

Building Safety Act 2022: Key Issues For Lenders

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26 July 2023

Our Agenda



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The Building Safety Act 2022: timeline

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Development finance issues

- Building Safety Regulator, building types and transitional provisions
- Gateways
- The Golden Thread
- Accountable Person scheme
- Developer “pledge” and Responsible Actors’ Scheme

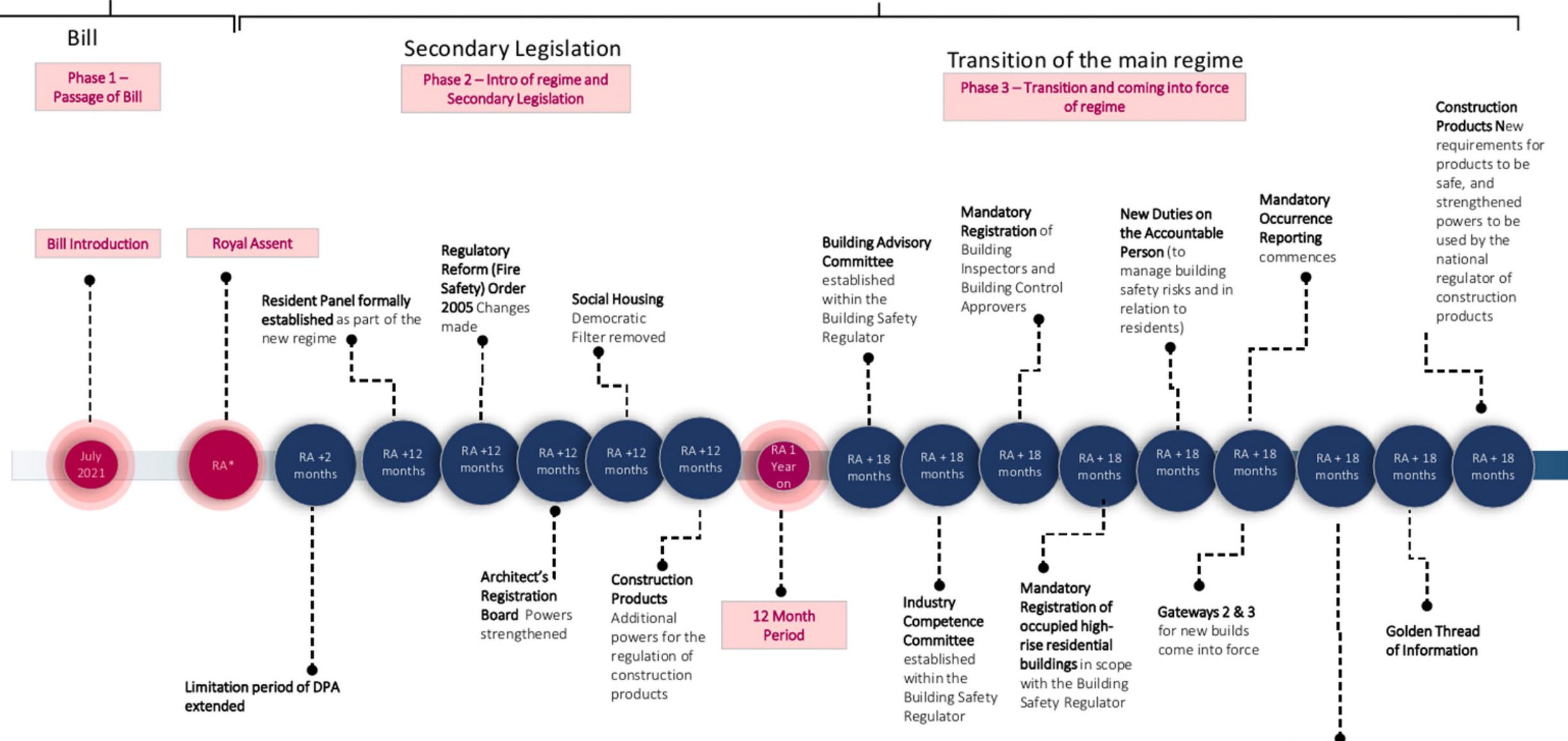
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Investment finance issues

- Leaseholders
- Building Liability Orders
- Remediation Orders and Remediation Contribution Orders

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Q&A



* Royal Assent (RA) is anticipated 9-12 months after introduction.
 We intend for provisions marked RA + 12 months to come into force within six to twelve months of Royal Assent.
 We intend for provisions marked RA + 18 months to come into force within twelve to eighteen months of Royal Assent.

