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FREETHS

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# OVERVIEW OF THE MANDATORY BIODIVERSITY NET GAIN LEGAL FRAMEWORK

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2 February 2024

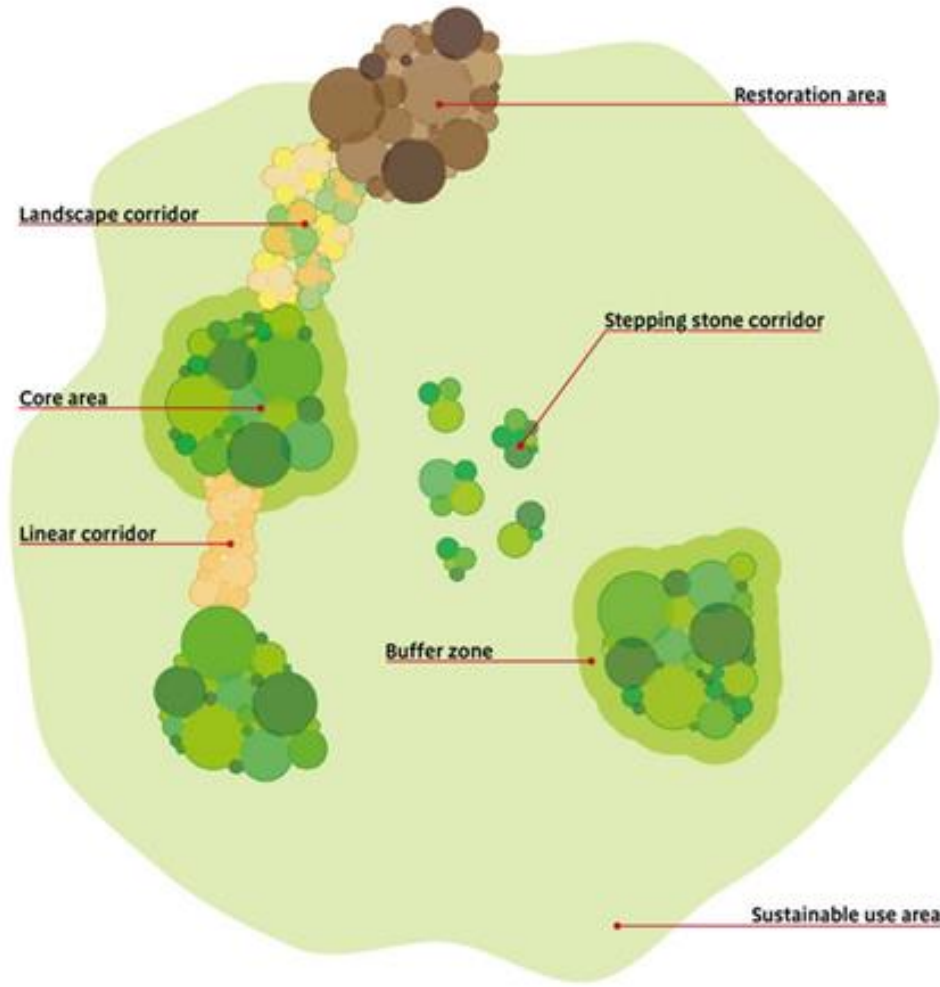
## Freeths LLP's Planning and Environment Team

- Planning lawyers
- Environmental lawyers
- Planning consultants
- Advocates
- Based in: London, Nottingham, Bristol, Sheffield, Leeds, Liverpool and Leicester

