



# Habitat Bank

## PAS Biodiversity Net Gain (BNG)

### Legal Agreement Template Version ~~1.0~~2.0

The Planning Advisory Service (PAS) commissioned Dentons to create a suite of sample agreement templates to facilitate securing biodiversity gains in the various ways allowed for by the Environment Act.

This template is provided for council legal teams to modify according to their council's standards and the specific requirements of individual developments.

This template is aimed at providing a streamlined approach, enhancing the efficiency in drafting agreements, and benefitting all stakeholders involved.

#### **Important Notes:**

- This document is a template and serves as an initial guide or heads of terms.
- This template requires judgement and does not constitute legal advice. It is essential to consult with your legal teams to review and modify the content.
- Local Planning Authorities (LPAs) and other parties to the agreement should collaborate with their legal teams to modify the template as needed for each specific development.

This template includes drafting notes to explain options of drafting and usage.

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Check for updates to this template on the PAS website	

# Agreement under Section 106 of the Town and Country Planning Act 1990 and Other Powers

relating to biodiversity net gain on part of the land known as [\*\* ]

**[Purpose:** securing BNG as a Habitat Bank that can be Allocated to multiple developments to fulfil a requirement to create or enhance biodiversity under Schedule 7A of the Town and Country Planning Act 1990]

## Dated

[\*\* ]  
(the Council)

[\*\* ]  
(the Gain Site Operator)

[\*\* ]  
(the Freehold Owner)]

[\*\* ]  
(the Mortgagee)]

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#### **DRAFTING NOTES**

**Scope:** This template is a Section 106 agreement to secure biodiversity units in a way that is compatible with Registration on the Biodiversity Gain Site Register. It does not rely on powers for non-LPA functions or non-LPA bodies. Such powers are available but need to be used with reference to their limitations: e.g. S.33 Local Government (Miscellaneous Provisions) Act 1982 is only applicable where the agreement is neither facilitating nor connected to the development of the land.

**Bond:** Security for BNG maintenance obligations is not a statutory requirement. This template includes this optional wording to assist where it has been agreed with the ~~owner~~ Gain Site Operator or Freehold Owner that it is necessary.

**Statement of Achievability:** There is no statutory requirement for a Gain Site Operator to provide a statement of achievability to the local authority. Local authorities will need to determine at the time this obligation is entered into that the habitat creation and enhancement works are capable of being carried out and maintained for the 30-year period. A Statement of Achievability is included as one way to assist the authority in confirming this via a suitably qualified ecologist.

**Force Majeure:** This template does not contain provisions in respect of force majeure events (acts of god). The Habitat Management and Monitoring Plan appended to this deed can set out what should be done in case the Gain Site Operator is in breach of this obligation due to circumstances outside of its control. Be aware there is a defence to breach of obligation for conservation covenants in section 126 of the Environment Act 2021 which does not apply to the obligations of this deed. Local Authorities may wish to include defences to breach of obligations pursuant to this deed and this optional wording is included in Clause 14.

**Freehold Owner:** This template is drafted on the basis that the Gain Site Operator is the Freehold Owner of the Biodiversity Gain Land. If the Gain Site Operator does not have a freehold interest, local authorities may want to consider adding the Freehold Owner as a party to the agreement to ensure the covenants will bind the freeholder if the leasehold is surrendered. In this scenario local authorities may also want to consider the length of the Gain Site Operator's leasehold interest. For example, does the Gain Site Operator have a sufficiently long lease to maintain the habitat creation and enhancement works for 30 years after they are completed?

This template therefore:

- includes drafting notes to accommodate a Freehold Owner as party; and
- assumes that the Gain Site Operator has a sufficiently long lease over the Biodiversity Gain Land to carry out the obligations.

**Mortgagee:** Reflecting general practice for S106 obligations, this template provides for acknowledgement that any mortgagee will be bound by the obligations should (and only if) it takes possession of the Biodiversity Gain Land.

# Agreement

## Dated

## Between

- (1) [\*\* ] of [\*\* ] (the **Council**); and
- (2) [\*\* ] (company registration number [\*\* ]) whose registered office is situated at [\*\* ] (the **Gain Site Operator**); [and
- (3) [\*\* ] (company registration number [\*\* ]) whose registered office is situated at [\*\* ] (the **Freehold Owner**)];

**Freehold Owner Drafting Note:** If including a Freehold Owner, include this text.

- (4) [\*\* ] (company registration number [\*\* ]) whose registered office is situated at [\*\* ] (the **Mortgagee**).

**Mortgagee Drafting Note:** If including a Mortgagee, include this text.

## Introduction

- A The Council is the Local Planning Authority for the purposes of the 1990 Act for the area in which the Biodiversity Gain Land is situated;
- B The Gain Site Operator is the registered freehold owner of the Biodiversity Gain Land, which is registered at the Land Registry under title number [\*\*];

**Freehold Owner Drafting Note:** If the Gain Site Operator is the freehold owner, use recital B and delete recitals C to E (inclusive).

If including a Freehold Owner, delete recital B and include recitals C to E (inclusive).

- C [The Gain Site Operator is the registered leasehold owner of the Biodiversity Gain Land which is registered at the Land Registry under title number [\*\*];
- D The Freehold Owner is the registered freehold owner of the Biodiversity Gain Land which is registered at the Land Registry under title number [\*\*];
- E The Freehold Owner is bound by this Deed subject to Clauses 13 and 14;]
- F [The Mortgagee is the beneficiary of a charge dated [\*\* ] in respect of the [freehold/ leasehold] title registered at the Land Registry under title number [\*\*];]

**Mortgagee Drafting Note:** If including a Mortgagee, include recital F.

- G This Deed is entered into to ensure that the Biodiversity Gain Land provides a Biodiversity Net Gain to satisfy the requirements of Schedule 7A of the 1990 Act.

It is agreed as follows:

## 1 Definitions and Interpretation

1.1 For the purposes of this Deed the following expressions shall have the following meanings unless the context requires otherwise:

**1990 Act** means the Town and Country Planning Act 1990 (as amended).

**[Acceptable Surety** means:

- (a) a bank or financial institution that has a rating for its long-term debt obligations of B or higher by S&P Global Ratings or B or higher by Moody's Investors Services (or in each case any successor to their respective rating business) or a comparable rating from an internationally recognised credit rating agency; or
- (b) any other bank or financial institution of good commercial standing, acceptable to the Council.]

**Bond Drafting Note:** If no bond is agreed, delete the definition of Acceptable Surety.

**Agreement Expiry Date** means a date which is the expiration of the period of 30 years following the Completion Date.

**Allocation** means attributing any BNG Capacity, whether in respect of Biodiversity Units or Biodiversity Gain Land, by the Gain Site Operator toward a development's requirement to deliver biodiversity (and **Allocate** and **Allocated** and **Allocations** shall be construed accordingly).

**Area Habitat Units** means ~~[\*\* ]~~ **Land** means the area in hectares specified in the HMMP which would generate BNG, as measured in area habitat units as measures by the Biodiversity Metric comprising of, following the implementation and carrying out of the HMMP and maintenance of the relevant Habitat Creation and Enhancement Works in accordance with the HMMP.

