

# BIODIVERSITY NET GAIN: HOW TOWN AND COUNTRY PLANNING ACT DEVELOPMENTS MUST COMPLY

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Developers will need to factor in biodiversity gain objectives when eyeing development opportunities.

The Environment Act 2021 (EA 2021) introduced a new requirement for the delivery of mandatory biodiversity net gain under both the Town and Country Planning Act 1990 (TCPA) and the Planning Act 2008 (PA 2008). A [consultation](#) by the Department for Environment, Food and Rural Affairs (Defra) provides more detail on how the new requirement will work, including how and when it will be applied to TCPA development and Nationally Significant Infrastructure Projects (NSIPs).

Here we discuss which developments pursuant to the TCPA will be affected, when the requirements are anticipated to come into force and what steps developers or promoters should be taking now.

## WHICH DEVELOPMENTS WILL BE AFFECTED?

This is governed by Part 6 (Nature and biodiversity) and Schedule 14 of the EA 2021, which insert a new section 90A and Schedule 7A into the TCPA.

Development must demonstrate that it will meet the "biodiversity gain objective", namely that it will achieve a minimum 10% increase in biodiversity net gain and that this gain will be maintained for at least 30 years. With limited exceptions, all types of development will be subject to these statutory biodiversity net gain requirements. Planning permissions will be subject to a deemed planning condition preventing the commencement of development until a "biodiversity gain plan" has been submitted to and approved by the local planning authority. This must set out specified information demonstrating that the biodiversity value attributable to the development will exceed the pre-development biodiversity value of the on-site habitat by at least 10%.

## ***Excepted development***

The limited exceptions to this requirement currently include:

- development pursuant to a development order, eg permitted development;
- urgent Crown development; and
- other development specified by the Secretary of State in regulations. The Defra consultation suggests that this may include:
  - development proposals which result in negligible impacts, or minimal impacts to low or medium distinctiveness habitats;
  - householder applications;
  - applications for change of use only; and
  - applications for the creation of biodiversity gain sites (read more [here](#)).

Other exceptions are under discussion, including brownfield development and temporary planning permissions. However, the government's stated intention is that further types of development will not be excepted.

## ***Phased planning permissions***

Secondary legislation will modify the biodiversity gain planning condition for developments which are phased.

Additional information, a framework plan, must be supplied to the local planning authority explaining how the biodiversity gain objective will be achieved across the site as a whole and demonstrating delivery in each phase. It is currently stated that biodiversity gains should be "frontloaded" into earlier phases where possible, and consideration should be given to what approach will be taken if subsequent phases do not proceed or fail to achieve their biodiversity net gain targets.

## ***Varied planning permissions***

Where planning permissions are varied pursuant to section 73 of the TCPA, resulting in a new planning permission, the biodiversity gain condition imposed on the original permission will continue to apply as follows:

- Where the variation *does not* affect the post-development biodiversity value of the onsite habitat, the approved biodiversity gain plan for the earlier permission will apply to the new planning permission.
- However, where the variation *does* affect the post-development biodiversity value, a new biodiversity gain plan must be submitted to and approved by the local planning authority. The biodiversity baseline will be that contained in the previous biodiversity gain plan, to avoid placing an obligation on a development to achieve further gains on top of the original requirement.

A matter addressed by neither the EA 2021 nor the Defra consultation is what happens where a planning permission is *granted before* the biodiversity net gain requirement comes into effect, but is *varied afterwards*. It seems that the result of this will be a new section 73 planning permission which is deemed to be subject to the biodiversity gain condition. It is not clear whether or not this is intentional, however deeming the imposition of the biodiversity gain condition on development not designed to achieve it could have significant impacts, for example requiring design changes and/or impacting scheme viability.

## **WHEN WILL THE BIODIVERSITY NET GAIN REQUIREMENTS COME INTO FORCE?**

For non-exempt TCPA 1990 development, the mandatory biodiversity net gain requirement is intended to commence in November 2023 for new applications.

## **WHAT CAN APPLICANTS BE DOING NOW?**

The delivery (or non-delivery) of biodiversity net gains is a politically sensitive topic, particularly for major developments, and planning policies relating to net gain are already adopted or in the process of being adopted in many locations. Applicants should therefore consider how they can maximise biodiversity net gains in their development proposals now prior to the transitional periods expiring and the legal requirements for mandatory net gains coming into effect.



## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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