The Building Safety Act and Building Safety (Leaseholder Protections) (England) Regulations 2022[1]

Conveyancer Guidance

1. Leaseholder protections outline the need for the Leaseholder Deed of Certificate and Landlord Certificate and apply to buildings at least 11 metres/5 storeys and a new regulatory framework applies to buildings over 18 metres with a special role for the Building Safety Regulator

What is a Relevant Building?

For a building to be defined as a 'relevant building', it must meet all of the following criteria:

a. It is at least 11 metres in height or has at least five storeys (whichever is reached first).

b. It contains at least two dwellings.

c. It is not a **leaseholder-owned building**.

1. A relevant building can be either a self-contained building or a self-contained part of a building. A self-contained building is a detached building. A self-contained part of a building means that the part could be redeveloped independently of the rest of the building (see figure 1 below).

2. Commonhold buildings are not relevant buildings because each unit-holder is entitled to be a member of the Commonhold Association (which owns the freehold to the structure and common parts of the building). There is no separate building owner to whom costs can be passed to (the definition of 'building owner' can be found in What are my building owner's legal obligations?).

3. Leaseholder-owned buildings are also not relevant buildings as there is no separate building owner to whom costs can be passed. Leaseholder-owned buildings could include:

a. Collectively enfranchised buildings – where some, or all, of the qualifying leaseholders have bought the building's freehold.

b. Any building where leaseholders directly own the freehold, including through a company, where there is no separate freeholder.

c. Other circumstances where the freehold is owned 100% by one or more leaseholder.

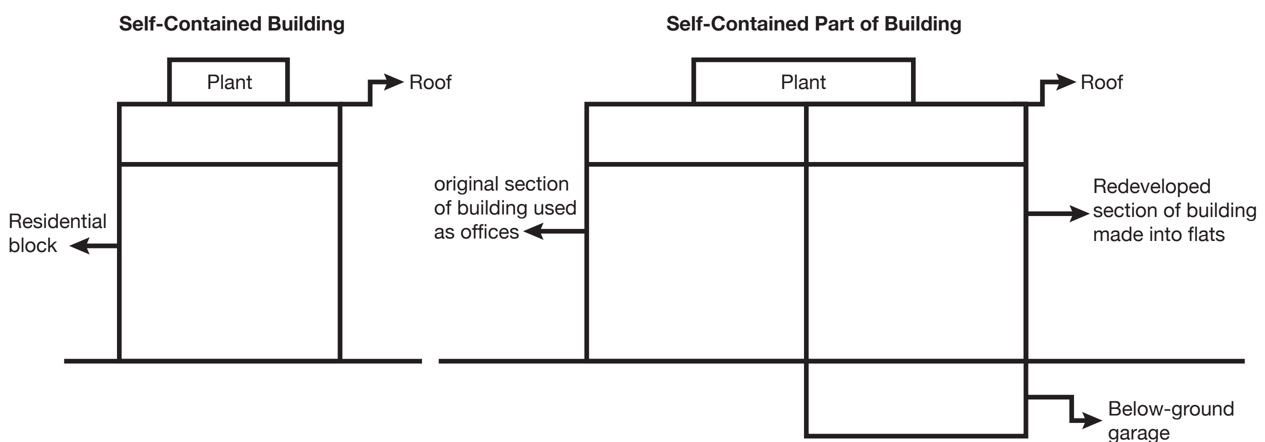

Figure 1: Example of a self-contained building and self-contained part of a building.

How to determine building height

1. The building owner, or their managing agent, must know the height to assess risk under the Fire Safety Order.

2. Figure 2 (right) shows how building height is measured from the floor of the top storey to the ground level on the lowest side of the building.

3. Building height is measured from ground level to the floor of the top storey. It does not include any floors below ground level.

4. If the building is situated on ground, which is not level, the height is measured from the ground level on the lowest side of the building to the floor of the top storey (excluding roof-top plant areas).

5. If the top floor contains machinery or plants exclusively, this will not count as the top storey. Instead the building height will be measured up to the floor of the storey below the plant storey or the machinery storey.

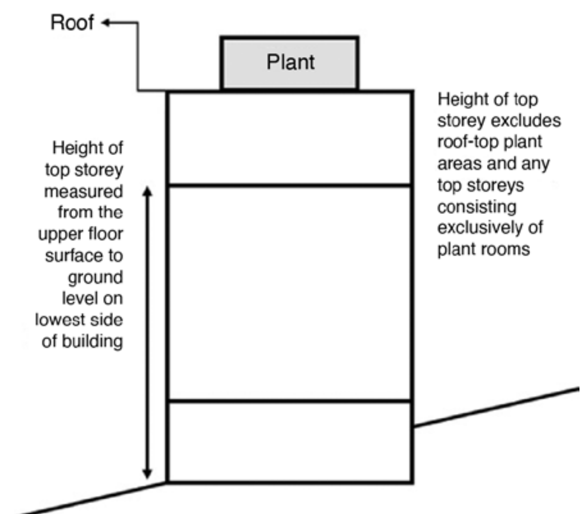

Figure 2: Figure demonstrating how to measure building height.