~~[area in hectares ] hectares of [habitat type ] in [condition status ] condition; and~~

~~[area in hectares ] hectares of [habitat type ] in [condition status ] condition.~~

**Drafting Note:** *Example* The HMMP will specify the Habitat Creation and Enhancement Works which, when carried out and maintained pursuant to the HMMP, will deliver a specified amount (in hectares) of a particular habitat type to a specified condition such as: "0.5 hectares of heathland and shrub- mixed scrub in moderate condition"

~~The HMMP will deliver at least one biodiversity unit type (Area Habitat units, Hedgerow Units, or Watercourse Units). If no Area Habitat Units will be provided this definition can be deleted.~~

If no area habitat will be created or enhanced, this definition can be deleted.

**Biodiversity Gain Land** means land shown edged [red] on Plan 1.

**Biodiversity Gain Land Monitoring Contribution** means the sum of £[\*\* ] ([number to be written out ]) Index Linked to be paid by the Gain Site Operator to the Council under paragraph 5 of Schedule 2 of this Deed to be applied by the Council as a financial

contribution towards the Council's costs of monitoring compliance with the Gain Site Operator's obligations under this Deed for the purpose of achieving the Biodiversity Net Gain as specified in the Habitat Management and Monitoring Plan.

**Drafting Note:** [This could be a single lump sum, an annual payment, or some other sum, where justified. Please review the drafting for the payment of the Biodiversity Gain Land Monitoring Contribution and consider whether this definition needs to be amended and whether the contribution needs to be Index Linked.](#)

**Biodiversity Gain Site Register** means the statutory biodiversity gain site register created under regulation 3 of the Biodiversity Gain Site Register Regulations 2024 or any other equivalent regulations.

**Biodiversity Metric** means the statutory biodiversity accounting tool published by DEFRA or Natural England from time to time that can be used to measure the biodiversity value or relative biodiversity value of habitat or habitat enhancement for the purposes of biodiversity net gain.

**Biodiversity Net Gain** or **BNG** means an increase in Biodiversity Units resulting from implementing [and carrying out](#) the Habitat Management and Monitoring Plan (as measured using the Biodiversity Metric) that can be Allocated to the development to fulfil its requirement to create or enhance biodiversity under Schedule 7A of the 1990 Act.

**Biodiversity Unit(s)** means the quantum of biodiversity as measured by the Biodiversity Metric.

**BNG Capacity** means the total Biodiversity ~~Units offering~~ [Net Gain to be generated on the Biodiversity Gain Land](#) comprising of [the](#):

- (a) [Area Habitat ~~Units~~[Land](#);
- (b) Hedgerow ~~Units~~[Length](#); and
- (c) Watercourse ~~Units~~[Length](#)],

**Drafting Note:** The HMMP will deliver at least one ~~biodiversity unit type (Area Habitat Units, Hedgerow Units, and Watercourse Units)~~ [habitat type that will fall into one of the following three categories of the Biodiversity Metric: area habitat units, hedgerow units, and watercourse units](#). Delete any ~~unit~~ [habitat](#) types from this definition which will not be provided.

resulting from the implementation [and carrying out](#) of the Habitat Management and Monitoring Plan on the Biodiversity Gain Land [and which the Statement of Achievability confirms is achievable on the Biodiversity Gain Land].

**Drafting Note:** If no Statement of Achievability is sought, delete this from the definition of BNG Capacity.

**[Bond** means any of the following (alone or in combination):

- (a) a standby letter of credit (or equivalent or replacement form of security or guarantee);
- (b) a bond,

in either case from an Acceptable Surety in favour of the Council [and/ or the Freehold Owner] for the Bond Sum for the Covenant Period or until termination of this Deed.]

**Bond & Freeholder Drafting Note:** If no bond is sought, delete the definition of Bond. If no Freeholder Owner will be party to the agreement, delete accordingly.

**[Bond Sum** means the sum of £[\*\* ] decreasing each year in accordance with the Reduction Schedule as the relevant Biodiversity Gain Land Monitoring Contributions are paid [and actions required under the Habitat Management and Monitoring Plan are delivered.]

**Bond Drafting Note:** If no bond is sought, delete the definition of Bond Sum.

**Breach Notice** means a notice which may be served by the Council on the Gain Site Operator under paragraph 6 of Schedule 2 of this Deed.

**Certificate of Completion** means a written certificate of completion confirming that the Habitat Creation and Enhancement Works have been completed to the reasonable satisfaction of the Council on the Completion Date issued (or deemed to have been issued) by the Council under paragraph 1.1(b)(i) of Schedule 3.

**Commencement Date** means the date upon which the Habitat Creation and Enhancement Works have commenced.

**Completion Date** means the date specified in the Certificate of Completion as the date the Habitat Creation and Enhancement Works were completed.

**Drafting Note:** Different works are required to create and enhance each habitat type. It is not guaranteed that all works needed to create and enhance all habitats will be completed at the same time. This agreement is drafted on the basis that 30-year maintenance period does not begin until all habitat creation and enhancement (across all habitat types) have been completed.

Local authorities should examine the Habitat Management and Monitoring Plan to ensure that it is clear what actions/works are needed to be complete the Habitat Creation and Enhancement Works in respect of each habitat type.

The Habitat Creation and Enhancement Works within the Habitat Management and Monitoring Plan may be delivered in phases. Local authorities should consider if the phasing requires this agreement to have a completion date for each phase of the Habitat Creation and Enhancement Works.

**Completion Date Notice** means written notice from the Gain Site Operator to the Council of the proposed Completion Date of the Habitat Creation and Enhancement Works served in accordance with paragraph 1.1(d) of Schedule 2.

**Covenant Period:** 30 years from and including the Completion Date.

**Bond Drafting Note:** If no bond is sought, delete the definition of Covenant Period.

**Deed:** this agreement.

**[Default Interest Rate:** [\*\* ]% per annum above the basic lending rate of the Council's bank.]

**Drafting Note:** This definition should reflect the Council's general approach to default interest.

**DEFRA** means the public body known as the Department for Environment, Food & Rural Affairs or any successor body which acts as the Government's advisor for the natural environment, food or rural affairs in England.

**[Ecology Competence Criteria** means:

- (a) membership of the Chartered Institute of Ecology and Environmental Management and its associated professional code; and
- (b) a minimum of three years relevant experience.]

**Drafting Note:** If no Statement of Achievability is sought, delete this definition.

**Expert** has the meaning given by Clause 9 of this Deed.

**Habitat Creation and Enhancement Works** means the habitat creation and enhancement works set out in the Habitat Management and Monitoring Plan (excluding any management or monitoring activities specified in the Habitat Management and Monitoring Plan).

**Drafting Note:** Local authorities will want to review the Habitat Management and Monitoring Plan so that it is clear what actions in respect of each habitat type will constitute the works to create and enhance habitat. The habitat management and monitoring plan will also set out the actions needed to maintain the habitat for 30 years so these maintenance activities need to be distinguishable from the activities needed to create or enhance the habitat.

**Habitat Management and Monitoring Plan** or **HMMP** means the approved document titled 'Habitat Management and Monitoring Plan' at Schedule 4 which contains written narrative and spatial mapping details for Biodiversity Net Gain on the Biodiversity Gain Land (and any modification to it under Clause 3.5).

**Hedgerow Length** means the length in kilometres specified in the HMMP which would generate BNG, as measured in hedgerow units by the Biodiversity Metric, following the implementation and carrying out of the HMMP and maintenance of the relevant Habitat Creation and Enhancement Works in accordance with the HMMP.

