

## What do you want to do about on-site BNG?

- What do you want to ask for at planning application stage? How much information do you need?
- When do you want to have a separate condition or S106 to secure it?
- What do you need to secure? Management? Maintenance? Monitoring? Reporting?

So for each of these...

- What is legally required?
- Might you want to go beyond the legal requirements?

# On-site at planning application stage (1)

- BNG is by design a post-consent matter
- Legally, the applicant is not required to submit any information on post-development BNG at planning application stage
- However, it's likely that you will want some information about what the applicant is proposing on-site for most planning applications
- The PPG supports this:

When a planning application is submitted, there are minimum national information requirements related to biodiversity net gain for those applications which, if planning permission was granted, would be subject to the general biodiversity gain condition. This will allow consideration of existing habitat baselines. Local planning authorities may also seek further information about the proposed strategy to meet the biodiversity gain objective for the development.

When determining a planning application, biodiversity net gain will often be a material consideration, and local planning authorities will want to consider, where relevant, whether the general biodiversity gain condition is capable of being discharged successfully through the imposition of conditions and agreement of section 106 planning obligations to secure significant onsite biodiversity gains and registered offsite biodiversity gains.

However, decision makers may need to consider more broadly whether the general condition is capable of being successfully discharged. Matters for consideration may include the following (but this is not an exhaustive list):

- the appropriate balance expected between onsite gains, off-site gains and the use of statutory biodiversity credits for the development, taking account of the biodiversity gain hierarchy
- whether the type and location of any significant onsite habitat enhancements proposed for onsite gains are appropriate, taking into account other policies to support biodiversity (including local nature recovery strategies) and other wider objectives; and
- any planning conditions which need to be imposed to secure any significant onsite habitat enhancements, including any conditions requiring the maintenance of the enhancement for at least 30 years after the completion of the development.

Prior to the determination of the planning application, decision makers will also want to discuss with the applicant whether any section 106 planning obligations are required to secure either significant onsite habitat enhancements or offsite gains for the development.

*'Where development would be subject to the general biodiversity gain condition, the application must be accompanied by minimum information set out in Article 7 of The Town and Country Planning (Development Management Procedure) (England) Order 2015...'*

*If this information has not been provided, the local planning authority must refuse to validate the application.*

*In addition to these minimum information requirements, further information may need to be provided in order to assist the consideration of biodiversity net gain as part of the planning application, in particular where there are particular considerations around significant onsite biodiversity enhancements...*

*If planning obligations are going to be used, it is good practice to submit information about any potential planning obligations which may need to be entered into connected to the application.'*

It might be time to think about your **local validation list** and what you want to ask for above and beyond the legal minimum BNG requirements to enable you to determine whether on-site BNG is significant at planning application stage, e.g.:

- Metric calculation for the baseline and post-development on-site BNG
- Plans for on-site habitat and BNG gains
- A statement/indication of how the applicant is meeting the BNG objective, i.e. whether they intend to buy off-site units/credits and how they have applied the biodiversity gain hierarchy
- For majors (and perhaps other types of applications?), information on whether the applicant thinks the on-site BNG gain is ‘significant’ summarising how the biodiversity value has increased (perhaps in a draft/final Habitat Management and Monitoring Plan – HMMP - or Landscape and Ecological Management Plan – LEMP)

**If the applicant hasn't provided information on post-development biodiversity value:**

- **Is the application valid? Should you refuse it? Ask for further information prior to approval?**
- **Is it fair to expect something? Or is it inconsequential? Or phased and very uncertain?**

## If the developer hasn't provided information on on-site BNG at application stage, what should you do?

Before you decide whether the application is not valid/should be refused, you probably want to ask yourself:

- Do you think it's likely that the development will provide some BNG on-site? Think about the scale and type of development, plus what the baseline biodiversity value is (legally, information on this has to be provided at application stage).
  - Is it likely that you'll want to secure the BNG through a condition or S106? (See next slides) If so, you probably need more information.
  - Can you determine whether the BNG objective will be met without further information, i.e. can they meet 10%? Bear in mind that the developer can always go to national credits as a last resort, so it may be difficult to prove that they can't do this at this stage (see the BNG PPG for more on this).
  - What type of development is it? How big is the development?
  - **Is it worth bothering with?**
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- If based on the above, you think you might decide on-site BNG is worth securing for 30 years, then you can either say the application is **not valid without heads of terms for a s106, ask for further information or refuse it**.
  - Which you do will probably depend on the type/size of development and your LPA's usual approach to these types of issues, plus how concerned you are about being challenged/going to appeal.
  - It will also depend on whether/what you have in your local validation list/local plan policy/any local developer guidance on BNG requirements.

