

# Biodiversity Net Gain and Planning — Enforcement

An LPA Perspective -

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30 April 2024



Enfield

Barnet

Waltham  
Forest

Harrow

Haringey

Redbridge

Havering

Hillingdon

Brent

Camden

Islington

Hackney

Barking and  
Dagenham

Ealing

Hammersmith  
and Fulham

Westminster

Tower  
Hamlets

Newham

Hounslow

Kensington and  
Chelsea

Southwark

Greenwich

Bexley

Richmond upon  
Thames

Wandsworth

Lambeth

Lewisham

Merton

Kingston  
upon  
Thames

Sutton

Croydon

Bromley

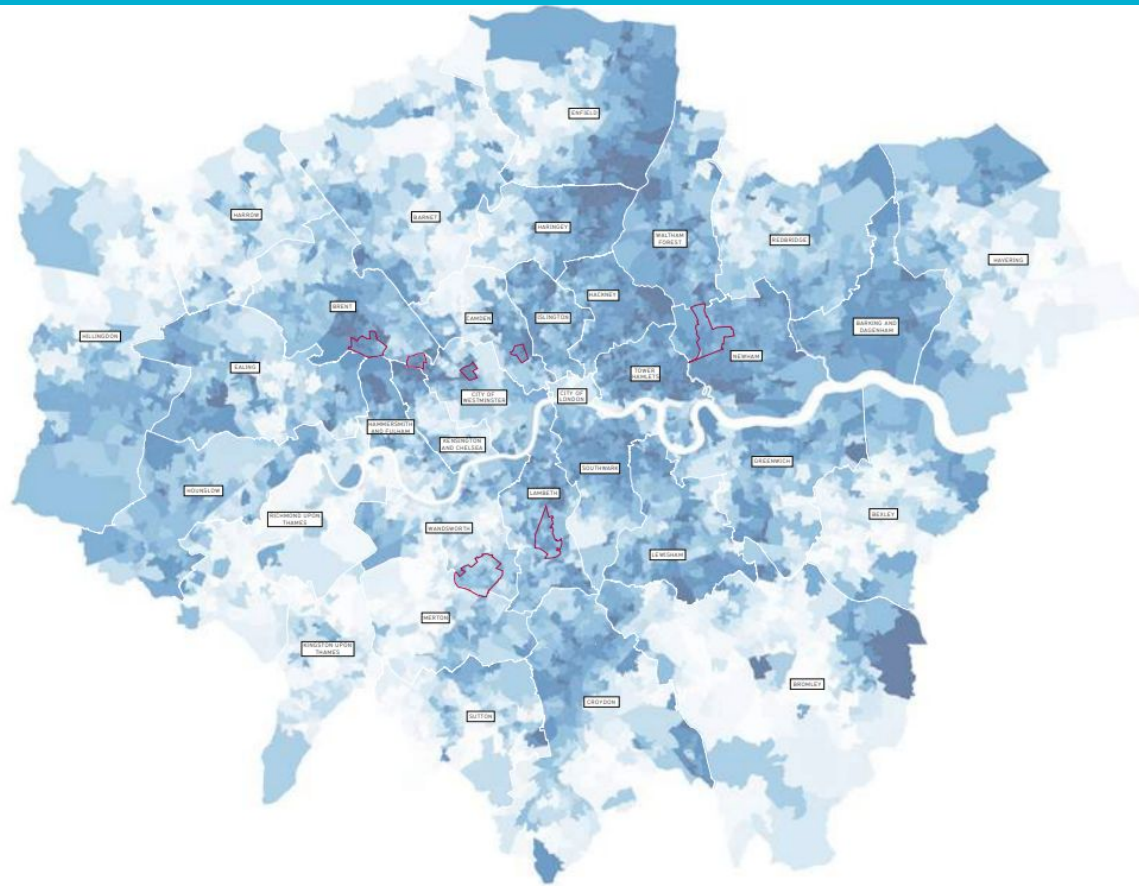
# An LPA perspective via London Borough of Sutton

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## Background -

Sutton is primarily a suburban Borough, featuring a mix of residential neighborhoods, green spaces, and commercial areas. It is a relatively affluent Borough typically attracting families to its suburban neighbourhoods as well as commuters travelling to central London from the central centres.

