

## Insights

# BUILDING SAFETY GATEWAY REGIME – FREQUENTLY ASKED QUESTIONS

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One of the major changes to the regulation of the design and construction of “higher-risk buildings” is the introduction of the gateway regime.

This regime comprises a series of “hard stops” that a construction project will need to pass through in order to proceed to construction, completion and then occupation. The gateways are:

- Gateway 1 – Planning stage.
- Gateway 2 – Before building work starts.
- Gateway 3 – When building work is “completed” and before occupation.

Gateway 1 is already in force and government commentary suggests that gateways 2 and 3 will come into force in October 2023.

At the date of writing in March 2023, we await secondary legislation that will implement the regime for gateways 2 and 3 and government guidance as to how these regimes will work in practice. However, we can get a sense of how government intend these to operate from the consultation on changes to the building control regime (Consultation), which closed on 12 October 2022.

In this blog, we will take a look at some of the questions we are commonly asked as everyone prepares for the new regime.

## IS THE GATEWAY REGIME INTRODUCED BY THE BSA 2022?

No, not directly.

Gateway 1 (which has been in force since 1 August 2021) was introduced by the Town and Country Planning (Development Management Procedure and Section 62A Applications) (England) (Amendment) Order 2021.

BSA 2022 amends the Building Act 1984 to allow for the creation of the regime for gateways 2 and 3, which will be introduced by way of secondary legislation.

## WILL THERE BE A TRANSITION PERIOD FOR THE GATEWAY REGIME? IF SO, HOW WILL IT WORK?

Not for gateway 1, which is already in force, but the Consultation proposes a six month transition period for gateways 2 and 3 as long as the following criteria are met:

- An initial notice or deposit of full plans for building control approval has been submitted by the time the new regime comes into force; and
- Building work has commenced within six months from the day the new regime comes into force. The plan is to introduce a new statutory definition of “commencement” of work for these purposes.

If these criteria are met, the building work will not be subject to gateways 2 and 3. Instead, the building control approval regime relevant at the time the initial notice or deposit of full plans are submitted will apply in relation to the carrying out and completion of the building work. However, it is expected that the new requirements under Part 4 of the BSA 2022 in relation to occupation of the building will apply, whether or not the above criteria are met.

If the criteria are **not** met, then the new regime for gateways 2 and 3 will apply in full.

## IF A PROJECT HAS ALREADY RECEIVED PLANNING PERMISSION BEFORE GATEWAY 1 WAS INTRODUCED, WILL A SUBSTANTIVE CHANGE MEAN IT HAS TO GO BACK THROUGH GATEWAY 1?

An application to change a permitted scheme may need to go through gateway 1, even if it was granted before gateway 1 was introduced, depending on the nature of the change sought.

As already mentioned, gateway 1 has been in force since 1 August 2021. It is triggered at the planning application stage for applications for “relevant buildings”, currently defined as buildings that contain two or more dwellings or educational accommodation and are 18m or 7 storeys or more in height.

There are two elements to Gateway 1 that apply to planning applications for “relevant buildings”, comprising:

- Submission of a fire statement; and
- A requirement for the local planning authority (LPA) to consult the HSE before granting planning permission.

There are slight variations as to when each of these requirements are triggered. Depending on the nature and extent of the changes sought, either one, both or neither of them will apply.

If the modifications are fundamental or substantial such that a new full planning application is required, or they comprise material changes to the approved scheme that would result in the building becoming a “relevant building” (either from a change of use or a physical change) and a new full planning application is submitted, or the changes are made in reliance on permitted development rights, then a fire statement needs to be submitted with the relevant application.

However, changes that are minor material amendments under section 73, Town and Country Planning Act 1990 (TCPA), non-material amendments under section 96A, TCPA or are authorised by an outline planning application avoid the gateway 1 requirement to submit a fire statement.

The requirement to consult with the HSE is broader and is triggered if the scheme changes comprise:

- **Any** “development” of or within the curtilage of a “relevant building” (unless the development means the building is no longer a “relevant building”).
- Minor material amendments under section 73.

Only non-material amendments under section 96A avoid the need to consult with the HSE.

## WHAT HAPPENS IN PRACTICE IF GATEWAY 1 APPLIES? PRACTICAL TIPS

If a fire statement is required to be submitted with a planning application it will be a material consideration for the LPA to take into account when reaching its decision on the planning application.

If an LPA considers the safety provisions as set out in the fire statement are inadequate, this could be a reason for refusal. It is therefore essential that sufficient information is contained in the fire statement. While not a statutory requirement for a fire statement to be submitted with outline applications, a developer may voluntarily provide this information with this type of application too.

Fire statements should be submitted either on the form published by the Secretary of State, or a form to a similar effect, and include the requisite information (which includes the approach to fire safety applied to each building in the development, details of the site layout, emergency vehicle access and water supplies for firefighting, details of any consultation carried out and how fire safety policies in the local plan have been taken into account).

