THE PUBLIC AUTHORITIES CLAUSE

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INTRODUCTION

The Public Authorities clause is also known variously as the Local Authorities clause and more recently the European Community and Public Authorities clause. It is usually regarded as an important part of the reinstatement suite of clauses and, as such, rarely exists in isolation.

The purpose of the clause is to indemnify the policyholder against the costs incurred due to involuntary betterment as a direct consequence of compliance with a mandatory requirement in pursuance of a statutory requirement or authority following a loss.

Whilst application of the clause can manifest itself in many ways, for the purposes of this paper and for the sake of brevity, I have concentrated on buildings related aspects and legislation as it might occur in England and Wales. Other regions will have their own similar requirements.

One of the most common of these requirements will undoubtedly be the application of Building Regulations particularly following destruction or significant damage. The owner of a building whilst reconstructing can be forced to comply with onerous modern requirements including, for example, disabled access, upgrading of fire protection or thermal insulation. Often, compliance with these requirements will attract a significant additional cost to the reinstatement project.

Almost equally as important, Planning Authorities have wide ranging powers which can prove costly to the rebuilding process. These will be explored later in the text.

Finally, I am indebted to Michael Weatherhead and Andrew Cavan for their invaluable assistance in preparing this paper.

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THE CLAUSE EXAMINED

The Clause

Whilst the majority of practising loss adjusters will encounter the wording on a regular basis, it would be useful to remind ourselves of the salient clauses of a typical wording such as might occur in any commercial policy. I have included a slightly abbreviated and consolidated version, selecting the most common elements taken from a variety of commercial policies. Whilst wordings will differ the general import is likely to be similar.

Public Authorities

The additional cost of reinstatement which may be incurred solely due to the necessity of compliance with the requirements of European Community legislation or regulations pursuant to any Act of Parliament or byelaw of any public authority but excluding:

1. *the cost incurred in complying with the requirement*
   - *in respect of undamaged property or portions of the property [except foundations]*
   - *in respect of damage occurring prior to the extension*
   - *in respect of damage not insured by the policy*
   - *where notice has been served prior to granting of the extension*
   - *for which there is an existing requirement which has to be implemented within a given period*
2. *the additional cost that would have been required to make good the property damaged to a condition equal to its condition when new had the necessity to comply with any of the requirements not arisen.*
3. *any charge arising out of capital appreciation in order to comply with the requirement*

Special conditions

a) *The work of reinstatement must be commenced and carried out without unreasonable delay and in any case within 12 months after the damage or within such further time as the company may allow*

b) *If the liability under this section apart from this clause shall be reduced by the application of any terms or conditions of the policy then liability under this section shall be reduced in a similar proportion*

c) *The total amount recoverable under any item shall not exceed the sum insured*

Most household policies contain a much simplified wording of similar import but usually with much less onerous conditions.

What Constitutes a Requirement?

This is frequently the cause of misunderstanding and very often adjusters will encounter situations where policyholders and their appointed professionals will submit claims for upgrading properties to comply with current 'codes of practice' following a loss. More on this later. However, the clause will only operate in the case of a mandatory requirement imposed by statute or a public body with statutory authority. This can manifest itself in a number of ways - the most frequent being Building Regulations: other examples are planning and local authority byelaws. It is important to remember that codes of practice or British Standards by themselves do not constitute mandatory requirements.

In all cases the adjuster should undertake enquiries as to the nature and origin of the requirement, obtaining documentary evidence where necessary that the requirement is indeed mandatory and consequent upon the loss. Enquiries can also be made directly with the issuing authority such as the Building Control or Planning departments. In the event that the 'requirement' is a grey area there may be scope for discussion and negotiation with the authority concerned.

Cost Incurred

An essential part of the clause is the use of the words ***'may be incurred'*** or similar. Therefore, apart from flowing from a mandatory requirement it is essential that the cost is actually incurred in compliance with the stipulated requirement. This tends to rule out inclusion in any form of cash indemnity settlement. Also, in a sense, the proof is often in the doing rather than mere speculation or assertion by the parties as a negotiating position that the proposed upgrade will be necessary.