# The State of Nature in the UK

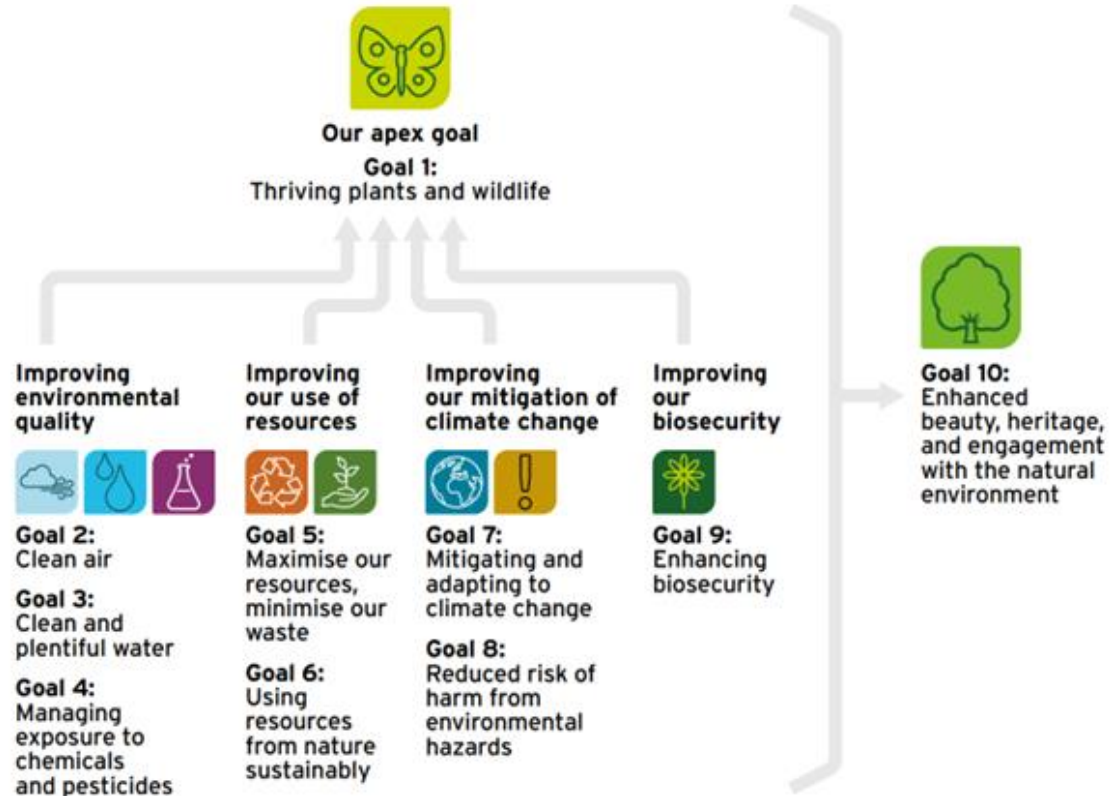
- UK one of the most nature-depleted countries in the world – only half of its entire biodiversity left, in bottom 10% of the world's countries for biodiversity
- 73 million fewer wild birds since 1970 (BTO, May 2023)
- Lost 97% of wildflower meadows in last 90 years
- 60% of species have declined, 31 declined seriously
- 90% of the UK's wetland habitats over the last 100 years





**“More, bigger,  
better and joined”**

# Environment Act 2021: EIP Apex Goal 1



- **Apex Goal: We will halt the decline in our biodiversity so we can achieve thriving plants and wildlife**
- Biodiversity on land: *“The target to halt the decline of species by 2030 is our apex target. To meet this, we must make good progress towards our other long-term environmental targets and commitments at home, such as our tree canopy and woodland cover target and water quality targets”*

What is biodiversity net gain?

