

Building Safety Act: The Gateway regime

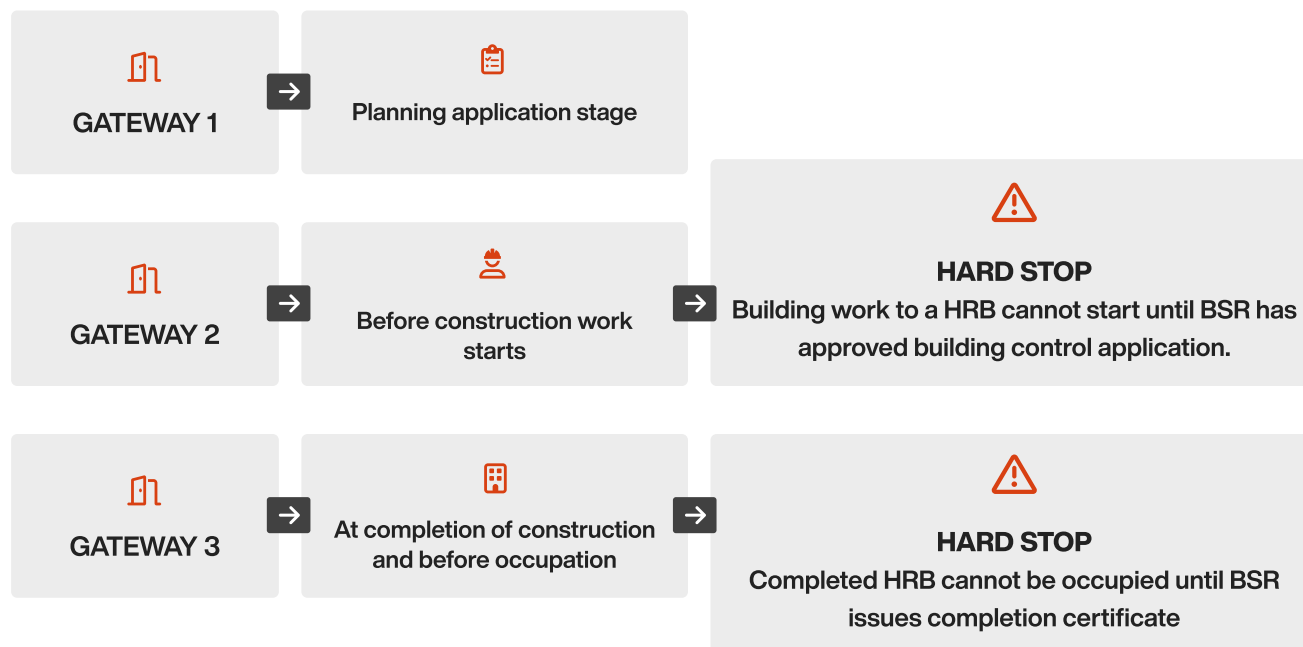


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It's business. But it's personal.

The gateway regime for higher-risk buildings (as defined below) came into force on 1 October 2023, as part of the major changes brought about by the Building Safety Act 2022 (**BSA**). The new regime requires the approval of the Building Safety Regulator ("**BSR**") at three "Gateways", to ensure building safety requirements have been met before the project can progress to the next stage.

Overview of the Gateway regime



What work does the Gateway regime apply to?

It applies to "higher-risk building work", which is defined as:

- construction of a new higher-risk building (see definition below);
- work to an existing building which causes it to become a higher-risk building, together with any work to the building carried out at the same time; or
- such work which is necessary to ensure a building that undergoes a material change of use to become a higher-risk building complies with the applicable requirements in the Building Regulations, together with any work to the building carried out at the same time.

What is a higher-risk building?

A "higher-risk building" is defined as a building which is:

- at least 18 metres in height, or has at least seven storeys; and
- contains at least two residential units.

It includes care homes and hospitals, but excludes residential institutions and hotels. The applicability of this statutory exclusion is outside the scope of this guide, but note that a hotel will only be excluded from the HRB regime if the relevant building consists entirely of a hotel (i.e. is not part of a residential building, and does not contain serviced apartments).

Gateway 1

This is the planning Gateway which forms part of the planning application stage. It has been in force since 1 August 2021 and was implemented by secondary legislation and statutory guidance under the Town and Country Planning Act 1990 (rather than the BSA).

In order to pass through this Gateway, the applicant must demonstrate in a fire statement that fire safety matters have been taken into account as part of the planning application. This note focuses on Gateways 2 and 3.

Gateway 2

This is the pre-construction Gateway. It is a "hard stop" which means that **construction works to the higher-risk building cannot commence until building control approval is granted.**

What does Gateway 2 require?

Before starting work on a new or existing higher-risk building, the client must:

- submit an application (in electronic format) for building control approval to the BSR;
- be granted building control approval for the work;
- fulfil any requirements that must be met before the work is started under the building control approval; and
- give the BSR at least five working days' advance notice of the date on which they intend to start work.