- Low to Medium Density: Unlike more central London boroughs, Sutton trends toward a medium-density level of development, with a predominance of low-rise buildings outside of the centre of Sutton.
- Green Spaces and Parks: Sutton has a large number of green spaces, parks throughout the borough. These include large parks like Sutton Park, Beddington Park, and Oaks Park
- Sutton benefits from good transport connections, including railway stations served by Southern and Thameslink services, as well as bus routes connecting it to surrounding areas. This accessibility enhances connectivity for residents and businesses, but Sutton is typically the point of departure/return, and not the destination.
- Sutton town center, serves as the borough's primary commercial hub, offering shopping facilities, restaurants, entertainment venues, and public spaces..
- Overall, Sutton's town planning reflects a commitment to balancing growth and development with the preservation of its suburban character. Typical conflicts arise where longstanding, unaltered locations encounter prospective development involving mixed-use, car-free, affordable housing that aligns with policy aims but not necessarily established members and constituents
- A majority Lib-dem led council, it has a thin majority opposed by an active and vocal conservative/independent group of Cllrs.
- The councils elected members would not be described as 'pro-development' Council policies have directed the majority of new home development towards the higher density Sutton town centre in order to 'preserve' the more suburban outer towns and villages
- The Borough contains 606ha of Greenbelt designated land and 529ha of MOL (Metropolitan Open Land) which carry equivalent weight and designation
- Sutton has an up-to-date local plan 2016-2031 (adopted (2018))



KEY

- Case studies
- Most disadvantaged  
(Top 10% of socio-economically  
deprived areas by LSOA)
- Least disadvantaged  
(Bottom 10% of socio-economically

# BNG Initial thoughts:

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- New legislation inevitably arrives with concerns to planning professionals and this was not assuaged by the repeated deadline delays before the BNG finally took effect on the 12th Feb 2024/2nd April 2024
- However the importance of BNG is clear and if it can be delivered effectively, undoubtedly benefit to all
- It is not often that England is a world leader in a positive metric, but now England is one of the first in the world to make biodiversity Net gain a legal requirement (climateaction.org 13th Feb 2024)
- Biodiversity Net Gain is an approach to development that ensures that biodiversity is enhanced rather than diminished.
- Simplest Terms: It requires developers to ensure that any harm to biodiversity caused by their developments is outweighed by the benefits of actions taken to enhance biodiversity.
- Ensuring Biodiversity Net Gain is essential for protecting our environment and preserving species diversity for future generations. Numerous positives but inevitably there will be difficult and concerns with delivery, particularly at the initial stages.

# Immediate concerns...

(From an enforcement point of view -)

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- It's all very new!
- Sutton is fortunate enough to have Ecological expertise involved with BNG for a number of years and has been included as Specific Policy in the Local plan.
- Validation requirements have been strengthened so as to require as much upfront information as possible.
- This can be onerous but increases awareness of BNG importance
- Standard BNG Pre-commencement condition added to all relevant decisions.
- This **must** be agreed/details approved before works start
- The conditions is only discharged once the habitats are completed and provide the intended uplift of at least 10% Biodiversity Net Gain for >30 years
- Secured by condition and legal agreement (S106)
- Sutton has already been using (Not yet tested at appeal) conditions requiring pre-com BNG plans, installation methods, monitoring reports, completions statements and contingency arrangements (S106 Funding)

Examples as follows;

# BNG Conditions (Typical)

## Example A

Prior to commencement of the development hereby permitted, a scheme for habitat protection, creation and enhancements shall be submitted to and approved in writing by the Local Planning Authority. This will take the form of a Biodiversity Enhancement and Management Plan (BEMP) and include an updated Biodiversity Net Gain report, working to LBS's methodology and in general accordance with BS42020:2013, to provide a Net Gain on site. The BEMP will provide:

- a) The sizes of each habitat area to be created, how they will be created and full details and responsibilities on at least 30 years of aftercare and ongoing management and monitoring from creation;
- b) Green infrastructure, including at least, but not limited to: a) living walls / fences These will be provided to maximise local biodiversity and contribute to increased urban permeability. Green infrastructure should select species appropriate for the type of roof / planting proposed, in accordance with Clause c (below).
- c) Soft landscaping will detail biodiversity enhancement through planting schemes that provide nectar, pollen and fruit resources throughout the seasons, a variety of structural diversity and larval food plants, through no less than 60% native and local species by number and diversity. Substrate, provenance and numbers of all bulbs, seeds and plugs / whips / trees will be detailed, as will aftercare and ongoing management. Ornamental plants will not include any genera or species on Schedule 9 of the Wildlife and Countryside Act (1981) or the LISI list and should be on the "RHS Plants for Pollinators" lists (or of documented wildlife value), to provide increased resource availability;
- d) Current substrate physico-chemical values / soil sampling analysis for the proposed semi-improved neutral grassland wildflower turf, to determine suitability of the proposed habitat creation and any necessary remediation of the underlying soils;
- e) A timetable of delivery for each habitat to be created;
- f) Details on the monitoring of habitats and the provision of a report, which shall be provided to the LPA on the 1st November of each year of monitoring (years 1-3 after creation, years 5, 7 & 10 and every 5 years thereafter), which will assess the condition of all habitats created and any and all necessary management or replacement / remediation measures required to deliver the Net Gain values set out in the BEMP for each habitat;
- g) Details of the contingency methods for management and funding, should the monitoring identify changes are required to ensure the habitat(s) are in the appropriate condition to deliver the Net Gain values set out in the BEMP for each habitat. Work shall be undertaken in accordance with the approved scheme and thereafter retained in perpetuity.

# BNG Process

Validation>Assessment>Approval(Full PP)> Approval (Condition details)

- Implementation (and then monitoring) can begin.
- DEFRA states that Habitat monitoring is the responsibility of the developer and should be set out in the BNG plan
- LPA's should set specific monitoring requirements via planning conditions (S106) to secure the on-site or off-site (agreed) enhancements with required evidence.
- A typical site should expect to submit monitoring reports in years 2, 5, 10, 20 and 30... in order to evidence BNG compliance. Again secured by either condition or S106 agreement or both.
- Expected that LPAs will require a minimum of 30yrs monitoring
- LPA's must evidence and report on BNG (Natural Environment and communities Act (NERC) It is likely that this information will need to be recorded on a public register

So how will LPA's fund the 30+ Years of monitoring and reporting required? (Unknown)

Some LPA's have requested specific monitoring Fees via S106 monies

No additional funding from central Govt has been specified

The amount of additional capacity/resourcing required should not be understated and neither should the importance of LPA monitoring/recording to check that developers are not marking their own homework.

Assuming proactive monitoring is undertaken, workloads **will** increase, year on year for 30+yrs before 'sign-off' - assuming works are completed as agreed.

But what if owners/developers don't do exactly what they said they would do?....



# What if? Possible scenarios

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- Application approved - But no BNG plan submitted = Works are not permitted to start..
- Works start before BNG Submitted/approved. = Pre-commencement condition dictates that the site does not benefit from planning permission without these being agreed...
  - Normally the LPA has 'flexibility' on this aspect as a lot of Pre-commencement conditions are not true conditions precedents (bike/bin stores for example)
  - However - This is the first Central Govt mandated pre-commencement conditions and one must assume that it carries the full weight that such a condition should.

Therefore - Works carried out would be development without PP.

No BCN possible in this scenario. Full EN or Temp Stop followed by Full stop and EN and(or) injunction are the only routes available and the requirements would be to stop/cease works and restore the land to its previous condition

# What if? Possible scenarios

- Application approved - BNG plan submitted and approved = Works are permitted to start (assuming all other CONS are agreed)

- Works start but development is not being carried out in accordance with the BNG approved condition plan because;

Development on site does not match approved plans = BCN possible, i.e. the instructions are clear and requirements are straightforward to bring the development back on track.

If the work is materially different to the agreed condition then a full EN may be necessary, Therefore - Works carried out would be development without PP (again).

- Works starts according to plan but monitoring reports required by condition are not submitted = Breach of condition but enforcement action required is difficult to consider - BCN requiring plans be submitted and approved? -Developer is not in control of the approval process..  
Issue a BCN requiring submission of the report, but compliance would be achieved on receipt, regardless of acceptability.
- likely that in this situation an LPA would conduct its own monitoring to determine whether works have fallen behind/not followed the BNG plan and if the only issue is the absence of a monitoring report that confirms the works are progressing then what further action would be in the public interest?