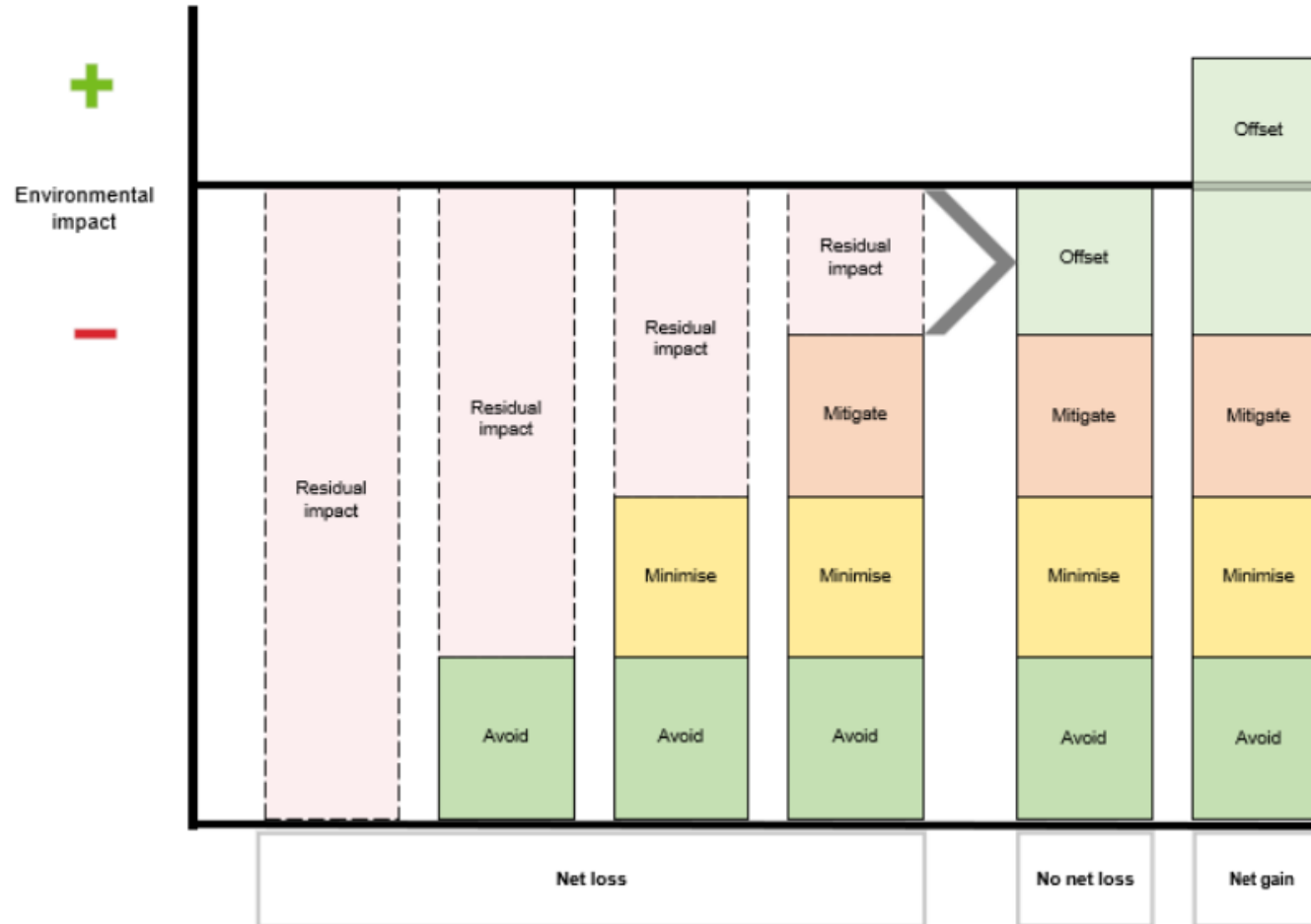
# What is BNG?

Berkeley Group

- The Green Quarter,  
West London



# What is BNG?



Adapted from BBOP's adaptation from Rio Tinto and government of Australia

Figure 2: The mitigation hierarchy and net gain

# Overview of mandatory biodiversity net gain

## Current position on biodiversity net gain

- No in-force legislation yet (start date: 12 February 2024)
- National policy (NPPF) promotes BNG (does not mandate it), e.g.
  - “Planning policies and decisions should contribute to and enhance the natural and local environment by... providing net gains for biodiversity...” (para 180(d))
  - “plans should ... identify and pursue opportunities for securing measurable net gains for biodiversity” (para 185(b))
- Local Plans often encourage BNG

## Mandatory BNG start dates

- Start dates for mandatory BNG:
  - 12 February 2024 (most Town and Country Planning Act 1990 development)
  - 2 April 2024 (“small sites” TCPA 1990)
  - November 2025 (nationally significant infrastructure projects)



## Key Mandatory BNG obligations on developers

- England only
- Developments must deliver mandatory “at least 10%” BNG
- Applies to planning determinations of applications made on or after the start date (i.e. after 12 February 2024)
  - Special rules for s73 permissions where application pre-dates 12 Feb 24.
- Not subject to Mandatory BNG:
  - Permissions granted before 12 February 2024
  - Permissions granted after 12 February 2024 where the application was made before 12 February 2024
  - Retrospective planning permissions made under section 73A and section 73 of TCPA.

