

## Legal changes in 2023: What should property developers be aware of?

### Generally

This section provides a high level overview of selected legal developments relevant to all developers:

#### Building Safety Act



Expect to see real focus on the Building Safety Act 2022 as more and more provisions are likely to come into force this year.

Changes to the Building Act and building regulations as well as new dutyholder and competence requirements will impact all projects.

The Act will particularly impact the development of buildings which are 18m or seven storeys or taller with two or more residential units. The new gateway provisions will have a material impact on overall programmes as periods for Regulator approval before start on site and occupation will need to be factored in. Developers should prepare for requests for additional information to be handed over at practical completion for these types of buildings. Owners of these types of building will also need to prepare to register them with the Regulator.

#### Net zero



The government's net zero target of 2050 is spurring a greater focus on sustainability in the real estate sector. Embedded and operational carbon reduction requires a re-think of the whole life cycle of the built environment from construction processes and supply chains to tenant use of buildings and, ultimately, demolition and refurbishment.

The concept of the circular economy will continue to drive sustainability practice. Development contracts (both funding and construction) and policies will need to be updated to reflect the changes in approach to both safety and insurance. This will also need to be costed into risk profiles. For example, where materials, particularly structural elements (such as steel girders), are re-used, there may be increased demands on safety testing, material integrity and insurance premiums.

#### Energy



The Energy Bill and the Energy Prices Act are currently making their way through Parliament. The former includes provisions relating to low-carbon heat schemes, heat networks and the energy performance of premises. The latter includes provisions to encourage the efficient use and supply of energy. More stringent energy performance delivery requirements might be expected in development and funding agreements with a greater focus on installation of new technologies in buildings to secure long-term energy efficiency.

There is also a broader theme of building resilience which is permeating the sector. On-site renewables and self-sufficiency of buildings require greater design input at earlier stages along with associated funding requirements and necessitate the documentation of ownership/operator arrangements.

#### EPCs/MEES



Since 1 April 2018, landlords of private rented non-domestic properties have been unable to grant a new tenancy in respect of a property with an EPC rating below E. From 1 April 2023, they will also not be able to continue to let the property without a "legitimate reason" as permitted by the MEES regulations.

The outcomes of various EPC related consultations are awaited. Two of these consultations are of particular interest and are likely to further increase the obligations on developers and landlords requiring capital expenditure and closer management of energy performance:

- a consultation into a performance-based metric for measuring energy use and carbon emissions in industrial and commercial buildings exceeding 1,000m<sup>2</sup>; and
- a consultation regarding the whole-life carbon impact of newly constructed buildings.

#### Nature based solutions



Nature based solutions offer new and innovative methods of carbon capture and storage, efficiencies in water usage, and protection from the effects of natural disaster. Consequently, these measures are informing the design, construction and use of new and refurbished buildings.

The requirement, under the Environment Act 2021, for new development to achieve at least 10% biodiversity net gain (expected to come into force in November 2023) is leading to the emergence of a new market for offsite biodiversity units, where such requirements cannot be met on site. The requirement will apply to development for which planning permission is granted (or deemed to be granted) under the TCPA 1990 and to NSIPs consented under the Planning Act 2008. The cash flows generated by the sale of such units by landowners and environment banks to developers have the potential to generate returns for natural capital investors, particularly if "stacked" alongside the income streams generated by other voluntary markets and environmental services. The introduction of mandatory biodiversity net gain will, it is estimated, generate annual demand for around 6,200 off-site biodiversity units. Defra are working with at least one private asset manager with the intention of ensuring that credits will be available.

## CE markings



Following Brexit a transitional period allowed products placed on the UK market to continue to bear CE marking until and including 31 December 2022.

The transitional period for construction products has been extended to 30 June 2025 which means that those products can continue to be placed and used in the UK avoiding a potential shortage of construction materials/products. After 30 June 2025 construction goods, materials and products will need to be assessed in accordance with UK standards and bear the new UK markings.

