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BIODIVERSITY NET GAIN: ANOTHER BLOSSOMING REQUIREMENT FOR THE PLANNING SYSTEM



The deadline for the introduction of the Government’s mandatory Biodiversity Net Gain (‘BNG’) requirement is fast approaching (November 2023). As BNG is proposed to be secured via the planning process, we expect to see changes to how applications are structured and then determined by Local Planning Authorities (‘LPAs’).

This note examines the background to BNG, what we know (and don’t yet know), and the potential future implications, challenges, opportunities and unknowns.

Some BNG Background

The Environment Act 2021 brought in to law a mandatory ‘Biodiversity Gain Objective’ for development – basically that any development for which planning permission is granted must deliver an improvement of at least 10% to the biodiversity value of the on-site habitat.

This effectively is what we refer to as BNG i.e. “an approach to development which means that habitats for wildlife must be left in a measurably better state than they were in before the development”. BNG adopts a cascading ‘Mitigation Hierarchy’ approach, as shown in Figure 1, which all development needs to follow.



Figure 1: Mitigation Hierarchy

The idea is that the BNG requirement will be secured and enforced via the planning system. BNG requirements are not a new concept in planning – some LPAs have been securing biodiversity enhancements under planning policy for some time now – however, what is new is that the 10% will be enshrined in law and therefore will operate in a similar way to the Community Infrastructure Levy ('CIL') i.e. non-negotiable.

Whilst we know the basics about the new requirement, we are still yet to see any full detail for how this will work in practice. DEFRA and the DHLUC are working on implementing the regime and in January 2022 DEFRA consulted on the practical and legal implementation details of the BNG requirement. In April this year DEFRA published a response to that consultation which gave some good indicators of what we can expect, but to date we are still waiting on secondary legislation / regulations, amendments to national planning policy and guidance to formally set out how the new regime will be implemented.

Notwithstanding this, given the planned November 2023 implementation date, we are advising our clients on potential BNG requirements now and how these can potentially be managed for planning applications.

The Planning Requirements - What We Know

As noted above, the details of how BNG will work via the planning system is still emerging. However, we set out below what we anticipate, based on the Environment Act provisions and the Government's April consultation response:

- It is intended that the BNG requirement will **operate as a pre-commencement condition**, whereby development granted planning permission cannot begin until a Biodiversity Gain Plan has been submitted to and approved by the LPA. Once agreed in any permission, BNG will be secured via condition, planning obligation or conservation covenant (or a mixture) for a minimum of 30 years. Biodiversity Gain Information will need to be submitted at application stage.
- Establishing BNG will require developers to assess the pre and post-development biodiversity site value and work out how the BNG requirement can be met (see more on this below). The intention is that this assessment would be done using the **biodiversity metric** (not yet finalised but anticipated that the current version 4.0 will be used initially) and would likely need to be carried out by a qualified ecologist. For both existing and proposed biodiversity habitats, our understanding is that not all greenery is equal in the metric – i.e. replacing a tree with another tree of a different species/age may not deliver the same biodiversity credentials, and therefore this will need to be factored into any scheme proposals.
- The Government intends to make Regulations to make **exemptions** for some development including householder applications and development impacting habitat below a 'de minimis' threshold.

We understand that the biodiversity metric also allows for some temporary impacts to be excluded from calculations, as well as existing sealed surfaces (such as tarmac or existing buildings) so effectively these may be exempt also. As noted above, the metric is also not finalised therefore this is subject to change.

- For proposals to which BNG would apply, there is no allowance for developments to simply not meet the 10%. BNG improvements should be met **on-site** but where this cannot be achieved there will be a system for these to be provided **off-site or via the purchase of biodiversity units/credits** via a cascade, as shown in Figure 2. Biodiversity 'units' can be sold by landowners/private developers or 'credits' can be bought from Natural England (although the intention is that the Natural England ones will be phased out once the BNG unit market has matured). Guide prices for the statutory credits have recently been published by DEFRA. The metric will prioritise on-site gains. We have already seen habitat banking platforms emerge and expect that this may become an area of revenue for some land assets for which alternative development uses are limited.

