

Chichester District Council

Planning Committee

Monday 21 March 2022

DEFRA Consultation on Biodiversity Net Gain Regulations and Implementation

1. Contact

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2. Recommendation

2.1 The Planning Committee is asked to;

i. note the contents of the Department for Environment, Food & Rural Affairs (DEFRA) Consultation on Biodiversity Net Gain Regulations and Implementation, and

ii. to comment on, and endorse, the proposed Council response set out in Appendix 1.

3. Background

3.1 Under the Environmental Act 2021, all Planning Authorities in England will be required to implement Biodiversity Net Gain (BNG) from November 2023. BNG is described as ‘an approach to development which means that habitats for wildlife must be left in a measurably better state than they were in before the development.’ It would mean that developments would be required to provide not only mitigation and compensatory measures in response to impact on habitats and protected species but to also provide ecological enhancements. BNG would also recognise other important habitats which may not have statutory protection (such as native woodland and scrubland).

3.2 The rationale for mandating BNG through the Environment Act is establish a consistent set of requirements and necessary exemptions which give developers clarity as to how they can meet their net gain obligations. DEFRA has now published a consultation document titled ‘Consultation on Biodiversity Net Gain Regulations and Implementation’ to seek views on their proposals for the detailed regulations and implementation measures. It

is intended that the responses received will shape legislation, processes and guidance ahead of the proposed date at which achieving BNG will become a mandatory requirement (currently November 2023).

- 3.3 The consultation period runs from 11 January 2022 until 5 April 2022. A copy of the DEFRA consultation document can be viewed online (see weblink below under 'Background Documents').

4.0 Consultation responses

4.1 Environmental Strategy Unit

The Sussex Nature Partnership (of which CDC are a member) is preparing a joint response to the BNG consultation on behalf of all member authorities across East and West Sussex. This draft response is not yet ready, but if it is circulated before the Committee meeting date, then it will be made available to members.

5.0 Biodiversity Net Gain Requirements

- 5.1 The national mandatory requirement will be to achieve at least a 10% BNG increase from the pre-development biodiversity value. The BNG would be secured via a pre-commencement condition, meaning that the biodiversity gain condition must be discharged before development can begin. A BNG metric has been made available by DEFRA, acting as an accounting tool that can be used for the purposes of calculating BNG. To discharge a BNG condition, the developer will need to produce a Biodiversity Gain Plan, to be approved by the Local Planning Authority (LPA).

- 5.2 Whilst the proposals centre around approval of this information via planning condition, DEFRA also propose to require applicants for planning permission to include biodiversity gain information with their application. This core information will include:

- the pre-development biodiversity value,
- the proposed approach to enhancing biodiversity on-site, and
- any proposed off-site biodiversity enhancements (including the use of statutory credits) that have been planned or arranged for the development

- 5.3 The existing statutory and policy protections for our statutory protected sites and protected species will not be replaced by the Environment Act's biodiversity net gain measures. A proposal to deliver BNG will not affect the weight that

should be given to other planning considerations, matters of planning policy, or legal obligations. Instead, the requirement for BNG will be an additional requirement.

- 5.4 The requirement for BNG will be triggered for all development that would be granted (or deemed to be granted) planning permission under the Town and Country Planning Act 1990 (as amended) (TCPA), which includes permitted development. However, there may be exemptions, and this issue is explored in the consultation. In addition, BNG will be required for Nationally Significant Infrastructure Projects (NSIPs) consented under the Planning Act 2008.

6.0 Consultation question responses

- 6.1 The Consultation questions are split into three parts, each of which covers several themes:

- 1) Defining the scope of the biodiversity net gain requirement for Town and Country Planning Act 1990 development
 - exemptions
 - development within statutory designated sites for nature conservation
 - irreplaceable habitat
- 2) Applying the biodiversity gain objective to different types of development
 - phased development and development subject to subsequent applications
 - small sites
 - Nationally Significant Infrastructure Projects (NSIPs)
- 3) How the mandatory biodiversity net gain requirement will work for Town and Country Planning Act 1990 development
 - biodiversity gain plan
 - off-site biodiversity gains
 - the market for biodiversity units
 - habitat banking
 - the biodiversity gain site register
 - additionality
 - statutory biodiversity credits
 - reporting, evaluation, and monitoring

- 6.2 Many of the questions are multiple choice and not all of the questions are relevant to the function of the planning authority in implementing BNG. Responses are therefore only proposed in respect of the questions directly

relevant to the planning process. As stated above the Sussex Nature Partnership is also providing a response, and that will deal with the technical matters. Below is an explanation of the key matters and the Council's proposed responses.

