



The Building Safety Act 2022's new gateway regime for the construction of higher risk buildings in England: What do lenders need to know?

The long-awaited regulations in respect of the Building Safety Act 2022 (the “**Act**”), which introduce new steps for (a) the construction of new “higher risk buildings” and (b) the carrying out of works to existing “higher risk buildings”, are now – following the enactment of the latest package of secondary legislation – in force as of 1 October 2023.

The regulations introduce a new “gateway regime”; in essence, this requires the approval of the Building Safety Regulator (the “**Regulator**”) to be obtained at three “gateway stages” with the aim of ensuring that due consideration is given to building safety risks at each stage. In this article, we explore the requirements of each “gateway” and discuss some of the practical issues lenders should consider when financing the development of a new higher risk building.

So, first things first – what constitutes a “higher risk building”?

The “gateway regime” applies to buildings that are deemed to be “higher risk buildings” according to the Act. During the design and construction phase, a “higher risk building” is a building which:

- (a) is at least 18m in height; or
- (b) has at least seven storeys,

and contains at least two residential units, is a care home or is a hospital.

Hotels, military barracks, secure residential institutions and buildings containing Ministry of Defence accommodation are excluded from the definition of “higher risk buildings”; however, buildings which are used partially for any such excluded use – but which otherwise meet the criteria for a “higher risk building” – will qualify as a “higher risk building”.

What is the “Gateway Regime”?

The new procedures for the design and construction of “higher risk buildings” are collectively known as the “gateway regime” because of the three approval points where Regulator sign-off is required in order to progress to the next stage of the development. The approval points are:

Gateway 1 – Planning

Gateway 1 has been in force since 1 August 2021 – in short, it requires those applying for planning permission to demonstrate that fire safety matters have been taken into account at the planning stage. A fire statement (in the prescribed form) must, therefore, be submitted alongside any application for planning permission – this is to provide (amongst other things) an outline of the principles/approach to fire safety that have been applied to the building which is the subject of the application for planning permission, the details of the emergency vehicle access for such building and the details of any consultation(s) undertaken on issues relating to fire safety.

Gateway 2 – Pre-Construction

Gateway 2 requires the person for whom the construction work is being carried out (the “**Client**”) to submit to the Regulator a building control application which demonstrates that the works will comply with all applicable requirements of the building regulations. Detailed information – including a description of the works (accompanied by detailed plans), a construction control plan describing how building safety will be maintained during construction, a fire and emergency file, together with a written statement in respect of compliance with building regulations and a declaration in respect of the competence of the principal contractor and the principal designer are required to be submitted alongside the building control application.

Within 12 weeks (eight weeks where works are to an existing higher risk building) of the date of submission of the application, the Regulator must either: (a) approve (on an unconditional basis, or subject to certain conditions being fulfilled – if the latter, any such conditions must be satisfied before any works commence); or (b) reject the building control application; if the application is rejected, reasons must be provided by the Regulator.

It is important to note that Gateway 2 is a “hard stop” and construction work cannot commence before building control approval is granted.

Gateway 3 – Completion

With a view to ensuring that the building is safe for occupation, Gateway 3 requires the Client to apply to the Regulator for a completion certificate once the works have been completed and before the building is occupied. This requires the Client to hand over various documents, including “to-scale” plans of the building and documents demonstrating that the requirements of the building regulations have been met. The Regulator has eight weeks to determine the application, and an inspection will be carried out before approval is given. Once a completion application has been submitted and approval received, the Client is then required to apply to register the building with the Regulator. It is an offence for a “higher-risk building” (or part thereof) to be occupied before:



(a) a completion certificate has been granted for the building or the relevant part; and (b) the building has been registered (with breaches of such requirements punishable by fine or imprisonment).

Who is responsible for obtaining the various approvals from the Regulator?

The Client is responsible for obtaining the approval of the Regulator at each gateway stage; however, the Client is not the sole party responsible for compliance with the new regime. The regulations establish a new “dutyholder” regime which places specific legal obligations on each “dutyholder” (which includes the client, designers, contractors, the principal contractor and the principal designer) and each has specific legal obligations (including contributing to the “Golden Thread”¹).

Implications for Lenders

From an operational and compliance perspective, the requirements imposed by the new gateway regime present significant challenges for the construction industry and wider real estate sector. Some key issues for a lender lending against a “higher risk building” in a development financing context are as follows:

1. Dutyholders of new “higher risk buildings” are required to maintain a digital “Golden Thread” of information relating to the fire safety of the building. The required documents include all the approved documents from Gateways 1 and 2, the change control log, any notified changes in the principal contractor or principal designer and a draft Gateway 3 application.

- > **Due Diligence** – Establishing present and future compliance (depending on the stage of development) with the regime and wider requirements of the Act will be essential, and thorough legal and technical due diligence should be undertaken. For very early-stage projects, key development documents such as the specification, programme and cost forecasts should be scrutinised to ensure the requirements of the regime are met and associated constraints in relation to time and the costs of preparing and submitting each application have been duly considered. Lenders would also be well advised to instruct a technical review of the “Golden Thread” information to ensure that the information is complete and is being properly maintained.
- > **Facility Agreement** – Depending on the stage of the development, it will be important to consider any bespoke representations, undertakings, warranties and conditions precedent/subsequent that might need to be included in a facility agreement as a result of the Act.
- > **Timing** – The transaction timetables and construction programmes should also factor in the approvals process at each gateway stage, and the expected length of time to receive a decision. The potential impact on programme is up-to twelve weeks at Gateway 2 and up-to eight weeks at Gateway 3. It will therefore be important to factor these timescales into the completion timetable, as the building cannot become an income producing asset until the completion certificate has been granted. This should be factored into the lender’s financial model.

While this is a new area of law and the market approach to funding the development of “higher risk buildings” remains to be established, it is important that lenders are fully aware of the risks posed by the new legislation and are comfortable that adequate steps have been taken and processes implemented to ensure that buildings being funded (along with borrowers) remain on the right side of the law.

Please contact the Linklaters UK Construction team if you would like to discuss any of the above and its implications.



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