



DAVITT
JONES
BOULD

REAL ESTATE LAW SPECIALISTS

Biodiversity Net Gain



NIGEL HEWITSON

Partner

E: nigel.hewitson@djblaw.co.uk

T: 020 3026 1873



STEPHANIE HALL

Partner

E: stephanie.hall@djblaw.co.uk

T: 0161 399 0127



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Background

- Limited scope of existing environmental legislation
- Discretionary BNG – Local Plans
- Environment Act 2021
- Draft Regulations 30 November 2023



Planning Applications and Biodiversity Net Gain

Nigel Hewitson

Legislative Sources

- Environment Act 2021 ss.98 & 99 and Sch.14 & 15 (inserted s.90A and Sch 7A into the Town and Country Planning Act 1990)
- Draft Biodiversity Gain (Town and Country Planning) (Modifications and Amendments)(England) Regulations 2024
- Draft Biodiversity Gain Requirement (Exemption) Regulations 2024
- Draft Biodiversity Gain Requirement (Irreplaceable Habitat) Regulations 2023

The Biodiversity Gain Objective

- With a few exceptions new developments must achieve at least a 10% net increase in biodiversity- calculated in accordance with a metric available online – involves consideration of the habitat type, size, distinctiveness, condition and strategic significance
- Exemptions:
 - Householder applications (as defined in the TCP (Development Management Procedure) (England) Order
 - Self-build developments (max 9 dwellings or 0.9 hectares)
 - De minimis (less than 25 sq m or 5 m linear –hedgerow or watercourse)
 - Sites solely for providing BNG
 - HS2-related developments

Requirements when Submitting Planning App

- Applications to be accompanied by a statement whether the applicant believes PP, if granted, would require a biodiversity gain condition.
- If so, application must be accompanied by:
 - The biodiversity value of onsite habitat pre-development
 - The completed biodiversity metric calculation
 - Description of any “irreplaceable habitat”
 - A plan showing the existing habitat

The Biodiversity Gain Condition

- For almost all planning permissions a condition will be deemed to have been imposed as follows:
 - Development may not be begun until:
 - a biodiversity gain plan has been submitted to the planning authority
 - the planning authority has approved the plan
- Applies to each phase of a phased development and to s.73 development

The Biodiversity Gain Plan

- Submitted no earlier than grant of planning permission. Must include:
 - Information about steps taken to minimise impact on onsite habitat
 - The pre-development biodiversity value of the onsite habitat
 - Any registered offsite biodiversity proposed to be allocated to the development
 - Any biodiversity credits proposed to be purchased for the development
 - The post-development biodiversity value of the onsite habitat
 - The strategy for meeting the biodiversity gain objective
 - Arrangements for maintenance for 30 years' of habitat enhancement
 - Description of the actions taken to comply with the biodiversity gain hierarchy (inc reasons for not following it)
 - Pre- and post- development plans showing habitat (inc arrangements for compensating for any irreplaceable habitat)

The Biodiversity Gain Hierarchy

- AVOID adverse effects on onsite habitat
- MITIGATE adverse effects onsite
- ENHANCE onsite habitat
- CREATE onsite habitat
- USE registered offsite biodiversity gain units
- PURCHASE government credits
- N.B. Government credits cannot be used to offset loss of irreplaceable habitat.

Irreplaceable Habitat

- **Ancient Woodland** (“areas of woodland that have been continuously wooded since at least 1600”)
- **“Ancient trees”** (“trees [that] have passed beyond maturity into an ancient life stage or are old in comparison with other trees of the same species which exhibit one or more of the following— (i) demonstrably great age relative to others of the same species (ii) changes to their crown and trunk development indicative of the ancient life stage Veteran trees are mature trees that share physical and other characteristics in common with ancient trees, due to their life or environment, but are neither developmentally nor chronologically ancient.”)
- **“Veteran trees”** (“trees [that] exhibit one or more of the following— (i) significant decay features such as deadwood, hollowing or signs of advanced decay in the trunk or major limbs (ii) a large girth, depending on and relative to species, site and management history (iii) a high value for nature, especially in hosting rare or specialist fungi, lichens and deadwood invertebrates.”)
- **Spartina Saltmarsh Swards**
- **Mediterranean Saltmarsh Scrub**

Processing Biodiversity Gain Plans

- Determine within 8 weeks (or such longer period as may be agreed with the applicant)
- Should be no dispute as to the habitat that is affected – will have been considered at application stage – so largely a matter of checking that:
 - the correct metric has been used and the calculations are correct
 - onsite BNG is properly secured (via condition or s.106)
 - offsite units are registered/have been purchased
- LPA can take account of extent to which the biodiversity gain hierarchy has been followed and the reasons for departing from it
- Appeal lies to the Secretary of State



Offsite Biodiversity Net Gain

Stephanie Hall

Registering a site for off-site biodiversity gain

- Established and maintained by Natural England
- Works of habitat enhancement
- 30 years
- Available for off-site credits
- Fees
- Updating the register – allocations and removal
- Multiple use?

Delivering off-site credits via s106 agreement

- Not linked to grant of planning permission
- Sets out how land may be used (or not used)
- Minimum 30 years
- Not development or developer specific

Drafting the s106 agreement

- Template
- Parties
- Monitoring fee?
- Bond?
- Step in rights?
- Any activities which may continue on the land?

Management Plan

- Key document – appended to s106 agreement
- To deal with a range of matters including:
 - What if measures fail?
 - Non-compliance / period to rectify
 - Duration

Delivering off-site credits via conservation covenants

- Private, voluntary agreement between landowner and “responsible body”
- Conservation purpose, public good
- Responsible body must be registered with Natural England
- Public body, charity or certain private sector organisation with conservation focus
- Execute as deed, register as land charge

Legitimacy of off-site credits when determining applications

- Has land been correctly registered with Natural England?
- Have the credits been allocated to the development in question
- Is the value of credits purchased sufficient?

Opportunities for local authority land

- Reduce shortfall in credits
- Income generation
- Deliver more and improved green spaces
- No limit on number of sites

Disadvantages for local authority land

- Cannot require developer to take credits
- Ecologist to calculate value of the land
- Consider any constraints
- How would long term management be secured?
- May need separate corporate entity – “habitat banking vehicle”

Guidance

- DEFRA: <https://defralanduse.blog.gov.uk/2023/11/29/biodiversity-net-gain-guidance-what-you-need-to-know/>
- Draft PPG: <https://www.gov.uk/guidance/draft-biodiversity-net-gain-planning-practice-guidance>
- PAS: <https://www.local.gov.uk/pas/topics/environment/biodiversity-net-gain-local-authorities#what-is-biodiversity-net-gain>



**ANY
QUESTIONS**



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