Undamaged property

The intention is normally that the Public Authorities clause will not apply in respect of undamaged property but only in respect of property damaged as a direct consequence of the operation of the insured peril. However, some policy wordings seek to modify this by recognising that the repercussions of a requirement may extend beyond reinstating actual damage.

It is often the case that foundations are undamaged and yet the local authority building control officer will require new foundations as part of the reconstruction of a property. It is quite likely that the existing foundations will not meet current codes or that their integrity cannot be proven to building control satisfaction. This eventuality is often overcome by a contra-exclusion. In these cases the exclusion typically reads ***'in respect of undamaged property or portions of the property [except foundations]'***. Therefore the undamaged foundations are brought back into play.

Some wordings will seek to give the Insured even wider protection, perhaps recognising the ever increasing powers of local authority officers and it is not unusual to find the extension wording to include ***undamaged portions of the building***. An example might be the upgrading of insulation to the whole of a building whereas only part has been damaged by the insured incident; or another possible example being the creation of a means of escape within an otherwise undamaged portion of the building.

In most cases there will be an exclusion for ***property*** entirely undamaged by the insured event.

Damage Occurring Prior to the Extension being Granted

It may seem sensible that the wording will also include an exclusion to prevent claims arising from retrospective damage. Often when dealing with claims causation may not be straightforward and it may be necessary to distinguish between damage from different causes and the statutory requirement which might apply arising there from. This may also include defects occurring prior to the extension, such as defective or non-compliant work.

Damage Not Insured by the Section

This exclusion may seem 'belt and braces' and at the risk of spelling out the obvious. However, this will often be relevant where there are instances of multiple causation. ***'Damage not insured'*** could also be implicitly extended to include *property* not insured. The intention here may be to also exclude claims for dilapidated and ruinous properties and any upgrading which might arise as a result. However it is often a requirement under the reinstatement wording, whether express or implied, that properties are maintained in 'good repair'.

Notice Served Prior to Granting of the Extension

This is another sensible exclusion. It will be necessary for the adjuster to make detailed enquiries as to the origin of the requirement. It may be that there is an existing obligation placed upon the insured which they have yet to fulfil. In these instances the policy extension should not apply. It should be noted that the clause usually includes the words ***'served in writing'***.

A grey area exists where there are general ongoing obligations arising, for example, due to the Health and Safety at Work Act or Disability Discrimination Act. In these instances the insured may not have been subject to a written notice but otherwise obliged to comply. However, it would seem iniquitous if the policy should respond in these cases i.e. where the enforcement could have equally been applied before the loss. In these cases the opening wording might be relied upon and the words '***incurred solely due to the necessity of compliance with the requirements of ….***' might be relevant if not the precise wording of the exclusion.

Another instance might be where the policyholder is in contravention of a notice such as a planning decision. Equally, where buildings are constructed without the requisite approvals it would be iniquitous if the insured could claim the benefit of the cost of complying with the statutory requirement following a loss.

In addition the extension excludes existing requirements which have to be implemented within a given period. Possible examples might be a HSE enforcement notice or a planning requirement.

The Additional Cost Required to Make Good the Property Damaged to a Condition as New

This is a rather verbose exclusion clause which the above heading somewhat paraphrases. However the intention is not to provide the additional 'new for old' cover which would be provided under the reinstatement wording. It possibly recognises the fact that in rare cases policies are written on an indemnity basis.

In the event of an indemnity settlement based upon the cost of reinstatement less depreciation the statutory compliance costs would be added without depreciation being applied. This may seem strange but something which fundamentally did not exist prior to the loss cannot be depreciated for wear and tear. Such instances will be rare and would still require demonstration of actual compliance with the requirement, i.e. by actually incurring the cost.

Capital Appreciation

The intention here is to exclude consequential losses arising following the upgrading work however it is probably true to say that the exclusion rarely arises in practice. A possible example might be where an enhancement to a property potentially attracts increased business rates.

Reinstatement within 12 months

It is a requirement under most policies that reinstatement takes place with reasonable despatch and, in any event in the case of statutory requirements, within 12 months. This period may be extended upon application to Insurers however, rather surprisingly, the 12 months' requirement is rarely applied in practice. This might otherwise seem to be a valuable tool available to the insurer.

