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SCOTTISH STATUTORY INSTRUMENTS

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**2008 No. 309**

**BUILDING AND BUILDINGS**

**The Energy Performance of Buildings  
(Scotland) Regulations 2008**

<i>Made</i>	-	-	-	-	<i>16th September 2008</i>
<i>Laid before the Scottish Parliament</i>	-	-	-	-	<i>18th September 2008</i>
<i>Coming into force</i>	-	-			<i>4th January 2009</i>

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 2(2) of the European Communities Act 1972<sup>(1)</sup> and all other powers enabling them to do so.

**Citation, commencement and extent**

1.—(1) These Regulations may be cited as the Energy Performance of Buildings (Scotland) Regulations 2008 and come into force on 4th January 2009.

(2) These Regulations extend to Scotland only.

**Interpretation**

2.—(1) In these Regulations—

“approved organisation” has the meaning given in regulation 8(1);

“asset rating” means a numerical indicator of the estimated amount of—

(a) energy consumed; and

(b) carbon dioxide emitted,

to meet the different needs associated with a standardised use of the building, such estimate being made in accordance with a method of calculation approved under regulation 7(a);

“associated data” means the data used to calculate the asset rating in an energy performance certificate;

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(1) 1972 c. 68. Section 2(2) was amended by the Scotland Act 1998 (c. 46), Schedule 8, paragraph 15(3) and section 27 of the Regulatory and Legislative Reform Act 2006 (c. 51).. The functions conferred upon the Minister of the Crown under section 2(2) of the European Community Act 1972, insofar as exercisable within devolved competence, were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998.

“dwelling” has the same meaning as regulation 2 of the Building (Scotland) Regulations 2004<sup>(2)</sup>;

“energy performance certificate” means a certificate which complies with regulation 6;

“enforcement authority” has the meaning given in regulation 15(1);

“local authority” means a council constituted under section 2 of the Local Government etc (Scotland) Act 1994<sup>(3)</sup>;

“keeper” means the Scottish Ministers or a person appointed by the Scottish Ministers to keep a register on their behalf in accordance with regulation 10;

“owner”, other than in regulation 9, means—

- (a) in relation to a building which is to be sold, the seller; and
- (b) in relation to a building which is to be let, the prospective landlord;

“prospective buyer” and “prospective tenant” have the meaning given in regulation 3;

“reference value” means such current legal standard or benchmark which makes it possible to compare and assess the energy performance of the building; and

“verifier” means a person appointed under section 7(1)(a) of the Building (Scotland) Act 2003<sup>(4)</sup>.

(2) Unless otherwise defined in these Regulations, terms used in these Regulations have the same meaning as in Directive [2002/91/EC](#) of the European Parliament and of the Council on the energy performance of buildings<sup>(5)</sup>.

### **Meaning of prospective buyer or prospective tenant**

3.—(1) A person becomes a prospective buyer or prospective tenant in relation to a building on the earliest of the dates when that person—

- (a) requests any information about the building from the owner for the purpose of deciding whether to buy or lease the building;
- (b) makes a request to view the building for the purpose of deciding whether to buy or lease the building; or
- (c) makes an offer, whether oral or written, to buy or lease the building.

### **Application of Regulations**

4. These Regulations do not apply to—

- (a) temporary buildings with a planned time of use of two years or less, workshops and non-residential agricultural buildings with low energy demand; and
- (b) stand-alone buildings with a total useful floor area of less than 50m<sup>2</sup> which are not dwellings.

### **Energy performance certificates on sale or rent**

5.—(1) Where a building is to be sold or let the owner must make a copy of a valid energy performance certificate for the building available free of charge to a prospective buyer or prospective tenant.

(2) S.S.I. 2004/406 as amended by S.S.I. 2006/534 and S.S.I. 2007/166.

(3) 1994 c. 39.

(4) 2003 asp 8.

(5) O.J. No. L 1, 4.1.2003, p.65.

(2) The energy performance certificate to be made available under paragraph (1) is the most recent valid certificate obtained in respect of the building.

(3) This regulation does not apply at any time before the construction of a building has been completed.

### **Energy performance certificates**

6.—(1) An energy performance certificate must—

- (a) express the asset rating of the building in a way approved by the Scottish Ministers under regulation 7(b);
- (b) include a reference value;
- (c) include cost effective recommendations for improving the energy performance of the building;
- (d) include the following information—
  - (i) the address of the building;
  - (ii) where the certificate is issued by a qualified member of an approved organisation, the name of the approved organisation of which the person issuing the certificate is a member; and
  - (iii) the date on which it was issued; and
- (e) be issued by a qualified member of an approved organisation for that category of building, or accepted by a verifier following submission of a completion certificate in accordance with regulation 41 of the Building (Procedure) (Scotland) Regulations 2004(6).