NB Certain minor works are exempt, such as those which are routine and low-risk. Emergency repairs to a higher-risk building are also excluded, but notice must be served on the BSR as soon as reasonably practicable after the work has started.

Notice must be given to the BSR that the work has commenced within five working days.

The Building Regulations set out what needs to be included with the Gateway 2 application. This includes a description of the proposed higher-risk building work, along with intended use, height, number of storeys and proposed drainage.

The Gateway 2 application must be supported by numerous documents, including (but not limited to): a competence declaration from the client that they are satisfied their appointed principal contractor and principal designer are competent; the construction control plan; the change control plan; a mandatory occurrence reporting plan; and a fire and emergency file.

The client can require another dutyholder (such as the principal designer or principal contractor) to submit the application on their behalf. The application must then include a statement signed by the client confirming their agreement to the application and that the information contained in it is correct.

What are the timings of the approval process?

The BSR has **12 weeks** to approve a valid application for the construction of a new higher-risk building (or **eight weeks** for work to an existing higher-risk building), or such longer period as the parties agree in writing.

If the BSR does not respond within the prescribed time period, the applicant can make a non-determination application to the Secretary of State. If the applicant does not do so, there is a deemed refusal of the application.

What if the parties want to amend the design?

The applicant must obtain the BSR's approval of any *"major"* change to the original application before the work relating to this application can start. A *"major"* change undermines the basis by which building control approval was originally granted for the project, such as changes to the external height or width of a building, or to the number, width or length of the staircases in a building. The BSR can take up to six weeks to determine the major change application.

For a *"notifiable"* change, the applicant must notify the BSR of the change before starting the work. A *"notifiable"* change would potentially have an impact on compliance with the Building Regulations, such as changes to the construction control plan, change control plan, layout of a flat, or support system for any wall (excluding an external wall).

Gateway 3

Gateway 3 occurs at completion of construction. This is a "hard stop" and the higher-risk building cannot be occupied until the BSR issues a completion certificate to confirm that the Building Regulations have been complied with. Once the certificate has been issued, the building must also be registered with the BSR. It is a criminal offence to occupy the building before these requirements have been satisfied.

What does Gateway 3 require?

The key information which must be submitted to the BSR as part of the Gateway 3 application is set out in the Building Regulations and includes:

- details of the as-built higher-risk building work which has been carried out;
- confirmation that the "Golden Thread of information" has been provided to the relevant person (see our separate [guide regarding the Golden Thread of Information](#));
- a compliance declaration signed by the client, principal contractor and principal designer confirming to the best of the client's knowledge that the work complies with the applicable requirements of the Building Regulations, and that the principal contractor and principal designer have complied with their respective duties under the dutyholder regime (see our separate [guide regarding the dutyholder regime](#)).

If the client does not submit the application, a statement must be included which is signed by the client and confirms their agreement to the application and that the information contained in it is correct.

What are the timings of the approval process?

The BSR must approve a valid application for higher-risk building work within eight weeks, or such longer period as the parties agree in writing.

As with Gateway 2, if approval is not granted, the applicant may use the non-determination procedure. If the applicant does not do so, there is deemed refusal of the application.

When can the application for the completion certificate be made?

The application for a completion certificate should be made when the higher-risk building work is completed. On the face of it, the BSA makes no allowance for the fact that work under a building contract is often certified as having reached practical completion notwithstanding minor defects or incomplete works. The previous Government considered it appropriate for an application to be made *"on the completion of notifiable building work"* while recognising that snagging work may still need to be dealt with.

It remains to be seen how the construction industry will react to the eight-week period expected for BSR approval (i.e. whether contractors will make allowances in their price and programme to factor in the timetable for obtaining BSR sign-off, where clients will consider the risk allocation sits in terms of BSR sign-off being required as a pre-condition to achieving practical completion and whether any relief will be afforded to the contractor in the event of any delay in the BSR's issue of the completion certificate). Please contact our construction team if you have any queries or require advice on this topic.

What is the registration process?

After the completion certificate has been issued, the principal accountable person must separately apply to register the building with the BSR. **This is distinct from the Gateway 3 process and registration must be done before the building is occupied, or it is a criminal offence.**

What are the sanctions for breach?

A breach of the Gateways 2 and 3 regime is a criminal offence punishable by unlimited fines and/or up to two years' imprisonment. The detailed procedure for enforcement of the Gateway regime is outside the scope of this note.

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Adriano Amorese

Partner

T: +44 20 3321 7710

E: adriano.amorese@mishcon.com



William Chung

Managing Associate

T: +44 20 3321 7369

E: william.chung@mishcon.com

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Mishcon de Reya LLP

Africa House
70 Kingsway
London WC2B 6AH

T +44 20 3321 7000
F +44 20 7404 5982
E contactus@mishcon.com

mishcon.com