The Building Safety Regulator



- Created out of a new division of the Health & Safety Executive
- The primary objective of the new regulator is to:
 - (a) oversee the safety and standards of all buildings
 - (b) improve competence within the industry
 - (c) lead the implementation of the new regulatory regime for high-rise buildings.
- The Building Safety Regulator will regulate, and act as the Building Control authority for “high rise” buildings (7 or more storeys, or that are 18 metres or higher **and** have at least 2 residential units or are hospitals or care homes under construction).

Buildings regulated by the BSR (as at July 2023)

Building type (in England)	Regulated during construction?	Regulated during occupation?	
Less than 18m / 7 storeys regardless of use (but more than 11m/5 storeys)	✗	✓	
18m / 7 storeys or more, and:			
Residential with at least two dwellings or other units of living accommodation (incl. student accommodation)		✓	✓
Hospital or care home		✓	✗
Hotel		✗	✗
Military barracks		✗	✗
Comprises entirely of a secure residential institution		✗	✗
Mixed use building with two or more dwellings or other units of living accommodation		✓	✓
Commercial, or is a building with only one dwelling		✗	✗

Transitional Provisions



Higher risk buildings outside the scope of the Building Safety Regulator

- Not all higher-risk buildings will fall under the ambit of the new Regulator during construction.
- The existing Building Control regime will apply if the transitional arrangements are met. These require:
 - Deposit of Plans by date new regime comes into force; and
 - Commence work in line with new definition of commencement within six months of new regulations coming into force.
- All requirements of BSA Part 4 will still apply to a higher-risk building in occupation.

Transitional Provisions: “Commencement”



Defining commencement of work in relation to new buildings

11.16 We propose that either of the following two definitions for commencing work on new buildings (both higher-risk and non higher-risk) should apply depending on the construction method:

- i. Completion of the sub-structure of a building up to and including the foundations and any basement levels the construction of walls up to damp proof course level, the laying of foul and surface water drainage (within the footprint of the building) and the installation of the ground floor structure; or
- ii. Completion of the sub-structure of a building up to and including the foundations and any basement levels, the laying of foul and surface water drainage (within the footprint of the building) and the installation of the ground level supporting structure.

Example Scenario # 1- Question



- Deposit of plans done on **1 June 2023** on **higher-risk building**.
- New regulatory regime introduced as planned on **1 October 2023**.
- Works on site **delayed** by discovery of archaeological artefacts.
- Works now expected to meet definition of commencement by **10 April 2024**.

Does this project fall under the ambit of the new Building Safety Regulator?

Example Scenario # 1 – Answer



Answer: Yes. If the new regulator is introduced on 1 October 2023, the definition of “commencement” is likely to have to be met within six months. Completing works on 10 April 2024 would exceed this period. The Transitional Provisions are not met, resulting in the transfer of this project to the jurisdiction of the Building Safety Regulator, as follows:

- Initial notice or deposited full plans must be sent to the BSR within 12 weeks of end of transition period.
- BSR will not re-assess these buildings, but can require further information.
- Where request for information received, works must pause for 10 days.
- BSR can issue compliance or stop notices where it has concerns about compliance.
- Guidance currently unclear on how much of new regime will apply.

Example Scenario # 2 - Question



- Deposit of plans done on 8 October 2023 on higher-risk building.
- New Building Safety Regulator regime introduced on 15 October 2023.
- Works achieve definition of “commencement” by 12 April 2024.

Does this project fall under the ambit of the new Building Safety Regulator?

