

Introduction

The Assessment of Energy Performance of Non-domestic Buildings (Scotland) Regulations 2016 apply from 1 September 2016. These regulations are triggered by the process of making a building or building unit available for sale or rental to a new tenant. They introduce a requirement for owners of larger non-domestic buildings to assess and, ultimately, improve the energy and emissions performance of their buildings.

Details of these regulations and further guidance on how they affect building owners is published at www.gov.scot/section63.

This 'frequently asked questions' document supplements published guidance and summarises issues raised by those affected by the regulations. It is intended that this resource will be updated periodically to reflect common queries received and topics of interest.

Frequently asked questions - list of topic areas

Questions and answers are arranged under the following topic groups. Click on the relevant topic to be taken to the content for that section.

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1. Triggers for application of the regulations

Q. What is meant by 'building owner' and 'sale' in the regulations?

The concepts of ownership and sale of a property are already adequately defined in property law and not discussed further in the context of these regulations. Where there is not a specific definition within regulations, the common definition of a term should be used in considering application of regulations.

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Q. What constitutes ‘rental to a new tenant’

The concept of rental or lease of a property is already adequately defined in property law and not discussed further in the context of these regulations. Where there is not a specific definition within regulations, the common definition of a term should be used in considering application of regulations.

However, it should be noted that the intent of the trigger identified in regulations relates to a situation which would result in creation of a new lease. Extending the duration of an existing lease for an existing tenant does not trigger application of the regulations. Similarly, assignation of an existing lease, by a party who is not the owner, to a new tenant should not trigger application of the regulations¹.

Building owners should ensure that they receive documentation on any such assignation as this may be needed to demonstrate to an enforcing authority that the application of the regulations was not triggered.

Q. Will the assignation of an existing lease trigger the requirement to assess and improve?

No, this is not the intent. See the previous answer.

It should be noted that, for any qualifying building, a new lease entered into following the placing of a property to the market on or after 1 September 2016 will attract the provision of an Action Plan. The duty of the owner to provide an Action Plan in respect of any subsequent lease situation would be met through use of the Action Plan prepared for initial marketing when first subject to the regulations. Where an Action Plan exists and a lease is assigned, it is recommended that that information and any obligation on the tenant arising from it is communicated to the new tenant.

Q. Am I required to produce an Action Plan if my building is a qualifying building but was already on the market before 1 September 2016?

No, that is not the intent. Application of the regulations is triggered by the act of making a building available for sale or rental to a new tenant. It is this planned change in status that would require preparation of an Action Plan as part of preparation for marketing so that the document is available once the building is available to prospective buyers or tenants.

However, if a building marketed before 1 September is withdrawn from the market then re-marketed, the regulations would be triggered and an Action Plan needed. For buildings marketed before 1 September 2016, owners should therefore ensure that they have evidence to support both date and continuity of marketing in case of challenge by an enforcing authority.

¹ Note that this advice relates only to application of The Assessment of Energy Performance of Non-domestic Buildings (Scotland) Regulations 2016 and should not be considered outwith this context.

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Q. Does an owner need to produce an Action Plan where, for a building over 1,000 m², the part of the building for sale or rental is less than 1,000 m²?

The regulations define a building unit as “a part of a non-domestic building which is designed or altered to be used separately”.

The floor area trigger refers to the area of the property for sale or rental. Where part of a building (a ‘building unit’) is marketed, it is the area of that part, not the area of the entire building, which is considered.

Accordingly, where a building for sale or rental is more than 1,000 m² in area, and it is not otherwise exempt, an Action Plan must be produced before marketing the property.

Similarly, where a building unit for sale or rental is more than 1,000 m² in area, and it is not otherwise exempt, an Action Plan must be produced before marketing the property.

See also ‘Can my existing EPC be used as the basis for an Action Plan’ below.

