



Habitat Bank

PAS Biodiversity Net Gain (BNG)

Legal Agreement Template Version ~~2.0~~3.0

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

[Conservation Covenant Drafting Note: If using this resource as a conservation covenant, this cover page should be titled "Conservation Covenant under Section 117 of the Environment Act 2021"](#)

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

2	Habitat Management and Monitoring Plan	24
3	Biodiversity Gain Register	24
4	Habitat Management and Monitoring Contribution	25
5	Right of Access	25
6	Breach Notice and Step-in Rights	25
7	Recalculation of BNG Capacity	25
	Schedule 4 – Habitat Management and Monitoring Plan	26
	Schedule 5 – Bond Sum Reduction	27
	Schedule 6 – Statement of Achievability	28

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.

Conservation Covenant: [By making a few amendments, this template could be used as a conservation covenant. There are drafting notes in this template that identify where the template resource should be amended.](#)

Bond: Security for BNG maintenance obligations is not a statutory requirement. [If seeking forms of financial security, some thought should be given to how much security is required and when it will be required; as well as whether it is appropriate for any financial security to be reduced upon achieving certain milestones.](#) This template includes ~~this~~ optional wording to ~~assist~~ [require a bond](#) where it has been agreed with the Gain Site Operator or Freehold Owner that it is necessary. [Other forms of financial security could be sought such as \(but not limited to\): security deposits, ringfenced funds \(that may or may not be invested\), or requiring the submission of evidence demonstrating solvency is provided.](#)

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.

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**)]]; and

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;

[Conservation Covenant Drafting Note: If using this resource as a conservation covenant, this recital should read "The Council is a designated responsible body under section 119\(2\) of the 2021 Act."](#)

- 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).

[Conservation Covenant Drafting Note: If using this resource as a conservation covenant, add an additional definition here that reads "2021 Act means the Environment Act 2021 \(as amended\)."](#)

[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 Land means the area in hectares specified in the HMMP which would generate BNG, as measured in area habitat 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 (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*"

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. [Authorities may apply different monitoring contributions or fee schedules to different habitat bank types.](#) Please

- 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.

[Conservation Covenant Drafting Note: If using this resource as a conservation covenant, this paragraph should be amended to read "This Deed is made under Section 117 of the 2021 Act with the intent that it creates covenants binding the Gain Site Operator's \[and Freeholder Owner's\] interest\[s\] in the Biodiversity Gain Land." See the drafting note on Freehold Owner below for guidance on the square brackets.](#)

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.

[Conservation Covenant Drafting Note: If using this resource as a conservation covenant, this paragraph can be deleted.](#)

- 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.

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.

Conservation Covenant Drafting Note: [If using this resource as a conservation covenant, this paragraph can be deleted as the defences to breach of an obligation under a conservation covenant is set out in Section 126 of the 2021 Act.](#)

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.