(2) An energy performance certificate for a building is valid for a period of 10 years from the date on which it was issued.

(3) An energy performance certificate must not contain any information or data from which a living individual (other than the person issuing it or that person's employer) can be identified.

(4) Certification for a unit designed or altered for separate use in blocks may be based—

- (a) on the assessment of another representative unit in the same block; or
- (b) on a common certification of the whole building for blocks with a common heating system.

(5) Paragraph (4)(b) does not apply to a unit that is a dwelling.

### **Assessment of energy performance**

7. The Scottish Ministers must approve—

- (a) a methodology of calculation of the energy performance of buildings, including methods for calculating asset ratings of buildings, based on the general framework set out in the Annex to Directive 2002/91/EC of the European Parliament and of the Council; and
- (b) ways in which the energy performance of buildings, as calculated in accordance with the methodology, must be expressed.

### **Approved organisations**

8.—(1) An approved organisation is an organisation approved by the Scottish Ministers in accordance with this regulation as an organisation whose members may issue energy performance certificates.

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(6) S.S.I. 2004/428 as amended by S.S.I. 2007/167.

(2) The terms of approval of any organisation may be limited in relation to the categories of building for which its members may issue energy performance certificates.

(3) Before approving an organisation the Scottish Ministers must be satisfied that the organisation will—

- (a) ensure that the preparation and issuing of energy performance certificates is carried out in a consistent, accurate and independent manner; and
- (b) ensure that members are fit and proper persons who are qualified by their education, training and experience to carry out the preparation and issuing of energy performance certificates.

### **Display of energy performance certificates**

9.—(1) The owner or, where the owner is not the occupier, the occupier, of a public building must ensure that an energy performance certificate for that building is displayed within the building in a prominent place clearly visible to visiting members of the public.

(2) For the purpose of this regulation—

“owner” means a person who has right to the building whether or not that person has completed title, but if, in relation to the building more than one person comes within that description of owner, then “owner” means such person as has most recently acquired such right; and

“public building” means a building with a floor area of more than 1000 m<sup>2</sup>, which is occupied by a public authority or by an institution providing public services and which can be visited by the public.

### **Registration of certificates**

10.—(1) There must be a register of energy performance certificates and there may be more than one.

(2) Each register referred to in paragraph (1) shall be maintained by a keeper.

(3) A register may be maintained for different purposes or for different classes of buildings.

(4) Where a member of an approved organisation issues an energy performance certificate, that person must ensure that it, and the associated data, is sent to the relevant register before that person gives it to the person who requested it.

(5) Any energy performance certificate or associated data entered onto a register—

- (a) must be registered under a unique reference; and
- (b) must not be altered once registered.

(6) Any energy performance certificate or associated data entered onto a register must be kept on the register for a period of at least 10 years beginning on the date on which it is entered onto the register.

### **Disclosures generally**

11.—(1) The keeper of a register may only disclose any energy performance certificate or associated data entered onto the register if authorised by regulation 12 or 13.

(2) A reference to the disclosure of an energy performance certificate includes a reference to the disclosure of information derived from that certificate.

### **Disclosures to approved organisation**

12. The keeper of a register may disclose to an approved organisation—

- (a) any energy performance certificate which was prepared by a member of that organisation;  
and
- (b) any associated data.

#### **Disclosures to enforcement authorities and/or the Scottish Ministers**

**13.** The keeper of a register must, when requested to do so, disclose any energy performance certificate or associated data to an enforcement authority or to an officer of the Scottish Ministers.

#### **Use of information by the Scottish Ministers and/or the keeper of the register**

**14.** The Scottish Ministers and, where the Scottish Ministers are not the keeper of the register, the keeper of the register may use any energy performance certificate or associated data entered onto the register—

- (a) for statistical or research purposes; or
- (b) for providing advice or guidance on the energy performance of buildings,

provided that for the purposes of paragraph (a) no building is identifiable from the energy performance certificate or associated data disclosed.

#### **Enforcement authorities**

- 15.**—(1) Every local authority is an enforcement authority for the purposes of these Regulations.  
(2) It is the duty of each enforcement authority to enforce these Regulations in its area.

#### **Power to require production of energy performance certificate**

**16.**—(1) An enforcement authority may require an owner who appears to it to be or to have been subject to the duty under regulation 5 in relation to a building to produce for inspection a copy of the energy performance certificate for that building.

- (2) The power conferred by paragraph (1) includes power—
- (a) to require the production in a legible documentary form of any energy performance certificate which is held in electronic form, and
  - (b) to take copies of any energy performance certificate produced for inspection.

(3) A requirement under this regulation may not be made more than 6 months after the last day on which the owner concerned appeared to the enforcement authority to be subject to the duty under regulation 5 in relation to the building.

