

MONTAGU EVANS TALKS...

BIODIVERSITY NET GAIN (BNG) FAQ

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KNOW WHAT YOU'RE LOOKING FOR? CLICK BELOW TO JUMP AHEAD.

ECOLOGY

If a site over-delivers on BNG, can the excess units be sold/banked?

Do affected habitats always have to be replaced like-for-like?

What role do/could BNG screening tools play, if any?

Can BNG units be generated [and therefore sold] by committing to maintain agricultural land in its current use?

Are offsite BNG unit and statutory credit prices fixed?

Is BNG subjective – could two ecologists provide different answers?

PLANNING

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Are there statutory timescales for LPAs when dealing with BNG?

How will BNG work for phased developments?

Does BNG apply to phased developments where outline consent pre-dated the introduction of the bill?

Are some local authorities targeting more than 10% BNG?

VALUATIONS / AGENCY

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Should LANDOWNERS do baseline biodiversity surveys on every piece of potentially developable land within its portfolio?

LEGAL

Would a landowner be able to retract biodiversity units that it has sold?

How is BNG accommodated in a conditional sale contract?

APPENDIX 1 - TRADING RULES (RULE 1) TO COMPENSATE FOR LOSSES

ECOLOGY

IF A SITE OVER-DELIVERS ON BNG, CAN THE EXCESS UNITS BE SOLD/BANKED?

- Technically yes, however the intention to do so would need to be proposed during the planning process, and selling biodiversity units may not be straightforward and/or worth the return.
- Where there are local policies requiring more than 10% BNG, you may need to follow these, for example if an LPA requires 20% BNG, a developer can only sell the excess above 20%.
- It's worth noting that oftentimes, high BNG percentages are a function of a low biodiversity unit baseline, and as a result the BNG surplus may in fact not equate to many saleable units.
- Additionally, over-delivering BNG is likely to contribute positively to the planning balance – planning inspectors appear to be giving BNG significant weight.

DO AFFECTED HABITATS ALWAYS HAVE TO BE REPLACED LIKE-FOR-LIKE?

- It depends on so called BNG 'trading rules'. Depending on their distinctiveness, habitats need to be compensated for on a like for like or like for better basis, and any high distinctiveness habitats lost need to be compensated for with the same habitat type. *See Appendix 1 for more information.*

WHAT ROLE DO/COULD BNG SCREENING TOOLS PLAY, IF ANY?

- Several desk-based platforms have emerged that offer rapid, cost-effective biodiversity/BNG assessments.
- These platforms use combinations of satellite imagery, GIS layers, open-source data, and artificial intelligence.
- Whilst worthy of further investigation, an initial look suggests their accuracy may be too limited for many use cases.
- For example, they may only be effective at identifying the broad habitat (i.e. not at the level of specificity required for BNG). This could have a large impact on the biodiversity baseline and ultimately the cost of delivering BNG.
- Similarly, they may lack the detail required to accurately determine the condition of the habitat, which also plays a significant role in the determination of the biodiversity baseline.
- More recently, some of these platforms appear to have added some level of onsite validation of the results by an ecologist. That's potentially helpful, but to be efficient it would likely be important to make sure that such site visits include a review of other non-BNG related ecological issues, such as protected species.
- It may be that these platforms do have a use in portfolio-level screening for sites of high and/or low levels of biodiversity and therefore BNG risk; ultimately, helping to identify sites of higher development potential where the costs of detailed investigation will be more easily justified.

CAN BNG UNITS BE GENERATED [AND THEREFORE SOLD] BY COMMITTING TO MAINTAIN AGRICULTURAL LAND IN ITS CURRENT USE?

- The short answer is no, as to achieve biodiversity gain, habitat must be enhanced or created anew.
- However, it might be possible to enhance the biodiversity value of agricultural land in a way that is compatible with certain agricultural activities.

ARE OFFSITE BNG UNIT AND STATUTORY CREDIT PRICES FIXED?

- Offsite biodiversity units are traded in an open market and as such the price is not fixed and will change over time.
- The government anticipates the market for biodiversity units will grow significantly in the coming years.
- Statutory credits are intended to be a last resort and as a result the prices are fixed and deliberately expensive.

IS BNG SUBJECTIVE - COULD TWO ECOLOGISTS PROVIDE DIFFERENT ANSWERS?

- Yes, two different ecologists could provide different answers as a result of visiting the site at different times of the year (e.g. outside of versus during the growing season), or through having differing levels of botanical survey skill.
- Choosing a good quality ecologist with extensive botany expertise and UK Habitat Classification experience is key.

PLANNING

WHICH SITES ARE EXEMPT?

- Small-scale self-build applications and custom house buildings (< 9 units, < 0.5 ha).
- Development impacting habitat < 25m² (area) or < 5m (linear) (and no priority habitat).
- BNG sites (sites that are being enhanced for wildlife).
- Sites with temporary impacts that can be restored within 2 years.
- Householder applications.
- Sites with a baseline of zero.

ARE THERE STATUTORY TIMESCALES FOR LPAS WHEN DEALING WITH BNG?

- BNG is included within normal statutory planning timescales – i.e.
 - *For the planning application, which includes submission of BNG Report & Metric, and ideally draft HMMP;*
 - *For pre-commencement conditions, which includes confirmation of Biodiversity Gain Plan and HMMP.*
- Interestingly, some LPAs are using Local Wildlife Trusts to help them manage BNG, which can speed up the process, but may also result in additional fees for developers.
- One thing a developer can do to help timescales is to front-load BNG such that the information required for the LPA to discharge the pre-commencement conditions is available immediately.