~~**Hedgerow Units** means [\*\* ] hedgerow units as measures by the Biodiversity Metric comprising of:~~

~~[length in kilometres ] kilometres of [hedgerow type ] in [condition status ] condition; and~~

~~[length in kilometres ] kilometres of [hedgerow type ] in [condition status ] condition.~~

**Drafting Note:** Example: "1.01 kilometres of Native Hedgerow in moderate condition"

~~The HMMP may deliver at least one biodiversity unit type (Area Habitat units, Hedgerow, or Watercourse Units). If no Hedgerow Units will be provided, then this definition can be deleted.~~

**Drafting Note:** The HMMP will specify Habitat Creation and Enhancement Works which, when carried out and maintained pursuant to the HMMP, will deliver specified amount of a particular hedgerow type to a specified condition such as: "1.01 kilometres of Native Hedgerow in moderate condition"

If no hedgerow will be created or enhanced, this definition can be deleted.

**Index** means the [\*\* ] Index published by the [\*\* ] (or any successor government body minister or department).

**Drafting Note:** This definition should reflect the Council's general approach to indexation.

**Index Linked** means all payments expressed in this Deed are to be increased from the date of this Deed to the date of payment by reference to the Index applying the following formula:

D = A x B/C where:

A = the sum stated to be payable in this Deed;

B = the last Index figure published prior to the payment date;

C = the last Index figure last published prior to the [date]; and

D = the sum payable to the Council.

**Drafting Note:** This definition should reflect the Council's general approach to indexation.

**Insolvency Event** means, in respect of the Gain Site Operator:

- (a) a winding up order is made by the Court;
- (b) an administrator is appointed under the provisions of Schedule B1 of the Insolvency Act 1986;
- (c) a receiver, liquidator, provisional liquidator, administrative receiver is appointed in respect of it, or any of its assets;
- (d) a resolution is passed for its winding up, liquidation or reorganisation (save for the purposes of a solvent reorganisation);
- (e) an order is made for a moratorium under Part A1 and Schedule ZA1 of the Insolvency Act 1986; or
- (f) a bankruptcy order is obtained against an individual under part IX of the Insolvency Act 1986.

**Interest** means Interest at a rate of 4% above the base rate of the Bank of England from time to time.

**Drafting Note:** This definition should reflect the Council's general approach to interest.

**[Modification Notice** means a notice given to the Council:

- (a) identifying land which at the date of the notice:
  - (i) forms part of the Biodiversity Gain Land;
  - (ii) has not been Allocated; and
  - (iii) which is proposed to be removed from the Biodiversity Gain Land;
- (b) signed by all parties liable under Clause 4 at the date of the notice;
- (c) providing a certificate by a registered conveyancer that the information provided in respect of (a) is correct at the date of the notice;
- (d) including a draft:

- (i) modified Habitat Management and Monitoring Plan to reflect the area to be removed; and
  - (ii) application to amend the Registration so it accurately reflects the consequences of such a modification;
- and
- (e) requesting the Council's confirmation that the notice is valid.]

**Modification Notice Drafting Note:** This is optional, see clause 3.5 and 3.6. If no modification notice mechanism is sought, delete this definition.

**Monitoring Report** means the monitoring reports to be issued to the Council as specified in the Habitat Management and Monitoring Plan.

**Natural England** means the public body known as Natural England or any successor body which acts as the Government's advisor for the natural environment in England.

**Gain Site Operator's Obligations** means the obligations given to the Council by the Gain Site Operator as set out in Schedule 2.

**Parties** means (collectively) the Council, Gain Site Operator[, Freehold Owner, and Mortgagee] and **Party** shall refer to any of them as the context requires.

**Freehold Owner & Mortgagee Drafting Note:** Delete text in square bracket to reflect the parties to this agreement.

**Plan 1** means the plan marked "Plan 1" at Schedule 1 (including any modification of it under Clause 3.5)

**[Reduction Schedule** means the reduction schedule at Schedule 5, which sets out how the Bond Sum shall be reduced each year during the Covenant Period.]

**Bond Drafting Note:** If no bond is sought, the definition of Reduction Schedule can be deleted.

**Register** means act of applying for Registration on the Biodiversity Gain Site Register.

**Registration** means the record on the Biodiversity Gain Site Register of the Biodiversity Gain Land, the BNG Capacity, the Remaining BNG Capacity, and any Allocations.

**[Relevant Event** means any of the following events:

- (a) a change in the law and/or national policy; or
- (b) a decision of a Court, tribunal, Secretary of state or other decision maker with competence,

that results in Biodiversity Net Gain not being required by law or the Biodiversity Gain Land ~~the subject of this Deed~~ no longer being considered to be an effective form of Biodiversity Net Gain.]

**Bond Drafting Note:** If no bond is sought, the definition of Relevant Event can be deleted.

**Remaining BNG Capacity** means the available BNG Capacity on the Biodiversity Gain Site Register which can be Allocated to a development

**[Statement of Achievability** means a statement prepared and signed by a person that meets the Ecology Competence Criteria confirming the BNG Capacity is achievable through the Habitat Management and Monitoring Plan on Biodiversity Gain Land and annexed to this Deed at Schedule 6.]

**Drafting Note:** If no Statement of Achievability is sought, this definition can be deleted.

**Variation Event** means any of the following events that would have a material impact on the ~~calculation~~delivery of any ~~un-Allocated~~ Biodiversity Net Gain in respect of any Remaining BNG Capacity:

- (a) a change in Natural England's guidance or policies;
- (b) a change in scientific opinion based on evidence;
- (c) a change in industry practices or in the generally accepted calculation methods for the type or extent of land required to achieve Biodiversity Net Gain;
- (d) the Biodiversity Metric is amended, updated, or replaced by Natural England and/or DEFRA;
- (e) the Biodiversity Gain Land becomes designated under law or is otherwise encumbered by any right which would be incompatible with the Biodiversity Net Gain or any existing Allocation; or
- (f) such other event as may be agreed between the Parties as constituting a Variation Event.

**Drafting Note:** It is not mandatory to require the recalculation of biodiversity secured under this agreement. This template includes a mandatory re-calculation of any Remaining BNG Capacity upon a Variation Event to ensure that no BNG Capacity is allocated on an outdated practice, methodology, or law. Limb (e) is an unusual Variation Event but is intended to cover events such as the designation of the Biodiversity Gain Land as a new town or village green or the designation of a new public right of way.

**Watercourse Length** means the length in kilometres specified in the HMMP which would generate BNG, as measured in watercourse units by the Biodiversity Metric, following the implementation and carrying out of the HMMP and maintenance of the relevant Habitat Creation and Enhancement Works in accordance with the HMMP.

**Drafting Note:** The HMMP will specify the Habitat Creation and Enhancement Works which, when carried out and maintained pursuant to the HMMP, will deliver a specified amount of a particular watercourse type to a specified condition such as: *Example: "1.01 kilometres of canal in moderate condition"*

If no watercourses will be created or enhanced, then this definition can be deleted.

~~**Watercourse Units** means <sup>\*\*</sup> [ ] area habitat units as measures by the Biodiversity Metric comprising of:~~

~~[length in kilometres ] kilometres of [watercourse type ] in [condition status ] condition; and~~

~~[length in kilometres] kilometres of [hedgerow type] in [condition status] condition.~~

**Drafting Note:** Example: "1.01 kilometres of canal in moderate condition"

The HMMP may deliver at least one biodiversity unit type (Area Habitat units, Hedgerow, or Watercourse Units). If no Watercourse Units will be provided, then this definition can be deleted.