There are variations in policy wordings. Some policies state 'commenced' whilst some state 'completed' within 12 months. On the face of things 'completed' within 12 months might seem a little onerous when one considers the complexities of drawing up plans, obtaining planning permissions and obtaining tenders - let alone the construction time. However the wording 'commenced within 12 months' makes good sense.

The clause is so worded to mitigate the cost to insurers. Undoubtedly, statutory requirements will inevitably become more stringent with the passage of time and rarely the reverse.

It is important following a major incident that a programme is quickly drawn up and adhered to as programme creep can only give rise to additional cost. For example there are measures which might be undertaken on an emergency basis with less onerous requirements, however, once delays set in this gives an opportunity for increased requirements from planners and for conservation officers to intervene and impose additional obligations.

Sum insured and Application of Policy Terms

The sum insured will generally represent the absolute limit payable under the policy and it is unusual to find any additional headroom to cater for statutory compliance costs. The clause usually includes the following wording to the effect that: ***'The total amount recoverable under any item shall not exceed the sum insured'***.

On most reinstatement wordings there is no requirement of the policyholder to include the cost of compliance with statutory upgrades within the sum insured for the purposes of average. This may seem eminently sensible as it would be difficult for the policyholder to predict the nature of any requirement in the future. However where underinsurance does exist average will apply to the statutory element in the same proportion or ratio.

The usual wording states: ***If the liability under this section apart from this clause shall be reduced by the application of any terms or conditions of the policy then liability under this section shall be reduced in a similar proportion***. The wording ***'apart from this clause'*** can be taken to mean that the additional costs arising due to compliance with the necessary requirements do not need to be added to the value at risk but will be subject to average in the same ratio.

In contrast, 'Day One' policies require that the insured contemplates the cost of statutory requirements within the selection of the declared value. This may seem harsh given the reasons above.

Occasionally, some policies will apply a % limit on the value relating to the costs associated with compliance with statutory requirements and so careful consideration of the precise wording is required in all cases.

The Manner of Compliance

It is important that the most cost effective but, at the same time, reasonable method of compliance is adopted and this may mean some radical reconsideration of the overall design to accommodate the requirement but without compromising the situation of the policyholder.

An extreme example which illustrates the point could be where a policyholder having a building constructed of solid masonry walls claims for this feature exactly 'as was' whilst also claiming for an additional cost upgrade to meet current insulation (U) values. On the face of it this may be considered to be unreasonable unless there is some intrinsic value to the policyholder.

The practical and reasonable solution in most cases will involve the redesign of the walls as cavity walling with masonry facing and containing the required insulation.

A further difficult example could be where the local authority insists upon compartmentation of what was an otherwise an open plan factory area the alternative being to install a sprinkler installation. The policyholder could argue that the partitioning of an open plan area was unreasonable in terms of their manufacturing operation and, in this situation, the more costly option of installing a sprinkler installation might be the reasonable outcome.

In many cases careful consideration will be required and some element of redesign may need to be accepted as the practical answer by the policyholder.

Fundamentally, a test of the operation of the Public Authorities extension is in the doing and not the mere speculation advocated for the purposes of negotiation. If the policyholder asserts the additional costs of compliance merely for negotiation purposes but then carries out the work in some other manner [or not at all] then the extension will surely not apply.

In any complex reinstatement the necessary redesign to comply with current mandatory requirements should be contemplated from the beginning. In some cases the necessity of compliance will rule out some forms of out-moded construction from the start.

Reinstatement on another Site

The reinstatement wording of the policy provides that reinstatement may be carried out in a manner suitable to the Insured or on another site always provided that insurer's liability is not increased. The wording of the Public Authorities clause '***may be incurred solely due to the necessity of compliance….'*** is highly relevant here also. This gives rise to a number of interesting issues and the extent to which the benefits of the Public Authorities clause are 'transferable'.

However, there is a practical solution. In situations where reinstatement is proposed on another site it is usual that the Notional Reinstatement Value will have been calculated for the damaged building on an 'as existing' basis. This should initially exclude any enhancements to cater for statutory compliance including the provision of new foundations [if indeed new foundations are deemed necessary].