How to determine the number of storeys

1. For the purposes of defining whether a building is relevant building, only the storeys from ground level or above count. Any storey below ground level, for example, a basement, does not count. The ground floor is counted as the first storey. A building with an underground car park, a ground floor, and a first floor would be defined as a two-storey building and not a three-storey building.

2. Mezzanine floors only count as a storey if the floor area is at least half the floor area of the largest storey in the building.

3. If the building is under 11 metres in height but which has five or more storeys and contains at least two dwellings, it will count as a 'relevant building'. This means the leaseholder protections will apply if all the other criteria needed to be a qualifying leaseholder are met.

4. If it is a block of flats which is above 11 metres in height that is mixed use and contains both commercial and office space as well as residential dwellings, the leaseholder protections will only apply if there are two or more residential dwellings within the property.

What are the Relevant Defects covered?

For a defect within a building to be defined as a 'relevant defect', it must meet all of the following criteria:

a. It puts people's safety at risk from the spread of fire, or structural collapse.

b. It has arisen from work done to a building, including the use of inappropriate or defective products, during its construction, or any later works (such as refurbishment or remediation).

c. It has been created in the 30 years prior to the leaseholder protections coming into force (meaning the defect had to be created from 28th June 1992 to 27th June 2022), and it relates to at least one of the following types of works:

- The initial construction of the building;
- The conversion of a non-residential building into a residential building; or
- Any other works undertaken or commissioned by or on behalf of the building owner (the definition of 'building owner' can be found in What are my building owner's legal obligations?), or management company.

1. Work done before or after 28th June 2022 to remediate a relevant defect that was itself created during one of the above pieces of work is also covered by the leaseholder protections.

2. Defects that have arisen in relation to professional services are also covered by the definition of relevant defect. This would include, for example, if an architect or building designer specified the inappropriate use of flammable materials on a building and the contractor followed those designs.

3. This definition of relevant defect covers work needed to put right and ease historical building safety issues, but not, for example, wear and tear or routine maintenance.

Who is a Qualifying Leaseholder?

The qualifying leaseholder is established by the Leaseholder Deed of Certificate relating to the status of the Leaseholder on 14th February 2022, which once served provides protection for future leaseholders.

Four conditions must be met:-

- Long Lease
- Leaseholder responsible for paying service charges
- Lease granted before 14 02 2022
- It must be the Leaseholder's main home or they do not own more than 3 properties

The exception of Leaseholder Owned Buildings[1]

The Leaseholder of a flat in a building owned by the residents, even if otherwise the building may apply to qualify under the act, will be restricted as the Act does not apply to Leaseholder owned buildings, other than to give tools to empower leaseholders and building owners to recover remediation costs from those responsible for defects.

However, if there are defects that need remediation there could still be funding from a responsible developer who has signed the government contract to remediate a building which they developed, to a life critical standard.

If there is no responsible developer to fund, then there is a government funded Building Safety Fund to remediate unsafe cladding for buildings over 18m and there is a medium rise scheme for 11-18m buildings to address fire safety risks from cladding.

Leaseholder Deed of Certificate (LDoC)

Required under the Building Safety Act 2022 to gather **mandatory information** about leasehold properties in residential buildings located in England which contain at least two flats, and is at least five stories or are 11 meters high, and built prior to 28th June 2022.

The LDoC is used to identify whether the property was owned by a tenant who qualifies for the remediation cost to be paid by someone else.

The Government has issued guidance for leaseholders on its official website, which can be accessed here:

https://www.gov.uk/guidance/mandatory-information-required-from-leaseholders-and-building-owners

The process needs to be completed once for each leasehold property affected:

i) If the Landlord sends a notice to complete an LDoC, there is a time limit of eight weeks to respond with the completed LDoC which can be extended by four weeks if requested.

ii) If the building containing the property meets the requirements which determine the landlord must serve the notice under the Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022, in the following circumstances:

- The building owner has become aware that the that the leaseholder's property is to be sold.
- The building owner has become aware of a defect at the building which meets the definitions under the Building Safety Act 2022, for it to be relevant to the regulations referred to above.

iii) If the Leaseholder wishes to sell a property which is in a building which may qualify under the Regulations.

