

CLA Webinar: Biodiversity Net Gain – What to expect with mandatory Biodiversity Net Gain Confirmation.

Answered questions from the Q&A session.

Planning

If a developer commences development prior to approval of the Biodiversity Gain Plan would this 'invalidate' their planning consent?

Yes, commencing development prior to the approval of any pre-commencement planning condition will result in a breach of planning. This could result in a Breach in Condition Notice and/or enforcement action from the Local Planning Authority.

Are new agricultural buildings exempt from BNG?

This depends on how a new agricultural building is being applied for. If the building is permitted development via Part 6, Class A of the Town and Country Planning (General Permitted Development) Order 1995 as amended then it will be exempt from BNG. If a full planning application is being submitted for the new building, whether it is exempt from BNG will depend on the size of the building and time the application is submitted.

Anything over 1,000sqm will need to demonstrate 10% BNG from 12th February 2024, anything less than 1,000sqm will need to demonstrate 10% BNG from 2nd April 2024.

Are lodge park developments required to provide BNG?

Any full planning application validated after 12th February 2024 that is for 10 or more dwellings, on a site of over 1hectare or covers more than 1000sqm will need to provide BNG.

Will converted buildings have to demonstrate BNG?

This depends on how the building conversion is being applied for. If the change of use is permitted development via Part 3 of the Town and Country Planning (General Permitted Development) Order 1995 as amended (such as Class Q or Class R) then it will be exempt from BNG. If a full planning application is being submitted for the conversion, whether it is exempt from BNG will depend on the size of the building or number of homes being provided and time the application is submitted.

Anything over 1,000sqm or for 10 or more homes will need to demonstrate 10% BNG from 12th February 2024, anything less than 1,000sqm or providing less than 10 homes will need to demonstrate 10% BNG from 2nd April 2024.

If just a change of use is being sought, the development could class as de minimis and would therefore be exempt from BNG.

Crown development is exempt from BNG, what does this mean?

Section 293 of the Town and Country Planning Act 1990 defines land with a Crown or Duchy interest as Crown land. Section 293A outlines a procedure to speed up the determination of a planning application where there is an urgent need for the Crown to undertake development. This is often development that is of national importance or is required as a matter of urgency. In these instances, BNG does not need to be provided.

How will Local Authorities cope with enforcing these Gain Plans when they are already over stretched?

Additional funding has been provided for Local Planning Authorities to prepare for mandatory BNG. £10.6m has been confirmed by DEFRA for the next financial year. Despite this, the

Royal Town Planning Institute has reported that *'41% of public sector planners cannot confirm whether they'll have access to the necessary ecological expertise to comply with the new BNG requirements before implementation.'*

Are there any developments so small that they don't need BNG e.g. extensions or buildings smaller than a certain size?

Yes, some development is exempt from BNG. The following is exempt from BNG:

Householder development as defined by the Town and Country Planning (Development Management Procedure) (England) order 20152.

Development granted under a Section 59 development order (including permitted development rights)

Self-build and custom build development (of no more than 9 dwellings on sites less than 0.5ha).

Development that does not impact a priority habitat and impacts less than 25 square metres of habitat or 5 metres of linear habitats (de minimis exemption)

Urgent Crown development

Development of a BNG site

Development related to HS2

Do you think that LPA Legal Depts are likely to be overwhelmed with the demand for S106 Agreements etc and, if so, should we expect delays to the issue of decision notices?

There is a possibility that whilst Local Planning Authorities navigate the new requirement for BNG that there could be delays with planning applications.

Would environmental improvement/nature restoration plans in a priority habitat site still need BNG despite being a non-commercial? - such as a new footpath through a SSSI to help protect the surrounding habitats from being affected by people/dogs.

If a planning permission is required for the restoration plans, then yes BNG may be required. When BNG applies will depend on the size of the application site. Anything over 1ha is required to demonstrate BNG from 12th February 2024, anything less than 1ha will need to demonstrate BNG from 2nd April 2024. The development may be exempt if it does not impact the priority habitat and impacts less than 25m² of habitat or 5m of linear habitats. If this is the case, it is a de minimis exemption.