The enhancements to cater for statutory requirements should then be considered and costed on an individual basis. However, only those items which would have occurred on the original building will be transferable to the extent they also occur on the new building. Any 'novel' aspect manifest in the new building [on an alternative site] should not rank for consideration.

Thus, in a situation where piling would have been required on the existing site but not on the new site, this additional cost will not be transferable. Conversely, if piling is required on the new site but not on the existing this would be excluded anyway under the reinstatement clause which permits reinstatement on another site ***provided that insurer's liability is not increased***.

Continuing with the illustrations the upgrade of a roof system to meet current 'U' values will surely be just as applicable to the new site as the existing location and so would most likely rank for inclusion under the policy extension.

Clearly, it is a fundamental requirement that reinstatement actually takes place and the cost is actually incurred.

Loss of Floor Area

Occasionally, compliance with the local authority requirements may cause a reduction in the useable floor area where it is necessary to accommodate the requirement within the existing building dimensions or footprint. An example of this issue could be where the requirements stipulate that a disabled lift or a fire escape should be provided, the consequence being the loss of some of the usable floor area. This assumes that that the options of locating outside the existing building have been explored or are non-existent, perhaps due to the confines of the site or planning restrictions.

In many instances this will not be an issue but, clearly, this could be a very real concern to a property investor faced with a reduction in lettable floor area and, therefore, rental income.

This poses an interesting question as to whether loss of pecuniary interest (e.g. market value) should be considered as part of the claim. One view based on the strict interpretation of the wording might be that ***'additional costs arising from'*** would preclude such a compensation payment.

Each instance must be considered on its own merit; however, in many cases the compliance is most likely to represent an enhancement to the property value rather than the reverse. If these discussions arise then, arguably, the property should be considered as a whole before the fire and after the reinstatement is completed. It may well be that the reinstated building as a whole commands a higher market value simply because it is 'new' and the Insured has ended up with something better, often an inevitable consequence of reinstatement cover anyway.

On occasions the introduction of a feature may necessitate delicate negotiations with existing tenants with ongoing leases who may understandably be reluctant to give up their valuable retail space for such purposes and particularly something which might not directly benefit them - e.g. a lift providing disabled access to the upper floors.

Household Policies

I will make brief mention of household policies at this juncture. All household policies, without exception, will include some provision for compliance with public authority requirements.

Usually this is written in very simple terms such as the following example:-

> ***Local Authority Requirements***
>
> *We will pay the additional cost of rebuilding or repairing the damaged part of the buildings but only if this is necessary to comply with any government or local authority requirement after damage insured by this policy <u>but not</u> if you have been told about the requirement before the damage occurred*

The wording is very simplistic and it is likely that most insurers would take a realistic view as to situations where compliance is said to be necessary, generally supporting their policyholders in situations following damage.

IMPLICATIONS OF BUILDING REGULATION AND PLANNING REQUIREMENTS

The Building Act 1984

The Building Act 1984 is the primary legislation under which the Building Regulations and other secondary legislation are made and is applicable to England and Wales. Other regions of the UK have their own legislation. This is an extremely lengthy piece of legislation available to read on-line; however, I would suggest that it is not necessary dwell too long on the precise wording of the Act as the Building Regulations [to be discussed shortly] will generally prove to be of greater relevance and interest to loss adjusters.

However for the present purposes, the main provisions can be summarised as follows:-

- Part I – The powers to create and enforce building regulations
- Part II – Supervision of building works otherwise than by local authority
- Part III – Drainage, sanitation, means of escape and dangerous structures
- Part IV – Duties of local authorities, rights of appeal and interpretation

Part IV sections 121 and 123 contain definitions of the terms ***'building' 'construct'*** and ***'erect'***. However, it is probably true to say that the subsequent definitions contained within the opening clauses of the current Building Regulations are more useful in a day to day

context when considering whether building work is subject to requirement. In the event of any difficulties in interpretation resort will undoubtedly be made to the Building Act as being the primary legislation.