Evidence Required

The LDoC itself provides a list of evidence requirements and the Government guidance provides further detail on the appropriate documents that can be provided to support the information contained in the completed certificate. These include:

- A utility bill or council tax statement in the Leaseholder's name as at 14th February 2022 to demonstrate the property was their principle home.
- A copy of the Land Registry's Title for property which details the current ownership and provides evidence of the last sale date. This document may also detail the last sale price.
- If the above Land Registry Title does not detail the last sale price, a copy of the contract of sale, or some other formal document from the Leaseholder conveyancing lawyer at the time of sale, perhaps a completion statement may be used as evidence of the price paid for the property.
- If shared ownership, a copy of the shared ownership lease must be provided to evidence the property is owned on that basis. In addition, evidence of the percentage share held on that date. This could be the contract between the Leaseholder and the Housing Association (or other immediate landlord), or documentation arising from it, to evidence the percentage share owned as at 14th February 2022.

1. Right to Manage and Resident Management Companies to not constitute Leaseholder owned buildings as there remains a separate freeholder.

Leaseholder Protection

The Building Safety Act and the associated regulations provide some leaseholders with protections against costs arising from certain building safety-related costs in some circumstances. Some leaseholders will still have to pay up to a capped amount (the cap is only relevant where the building owner or landlord is not linked to the developer and doesn't have net wealth over the set threshold), in line with their usual service charge apportionments as determined by their lease.

The regulations prevent a fee from being charged to the Leaseholder for any notice issued in relation to the Building Safety Act.

The LDoC enables the Landlord to understand who within a block may, under certain circumstances, be required to contribute towards those building safety-related costs, and to ensure they only pay the amount the law has deemed appropriate.

The leaseholder will need to complete the LDoC to determine if they qualify for the leaseholder protections against building safety costs, arising from the Building Safety Act and to enable the landlord to calculate the maximum financial contribution towards those costs.

The information provided in the LDoC will help the building owner to ensure no leaseholder will pay more than the law now requires in relation to building safety-related costs.

Who else might be responsible?

- Where building owners are – or are associated with - the developer they must pay for the remediation of historical safety defects
- The courts have new powers to extend liability to associated companies.
- The Act also introduces a package of measures to ensure those responsible put the building right

Where a developer cannot be identified or has not yet agreed to pay for its own buildings, funding will be made directly available to pay for cladding system repairs and remediation. Government funding is available to remediate unsafe cladding where the developer is not funding necessary remediation.

This will ensure no **qualifying leaseholder** faces costs to remediate unsafe cladding systems on their building.

Qualifying leaseholders are protected from all cladding system remediation costs. Those whose property is calculated as being less than £325,000 in Greater London (£175,000 elsewhere in England) or whose building owner has a group net worth of more than £2 million per **relevant building**, as of 14th February 2022, are **exempt from all historical safety remediation costs**.

The Act ensures that any contribution required from qualifying leaseholders for non-cladding defects and interim measures (including waking watch costs) is firmly **capped and spread over 10 years**, with costs already paid out since 28th June 2017 counting towards the cap. If remediation costs exceed the cap, building owners must make up the difference.

The Developer, Landlord, Superior Landlord, or the Leaseholders

The developer who constructed the building may have accepted responsibility for repairs under the Responsible Actors Scheme in England, due to be established under regulation in 2023. Through signing the contracts, developers are committing themselves to fix life critical fire safety defects in buildings in England that they have developed or refurbished over the last 30 years and reimburse the taxpayer for money spent by government funds to fix those buildings

Under powers in the Building Safety Act, all those who fail to sign or comply with the terms of the contract made by the developer with the Government committing them to pay for life-critical fire-safety repairs and to reimburse the taxpayer for money already spent making their building safe, will be ineligible to join the scheme.

Those that join and comply with the terms of the contract will remain in the scheme. Those that opt not to join or remain in the scheme would be prohibited from commencing new developments for which they have planning permission, and from securing building control sign-off for buildings already under construction.

The Landlord or previous Landlord. The Landlord will serve a Landlord Certificate to show whether the building owner's group meet the contribution condition, whether they, or the Superior Landlord at the time, was associated with the developer of the building.

The Regulations prevent the building owner from passing historical safety remediation costs on if they were, or were associated with, the developer who was responsible for the historical safety defect.

Landlord Certificate

The building owner must provide a **landlord's certificate**, in any of the following instances:

a. When they want to pass on part of the cost of remediation onto the leaseholder, through the service charge.

b. Within four weeks of receiving a notification from the leaseholder that their leasehold interest is to be sold.

c. Within four weeks of them becoming aware of a relevant defect which was not covered by a previous landlord's certificate.

d. Within four weeks of the Leaseholder requesting a landlord's certificate.

