

Examination of the Tunbridge Wells
Borough Local Plan

**Tunbridge Wells Borough Council
Hearing Statement**

**Matter 15: The Natural
Environment (Policies EN9,
EN10, EN12, EN13, EN14, EN20,
EN21, EN22, EN23, EN24, EN25,
EN26, EN27 and EN28)
Issue 1: Biodiversity Net Gain**

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Matter 15 – The Natural Environment (Policies EN9, EN10, EN12, EN13, EN14, EN20, EN21, EN22, EN23, EN24, EN25, EN26, EN27 and EN28)

Issue 1 – Biodiversity Net Gain

Inspector’s Question 1: [justification for seeking to achieve 10% net gain]

What is the justification for seeking to achieve a minimum 10% net gain in biodiversity? What will be required of applicants?

TWBC response to Question 1

Introduction

1. Section 98 ‘*Biodiversity gain as condition of planning permission*’ of the Environment Act 2021 brings in a mandatory requirement for biodiversity gain and, under Schedule 14, explains how the biodiversity gain objective is to be met in paragraph 2(1):

“The biodiversity gain objective is met in relation to development for which planning permission is granted if the biodiversity value attributable to the development exceeds the pre-development biodiversity value of the onsite habitat by at least the relevant percentage.”
2. The relevant percentage is set out in paragraph 2 (3) of the Schedule which states “*the relevant percentage is 10%*”. Hence, the policy requirement is for a minimum of 10% gain in biodiversity and, in accordance with the legislation, requires this to be demonstrated through the application of the Defra Metric (paragraph 3).
3. The 10% figure within the Environment Act has been proposed for some time and been the subject of feasibility and viability studies by Defra and will come into force during the lifetime of the Plan. There is currently a transition period so that the statutory requirement for net gain is likely to come into force November 2023.

4. As the 10% is a minimum, the Council has been encouraged by Natural England and others, including Kent Nature Partnership, to seek a higher level of gain and a figure of 20% has suggested. The Council has considered this, and early drafts had a 20% provision, and another draft had a split with 10% on site and 20% offsite but, on advice from PAS and others, these options were dropped as the Council did not at the time have the evidence to support them.
5. Whilst the evidence for Kent in terms of the threat to biodiversity and the decline in biodiversity recent years can be easily found that might justify the need for a greater net gain percentage, before that could be proposed evidence is also required to show that development would remain viable, and that sufficient land is available for the provision of net gain.
6. Until such evidence is available the Council has proposed a 10% gain within the policy, but this may be reviewed through Supplementary Planning Document when and if the evidence supports an increase over and above the 10%. The first stage of that work, a Kent wide viability assessment undertaken by Kent Nature Partnership with support from Natural England for biodiversity net gain looking at 10%, 15% and 20%, has just been completed this needs to be reviewed by the Council and additional local factors considered before coming to any formal view on an appropriate percentage.
7. The Local Plan Viability Assessment Stage 2 [CD 3.65] clearly states at paragraph 1.1.7 that it has considered the proposed requirement for all developments to show a 10% improvement in biodiversity net gain.
8. It is clear that, at the moment, the Council requires developers to provide a minimum 10% gain in biodiversity and the viability of 10% has been tested at a national and local level and that this will not change unless there is robust evidence to support it.
9. In terms of what is required of developers to demonstrate a biodiversity net gain, this is set out within the policy with further details in the supporting text and both refer to the commitment to a Supplementary Planning Document (SPD) which is included within the Council's Local Development Scheme [[CD 3.143](#)] to provide further details. The justification for the SPD is dealt with under Question 4 below.

