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Midlands

Draft Building Safety Bill from a client, contractor and building control perspective

Introduction

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The potential implications of the *Draft Building Safety Bill* are wide-ranging across both the construction and property management sectors. This is one of a series of briefing notes produced by the Constructing Excellence Midlands Quality & Compliance group and focuses on the system of building control approval and certification from a client and contractor perspective.

Why

The Draft Bill was published on 20th July 2020. It is the Government's legislative response to the Grenfell Tower tragedy and the subsequent independent review of building regulations and fire safety conducted by Dame Judith Hackitt resulting in the *Building a Safer Future* publication on 17th May 2018.

When

At the time of writing there is no indication as to when the Draft Bill will be enacted, nor when each of the provisions of the Draft Bill will come into force. It is also noted that at the time of writing transitional provisions have yet to be developed.

The Draft Bill has initially been subject to scrutiny by the Housing, Communities and Local Government Select Committee who reported on 24th November 2020. The Draft Bill was broadly welcomed by the scrutiny committee however recommendations were made as to how the committee believes the Bill could be improved i.e. leaseholders should not be left to cover the costs of historical defects such as unsafe cladding, the definition of 'higher-risk' buildings to include buildings occupied by vulnerable people and the publication of a timetable for commencement of the new regime. The Government must now respond to these recommendations before proceeding with the Bill.

Where

It is noted the proposals are currently applicable to England, although the devolved Welsh Government have welcomed the Draft Bill and have stated they will legislate for it to apply (with some amendments) to Wales.

Of direct relevance to the building control sector is the establishment of the Building Safety Regulator (BSR), proposals to amend the Building Act 1984 (specifically providing a new regime for 'higher risk' buildings in both the design and construction phase) and requiring the registration of all building inspectors at an individual level in addition to building control approvers (currently known as Approved Inspectors).

Grenfell Tower wrapped in banners in June 2018

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What

The Building Safety Regulator

Part 2 of the Draft Bill establishes a new national Building Safety Regulator (BSR) which will sit within a new division of the Health & Safety Executive (HSE) with this role already established in shadow form.

Part 2 of the Draft Bill also defines the term 'building safety risk' as a risk to the safety of persons in and about buildings due to occurrence of a fire, structural failure or any other prescribed matter.

The Draft Bill allows the BSR to charge fees and recover costs from those it regulates under Parts 2 & 4 of the Draft Bill which follows on from one of the Hackitt Review recommendations i.e. the BSR should be funded by full cost recovery.

The Building Safety Regulator has three broad functions in respect of building safety risk.

1

Acting as the Building Control Authority for higher risk buildings and overseeing and enforcing the new regime in occupation for higher risk buildings. Currently an applicant can seek building regulation approval for building work from either an Approved Inspector or via the Local Authority. Under the proposed regime only the BSR can provide this approval for 'higher risk' buildings while the BSR will in addition have powers through the life of a 'higher risk' building. This includes the requirement for the BSR to issue a Building Assurance Certificate prior to occupation which does not currently exist in the current building control system.

2

Overseeing the performance of Building Control Bodies (both registered Building Control Approvers and Local Authorities) and advising on building standards. Currently the Construction Industry Council Approved Inspectors Register CICAIR oversee only private sector building control bodies including being responsible for assessing and licensing Approved Inspectors both at initial registration stage and then every five years with intermediate audits. CICAIR can also impose a range sanctions against Approved Inspectors due to upheld complaints or poor performance standards up to and including the removal of the license to act as an Approved Inspector. The proposed regime moves the overseeing role to the BSR and extends the role to overseeing public sector building control within local authorities with powers to place underperforming local authority units in 'special measures'. This role relates to the performance of building control bodies in respect of all building work and not just 'higher risk' buildings.

3

Assisting and encouraging competence across the industry. Establishing and setting strategic direction for the proposed industry-led competence committee. This is not specific to building control however – there will be competence standards required for building control in respect of mandatory registration of all practicing building inspectors as individuals (there is no current requirement for registration of individuals) together with bodies known as Building Control Approvers (currently known as Approved Inspectors and licensed by CICAIR as noted previously). Registration can be for all buildings or for specified building types only.

Which (buildings)

In Scope Buildings

It is interesting to note the term "high risk residential building" as referenced in the Hackitt Review has not been adopted in draft legislation. Instead the Secretary of State can prescribe 'higher risk' buildings to which the more stringent gateway regime will apply. The buildings included in the currently proposed definition are noted below, however the draft legislation creates a power for the Secretary of State to amend definitions.

