

Biodiversity Net Gain

The Environment Act 2021 (“the Act”) introduces far reaching statutory changes aimed at, amongst other things, increasing biodiversity and restoring natural habitats in conjunction with development. The biodiversity gain objective of the Act will be met when, in relation to development for which planning permission is granted, the post-development biodiversity value exceeds the pre-development biodiversity value of the onsite habitat by at least 10%.

The mandatory provisions relating to biodiversity net gain (“BNG”) provided for in the Act have not yet come into force. Following a recent Government announcement, these are now expected to come into force in January 2024 for the majority of sites, with ‘smaller sites’ following in April 2024.

The Government has indicated that the BNG obligations will not be applied retrospectively to planning applications that have been submitted, or have already been granted permission, before the regulations come into force. For example, planning permission granted under section 73 (varying or removing a condition on an earlier permission) where the earlier permission was submitted or granted before this date, will not be subject to a BNG requirement.

PLANNING REQUIREMENTS

The Act requires a standard pre-commencement condition to be attached to every applicable planning permission, requiring a Biodiversity Gain Plan to be submitted to and approved by the local planning authority.



In order to secure the mitigation for the requisite minimum 30 year period, either a section 106 agreement or conservation covenant will be required. At the end of the 30 year period, the relevant land will become free from the previously secured BNG restrictions. It will therefore be important to consider future proofing the type of mitigation which is provided, particularly where this is being delivered on site.

Notwithstanding that the statutory provisions have not yet taken effect, local authorities are increasingly adopting BNG related policies which many developers will already be familiar with. The biodiversity requirements are mandatory and imposed by primary legislation and will therefore be applicable irrespective of the local planning policy relevant to the development site.

BIODIVERSITY GAIN PLAN

The Plan will be required to set out how a net biodiversity gain of at least 10% can be achieved for the relevant development by:

- implementing a biodiversity gain on the development site;
- registering a biodiversity gain off-site; or
- purchasing statutory biodiversity credits through the Government's system.

The Government has indicated it will produce a template Plan to guide the format of what local planning authorities can expect to receive. The template is expected to be released by the Government in November 2023.

The indication is that a Biodiversity Gain Statement is provided alongside the planning application at the initial stage, before a final Biodiversity Gain Plan is submitted and approved prior to commencement of development (pursuant to the imposed planning condition).

BIODIVERSITY NET GAIN

METRIC

Calculating the pre-development biodiversity value of the relevant site, in order to demonstrate that a 10% gain has been achieved, is the starting point for establishing the level of mitigation that will be required. The pre-development value is required to be calculated at the date of the planning application in the majority of cases. An earlier date can be agreed with the local planning authority in certain circumstances, the reason being that it could encourage landowners to improve the biodiversity value of their site in the interim.

Natural England has published [Metric 4.0](#) which at this stage is expected to be the version of the metric which will become statutory for the purposes of complying with the Act. In order to comply with the Act, the post-development biodiversity value of the relevant site will need to increase by at least 10% calculated in accordance with the approved metric. An alternative metric has been produced for 'small sites' (as detailed further below).

Mitigation Hierarchy

The 10% uplift can be met by providing mitigation on-site, off-site or via statutory credits. It is only where delivery of the requisite 10% uplift cannot be provided on-site (to the satisfaction of the local planning authority) that off-site delivery can be explored. The Metric provides for this in calculating the biodiversity unit score – more value is attributed to an enhanced unit on-site than doing so off-site. The further away the off-site unit is from the development site, the lower its value for the purposes of the calculation.

Off-site

'Biodiversity Units' refers to the off-site areas of land to be purchased in order to reach the required 10% gain output of the biodiversity metric.

The Government will introduce a BNG register ("Register") to record information about biodiversity gain sites and planned habitat enhancements, as well as the allocation of enhancements to developments. The Register is intended to generate confidence in the delivery of BNG and act as a publicly accessible record, preventing double counting.

Local planning authorities will be able to check via the Register that off-site gains are allocated to the relevant development when approving the Biodiversity Gain Plan. The Register will not act as a marketplace platform for buying and selling units, nor will it assess the ecological suitability of proposals.