Example Scenario # 2– Answer



Answer: No. The transitional arrangements have been satisfied:

- Plans were deposited before the new regulatory regime was introduced (in this example, that is slightly later than currently expected, being 15 October 2023); and
- The definition of “commencement” is satisfied within six months of the new regime coming into force (note this is not a fixed date, it will move depending on when the new regime is introduced).

Accordingly, the project proceeds under the existing Building Control function. It is not subject to Gateway 2 or 3.

It is not until registration and occupation that this higher-risk building will fall under the jurisdiction of the Building Safety Regulator.

The Gateways

Applies to “relevant buildings” – those that contain two or more dwellings, or educational accommodation and meet the height condition of either 18m or higher, or 7 or more storeys.

Gateway 1 – The Planning Phase – utilises existing planning framework with new requirement to show fire safety requirements have been considered.

Gateway 2 – The Pre-Construction Phase – a hard stop. New Regulator must be satisfied the Functional Requirements of the Building Regulations are met.

Gateway 3 – the Completion Phase – a hard stop. New regulator assesses compliance with Building Regulations and issues a completion certificate.



The Golden Thread – Before works start



Before building work starts

Before starting any building work, applicants will need to submit a design application to BSR. The application will include information that shows how the design will:

- meet the building regulations
- manage change control
- help dutyholders meet legal requirements, including on competence golden thread requirements.

The application will need to show the assumptions that have been made about the occupied building once built. Any assumptions and proposals must be reasonable and justified

The Golden Thread – During Construction



During Construction

Building work must not start until approved by Building Safety Regulator.

There will be ongoing requirements, including:

- site inspections at key milestones
- reporting certain occurrences
- managing change
- identifying and storing the golden thread of key information about the building

The Golden Thread – Completion



Completion

At completion, the Building Safety Regulator will:

- assess the application against the building regulations
- undertake final inspections of the completed building work
- assess the documents to be given to the building owner

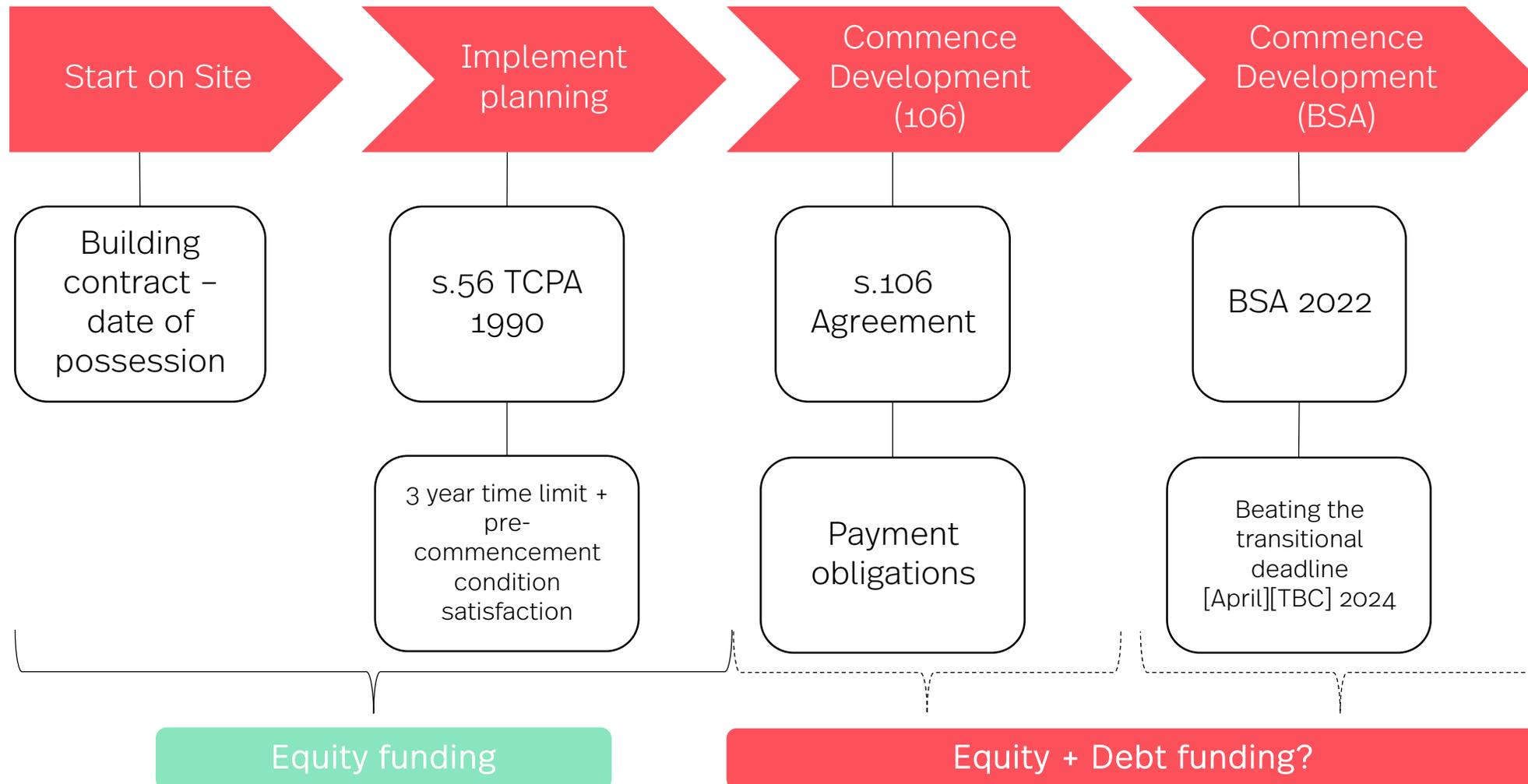
On approval, the Building Safety Regulator will issue a completion certificate.