A building which satisfies the height condition and contains:

- **Two or more dwellings (i.e. house, flat or serviced apartment)**
- **Two or more rooms for residential purposes (e.g. supported accommodation), or**
- **Student accommodation.**

A room for residential purposes excludes rooms in a residential care home, secure residential accommodation (e.g. prisons, detention centres) and temporary accommodation (e.g. hotel, hostel, guest house, hospice, hospital)

– The height condition is satisfied with the floor surface of the top storey being more than 18m above ground (excluding any storey consisting only of plant or machinery) OR a building that contains more than 6 storeys. (ignoring any basement storeys).

How

Gateway 1

Current

Proposed

Gateway Points

The proposal is that that Gateway Points are applicable to higher risk buildings.

In terms of the process for obtaining building regulations approval and building 'sign-off' (Final Certificates) this element of the Draft Bill is of significance to the wider construction sector as in addition to the power to approve and 'sign-off' higher risk buildings being transferred to the BSR the proposed system requires demonstration of safe designs prior to commencing work and of completed buildings being constructed in accordance with approved designs rather than the current system of depositing Initial Notices or applications for approval to the local authority and then notifying Building Control Bodies of occupation and/or completion. It is proposed that these responsibilities are aligned with the Construction (Design & Management) Regulations 2015, notably the principal designer and the principal contractor roles.

A comparison of current and proposed systems follows.

Planning stage – no current requirements in respect of considering structural and fire safety matters.

Proposed Planning Gateway 1
A fire statement to be submitted to the BSR is a Statutory Consultee.

Commencement stage – the current requirement is to submit an Initial Notice at least five days prior to commencing or a Building Notice or Full Plans Application at least 48 hours prior to works commencing (there is no legal requirement for proposals to be approved prior to commencing work).

Proposed Gateway 2
is a 'Hard Stop' with approval by the BSR required prior to commencing work (i.e. relevant to building safety risk fire, structural failure and any other prescribed matter).

Completion stage – current requirement is to notify the Building Control Body prior to occupation or completion. Occupied buildings then come under the jurisdiction of the Fire Authority via the Regulatory Reform (Fire Safety) Order 2005 although for dwellings / apartments this is limited to common and landlord areas. The local authority does have powers under the Housing Act 2004, however fire is one of 29 hazards to be considered. There is no requirement for any approval or certificate from an Approved Inspector, local authority or fire authority prior to occupation.

Proposed Gateway 3
Final Certificate required from BSR with the requirement to demonstrate that works comply with building regulations and a requirement to provide as built drawings and information on how any relevant fire safety systems should be operated and maintained (The Golden Thread). All higher risk occupied buildings both new and existing then require a Building Assurance Certificate from BSR.

This contrasts with the current Regulation 38 Fire Safety Information which states the following, however is not a prerequisite prior to occupation of a building:

(2) The person carrying out the work shall give fire safety information to the responsible person not later than the date of completion of the work, or the date of occupation of the building or extension, whichever is the earlier.

(3) In this regulation—

(a) "fire safety information" means information relating to the design and construction of the building or extension, and the services, fittings and equipment provided in or in connection with the building or extension which will assist the responsible person to operate and maintain the building or extension with reasonable safety;

It is also worth noting that punitive sanctions can be imposed for even procedural contraventions of the regulations (i.e. commencing work or occupying a building without approval from the BSR even if no risk is identified).

The Draft Bill proposes sanctions of imprisonment for up to 12 months on summary convictions or up to two years indictment, or a fine, or both for failing to comply with stop notices and compliance notices. The same level of sanctions can be imposed for providing misleading information to the BSR.

Fines can also be imposed for obstructing an authorised officer of the BSR or impersonating an authorised officer of the BSR.

It is also worth noting there is an increase of time-limits for enforcement of non-compliance with building regulations (s35/s36 of the Building Act 1984) from two years to ten years in respect of prosecutions for contravention of the Regulations and from one year to ten years in respect of the requirement to correct non-compliant work.

What you need to know from a Client's perspective

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 April 2021

Client duties

Pre-Construction & Construction

Make suitable arrangements for managing building work to deliver compliance with building regulations, including allocating sufficient time and resource.

Appoint a Principal Designer and Principal Contractor in accordance with CDM requirements, if there is more than one contractor working on the building project.

Take reasonable steps to ensure that those they appoint comply with their responsibilities in relation to building safety.