**Working Day** means Monday to Friday inclusive excluding Bank or public holidays.

- 1.2 Clause headings do not affect the interpretation of this Deed.
  - 1.3 A **person** includes a natural person, corporate or unincorporated body (whether or not having separate legal personality).
  - 1.4 A reference to a **company** includes any company, corporation or other body corporate, wherever and however incorporated or established.
  - 1.5 Unless the context otherwise requires, words in the singular include the plural and in the plural shall include the singular.
  - 1.6 Unless the context otherwise requires, a reference to one gender includes a reference to the other genders.
  - 1.7 A reference to the [Gain Site Operator [or the Freehold Owner]] includes those deriving title through or under it. A reference to the Council includes any successors to its statutory functions.
- Freehold Owner Drafting Note:** If including a Freehold Owner, include this text.
- 1.8 Unless the context otherwise requires, a reference to a statute or statutory provision is a reference to it as amended, extended or re-enacted from time to time.
  - 1.9 Unless the context otherwise requires, a reference to a statute or statutory provision does include any subordinate legislation made from time to time under that statute or statutory provision.
  - 1.10 A reference to **writing** or **written** excludes faxes and e-mail.
  - 1.11 A reference to **this Deed** or to any other deed or document referred to in this Deed is a reference to this Deed or such other deed or document as varied or novated (in each case, other than in breach of the provisions of this deed) from time to time.
  - 1.12 References to Clauses and Schedules are to the Clauses and Schedules of this Deed.
  - 1.13 An obligation on a Party not to do something includes an obligation not to allow that thing to be done.
  - 1.14 Any words following the terms **including, include, in particular, for example** or any similar expression shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or term preceding those terms.
  - 1.15 Where an obligation falls to be performed by more than one person, the obligation can be enforced against every person so bound jointly and against each of them individually.

## 2 Legal Basis

- 2.1 This Deed is made under Section 106 of the Act, Section 111 of the Local Government Act 1972 and Section 1 of the Localism Act 2011 with intent that it creates planning obligations binding the Gain Site Operator's [and the Freeholder Owner's] interest[s] in the Biodiversity Gain Land.

**Freehold Owner Drafting Note:** If including a Freehold Owner, include this text in square brackets.

- 2.2 The obligations, restrictions and covenants in Clause 4 are planning obligations for the purposes of Section 106 of the Act enforceable by the Council as local planning authority.
- 2.3 No person shall be liable for any breach of any provisions of this Deed after it shall have parted with its entire interest in the Biodiversity Gain Land or the part of the Biodiversity Gain Land in relation to which the breach relates but without prejudice to its liability for any subsisting breach arising prior to parting with such interest and for the purposes of this clause a person parts with an interest in the Biodiversity Gain Land notwithstanding the retention of easements or the benefit of covenants, restrictions or reservations which shall not constitute an interest for the purposes of this clause.

## 3 Conditionality and Termination

- 3.1 This Deed is effective on the date it is dated.
- 3.2 This Deed shall terminate on the Agreement Expiry Date, where the Gain Site Operator [or the Freeholder] [is/are] are not in material and continuing breach of [its/their] obligations at that date.

**Freehold Owner Drafting Note:** If including a Freehold Owner, include this text in square brackets.

- 3.3 Where a Relevant Event occurs, the obligations in Clause 4 shall not apply in relation to any Biodiversity Gain Land which has not been Allocated at the date of the Relevant Event.

**Drafting Note:** This clause and the definition of Relevant Event are intended to capture a situation where biodiversity net gain as a legal requirement has been revoked or the law has changed in a way to make this Deed non-compliant to Allocate BNG Capacity under the new regime. In this situation, any biodiversity already Allocated on the Biodiversity Gain Site Register would continue to be governed by the provisions of this Deed and any unallocated BNG Capacity would need to be secured under a new (compliant) legal agreement for it to be Allocated.

- 3.4 The termination of this Deed under clause 3.2 shall not affect any accrued rights and liabilities or any rights or remedies of the parties for breach, non-observance of non-performance of the obligations under this Deed.
- 3.5 [Plan 1 shall be modified (and the modified version noted on this Deed by way of memorandum) where the Council agrees (or the Expert determines) that the relevant Modification Notice is valid.
- 3.6 A Modification Notice may only be served in respect of the Biodiversity Gain Land where:
- (a) no Allocations have been made at the date of the notice; or
  - (b) at the date of the notice no land which is sought to be removed from the Biodiversity Gain Land; and

- (c) no previous Modification Notices are awaiting confirmation or determination of their validity.]

**Drafting Note:** This clause is optional, for use where it is considered appropriate by the parties. It would allow the Gain Site Operator to modify or release part of the Biodiversity Gain Land from this agreement but only where the land to be released has not been Allocated on the Biodiversity Gain Site Register.

#### **4 The Gain Site Operator's Covenants**

The Gain Site Operator [and the Freehold Owner] covenant[s] with the Council so as to bind [its/their] interest[s] in the Biodiversity Gain Land as set out in Schedule 2 of this Deed.

**Freehold Owner Drafting Note:** If including a Freehold Owner, include this text in square brackets.

#### **5 The Council's Covenants**

The Council covenants with the Gain Site Operator [and the Freehold Owner] as set out at Schedule 3.

**Freehold Owner Drafting Note:** If including a Freehold Owner, include this text in square brackets.

#### **6 Indexation**

6.1 All financial contributions payable to the Council shall be Index Linked.

6.2 Where reference is made to an index and that index ceases to exist or is replaced or rebased then it shall include reference to any index which replaces it or any rebased index (applied in a fair and reasonable manner to the periods before and after rebasing under this Deed) or in the event the index is not replaced, to an alternative reasonably comparable basis or index as the Council shall advise the Gain Site Operator [and Freehold Owner] in writing.

**Freehold Owner Drafting Note:** If including a Freehold Owner, include this text in square brackets.

#### **7 Interest on late payment**

If any sum or amount has not been paid to the Council by the date it is due, the Gain Site Operator [and the Freehold Owner] shall pay the Council interest on that amount at the Default Interest Rate. Such interest shall accrue on a daily basis for the period from the due date to and including the date of payment.

**Freehold Owner Drafting Note:** If including a Freehold Owner, include this text in square brackets.

#### **8 Ownership**

8.1 The Gain Site Operator [and the Freehold Owner] shall notify the Council immediately of any change in ownership of any of [its/their] interests in the Biodiversity Gain Land occurring before all the obligations under this Deed have been discharged.

**Freehold Owner Drafting Note:** If including a Freehold Owner, include this text in square brackets.

8.2 Notice under Clause 8.1 shall include details of the transferee's full name and registered office (if a company or usual address if not) together with the area of the Biodiversity Gain Land or unit of occupation purchased by reference to a plan.