Which date is a CP to first utilisation?



Transitional period

Transitional period

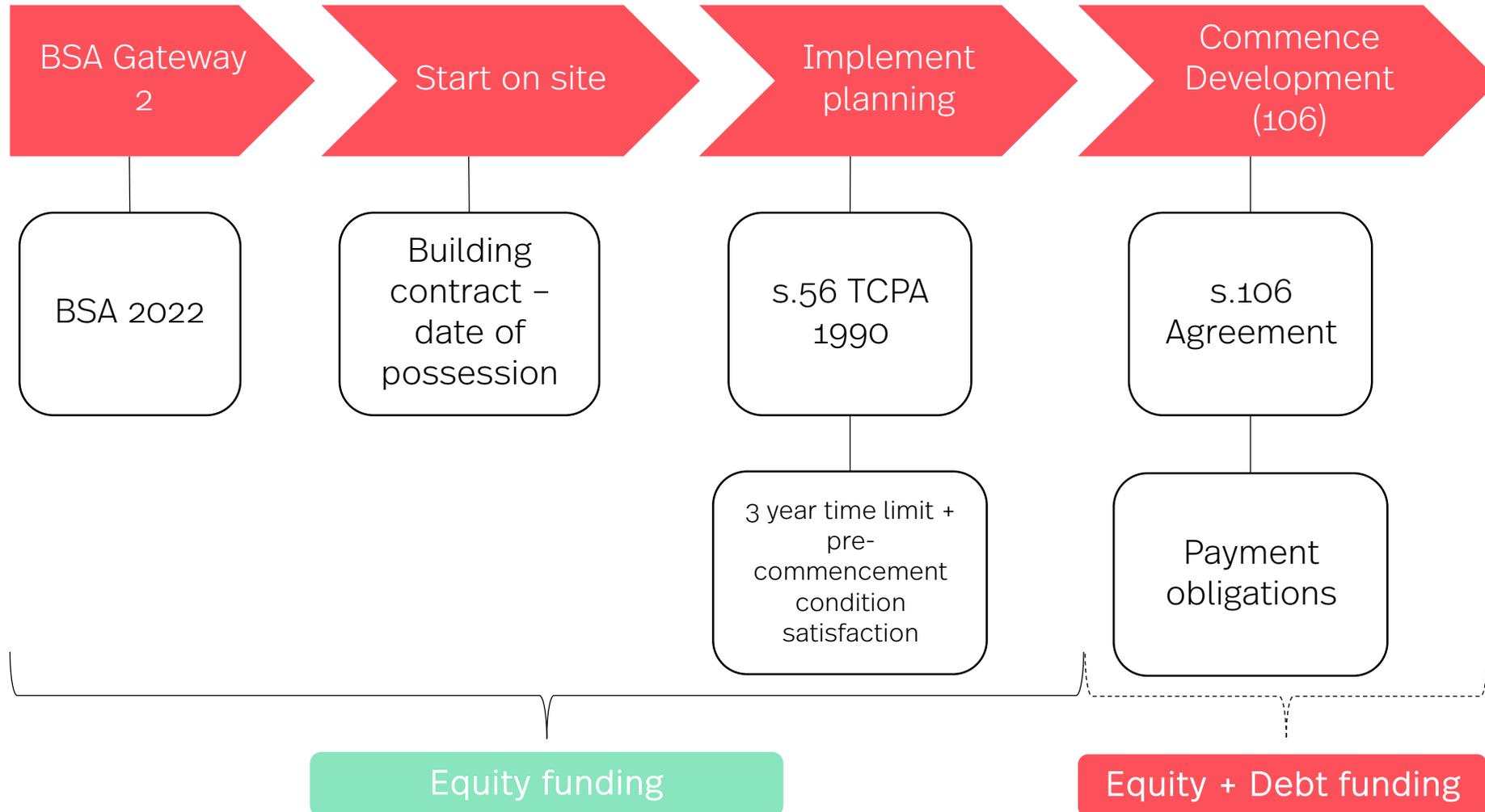


Which date is a CP to first utilisation?



New regime

New regime



Panel discussion