At Gateway two the client will be required to submit key information to the Building Safety Regulator demonstrating how they are complying with building regulations and demonstrating that they are managing building safety risks. Key information will include:

- **Full Plans**, as defined under the Building Regulations 2010;
- **Construction Control Plan**, describing how building safety and Building Regulations compliance will be maintained during the construction phase, the framework for mandatory occurrence reporting, how information will be collated and managed to develop the golden thread, how competence of those appointed to work on the project will be assured, and how change will be controlled and recorded;
- **Fire and Emergency File**, which builds upon the fire statement produced at Planning Gateway one (where produced) and sets out the key building safety information;
- A **signed declaration** that they are content the Principal Designer and Principal Contractor have the necessary skills, knowledge, experiences and behaviours, with evidence of their assessment process;
- The **relevant key dataset** (See paragraphs 47-49 on Golden Thread) and other supporting documentation that will help the Building Safety Regulator determine whether the application meets the building regulations requirements and that the duty holder has sufficiently demonstrated that they will manage building safety risks.
- A developer may wish to start occupation of the building before building work is complete. Developers should submit plans for partial occupation as part of the 'full plans' application submitted at Gateway two.

Ensure appropriate handover of information takes place between key duty holders;

Ensure that the regulatory requirements of the building regulations are met, including the requirements specific to buildings in scope;

Develop and maintain a golden thread of information that will enable building safety information to be available to other duty holders, during design and construction, to the Building Safety Regulator and later to the Accountable Person;

Establish reporting processes to support a mandatory occurrence reporting regime;

At Gateway three, the Client, Principal Designer and Principal Contractor will be required to produce and co-sign a final declaration confirming that to the best of their knowledge the building complies with building regulations.

Post-Handover (if Owner) – Accountable Person

Registering the building with the BSR and apply for a Building Assurance Certificate (BAC).

Ensuring the most recent issue of the BAC is displayed prominently in the building.

Appointing the Building Safety Manager (BSM) who must have the "organisational capability and relevant skills, knowledge, experience and behaviours" – and informing the BSR of this appointment.

An ongoing duty to assess the building's safety risks and to take reasonable steps to prevent, control the impact of a major incident.

Produce and maintain a Residents' Engagement Strategy, which will include information about where residents can access safety information and a complaints process.

Maintaining a Safety Case Report (see below) to demonstrate compliance with this ongoing duty.

Client Opportunities

Reduced risk to life (safer buildings)

