

Construction Law Update

Government gives industry deadline of early March 2022 to agree to a plan of action to remediate unsafe cladding

Since the Grenfell Tower fire in 2017, the Government has taken a number of steps aimed at addressing the building safety and cladding crisis. Those steps have included provision for financial contributions to remedying unsafe cladding through the ACM cladding remediation programme and the Building Safety Fund, which helps fund the removal and replacement of unsafe non-ACM cladding on buildings over 18m in height. Despite this, significant gaps in funding (including for buildings between 11m and 18m in height) has meant that, in many cases, leaseholders have been forced to fund remedial works themselves.

Following the Secretary of State for Levelling Up, Housing and Communities, Michael Gove's, statement to the House of Commons on 10 January 2022, it appears that is about to change. Mr Gove's speech proposed a substantial reset of the Government's approach to the remediation of unsafe cladding, insisting that those who profited from the unsafe buildings would now be made to pay for the remedial works, not leaseholders and taxpayers.

An Open Letter to the Residential Property Developer Industry

Following his speech, Mr Gove published a letter to the Residential Property Developer Industry requesting that they "*work with [his] department through open and transparent negotiations to agree a settlement that will restore confidence and ensure the industry that caused the problem pays to fix it*". The industry is now asked to:

1. make voluntary financial contributions to a dedicated fund totalling £4 billion to remediate unsafe cladding on properties of 11m – 18m in height;
2. self-fund and undertake all necessary remediation works to buildings over 11m (including over 18m) in height that they have played a role in developing; and
3. provide comprehensive information on all buildings over 11m in height which have historic safety defects and which they have played a part in constructing in the last 30 years.

The letter goes on to state that the next step will be "*open discussions through a roundtable that brings together 20 of the largest housebuilders and developer trade bodies, followed by ongoing negotiations with all those in scope*".

Mr Gove has set a deadline of early March 2022 for a clear, fully funded plan of action to be agreed and has warned the industry that if it fails to commit to resolving the cladding crisis the Government is prepared to take "*all steps necessary to make this happen*" including:

1. restricting access to government funding and future procurements for individual companies;
2. the use of planning powers;
3. the pursuit of companies through the courts; and
4. the imposition of a solution in law.

At this stage it is unclear which companies fall into the letter's scope, however, it is expected that all

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firms with annual profits from housebuilding at or above £10 million will be included.

A 'Bold New Plan'

Other changes in the Government's approach to the cladding crisis which were set out by Mr Gove include:-

1. opening up the next phase of the Building Safety Fund to drive forward removing dangerous cladding from high-rise buildings, prioritising the Government's £5.1 billion funding on the highest risk buildings;
2. providing £27 million to fund fire alarms in all high-risk buildings in an aim to end controversial "waking watches";
3. scrapping proposals for loans and long-term debt for leaseholders in medium-rise buildings and guaranteeing that leaseholders living in their own flat will not have to pay anything to remedy unsafe cladding;
4. establishing a team dedicated to pursuing and exposing companies at fault to make them fix the buildings they built and face commercial consequences if they refuse; and
5. amending the Building Safety Bill to retrospectively extend the legal right to claim under the Defective Premises Act 1972 to 30 years (instead of the previously proposed 15 years).

Consolidated Advice Note Withdrawn

A further change that was announced by Mr Gove which will have wide implications is the immediate withdrawal of the Consolidated Advice Note which was published in January 2020 and, amongst other things, provided guidance on how to assess a

building's external walls and smoke control systems.

It is alleged that the Consolidated Advice Note had been wrongly interpreted by the industry leading to an overly cautious approach to building assessment which went beyond what is reasonably necessary. The Consolidated Advice Note will be replaced by updated guidance by the British Standard Institution which is hoped to help fire risk assessors take a proportionate approach to the assessment of walls and avoid wholesale cladding replacement where safe to do so.

The Government also intends to indemnify building assessors from being sued in the hope this will restore a "common sense" approach to building assessment and prevent buildings being declared unsafe without due cause. The Government will also audit building assessments to ensure that expensive remediation is being advised only where necessary to remove a threat to life.

Analysis

The announcements made by Mr Gove on 10 January 2022 represent widespread changes in the Government's approach to the cladding crisis. Of particular note to those in the industry is the clear shift in focus which made clear the Government was "coming for" developers and building firms for cash to fund remedial schemes. Eyes should also be kept peeled for the publishing of the guidance which will replace the Consolidated Advice Note.

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