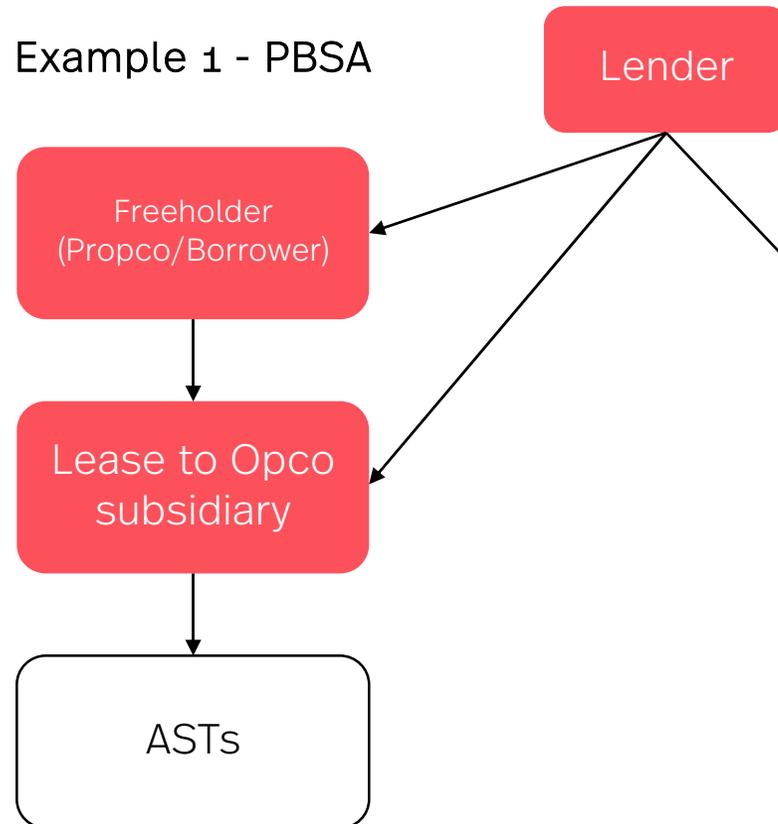
Summary checklist – development finance



- In or out of transition period?
- Gateway evidence CPs
- Competency statement
- Construction document protections
- Transactional document protections
- Registration