The intention of Clause 123 subsection (2) of the Act is to require, for the avoidance of any doubt, that certain operations mainly concerning the re-erection of buildings, to be subject to minimum requirements of Part III of the Building Act essentially relating to drainage, sanitation and means of escape. Again, it is possible that the original intended purpose may be largely overtaken by the more stringent current Building Regulation wording. However, for the purpose of Part III it is interesting to note that the following operations are deemed to be the '***erection of a building***':

a) *the re-erection of a building or part of a building when an outer wall of that building or, as the case may be, that part of a building has been pulled down, or burnt down, to within 10 feet of the surface of the ground adjoining the lowest storey of the building or of that part of the building,*

b) *the re-erection of a frame building or part of a frame building when that building or part of a building has been so far pulled down, or burnt down, as to leave only the framework of the lowest storey of the building or of that part of the building,*

c) *the roofing over of an open space between walls or buildings,*

Whilst the above definition is strictly speaking restricted to Part III of the Building Act only it has been argued that wording could be used as a basis for the wider interpretation of what might constitute the ***erection of a building*** following serious damage. It is nevertheless interesting to note that fire damaged structures and the rebuilding of structures receive specific mention.

Worthy of mention although outside the scope of this text, Part III also includes the various notices which can be served by the local authority in respect of dangerous structures and ruinous buildings often encountered by loss adjusters. However these clauses are most unlikely to present additional costs for consideration under the Public Authorities wording of the policy and will be largely give rise to debris removal or making safe measures.

Building Regulations

It is probably true to say that compliance with Building Regulations [or their equivalent] will give rise to the majority of claims under the Public Authorities clause. As I have already mentioned the Regulations are not a statutory instrument but pursuant to the Building Act 1984 relevant to England and Wales. Other regions have their own codes with similar import.

The basic requirements as included in Schedule 1 of the Building Regulations can be summarised as follows:-

Part	Title	Outline of provision [where relevant]
Part A	Structure	Loads transmitted safely to ground and with regard to ground movement *[e.g. subsidence or heave].*
Part B	Fire Safety	Provision for escape, fire protection warning and access for fire service.
Part C	Site Preparation and Resistance to Contaminants and Moisture	The provision of damp proof courses and membranes, protection from substances in the ground *[such as radon gas]*
Part D	Toxic Substances	Precautions for toxic fumes emanating from cavity wall insulation.
Part E	Resistance to the Passage of Sound	Acoustic insulation in internal walls, party walls, floors stairs and other building elements.
Part F	Ventilation	Provision of adequate ventilation and provision for condensation in roofs.
Part G	Sanitation Hot Water Safety and Water Efficiency	Adequate provision of sanitary appliances and safe storage of hot water.
Part H	Drainage and Waste Disposal	Adequate provision of foul and surface water drains / disposal / storage.
Part J	Combustion Appliance and Fuel Storage Systems	Discharge of fumes from appliances, supply of oxygen and safe installation of flues.
Part K	Protection from Falling, Collision and Impact	Stairs must allow safe movement of persons; protection from falling from ramps, stairs and

Part	Title	Outline of provision [where relevant]
		balconies; provision of vehicle barriers; precautions for trapping or impact from doors.
Part L	Conservation of Fuel and Power	Wide ranging requirements as regards heating appliances and thermal insulation including all external elements of the building construction.
Part M	Access to and Use of Buildings	Provisions for disabled access to buildings and toilets facilities.
Part N	Glazing – Safety in Relation to Impact Opening and Cleaning	Protection against impact / breaking of glass and safe access for cleaning.
Part P	Electrical Safety	In respect of dwellings only: Design and installation to protect user from fire or injury; compliance with BS 7671

It is important to realise that the Regulations are framed as a series of performance clauses in turn referring to Approved Documents which further detail the methods by which the requirements might be satisfied.

I would not propose to discuss the Regulations in detail [except for reference to the increased requirements for conservation of fuel and power] as the full wording is easily available for detailed study on-line together with the associated Approved Documents. However, for the purposes of this text, I will concentrate on why the requirements may or may not apply in the particular context of insurance claims.