**Before you decide whether to use a condition or S106, work out whether you need/want to secure the onsite BNG...**

- Legally (under the Environment Act), on-site BNG habitat that the LPA considers is a '**significant increase**' needs its maintenance for at least 30 years to be secured via condition, S106 or conservation covenant. See Annex 1 for the legislation and current guidance on significant on-site BNG (5 Feb 2024).
- Up to LPA to define what **gain** is '**significant**' and decide how to secure its maintenance.
  - It's a 30 year commitment - needs to be applied proportionately.
  - It's your decision, which allows for flexibility and ability to be pragmatic.
  - See Annex 2 for some PAS thinking on this.
- **A non-significant gain does not mean that the habitat is of low importance or value.** There are plenty of reasons beyond the BNG legal requirement why it may be important to secure on-site habitats for 30 years (or more) and you may also want/need to secure retained habitat, not just the 'gain', including:
  - Existing habitat or habitat created to compensate for habitat lost (no gain) may be of high value and you want to make sure this is appropriately maintained (helping to secure the mitigation and biodiversity gain hierarchies);
  - Habitats Regulations mitigation/compensation – likely to require to be secured for 70 years+;
  - Protected species/other environmental mitigation/compensation (e.g. EIA);
  - Urban greening factor/green infrastructure requirements;
  - Open space requirements; and
  - Policy requirements relating to nature and biodiversity, including the NPPF and Local Plan policies.

Think about the following:

- What is the increase in units compared to pre-development?
  - Beyond just the number, or the percentage: in our local context, is this habitat important? How does it fit with relevant local biodiversity strategies, including the Local Nature Recovery Strategy (LNRS)?
  - What is the habitat condition or distinctiveness and has it increased? (You may need the developer's ecologist to tell you this, as it's not easy to tell from the metric. Do you want to add this requirement to your validation list?)
  - These answers are going to depend on LPA and site location and context.
- Are there downsides to declaring a habitat gain as significant?
  - Projects we want to come forward but that landowners won't sign up to 30 years.
- Even if it's not a 'significant' increase, do you still want to secure it for other reasons?
- Can the gain realistically be secured? (i.e. enforced)
- Is the time/effort of securing value of the gain (i.e. legal agreement or condition) in proportion to its value?

Once you've decided you do want to secure the BNG, you need to decide whether to do this via a condition or S106:

- Think about what you want to secure. For a significant increase in BNG, you have to **secure its maintenance for at least 30 years** after development is completed.
- How do you ensure the **habitat is maintained**?\* Do you require habitat monitoring **reports** over time? Have you set out a schedule for these? Is there (going to be) a Habitat Management and Monitoring Plan (HMMP) or Landscape and Ecological Monitoring Plan (LEMP)?
- Will you want to **monitor delivery**? You can secure contributions for monitoring through S106, but not condition. You will probably want to have fees set for this. (If you do set fees, you can use the same approach for monitoring any off-site BNG secured via a S106 and even use a condition to require a later post-consent S106.)
- Is the developer going to sell excess units (>10%) from the on-site BNG? (You will need a S106 for this now.)
- Are you doing a S106 anyway for the development? If so, it will be easier to add BNG to it.
- Go back to the questions on slide 6, i.e., what is the balance of the habitat value vs the resource/time costs of securing it? How will enforcement work?
- If you decide to go for a condition and the BNG probably isn't a 'significant' gain, think carefully about whether this is needed in addition to the general BNG condition and a condition requiring development in accordance with the approved plans – it might not be, in which case, why are you doing it?

We will be providing sample S106 and planning conditions for BNG very soon...

\* see next slide.

The Environment Act requirement is for significant on-site gains ‘to be maintained for at least 30 years’. Maintaining will usually involve habitat management, but there is no mention of monitoring or reporting requirements in the Act and very little in the guidance. So, we’re not quite sure yet what is required...

### Draft BNG PPG

#### How will biodiversity net gain be effectively monitored and enforced?

Failure to comply with the general biodiversity gain condition by commencing development without approval of the Biodiversity Gain Plan will be a breach of planning control. Local planning authorities have a range of [planning enforcement powers](#) and have responsibility for taking whatever enforcement action may be necessary, in the public interest, in their area.

Effective enforcement is important to tackle breaches of planning control and maintain integrity of the decision making process. Local planning authorities are already encouraged to prepare local enforcement plans, and set out the priorities for enforcement action, and they may want to update these to reflect the introduction of biodiversity net gain. This could cover both the initial delivery and ongoing management and maintenance mechanisms to assist monitoring of gains in the longer term.

