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Thoughts on a Year of Biodiversity Net Gain

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It has now been just over a year since mandatory biodiversity net gain (BNG) came into effect. I would love to be sitting here now and saying the process has been entirely smooth, but, as with most planning reforms, that is not the case. There are undoubtedly a number of positives, which I will explore further in this article, although equally there remain a number of trends and patterns of behaviour that still need to evolve.

I have followed the evolution of BNG policy with keen interest for many years now. As a planning lawyer of too many years' experience, one sees governments come and go, and with them, new and – in some cases – repeated (Regional Spatial Strategies?), policies and focuses. However, what is clear is the need for robust and effective measures to enhance biodiversity and the environment. Until the Environment Act 2021 came into force, arguably one might have considered the approach to be somewhat piecemeal and localised. We now have a clear directive and target for achieving a 10% net gain. The legislation and guidance may not be perfect, and indeed, it is quite clear that certain aspects of the policy were rushed in order to meet timeframes that were ultimately missed in any event. Yet, we do at least now have a mandatory BNG requirement that appears (as far as one can predict these things) here to stay.

I am incredibly fortunate to act for a number of responsible bodies, habitat bank developers and conservation charities, and as such, over the last year, I have been able to gain what I would consider to be a reasonably comprehensive insight into the delivery of biodiversity projects.

To date, I have completed just over ten conservation covenants, with an equal number expected to complete in the coming months. By contrast, I have completed two Section 106 agreements for the delivery of habitat banks. These contrasting figures are, in my view, indicative nationally of the difficulties in progressing a habitat bank through the Section 106 process. I must highlight here that this is by no means an indictment of the local authorities intent to progress environmental and habitat enhancement. This is purely a reflection of the lack of resources and guidance I feel local authorities have been given.

There are undoubtedly a number of progressive local authorities that do have the necessary procedures in place. However, from the perspective of the local authorities, they needed to – in short order – look to put in place a whole new system of comprehensive ecological due diligence, a process by which habitat sites could be secured outside of a planning application, and a means by which they could determine what the costs of monitoring sites for 30 years would be. It is ultimately the determination of an approach on monitoring fees that appears to have caused the biggest delay. A national scheme for monitoring fee calculation would perhaps have helped, and, indeed, the approach taken by local authorities still remains inconsistent and, given the level of fees some authorities are charging, potentially unsustainable.

This accordingly brings me on to the benefits of conservation covenants. I am unashamedly an advocate of conservation covenants. This, in my view, was a clear positive in the approach to the delivery of habitat banks as it has allowed a mechanism by which projects can be delivered outside of, what some might consider, the constraints of the public sector.

The responsible body approach is incredibly thorough in terms of ecological and legal due diligence. There are higher costs associated with this process, but with it comes the advantage of speed and a huge and comprehensive knowledge of habitat delivery on the part of the responsible body. Conservation covenants remain a relatively new concept, and drafting techniques continue to evolve, but I do feel the clear focus of these agreements will allow for the delivery of habitats that will achieve their stated targets in the habitat management and monitoring plan and remain in place and viable for the full 30-year period.

This then leads me on to the next slightly contentious topic of off-site versus on-site habitat delivery. The clear question is whether on-site delivery can lead to effective habitat delivery on the same level as off-site. Concerns arise regarding the ability of on-site management companies to manage habitats and whether the necessary experience and finances are in place to maintain habitats for the requisite 30-year period. Equally, the lack of any on-site register with Natural England has been raised as a point of concern, as has the likely proximity of residents to on-site habitat and the risk of damage taking place. I don't feel that this is a question that will be answered in the short term. The question of viability and the cost difference between on-site and off-site delivery has to be a consideration. There is a clear push for more new housing development and with that comes the need for a practical approach to the delivery of environmental improvements. However, we cannot lose focus on what is the ultimate objective of delivering biodiversity improvement.

The approach to baseline assessments and the application of the statutory metric also remains an area of continued discussion. I am not an ecologist and therefore cannot go into depth regarding the complexities surrounding determining the type and distinctiveness of certain habitats. However, through many discussions with ecologists, it has become clear to me the frustration felt in the application of the metric. A mistake in identifying certain habitats can have significant financial consequences for developers and, as such, it is not unusual now to see developers obtaining second opinions on calculations. Equally, there is far more care being taken on how the red line application boundary is being drawn to determine what habitats should or should not be included.

One aspect that I do feel has shown a clear improvement is the approach of Natural England to the biodiversity gain register. Natural England has taken a pragmatic approach to sites that are in the process of registration at the Land Registry (given the huge backlog). Equally, where a slight error has been noted in a Conservation Covenant, there has been no substantive delay in dealing with a deed of variation. Natural England appears willing to enter into direct communication on applications and, in turn, evolve its own processes.

Case law on BNG remains very much in its infancy. I do expect to see more cases associated with the application of the biodiversity gain hierarchy, and this may be an area where a softening in approach will allow greater development. Equally, the weight attributed to the delivery of BNG, particularly where much greater percentages are provided (for example, on greenfield renewable energy development sites) will be an area of keen interest.

There are many other topics that one could discuss in the BNG space – these include delays in local land charge registration; Section 106 agreements being required for small sites; the imposition of Section 106 agreements requiring the purchase of BNG Units; the imposition of Section 106 agreements despite a conservation covenant being in place; fluctuations in BNG unit pricing; the progress on local nature recovery strategies; the relationship with the proposed new nature restoration levy; the list goes on. I would say that this is the point. This is a new area where views differ and evolve. The key is communication on a broader national level to ensure this system works and is robust enough to last in perpetuity.

Hopefully, some of the topics raised in this article will elicit discussion, and I remain happy to discuss the topic of BNG with anyone, as I view this as a particular passion. I communicate with professionals involved in this sector every day, and I can see the drive to make this succeed. As such, I do feel confident for the future of BNG and will continue to extol the virtues of the same.

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