Reduced risk to buildings

Better quality-built buildings

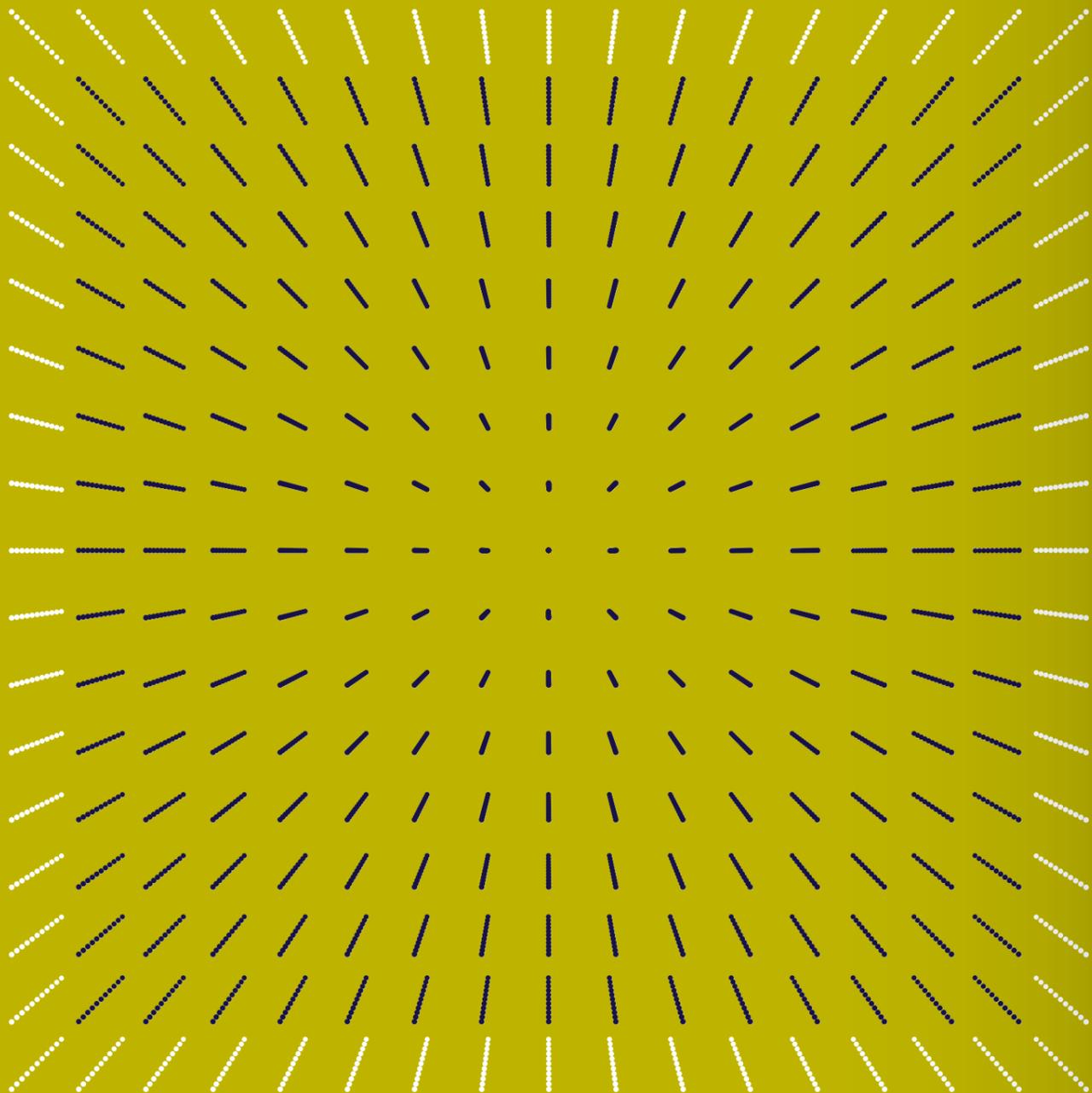
Client Challenges

Potential project programme increases (pre-construction/construction)

Potential increased costs, construction/professional services

Potential impacts to contract types (e.g. D&B etc)

What you need to know from a Principal Contractor's perspective



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Principal Contractor duties

Pre-Construction & Construction

- Plan, manage and monitor the construction phase and coordinate matters to ensure that the building project complies with building regulations

- Ensure cooperation between Contractors, Client and the Principal Designer

- Liaise with Principal Designer and share information relevant to the planning management and monitoring of the pre-construction phase

- Take reasonable steps to ensure contractors are meeting their core duties

- Assist the client in meeting the requirements of the building regulations, including those specific to buildings in scope

- Assist the Client and Principal Designer in developing and maintain the golden thread through the construction process

- Contribute to handover of golden thread to the Accountable Person, including relevant information provided as part of gateways

- At Gateway three, the Client, Principal Designer and Principal Contractor will be required to produce and co-sign a final declaration confirming that to the best of their knowledge the building complies with building regulations

Principal Contractor Opportunities

- Greater opportunity for Early Contractor Involvement (ECI)

- Reduced risk to life (safer buildings)

- Better quality buildings

- Reduced defects during construction, at handover and latent defects cost of poor quality work (circa £115k on average in-scope project)

- Driven to adopt BIM level 2 and COBie

- Better records of both works carried out and changes made and approved

Principal Contractor Challenges

- Fewer D&B projects due to the greater need for upfront design

- Involvement in preparing Construction Control Plan – new territory?

- Delayed project starts due to Gateway two requirements having to be satisfied prior to commencement

- Contractual obligation to satisfy Building Safety Regulator?

- Both demonstrating their own competence whilst testing and confirming competence of those they appoint

- PI issues for cover the production and co-signature of the final declaration of compliance with Building Regulations

- Delayed handovers due to Gateway three requirements having to be satisfied prior to handover

- More areas for disputes with the parties involved

- Less opportunity for Value Engineering (= profit?) on structural and fire elements



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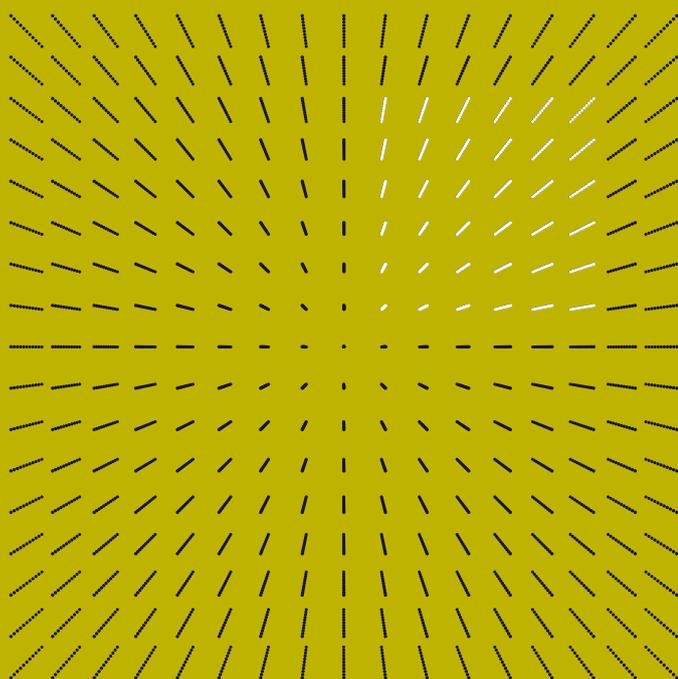
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