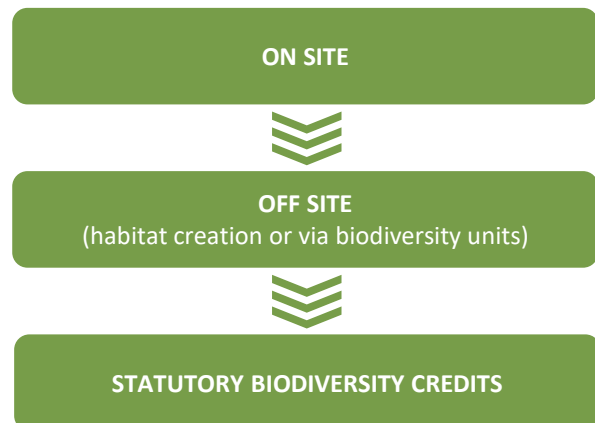


Figure 2: BNG Improvement To Be Met

- The requirement will become mandatory for **major sites in November 2023** and **'small sites' in April 2024** (expected to be November 2025 for Nationally Significant Infrastructure Projects). DEFRA has confirmed via one of its blogs that **mandatory BNG will only apply to new applications for major development made after November 2023** and that they are working with the DHLUC on transitional arrangements to ensure that BNG is not applied retrospectively to applications that have been submitted or have already been granted permission.

The Government is looking at bringing forward national planning policy to encourage minor development to secure enhancements where possible. Many LPAs already have (or are bringing forward) their own **BNG planning policies, some of which go above the 10% requirement**. Local authorities have suggested in some cases they make seek either increased BNG requirements, such as 30%, or specified numbers of biodiversity units, rather than relative percentage increases. Whilst planning policy requirements are not necessarily mandatory, it is another element which needs to be considered in preparing any scheme.

Potential Implications, Challenges, Opportunities and Unknowns

Clearly there will be a need for most schemes to at least consider if they will trigger the mandatory BNG requirements and if not, if there is a policy requirement. Below we set out some initial considerations on the potential implications and challenges for schemes as well the potential opportunities and some of the unknowns which we hope are addressed in any emerging guidance / regulations / legislation.

- **City Centre and Brownfield Sites:** On the face of it, as many city centre sites have little or no existing biodiversity (and may be classed as 'sealed sites') BNG requirements may have less impact than elsewhere. Notwithstanding this, we expect that there will be a need to confirm this on a site-by-site basis with an ecologist and regardless of the mandatory requirements we expect that many LPAs will require biodiversity enhancements on most sites via planning policy. Caution may need to be exercised with brownfield sites as well, which are not intended to be exempt. Whilst such sites may appear barren, we understand that in some instances they can harness rich ecological habitats (particularly where left unattended for some time) and therefore the BNG requirements may be significant.
- **Complex Planning Applications and Resourcing:** As was the case when the CIL regime was brought forward, we expect that the introduction of the BNG regime via legislation will inevitably lead to complications for some planning applications. Thought has been given in the Government's consultation response to phased developments/outline applications as well as S73 applications, but we will need to see in time how this works in practice and in line with any detailed regulations/guidance. Whilst not complex in themselves, how the BNG requirements (either mandatory or policy based) will be applied to smaller applications could lead to relatively straightforward applications becoming more complex and take longer to determine.

We will also need to see how other elements required in planning submissions inter-relate with the BNG requirement – for example, how the Mayor of London's Urban Greening Factor will tie in (or not) with the ecological requirements needed for BNG, or how green elements factor into any fire safety strategy for buildings, particularly residential (e.g. green/living walls).