## To what does it apply?

- Applies to all land development to low water mark (subject to exemptions)
- Does include:
  - brownfield development
  - change of use applications
  - temporary permissions
  - “small site developments” (from 2 April 2024). A “small site” means:
    - Residential development where the number of dwellings is between 1 and 9, or if this is unknown, the site area is less than 0.5ha
    - Commercial development where floor space created is less than 1,000 sqm or total site area is less than 1ha
    - Development that is not the winning and working of minerals or the use of land for mineral-working deposits
    - Development that is not waste development

## Exemptions

- Does not include the following as falling outside the regime:
  - Planning permission granted through a development order, i.e. permitted development
  - Marine development
  - Reserved matters applications (as these are not a “grant of planning permission”)
  - Permissions in principle (but technical details consents *are* caught by the regime)
  - Urgent Crown development
- Does not include the following due to the operation of the Statutory Metric (29 November 2023):
  - Where a site’s baseline biodiversity score is zero (e.g. hardstanding, sealed surfaces)
  - Where temporary impacts will be restored within two years

## Exemptions

- Does not include the following due to statutory exemptions under the Biodiversity Gain Requirements (Exemptions) Regulations 2024:
  - “De minimis” onsite habitat area i.e. where (i) no onsite “priority habitat” is impacted; and (ii) onsite area is <25m<sup>2</sup> with a biodiversity value of >0 OR <5m length (onsite linear habitat i.e. watercourse or hedgerow)
  - Householder applications (extensions / gardens)
  - Biodiversity gain sites (i.e. development solely or mainly to help another developer meet Mandatory BNG)
  - Small scale self-build and custom housebuilding where no more than 9 dwellings on plot of no more than 0.5ha (“self-build and custom housebuilding” is where individuals design and build their own homes)
  - Part of / ancillary to the high speed rail transport network (ie HS2)

## Yet to come...

- Draft Planning Practice Guidance: Mandatory BNG *“has not been commenced yet for planning permissions which have been granted through other routes to permissions.”* These include:
  - Local development orders
  - Neighbourhood development orders
  - Successful enforcement appeals
  - Deemed planning permission

## Key to Mandatory BNG: new general planning condition

- New statutory “general planning condition” inserted into the T&CPA 1990
  - Summary: No commencement of development until a “Biodiversity Gain Plan” has been submitted to and approved by the LPA
- Applies to every planning permission *granted*
- So if no *grant* of planning permission Mandatory BNG is not relevant
- Condition cannot be removed, modified or disapplied
- Note: Condition not requiring implementation of the Biodiversity Gain Plan

# Biodiversity Gain Plan

## Biodiversity Gain Plan

- Developer must deliver a “Biodiversity Gain Plan”
- Plan must show biodiversity gain of “at least 10%” between:
  1. “pre-development biodiversity value of onsite habitats”; and
  2. “biodiversity value attributable to the development”
- Development cannot commence until LPA has approved the Biodiversity Gain Plan
- Biodiversity gain plan must be submitted after planning permission has been granted

## Biodiversity Gain Plan

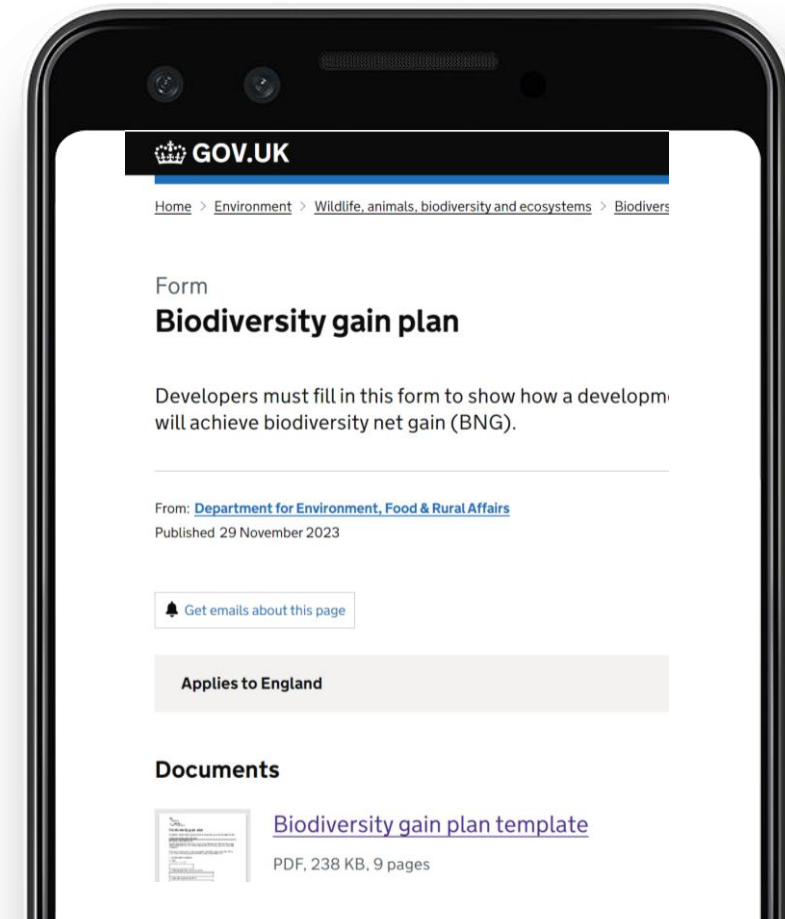
- At least 10% gain
- To be measured in “biodiversity units” ...
- NE Statutory Metric or “small sites” metric
- The Metric uses habitats as a proxy i.e. does not address:
  - Species
  - Protected sites
  - Indirect impacts
  - Cumulative / in combination impacts