Part 1: defining the scope of the biodiversity net gain requirement for Town and Country Planning Act 1990 development

- 6.3 Questions 1-9 of the consultation relate to proposed exemptions to providing BNG on development granted planning permission under the Town and Country Planning Act 1990, as amended. It should be noted that any development that DEFRA decide to exempt from mandatory BNG would not prevent the LPA seeking BNG on these developments, only that the LPA is not obliged to do so.
- 6.4 DEFRA's proposed exemptions to 'de minimus', householder and change of use applications are considered reasonable. However, it is recommended that self and custom build builds should not be exempt; despite such builds often being small in size and ambitious in terms of other sustainability measures, it may create loopholes where there is a mix of self/custom builds and standard housing on a particular site, as is DEFRA's concern. It is also considered that Brownfield development should not be exempt from BNG requirements. These sites present opportunities for on and off site enhancement, and given the requirement would be 10% of a low pre-development baseline it is considered that requiring BNG would not be unreasonable.
- 6.5 Officers agree with DEFRA proposals to ensure that the requirements for BNG are consistent irrespective of where it is permitted development or not. Any exempts should reflect the nature of the proposal, and not whether the proposal benefits from permission via the Town and Country Planning (General Permitted Development) Order 2015, as amended or via an express grant of planning permission.
- 6.6 The proposal to not exempt developments with temporary planning permission is not considered reasonable. DEFRA's rationale is that the BNG metric will allow for the temporary nature of developments and how quickly they can be restored into account. However, temporary permissions are often needed to fulfil an immediate need, and as such requiring work to be undertaken to calculate BNG when the metric may likely not require it in any event, would be disproportionate and could cause delays to the provision of temporary uses and developments.
- 6.7 Question 10 of the consultation relates to developments on statutory designated sites for nature conservation. Officers agree with DEFRA's proposal not to exempt development in such areas from mandatory BNG. The

purpose of BNG is to go above and beyond the existing statutory biodiversity requirements and policies and should therefore be considered separately. As DEFRA highlight, an otherwise unacceptable scheme cannot be justifiable by BNG on statutory designated sites.

Part 2: Applying the biodiversity gain objective to different types of development

- 6.8 Question 12 relates to development consented by outline permission with reserved matters, some of which will be delivered in phases. Officers agree with DEFRA's proposal that outline applications should be submitted with a BNG strategy outlining the proposals for the entire development and how it will be delivered phase by phase. The outline application should also agree the pre-development value of the whole site. If any degradation of the site value has occurred since 30/01/2020 then this must be reported and the 10% gain calculated on the site value for that date – this is to avoid pre-emptive site clearance to reduce the baseline value. Should outline permission be granted, it should be subject to a condition requiring the approval of a detailed BNG Plan prior to the commencement of each phase of development.
- 6.9 The consultation documents sets out the proposed approach for applications for non-material amendments and variation of conditions which is helpful. It is proposed that the requirements of BNG shall apply to amendments and it will not be possible to disapply or vary the net gain condition on an existing permission. If no changes are proposed that would affect the post-development biodiversity value the existing agreed biodiversity gain plan will remain in place, and only if the proposal would affect the post-development biodiversity value would a new biodiversity gain plan be required. If a new net gain plan is required the baseline would be taken from that of the original permission rather than the new s73 permission to ensure that a 10% uplift from pre-development levels. It is considered that this is a pragmatic approach which will assist with the consideration of amendments to proposals that already benefit from a planning permission.
- 6.10 Questions 14-16 relate to the process of assessing BNG on small sites can be streamlined, to ease the process for both developers and LPAs. Officers agree with DEFRA's proposal to introduce a simplified 'small sites' metric to help to reduce any time and cost burdens introduced by a BNG condition. It is also considered that a transition period of 6 months from the date BNG is mandatory would be reasonable.

