

What does a developer need to do to satisfy the legal requirements for Biodiversity Net Gain?



Biodiversity Net Gain (BNG) is the requirement for (most) development in England to secure a 10% gain in biodiversity against the pre-development baseline. This means bringing the habitat value of a site back up to the level that subsisted prior to development and then increasing that level by 10%. The law is complex and the “industry conversations” laden with detail, referring to external sources which are often very difficult to find^[1]. We have attempted to ‘cut through the noise’ and give a simplified breakdown of what you now need to do in relation to BNG to obtain a planning permission and then develop.

Prior to date of application – determine the Biodiversity Baseline for the application site. If degradation (habitat clearance) not relating to a planning permission has taken place between 30 January 2020 and application submission, the baseline may need to be backdated.

When the application is submitted to the planning authority It is submitted with **(1) the completed Metric (2) a description of any “irreplaceable” habitat together with (3) a plan showing on-site habitat.** At this stage, you will know if the gain can be delivered on-site (within the planning application red line) or if it needs to be delivered off-site (potentially involving third party landowners and / or purchase of biodiversity credits).

At determination the planning permission is deemed to be granted **subject to the “BNG condition”.** **This is effectively a pre-commencement condition requiring a Biodiversity Gain Plan to be submitted and approved** by the local planning authority prior to commencement of the development. Current guidance is that the condition (and its reason for imposition) should not be included on decision notices, although where appropriate, local planning authorities can include additional conditions relating to the delivery of biodiversity net gain such as monitoring and reporting arrangements.

Following the grant of the planning permission, a Biodiversity Gain Plan will need to be submitted and approved. Where significant on-site enhancements are provided the plan will need to evidence how these are to be managed and monitored for the 30 year period. A [Habitat Management and Monitoring Plan](#) is the recommended way to do this. If used; it is approved as part of the Biodiversity Gain Plan and as such is secured by the same condition which requires the approved documents to be complied with.

Where significant on-site enhancements are provided the local planning authority may require a contribution towards their costs of securing the long term provision of the gain by **monitoring the ongoing management of on-site biodiversity gains over the 30 year period.**

It seems possible that a local planning authority can also require the payment of their monitoring costs to check that the gain is delivered in the first instance but this in our view would fall as part of the general s.106 monitoring provision. Such contributions can only be secured by s.106 agreement. How much and how often either sum is, is not subject to a general consensus as yet.

Where the biodiversity gain plan relies on off-site delivery, a planning obligation or conservation covenant will be required in all cases, with such a document having to be in place to enable registration of an off-site gain. In contrast on-site gain is only registered where it is significant (and the definition of significant is vague but it is not the retention of existing habitat or planting in gardens).

This is the compulsory system as we understand it.