Appropriately worded planning conditions and planning obligations would also help achieve effective monitoring and enforcement of biodiversity net gain, particularly in relation to the maintenance and monitoring of significant onsite habitat enhancements.

#### [Legal agreements to secure your biodiversity net gain - GOV.UK \(www.gov.uk\)](#)

##### **What to include in your legal agreement**

You'll need to provide detailed information on your planned biodiversity habitat enhancements for the site (for example, create 2 hectares of neutral grassland in moderate condition).

You may also include what specific actions you'll take to achieve the habitat enhancements (for example, sow a seed mix or carry out bi-annual cuts).

You'll also need to agree who is responsible for:

- creating or enhancing the habitats
- managing and monitoring the habitats

You can sub-contract the habitat work to a third party, but the legal agreement sets out who is responsible. You cannot include a subcontractor in the legal agreement. Only the landowner, LPA or responsible body can be responsible. You can provide a detailed schedule of management and monitoring in a [Habitat Management Monitoring Plan \(HMMP\)](#).

## So, what do you want to do about on-site BNG?

1. Decide whether you want to go beyond the minimum legal requirements at planning application stage, e.g. by setting out what BNG information you want in a local validation list
2. Decide what approach you will take if you don't have enough information at planning application stage
3. Decide what approach you will take to determining whether or not you want to secure on-site BNG
4. Decide what you want to be securing in different circumstances and when you will use a S106 or condition

## ANNEX 1

Legislation and guidance on ‘significant’ increase in on-site BNG

## Environment Act

- 9 (1) This paragraph applies in relation to any development for which planning permission is granted where—
- (a) the person submitting the biodiversity gain plan for approval proposes to carry out works in the course of the development that increase the biodiversity value of the onsite habitat, and
  - (b) the planning authority considers that the increase is significant in relation to the pre-development biodiversity value.
- (2) The increase in biodiversity value referred to in sub-paragraph (1) is to be taken into account in calculating the post-development biodiversity value of the onsite habitat only if the planning authority is satisfied that the condition in sub-paragraph (3) is met.
- (3) The condition is that any habitat enhancement resulting from the works referred to in sub-paragraph (1)(a) will, by virtue of—
- (a) a condition subject to which the planning permission is granted,
  - (b) a planning obligation, or
  - (c) a conservation covenant,
- be maintained for at least 30 years after the development is completed.
- (4) The Secretary of State may by regulations amend sub-paragraph (3) so as to substitute for the period for the time being specified there a different period of at least 30 years.

## How are significant onsite habitat enhancements treated as part of the determination of the planning application?

Paragraph 9 of Schedule 7A of the Town and Country Planning Act 1990 requires that where an applicant relies upon a significant increase in onsite habitat biodiversity value, the habitat enhancement ("significant onsite habitat enhancement") must be subject to a [planning condition](#), [section 106 agreement](#), or conservation covenant requiring the habitat enhancement to be maintained for at least 30 years after the development is completed.

Further guidance about the definition of significant onsite habitat enhancements can be found in guidance published by the Department of Environment, Food, and Rural Affairs.

These significant onsite habitat enhancements are likely to form an integral part of the development, and an application for planning permission would be expected to include detailed proposals of these habitat enhancements as part of the plans, drawings and supporting information accompanying the application. (For outline planning applications, details of landscaping and layout may be reserved for later approval.)

When considering development which seeks to increase biodiversity value, decision-makers should apply principles set out in [paragraph 180 of the National Planning Policy Framework](#), notably that opportunities to improve biodiversity in and around developments should be integrated as part of their design.

Decision-makers will also need to consider wider matters, which may indicate whether the proposed type and location of the significant enhancement are suitable for that location. For example: highways safety, designated heritage assets, increasing or restricting access to nearby natural areas (depending on the sensitivity of nearby habitats), and the impact on aviation safety. It is particularly important that planning applications provide sufficient detail of habitat enhancements to enable proper consideration of the impact on aviation safety.

## Can a local planning authority apply planning conditions in relation to biodiversity net gain?

Local planning authorities have broad powers to impose [planning conditions](#) and can, where appropriate, include additional conditions relating to the delivery of biodiversity net gain.

A planning condition can be used to secure significant on-site habitat enhancements which are required to be secured and maintained for at least 30 years under paragraph 9 of Schedule 7A. Other potential conditions could include monitoring and reporting arrangements. Planning conditions should be appropriately worded to ensure effective compliance and enforcement of biodiversity net gain.