## Conservation covenants



Part 7 of the Environment Act came into force on 30 September 2022. This introduces the concept of conservation covenants, which will operate as local land charges to preserve conservation in respect of land to which they apply. Landowners and local authorities/specific organisations will be able to agree conservation covenants and, once in place, they will bind the landowner and their successors. Successors will inherit prior breaches of conservation covenants and remedies for breach include damages and injunctions.

Such covenants will exist in perpetuity on freehold land unless expressed otherwise (although they can be terminated by agreement) and certain covenants (i.e. biodiversity covenants) must last for at least 30 years. Defra has committed to publishing guidance on registration of local land charges for conservation covenants in early 2023.

## Building liability orders & structuring



The Building Safety Act introduced building liability orders in 2022. Building liability orders may make parent, sister or other related or associated companies or entities of an owner or developer liable for breaches of (i) the Defective Premises Act 1972, and/or (ii) s. 38 Building Act 1985 (which, when it is in force, will introduce civil liability for breach of the Building Act and associated regulations) and/or (iii) as a result of a risk to the safety of people in or about a building arising from the spread of fire or structural failure (a building safety risk), even though they had no involvement with the works/development in question.

Given the broad definition of building safety risk and breadth of work which the Building Act applies to, building liability orders may be applied for in relation to a wide spectrum of commercial, residential and industrial buildings. Organisations may also be ordered to disclose information about group structures to allow potential claimants to establish whether organisations are “associated”.

This should be considered when setting up future development structures; reviewing potential liabilities on existing developments; changing group structures and/or seeking to acquire an organisation involved with property development.

## Economic Crime Act



If an overseas entity wishes to acquire or dispose of certain legal interests in land that entity will have to register (or be registered) on a new Register of Overseas Entities (ROE) maintained by Companies House. Overseas entities that are registered at the Land Registry as owners of freehold land or registrable leasehold interests as a result of an application made since 1 January 1990 will need to be registered on the ROE by 31 January 2023.

Failure to register on the ROE when required carries criminal penalties and will fetter the entity's ability to deal with land within its ownership or register land it acquires. Registration is likely to be a pre-requisite to land transactions and suitable time for registration will need to be factored into transaction timetables. Diligence will also need to be carried out to identify whether an entity is registered and compliant with relevant duties under the Act (such as the annual duty to keep the register up to date).

## Building safety levy



The government is consulting (until 7 February 2023) on proposals for a “building safety levy” which will apply to new residential buildings. This is broadly defined and may include hotels, care homes and hospitals as well as flats and houses. Discussions are underway about whether BTR, purpose-built student accommodation and the older living sector will be subject to the levy. How much the levy will be and how it will be calculated is still to be settled – as is the inter-relationship with the Residential Property Developer Tax (RPDT).

The RPDT is a levy on the profits of companies carrying out activities in connection with the development of residential property. This includes companies who deal with, design, seek planning for, construct, adapt or manage any UK land provided they satisfy a “interest in land” test (having had or currently owning an interest in the relevant land). The levy, 4%, will be applied to residential development profits of a company (or group) that exceed an annual allowance of £25m. For further details [see our article](#).

## Construction documents



The publishers of standard form contracts (including the JCT, ACE and NEC) may publish new editions, or update sheets, in 2023 to take into account the Building Safety Act.

## Environmental targets



Draft legislation has been laid to implement new long-term environmental targets under the Environment Act 2021, this is anticipated to pass onto the statute books early in 2023. The regulations relate to setting targets for:

- increasing biodiversity on land (species abundance and habitat restoration/creation);
- increasing resource efficiency and waste reduction;
- improving air and water quality; and
- increasing woodland cover (through planting and associated biodiversity targets).

These targets (and provisions within the Environment Act 2021 generally) are likely to have varying degrees of impact on the development of land. For example, improving water quality includes a target for reducing nutrient pollution which in turn sits alongside separate proposals (under the Levelling Up and Regeneration Bill) to introduce a Nutrient Mitigation Scheme, which is intended to facilitate planning consent for sustainable new homes.