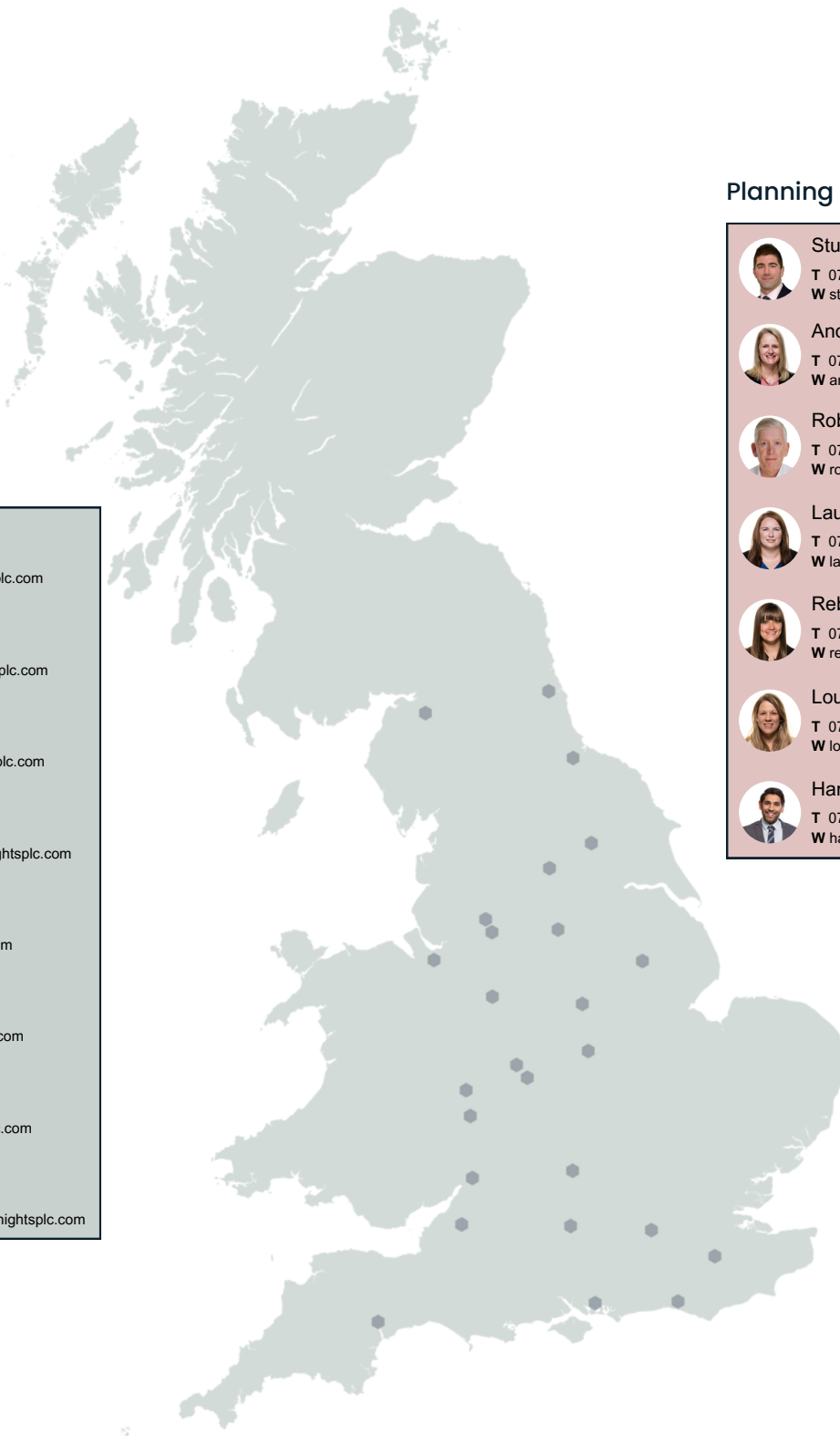
In addition it is however advisable, particularly on large schemes, that a draft Biodiversity Gain Plan is submitted with the planning application. Where the draft plan shows significant on-site enhancements it is also advisable that a draft HMMP is submitted with the planning application. The NPPG states that “these gains should be subject to a planning condition, legal agreement or conservation covenant to ensure they are maintained for 30 years”. The condition will still be used to secure the gain plan and the HMMP which governs the long term maintenance as it subsists in law.

There is no legal requirement for anything other than a payment towards monitoring to be secured in the s.106 agreement. The s.106 agreements seen so far duplicate the condition and are generally unnecessary other than (1) to secure the payment of a monitoring fee and (2) to agree access arrangements for the planning authority on the dates on which Monitoring should take place, (although also not generally necessary given local authority powers of access already available to them under the TCPA 1990).

In reality more information may be needed at the planning application stage and indeed many local authorities now have additional validation requirements so it would be prudent to check for any changes before submission. Most planning authorities will want to understand how the Biodiversity baseline will be increased by at least 10%. The amount of information on these matters will vary depending on the type and scale of development, type of planning application, the onsite habitat impacted, and the extent of any significant onsite enhancements; with planning authorities reminded to take a proportionate approach focusing only on necessary information. It is paramount to involve an ecologist in the development lifespan as early as possible and take early legal advice to ensure maximum benefit and best course of action with BNG.

[1] Just Google “biodiversity deemed condition” and let me know how quickly you can find it?




National coverage



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