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2. Assessors and information needed for assessment

Q. What is a section 63 Assessor and where can I find one?

A Section 63 Advisor is an individual registered with a Scottish Approved Organisation. They can produce Action Plans and provide advice to building owners on how the targets identified in an Action Plan can be met by implementing building improvement measures.

They are existing non-domestic EPC Assessors who have been registered on the basis of further competence in the application of the Action Plan assessment software and the provision of building-specific advice on energy efficiency improvements.

Section 63 Advisors registered with Approved Organisations can be found using the ‘Search for an Assessor’ function on the Scottish EPC Register Website – <https://www.scottishepcregister.org.uk/assessorsearch>.

Q. Can my existing EPC be used as the basis for an Action Plan? If the EPC is valid (i.e. not expired), why couldn't it be subsequently be used to inform the action plan?

You should seek advice from your Section 63 assessor on such matters as they will be best placed to interrogate the information you currently have and advise if a current, valid EPC and the data it presents is suitable for reuse.

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There may be a benefit in engaging a Section 63 Advisor who was also the EPC assessor who undertook your EPC and is familiar with your building.

In considering EPC use as the basis of an Action Plan, the current valid EPC must:

- be an assessment lodged as data to the Scottish EPC Register;
- relate to the same building extents that are for sale or rental;
- represent the current form, fabric and services of the building/building unit for sale or rental; and
- be retrievable as data, either from the Register or from the original Assessor and be suitable for reuse in the iSBEM Action Plan tool.

Q. Are there other issues I should be aware of when marketing separate parts of a building?

As noted in the previous answer, owners should be aware that the EPC used as the basis for the Action Plan must match the description and extents of the property for sale or rental. Where a building unit is marketed, this may not always be the case as a non-domestic EPC may have been produced for the entire building rather than individual units.

In such cases, a new EPC, covering only the proposed subject of the transaction, would be required prior to preparing an Action Plan. However, where the owner owns the entire building, and particularly if lease of other building units is anticipated, the owner may choose voluntarily to prepare and execute an Action Plan for the whole building.

Q. As an owner, what should I consider where arranging an assessment at the end of a lease where, for example, a building will be returned to original condition by the tenant as a condition of lease?

Assessment of a building and preparation of an Action Plan can only be undertaken based upon the building at the date of assessment. It is therefore important to discuss the current status with the Section 63 Advisor during initial discussions to identify options available to you.

- If an assessment of the building in its current leased state reports that it is either exempt due to compliance with the 2002 building regulations (as reported in a v5.2g EPC Recommendations Report) or by other documented means, no Action Plan is needed;
- Similarly, if the building is not exempt but application of the prescriptive scenario identifies a zero improvement target, a final Action Plan is lodged and no further action is needed.

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However, if assessment identifies an improvement target, the building owner will need to consider the following and confirm to the Advisor, that they wish to either:

- lease the building in its current form and base the improvements listed in the Action Plan on the current building, with the intent of undertaking them; or
- recognise that the building must be stripped and refitted, accept that a further Action Plan will be needed following a new lease agreement, once the new form of the building is established.

In relation to both option, discussion with a tenant on the potential to build improvement measures into any planned fit-out work is sensible.

Q. If my building is currently exempt as it meets the 2002 regulations but work is planned as part of a new lease, do I now require an Action Plan?

No. Such work can be ignored in relation to the regulations as any building work undertaken as part of a new fit-out meets the more stringent requirements of guidance supporting current building regulations. In this situation, a building that was already deemed energy efficient enough (meeting the 2002 or later standards) would only be improved through application of current building regulations. It is therefore deemed that any current exemption would be maintained.

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3. Producing the initial and subsequent Action Plans

Q. Can a purchaser negotiate the content and proposals in an initial Action Plan with a seller before submitted to the register?

The initial Action Plan for a qualifying building should be lodged prior to marketing to enable it to be available to any prospective buyers or tenants. Failure to do so leaves an owner open to enforcement action under regulation 22 (Penalty charge notices - failure to provide an Action Plan).