(4) An owner subject to a requirement under this regulation must comply with it within the period of 7 days beginning with the day after that on which it is made.

(5) An owner is not required to comply with the requirement if the owner has a reasonable excuse for not complying.

#### **Penalty charge notices**

**17.**—(1) An enforcement authority may, if it believes that an owner has breached any duty under regulation 5, give a penalty charge notice to that owner.

- (2) A penalty charge notice may not be given—
- (a) unless the owner has failed to make an energy performance certificate available to a prospective buyer or tenant within a period of 9 days after a request for such a certificate was made to the owner; and

- (b) after the end of the period of 6 months beginning with the day on which it appeared to the enforcement authority that the duty under regulation 5 was breached.
- (3) A penalty charge notice must—
  - (a) be in writing;
  - (b) state the enforcement authority's belief that the owner has breached regulation 5;
  - (c) give such particulars of the circumstances as may be necessary to give reasonable notice of the breach;
  - (d) require that owner, within a period specified in the notice—
    - (i) to pay a penalty charge specified in the notice; or
    - (ii) to give notice to the enforcement authority requesting the authority to review the notice;
  - (e) state the effect of regulation 21(3) (certificate as evidence of facts stated);
  - (f) specify the person to whom and the address at which the penalty charge may be paid and the method or methods by which payment may be made; and
  - (g) specify the person to whom and the address at which a notice requesting a review may be sent.
- (4) The amount payable as a penalty charge is—
  - (i) £500 for dwellings or buildings that are ancillary to dwellings; or
  - (ii) £1000 in any other case.
- (5) The period specified under paragraph (3)(d) must not be less than 28 days beginning with the day after that on which the penalty charge notice is given.
- (6) The enforcement authority may, if it considers that the penalty charge notice ought not to have been given, give the recipient a notice withdrawing the penalty charge notice.
- (7) The enforcement authority must withdraw a penalty charge notice where regulation 18 applies.
- (8) Any sum received by a local authority under this regulation shall accrue to that authority.

#### **Defence where energy performance certificate unobtainable**

**18.—(1)** An owner is not liable to a penalty charge for a breach of the duty imposed by regulation 5 if it can be demonstrated that—

- (a) a request for an energy performance certificate was made at least 14 days before the relevant time, and despite all reasonable efforts and enquiries by the owner, the owner did not have possession or control of a valid energy performance certificate at the relevant time; or
- (b) in the case of a failure to make available an energy performance certificate to a prospective tenant—
  - (i) the prospective tenant was seeking to lease the building due to an emergency which required the tenant's urgent relocation;
  - (ii) at the relevant time the owner did not have possession or control of a valid energy performance certificate;
  - (iii) there was insufficient time in which the owner could reasonably have been expected to obtain a certificate before letting the building to the prospective tenant; and
  - (iv) the owner made a valid energy performance certificate available to the tenant as soon as reasonably practicable after letting the building.

(2) In paragraph (1)(a) the reference to a request is to a request properly addressed to a person who usually provides or is likely to provide an energy performance certificate for the category of building in question and which includes such payment or an undertaking to make such payment as is usually necessary to obtain an energy performance certificate.

(3) In this regulation “relevant time” means the point in time at which one of the events specified in paragraphs (a) to (c) of regulation 3 first occurs.

## **Reviews**

**19.**—(1) If, within the period specified under regulation 17(3)(d) the recipient of the penalty charge notice gives notice to the enforcement authority requesting a review, the authority must—

- (a) consider any representations made by the recipient and all other circumstances of the case;
- (b) decide whether to confirm or withdraw the notice; and
- (c) serve notice of its decision and the reasons for it on the recipient.

(2) A notice under paragraph (1)(c) confirming the penalty charge notice must also state the effect of regulations 20 (appeal to the sheriff court) and 21 (recovery of penalty charges).

(3) If, following a review, the enforcement authority is satisfied that—

- (a) the recipient did not commit the breach of duty specified in the notice; or
- (b) the notice was not given within the time allowed by regulation 17(2)(b); or
- (c) the notice did not comply with any other requirements imposed by these Regulations; or
- (d) in the circumstances of the case it was not reasonable for a penalty charge notice to be given to the recipient,

it must withdraw the penalty charge notice.

## **Appeal to the sheriff court**

**20.**—(1) If after a review the penalty charge notice is confirmed by the enforcement authority, the recipient may appeal against the penalty charge notice to the sheriff court of the sheriffdom in which the building is situated.

(2) An appeal against a penalty charge notice must be made within the period of 28 days beginning with the day after that on which the notice under regulation 19(1)(c) is given.

(3) The sheriff may extend the period for appealing against the notice on cause shown.