10. The Council has been applying a net gain policy to development since 2019, seeking a minimum 10% gain from development in general conformity with the emerging policy and legislation and has an interim project to provide off-site net gain where required.
11. In the absence of the SPD, the policy and supporting text refer to various guidance documents to make it clear as to what is required at present and, in particular, reference is made to the Defra Metric which itself is supported by detailed technical guidance. The Defra Metric was first introduced in 2018 (Metric 2.0), was substantively updated in 2012 with Metric 3.0 and a new beta version for small sites and has again been updated with the release of Metric 3.1 (April 2022).
12. The Policy specifically refers to a Biodiversity Gain Plan in criterion 1 and this is now specified in the Environment Act Schedule 14 paragraph 14, but final details of this and other measures will be set out in secondary legislation for the Environment Act drafts of which are expected later this year. A consultation exercise to "[shape the secondary legislation policy and delivery plans](#)" closed earlier this month.
13. In the absence of the secondary legislation to define what exactly a Biodiversity Gain Plan should include, the supporting text (paragraph 6.136 of the Submission Local Plan) requires that applicants provide:
 - appropriate and up-to-date ecological surveys;
 - an accurate, measurable plan of existing habitats as referenced in the metric;
 - an accurate, measurable plan of proposed habitats as referenced in the metric;
 - the metric calculations in their original form.
14. These requirements are based on the Council's experience with submission for Biodiversity Net Gain and current guidance. Guidance listed in the supporting text includes Biodiversity Net Gain – Principles and Guidance for UK Construction and Developments (CIEEM, CIRIA, IEMA, 2016), which sets out the key principles which are required to be followed if net gain is to be achieved. CIEEM has now provided further, more detailed guidance '[Biodiversity Net Gain Report and Audit Templates \(July 2021\)](#)' which will be helpful in formulating the SPD.
15. In the face of emerging legislation and developing practice, which continues to be refined, and helping to address the acknowledged 'biodiversity emergency', the Council

is of the view that it has done all that it can to provide as much information as possible at this time on this matter and that its approach to biodiversity net gain and the proposal for a future SPD is the most pragmatic and robust solution possible.

Inspector's Question 2: [achievability of achieving a 10% net gain]

Is the requirement to achieve a 10% net gain achievable across the proposed site allocations?

TWBC response to Question 2

Introduction

16. The Council is confident that a minimum biodiversity net gain of 10% can be achieved across all allocations in line with Policy EN9. Essentially, there are two potential barriers to achieving net gain, viability, and deliverability.
17. The viability of net gain as a national policy, now enshrined in the Environment Act 2021, was tested by Defra in 2018 in their report '[Biodiversity Net Gain: preliminary housing viability analysis - WC07605](#)' and has been tested in a number of Planning authorities through the Biodiversity Net Gain pilot projects carried out ahead of drafting the Environment Bill and by early adopters of net gain since the publication of the Defra Metric 2.0 in 2018 which includes Tunbridge Wells borough.
18. The Defra 2018 report concluded (page 19):

“Evidence from interviews and results from the model agree and give high confidence to the findings:

- *There is strong evidence that on-site mitigation is possible at little or no cost for the majority of housing developments*
- *Residents pay maintenance costs for on-site mitigation, which are often of nil additional cost*
- *Higher costs, such as offsite mitigation or green roofs, will be passed through to the land owner, but these still represent less than 1.5% of uplift*
- *The budget for contributions has not been exhausted, except in a small number of low income, low economic growth areas, so net gain **does not compete with affordable housing***

- *There is no need to apply a limit of contributions to the environment envelope: insofar as this policy introduces an additional cost, it is within the year to year fluctuations of the envelope*

These conclusions are valid for all biodiversity net gain scenarios considered (+5%, +10%, +20%)

A biodiversity net gain requirement is not expected to affect the financial viability of housing developments”

19. This report and other work provided the basis of setting the 10% gain required by the Environment Act. A separate biodiversity net gain viability report for Kent looking at 10%, 15% and 20% has just been completed and this needs to be reviewed by the Council and additional local factors considered before coming to any formal view on an appropriate percentage above 10%.
20. In terms of deliverability, whilst the thrust of the policy is to provide biodiversity gains on site it does allow for gains to be provided offsite where appropriate and the supporting text states when this is acceptable (this is discussed in more detail in answer to question 3 below). Consequently, where a site is constrained or potentially scores a higher baseline than anticipated any shortfall in biodiversity units can be made up with an off-site provision.
21. The Council has in place an interim strategy for off-site provision of biodiversity units to facilitate development where this is required; also, work to support the proposed SPD on biodiversity net gain will set out how this will be achieved in the longer term. In addition, developers are free to provide their own sites for net gain or use an existing biodiversity banking scheme provided the details of those proposals are satisfactory to the Council. Again, the SPD will set out in more detail the options open to developers.
22. The concept and practice of biodiversity net gain has taken time to gain traction and build understanding across the planning industry and it would naturally take time for it to be embedded in land deals and financial models. As an early adopter of biodiversity net gain, the Council has built up considerable experience on applying net gain principles and been able to raise awareness amongst developers and has gradually moved from a position of no net loss to measurable gains and on the basis of emerging policy and legislation is now seeking a minimum of 10% supported by an interim net gain strategy.