On many occasions it is incorrectly stated by the policyholder's professional advisors that all building repairs must comply with current regulations. Whilst in some cases this may be true it is certainly not so in all instances. In order to explain it is imperative to consider Regulation 3 (1) within the opening clauses of the Building Regulations which defines the meaning of 'building work':-

> ***Meaning of building work***
>
> *3.—(1) In these Regulations "building work" means—*
>
> *(a) the erection or extension of a building;*

(b) the provision or extension of a controlled service or fitting in or in connection with a building;

(c) the material alteration of a building, or a controlled service or fitting, as mentioned in paragraph (2);

(d) work required by regulation 6 (requirements relating to material change of use);

(e) the insertion of insulating material into the cavity wall of a building;

(f) work involving the underpinning of a building;

(g) work required by regulation 22 (requirements relating to a change of energy status);

(h) work required by regulation 23 (requirements relating to thermal elements);

(i) work required by regulation 28 (consequential improvements to energy performance)

I have included the clause in full such is the importance in the context of insurance claims. From the wording it will be seen that Building Regulations essentially apply to the ***erection or extension of a building*** or ***the material alteration of an existing building***. Therefore, by implication, the building regulations do not apply wholesale to the repair of an existing building. All new buildings will however be subject to Building Regulation approval with some minor exceptions including agricultural buildings and those not generally inhabited by people. These exceptions are listed within the Regulations.

However, to confuse matters, there are some instances where work of a repair nature will always be subject to compliance with the requirements. These potential areas include:-

- Controlled services including:-
  - Part G – Sanitation, hot water safety and water efficiency
  - Part H – Drainage and waste disposal
  - Part J – Combustion appliances and fuel storage systems

- Part L – Conservation of fuel and power
- Part P – Electrical safety *[in respect of dwellings only]*

- Thermal elements – Part L Conservation of Fuel and Power
- Underpinning *[actually regarded as new work rather than a repair]*

Another relevant clause is Regulation 4 which clarifies that where works are carried out on an existing building there is no requirement to upgrade other existing elements provided that the building is left in a condition ***no more unsatisfactory*** in relation to the requirements than before the works were carried out.

This has particular relevance to domestic electrical installations where part of the installation only has been damaged. In this instance there is no requirement to upgrade the remainder of the installation, provided that the new work forming the repair can be operated safely.

Whether or not compliance is necessary can give rise to complex discussions, often directly involving the local authority Building Control department. It is probably true to say that, in the majority of cases, buildings works arise out of the desire to create something new or to alter an existing structure for which Regulations will usually apply. However, in the context of insurance claims the premise is repair or reinstatement with something not materially different. In defence of the local authority or professional advisor this scenario is not one which would be considered on a regular basis and the default position of 'compliance in all cases' is often erroneously adopted. Also this is, no doubt, reinforced by the genuine desire to comply with what is current best practice, even though this might be at odds with the strict interpretation of the policy cover.

It is therefore necessary to carefully manage the expectations of the policyholder and their advisors in such situations. It may be necessary to seek agreement from the local authority that the work does not in fact need building regulation approval. Also, the policyholder should be dissuaded from making a wholesale Building Regulation application where this is not strictly necessary.

Often professionals and indeed building control officers will be reluctant to concede that work can be carried out in a 'like for like' manner without the need to upgrade to current codes but it is important to remember that the policy covers compliance with mandatory requirements only and not merely what is considered to be good practice.

There would appear to be a matter of degree beyond which the local authority regard a repair as so extensive that it is effectively the ***'erection of a building'*** and therefore within the remit of the regulations. For example, the re-roof of a building with new roof structure is often cited as being the ***erection of a building*** and therefore subject to regulation. There may be some further justification for this as under the Building Act roofing over an open space between walls is deemed to be the ***erection of a building*** although of limited scope in the context of the Act.

As earlier mentioned, where requirements are deemed to be applicable to certain aspects such as a new roof, the Building Regulations would not automatically apply to other lesser damaged or undamaged elements of the structure in the absence of any material alteration.

However in practical terms this might be a process of negotiation with the relevant building control officer.

Notwithstanding the above comments, the decision of the building control department will often prevail and it is most unlikely that the policy will fail to respond in such instances when all avenues of discussion have been exhausted and the Local Authority decision has been made final and, often in writing. As a final recourse where Building Control enforcement is too onerous or there is a failure to grant relaxation there is facility under the Building Act for appeal to the Secretary of State.

