

Briefing Note: Energy Efficiency in Privately Rented Commercial Property

Introduction

This note provides a short summary in relation to the requirements of the *Energy Performance of Buildings (England and Wales) Regulations 2012* (the “2012 Regulations”) applying to Energy Performance Certificates (“EPCs”), which are to be made available to prospective buyers or tenants whenever a building used for commercial purposes is constructed, sold or let.

It also provides some points to consider in light of the *Energy Efficiency (Private Rented Property) England and Wales) Regulations 2015* (the “2015 Regulations”), which aims to improve energy efficiency in both residential (i.e. domestic) and commercial (i.e. non-domestic) privately rented property, and reflects the Government’s *Non-Domestic Private Rented Property Minimum Standard Guidance for Landlords* issued in February 2017 (the “2017 Guidance”).

The most significant difference in respect of residential property, from the commercial property position discussed below, is that the requirements for privately rented commercial properties from 1 April 2023 will apply to privately rented residential properties 3 years earlier, from 1 April 2020.

This guide should not be relied upon as legal advice and you should contact us for advice on your specific circumstances.

Since 2008, an EPC has been required upon the construction, sale or letting of virtually all properties (domestic and non-domestic) in England and Wales and gives a property an energy efficiency rating from A (being the most efficient) to G (being the least efficient). An EPC may also be required when a property is altered in particular ways. There are properties in respect of which an EPC is not required, most notably some listed properties and properties within a conservation area. In circumstances where an owner or occupier of such property is uncertain as to whether an EPC is required, appropriate advice should be sought at the earliest opportunity.

The 2012 Regulations place an obligation on the ‘relevant person’, being the seller, landlord or person carrying out the construction of the property in question, to make a valid EPC available free of charge to any prospective buyer or tenant. An EPC must be commissioned by the relevant person before the property is put on the market, and should be made available to any prospective buyer or tenant at the earliest opportunity and, in any event, within the timeframe specified in the 2012 Regulations. No viewings should be arranged, or details of a property distributed, until a valid EPC has been made available.

If the above conditions are not adhered to, the ‘relevant person’ may be liable for a penalty charge. This will be imposed by Trading Standards Officers and in most cases the penalty will be 12.5% of the rateable value of the building, with a minimum of £500 and a maximum of £5,000.

Once granted, an EPC remains valid for a period of 10 years (unless works are undertaken at the property during that time which would require a new EPC to be commissioned). Once lodged on the EPC register, the EPC will remain valid after a property is sold on. Future owners of the property can therefore use the EPC for their benefit, so long as it is less than 10 years old. An owner, landlord or tenant is free to commission, produce and lodge a voluntary EPC at any point, which will then become the current EPC for the Property. Once an EPC certificate expires, there is no automatic requirement to produce a new one until the next time the property is sold, let or relevantly modified.

Briefing Note

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Summary:

A short summary on the various measures in place (and due to be put in place) in the UK, aimed at increasing energy efficiency in privately rented commercial buildings.

For detailed advice on all commercial property matters please contact:

Hannah Bambury
Partner

01323 435900

hannah.bambury@gabyhardwicke.co.uk

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The 2015 Regulations brought into force the minimum energy efficiency standards (“MEES”), designed to tackle the very least energy efficient properties in England and Wales, namely those rated F or G on their EPCs, with the overarching aim of improving energy efficiency in privately rented properties. A property that fails to meet MEES is known as a **sub-standard property** and soon will not legally be lettable without the landlord first implementing recommended energy efficiency improvements so that MEES are met. There are, therefore, implications for landlords, lenders and tenants. However, the 2015 Regulations have come into effect in stages (an overview of which is set out below) and not all privately rented commercial property is subject to them, so it is important to take legal advice as to how, and to what extent, you might be affected in your particular circumstances.

Stage 1, Registering Exemptions – Act Now!

Landlords of sub-standard commercial properties have been able to register valid exemptions to MEES on The National PRS Exemptions Register (“Exemptions Register”) since April 2017. A valid and registered exemption will allow a landlord to let, or continue to let, a sub-standard property without meeting MEES. Potential registrable exemptions include:

- in respect of properties which are listed or within a conservation area, where an EPC is not required; and
- where it has been determined by an independent surveyor that the relevant energy efficiency improvements (i) are not financially viable, or (ii) would reduce the market value of the property by more than 5%.

With Stage 2 fast approaching, Landlords should act now to ensure that they have completed registering exemptions on the Exemptions Register by 1 April 2018.

It is important to note that registered exemptions will not pass to a new owner or landlord upon sale, or other transfer, of the property. A new owner or landlord will therefore need to either improve the property to meet MEES at this point, or register a fresh exemption if they intend to continue letting the property.

Stage 2, 1 April 2018 – Prohibition on New Lettings of Sub-Standard Commercial Properties

On or after 1 April 2018 it will be unlawful to grant a relevant new lease, or let as a result of an extension or renewal of an existing lease, of any private commercial properties that are deemed to be sub-standard. This will apply to all such properties which require an EPC and appears to extend to lease extensions/renewals, sub-lettings and assignments.

It should also be noted that if a sub-standard property is sold, the new owner/landlord has a temporary exemption of only 6 months (which must be registered on the Exemptions Register) during which to comply with the regulations. Compliance could be very expensive, and this will therefore be an important due diligence consideration when purchasing a property.

Stage 3, 1 April 2023 – Prohibition on Letting All Sub-Standard Commercial Properties with Valid EPCs

On or after 1 April 2023 the 2015 Regulations become more onerous, capturing all privately rented commercial properties (where a valid EPC, which has not expired, exists) even where there has been no change in the tenancy agreement/lease. This will amount to a prohibition on letting all such sub-standard commercial property without the landlord first implementing recommended energy efficiency improvements so that MEES are met (unless a valid exemption applies, and is registered on the Exemptions Register).

The new regime will have teeth through penalties imposed by the enforcement authorities, with the level of such penalties being dictated by the duration of the breach, with the amount currently capped at the greater of (i) £10,000 or (ii) 20% of rateable value, up to a value of £150,000. A record of the breach will also be published in the Exemptions Register, and additional penalties will be imposed for registering false or misleading information and/or for failing to comply with a compliance notice.

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Given the various measures already in place, and the staged implementation of the 2015 Regulations including the 1 April 2018 deadline fast approaching, energy efficiency in privately rented commercial properties is not an issue which will be going away. Landlords should ensure they have completed registering exemptions on the Exemptions Register by 1 April 2018 and, whether you are a landlord or tenant, you should:

- consider including provisions relating to energy efficiency of the relevant buildings in new leases being granted; and
- take legal advice if you are unclear as to how, and to what extent, the forthcoming changes might affect your particular circumstances.

We would be happy to advise you further on both of these issues.

If you would like to know more about this topic or our legal services, please contact Hannah Bambury on 01323 435900 or hannah.bambury@gabyhardwicke.co.uk.

Gaby Hardwicke
33 The Avenue
Eastbourne
East Sussex
BN21 3YD

Tel: 01323 435900
Fax: 01323 435901
www.gabyhardwicke.co.uk