Q. If a current Action Plan indicates that building improvement measures are to be carried out, can a purchaser lodge a new Action Plan if they would prefer to carry out alternative improvement measures, or measure operational ratings and display a DEC instead?

An Action Plan produced in support of the initial marketing of a property for sale or rental remains valid for subsequent transactions until replaced or revoked. Any subsequent owner of the building may choose lodge a new Action Plan at any time. In any new Action Plan, the improvement targets and the planned completion date will remain unchanged and the option to report operational ratings can only be adopted within 12 months of the date of issue of the first Action Plan for the building.

- Q. If a purchaser wishes to change the improvement measures in an Action Plan, can they use the original data to do so? Must they use the original section 63 advisor to make those changes?**

The data lodged to the Scottish EPC Register which is used to produce an Action Plan is available for reuse to all registered Section 63 Advisors. Whilst it will usually be most practical and cost-effective for an owner to engage the Section 63 Advisor who produced the current Action Plan, owners can use another Advisor if they wish to.

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4. Choosing improvement measure for inclusion in an Action Plan

- Q. Published examples of the Action Plan format imply that an owner can reject the prescriptive improvement measures in favour of alternative measures. Can a landlord just rely on alternative measures to comply?**

It is expected that most building owners will, after discussion with their Section 63 Advisor, record alternative measures on a lodged Action Plan as these will generally offer the most cost-effective improvement route.

The main purpose of prescriptive measures is to set the energy performance and emissions targets for the building under assessment. Whilst a building owner can choose to adopt the prescriptive measures in a lodged Action Plan, it is unlikely that they alone will always offer the best solution for the building.

Accordingly, the Section 63 Advisor is required to provide at least one alternative improvement scenario which can comprise of both prescriptive and/or alternative improvement measures.

- Q. There are 7 prescriptive improvements listed, however, alternative improvements are also encouraged. Could examples of acceptable alternative improvements be given?**

The intention for the Action Plan is that alternative improvement measures, rather than prescriptive measures, will be the normal output and these will be tailored for the building under assessment.

Examples of generic alternative improvements can be found in the measures recommended on non-domestic EPCs. However, it is expected that measures recommended in an Action Plan will be more specific to the building under assessment and will also be supported by further information provided by the Section 63 Advisor.

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The Section 63 Advisor is required to propose only measures which are relevant to the building under assessment, are practical to implement and can have their energy and emissions benefit quantified within the calculation methodology. It is intended that alternative measures recommended should indicate a cost effective approach to building improvement that offers a 'best fit' for the owner's intentions for the building.

Q. Will purpose-built student accommodation buildings, serviced apartments or care homes, which are classed in some cases as commercial buildings, be affected by the regulations?

If the building is categorised as a non-domestic building, be this a commercial premises or a building owned or occupied by a public authority, it can be subject to the regulations. If the building or a building unit is to be made available for sale or rental to a new tenant, the owner should determine if an Action Plan is required.

If the building is categorised as a dwelling, it is a domestic building and outwith the scope of these regulations.

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5. Challenges when undertaking improvement measures

Q. Building owners may wish to undertake improvement following an Action Plan but, where leasing, it may not be possible for the owner, as landlord, to gain access to carry out the works?

It is recognised that improvement of a building in a commercial environment where continuity of let is important may be challenging. That is one of the reasons why the less-invasive deferment option of reporting annual operational ratings may be useful initially.

However, the trigger for an Action Plan on lease relates to the lease of a building to a new tenant (extension of an existing lease is an exclusion). It is therefore important for building owners to ensure, as far as practical, that the provisions needed to meet their duties under these new regulations are present in the conditions of any new lease, as appropriate to their circumstances.

In situations where a tenant intends to make alterations to a building before occupation, this may include investigating the opportunity to implement Action Plan improvements as part of such enabling works.

