

Insights

THE ENVIRONMENT ACT 2021: A PRACTICAL LOOK AT THE NEW BIODIVERSITY REQUIREMENT

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SUMMARY

One of the more ambitious provisions of the new Environment Act 2021 is the mandatory requirement for new developments to provide a 10% biodiversity net gain. Whilst this requirement has no legal effect yet (and will be brought into force through secondary legislation at a date not yet known), the provisions are complex and warrant close examination.

The Environment Act 2021 (the Act), first introduced to Parliament in 2019 finally received royal assent and became law on 9 November 2021. This is an important and wide reaching Act that has been closely scrutinised, debated and amended during its lengthy passage through Parliament and introduces a new post-Brexit environmental protection regime.

The Act principally creates a post Brexit framework to improve and protect the natural environment, which the newly created Office for Environmental Protection will oversee. It also makes wide ranging provisions covering waste and recycling, air quality, the recall of products that fail to meet environmental standards, water, nature and biodiversity, conservation covenants and updates to laws on chemicals (REACH).

PLANNING IMPLICATIONS OF THE ACT

The planning system plays an important role in environmental protection, with one of its three overarching objectives enshrined in national planning policy being to protect and enhance the environment. This Act introduces new statutory requirements that will strengthen this objective. For example, new local nature recovery strategies must be prepared by a 'responsible authority' to support plan-making and other measures by local planning authorities.

However, one of the more ambitious provisions of the Act, which overlaps with the planning regime, is a new mandatory requirement for developments to provide a 10% biodiversity net gain.

BIODIVERSITY NET GAIN – WHAT IS IT?

The concept and quantification of biodiversity net gain is not new. Current planning policy promotes biodiversity improvements through the planning system where possible, but up until now, there has been no statutory requirement for developments to deliver it.

The Act changes this and (through amendments to the Town and Country Planning Act 1990) will require all planning permissions in England (subject to exemptions) to be granted subject to a new general pre-commencement condition that requires approval of a biodiversity gain plan.

The planning authority can only approve the biodiversity gain plan if the biodiversity value attributable to a development exceeds the pre-development biodiversity value of the onsite habitat by 10% which, for the purposes of the legislation, is known as the 'biodiversity gain objective'.

The biodiversity plan must set out the steps taken to achieve the 'biodiversity gain objective', which could be through minimising the adverse effects of the development on habitats, the identification of the pre and post development onsite biodiversity value, details of registered offsite biodiversity value allocated to the development and biodiversity credits purchased, and any other information that may be required by regulations.

EXCEPTIONS

Once the relevant provisions come into force, the biodiversity condition will be deemed included on every planning permission for development in England, subject to some exceptions. Permissions granted by development order, for urgent crown development or for other development prescribed by the Secretary of State will be exempt. We expect that the Secretary of State will expand the exempt categories through regulations (there is a lot of discretion to do so) but it is not clear yet what categories these might be.

There is no requirement for a general condition to be deemed included in Development Consent Orders (DCOs), but the Act includes equivalent provisions for 10% biodiversity net gain to be applied to nationally significant infrastructure projects consented through the DCO regime.

MECHANISMS FOR DEVELOPERS TO DELIVER THE BIODIVERSITY REQUIREMENT

There will be flexible mechanisms available to increase the biodiversity value to demonstrate a 10% biodiversity net gain. Works to enhance habitats can be carried out either onsite or offsite or through the purchase of 'biodiversity credits' from the Secretary of State. However, this flexibility may be removed (subject to regulations) if the onsite habitat is 'irreplaceable'. For such developments, arrangements to minimise their adverse effects and improvements, must be delivered onsite.

ENHANCEMENTS MAINTAINED FOR 30 YEARS

Both onsite and offsite enhancements must be maintained for at least 30 years after completion of a development (which period may be amended).

Onsite enhancements must be secured by planning condition, s106 obligation or a conservation covenant, which is a written agreement that is registrable as a local land charge, between a landowner and a 'responsible body' that binds a landowner and its successors to do/not do something on the land for a conservation purpose.

Offsite enhancements must be secured under either a s106 agreement or a conservation covenant and be registered in the new, publicly available, biodiversity gain site register.

The flexibility around offsite enhancements may lead organisations with large non-operational land holdings to register biodiversity gain sites and (for consideration) allow them to contribute in principle to the registered offsite biodiversity value attributable to another's development.

BIODIVERSITY CREDITS IN LIEU OF ONSITE OR OFFSITE ENHANCEMENT WORKS

The preference will be for improvement works to be delivered either on or off site. However, developers will be able to purchase credits from the Secretary of State to meet the biodiversity gain objective. How this will work in practice is not known at this stage (and is subject to arrangements yet to be introduced) but the price of the credits will be set sufficiently high so that it does not disincentivise onsite or offsite habitat improvements.

COMMENTS

The passing of this Act and the introduction of a new environmental framework is an important milestone in the post-Brexit environmental landscape. However, as it stands a number of its component parts have no legal effect, and the introduction of the necessary supporting regulations is unlikely to be imminent. Full details of the biodiversity net gain regime and when it will come into force are not yet known.

The complexity of the detail that will be required to bring requirements of the Act into force, particularly the biodiversity net gain requirements, should not be underestimated. However, given the state of the climate emergency we expect that political pressure will ensure that these requirements are not left to gather dust.

RELATED PRACTICE AREAS

- Planning & Zoning
- Redevelopment
- Environment
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MEET THE TEAM



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