Also, it is important to bear in mind that any improvements or alterations to the building reinstatement incorporated by the Insured are very likely to cause the works to be subject to Building Regulation approval as ***'material alterations'***. This could impact upon the insurance related works. In this event the policy should not respond to any such additional costs where they arise solely due to the insured's desired changes.

Increasingly, building control responsibilities are discharged to private firms [for which there is provision contained under Part II the Building Act] and indeed the Insured has the option of seeking approval from an independent building control consultant from whom certification can be obtained. The latter option is favoured by some developers as it can be a faster route to obtaining approval.

However, there be can a tendency for the private company concerned to adopt a 'safe' option rather than applying the minimum requirement of the regulations and so all proposed requirements should be carefully considered by the adjuster and challenged where necessary.

Conservation of Fuel and Power

'Green' issues and energy conservation have become high on the agenda in current legislation and Part 6 of the Building Regulations imposes specific requirements for energy efficiency as regards new and also existing buildings under renovation or extension. If a building is being extended or renovated the energy efficiency of the existing building may need to be upgraded and this has significant potential implications as regards insurance claims following destruction or damage.

The regulations cover both the heat producing appliances and the thermal insulation properties of building elements, the latter often referred to as the 'U' value.

Regulation 23 imposes requirements on the renovation of buildings more particularly causing the thermal element to be considered as a whole. This has particular relevance in the context of insurance claims as, in effect, the policyholder may be faced with having to upgrade an otherwise undamaged part of the structure.

> ***Requirements relating to thermal elements***
>
> *23.—(1) Where a person intends to renovate a thermal element, such work shall be carried out as is necessary to ensure that the whole thermal element complies with the requirements of paragraph L1 (a) (i) of Schedule 1.*
>
> *(2) Where a thermal element is replaced, the new thermal element shall comply with the requirements of paragraph L1 (a) (i) of Schedule 1.*

The requirements exclude listed buildings; scheduled monuments where compliance would alter their character; buildings used primarily for worship; temporary buildings and stand alone buildings other than dwellings having a floor area of less than 50m2.

The Building Regulation itself merely states that reasonable provision shall be made to conserve fuel and power by minimising heat losses/ gains and providing efficient services. It is the Approved Document that details what would be an acceptable means of compliance.

The Approved Document is written in 4 sections; however for the sake of brevity I have paraphrased the salient clause of L2B covering existing buildings [other than dwellings] as it is highly relevant to the repair of damaged buildings. The requirements for existing dwellings are of similar import and contained within L1B. I would, however, suggest that the Approved Document is worth reading in full:-

> ***5.9*** *Where a thermal element subject to renovation …… the performance the whole element should be improved to achieve better the relevant U value set out in column (b) of table 5, provided the area to be renovated is greater than 50% of the surface of the individual element or 25% of the total building envelope. When assessing this area proportion, the area of the element should be taken as that of the individual element, not all the elements of that type in the building…….*

The issue therefore arises in situations where greater than 50% of the thermal element is damaged or intended to be repaired. The policyholder can be obliged to not only upgrade the damaged portion but also the undamaged portion of the element. The requirement will not apply to a building without a fixed heating installation.

It is also perhaps worth noting that ***'thermal element'*** means a wall, floor or roof but does not include doors, windows or roof-lights.

It can be seen that this may place the policyholder in a potentially difficult position under the normal policy wording as the Public Authorities extension will generally exclude undamaged portions of the property.

Planning and Conservation

Following destruction or significant damage to the insured property it is quite likely that a policyholder will be faced with making a planning application for the reconstruction. It is imperative that this process is considered and implemented as soon as possible due to the time periods involved in obtaining consent. This may have a considerable effect on the critical path of the reconstruction, often with implications as regards the business interruption aspect.

Whilst it is reasonable that the policyholder should be permitted a brief 'thinking' period following major destruction, it is true to say that any delays due to deliberation as to alternative schemes can prove to be costly and increase the potential claim. It should be remembered that the normal premise of the insurance policy is ***reinstatement in a 'like manner'*** and there is generally no reason why outline plans based upon what existed could not be submitted at an early stage. Obviously, any major changes contemplated by the policyholder will potentially delay the process.