## Developer's Biodiversity Gain Plan content

- Different requirements for phased and non-phased developments.
- In general, Biodiversity Gain Plan must include the following matters:
  - information about the steps taken or to be taken to minimise the adverse effect of the development on the biodiversity of the on-site habitat and any other habitat;
  - the pre-development biodiversity value of the on-site habitat;
  - any on-site irreplaceable habitat;
  - the post-development biodiversity value of the on-site habitat;
  - any registered off-site biodiversity gain allocated to the development and the biodiversity;
  - value of that gain in relation to the development; and
  - any biodiversity credits purchased for the development
- Once submitted it cannot be amended.

## The biodiversity gain plan: template and guidance

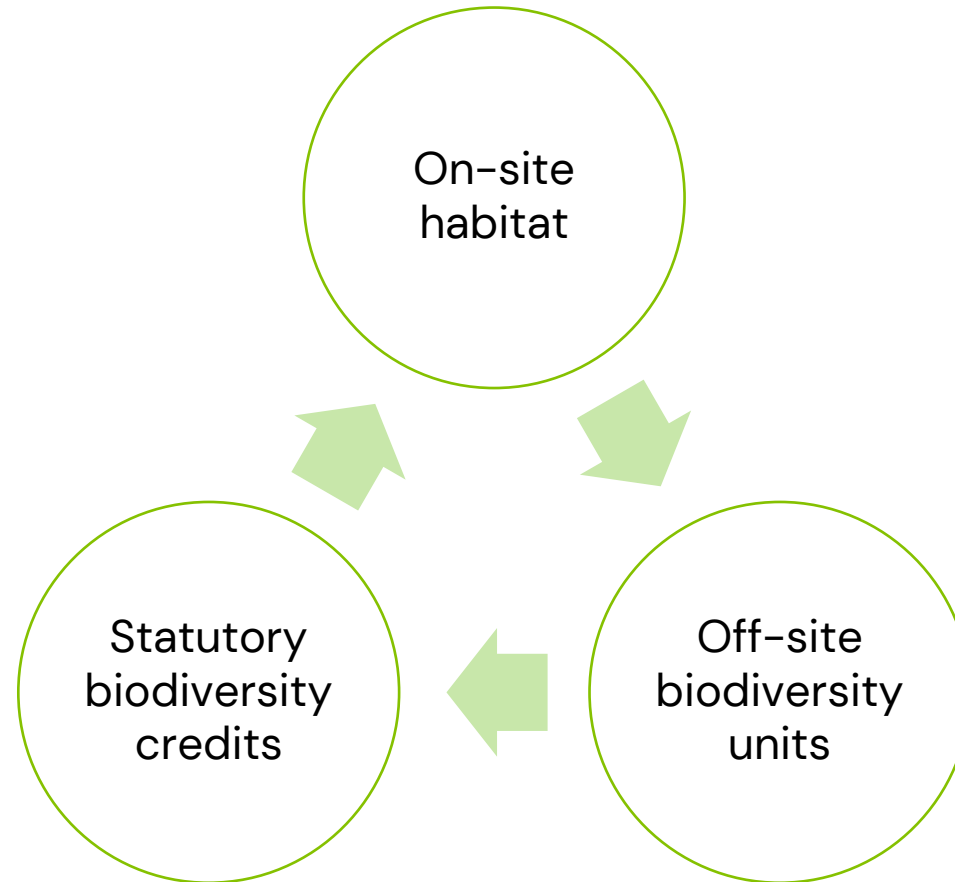
- The Defra guidance note [Submit a biodiversity gain plan – GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/submit-a-biodiversity-gain-plan) provides a template biodiversity gain plan which developers can use.