A linked issue is that of resource within the industry, particularly the local authorities, to manage the implementation of the new regime. The scope and depth of technical elements which planning officers need to assess has grown hugely in the last few years and BNG will only add to the list. In addition, because of the mandatory element, and how BNG is to be secured potentially via legal agreement, there is a risk of increased complexity within the planning process which is likely to lead to delay.

- **Development Timescales:** Given that the BNG requirement is proposed to be operated as a pre-commencement condition, whereby development granted planning permission cannot begin until a Biodiversity Gain Plan has been submitted to and approved by the LPA, care will need to be given to any post-permission build out programme to ensure that the relevant information can be provided alongside any other pre-commencement conditions to enable works to start on site. This will be particularly acute for any phased permission and potentially the relationship between any CIL strategy will also need to be considered. It has also been suggested (albeit not confirmed) that any on-site biodiversity gains should be secured for delivery within 12 months of commencement, or where not possible, before occupation. This would need to be factored into any development programme, alongside considering relevant planting/ecological seasons as necessary.
- **Habitat Banking:** As noted above, we have seen the emergence of habitat banks in response to the system to enable BNG units to be provided off-site. Such 'banks' (such as the Environment Bank) effectively are structured as trading platforms where landowners can sell biodiversity units to developers in need of such units to meet BNG requirements. We understand that the biodiversity metric will prioritise sites within close proximity to the development site, so we question whether this could generate opportunities particularly for areas with lower potential to deliver on-site gains e.g. urban or built-up areas. Depending on an asset's potential for redevelopment, developers may begin to see the creation of BNG units as a viable revenue stream.
- **Development Uncertainty:** BNG requirements are likely to add uncertainty to the planning and development process, particularly in the first few years following implementation, in terms of design and cost risk. Therefore, early appointment of an ecologist (even at site selection) is likely to be key as any BNG issues/opportunities will need to be understood as early in the development process as possible.
- **Land Use Suitability:** We expect that some land uses will be more able to provide on-site BNG gains (dependent on the site characteristics) e.g. residential may be able to deliver BNG gains through effective design, open play spaces and terraces. However, depending on the eventual requirements, some uses may find provision more challenging due to operational requirements and/or size of sites and resulting requirements. This could be the case for some industrial and logistics uses, for example, where more roof space may need to be utilised alongside PV panels to meet any requirements, or, where simply the size of the development sites makes the 10% BNG requirement particularly onerous. Likewise, proposals for non-grassed green spaces (e.g. artificial sports pitches) may struggle to meet the requirements, particularly if they are replacing an existing green field (notwithstanding other planning benefits).



Final Thoughts

It can probably be agreed by all that encouraging the built environment to deliver biodiversity benefits is no bad thing – in fact, the overarching aim should be celebrated.

However, as is the case often with these targets, the way in which this aim is proposed to be delivered could well have significant implications on the speed of the planning process and the ability for developers to deliver schemes. It is clear that the BNG regime will add another layer of complexity to the planning system which will need to be addressed and managed by the development industry and LPAs that are already struggling with resourcing. Enshrining the requirement in law, whilst understandable in theory, could well lead to real issues for schemes working through the planning system, given that decision makers will have no flexibility due to the legislative framework. This lack of flexibility and ability for discussion/pragmatism has been seen through the implementation of the CIL regime, certainly in the early years where points of legal interpretation had not yet been tested and multiple revisions to the legal machinery proved necessary to develop a functional system.

Regardless, the requirement is coming forward and the development industry needs to be adapting now to ensure that schemes take into account any requirements to try and mitigate any delay in the planning process. As noted above, early appointment of an ecologist is likely to be key and any relevant findings will need to be factored into an appropriate planning strategy. It will be interesting to see how the BNG unit and credit market will evolve, and the scope and demand for sites to be utilised for BNG unit creation.

The industry urgently needs sight of the details from the Government on how the BNG regime is going to be implemented in practice which we hope will provide some answers and help to inform planning strategies moving forward.

If you would like to discuss BNG in the context of any planning or development strategy, please do contact a member of our Planning & Development team who would be happy to assist.

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