It is not appropriate to use planning conditions to secure funding for delivering or monitoring biodiversity net gain. These should be secured through section 106 [planning obligations](#) where justified.

Paragraph: 025 Reference ID: 74-025-2023

## Make on-site biodiversity gains as a developer - GOV.UK ([www.gov.uk](http://www.gov.uk))

- **Significant enhancements** are areas of habitat enhancement which contribute significantly to the proposed development's biodiversity net gain relative to the biodiversity value before development.
- What counts as a significant enhancement will vary depending on the scale of development and existing habitat, but these would normally be:
  - habitats of medium or higher distinctiveness in the biodiversity metric - this definition says nothing about the biodiversity value before development though and the relative increase is a key part of the Environment Act consideration....
  - habitats of low distinctiveness which create a large number of biodiversity units relative to the biodiversity value of the site before development
  - habitat creation or enhancement where distinctiveness is increased relative to the distinctiveness of the habitat before development
  - areas of habitat creation or enhancement which are significant in area relative to the size of the development - this also includes nothing about the biodiversity value before development.
  - enhancements to habitat condition, for example from poor or moderate to good
- Examples of significant enhancements include creating a wildlife pond or a nature park.
- **Non-significant enhancements** are habitat enhancements that will be included in your metric calculations, but that will not make a significant difference to the development's biodiversity value.
- Examples could include private gardens (such as for new homes) which have a low distinctiveness value, or container planting. These enhancements do not normally require maintenance provisions, so for non-significant enhancements, you do not need to have an HMMP, legal agreement or commitment to maintain them for 30 years.

## ANNEX 2

PAS thinking on determining a ‘significant’ increase in on-site BNG (with some help from LPA and developer friends)

- What is the ecological value of the habitat enhancement compared to the value pre-development?
  - Use the **metric calculations** to determine this
  - The Defra guidance asks you to consider whether the habitat created/enhanced will be of medium or high distinctiveness, i.e. a metric distinctiveness score of ‘4’ or above. If it is, it’s suggests it’s significant (BUT this doesn’t factor in pre-development value...). However, **if it was low distinctiveness to start with, then it almost definitely is significant.**
- How much habitat is being created or enhanced?
  - For **low distinctiveness habitats**, Defra guidance indicates that the number of units created is important – guidance says ‘**a large number**’ relative to before development, i.e. **probably not just 1 or 2**
  - Defra guidance says that the area of habitat created relative to the size of the development – should be ‘significant’. Using a blanket percentage is probably not helpful, as the value of a habitat will increase with its absolute size, so whilst 5% of a large development may be significant, 5% of a small site probably wouldn’t. Also, ecologically we know that the area that makes a habitat viable will vary depending on the type of habitat. Plus again this definition doesn’t refer to the pre-development habitat area. So...
- Why don’t we just use the **number of units relative to what was there to start with?**
  - Units measured via the metric are a proxy for habitat value (factoring in lots of important ecological aspects) so surely the difference in units is the way to look at the increase in biodiversity value between before and after development (which is what the Environment Act says LPAs should do).
  - Then you just need to decide what difference in units is ‘significant’. To compare with the pre-development number of units, should we use a % increase in units?
  - However, **the metric has risk multipliers for habitat creation that reduce the unit value of many higher distinctiveness habitats created on-site**. So we probably need to bring in some consideration of habitat distinctiveness/condition as well as % increase to counter-act these multipliers in determining a ‘significant’ gain. BUT it’s difficult to know from a quick look at the metric results whether habitat distinctives or condition has increased... Can we get the developer to tell us this then?
  - Also local context and the location is important ecologically, so we probably ought to factor these in.

- Will it be possible to enforce any condition or agreement, i.e. is it practically possible to secure it for 30 years?
  - e.g. you definitely can't secure private gardens/container planting
- Is it worth spending the time on a S106 to secure the habitat for 30 years?
  - How much habitat is being provided? How much time/resource will it take to agree a S106? (Is S106 required anyway?)
  - What the habitat is worth in cash terms might be a helpful guide? If the habitat is worth the equivalent of £8,000 would you bother securing it for 30 years?
  - Is the developer going to sell excess units from the on-site BNG? (You will need a S106 for this.) If the “excess units” are worth £8,000 are they worth securing, registering, and reselling?

**So... we now have a way to determine ‘significant’ gain:**

**It's the number of units compared to the pre-development baseline, factoring in habitat distinctiveness/condition plus location and local context, but you should also take into account whether it is practical (both possible, but also worth the time/effort) to secure for 30 years.**