## LPAs approving a developer's Biodiversity Gain Plan

- LPAs must approve a Biodiversity Gain Plan if they are satisfied that:
  - the pre-development biodiversity value of the onsite habitat is as specified in the plan;
  - the post-development biodiversity value of the onsite habitat is at least the value specified in the plan;
  - the registered offsite biodiversity gain allocated to the development has the biodiversity value specified in the plan in relation to the development;
  - any biodiversity credits specified in the plan as purchased for the development have been so purchased; and
  - the biodiversity net gain objective is met.

- The “biodiversity value attributable to the development” is comprised of:



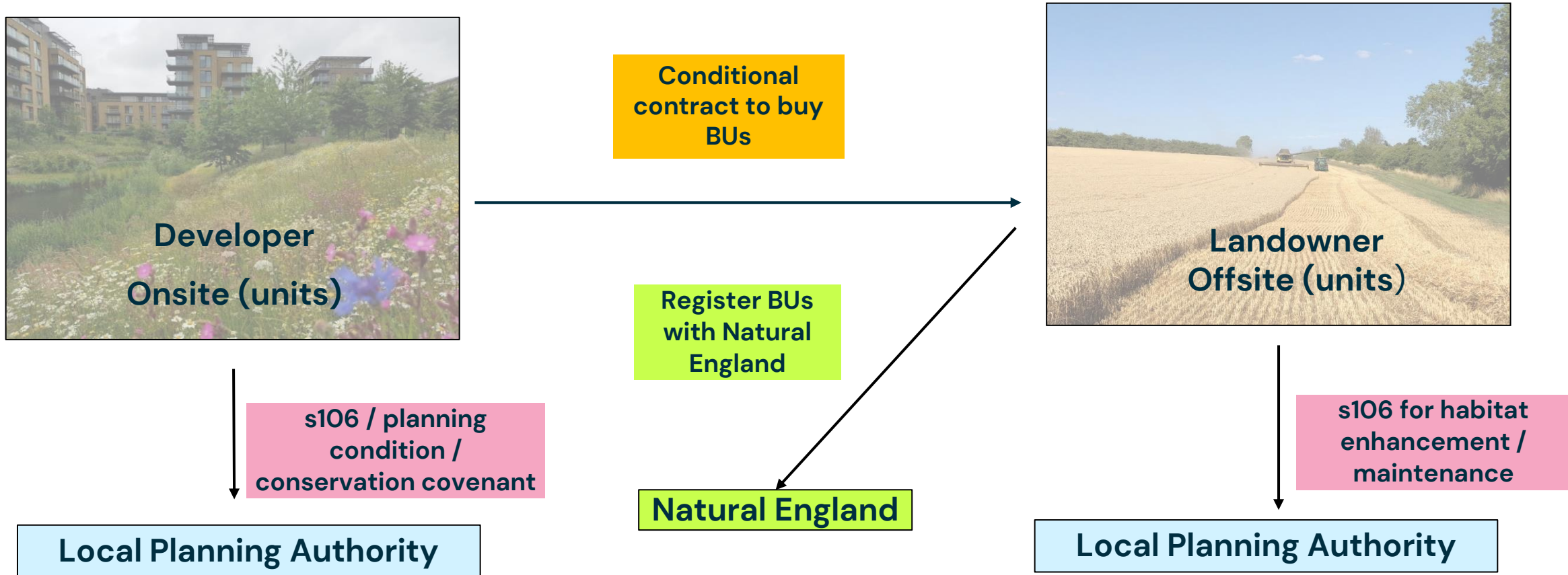
## On-site habitat

- “Significant” on-site habitat must be legally secured.
- Legal security through:
  - Planning condition; or
  - Planning obligation between LPA and landowner of onsite habitat; or
  - Conservation covenant between responsible body and landowner of onsite habitat

