

ENVIRONMENT ACT

Quick guide for Landowners and Developers

The much-delayed Environment Act 2021 (“the Act”) which finally received Royal Assent during the second week of COP26 (in November 2021), has been described by the UK government as delivering “the most ambitious environmental programme of any country on earth”. The Act introduces far-reaching statutory changes aimed at, amongst other things, increasing biodiversity, restoring natural habitats, reducing waste and making better use of our resources.

The Act brings in mandatory biodiversity net gain provisions through changes to the existing planning regime and introduces the concept of voluntary but legally binding conservation covenants. There is much to digest and in this briefing, our team sets out an overview of the key provisions that landowners and developers alike will need to consider going forward.

BIODIVERSITY NET GAIN

Biodiversity net gain refers to an approach to development aiming to leave the natural environment in a measurably better condition than it was to begin with. The part of the Act securing the biodiversity net gain provisions is not currently in force but is expected to take effect for new planning applications in November 2023.

Following implementation, the Act will require a 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 (“LPA”). The Act provides that certain permissions are exempt, for example those granted by development order.



The Secretary of State has the power to expand the categories of development which will be exempt and it is expected that this discretion will be exercised. The [ongoing consultation](#) indicates that exemptions are now only proposed for householder applications, changes of use and those development which will impact habitat areas below a de minimis threshold.

This plan must set out how a net biodiversity gain of **at least 10%** can be achieved for the development by:

- Having biodiversity included on the site or at a registered biodiversity gain site (being off-site) or
- Purchasing biodiversity credits through the government’s system (which will be established through secondary legislation).

“HIGH LEVEL CLIENT SERVICE AND PROMPT, WELL-RESOURCED AND INFORMED ADVICE”

Chambers UK, 2022

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As this condition is mandatory and imposed by statute, it will be possible to submit the required information in support of the planning application at the initial stage (where the information is available) rather than via an application to discharge a condition.

The metric by which the biodiversity value of a site will be measured has not yet been finalised and will be brought forward via secondary legislation. Any habitat enhancement introduced by works to increase the biodiversity value of the on-site habitat, or off-site provision of biodiversity gain, is required to be maintained for a period of 30 years from completion of the development. This will be secured by a planning condition, planning obligation or conservation covenant (see page 3) and the associated enforcement will fall within the planning system.

A government consultation is currently ongoing in order to finalise the details of the associated secondary legislation and will close on 5 April 2022. Further details can be found [here](#).



DEVELOPER CONSIDERATIONS

Biodiversity assessment

Potentially undertake a biodiversity assessment prior to submitting the planning application, so that the biodiversity value of the site is known. This may make it easier to anticipate the LPA's requirements in respect of the net biodiversity gain for the development in granting the planning permission.

Design process

Biodiversity could be integrated into the design of the development to achieve the necessary net biodiversity gain.

Availability of offsite biodiversity options (if required)

There will be a register of such sites which can be consulted to ascertain nearby sites. Maintaining such offsite options may be achieved by a developer entering into a conservation covenant to procure that a charity or other organisation manages a biodiverse site away from the development site (see further details below on conservation covenants).

Availability of biodiversity credits

It is not yet clear how easy it will be to purchase credits; the National Planning Policy Framework already includes a biodiversity mitigation hierarchy as guidance for LPAs and places compensation for biodiversity harm as the last resort.

Public relations for the development

With many developers now having sustainability targets, their actions relating to biodiversity net gain may be more heavily scrutinised and the results will be publicly available via the planning process.

ESG requirements of stakeholders

Developers may also need to consider their investors, lenders, tenants or other stakeholders' sustainability requirements in their decisions on achieving a net biodiversity gain for the development.

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CONSERVATION COVENANTS

Conservation Covenants (“CCs”) are voluntary but legally binding agreements between a landowner and a designated ‘responsible body’ such as a conservation charity, public body or for-profit body to conserve the natural or heritage features of the land. Conservation covenants can contain positive and restrictive obligations to fulfil conservation objectives for the public good. Designed to be flexible, the parties can negotiate the terms (including the duration) to suit their circumstances. Generally, they will bind subsequent landowners and therefore have the potential to deliver long-lasting conservation benefits.