If a planning application has been submitted prior to 12 February 2024, will BNG be required?

No, BNG should not be required for an application that was submitted prior to 12th February 2024. However, if the application has been submitted but not made valid by the Local Planning Authority, there is a risk that BNG will be required due to the validation date falling after 12th February 2024. There may be differences between Local Authorities on this and it is worth speaking with the relevant Planning Department if this is the case.

Can you add the 10% Biodiversity Net Gain to the Land you are offering for Planning Permission?

Yes, if BNG is required, it can be provided within the site that is being offered for planning permission. It is a good idea to have a baseline assessment undertaken at an early stage to understand the existing habitat and features on a site prior to development. Having a baseline prepared early on can enable BNG to be incorporated into any proposals.

What happens to applications at appeal?

If an application is being determined at appeal and was submitted to and determined by the Local Authority prior to 12th February 2024, it will not need to demonstrate BNG. If an application was submitted to the Local Authority after 12th February 2024 (or 2nd April 2024 for small sites/minor applications), the Planning Inspectorate will require BNG as part of any grant of planning permission. The standard condition will likely be attached to any decision notice when an appeal is allowed.

Creating and selling biodiversity units

If you have land in a local plan can you create BNG units and hold them as a credit for a future development on part of your land?

You can create biodiversity units for later sale by creating a habitat bank. You would need to evaluate whether this was the best use of the land compared to potential building value.

Can biodiversity units be created within an Area of Outstanding Natural Beauty (recently renamed as National Landscapes)?

Yes, biodiversity units can be created in Protected Landscapes (National Parks and National Landscapes). Protected Landscapes are already subject to its own planning regime and BNG will apply in the same way, though it could be applied on top of any existing requirements.

Does off-site BNG need to be within a certain distance of the development?

There is no limit for the distance from the development. However, the Biodiversity Metric spatial risk multiplier reduces the value of habitats delivered further from the development, so you will need more biodiversity units if you move outside the LPA or National Character Area.

I have potential development land on city fringe. This is an isolated parcel. Further land is 25 miles away. Could this be used for BNG given the distance, if so what would be the impact.

Yes, this land could be used to provide off-site BNG. If the site is located within another Local Planning Authority area, more units will need to be provided to provide the appropriate net gain than would be required if the site was in the same authoritative area.

How do farmers get started if they are interested in creating and selling biodiversity units? And what sort of scale does it need to be?

- Consider how a long term contract for BNG might work with your business objectives – read the BNG guidance, speak to advisers etc to improve knowledge.
- If it does, identify land that suitable.
- Investigate the market opportunities for BNG – speak to advisers, local authorities, and developers for example – to see what the demand is for off-site biodiversity units of different types.
- Consider options for developing a project
 - o Habitat banking or on demand creation
 - o Doing it yourself, working with project developers or leasing land – and speak to a range of organisations

What are the typical values of different types of biodiversity units?

There is not standard value as it will depend on the type of biodiversity unit and the supply and demand in the local areas. The [statutory biodiversity credits](#) will give you a guide on the expected maximum values.

What are the costs of entry into BNG?

There are no standard costs available and it will depend on the size of the site, and the type of units you are creating. Initial costs of ecologist surveys and professional advice can be significant, but these are sometimes covered or shared by the project developer.

Who will assess the off-site BNG over the 30 year contract?

The project owner/manager will be responsible for the costs of regular monitoring during the course of the contract. This timing will be set in the legal agreement. There might also be inspections by the local authority if under a section 106 agreements or responsible body if a conservation covenant.

What happens to BNG land after the 30 year contract period?

In theory you get the land back at the end of the contract period, and you can then do what you like with the land. In reality, there may be some restriction on its use. For example, you may need Environmental Impact Assessments to cultivate grassland, hedgerows will need permission for removal and tree may need a felling licence. There is also a risk that it could be designated as a Site of Special Scientific Interest if it meets the requirement. Potentially, the land could be used for a further BNG contract if additional biodiversity units are created.