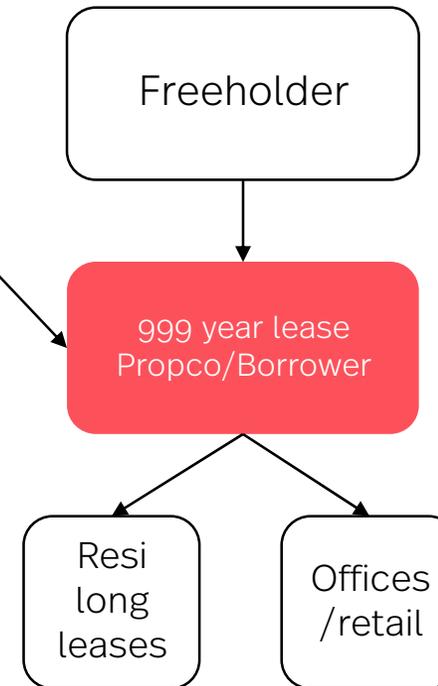
Accountable Person / Principal Accountable Person for HRBs

Example 1 - PBSA



- Does the lease to Opco demise the common parts?
- Does it demise the structure and exterior?
- If so, Opco will be the PAP.
- Less clear that Propco is an AP but take the cautious approach and assume it is

Example 2 - Mixed use - resi units "sold"



- Does the 999 year lease demise the common parts?
- Does it demise the structure and exterior?
- If so, Propco/Borrower will be the PAP.
- Less clear that Freeholder is an AP but take the cautious approach and assume it is

Duties of the AP/PAP



Duty to take all reasonable steps to:

1. prevent a building safety risk happening (building safety risk defined as the spread of fire and/or structural failure); and
2. reduce the seriousness of an incident if one happens.

PAP's must also:

- Register existing buildings with the Building Safety Regulator before **1 October 2023**
- Prepare a safety case report assessing and managing risk
- Establish and operate a Mandatory Occurrence Reporting system
- Establish and operate a residents compliant system
- Apply for a building assessment certificate

Pledge / Developer Remediation Contract

- Government process for ensuring Developers take responsibility for (a) remediating “life critical fire safety” defects in existing 11m+ residential / mixed use buildings in England developed by them; and (b) repaying Government for building safety funding provided to owners to remediate blocks
- Developer Pledge and Developer Remediation Contract:
 - Large Developers asked to sign “pledge” in March 2022.
 - Negotiation of terms with DLUHC resulted in “Developer Remediation Contract” which large developers expected to sign up to by March 2023.

Responsible Actors’ Scheme – s126 – 129 BSA

- Sections empower Government to create a building industry scheme and to impose prohibitions on eligible members who do not join
- “Responsible Actors’ Scheme” regulations now in force
 - Will cover entities who meet certain eligibility criteria (presently focussed on larger entities / groups but Government has noted intends to extend to smaller entities in future)
 - Qualifying persons will be required to sign up to the “Developer Remediation Contract”
 - Refusal to join scheme when eligible will result in placement on publicly available “prohibitions” list which will bar planning permission or building control approval for most types of proposed work.

Investment Loans

BSA considerations



Investment loans

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- Higher risk (7 storeys/18m) or “medium rise” (5 storeys/11m)?
- 2+ dwellings (so includes mixed use)
- If an HRB:
 - Recently developed? PC has occurred but is the building registered?
 - Is your borrower/obligor an AP? Are they a PAP?
 - Has all the required information been provided?
- If an MRB:
 - Are there building safety risks ? Who might be liable?
 - Service charge shortfall risk?
 - Management obligations will be more onerous
- Review and retention of Golden Thread information (ongoing updates)

Building Liability Orders (“BLO”)



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What are BLOs?

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What is a “relevant liability”?

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When is a “relevant liability” incurred?

4

What is the effect of a BLO?

