Real Estate Update

25 MAY 2016
By: Drew Wallace | Sheila Irvine

The first batch of general and technical guidance notes on the Assessment of Energy Performance of Non-domestic Buildings (Scotland) Regulations 2016 (“the Regulations”) was published on 23 May and is now available on the Building Standards section of the Scottish Government’s website. The initial guidance includes a useful guide for building owners called “Improving Energy Performance and Emissions in existing Non-Domestic Buildings – a guide for owners”.

Overview

From 1 September 2016, owners of pre 2002 building stock in Scotland will be obliged, on sale or lease, to prepare an “action plan” of measures to improve the energy performance of (and reduce emissions of greenhouse gases from) the building, and to make the action plan available to prospective buyers or tenants.

Trigger point for the application of the Regulations

Subject to the exemptions and exclusions referred to below, the obligations under the Regulations are triggered on sale or lease of non-domestic buildings or “building units” with a floor area greater than 1000 square metres. “Building units” are defined as parts of buildings designed or altered to be used separately, and references below to “buildings” include “building units”.

Obligations under the Regulations

As noted above, the Regulations provide that an owner must, prior to the sale or lease of a building, make an “action plan” available to prospective buyers or tenants. The Regulations do not oblige the owner to improve the energy performance of the building before it can be sold or let, although the “Guide for owners” states that “owners may wish to do so as part of preparation for marketing”.

A person becomes a prospective buyer or tenant in relation to a building on the earliest of the dates when that person (a) requests any information about the building from the owner for the purpose of deciding whether to buy or lease the building; (b) makes a request to view the building for the purpose of deciding whether to buy or lease the building; or (c) makes an offer, whether oral or written, to buy or lease the building.

Action plans will be prepared (with input from the building owner) by registered “section 63 advisors” following an
assessment of the building. Where the advisor identifies a need for physical improvement measures to be carried out, these must be set out in the action plan. The Regulations provide that any physical improvement measures shall consist of “identified improvement measures” (such as boiler replacement, installation of roof space insulation, and upgrading low energy lighting) set out in the Schedule to the Regulations, any “alternative improvement measures” recommended by the advisor, or a combination of both. Any “identified improvement measures” must (in the opinion of the advisor) be able to pay back the initial cost (through reduced energy consumption) within 7 years (or within 15 years, in the case of a replacement boiler).

Deferring physical improvement measures

If an action plan contains a statement that operational rating measures are to be implemented in respect of the building, the owner will be able to choose to defer the timetable for completing any physical improvement measures by arranging to record and report operational energy ratings (logging actual emissions and energy use via a Display Energy Certificate, reported on an annual basis). In order to defer completion of physical improvement works the reporting of annual operational ratings must be commenced within 12 months of the date of issue of first action plan for the building. The Regulations do not impose a limit on how long the completion of physical improvement measures may be deferred once operational ratings reporting is commenced, and the “Guide for owners” says (at paragraph 18) that the owner must continue to report annually on operational use “until he/she has completed improvements”.

Where the owner decides not to defer completion of physical improvement measures, a maximum period of 42 months is allowed to carry out the work. This period has been chosen as it corresponds to the current duration of a building warrant plus six months planning time.

Exemptions and exclusions: Buildings not caught by the Regulations

- Buildings constructed to the 2002 building standards or more recent standards, and pre 2002 buildings that have been built to or improved to meet more recent energy standards.
- Temporary buildings with a planned time of use of 2 years or less.
- Workshops and non-residential agricultural buildings with low energy demand.
- “Green deal improved properties” (N.B. These are buildings in which energy improvements have been made under a green deal plan. The framework for the green deal is set out in the Energy Act 2011.)

Exemptions and exclusions: Transactions not caught by the Regulations

- The sale or lease of a building at any time before the construction of the building has been completed.
- The renewal of an existing lease with the same tenant.
- The grant of a “short term lease” (defined as a lease for a period of not more than 16 weeks which does not include any option to extend its duration) where the building has not been let by the owner during the preceding 36 weeks.

Enforcement

Local authorities will be responsible for enforcement of the Regulations, and will have power to impose a penalty charge of £1000 for failure to comply.

Sales

Where a building is sold with an existing action plan, any on-going responsibilities under the action plan pass on to the new owner. If the new owner does not wish to implement the physical improvement programme set out in the seller's action plan, the new owner can work with a section 63 advisor to put in place a revised action plan. However, the physical improvement measures set out in the revised action plan must be completed by the same deadline as that recorded in the original action plan for the building.

Leases

In the consultation papers which preceded the Regulations, the Government envisaged that, on the grant of a lease, the parties will be free to decide the extent to which any works set out in an action plan are to be carried out, or paid for, by the tenant. However, notwithstanding any contractual arrangement between a landlord and tenant,
the Regulations state that responsibility for compliance ultimately falls upon the owner of the building in question.

Comment

The Government has advised that the initial guidance will be supplemented by additional documentation, including an "evolving FAQ sheet", over the coming weeks.

During the prior consultation exercise the Government stated that the intention was to publish guidance sufficiently early to give the property sector a lead-in period of at least seven months to get up to speed with what will be required for compliance at a practical level. Although the lead-in period is now little over three months long, the guidance is still very welcome, and serves as a reminder to owners of pre-2002 buildings that the need to become familiar with the requirements of the Regulations should now be at, or at least near, the top of their list of priorities.

Click here for the Building Standards web pages.

AUTHORS

Drew Wallace
Partner
Edinburgh | T: +44 (0)20 7349 0296
[email protected]

Sheila Irvine
Partner
Edinburgh | T: +44 (0)20 7349 0296
[email protected]