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Stephenson Harwood Real Estate Briefing

Building Safety Act 2022

Financing existing buildings

Introduction

The Building Safety Act 2022 ("**BSA 2022**") has been described as "the biggest change in building safety in a generation"¹.

The changes introduced by BSA 2022 were prompted by the recommendations of Dame Judith Hackitt in the independent review of building regulations and fire safety which was commissioned following the Grenfell Tower fire in 2017.

The Act places greater obligations on those responsible for high-rise buildings with residential elements to ensure the buildings are safer and better monitored than was previously the case.

BSA 2022 has various implications for the construction of new buildings. However, many lenders may well first encounter BSA 2022 in the context of funding or refinancing existing buildings. This article therefore looks at the impact of the BSA 2022 on the financing of existing buildings and supplements "[12 things to check when buying a mixed use building](#)" - an article recently published by Stephenson Harwood's real estate group.

7 points for lenders to be aware of

1. Mixed-use developments with as few as 2 residential units can fall within the remit of the tall buildings regime under BSA 2022.

A common misconception is that BSA 2022 only regulates tall residential buildings with cladding. However, it has a very broad reach indeed.

The most onerous parts of the BSA 2022 focus on "higher-risk buildings". A higher-risk building is one which contains at least two residential dwellings and is at least 18 metres in height or has at least 7 storeys.

BSA 2022 also introduces new sanctions and enforcement routes to ensure remediation of "relevant buildings". A relevant building is one

which contains at least two residential dwellings and is at least 11 metres in height or has at least five storeys.

This means that existing mixed-use developments with as few as 2 residential units can fall within the new tall buildings regime introduced under the BSA 2022.

The property reporting prepared by the borrower's solicitor should confirm which category (if any) a building falls within. Lenders may also consider whether it should be backed up by a representation in the loan agreement.

Note also that even if a building is not "relevant" or "higher-risk" on day 1, this can change over time if certain works are done to a building. Lenders are therefore likely to prohibit borrowers from carrying out works which could bring that building within the relevant definitions.

2. Every "higher-risk" building will have (at least one) "Accountable Person" (an "AP") and one "Principal Accountable Person" ("PAP") with specific responsibilities and obligations under BSA 2022.

APs are the entities legally responsible for repairing common parts of a building (typically the freeholder and/or superior landlord). If there is a single AP, the AP will also be the PAP. However, in circumstances where there is more than one AP, the AP which owns or has legal obligations to repair the structure of the building will be designated the PAP.

As such, on a typical real estate financing of a higher-risk building, your borrower is very likely to be an AP and/or the PAP.

APs and PAPs cannot delegate their legal obligations under the act to a managing agent – the statutory responsibility rests with them. Consequently, if an AP or PAP is not already an obligor under the facility

¹ The then Housing Secretary Rt Hon Robert Jenrick MP described the changes in this way in April 2020.

agreement, lenders should consider how they can obtain direct recourse to these entities.

Accountability for fire and structural safety of the building during occupation is a key theme of the BSA 2022, and many legal obligations (breach of which result in criminal liability) are imposed on the APs and the PAP. Consequently, lenders are likely to want to receive details of all relevant APs and the PAP as a condition precedent to funding and will want to ensure that at all times the APs and the PAP comply with their ongoing duties under BSA 2022. Breaches of certain key obligations may be events of default under the facility agreement.

Lenders are also likely to wish to see evidence, in line with their statutory obligations, that (among other things) the APs and the PAP have established and are operating various reporting systems for building safety issues and complaints and are engaging with residents, keeping the Building Safety Regulator ("the BSR") updated of changes and applying for building safety assessments within 28 days of being required to do so by the BSR.

3. All existing higher-risk buildings must have been registered with the BSR prior to occupation (and, by 30 September 2023, if the higher-risk building was occupied at that date).

A lender will want to see, as a condition precedent to funding, evidence that a higher-risk building has been registered with the BSR.

Lenders will also want to ensure that any updates are made to the registration information within 14 days of the PAP becoming aware of such a change.

4. Higher-risk buildings must have a "golden thread" of information – a digital record of all relevant information associated with the building that is kept up to date throughout the life of the building.

This so-called "golden thread" of information should demonstrate that the building was compliant with building regulations during its construction phase and that the APs and PAP are complying with their requirements to manage and mitigate building safety risks.

Lenders will want to ensure this "golden thread" is in existence. As it is also information which needs to be available and kept updated throughout the

building's life, lenders will also want to ensure that they have on-going access to it.

5. Borrowers could be liable for historic defects.

BSA 2022 introduces new sanctions and enforcement routes to compel remediation of relevant buildings which have been identified as having "relevant defects", through remediation orders and remediation contribution orders.

A relevant defect in a relevant building is one which causes risk to the safety of people in or about the building due to the spread of or the collapse of the building or a part of it in the 30 years ending on 28 June 2022 (i.e., between 28 June 1992 and 28 June 2022).

Although a remediation contribution order can only be made where it is "just and equitable" to do so, this power is nonetheless very wide and could expose a borrower to liabilities at long-forgotten buildings.

Lenders should consider obtaining a repeating representation from borrowers that they are not aware of any relevant defects at the property being financed which may give rise to a remediation order or remediation contribution order being made against them.

6. Borrowers (as landlords) may find it difficult to recover costs of remediation works from tenants through the service charge.

BSA 2022 includes a strict prohibition on landlords recovering costs of remediation defects for which the landlord as at 14 February 2022 (the "**Feb 2022 Landlord**") was responsible for.

Even where this is not the case, where the Feb 2022 Landlord met a relatively low net worth condition (the so-called landlord contribution condition), the current landlord cannot recover remedial costs from tenants of "qualifying leases". A qualifying lease is a long lease held, as at 14 February 2022, by a tenant as its only or principal home (or, if not, the tenant at that time owned no more than two other dwellings in the UK).²

The upshot of this is that often landlords will not be able to cover their remediation costs through the service charge and so will have to absorb them themselves.

² Note here that it is not the financial worth of the current landlord, or current tenant's use of the property, which is relevant. The position as of 14 February 2022 is the important trigger for

determining whether the landlord contribution condition was met and for assessing if the tenant's lease is a "qualifying lease".

7. Buildings which have already been financed are unlikely to contain any BSA 2022 drafting.

Finance documents already in place are unlikely to contain drafting addressing BSA 2022 issues.

Consequently, a lender's control over a borrower's activities and whether the correct steps are being taken by the correct parties to comply with the various BSA 2022 obligations for affected buildings may be reliant on general "compliance with laws" obligations.

However, lenders will need to consider whether BSA 2022-specific issues should be taken account of in any future amendment and restatement exercise. Furthermore, work done to an existing building could serve to bring a building within the scope of BSA 2022, so this must be considered in the context of granting lender consents to works on existing buildings.

Key contacts

If you have any concerns about how the BSA 2022 might impact on an existing building you have financed, or may wish to finance, please get in touch with our expert team.



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