

# Developers pushed further on remediation by the Responsible Actors Scheme

11 July 2023  Rebecca Toates

The Building Safety (Responsible Actors Scheme and Prohibitions) Regulations 2023 (**Regulations**) came into force on 4 July 2023 setting the terms of the promised Responsible Actors Scheme (**RAS**) with the primary purpose of preventing developers who are not remediating relevant buildings from beginning or completing new projects as a further incentive for developers to remediate defects in unsafe buildings and ensure that developers who take on the cost of remediating unsafe buildings are not disadvantaged in the market against those who are not doing so.

This article seeks to provide a summary of how the scheme will operate in line with the Regulations and what developers will need to consider going forwards.

## What are Relevant Buildings under the RAS?

Building which are:

1. residential buildings (specifically including mixed-use);
2. at least 11 metres high and located in England; and
3. developed or refurbished between 5 April 1992 and 4 April 2022 (**relevant period**).

## Who should join the RAS?

Developers are “eligible” to join the RAS if they satisfy the following:

1. Their **principal business is residential property development**;

Regulation 10 states that 50% or more of a developer’s total adjusted operating profits must come from the development of residential property in the United Kingdom. Note that this criteria does **not** apply if the developer has been responsible for the development or refurbishment of a building which has already obtained public sector funding for remediation under the Building Safety Fund or ACM Cladding funds.

2. The developer (or an associated company) have been **responsible for** the development or refurbishment of one or more relevant buildings in the relevant period; and
3. The **profit condition** is met;

Regulation 11 states that this is satisfied where the developer’s average adjusted operating profits is £10 million or more per year over the years 2017-2019 (inclusive) with detailed drafting on how this is calculated.

The Regulations also allow for other developers to volunteer to join the scheme where they have been responsible for the development or refurbishment of one or more relevant buildings in the relevant period and at least one of the buildings requires remediation.

Given the measures set out in the rest of this article, it might be hard to see why a developer would volunteer for the RAS, but it could clearly become a tendering requirement for public sector bodies and, with the Grenfell report being published this year, fire safety

generally is an important topic for both the public and funders of such developments so a “Responsible Actor” status may bring benefits.

## Applying to join the scheme

If a developer appears eligible for the scheme, or it is a member of a group where more than one entity in the group is likely to be eligible, it will be given notice by the Secretary of State to apply to become a member of the scheme.

Within 60 days of that notice the developer must either: enter into the Government’s Self-Remediation Contract and submit an application for membership of the RAS; or give notice to the Secretary of State that neither it nor any body corporate in the same group is eligible to join the scheme and provide relevant evidence to support that view.

## What are the RAS requirements?

A member of the scheme must enter into the Self-Remediation Contract with the Secretary of State which contains onerous terms providing for the developer to undertake the remediation of the buildings for which they are responsible.

A developer’s membership of the scheme may be revoked for failure to comply with the membership conditions, failing to provide relevant information or taking steps to avoid their obligations.

The Secretary of State will publish a list of RAS members and a **prohibitions list** containing **eligible non-members** (those eligible for the RAS but that have not become members), or persons who were members of the RAS but membership has been revoked and **entities that are controlled by any eligible non-member**.

Given Michael Gove’s vocal stance to date on developers who did not sign the Self-Remediation Contract, we can expect there to be significant adverse publicity in relation to failure to join the RAS when eligible to do so.

## Planning Prohibition

Under Regulation 29, an applicable person is prohibited from carrying out (including through agents, contractors or other persons) major development of land (including sites with over 10 dwellings) (**Planning Prohibition**) and is obliged to notify local planning authorities of their status as an applicable person when applying for planning permission for major development, acquiring an interest in land (or a contractual entitlement to develop land) or transferring an interest in land which has the benefit of such permission to a person that is not an applicable person.

There is an exception in relation to critical national infrastructure where it is deemed to be in the public interest to disapply the Planning Prohibition (and the Building Control Prohibition below).

It is worth noting that the Planning Prohibition does not have retrospective effect so it will not apply to planning permission granted before 4 July 2023 but will apply should any subsequent application (including reserved matters) be required for all or part of the development.

The exact detail of how local authorities will enforce these prohibitions has not yet been published.

## Building Control Prohibition

Under Regulation 33, an applicable person is also subject to building control prohibitions (**Building Control Prohibition**) which include: prohibitions on giving building commencement notices, applying for building regulations final and completion certificates and other notices and extend to the developer’s agent and contractors applying on their behalf.

There are certain limited exceptions to the Building Control Prohibitions relating to emergency repair work and work on occupied buildings or where the prohibition unduly prejudices plot sale purchasers and an exception has been approved by the Secretary of State.

It is again worth noting that the Building Control Prohibition will not affect the validity of documents given to / accepted by an applicable person by a date before that person became an applicable person.

## Summary

The Responsible Actors Scheme represents the next step in the Government’s ongoing mission to ensure life-critical fire safety defects in buildings over 11 metres are remediated. However, its measures are extremely severe – effectively barring eligible developers who have

not signed up to the scheme from significant development completely, as they will not be able to obtain planning, carry out development and obtain building control sign off.

Letters are already being sent by the Secretary of State to developer entities stating they believe they may be eligible for RAS, so developers should act now to consider if they meet the criteria and how they will respond and not wait for the further guidance that is promised later this summer.

If you have further questions on this, or on any other matters, please get in touch with our team.

## Key contact

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