## **9 Disputes**

- 9.1 In the event of any dispute or difference arising out of the terms of this Deed such dispute or difference may, subject to Clause 9.4, be referred by any Party giving written notice to the other Parties to an independent and suitable person holding appropriate professional qualifications to be appointed (in the absence of an agreement) by or on behalf of the president for the time being of the professional body chiefly relevant in England with such matters as may be in dispute and such person shall act as the Expert whose decision shall be final and binding on the parties in the absence of manifest error.
- 9.2 Any costs incurred by referring a dispute to the Expert under this clause shall be borne by the Party incurring such costs unless the Expert determines otherwise.
- 9.3 A person appointed under this clause shall act as an independent expert and not an arbitrator. It shall be a term of appointment that a timetable for determination of the dispute shall be fixed at the outset of the matter provided that such timetable shall provide that:
- (a) each Party to the dispute must submit its first representations to the person appointed under Clause 9.1 above within 28 days of the person appointed writing to the parties requesting such representations; and
  - (b) once the parties to the dispute have received the first representations that each has submitted to the person appointed under sub-Clause (a) above, they shall have a further 14 days to submit to the person appointed their response to these first representations.
- 9.4 This Clause does not:
- (a) affect the Council's ability to apply for and be granted:
    - (i) declaratory or injunctive relief, specific performance, payment of any sum, damages or any other means of enforcing this Deed; or
    - (ii) consequential and interim orders and relief;
  - (b) not apply to disputes in relation to matters of law which will be subject to the jurisdiction of the courts;
  - (c) fetter any Party's rights to bring an action in the courts;
  - (d) apply to any dispute in relation to any matter which is expressly to be agreed or approved or determined by any Party in its absolute discretion under this Deed or in relation to any failure or delay by such Party in agreeing or approving or determining such matter in its absolute discretion.

## **10 Miscellaneous**

- 10.1 The Gain Site Operator shall pay to the Council the Council's reasonable and proper legal costs incurred in the preparation, negotiation and completion of this Deed in the sum of [\*\* ] on the date of this Deed.

- 10.2 Where the agreement, approval, consent or expression of satisfaction is to be given by any Party or any person on behalf of any Party hereto under this Deed such agreement, approval or consent or expression of satisfaction:
- (a) shall not be unreasonably withheld or delayed;
  - (b) shall be given in writing; and
  - (c) may be validly obtained only before the act or event to which it applies.

- 10.3 Where any payment of costs or other payments are to be made by the Gain Site Operator [or the Freehold Owner] to the Council such costs and other payments shall be deemed to be reasonable and proper.

**Freehold Owner Drafting Note:** If including a Freehold Owner, include this text.

- 10.4 This Deed shall be deemed a Local Land Charge and will be registered as such by the Council.
- 10.5 The Parties do not intend any person to have the benefit of the Contract (Rights of Third Parties) Act 1999.
- 10.6 If any clause or clauses of this Deed are found (for whatever reason) to be invalid illegal or unenforceable, such invalidity illegality or unenforceability shall not affect the validity or enforceability of the remaining provision of this Deed.
- 10.7 Nothing contained or implied in this Deed shall prejudice or affect the rights, powers, duties and obligations of the Council in the exercise of its functions in any capacity (including in particular its capacities as highway authority and local planning authority) and the rights, powers, duties and obligations of the Council under private, public or subordinate legislation may be effectively exercised as if it were not a Party to this Deed.

## 11 Waiver

No waiver (whether expressed or implied) by the Council of any breach or default in performing or observing any of the covenants, terms or conditions of this Deed shall constitute a continuing waiver and no such waiver shall prevent the Council from enforcing any of the relevant terms or conditions or for acting upon any subsequent breach or default.

## 12 [Mortgagee]

- 12.1 The Mortgagee consents to the [Freehold Owner/ Biodiversity Gain Site Operator] entering into this Deed.

**Freehold Owner Drafting Note:** If including a Freehold Owner, include this text.

- 12.2 Subject to Clause 12.3, the Mortgagee acknowledges that the part of the Biodiversity Gain Land over which the Mortgagee has a charge shall be bound by the planning obligations in this Deed.
- 12.3 The Mortgagee (and any other future mortgagee or chargee of any part of the Biodiversity Gain Land) shall have no liability under this Deed unless it takes possession of the

Biodiversity Gain Land in which case it shall be bound by the obligations in Clause 4 as a person deriving title through the Gain Site Operator [or the Freehold Owner.]

**Drafting Note:** If there is no Mortgagee as a party, this clause can be deleted.

### **13 [Freehold Owner's Liability]**

13.1 Subject to Clause 13.3, the Freehold Owner shall only be liable for any obligations in this Deed where:

- (a) the Gain Site Operator ceases to have an interest in the Biodiversity Gain Land capable of being bound by section 106 of the 1990 Act;
- (b) the Freehold Owner takes possession of the Biodiversity Gain Land; or
- (c) an Insolvency Event occurs in relation to the Gain Site Operator.

13.2 The Freehold Owner's liability under Clause 13.1 shall:

- (a) include liabilities arising before the date that it became liable Clause 13.1; and
- (b) not exceed the Bond Sum.

13.3 The Freehold Owner shall comply with Clause 8 at all times.]

**Freehold Owner Note:** This is only required where the Freehold Owner is a party.

### **14 Limitation of Liability**

14.1 No person shall be liable under this Deed after it shall have parted with its interest in the Biodiversity Gain Land (or in the event of a disposal of part of the Biodiversity Gain Land be liable in respect of that part disposed) but without prejudice its liability for any subsisting breach arising prior to parting with such interest (or part thereof).

14.2 This Deed shall not be enforceable against:

- (a) any statutory undertaker who acquires any part of the Biodiversity Gain Land or interest therein for the exclusive purpose of carrying out their statutory undertaking; or
- (b) any person whose only interest in the Biodiversity Gain Land or any part of it is in the nature of the benefit of an easement or covenant, or as the owner of the sub-soil of any highway within the Biodiversity Gain Land.

14.3 No person shall be liable for breach of obligation if it is shown:

- (a) That the breach occurred as a result of a matter beyond the defendant's control; or
- (b) That the breach occurred as a result of doing, or not doing, something in an emergency in circumstances where it was necessary for that to be done, or not done in order to prevent loss of life or injury to any person.

**Drafting Note:** Clause 14.3 reflects section 126 Environment Act 2021 defences to a breach of obligation of a Conservation Covenant. The parties may wish instead to agree similar exclusions in the HMMP itself rather than the agreement.

## **15 Notices**

15.1 Any notice to be given under this Deed shall be:

- (a) in writing; and
- (a) either
  - (i) delivered by hand; or
  - (ii) sent by pre-paid first-class post or other next working day delivery service.
- (b) sent to
  - (i) the Council at the address referred to on page 1 of this Deed (marked for the attention of [\*\* ] or as otherwise notified to the Gain Site Operator from time to time); and
  - (ii) any other Party at its registered address (marked for the attention of [\*\* ] or as otherwise notified to the Council from time to time).

15.2 This Clause does not apply to the service of any proceedings or other documents in any legal action or, where applicable, any arbitration or other method of dispute resolution.

## **16 Value Added Tax**

16.1 Any sum payable under this Deed is exclusive of VAT (if any).

16.2 If at any time VAT is required to be paid in respect of any sum due under this Deed then to the extent that VAT had not been previously charged in respect of that sum the Council shall have the right to issue a VAT invoice and the VAT shall be paid accordingly.

## **17 Governing Law**

This Deed and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales.

## **18 Execution**

This Deed has been executed by the Parties and is delivered on the date on the first page.