A landlord's certificate must:

a. Be signed by the person who is the current landlord on the date the certificate is signed.

b. Be based on the circumstances of whoever was the relevant landlord on 14th February 2022.

c. Be in the form of the landlord's certificate template (as found in The Building Safety (Leaseholder Protections) (England) Regulations 2022).

d. Contain the relevant information and be accompanied by the specified evidence. Legislation is being updated to show that evidence is not required where the Landlord is willing to accept responsibility for the remediation costs outright.

FAQs

- ***Is the Leaseholder Deed of Certificate sent because of a defect in the building?***

  Not necessarily. The requirement for a leaseholder to complete a LDoC, in the circumstances where the leasehold property is to be sold, applies regardless of whether a relevant building defect has been identified.

- ***Who completes the LDoC if the Leaseholder did not own the property on 14th February 2022?***

  The LDoC template makes clear it is the current owner who is responsible for providing the information required in the form, based on the Leaseholder who owned the property on 14 02 2022. The current Leaseholder may therefore need to contact the Leaseholder on 14 02 2022, or their conveyancer, as this previous owner will be required to confirm their ownership status at that point.

- ***Will an incoming Leaseholder have to complete a LDoC, if the leaseholder on 14 02 2022 already completed one?***

  No, the date for establishing a qualifying Leaseholder is 14th February 2022. Leaseholders after that date will take on the qualification.

- ***What happens if the Lease is extended after 14th February 2022?***

  The Building Safety Act requires a qualifying lease to have been granted before 14 February 2022 or to be a connected replacement lease under the Levelling Up and Regeneration Act 2023.

- ***Shared Ownership***

  The LDoC certificate template contains a section specifically for shared ownership leases. To assist the landlord in understanding the Leaseholder's contribution towards any relevant building safety costs the Leaseholder is required to supply information relating to the percentage of their share of ownership in the property. This in turn will be used to ensure the correct calculation is applied. Without this information, the building owner will assume that the Leaseholder owns 100% of the property.

- ***Receiving the Leaseholder Deed of Certificate on property no longer owned by the Leaseholder on 14th February 2022?***

  The Leaseholder who owned the property as at the 14th February 2022 but no longer owns it, will still need to supply the information to enable the new owner to complete the details regarding the ownership status on 14th February 2022 and supply evidence to show they sold or otherwise transferred their interest in the leasehold property as at that date.

- ***What if the Leaseholder does not respond with the LDoC, or does not provide the correct information?***

  Non-qualifying leaseholders are protected from costs of historical building safety remediation where the building owner is – or is associated with – the developer. In addition, developers in the contract are committing to remediate.

Furthermore, Government funding – through the Building Safety Fund and the Mid-Rise Scheme is available to fix unsafe cladding which, again, will benefit qualifying and non-qualifying leaseholders.

If the Leaseholder does not provide a completed LDoC, the property may not qualify for the protections against certain building safety contained within the Building Safety Act 2022.

This means the contribution towards any building safety-related costs which may otherwise have benefited from protections, will be charged and payable by the Leaseholder and future Leaseholders of the property, at the usual service charge apportionment, as determined by the lease.

- ***What about properties in Wales?***

  The Welsh Government have not adopted the whole of the Act so the Regulations do not apply. They are currently developing solutions and are funding External Wall System (EWS1) surveys on all relevant properties to identify remediation work required. There is no requirement for qualification of the lease as this pat of the Act does not apply to Wales. It is anticipated that the remediation work will be funded by the Welsh Government Fund or the developer but conveyancers should check with the Landlord if remediation is required.

Conveyancers should consider:

1. Is there a building safety risk?

2. Is the property greater than 5 storeys or 11m?

3. If no, other fire safety regulations may apply, see below.

4. If yes:

a. Has a Leaseholder Deed of Certificate been served detailing the qualification of the leaseholder on 14 02 22?

b. has the property had a building safety assessment, to the Publicly Available Specification: PAS9980 standard, in the last 5 years?

c. Have remedial works been identified

5. If yes:

a. Who will pay for the remedial works?

b. When will the works be done?

c. Will the works be disruptive to the leaseholder?

d. Are there additional safety measures required until the work is complete eg waking watch.

6. Will the incoming Leaseholder be the Responsible Person under the Fire Safety (England) Regulations 2022 and own common parts the use of which would be necessary when escaping from a fire?

7. If no, advise client that the responsible person should be in touch after they take up occupation to identify to them the relevant fire safety information eg how to escape from fire and the correct maintenance of fire doors etc.

8. If Yes, have the Regulations been complied with and, in particular:-

a. Have the occupants of the dwellings in the building been provided with the required information?

b. When were the inspections last made to the fire doors to the flats and to the communal areas?

You can see more FAQs here.

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