Part 3: How the mandatory biodiversity net gain requirement will work for Town and Country Planning Act 1990 development

- 6.11 Questions 28-29 ask for views on the proposed use of a consistent format for developers to fill in and LPAs to check if BNG requirement is met. DEFRA

also proposed that outline permissions would have a different template and a more concise one for small scale development. DEFRA proposes that a finalised BNG should not be required prior to determination of a planning application but can be secured via a pre-commencement condition, recognising that not all elements may be fixed at determination stage (such as full landscaping details for example). However, DEFRA also recognises that some schemes may be able to provide a compliant BNG plan during the application stage, in which case it can be submitted and approved by the application, negating the need for a BNG pre-commencement condition (a compliance condition may be required). Officers agree with this approach.

- 6.13 Questions 30-31 seek views on the proposals to allow for off-site BNG to be provided in cases where on-site BNG cannot be achieved. The off-site BNG should be local to the development site, and works should commence as soon as is feasible, and no more than 12 months after the discharge of the mandatory pre-commencement biodiversity net gain condition. The date for completion of the work should be included in the BNG plan with an increase in the number of credits required where a longer timescale for completion is agreed. The BNG site should then be maintained for a minimum of 30 years. This places an additional planning enforcement obligation on the authority for a 30 year timescale. Officers agree with DEFRA's assertion that further guidance is needed to support decision-making about what constitutes appropriate off-site biodiversity gains for a given development. Officers also agree with DEFRA's suggestion that developers should be encouraged and enabled to retain the BNG for longer than 30 years where appropriate.
- 6.14 Questions 32-33 relate to the creation of a market for biodiversity units or credits. This could also include 'habitat' banking' where developers or the LPA can create BNG land not directly attributed to a development, which could then be purchased towards the BNG of a future development. LPA's would be allowed to participate in this market, for example through selling BNG credits or units from their land. If developers go beyond their BNG requirement when building out their required BNG for a particular development, DEFRA are minded to allow them to sell the excess as 'credits' or 'units' to be used to facilitate other developments requiring BNG. DEFRA would develop a registry of off-site BNG and BNG units available for purchase, supported by both the public and private sectors which would be publicly available.
- 6.15 Officers are generally supportive of these measures, however there is a risk that developers delivering developments in areas where land values are high would prefer to buy credits for cheaper land elsewhere. It is therefore considered that a local gain should be required in the first instance, and only where it is not possible should credits be bought from elsewhere in England. Up-front investment in Habitat Banking would require a partnership approach with conservation bodies experienced in land acquisition and management.

The level of need for such banks is uncertain given the ability of many development to meet a 10% requirement on site and given that transfer of credits across a development portfolio is also likely. These factors, together with uncertainty about the future price of credits mean that LPA's participation in such markets is likely to be delayed until such time as the market has matured and the risk can be more fully evaluated.

- 6.16 Questions 52-55 relate to the reporting, evaluation, and monitoring of BNG. DEFRA proposed that LPAs will be responsible for monitoring BNG across their districts and report the information direct to DEFRA, for example through a local register or BNG reports. Officers recognise that monitoring and reporting of BNG will be crucial to the success of BNG at a strategic level. However, any mandatory requirements must take into account the often limited resources available to LPAs in undertaking such work.
- 6.17 The five yearly Biodiversity Reports mandated by the Environment Act will be the main reporting mechanism. These do add a new burden on local government and Annex C of the BNG consultation sets out the monitoring requirements. These will involve collecting multiple data points from each application covered by BNG so will require alteration to case management software ahead of the introduction of BNG in order to capture this data and produce the cumulative statistics at the end of the five year reporting period. More details relating to the new burdens funding of BNG in future years would help in the understanding of how the LPA could facilitate this.

6.0 Proposed Council response

- 6.1 Members are asked to;
- i. note the contents of the consultation proposals, and
 - ii. comment on, and endorse, the proposed Council response set out in Appendix 1.
- 6.2 Any further comments will be considered and where appropriate incorporated prior to the response being forwarded to DEFRA.

7.0 Background documents

- 7.1 DEFRA consultation document, response form and appendices are available at: [Consultation on Biodiversity Net Gain Regulations and Implementation - Defra - Citizen Space](#)