

Biodiversity net gain - update February 2024

Following the publication of the draft secondary legislation required to bring the biodiversity net gain (BNG) obligations secured by the Environment Act 2021 into effect, this note summarises the key points to note and is supplemental to our note of [October 2023](#) which sets out in more detail the nature of the planning requirements.



When does BNG take effect?

BNG will take effect on the following dates:

12 February 2024 – major development

- Development including 10 or more residential dwellings, or where the development site is more than 0.5 hectares.
- Development on a site of 1 hectare or more.
- Development where the floorspace to be created is more than 1,000sqm.

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- Residential development where the number of dwellings is between 1 and 9, or if unknown the site area is less than 0.5 hectares.
- Commercial development where the floorspace created is less than 1,000sqm, or the total site area is less than 1 hectare.

The provisions will not take effect in relation to retrospective planning permissions.

What are the transitional arrangements?

The following important caveats to the above dates apply to planning permissions either granted, or applied for, before the above dates. A planning permission already granted before the obligations take effect will not be subject to the BNG requirements. Equally, a planning permission applied for before the above dates, but granted afterwards, will also not be caught.

As a follow on consequence from the above, if such a planning permission is later varied by section 73, that variation will likewise not be subject to the BNG obligations.

What is exempted?

The Regulations specifically provide for certain types of development to be excluded from the BNG requirements:

- De minimis:** where the development does not impact an onsite priority habitat and it impacts (i) less than 25 square metres of onsite habitat that has biodiversity value greater than zero; and (ii) less than 5 metres in length of onsite linear habitat. A 'priority habitat' is provided for in Regulations and for these purposes, an 'impacted habitat' is one which has been lost or degraded such that there is an decrease in its biodiversity value.
- Householder applications:** householder applications will not be subject to the BNG obligations.
- Biodiversity gain site:** planning permissions for development which is undertaken solely or mainly for the purpose of fulfilling the biodiversity gain conditions which applies in relation to another development (refer to the comments on off-site mitigation below).
- Self-build and custom build:** the obligations will not apply to developments of no more than 9 dwellings on a site of no more than 0.5 hectares, which are exclusively self-build dwellings or custom housebuilding.



What needs to be submitted with a planning application?

Applications for planning permission will need to include a statement as to whether the applicant believes that planning permission would be subject to the biodiversity gain condition and if not, why not. Where it is considered that the BNG requirements are applicable, the following information will need to be submitted at application stage:

- the completed biodiversity metric calculation tool, showing the calculation of the biodiversity value of the onsite habitat;
- the biodiversity value or values;
- if any activities have been carried out on the site since 30 January 2020 which have lowered the biodiversity value of the site, a statement confirming those activities and the date when they were carried out; and
- a plan showing the location of the onsite habitat included in the calculations and any irreplaceable habitat.

How will BNG operate for phased developments?

Phased development for BNG purposes refers to the following:

- Outline permission where the reserved matters either permit or require the development to come forward in phases.
- Any planning permission subject to conditions which either permit or require the development to come forward in phases.

Permission for phased developments will be granted subject to the planning conditions requiring the following:

- An overall biodiversity gain plan will need to be submitted to the local planning authority prior to commencement of the development as a whole.
- No phase of the development can commence until a biodiversity gain plan for that phase has been submitted to and approved by the local planning authority.

Biodiversity units – off site mitigation

Where it is not possible to provide for a 10% increase in the biodiversity value of the development land on site, securing off site biodiversity units is an available option. The operation of the Biodiversity Gain Register, operated by Natural England, will record all of biodiversity gain site land. Any offsite mitigation must be provided on a registered gain site in order for it to satisfy the legislative requirements.

When is land eligible to be registered?

Land is eligible to be registered in relation to a conservation covenant or a section 106 agreement where the following six conditions are met:

- A conservation covenant or section 106 agreement requires a person to carry out works on the land for habitat enhancement.
- The conservation covenant or section 106 agreement requires the habitat enhancement to be maintained for at least 30 years after completion of the enhancement works.
- The conservation covenant requires a person to monitor habitats on the land to ensure that the habitat enhancement is maintained for the period of time secured by that covenant or agreement.
- The habitat enhancement is made available to be allocated in accordance with the terms of the covenant or section 106 agreement, to one or more developments for which planning permission is granted.
- The land is in England.
- The conservation covenant or section 106 agreement are registered as a local land charge.

The Register will prevent double counting – land cannot be registered twice.

Who needs to make the application to register the land?

The application to add land secured by a conservation covenant to the Register can only be made by:

- A person who is required under the covenant to carry out works on the land for the purpose of habitat enhancement.
- A person who is required under the covenant to maintain any habitat enhancement.
- A person by who can enforce (a) or (b) under the covenant.

The application to add land secured by a s106 agreement to the Register can only be made by a person required under the agreement to:

- to carry out works on the land for the purpose of habitat enhancement; and
- to maintain any such habitat enhancement.

A separate application will be required to register the allocation of habitat enhancement secured by either of the above options to a specific development site, thereby providing the offsite mitigation for the purposes of achieving the biodiversity gain objective.

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

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