The LPA has now had to expend resources to check compliance that would not have been required if the monitoring reports had been submitted, but how can these costs be recouped?

The same scenario is still relevant at the 2, 5, 10, 15, 20 and 30yr (or otherwise required) reporting stage.

- Works are being carried out according to plan (Onsite or offsite) but the BNG rating predicted has not been met and has instead fallen short of the rating or % intended.  
Assuming there is no clear reason why the habitat ratings have not been achieved LPA would have hopefully utilised a method of securing BNG payment by S106 to account for any shortfall.  
If any payments are not provided then the LPA will need to enforce the S106 in the usual manner (injunctive proceedings in court)

# Depends on the BNG Hierarchy

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The biodiversity gain hierarchy means the following actions in the following order of priority:

- Avoiding adverse effects of the development on on-site habitat with a habitat distinctiveness score, applied in the biodiversity metric, equal to or higher than six.
- So far as those adverse effects cannot be avoided, mitigating those effects.
- So far as those adverse effects cannot be mitigated, habitat enhancement of on-site habitat.
- So far as there cannot be that enhancement, creation of on-site habitat.
- So far as there cannot be that creation, the availability of registered off-site biodiversity gain.
- So far as that off-site habitat enhancement cannot be secured, purchasing biodiversity credits.

# - The Guidance (Verbatim)

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Failure to comply with the biodiversity gain condition by commencing development without approval of the Biodiversity Gain Plan will be a breach of planning control. Local planning authorities have a range of [planning enforcement powers](#) and have responsibility for taking whatever enforcement action may be necessary, in the public interest, in their area.

- Effective enforcement is important to tackle breaches of planning control and maintain integrity of the decision making process. Local planning authorities are already encouraged to prepare local enforcement plans, and set out the priorities for enforcement action, and they may want to update these to reflect the introduction of biodiversity net gain. This could cover both the initial delivery and ongoing management and maintenance mechanisms to assist monitoring of gains in the longer term.
- Appropriately worded planning conditions and planning obligations would also help achieve effective monitoring and enforcement of biodiversity net gain, particularly in relation to the maintenance and monitoring of significant onsite habitat enhancements and registered offsite biodiversity gains.

# Sutton's Current Protocol:

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- N.B. Subject to change as BNG experience evolves, currently;
- No automated trigger for BNG Compliance (Some LPA's may link BC notifications to compliance)
- Major apps will have a case raised and a unique case reference in order for BNG related matters to be recorded (ENF file on Uniform) after approval
- This is automatically listed on the public register and appears on land charges searches.
- If not already raised, cases will be created following notification from CIL/S106 Monitoring team or Biodiversity team.
- Less likely, but cases may be raised by Council Members or general public who are invested in the development
- Monitoring recorded using the Councils software(Uniform) and Document Management System (DMS) - Paperless
- Any potential issues/breaches will be actioned according to the circumstances of the case.
- Currently no plan to create a template procedure for officers whilst the BNG regulations are in their early stages
- Officers will need to liaise with Ecologist/Biodiversity team to inform on best response to issues and combine planning judgement with BNG Methodology
- No current scope for additional training but processes are evolving. No specific BNG enforcement training at this time
- All ENF teams are facing similar issues. Make use of fellow officer Knowledge - London Planning Enforcement Network, PAS Guidance, Nape etc.

# Challenges:

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- Sutton has a very small ENF team, with an allocation of just 2.6FTE including Manager.
- Until recently the team had 4x officers, 3x of which were agency staff and one part-time council employee.
- Council budget deficit results in recruitment Freeze prevents any additional staffing or replacement. Agency staff are not automatically renewed.
- Case-loads already high before recruitment freeze and reduction in team size.
- Backlog of cases means that officer are stretched to breaking.
- Non statutory function and lack of income generation makes ENF an easy target for cost reduction.
- Case prioritisation means certain matters cannot be effectively action: Section 215 cases, Conditions compliance, advertisements.
- Additional requirements as a result of BNG are likely to reduce this further, but uncertainty remains.
- Assistance is required, ideally from central government in terms of funding, training, resources
- Income generation, shared job roles with DM, Hybrid post creation all being considered but recruitment is difficult and morale is effected.
- Situation Is not unique to Sutton or London as research confirms.
- Time will tell if BNG can be successful in spite of significant challenges.

— Questions?

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