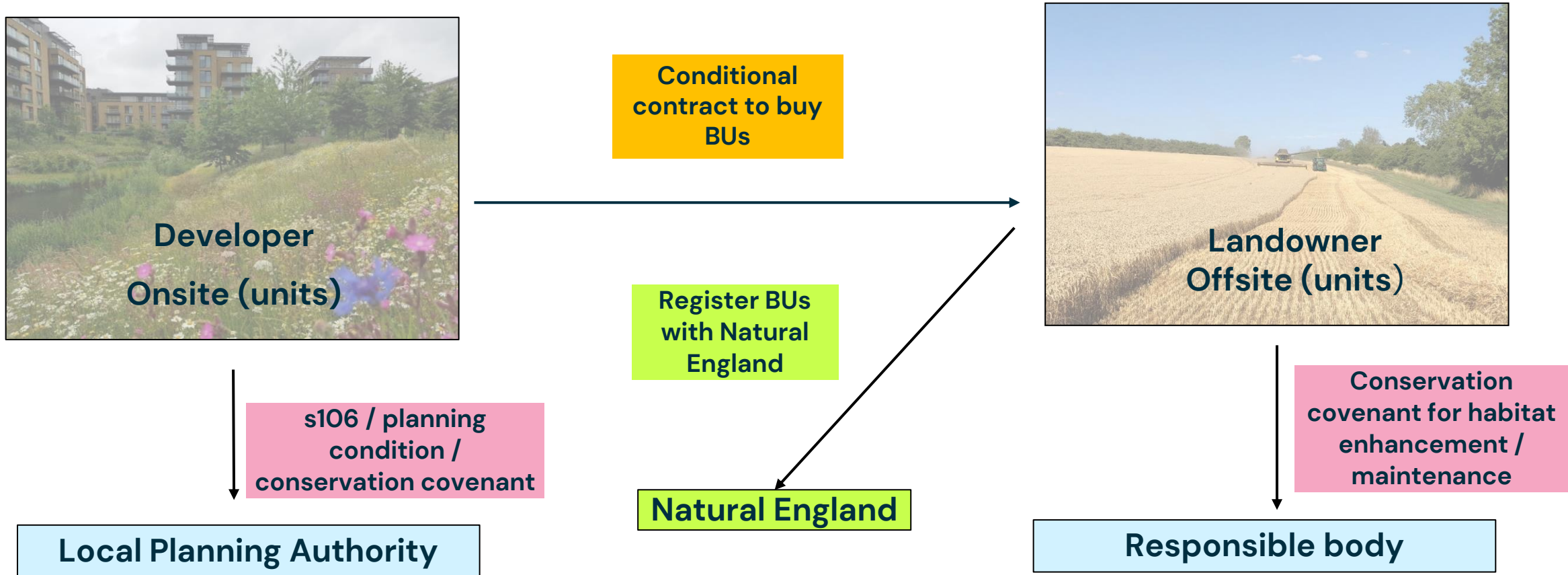
## Off-site biodiversity units

- Must be legally secured through:
  - Planning obligation (s.106 agreement); or
  - Conservation covenant (with a responsible body).
- Once legally secured (and registered as a local land charge) it must be registered on the Biodiversity Gain Site Register administered by Natural England.
- Developers can only rely on registered off-site biodiversity units.

# Offsite biodiversity units via s106 obligation



# Offsite biodiversity units via conservation covenant



## Statutory biodiversity credits

- Government scheme – published July 2023:
  - indicative price (excluding VAT) of credits which will be confirmed once BNG becomes mandatory
  - on-line sales platform
- Income used by Government to carry out enhancement works or to buy land to enhance
- Expensive as a disincentive
- Non-transferable
- Likely to be phased out
- The “go to” solution for developers at the start of the regime?

## Statutory biodiversity credits prices (July 2023)

Habitat Type	Minimum Price per Credit	Maximum Price per Credit
Low distinctiveness	–	£42,000
Medium distinctiveness	£42,000	£125,000
High distinctiveness	£42,000	£650,000
Hedgerow	–	£44,000
Watercourses	–	£230,000

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Thank you

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