HOWARD KENNEDY



Biodiversity net gain

Some practical points following the new regulations and mandatory BNG coming into force



Background

The concept and framework for Biodiversity Net Gain (BNG) was introduced by the Environment Act 2021 with the aim of achieving development that is nature positive. BNG is a way of creating and improving natural habitats and improving what was there before the new development.

From 12 February 2024, after two delays in November 2023 and January 2024, BNG became mandatory for most new development applications for planning permission. From 2 April 2024 BNG also became mandatory for small sites, meaning all planning applications must now demonstrate 10% BNG unless exempt. Eagerly awaited regulations and guidance were published towards the end of last year to aid BNG becoming mandatory. The Department for Environment, Food & Rural Affairs (DEFRA) stated there will be more regulations to come.

Key takeaways from the new regulations

Going forward you must consider BNG early on in developments, communicate with the local authorities to establish whether the site is subject to BNG, understand what can be considered as onsite gains and use experts to help with the complex metric system. Developers need to take into account how expensive BNG can be for a development and consider outsourcing liability due to potential enforcement action for non-compliance. It is also important to highlight that a section 73 application cannot vary or remove the BNG general planning condition

The BNG general planning condition

The new schedule 7A of the TCPA 1990 provides that almost all grants of planning permission (see below exemptions) will be deemed granted subject to a BNG general planning condition securing 10% biodiversity net gain in relation to the pre-development value of the site. Importantly, this BNG general planning condition will not be included in the list of conditions in the decision notice. If the planning permission does contain an express BNG condition (and it qualifies for statutory BNG to be imposed), the requirement is in addition to the statutory 10% unless the condition and/or an informative states otherwise. Many local authorities are choosing to go above and beyond the 10% minimum requirement for BNG with their policies.

The biodiversity net gain plan

If the BNG general planning condition applies to the development, applicants will need to submit and have approved by the local authority a Biodiversity Gain Plan (BNG Plan) before development can lawfully commence. The BNG Plan cannot be formally submitted until the day after planning permission is granted. The applicant can submit a draft BNG Plan to the local authority before determination of the planning application and the applicant also has the right to appeal for non-determination or refusal of the BNG Plan.

The 10% gain

The 10% statutory minimum gain can be achieved in three ways:

1. Onsite (the most preferable),
2. Offsite, on developers' land outside the redline or by purchasing biodiversity units from a third-party landowner, and
3. Purchasing statutory credits (the least preferable – requires more evidence and is deliberately expensive, starting from £42,000).

BNG must be legally secured for at least 30 years and depending on which of the three above options is used, this can be secured through the BNG general planning condition (as set out above) and also legal agreement (s106 or conservation covenant). A combination of all three options above can be used to achieve the required 10% gain.

Applicants should work with the local planning authority to clearly establish the point of completion for when the period of at least 30 years begins. The definition of completion should include the completion of any onsite habitat enhancements (not just the buildings related to that of the development) which would constitute development. The use of traditional indicators of completion for residential or commercial development (such as a building regulation notice) should be not relied on for the formal ‘completion’ of the development (i.e., when the final unit is completed) for the purposes of these provisions.



Planning Practice guidance

On 1 May 2024, the Planning Practice Guidance on Biodiversity Net Gain (at Paragraphs: 025 Reference ID: 74-025-20240214 and 026 Reference ID: 74-026-20240214) was updated with suggested text for Biodiversity Gain Information that Local Planning Authorities are encouraged to use on the written decision notice granting planning permission. The suggested paragraphs cover three scenarios:

1. Where the local planning authority considers that approval of a Biodiversity Gain Plan will be required before development commences
2. Where the local planning authority considers that approval of a Biodiversity Gain Plan will not be required before development commences
3. Where it is not known at the time of granting planning permission whether a Biodiversity Gain Plan will be required before development commences

We think that the information will be included in informatives. This means that everyone concerned with planning permissions needs to be more aware and take greater care in reading the entirety of the decision notice as it may contain vital information regarding Biodiversity Net Gain.

The guidance also contains a link to download the suggested paragraphs.

The Regulations

A summary of the new regulations is set out on the following pages.