5

Who is a “specified body corporate” and “associated entity”

What is a BLO



130 Building liability orders

- (1) The High Court may make a building liability order if it considers it just and equitable to do so.
- (2) A “building liability order” is an order providing that any relevant liability (or any relevant liability of a specified description) of a body corporate (“the original body”) relating to a specified building is also—
 - (a) a liability of a specified body corporate, or
 - (b) a joint and several liability of two or more specified bodies corporate.

What is a relevant liability?



- 1. Defective Premises Act 1972
- S38 of the Building Act 1984
- “as a result of” a “building safety risk” – “ a risk to the safety of people in or about the building arising from the spread of fire or structural failure”.



When is a relevant liability incurred?



S130(3)

- (3) In this section “relevant liability” means a liability (whether arising before or after commencement) that is incurred—
- (a) under the Defective Premises Act 1972 or section 38 of the Building Act 1984, or
 - (b) as a result of a building safety risk.

S 130(5)

- (5) A building liability order—
- (a) may be made in respect of a liability of a body corporate that has been dissolved (including where dissolution occurred before commencement);
 - (b) continues to have effect even if the body corporate is dissolved after the making of the order.

Who is a specified body corporate/associated entity?



- (4) A body corporate may be specified only if it is, or has at any time in the relevant period been, associated with the original body.

“the relevant period” means the period—

- (a) beginning with the beginning of the carrying out of the works in relation to which the relevant liability was incurred, and
- (b) ending with the making of the order;

131 Building liability orders: associates

- (1) For the purposes of section 130, a body corporate (A) is associated with another body corporate (B) if—
 - (a) one of them controls the other, or
 - (b) a third body corporate controls both of them.

Subsections (2) to (4) set out the cases in which a body corporate is regarded as controlling another body corporate.



“Relevant building” and “relevant defects” for ROs and RCOs

- “Relevant building”: A building 11m / 5 storeys or more with two or more dwellings, in England, self-contained and which has been constructed, converted or had works done to it within 30 years prior to 28 June 2022 (or in future, if the works are to remedy a relevant defect).
- “Relevant defects”: Defects arising out of those works which have caused a “building safety risk” (i.e. a risk to the safety of the people in the building relating to the spread of fire or the collapse of the building or any part of it).

“Relevant landlord”

- See s123(3) and (4) for definition in relation to Remediation Orders (note different definition for Remediation Contribution Orders)

“Remediation Orders and Remediation Contribution Orders”

- S123 – 124 BSA - new powers granted to the First Tier Property Tribunal to grant orders.
- “Interested persons” – including local authority, Secretary of State, anyone with a legal or equitable interest in a relevant building can apply for:
 - **A Remediation Order (s123 BSA):** “*requiring a relevant landlord to remedy specified relevant defects in a... relevant building ...*”; and/or
 - **A Remediation Contribution Order (s.124 BSA),** “*requiring a specified body corporate or partnership to make payments to a specified person, for the purpose of meeting costs incurred or to be incurred in remedying relevant defects in a... relevant building ...*” if the Tribunal considers it **just and equitable** to do so.
- **Remediation Contribution Order – who is a “specified body corporate or partnership”?**
 - Certain landlords (either a current landlord(s) or the entity(s) which were a landlord as at 14 February 2022) (see s124(3));
 - the “developer” of the relevant building; (see s124(5) for definition))
 - any entity “associated with” the above parties (see s121 of the BSA for the test for when entities are “associated” for this purpose).
 - RCOs cannot be made against directors.
- **Batish decision**
 - First decision in FTT to grant an RCO – requiring developer (and current freeholder) to repay leaseholders c £195,000 of service charges paid to remediate building safety defects relating to balconies and works identified by the local authority in an improvement notice.
 - FTT decided “relevant defects” existed as local authority had identified them as hazards under a Housing Act 2004 notice – considered sufficient to be a “building safety risk”. “Just and equitable” to make the order as the developer/freeholder would have had to pay for the works under new Schedule 8 BSA.

Building Safety Act

Q&A



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