**Drafting Note:** Insert the attestation clauses for the parties.

**Executed** as a deed by affixing the seal of  
[\*\* ] in the presence of:

Authorised Signatory

**Executed** as a deed by )  
[\*\* ] acting by a Director and its )  
Secretary )  
or by two Directors )

Director Name: (Capitals) )

Director Signature: )

Director/Secretary Name (Capitals) )

Director/Secretary Signature: )

**Schedule 1– Plan 1 (Biodiversity Gain Land)**

PAS Habitat Bank Template

## Schedule 2 – Gain Site Operator's Covenants

The Gain Site Operator [and the Freehold Owner] covenant with the Council so as to bind [its/their] interest[s] in the Biodiversity Gain Land as follows:

**Drafting Note:** If including a Freehold Owner, include this text in square brackets.

### 1 Implementation of the Habitat Management and Monitoring Plan

1.1 To:

- (a) notify the Council in writing of the Commencement Date within 10 Working Days of it occurring;
- (b) begin the Habitat Creation and Enhancement Works no later than ~~the date~~ 12 months following the date of ~~Registration; and~~ first Allocation;
- ~~(c) complete the Habitat Creation and Enhancement Works in accordance with the Habitat Management and Monitoring Plan;~~

**Drafting Note:** ~~There is no statutory requirement to commence the Habitat Creation and enhancement works under the deemed form of planning condition. To register land as a habitat bank, regulation 6(2) of the Biodiversity Gain Site Register Regulations 2024 requires that someone is required to carry out works on land for the purpose of habitat enhancement. Although the regulations do not specify when the works need to be carried out, DEFRA's guidance states (as at 1 July 2024) that the works Habitat Creation and Enhancement Works should be commenced within 12 months of Registering the Biodiversity Gain Land first Allocation.~~

- (c) complete the Habitat Creation and Enhancement Works in accordance with the Habitat Management and Monitoring Plan;
- (d) issue the Completion Date Notice to the Council within 10 Working Days of the completion date of the Habitat Creation and Enhancement Works;
- (e) promptly rectify any defects in the Habitat Creation and Enhancement Works identified by the Council under paragraph 1.1(b)(ii) of Schedule 3 and issue a subsequent Completion Date Notice and thereafter to continue to rectify any defects and issue Completion Date Notices until the Council issues a Certificate of Completion;
- (f) upon receiving the Certificate of Completion from the Council, maintain the Biodiversity Gain Land in accordance with the Habitat Management and Monitoring Plan for a period of not less than 30 years from the Completion Date; and
- (g) provide a Monitoring Report to the Council within 20 (twenty) Working Days of each Monitoring Report date specified in the Habitat Management and Monitoring Plan.

### 2 Allocation\*

2.1 To notify the Council when:

- (a) the BNG Capacity is first Allocated; and

**Drafting Note:** This could also be drafted to require notification whenever the BNG Capacity is Allocated.

(b) the BNG Capacity has been fully Allocated.

2.2 Not to Allocate any BNG Capacity:

- (a) while an application to amend the Registration is pending; and
- (b) unless
  - (i) the Allocation is recorded on the Biodiversity Gain Site Register; and
  - (ii) the Remaining BNG Capacity as recorded on the Biodiversity Gain Site Register is sufficient to fulfil any such an Allocation.

**\* Drafting Note:** This is not a statutory requirement. The restrictions on Allocation will restrict the Gain Site Operator's ability to allocate any BNG Capacity ~~in a manner that will not be~~ unless it is capable of being recorded on the ~~register or where such Allocation will be incompatible with the~~ Biodiversity Gain Site Register (and is registered). This ~~will prevent~~ prevents the Gain Site Operator from ~~double counting~~ selling any Biodiversity Units twice.

LPAs do not necessarily need this control. They may want to have oversight over this process to assist them with monitoring compliance with obligations of this Deed.

### 3 Biodiversity Gain Site Register

3.1 To:

3.1.1 ~~(a) Register~~ Apply to register the Biodiversity Gain Land on the Biodiversity Gain Site Register ~~at any time but no later than when the first application for Allocation is made~~ as soon as reasonably practicable PROVIDED THAT the Council is hereby authorised to apply to revise the Registration in line with any determination by the Expert;

- (a) ~~(b)~~ pay the Council's reasonable costs in respect of any application by it to applying to amend the Registration under sub-paragraph ~~(a)~~ 3.1(a);
- (b) ~~(c)~~ notify the Council in writing of the date of any Registration within 10 Working Days of it occurring;
- (c) ~~(d)~~ do the following if an application to Register the Biodiversity Gain Land under sub-paragraph 3.1(a) is unsuccessful, as soon as reasonably practicable:
  - (i) notify the Council in writing;
  - (ii) remedy the defects in the application;
  - (iii) re-apply to register the Biodiversity Gain Land on the Biodiversity Gain Site Register; ~~and~~
  - (iv) continue to notify the Council and remedy defects in any application until the Biodiversity Gain Land is Registered; and
- (d) ~~(e)~~ apply to amend the Registration if directed by the Expert under Clause 9.

**Drafting Note:** Registration at or around the completion of this agreement is not a statutory requirement. Prompt registration will, however, provide stakeholders with better visibility over the supply of biodiversity gain land via the public Biodiversity Gain Site Register. It therefore supports the effective administration of the regime.

- 3.2 Not to amend the Registration without the Council's prior written approval, other than to record additional Allocations or where necessary to comply with this Deed.
- 3.2.1 [To do the following once a Modification Notice has been confirmed by the Council or determined by the Expert to be valid for the purposes of Clause 3.5:
- (a) submit the modified Habitat Management and Monitoring Plan to the Council in the approved form, to be attached to this Deed by way of memorandum; and
  - (b) apply to amend the Registration in the approved form.]

**Modification Notice Drafting Note:** If no modification notice mechanism is sought, delete this paragraph.

## 4 Habitat Management and Monitoring Plan

- 4.1 To notify the Council of any requested amendment to the Habitat Management and Monitoring Plan, such notice to include:
- (a) the proposed amended Habitat Management and Monitoring Plan;
  - (b) a statement of reasons for such amendment; and
  - (c) confirmation (with reasons) that the amendment would not prejudice:
    - (i) the use or management of the Biodiversity Gain Land in a manner consistent with its function to deliver Biodiversity Net Gain; and
    - (ii) the continued functioning of the Biodiversity Gain Land for Biodiversity Net Gain or any existing Allocation.
- 4.2 Where the Council agrees (or the Expert determines) that an amended Habitat Management and Monitoring Plan is approved under paragraph 4.1 of this Schedule, to:
- (a) apply to amend the Registration as soon as reasonably practicable where necessary to reflect the BNG Capacity or Remaining BNG Capacity under the amended or replacement Habitat Management and Monitoring Plan; and
  - (b) keep the Council informed of the progress of the application and take all reasonable steps to conclude it (including correcting and re-submitting it where necessary).

## 5 Biodiversity Gain Land Monitoring Contribution

**Drafting Note:** Local authorities should consider whether a monitoring contribution is justified/ appropriate and what payment arrangements and Index Linking are appropriate from the Gain Site Operator.

The template provides three options, but these are examples and are not intended to be prescriptive; other arrangements may be appropriate/ justified.