The Regulations

Biodiversity Gain (Town and Country Planning) (Modifications and Amendments) (England) Regulations 2024

Planning applications will now need to be accompanied by certain BNG information including either a statement, if the applicant does not think a BNG general planning condition should apply, or specific information on the site and its current biodiversity, including confirmation of degradation of habitats and the presence of any irreplaceable habitats.

The regulations have introduced the requirement, in regard to phased planning permissions, for an overall BNG plan as well as a BNG phase plan for each phase. The regulations set out the specifics of what each plan needs to include.

These regulations also set out transitional provisions depending on when the planning application was made.

It is also important to highlight that a section 73 application cannot vary or remove the BNG general planning condition.

The Biodiversity Gain Hierarchy is also being introduced as part 7A to the Town and Country Planning (Development Management Procedure) (England) Order 2015. This is separate from the NPPF mitigation hierarchy.

The Biodiversity Gain Hierarchy:

a) avoid adverse effects to onsite habitat,

b) mitigate where adverse effects cannot be avoided,

c) where mitigation is not possible enhance the onsite habitat,

d) if c) cannot be done create onsite habitat,

e) if onsite habitat cannot be created, turn to offsite biodiversity gain; and

f) lastly, look to purchasing biodiversity credits.

The BNG Plan submitted to the local planning authority must reflect the use of this hierarchy and this will be considered by the local authority when approving the BNG Plan. This is where the local authorities can use their discretion to review the BNG Plan submitted.

The Regulations

Biodiversity Gain Requirements (Irreplaceable Habitat) Regulations 2024

BNG requirements are being approached differently for irreplaceable habitats which are currently defined as; "blanket bog, lowland fens, limestone pavements, coastal sand dunes, ancient woodland, ancient and veteran trees, spartina saltmarsh swards and Mediterranean saltmarsh scrub."

For BNG purposes, the 10% net gain requirement is not to be applied as irreplaceable habitats are so valuable that they cannot be recreated. Irreplaceable habitats will still be recorded in the biodiversity metric, but all negative impacts are unacceptable and will require specific compensation to be agreed with the planning authority. If there are no negative impacts from the development on irreplaceable habitats, enhancement of such habitats can contribute to the BNG requirement, but the development will still need to achieve 10% BNG on any other non-irreplaceable habitats on the site. The BNG Plan for irreplaceable habitats does not look at offsite gain or credits if purchased, only what can be improved onsite.

Further publications regarding irreplaceable habitats are to come later in 2024.

Irreplaceable habitats are assessed differently when part of a phased development.

Biodiversity Gain Requirements (Exemptions) Regulations 2024

These regulations set out further exemptions for when BNG does not apply:

- NSIPs will not need to deliver BNG until 2025,
- A development that does not impact priority habitat and impacts less than 25 square metres of habitat or 5 metres of linear habitats (e.g., hedgerows),
- Biodiversity gain sites which have the purpose of fulfilling the BNG general planning condition for another development,
- Any development forming part of, or ancillary to, the high-speed rail transport network,
- Householder applications and self-builds are also excluded from mandatory BNG.

These regulations also set out that BNG would only become mandatory for small sites from 2 April 2024 (a small site is where there are less than 9 dwellings on 1 hectare of land or where a site is less than half a hectare and for non-residential small sites it is where the floor space being created is less than 1,000 square metres or the site is less than 1 hectare) – BNG is now mandatory for small sites.

The Regulations

Biodiversity Gain Register Regulations 2024 and Biodiversity Gain Site Register (Financial Penalties and Fees) Regulations 2024 and Biodiversity Gain Site Register Regulations 2023

These regulations are in relation to the publicly accessible register for biodiversity net gain sites.

Any offsite gain must be on a registered biodiversity net gain site on this register to be applicable for the BNG general planning condition. Natural England operate this publicly accessible register and determine the applications for allocation onto this register. The regulations set out the eligibility criteria for being put onto the register, removal and modification from the register and gives applicant powers to appeal.

Penalties of £5,000 can be issued for false or misleading information when applicants apply to be put onto this register.

Biodiversity Gain (Town and Country Planning) (Consequential Amendments) Regulations 2023

These regulations have made consequential changes to the existing primary legislation incorporating the BNG framework into planning law.

For further advice, please get in touch with Jade Chalmers, Bob Sadler or Danielle Coglin.



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