(4) An appeal must be on one (or more) of the following grounds—

- (a) that the recipient did not commit the breach of regulation 5 specified in the penalty charge notice;
- (b) that the notice was not given within the time allowed by regulation 17(2)(b) or does not comply with any other requirement imposed by these Regulations; or
- (c) that in the circumstances of the case it was not reasonable for the notice to be given to the recipient.

(5) An appeal against a penalty charge notice must be by summary application.

(6) The sheriff must determine an appeal against a penalty charge notice by upholding or quashing the notice.

(7) If the penalty charge notice is withdrawn or quashed, the enforcement authority must repay any amount previously paid as a penalty charge in pursuance of the notice.

(8) The recipient or the enforcement authority may, on a point of law only, appeal to the sheriff principal.

### **Recovery of penalty charges**

**21.**—(1) The amount of the penalty charge is recoverable from the recipient of the penalty charge notice as a debt owed to the enforcement authority unless—

- (a) the notice has been withdrawn or quashed; or
- (b) the charge has been paid.

(2) Proceedings for the recovery of the penalty charge notice may not be commenced—

- (a) before the end of the period specified in accordance with regulation 17(3)(d); and
- (b) if within that period the recipient of the penalty charge notice gives notice to the authority requesting the authority to review the penalty charge notice, such proceedings may not be commenced—
  - (i) before the end of the period mentioned in regulation 20(2); and
  - (ii) where the recipient appeals against the penalty charge notice, before the end of the period of 28 days beginning with the day on which the appeal is withdrawn or determined by the sheriff.

(3) In proceedings for the recovery of the penalty charge, a certificate which—

- (a) purports to be signed by or on behalf of the person having responsibility for the financial affairs of the enforcement authority; and
- (b) states that payment of the penalty charge was or was not received by a date specified in the certificate,

is evidence of the facts stated.

### **Service of documents**

**22.**—(1) A penalty charge notice issued under regulation 17(1) must be given by—

- (a) personal service; or
- (b) first class recorded delivery post.

(2) Any other notice given under these Regulations—

- (a) must be in writing; and
- (b) may be given by post.

(3) Any notice may be given—

- (a) in the case of a body corporate, to the secretary or clerk of that body; and
- (b) in the case of a partnership, to any partner or a person having control or management of the partnership business.

### **Offences relating to enforcement officers**

**23.**—(1) A person who obstructs an authorised officer of an enforcement authority acting in pursuance of regulation 16 is guilty of an offence.

(2) A person who, not being an authorised officer of an enforcement authority, purports to act as such in pursuance of regulation 16 or 17 is guilty of an offence.

(3) A person guilty of an offence under this regulation is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

St Andrew's House,  
Edinburgh  
16th September 2008

*STEWART STEVENSON*  
Authorised to sign by the Scottish Ministers

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## EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations further transpose Article 7 (energy performance certificates), Article 3 (adoption of a methodology) and partially transpose Article 4(3) of Directive [2002/91/EC](#) of the European Parliament and of the Council (“the Directive”) in Scotland. The Directive lays down requirements for the production of energy performance certificates when buildings are to be sold or rented out. The Regulations also provide for the display of certificates in public buildings. The term “building” is defined in Article 2 of the Directive.

Regulation 5 imposes a duty on the owner of a building to make an energy performance certificate available to prospective buyers or tenants where the building is to be sold or let. The requirements of an energy performance certificate are set out in regulation 6.

The Scottish Ministers must approve a method of calculation of the energy performance of buildings and may approve organisations whose members may issue energy performance certificates (regulations 7 and 8).

The owner or occupier of a public building is required, under regulation 9, to ensure that an energy performance certificate is displayed within the building in a place clearly visible to members of the public.

Regulation 10 provides that the Scottish Ministers or a person appointed by them must maintain one or more registers of energy performance certificates, which must be sent to the relevant register before being issued. Regulations 11 to 14 regulate the disclosure of information contained in the register.

Local authorities have powers under regulation 15(2) to enforce the Regulations and under regulation 16 to require production of energy performance certificates. Under regulation 17 a penalty charge notice may be served on owners of buildings who contravene the requirement to make an energy performance certificate available. The penalty is—

- (a) £500 for dwellings or buildings ancillary to dwellings; and
- (b) £1,000 in any other case.

Regulations 18 and 19 deal with defences to and review of penalty charge notices. Regulation 20 deals with appeals to the sheriff.

Regulation 21 deals with recovery of penalty charges.

Regulation 22 deals with service of documents.

Regulation 23 makes it an offence to obstruct an authorised officer of an enforcement authority or to purport to act as an authorised officer.

A Transposition Note setting out how these Regulations transpose the Directive and a Regulatory Impact Assessment have been prepared and placed in the Scottish Parliament Information Centre. Copies can be obtained from the Building Standards Division, Directorate for the Built Environment, Ground Floor, Denholm House, Almondvale Business Park, Almondvale Way, Livingston, West Lothian, EH54 6GA.