How will land values be affected?

The impact on land values is not clear and will be situation and habitat dependent, as well as influenced by whether management funding stays with the land on transfer. For example, BNG could enhance overall holding value if strategically placed and sold as a whole.

Will it be difficult to find an ecologist who understand the Biodiversity Metric?

The ecology sector is building capacity and many intermediaries have their own ecologists.

Can land for BNG also be used for other purposes such as farming, agri-environment schemes, carbon sequestration or nutrient mitigation?

BNG land can be used for other purposes that are compatible with delivering the biodiversity units. This includes some farming activities, and some agri-environment actions provided it is not for the same action/outcome. Defra guidance also confirms that BNG is compatible with Nutrient Mitigation Schemes, although this will be reviewed in 2025. Technically, carbon payments can be stacked, but it will depend on the carbon code or standard as to whether it is allowable.

Tax Considerations

How is the option of leasing land to third party treated in the tax regime? Is there a benefit to the landowner from using a lease model for BNG?

Leasing land to a separate business who will be providing BNG does have the advantage of certainty, in that the tax treatment of a lease is well-established. Rent will be taxed as property income, whereas an up-front premium may be apportioned between income and capital under the lease premium rules.

However, when it comes to the IHT position, while this is still more certain, it is potentially less advantageous to the landowner than if they retain occupation of the land to deliver the BNG themselves. This is because it will inevitably be seen as an investment activity so far as the *Balfour* test for BPR is concerned, and (even if the land is still being used for agricultural purposes) it will not be taken into account for determining whether a farmhouse occupied by the landowner qualifies as character appropriate for APR.

With a mind to IHT, can land that is used for BNG and/or SFI and/or carbon credits still qualify for APR?

There is no reason in principle why it cannot still qualify. Unless and until the law is changed, the key question will be whether or not what is happening on the land is 'agriculture'. For the most part that will depend on the ordinary meaning of the word. For example, where BNG can be delivered on grassland at the same time as it is growing grass to feed livestock, that will still be agricultural use and so APR should still apply. However, if the land is converted to an entirely different use, then APR would no longer apply.

Might the election further delay any concrete guidance on tax?

This is a risk. We very much hope that the guidance will be made available ahead of the election being called. If not, we will of course continue to urge the post-election government to see the importance and urgency of addressing this.

If the land was gifted for inheritance purposes and the successor shortly entered into a BNG scheme would that avoid the inheritance tax issues?

Potentially. So long as the original landowner survives for at least seven years, then there will be no IHT due in respect of the gifted land upon the gift or upon the original landowner's death. Note that this will not work if the original landowner continues to receive any kind of benefit from the land in question or the income generated from it.

However, if they do die within seven years of the gift, then IHT could become payable on the land (based on its value at the date of the gift). In order to claim APR on the gift, it would be necessary to show that the land was in agricultural use both at the date of the gift, and also at the date of death.

You would also need to take into account that capital gains tax could be payable on a gift of the land. Holdover relief may be available, such as where the land qualified for APR at the date of the gift.

If a farm is reducing its crop acreage by entering into SFI options such as legume fallow or wild bird seed mix is that still accounted for agricultural for APR.

This will depend on the particular option chosen, and the purpose of it. For example, where land enters into an option as part of a crop rotation system with the intention that this will improve soil quality for farming that land in future years, then we would argue that the land is still in agricultural use. However, if the only purpose behind the option was to provide food for birds, and you cannot demonstrate how this serves your agricultural purposes, then it would be difficult to argue that this land was being used for agriculture.

Does forestry count as agriculture?

Generally, no. Short rotation coppicing is deemed to be agriculture. Woodlands that are ancillary to agricultural land (e.g. serving as a shelter belt, or required to provide fencing materials) can qualify for APR. In cases of agroforestry, where woodland is used for arable or pastoral farming, this will still be classed as agricultural use for APR.

A forest managed commercially for timber would not qualify for APR, but it would count as a trading activity for the purpose of claiming BPR.