- Q. If a Building has centralised plant, improvements to individual building units that are the subject of an Action Plan may be very limited. How would this be dealt with?**

That is for the owner to decide in discussion with their Section 63 Advisor.

Provided centralised plant is under the control of the building owner, this may make improvement easier and less disruptive to individual tenants, though potentially more costly as it would improve all parts of the building it serves.

Alternatively, the owner may wish to focus upon improvements that relate only to elements within the property being assessed.

In all cases, it would be sensible for an owner to consider, from a commercial and operational perspective, what the most beneficial wider improvement strategy for the building is. The owner is best placed to discuss their intent and direct their Assessor on this.

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6. Use of the Operational Ratings route

- Q. Is it correct that deferral of the completion of improvement measures, by annual reporting operational ratings can continue indefinitely?**

Under the current regulations, the operational ratings option may continue each year and no time limit for application is identified. However, building owners should be aware that annual reporting defers but does not remove the need to undertake improvement and the option to defer may change as part of future review of the regulations.

Information received from lodged Action Plans will inform the future policy review process for Scottish Government. This will include the extent to which energy use reported via operational ratings assessments does show a reduction in energy use and associated emissions, delivered without physical improvement.

- Q. If the Operational Ratings route is taken, would this only relate to the building or building unit described in the Action Plan and not the whole building?**

The requirement to report on annual operational energy use relates to the building extent described in the Action Plan. This is what is required under the regulations. Reporting should therefore be on that basis, to enable matching of assessments using the relevant building unique property reference number (UPRN).

- Q. Guidance states that owners have 12 months to decide whether to implement improvements or not. Do they have to commit at the very outset to do DEC's to be compliant if this is ultimately the route they take?**

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To enable an Action Plan to be lodged, owners must instruct the Section 63 Advisor on whether they will undertake improvement or defer improvement by reporting operational ratings.

The option to commence reporting of operational ratings is available to a building owner for a 12 month period that commences on the date of lodgement of the first Action Plan for a building.

If, in production of that first Action Plan, the building owner chooses to implement improvement measures, they may change to the operational ratings route within that first 12 month Period.

To do so, the owner can simply instruct the production and lodgement of a new Action Plan which changes only that element of the assessment to record that the operational ratings route is adopted and a Display Energy Certificate is lodged. The owner must ensure that a DEC is also lodged.

It is important to stress that a Section 63 Advisor cannot make such a change and lodge a new Action Plan that identifies the operational ratings route beyond the initial 12 month period.

Q. Is a new Action Plan required if a new lease is made shortly after an Action Plan has been implemented?

Not unless the building owner needs or wishes to change the information in the Action Plan.

Once an Action Plan for a building is produced, it remains valid until either replaced by a new Action Plan or revoked (marked 'not for issue'). Production of a new Action Plan is only needed if a building owner:

- has to replace an Action Plan marked 'not for issue';
- if the owner wishes to change the recorded improvement measures or the option to report Operational Ratings is changed; or
- if a Final Action Plan is produced confirming completion of improvement works.

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7. Calculation tools and methodology

Q. Will assessment be in line with current Simplified Building Energy Model software? This is an issue because in assessing energy efficiency for a particular building, otherwise there is no previous assessment to measure against?

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Production of an Action Plan uses a current lodged EPC assessment as the basis for the calculation of both improvement targets and how these targets can be met by implementing recommended improvements, with additional information needed being input by the Section 63 Advisor.

The calculation of both targets and benefits is an extension of the current Simplified Building Energy Model methodology used for EPCs.

In some cases, building owners may not have a valid EPC produced from data lodged to the Scottish EPC Register (central lodgement of assessments began in January 2013). In such cases, a new EPC would be required before an Action plan can be created.

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If, after reading the information on our website (www.gov.scot/section63), you have further questions, please email buildingstandards@gov.scot (please use 'Section 63' as the email subject) or call 0131 244 6639.

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