This template is drafted on the basis that all of the Habitat Enhancement and Creation Works are completed at the same time (i.e. the HMMP is not based on phased delivery). If the Habitat Creation and Enhancement Works will be delivered on a phased basis, the total duration of this planning obligation may not be known at the time the Deed is completed so care should be taken to consider the potential timeframe of compliance/ monitoring and whether an upfront or annual payment is most appropriate.

**OPTION 1:**

Some LPAs may prefer setting a one-off fee that accounts for inflation at a particular point in time instead of annually reviewing. LPAs should consider whether a single lump sum, even if adjusted for expected inflation, carries a risk of underestimating future inflation or changes in the cost structure for meeting the obligations of this deed that could lead to inadequate funds for effective monitoring. Additionally, the nature of the works and their complexity or difficulty may be a factor in this.

**OPTION 2:**

In this option, the Biodiversity Gain Land Monitoring Contribution is a yearly annual contribution rather than a lump sum. The template gives some example triggers to require payment, but another trigger could be adopted.

**OPTION 3:**

Some LPAs align the payment of annual or periodic contributions to a particular date for ease of monitoring. Option 3 gives an example of how this might be presented.

5.1 **OPTION 1:** To pay the Biodiversity Gain Land Monitoring Contribution to the Council [[upon Completion of this Deed]/ [within 10 Working Days of the Commencement Date]/ [within 10 Working Days of the first Allocation]].

5.2 ~~5.1~~ **OPTION 2:** To pay the Biodiversity Gain Land Monitoring Contribution to the Council:

~~(a) within 10 Working Days of the [Commencement Date]; and~~

(a) [[upon Completion of this Deed]/ [within 10 Working Days of the Commencement Date]/ [within 10 Working Days of the Completion Date]/ [within 10 Working Days of the first Allocation]]; and

(b) thereafter annually on each anniversary of [[the Completion of this Deed]/ [the Commencement Date]/ [the Completion Date]/ [first Allocation]] until the Agreement Expiry Date.

~~**Drafting Note:** Local authorities should consider whether a monitoring contribution is justified/ appropriate, what payment arrangements, and Index Linking it will seek from the Gain Site Operator.~~

5.3 The final annual payment in paragraph 5.2(b) shall be a pro-rata amount to reflect the period between the last anniversary of [[the Completion of this Deed]/ [the Commencement Date]/ [the Completion Date]/ [first Allocation]] and the Agreement Expiry Date.

5.4 **OPTION 3:** To pay the Biodiversity Gain Land Monitoring Contribution to the Council:

(a) on [Date ] immediately following [[the Completion of this Deed] [the Commencement Date]/ [the Completion Date]/ [first Allocation]]; and

(b) thereafter the Biodiversity Gain Land Monitoring Contribution annually on [Date ] until the Agreement Expiry Date.

5.5 The payment in paragraph 5.4(a) shall be a pro-rata amount to reflect the period between the [[the Completion of this Deed] [the Commencement Date]/ [the Completion Date]/ [first Allocation]] and the [Date ].

5.6 The final annual payment in paragraph 5.4(b) shall be a pro-rata amount to reflect the period between [Date ] the Agreement Expiry Date.

## 6 Access for Inspection

- 6.1 from the Commencement Date, to allow the Council, its agents, and contractors with or without workmen and equipment to:
- (a) enter onto the Biodiversity Gain Land at all reasonable times (following reasonable notice given in accordance with paragraph 6 of Schedule 3) to monitor compliance with:
    - (i) the obligations in this Deed; and
    - (ii) any Breach Notice;and
  - (b) pass and repass across any land in the Gain Site Operator's control which is necessary to gain access to for the purpose of accessing the Biodiversity Gain Land in accordance with paragraph 6.1(a).

**Drafting Note:** Consider access rights at the time of entering into this deed and note that interests in land may change over the 30-year maintenance period.

## 7 Step-In Rights

- 7.1 Where a Breach Notice is served, to notify the Council within 20 Working Days of service of the Breach Notice whether the Gain Site Operator accepts or disputes the notice;
- 7.2 Where it notifies the Council that it disputes a Breach Notice (or it is unable to agree remedial steps under sub-paragraph 7.3(a)):
- (a) to include a reasoned response in the notice under paragraph 7.1 (if disputing the Breach Notice); and
  - (b) it may request, within 10 Working Days of any time limit in the Breach Notice (or other extended timeframe as agreed with the Council in writing), that the matter be referred for determination by an Expert;
- 7.3 Where it has notified the Council that it accepts a Breach Notice (or the Expert has determined that it is valid), to:
- (a) comply with the requirements of the Breach Notice within the time limits specified by the Breach Notice (or other extended timeframe as agreed with the Council in writing);
  - (b) use reasonable endeavours to agree the following with the Council within 20 Working Days of the notifying the Council that it accepts the Breach Notice:
    - (i) the steps required to remedy the breach; and
    - (ii) if applicable, any remedial works;and
  - (c) commence and diligently proceed to remedy the breach within the time period specified in the Breach Notice (or such other period as may be agreed with the

Council under sub-paragraph (a)) in accordance with the details agreed under sub-paragraph (a);

- 7.4 To comply with any requirements imposed on the Gain Site Operator in connection with a Breach Notice by the Expert within the time limits specified in the Expert's determination;
- 7.5 Where it has failed to comply with a time limit of the Breach Notice or Expert's determination in respect of a Breach Notice, to allow the Council, its agents, and contractors with or without workmen and equipment to enter:
- (a) the Biodiversity Gain Land; and
  - (b) other land in the Gain Site Operator's control needed to access the Biodiversity Gain Land,

at all reasonable times (following reasonable notice given in accordance with paragraph 6 of Schedule 3) to carry out works reasonably necessary to comply with the requirement of the Breach Notice or the Expert's determination, as applicable, following reasonable notice given in accordance with paragraph 6 of Schedule 3; and

- 7.6 To pay the Council a sum equivalent to its reasonably and properly incurred costs in respect of carrying out the relevant works under paragraph 7.5 within 20 Working Days of a notice requesting payment (such notice to include a breakdown of such costs).

## **8 ~~Recalculation~~ Reassessment of BNG Capacity**

- 8.1 To do the following where a Variation Event occurs and there is un-Allocated BNG Capacity:
- (a) not further Allocate any Remaining BNG Capacity until any amendments to the HMMP and/ or the Remaining BNG Capacity ~~is~~ are agreed under sub-paragraph ~~(b)8.1(b)~~ of this Schedule (or determined by the Expert);
  - (b) notify the Council of its ~~calculation of~~ proposed amendments to the HMMP and/ or the Remaining BNG Capacity, taking into account the Variation Event, and submit it to the Council for approval;
  - (c) in the event of dispute over the ~~calculation of~~ proposed amendments to the HMMP and/ or the Remaining BNG Capacity under sub-paragraph ~~(b)8.1(b)~~ of this Schedule, either Party may refer the matter to an Expert for determination;
  - (d) upon receipt of written approval from the Council ~~for the calculation~~ in respect of the proposed amendments to the HMMP and/ or the Remaining BNG Capacity submitted under sub-paragraph ~~(b)8.1(b)~~ of this Schedule or by the Expert's determination under Clause 9, accept thereafter that the amended HMMP and/ or the Remaining BNG Capacity shall be deemed to be ~~the amounts~~ agreed and:
    - (i) ~~Allocate~~ if applicable, allocate only to the Remaining BNG Capacity on this revised basis; ~~and~~
    - (ii) if applicable, implement and carry out the HMMP on its revised basis; and

- (iii) ~~(ii)~~ ensure the Biodiversity Gain Site Register in respect of the Biodiversity Gain Land ~~to~~ reflects the revised Remaining BNG Capacity as soon as reasonably practicable.