23. In already seeking net gain, the Council is increasingly finding that 10% or more can be achieved on site and that developers agree to make up any on-site shortfall via a financial contribution to the Council's interim strategy. Proposed allocation sites that have been permitted during this shift in approach from no net loss to net gain demonstrate the progress that has been made and show that a 10% net can be achieved. The outcome for biodiversity net gain on these sites is summarised below:

AL/PE 8 Owlsnest, Tonbridge Road 19/01600

Development on this site was predominantly on previously developed land but the development brought a considerable area of private neglected woodland (including ancient woodland) and a lake into positive management with public access and so net gain was assured without application of the metric.

HO1 Land adjacent to Furnace Lane and Gibbets Lane Horsmonden 18/01976

Net gain was just being introduced and applying the Defra Metric 2.0 enabled the Council to be certain that there was no net loss, and likely a small gain, through the provision of an off-site financial contribution for additional biodiversity units.

RTW 17 Land adjacent to Longfield Road Tunbridge Wells 19/02267

The applicant used a different metric to the Defra version which was at that time accepted and predicted a gain of 10-24% on site. A condition of the consent requires that, for each phase of development, calculations are re-run using the Defra Metric.

CRS 3 Turnden Hartley Road Turnden Cranbrook 20/00815

Net gain was calculated using Defra Metric 2.0 and 3.0 and it was agreed with the Council that a 21.6% gain would be achieved on site.

HA 4 Land at Copthall Avenue and Highgate Hill Hawkhurst 20/02788

This site was consented at appeal and provided a 10% net gain through a combination of on-site provision and an off-site financial contribution.

FR 1 Land at Cranbrook Road, Frittenden 21/01638

This is predicted to achieve between a 10% and 37% net gain on site.

BM1 Land between Brenchley Road, Coppers Lane and Maidstone Road 21/03759

This has an agreed net gain of 11% on site.

24. In summary, the Council is confident that a minimum 10% gain in biodiversity can be achieved on the allocated and, indeed, on other sites in accordance with the policy, and that there is no viability or deliverability issues that would prevent the gain being achieved, which is supported by the Council's current application of a biodiversity net gain policy, government guidance and legislation.

Inspector's Question 3: [clarity on off-site improvements]

Is it sufficiently clear to users of the Plan how and when off-site improvements will be permitted?

TWBC response to Question 3

Introduction

25. The policy wording at 1a is that the net gain shall be “*provided on, or adjacent to, the site wherever possible and where provided off-site shall, in terms of location and type, be in accordance with the supporting text or as otherwise required by supplementary planning guidance*”.
26. This makes it clear that the priority is for net gain to be provided on site unless there is good reason for not doing so. Natural England supports the principle of prioritising on site measures to achieve net-gain in the SoCG [[CD 3.132c \(v\)](#) page 29 of Appendices H to J pages 115 to 116]. Further guidance on the off-site and on-site provision is provided in the supporting text for the policy at paragraph 6.136. It is proposed that this paragraph be amended slightly [[CD 3.127](#) Schedule of minor modifications page 45] to address comments made by Natural England to align the text more closely with the emerging legislation. The Council's consideration of Natural England's comments and the proposed changes are sets out in the SoCG [[CD 3.132c \(v\)](#) page 29 of Appendices H to J pages 115 to 116] and the subsequent modifications are shown in the tracked change version of the SLP:

“6.136 The Council will expect developers to provide mitigation, compensation, and enhancement measures for biodiversity on, or immediately adjacent to, a site for all major development proposals (10 dwellings plus, 1,000sqm plus of floorspace, new build, or conversion or outline proposals capable of accommodating either), and where necessary and appropriate only in exceptional circumstances and in the interests of biodiversity, ~~will~~ ‘off-site’ proposals will be considered acceptable. For such non-major development on-site, mitigation, compensation, and enhancement measures will be the preferred option, but off-site ~~or offsetting~~ will be considered where it offers the best outcome for biodiversity, is in reasonably close proximity to the application site, and follows the mitigation hierarchy. Only that which cannot be

mitigated or compensated for on-site will be permitted off-site, so even where off-site is agreed, on-site measures will still be required. Subject to forthcoming legislation provisions, a similar approach applies to non-major development, in a proportionate manner, also having regard to the most recent Metric and supporting Defra/Natural England Guidance. Prior to the adoption of a SPD, applicants are required to demonstrate a net gain in biodiversity through the application of the Defra Biodiversity Metric (or any subsequent replacement) and shall provide to the Council in support of an application a Biodiversity Gain Plan that includes:

- *appropriate and up-to-date ecological surveys;*
- *an accurate, measurable plan of existing habitats as referenced in the metric;*
- *an accurate, measurable plan of proposed habitats as referenced in the metric;*
- *the metric calculations in their original form”.*

27. The proposed change effects a more subtle distinction between the approach to major and non-major development but retains the strong priority for on-site provision, such that off-site provision will need to be justified and does not remove the obligation to provide as much on-site provision as possible. In either case, off-site is allowable where it is in the “*interests of biodiversity*”. The policy does rely upon some planning judgements, but they can, as the policy wording suggests, be further clarified by supplementary planning guidance.

28. The approach of combining off-site and on-site measures is specifically provided for within the Environment Act Schedule 14, 2:

“(2) The biodiversity value attributable to the development is the total of—

(a)the post-development biodiversity value of the onsite habitat,

(b)the biodiversity value, in relation to the development, of any registered offsite biodiversity gain allocated to the development, and

(c)the biodiversity value of any biodiversity credits purchased for the development”.

29. In summary, the Council considers that the requirements and approach to on and off-site provision for biodiversity net gain are clear, consistent with the NPPF and emerging legislation but can also be further addressed through the supplementary planning guidance.

Inspector's Question 4: [justification of supplementary planning guidance]

Policy EN9(1)(c) requires information to be provided in accordance with separate supplementary planning guidance. Is this requirement justified?

TWBC response to Question 4

Introduction

30. The purpose of a Supplementary Planning Document is to provide further detail required to meet the Policy objective. This is set out in the Planning Practice Guidance:

“What is the role of supplementary planning documents?”

Supplementary planning documents (SPDs) should build upon and provide more detailed advice or guidance on policies in an adopted local plan. As they do not form part of the development plan, they cannot introduce new planning policies into the development plan. They are however a material consideration in decision-making. They should not add unnecessarily to the financial burdens on development”.

(Paragraph: 008 Reference ID: 61-008-20190315 Revision date: 15 03 2019)

31. This policy has been prepared whilst government legislation for Biodiversity Net Gain has been emerging and the secondary legislation which provides much of the detail has yet to be published. In addition, practice and technical guidance has also been evolving and so it has not been possible to provide all the details that may eventually be required by the policy. The policy at present essentially stipulates a minimum requirement based on the best information available to date and has the support of Natural England.
32. The production of SPDs is governed by Regulations 11 to 16 of the Town and Country Planning (Local Planning) (England) Regulations 2012 and the proposal for a Biodiversity Net Gain SPD is set out within the Local Development Scheme (LDS) page 32 [[CD 3.143](#)].
33. The LDS confirms that the purpose of the SPD is to:

*“To provide guidance on the requirements for Biodiversity Net Gain in the Borough.
This will include:*

- *application of the Biodiversity Metric*
- *details required in Biodiversity Net gain Plans to support planning applications*
- *the assessment of Biodiversity Net Gain Plans*
- *the provision for long term monitoring*
- *the requirements for offsite biodiversity net gain*
- *details of any assessment or monitoring fees”*