## The residential sector

In addition to those set out above the following will be of interest to those involved in the residential sector:

### Levelling Up and Regeneration



The Levelling Up and Regeneration Bill continues its passage through Parliament and is likely to make it onto statute books in 2023. The current proposals include:

- limiting CIL to Greater London and Wales, and introducing a new infrastructure levy;
- new information disclosure requirements relating to land transactions;
- piloting Community Land Auctions to ensure delivery of vital infrastructure; and
- reducing the amount of mitigation measures required to offset nutrient pollution.

Proposed mandatory housing targets have been removed from the remit of this Bill. The Government's policy paper indicates that additional actions will be taken including more devolved powers, changes to the National Planning Policy Framework and additional housebuilding schemes. For further detail [see our article](#).

### Permitted Development rights



The recent broadening of Permitted Development rights (resulting from a change to use classes) might increasingly be met with Article 4 directives at local level. A drop in income realised through section 106 contributions (and resultant impact on affordable housing), falling standards of housing and contribution to a failing high street (namely as a result of office to residential conversions) have been cited by some authorities as reasons to issue directives of this nature. This could see a redirecting of applications through the planning process.

### Medium-Rise Scheme



The pilot of the Medium-Rise Scheme (MRS) has been launched. It will provide funding for the remediation of unsafe external wall systems in certain residential buildings where the developer cannot be identified. Buildings between 11m and 18m in height will be eligible.

Initially the scheme will apply to 60 buildings that have been earmarked as priorities (e.g. due to materials used in the external wall structure). Funding will eventually be provided by the Building Safety Levy and the scheme will be expanded in 2023.

### Fire Safety



The Fire Safety (England) Regulations 2022 come into effect on 23 January 2023. They impose duties on Responsible Persons, in relation to fire safety in a residential building, which are additional to those required by the Regulatory Reform (Fire Safety) Order 2005.

Certain duties apply to all residential buildings whereas others specifically relate to buildings of a particular height. The duties relating to high rise buildings require Responsible Persons to provide information about the construction of external walls and the installation of wayfinding signage. Developers should expect to be engaged in procuring and sharing relevant information and installing relevant apparatus.

### CMA investigation



In a letter to the CMA, the Secretary of State for Levelling Up, Housing and Communities has asked for a market study of the housebuilding sector to be carried out to ensure the market is working in the interests of consumers.

The correspondence states that "the last housebuilding market study took place 14 years ago and since then, there have been significant changes in both the market and the challenges facing the country as a whole – such as net zero, changes to the structure of the market following the financial crisis and changing demographic trends."

### The Leasehold Reform (Ground Rent) Act 2022



From 1 April 2023 the Leasehold Reform (Ground Rent) Act 2022 will apply to long leases of retirement homes. The ground rent chargeable on such leases will be limited to one peppercorn per year and administration charges will be prohibited.

Since 30 June 2022 this limitation has applied to most other long residential leases (exceeding 21 years) granted for a premium from that date onwards.

The intention of the legislation as a whole is to address the granting by developers of leases with ground rent multipliers.

Amendments and extensions to the existing law on enfranchisement and leasehold extensions should be anticipated in 2023/24.

### Domestic EPCs/MEES



In its "Clean Growth Strategy" the government set out a commitment to the tightening of energy performance standards in the domestic private rented sector, with the aim of having as many homes as possible upgraded to EPC C or above by 2035, where "practical, cost-effective and affordable". This is also reflected in the Government Energy White Paper.

The Government has also consulted on proposals that by 2028, all domestic rented properties require an EPC rating of C or above and that any new tenancies must meet these new criteria from 2025. It is also proposed that penalty for not having a valid EPC will also be raised from £5,000 to £30,000 from 2025. For further details [see our article](#).

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