## 9 Bond

**Drafting Note:** If no bond is agreed this paragraph can be deleted.

9.1 [To procure a Bond for the Bond Sum within 10 Working Days of the date of the Certificate of Completion;

9.2 Where an Insolvency Event occurs in relation to the Gain Site Operator, it shall:

- (a) [allow the Freehold Owner to call on the Bond in order that it can, for the remainder of the Covenant Period, undertake and satisfy the obligations assumed by the Gain Site Operator under this Deed; and]

**Drafting Note:** If there is no Freehold Owner party to this agreement, delete paragraph (a).

- (b) allow the Council to call on the Bond to receive the Biodiversity Gain Land Monitoring Contributions and recover any and all costs incurred expected to be incurred in exercising its step-in rights contained in this Deed.]

## Schedule 3 – Council Covenants

The Council covenants with Gain Site Operator as follows:

### 1 **Inspection of the Habitat ~~Management and Monitoring Plan~~ Creation and Enhancement Works**

1.1 To:

- (a) inspect the Habitat Creation and Enhancement Works within 30 Working Days following receipt of the Completion Date Notice;
- (b) to do the following where Habitat Creation and Enhancement Works are inspected under sub-paragraph (a):
  - (i) promptly issue a Certificate of Completion if the Habitat Creation and Enhancement Works if the Habitat Creation and Enhancement Works have been completed to the reasonable satisfaction of the Council; or
  - (ii) promptly notify the Gain Site Operator of any defects, if the Council determines that the Habitat Creation and Enhancement Works have not been completed; and
- (c) where the Gain Site Operator issues a subsequent Completion Date Notice under paragraph 1.1(d) of Schedule 2, re-inspect the Habitat Creation and Enhancement Works under paragraph 1.1(a) of this Schedule and to comply with paragraph 1.1(b) of this Schedule until it issues the Certificate of Completion.

### 2 **Habitat Management and Monitoring Plan**

- 2.1 Not to unreasonably withhold or delay giving its written approval to any revised or replacement Habitat Management and Monitoring Plan submitted by the Gain Site Operator to the Council under Schedule 2 of this Deed;
- 2.2 [To monitor the implementation and operation of the Habitat Management and Monitoring Plan by a suitably qualified ecology and environmental management professional by way of periodic physical visits to the Biodiversity Gain Land and/ or remotely surveying the Biodiversity Gain Land and to provide, as soon as practicable afterwards, a written report to the Gain Site Operator of the findings any monitoring activities, at the following intervals:
  - (a) annually from the Commencement Date until the 5 years' anniversary of the Commencement Date; and
  - (b) every five years thereafter until the Agreement Expiry Date.]

**Drafting Note:** Consider whether any periodic inspections of the Biodiversity Gain Land will be prescribed. Review the frequency of the Monitoring Reports in the HMMP, are inspections needed? Do they need to be carried out by the Council?

### **3 Biodiversity Gain Register**

- 3.1 To affirm with the Gain Site Operator that BNG Capacity shall be Allocated by the Gain Site Operator at the Gain Site Operator's absolute discretion subject to the provisions of this Deed.

### **4 Habitat Management and Monitoring Contribution**

- 4.1 To use the Biodiversity Gain Land Monitoring Contribution for its intended purpose and not for any other purpose.

### **5 Right of Access**

- 5.1 To give not less than 10 Working Days' notice to the Gain Site Operator of its intention to access the Biodiversity Gain Land for the purposes of inspection under paragraphs 6 of Schedule 2 of this Deed to ascertain the Gain Site Operator's compliance with its covenants under this Deed or a Breach Notice.

### **6 Breach Notice and Step-in Rights**

- 6.1 Where it considers that the Gain Site Operator is not complying with its obligations under this Deed, and intends to take steps to remedy the breach, to first notify the Gain Site Operator:

- (c) the reasons for alleging non-compliance;
- (d) the steps it proposes the Gain Site Operator should take to remedy any breach or non-compliance, and
- (e) the reasonable time limits for the Gain Site Operator to take these steps;

- 6.2 Where it serves a Breach Notice (or the Expert determines that the Gain Site Operator should take any steps within a specified time limit), it may notify the Gain Site Operator of any extension of time specified in the Breach Notice or Expert's determination, as it considers appropriate (in its absolute discretion);

- 6.3 Where the Gain Site Operator does not comply with the time limits specified in the Breach Notice (or as otherwise agreed) or the Expert's determination, undertake the requirements imposed on the Gain Site Operator as set out in the Breach Notice or Expert's determination provided that the Council:

- (a) provides reasonable notice that it, its agents, and contractors with or without workmen and equipment will enter the Biodiversity Gain Land and/or land in the Gain Site Operator's control to access the Biodiversity Gain Land;
- (b) ensures minimal damage and inconvenience to the Gain Site Operator;
- (c) promptly repairs any damage caused by exercising the step-in rights under this paragraph; and
- (d) issues to the Gain Site Operator a full breakdown of the time spent and costs incurred in exercising its step-in rights under this paragraph.

## **7 Recalculation of BNG Capacity**

7.1 To notify the Gain Site Operator in relation to any BNG Capacity ~~calculation~~reassessment submitted under paragraph 8.1(b) of Schedule 2 whether:

- (i) it is approved; or
- (ii) why it is not approved.

## **Schedule 4 – Habitat Management and Monitoring Plan**

## Schedule 5 – Bond Sum Reduction

**Drafting Note:** If no bond is sought, this schedule can be deleted. The table below show a form of a Bond Sum Reduction Schedule.

<b>Anniversary of Completion Date for Habitat Creation and Enhancement Works</b>	<b>Annual Habitat Management Budget (£)</b>	<b>Biodiversity Gain Land Monitoring Contribution (£)</b>	<b>Inflation allowance %</b>	<b>Amount held in Bond (£)</b>	<b>Annual Spend (£)</b>
0					
1					
...					
30 <sup>th</sup> Anniversary	<i>End of legal agreement</i>				

## Schedule 6 – Statement of Achievability

**Drafting Note:** If no Statement of Achievability is sought, this schedule can be deleted.

PAS Habitat Bank Template

<b>Summary report:</b>	
<b>Litera Compare for Word 11.9.1.1 Document comparison done on 11/04/2025 15:44:33</b>	
<b>Style name:</b> Default Style	
<b>Intelligent Table Comparison:</b> Active	
<b>Original filename:</b> PAS Template BNG S106 Agreement - Habitat Bank 05July 2024 v1.0 (2).docx	
<b>Modified DMS:</b> iw://ukdms.dentonwildesapte.com/SLO_ACTIVE/84846150/5	
<b>Changes:</b>	
<a href="#">Add</a>	136
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<del>Table Insert</del>	0
<del>Table Delete</del>	0
<del>Table moves to</del>	0
<del>Table moves from</del>	0
Embedded Graphics (Visio, ChemDraw, Images etc.)	0
Embedded Excel	0
Format changes	0
<b>Total Changes:</b>	<b>229</b>