HOW WILL BNG WORK FOR PHASED DEVELOPMENTS?

- For phased developments, an Overall Biodiversity Gain Plan must be submitted to and approved by the planning authority before any development can begin; and a Phase Biodiversity Gain Plan for each phase must be submitted to and approved by the planning authority before the development of that phase can begin.
- The purpose of the Overall Biodiversity Gain Plan is to confirm that there is a clear upfront framework for how the biodiversity gain objective of at least a 10% gain is expected to be met across the entire development. Each Phase Biodiversity Gain Plan will subsequently set out a phase's contribution to biodiversity net gain.

DOES BNG APPLY TO PHASED DEVELOPMENTS WHERE OUTLINE CONSENT PRE-DATED THE INTRODUCTION OF THE BILL?

- The approval of reserved matters for outline planning permissions are not within the scope of biodiversity net gain (as they are not a grant of planning permission).

ARE SOME LOCAL AUTHORITIES TARGETING MORE THAN 10% BNG?

- Yes, for example, Kingston Upon Thames (30%), Tower Hamlets (30%) and Cambridge (20%).
- However, all or most instances pre-date the Environment Act 2021 and the introduction of statutory BNG.
- As, technically, planning policy is not meant to duplicate legislation, most of the affect local plans are being amended to reframe the requirement, e.g. to minimum 10%, with a stretch target of 30%.

VALUATIONS / AGENCY

SHOULD LANDOWNERS DO BASELINE BIODIVERSITY SURVEYS AS A STANDARD PART OF DUE DILIGENCE, BEFORE BRINGING A POTENTIAL DEVELOPMENT SITE TO MARKET?

- Ideally, yes, because the risk to development potential is significant.
- That said, potentially it could be avoided on sites with patently simple, low biodiversity.
- In addition to a baseline survey, it would be good practice to also include an initial assessment of the feasibility to deliver the required uplift in biodiversity on the proposed scheme.

SHOULD LANDOWNERS DO BASELINE BIODIVERSITY SURVEYS ON EVERY PIECE OF POTENTIALLY DEVELOPABLE LAND WITHIN ITS PORTFOLIO?

- Again, in an ideal world, yes, however naturally the costs of doing so would presumably be prohibitive.
- Instead, and at least for the time being, an internal database of BNG cost benchmarks may be sufficient.
- Alternatively, landowners could look at employing an ecologist to develop a risk-based approach to reviewing sites through a combination of detailed site visits or high-level screening-tool assessments so that resource can be dedicated accordingly.
- There is also the potential to conduct a strategic review of the portfolio to identify sites capable of supporting other sites into development through provision of biodiversity units.

LEGAL

WOULD A LANDOWNER BE ABLE TO RETRACT BIODIVERSITY UNITS THAT IT HAS SOLD?

- To sell biodiversity units to a third-party, landowners must enter into a Section 106 agreement or Conservation Covenant, with the LPA.
- Additionally, there is a sale contract between the landowner and the third-party.
- It is feasible, that the agreement with the LPA could allow for the landowner to change its mind before selling the biodiversity units. However, once those units are sold, the landlord and successors are title bound for 30 years.

HOW IS BNG ACCOMMODATED IN A CONDITIONAL SALE CONTRACT?

- The standard conditional contract will be conditional on grant of a "Satisfactory Planning Permission". This is generally defined as a planning permission for the intended development which is free from any onerous conditions. In that way, a requirement to deliver BNG can be added to the list of onerous conditions that would make any planning permission not "Satisfactory" to the buyer.
- In terms of property disposals, a Seller will need to make sure that the Buyer can only treat a requirement to deliver BNG as an "Onerous Condition" if the requirement is over and above the statutory 10% gain or if the Buyer can demonstrate that providing the BNG is unachievable, unacceptably expensive or unviable in some way. This will need to be considered and drafted quite carefully and the seller will want to be able to test what is achievable.

- In terms of what is achievable or onerous in a particular case, should take account of the potential to deliver BNG offsite. For example –
 - Allow/limit buyer being able to walk away if not possible to deliver onsite
 - Ability to offer additional land from the portfolio to deliver BNG.
- Any purchaser should be required to demonstrate that they have explored all reasonable opportunities to deliver the BNG requirement on-site, before relying on the purchase of off-site (particularly statutory credits).

APPENDIX 1

TRADING RULES (RULE 1) TO COMPENSATE FOR LOSSES

BASELINE HABITAT DISTINCTIVENESS	AREA	HEDGEROW	WATERCOURSE
VERY HIGH	Priority should be given to replacing losses with area habitat units of the same habitat type <i>(see below notes on trading)</i>	Losses must be replaced with hedgerow units of the same habitat type	Priority should be given to replacing losses with watercourse units of the same habitat type <i>(see below notes on trading)</i>
HIGH	Losses must be replaced with area habitat units of the same habitat type	Losses must be replaced with hedgerow units of the same habitat type or a higher band	Losses must be replaced with watercourse units of the same habitat type
MEDIUM	Losses must be replaced by area habitat units of either medium band habitats within the same broad habitat type or, any habitat from a higher band from any broad habitat type	Losses must be replaced with hedgerow units of the same or of a higher band	Losses must be replaced with watercourse units of the same habitat type
LOW	Losses must be replaced with area habitat units of the same or higher band	Losses must be replaced with hedgerow units of the same or of a higher band	Losses must be replaced with watercourse units of a higher band
VERY LOW	Not applicable	Losses must be replaced with hedgerow units of the same or of a higher band	Not applicable

Source: The Statutory Biodiversity Metric, User Guide, February 2024

QUESTIONS? GET IN TOUCH

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