The information provided will evidence that thinking on fire safety matters as it relates to planning has been incorporated into the planning application. Applications should seek to get the right balance in the level of detail included in fire statements. It should be focused and concise, specific and relevant to the development, and proportionate to the scale, type and complexity of the proposal. It should not duplicate information to be submitted at the building control application stage.

If a planning application triggers the HSE consultation requirement, then early and timely engagement with the HSE at the pre-application phase may help to address issues and opportunities early on and avoid delays and possible redesign occurring after an application has been submitted.

## WHAT HAPPENS IF THE PARTIES WANT TO MAKE A CHANGE TO THE DESIGN DURING THE CONSTRUCTION PHASE? DO THEY NEED BUILDING SAFETY REGULATOR (BSR) APPROVAL?

During construction (following gateway 2 approval but before gateway 3), any “major” or “notifiable” changes to the original building control approval application will require the prior approval of the BSR.

It is anticipated that secondary legislation will define what constitutes a “major” and a “notifiable” change. In the meantime, the Consultation indicates that major changes are those that “could have an impact on compliance with all applicable building regulations’ requirements to a great extent”, while notifiable changes are those that potentially have an impact on compliance with building regulations’ requirements “but to a lesser extent than ‘major’ changes”. The Consultation provides examples of the types of changes that the government proposes fall within each category.

The Consultation indicates that the BSR is required to make its determination within:

- Six weeks for “major” changes.
  - If the BSR does not make a determination and no further action is taken by the applicant within the prescribed period, then the application is deemed to be refused.
- Ten working days for “notifiable” changes.
  - If the BSR does not make a determination, request further information or request a change control application for a “major” change within the prescribed period, then the change is deemed to be approved.

The BSR and the applicant may agree to extend these timescales.

While major and notifiable changes to the original building control approval application require the BSR’s oversight under the new regime, the Consultation makes clear that any changes during the construction phase must be recorded, evaluated and evidenced to demonstrate compliance with all relevant building regulations’ requirements.

Parties involved in construction work in the meantime should maintain clear records and ensure compliance with the building control approval regime, and all relevant building regulations’ requirements, applicable at the time of the submission of the initial notice or deposit of full plans in relation to proposed changes.

## WHEN IS “COMPLETION” FOR THE PURPOSES OF GATEWAY 3?

We don't yet know and await the Consultation outcome.

### Completion – the options

The Consultation indicates that a completion certificate application for the purposes of gateway 3 can be made only when the building is “complete”. A building can only be occupied once the BSR has issued a completion certificate and the building has been registered. Registering a building for occupation will be a separate process from the building control process and is outside the scope of this blog.

What constitutes “completion” of the building work will be defined in secondary legislation. For now, the Government is consulting on two options:

- When all building work has been completed (in other words, at practical completion); or
- When all building work, including snagging, has been completed.

The BSR is required to make its determination in relation to the completion certificate application within 12 weeks. This period may be extended by agreement between the BSR and the applicant.

The proposed new completion certificate regime raises several practical concerns, including:

- It seems unlikely that the issue of the completion certificate will be able to be a pre-condition to practical completion under a building contract, because:
  - it is anticipated that the earliest opportunity to make a completion certificate application will be when practical completion is certified, rather than at an earlier stage when the building work is objectively completed but the practical completion certificate has not yet been issued; and
- the BSR will have at least 12 weeks following submission of the completion certificate application to make its determination.
- It may be that a specific regime is introduced for building work that satisfies the transitional arrangements referred to above. Until the government clarifies its position, a prudent approach to programming for building work would be to assume that “completion” will be when all work, including rectification of snagging items, is complete.

### Partial completion?

The Consultation indicates that there will be a partial completion regime where partial completion may be approved in relation to separate stages of building work (for example in relation to separate buildings for a project or separate units of a building) to facilitate occupation of completed parts of a building while works continue in other areas.

## FINAL THOUGHTS

While gateway 1 does not introduce any fundamental changes to planning procedure at the planning application stage, it introduces for the first time the statutory consideration of fire safety matters as they relate to land use planning. Prior to this, this was policy consideration only. As such, there is a higher level of scrutiny, and if the LPA or the HSE consider there may be a fire risk this could result in delays and additional costs. However, early engagement at the pre-application stage with the relevant bodies could mitigate this risk.

The introduction of gateways 2 and 3 together with the involvement of the BSR during the construction phase undoubtedly does mean a major change for construction projects.

It is extremely challenging to fully prepare for the onset of this complex new regime without the certainty of the secondary legislation that implements it and accompanying government guidance to clarify how it will work in practice. Hopefully, this will be *published shortly* and then industry will be in a strong position to fully comply when the regime comes into force.

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