The local authority powers emanate from the Town & Country Planning Act 1990 together with subsequent amendments and legislation. This is an extremely lengthy document which I would not propose to cover in detail here but the full document is available to view on-line. However the Act requires that planning permission be obtained for the development of land and a useful definition is provided under Clause 55 as to what potentially constitutes 'development' as follows:-

> ***55 Meaning of "development" and "new development".***
>
> *(1) Subject to the following provisions of this section, in this Act, except where the context otherwise requires, "development," means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.*
>
> *For the purposes of this Act "building operations" includes—*
>
> *(a) demolition of buildings;*
>
> *(b) rebuilding;*
>
> *(c) structural alterations of or additions to buildings; and*
>
> *(d) other operations normally undertaken by a person carrying on business as a builder.]*

However, the maintenance, improvement or alteration of any building which only affects the interior and does not materially affect the external appearance of the building would not normally be subject to planning approval.

There are no absolute criteria set out as to at what point reconstruction or repair will be subject to planning and the 'Act' merely refers to ***'development'***. It is clear that where a building is demolished down to ground level the reconstruction will generally be subject to planning consent. In contrast the repair of a damaged building should not be subject to planning approval in the majority of cases, provided that the repair is carried out in a like manner. However there will be a matter of degree and this will often fall to a decision of the planning officer as to whether they might regard reconstruction as 'development'.

Clearly, any changes introduced by the policyholder may bring about more onerous planning terms and any costs arising, whether directly or indirectly from policyholder changes, must therefore be identified for exclusion from the claim.

Most planning applications are determined within eight weeks unless the proposed development is unusually large or complex, in which case the time period can be extended to 13 weeks. Once planning consent is obtained the building owner has a period of three years to commence construction otherwise planning consent will lapse. Another point is that once the building is constructed the planning consent is fulfilled and destruction at that point would require a completely new application.

Planners are primarily concerned with amenity and outward appearance and so alterations to external fabric, such as a change in roof material, may potentially fall for planning consent. In the majority of cases, however, the local authority will waive the necessity of obtaining planning consent for relatively minor matters, particularly in a non-sensitive area. Such uncontroversial changes might typically include the change of a corrugated asbestos sheet roof to a profiled steel sheet roof, for example.

Other concerns which can potentially arise on new developments typically include:-

- traffic management and access
- disabled access
- environmental issues - pollution noise and emissions

- drainage – sustainable urban drainage [SUDS]
- fire protection to adjoining properties
- renewable energy
- flood protection

Most local authorities will have their own policies on sustainable living and climate change and it is not uncommon to find a requirement imposed for 10% or greater renewable energy sources, often satisfied by introducing wind turbines, solar panels, combined heat and power sources, etc.

Another product of climate change has been the increasing occurrence of floods, in many instances exacerbated by over-development. The fast run off from developed land gives rise to increased risk of flooding downstream. To combat this most new developments are required to incorporate sustainable drainage schemes, the objective being to retain the surface water for gradual release into the watercourse.

Furthermore there is the risk of flooding to the property itself and the planners may require flood protection measures to be incorporated or even prevent redevelopment if it is deemed unsuitable by the Environment Agency.

On larger projects the local authority may seek to impose additional requirements on the development of land to improve the local amenity. Such examples might involve improved road layouts, pedestrian crossings, children's play areas or even public buildings such as libraries. These features are incorporated in the planning consent as **Section 106 planning obligations** and may involve a sum of money being paid to the council for the intended purpose. Clearly, these requirements can place significant financial burden on the project, which the policyholder will seek to recover under the Public Authorities clause.

On particularly complicated cases it is sometimes beneficial to engage the services of a planning consultant as part of the project team in order that negotiations can be undertaken with the local authority as to the scope and imposition of any costly planning requirements. It should also be noted that planning decisions can be appealed to the Planning Inspectorate although this will undoubtedly add delay to the process.

Listed buildings can present particular problems and it is preferable to engage with the conservation officer at an early stage and certainly before any demolition or strip out is undertaken. 'Like for like' reinstatement will not be subject to consent, provided the repairs are in keeping with the listed status of the property; however a substantial rebuild would require listed building consent.

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