34. As the secondary legislation for the Environment Act covering biodiversity net gain comes forward, the SPD will be able to reflect this and any updates in the Metric and supporting guidance.
35. There are also local issues that the SPD can include that national legislation and guidance will not, such as what schemes and projects are in place to provide offsite net gain and how much they will cost. There are also issues around locally important habitats such as grassland in the High Weald and old orchards that may require a nuanced approach within the Metric to ensure they are properly surveyed and valued.
36. At present the metric and the available guidance has some aspects that give rise to a great deal of variability as to approach which in turn leads to a lack of consistency within an area and contested outputs. Such issues include the habitat assigned to new gardens, what base line to use when habitats are variable across an area and how to address uncertainties when translating Phase1 habitats to UKHabs for inputting to the Metric. The SPD can address these issues and provide greater clarity.
37. The SPD will also be able to consider the viability work undertaken by Kent Nature Partnership looking at the justification and implications of higher levels of net gain. This work was supported by Natural England and the Council will have to give careful and detailed consideration as to the findings.

38. Natural England supports the commitment to an SPD and in the Regulation 19 comments suggest that it is needed to provide more detail in support of the legislation (SoCG [CD 3.132c\(v\)](#) Appendices H to J pages 115 to 116 page 30).
39. In summary, the need for a SPD is clearly stated and is supported by Natural England. It is necessary to assist applicants in addressing Policy EN9 and legislation at a local level.

Inspector's Question 5: [justification for payment to cover independent reviews]

What is the justification for requiring a payment to the Council to cover the cost of independent reviews of Biodiversity Gain Plans?

TWBC response to Question 5

Introduction

40. The implementation of Biodiversity Net Gain represents an additional burden to Local Planning Authorities (LPAs). A constant concern during development of the policy has been whether LPAs have the skills and capacity to undertake the work and the financial resources to do so.
41. The Government has acknowledged this new burden but, as yet, has not provided details of funding. Defra did announce a “*new funding pot of over £4 million to help Local Planning Authorities and other local authorities with planning oversight, to prepare for Biodiversity Net Gain*” on 11 January 2022 ([Protecting and enhancing the environment to be at the heart of new housing and infrastructure developments - GOV.UK \(www.gov.uk\)](#)) which amounted to £10k per LPA but this is to enable the LPAs to undertake preparatory work only and is a one-off payment.
42. The Local Government association have raised this matter again during the recent consultation on the secondary legislation for Biodiversity Net Gain and commented on 05 April 2022 that:

“The announcement of £4 million to support councils prepare for the go live date is welcome and this money is now with councils. We need clarity on new burdens funding and we stand ready to work with Defra to ensure that the resource implications are fully understood. Following this, an effective package of capacity building support must be put place. ([LGA response to Defra Consultation on biodiversity net gain regulations and implementation | Local Government Association](#))”

43. Councils may and commonly do seek financial contributions through SPDs and the Planning Practice Guidance notes this, but does state that “*they should not add unnecessarily to the financial burdens on development*” (Paragraph: 008 Reference ID: 61-008-20190315 Revision date: 15 03 2019). As biodiversity is required under this policy and is supported by legislation, and as we are in a biodiversity emergency, the requirements to fund independent reviews is seen as necessary. Furthermore, the process of ecological surveys and net gain calculations is a complex one that is subject to significant amount of professional judgement, and it is therefore of value to developers and individual applications that their submission can be independently and consistently verified so that the Council can attribute the appropriate weight to an agreed net gain figure.
44. The Council is in discussions with Kent Nature Partnership and other LPAs about a shared service to provide independent scrutiny of Biodiversity Gain Plans submitted in support of applications. Such a focussed service would provide a higher level of expertise and greater consistency across Kent in dealing with Biodiversity Gain Plans and the surveys and inputs used.
45. It is noted that the Council currently take a similar approach with Viability Studies in that the developer pays for an independent review by experienced consultants who specialise in this area of work. Such work is not required for all schemes but is necessary where it has a significant bearing on the outcome of an application or is likely to be contested.
46. In the light of the overall additional burden that Biodiversity Net Gain places on Councils, the lack of clarity on any future funding to address that burden and the complex and technical nature of Biodiversity Net gain calculations the Council do think that this is not an “*unnecessary*” financial burden on development as referred to in the Planning Practice Guidance above but is a necessary and justified one.