

# Biodiversity net gain

Update September 2024

Following the biodiversity net gain (BNG) requirements of the Environment Act 2021 coming into effect on 12 February 2024 and 2 April 2024 for major and small sites respectively, this note summarises some key points we have seen arise to date. Please also refer to our previous notes of [October 2023](#) and [February 2024](#) for further detail on these obligations.



## How are councils approaching BNG at application stage?

Broadly we have seen councils proactively engage with the BNG requirements but as expected, there are a number of issues arising due to local authority resourcing and the capacity to deal with the more onerous obligations associated with complying with the BNG requirements. Please refer to our note from February 2024 for details of what needs to be submitted at application stage.

We have seen some local authorities take an approach to the application requirements which does not accord with the legislative provisions. For example, we are aware of local authorities requiring the offsite gain units (where applicable) to have already been located and identified at application stage. There is no regulatory requirement for this and from a practical perspective, it is often

unlikely that applicants and developers will be able to demonstrate this at application stage, particularly given the number of registered gain sites (see further comments below).

## Does the BNG regime apply where the Council does not expressly impose the relevant condition on the face of the permission?

Yes, the pre-commencement condition requiring a biodiversity gain plan to be submitted is deemed to be imposed regardless as to whether it is included within the decision notice itself. It is important to bear this in mind when reviewing decision notices possibly with the intention of acquiring sites to develop or for investment purposes, as we are aware that some councils have not expressly included the condition even where the permission is subject to the BNG regime.





## **Are planning applications for alterations to building subject to the BNG regime?**

Alteration applications are not specifically excluded but some of the exemptions could apply. In particular, the BNG regime does not apply to the works carried out pursuant to a development right. Equally, the de minimis exemption is likely to apply in the context of alterations; in broad terms if the works will impact less than 25sqm of onsite habitat the statutory BNG regime will not apply.

It may therefore become important to consider the extent of the application boundary when applying for planning permission, to ensure this does not include any habitat at the property which is not in reality the subject of the application.

## **Is the biodiversity register working effectively?**

The register itself is publicly available and (at the date of this note) shows 11 registered gain sites. The register of course only shows the sites once they have been registered and where applicable the allocation and as a result, it is not representative of the number of sites which are in the pipeline to come forward. We are aware there are various sites where preparation work is underway for the gain sites to be dedicated but where this has not yet completed. Commercially, this may be because landowners are reluctant to tie up their land for this purpose until buyers for the units have been found.

## **How is the market for offsite gain units emerging?**

Given the number of developments which will not be able to deliver the entire required 10% gain on site, the market for offsite units will continue to grow in importance. The hierarchy of mitigation options means the BNG system is to an extent reliant on offsite units continuing to become available, otherwise the default position will be the purchase of the statutory credits which have been priced to disincentivise this option. This balance between the supply of the gain sites and the demand for the units is still emerging in these initial months since the regime became mandatory. As more applications which are submitted requiring offsite units it will become clear whether demand outgrows supply and at that point, whether the resort to the statutory credits becomes more prevalent than it has been to date.

## **Can applications to allocate units to a development be made at the same time as the registration of the gain site?**

Yes, applications to register an offsite gain area and allocate the associated units can be submitted at the same time. This is achieved via the online registration platform. Operating via this approach would be taken where the dedication and allocation has effectively happened simultaneously, perhaps where a landowner has dedicated land specifically for the purposes of providing the relevant units to offset a particular development.





### **How long does it take to register a gain site and allocate units to a development?**

The Government [website](#) currently indicates a 6 week period from receipt of the application to registration (provided the application is successful). The time period for this registration gap should be factored into transactional timetables which may be conditional on successful registration of the gain site.

### **Will it be less onerous to comply with the BNG requirements when trying to develop Brownfield land?**

The level of difficulty in complying with the BNG obligations will often be dependent on the baseline number of units on the site, as this dictates the target level of the 10% uplift. The rules apply equally to brownfield and greenfield land and regardless of the level of the baseline.

The assumption is that often, brownfield sites will have a lower baseline ecological value than their greenfield counterparts. Whilst in some cases this will be the position, it is not necessarily the case. As a particular example, open mosaic habitats are often found on brownfield land and are classified as a 'high distinctiveness' habitat in the statutory metric. An open mosaic habitat is identified by hard surfaces interspersed with vegetated areas; an example would be broken or fragmented paving in which habitats have naturally grown and often developing over a long period of time.

It therefore remains important to do robust initial assessments of the onsite habitat as early as possible and not assume that a brownfield site will have a low ecological baseline value.

### **Is there an industry standard S106 agreement for the purposes of securing BNG?**

Each local authority will have its own preferred form of s106 agreement for addressing BNG, similar to any other type of planning obligation. In terms of dedicating land as an offsite BNG area, again this will often depend on the dedicating party and whether a local authority or habitat provider are party to the agreement who may have preferred form documents in place.

In terms of the BNG plan to be submitted to discharge the planning conditions, the government has prepared an [example plan](#) which can be used to apply to discharge the pre-commencement condition. It is expected that most local authorities' preference will be that the BNG plans follow this template.

Please get in touch with our Planning Team for any specific advice or guidance on any individual sites.

Information correct as at September 2024. This note is a summary, please refer to the legislation and guidance for full details.

# Our key team



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Please note this checklist does not cover the law or procedures in Scotland or Northern Ireland, that may well in certain instances be different to those in England and Wales.

This briefing offers general guidance on commercial property issues. It reflects the law as at September 2024. The circumstances of each case vary and this note should not be relied upon in place of specific legal advice.

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