</b>	<b>New regime (including the Gateway process) applies</b>
<p>1. Initial notice submitted or full plans deposited before commencement of the new regime (such date expected to be between April-October 2023)</p> <p>and</p> <p>2. Works commenced within six months of this date (ie the transitional period).</p>	Yes.	<p>No but once completed, the 'Accountable Person' will need to comply with the relevant duties in occupation under the new regime under the BSA.</p> <p>For the avoidance of doubt, an 'Accountable Person' is a new duty holder in the occupation phase of a higher-risk building 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.</p>
<p>Initial notice not submitted or full plans not deposited before commencement of the new regime (such date expected to be between April-October 2023).</p>	No.	Yes.
<p>1. Initial notice submitted or full plans deposited before commencement of the new regime (such date expected to be between April-October 2023)</p> <p>and</p> <p>2. Works not commenced within six months of this date (ie the transitional period).</p>	No.	<p>Yes.</p> <p>Plans previously submitted must be transferred to the BSR. These shall not be reassessed but the BSR may require further information.</p> <p>The BSR may not refuse the application but could inform the developer that a completion certificate will not be issued.</p> <p>The works cannot commence until a prescribed period is passed and all original plans and additional information are provided.</p>

# Time implications of the new Gateway process

## Gateway two

The time limit for a BSR decision is proposed to be 12 weeks (eight weeks for a refurbishment) from application, subject to agreement to extend that period if required.

If the BSR fails to respond to an application, a new procedure is introduced under Section 30A of the Building Act 1984 where an applicant may opt to apply (within six weeks) to use the non-determination procedure to secure a decision from the Secretary of State.

Where the BSR fails to reach a decision within 12 weeks and the applicant has not applied to use the non-determination procedure, the proposal is that there will be a deemed BSR refusal.

This is intended to ensure that building approval applications that have not been appropriately scrutinised are not 'approved by default'.

Please note that it's been advised that early dialogue with the BSR is encouraged prior to submission of

a building control application so that the new Gateway doesn't slow down build plans, with two weeks' advance notice prior to submission also recommended.

## Gateway three

The current procedure for completion generally requires local authority building control or private approved inspectors to undertake final inspections and issue a completion certificate/final certificate once satisfied.

It's understood that this shall be replaced by Gateway three, with a BSR completion certificate being issued upon BSR approval of an application, without which the relevant higher-risk building can't be occupied.

The proposal is that the completion certificate application shall be made once the building is complete so that the assessment of the higher-risk building is as-built rather than as-designed.

The application process shall be as described for Gateway two above. Once the BSR decision has been obtained and Gateway three has been satisfied, the 'Accountable Person' (see above) or, where there's more than one 'Accountable Person', the 'Principal Accountable Person', will be required to register the building in accordance with the BSA prior to any occupation.

The 'Principal Accountable Person' is the 'Accountable Person' holding overall responsibility for the structure and exterior of the relevant building going forward.

Given the anticipated timeframe for obtaining a BSR Gateway three decision (which could take up to 12 weeks from the date of application) and the subsequent requirement for building registration, this may impact on, for instance, the ability of a purpose built student accommodation building to be occupied at the commencement of a relevant academic year notwithstanding that: (i) practical completion may have occurred; and (ii) the relevant building may be ready for occupation.



## What documents are required?

### Gateway two

It's understood that any application will need to be accompanied by a number of prescribed documents, including a:

- competence declaration
- fire and emergency file
- construction control plan
- change control plan
- description of the mandatory occurrence reporting framework.

It's also been proposed that:

- five days' notice to the BSR of commencement of construction will be required prior to any works occurring
- during the construction process:
  - a record of all controlled changes will need to be kept, as there'll be strong BSR oversight of the change control process for higher-risk buildings
  - 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 will require BSR approval before the change can take place, with such approval taking up to six weeks.

### Gateway three

As for Gateway two, it's understood that certain prescribed documents will be required by the BSR from the developer including:

- updated plans
- as-built drawings
- a developer golden thread statement confirming that the golden thread information (as required under the BSA) has been handed over to the relevant person (either the Responsible Person under the Regulatory Reform (Fire Safety) Order 2005 or the Accountable Person under the BSA)
- compliance declarations from the developer, principal designer and principal contractor.

## Conclusion

Although the precise timings of the introduction of the new building control regime and enhanced scrutiny by the BSR for higher-risk buildings in England remain unknown, it's clear that the new regime will be coming into force imminently.

It's crucial for the industry to prepare itself for these changes, which represent the biggest change to building safety in 40 years.

For more information, please get in touch.

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