New regulations will oblige owners of buildings in Scotland to improve or report on energy efficiency of buildings

Real Estate Update

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By: Drew Wallace | Sheila Irvine | Steven Edgecombe

Section 63 of the Climate Change (Scotland) Act 2009 provides for regulations to be made for: (1) the assessment of the energy performance of existing non-domestic buildings and greenhouse gas emissions from such buildings; and (2) building owners to take steps to improve the energy performance of, and reduce emissions from, such buildings.

Following a lengthy consultation period, The Assessment of Energy Performance of Non-domestic Buildings (Scotland) Regulations 2016 ("the Regulations") were published in draft on 19 January, and are due to come into effect on 1 September.

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

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.

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 and issued 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 any physical improvement measures by arranging to record and report operational energy ratings (logging actual emissions and energy use via a Display Energy Certificate) on an annual basis. Where the owner opts for physical improvement measures, a 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 and the new building owner does not wish to implement the physical improvement measures set out in the seller's action plan, the incoming owner may prepare their own action plan. However, if the new action plan does not provide for implementation of operational rating measures, the physical improvement measures set out in the revised action plan must be completed by the same deadline as that 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.

Practical guidance

The Scottish Government Building Standards team are currently working on detailed practical guidance for the property industry on how to comply with the Regulations. We are awaiting this guidance with interest and will provide a further update once it is has been published.