Habitat banks being used for the purposes of off-site mitigation do not need to secure their whole land area prior to the sale of any units. When units are sold the associated parcel of land must be secured and registered.

Whilst the secondary legislation has not yet come forward, it is expected that the landowner of the relevant off-site unit will need to be a party to the s106 agreement or conservation covenant. The inclusion of the landowner of the off-site units as a party to the s106 agreement (or conservation covenant) has the potential to delay s106 negotiations.

Statutory Credits

Purchasing statutory credits is a last resort option, where providing the 10% uplift is not possible via on-site and off-site delivery alone. Natural England will sell statutory biodiversity credits on behalf of the Secretary of State.

The price of the statutory credits has been deliberately set at an uncompetitive price within the market. The mitigation hierarchy imposed by the Act intentionally disincentivises developers to try to resort to biodiversity credits. The Government will be publishing policy guidance on when a developer will be able to access the credit scheme, to ensure that they remain a last resort.

Revenue from credit sales will be invested by Natural England on behalf of the Secretary of State, in strategic habitat creation and enhancement projects which deliver long term environmental benefits and an overall net gain in England. The Government has not proposed an intention to make a direct traceable link between an individual development that purchases credit and specific sites that have received that investment. An annual report will, however, be published detailing the total payments received by the credit scheme and how those payments have been used. Credit investment will only be used for the purposes set out in the Act.

Statutory biodiversity credits can only be sold by the Secretary of State; it will not be possible for local variations to be sold for the purposes of meeting the mandatory requirement.

BIODIVERSITY NET GAIN

EXEMPTIONS

Whilst the full extent of the exemptions is not yet finalised via secondary legislation, it is expected following the results of a Government Consultation that the following types of development will be exempt:

- development impacting habitat of an area below “de minimis” threshold of 25sqm, or 5 metres for linear habitat such as hedgerows;
- householder applications; and
- biodiversity gain sites (where habitats are being enhanced for wildlife).

It is expected, following the outcome of a Government consultation, that small scale self-build and custom housebuilding will also be exempt.

It is important to note that change of use applications are not expected to be specifically exempted from the biodiversity net gain requirements. However, the Government recognises that the majority of types of change of use application will be exempt by virtue of the de minimis exemption referred to above.

Developments which would fall within the remit of a permitted development right but do not qualify on account of their location in, for example, a conservation area, are not expected to be exempt. The Government in its consultation response dated February 2023, indicates that it expects the de minimis and householder exemptions will result in this lack of exemption having little effect in practice.

Developments which are exempt and therefore fall outside the scope of the statutory mandatory net gains secured by the Act will



not necessarily be exempt from biodiversity enhancements which are secured through local planning policy. It is therefore important to ensure that a thorough review of local planning policy is carried out for all proposed planning applications, even where it is expected that this will fall outside the scope of the national legislation.

SMALL SITES

An adapted BNG regime will apply for “small sites”. The introduction of the BNG requirements to small sites has been extended until April 2024.

Small sites are defined for the purposes of these provisions as follows:

- residential: where the number of dwellings to be provided is between 1 and 9 inclusive on a site having an area of less than one hectare, or where the number of dwellings to be provided is not known, a site area of less than 0.5 hectares.
- non-residential: where the floor space to be created is less than 1,000sqm, or where the site is less than one hectare.

The finer details surrounding the applicability of the BNG policy to small sites is yet to be determined. We are expecting this to be provided for in secondary legislation due in 2024.

POINTS TO CONSIDER

How the cost of complying with the BNG requirements will be met as between a landlord and tenant will need to be considered.

Perhaps most relevant in the case of on-site mitigation, whether ongoing maintenance costs will be recovered via service charge. Equally, whether the relevant on-site mitigation will be a tenant responsibility under the lease is likely to differ depending on the nature of the asset and circumstances of the lease.

It will be important to demonstrate compliance with BNG requirements when financing developments, as well as from a sale or lease perspective. Making the necessary arrangements at the outset and ensuring this is planned for in advance will be crucial to successfully complying with these planning requirements.

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