Though novel in England and Wales, there are existing covenants in favour of the National Trust which can, and does, enforce broad conservation restrictions on land. CCs also exist in various forms in Scotland, New Zealand, Australia, Canada the USA and elsewhere.

It will be interesting to see how CCs will work in practice.

How will they be enforced?

- Which organisations will be allowed to take the benefit of CCs?
- Where will they find the resources to enforce them?
- What happens if the organisation ceases to exist? The government has deliberately designed CCs as a private sector tool, but it might find itself the enforcer of last resort.

What can they cover?

The legislation is drawn widely and leaves plenty of room for discussion about what might fall within it. A CC may act to conserve:

- The natural environment of land or the natural resources of land.
- Land as a place of archaeological, architectural, artistic, cultural or historic interest.
- The setting of land with a natural environment or natural resources or which is a place of archaeological, architectural, artistic, cultural or historic interest.



“EXTREMELY KNOWLEDGE-ABLE AND NOT AFRAID TO MAKE SUGGESTIONS AND RECOMMENDATIONS WHICH LEAD TO PRAGMATIC, COMMERCIAL SOLUTIONS”

The Legal 500, 2020

LANDOWNER CONSIDERATIONS

CCs will automatically limit and, therefore, impact upon the value of land, so landowners should think carefully about entering into them. There are three main incentives to do so:

- Altruism and environmental conscience.
- As a means of discharging its bio-diversity net gain obligations under a planning agreement (which is specifically allowed for under the Act).
- As a contractual means of securing obligations benefitting natural capital, such as carbon sequestration.

At the moment, there is no tax incentive for CCs. However, that may change if the government wishes to encourage their use and/or align them with the wider green agenda.

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TREE FELLING

The key changes to the law relating to tree felling which may impact landowners are set out below. Note however that the date they will come into force has not yet been confirmed:

- **Illegal felling land charge:** there is now a new power for a Local Land Charge to be created where illegal felling of trees has taken place on a piece of land. This is something that should be noted when undertaking due diligence of a property. Additionally, landowners considering felling trees on their land should check whether they have the relevant felling permissions otherwise they may then incur a Local Land Charge on their property.
- **Consultation prior to felling:** a duty has been imposed on local highway authorities in England to consult before felling urban road trees. Urban roads are those that are not trunk or classified road and which are restricted to 30 miles or 40 miles an hour or otherwise a street in an urban area. However, there are certain exemptions for:
 - Small trees (diameter of the trunk being no more than 8cm at 1.3m above ground level).
 - Dead trees.
 - Where the tree is required to be felled owing to a disease.
 - Where the tree is dangerous.
 - Causing an obstruction.
 - Where a development (and the felling of a tree being part of that development) has been authorised by planning permission.

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The Act is a significant step towards protecting and improving people's health and the natural environment, but it is only the beginning, and much will depend on further targets and policies that are yet to be developed through further consultation and engagement.

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FORSTERS COMMITMENT TO SUSTAINABILITY

We are committed to running a business that is environmentally sustainable. Our efforts to minimize the firm's environmental impact are led by our Green Impact Group ("GIG"). GIG is made up of staff from across the firm which meet monthly to ensure we maintain a comprehensive sustainability policy.

We measure our sustainability performance by external, objective standards. Through our relationship with Natural Capital Partners, our carbon footprint is measured on annually. We have had carbon neutral status since 2007.

We are also a proud member of the Legal Sustainability Alliance, a group of law firms committed to working to improve the environmental sustainability of our operations and activities.

We operate a number of sustainability schemes across the firm including:

- Our Recycling scheme
- Our 'Turn it Off' campaign
- Our paperless drive to reduce unnecessary printing
- Our energy is sourced from renewable sources
- Our office and cleaning materials are sourced from environmentally responsible suppliers.

In terms of keeping our clients up to date on sustainability developments we have a dedicated resource, the Sustainability Hub which has a wealth of materials.

[Sustainability Hub](#)



OUR SUSTAINABILITY EFFORTS HAVE BEEN RECOGNISED BY THE INDUSTRY WITH A SHORTLISTING FOR THE 2020 LEXIS NEXIS SUSTAINABILITY AWARD.



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