

Offsite

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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| Version 1.0 published: | July 2024 |
| Last updated: | April 2025 March 2026 |
| Check for updates to this template on the PAS website | |

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DRAFTING NOTES

Scope: This template is a Section 106 agreement to **secure biodiversity units off-site*** in a way that is compatible with Registration on the Biodiversity Gain Site Register. It envisages that some biodiversity enhancements will be created on-site and secured by condition in connection with a specific planning permission, so it differs from the template s.106 agreement to secure biodiversity units for a habitat bank. The monitoring contribution is intended to fund the monitoring of compliance with the BNG obligations of the deed as well as the BNG conditions imposed on the planning permission. [* On-site BNG can be secured by condition: see the PAS Template BNG Condition (Single Phase Development)]

Habitat Management and Monitoring Plan (HMMP): This template secures obligations in respect of a Habitat Management and Monitoring Plan in connection with the Biodiversity Gain Land. The BNG condition(s) imposed on the Planning Permission may also include a Habitat Management and Monitoring Plan (or equivalent plan) which is solely in respect of the works on-site. Care should be taken not to confuse these two plans. Biodiversity units off-site must be registered so any offsite BNG cannot be secured by condition's HMMP.

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 ~~between the parties~~ 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 an Owner 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 Owner 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 13.

Parties: This template is drafted on the basis that the Owner is the freehold owner of the Biodiversity Gain Land. If the Owner does not have a freehold interest, local authorities may want to consider adding the freehold owner as a party to the agreement (and renaming the parties to this agreement for clarity) 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 leasehold interest. For example, is there a sufficiently long lease to maintain the habitat creation and enhancement works for 30 years after they are completed?

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. However, the Mortgagee may also have a charge over the Site or it may only have an interest in the Site and not the Biodiversity Gain

- (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 Owner 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 Owner to the Council under paragraph 5 of Schedule 3 of this Deed to be applied by the Council as a financial contribution towards the Council's costs of monitoring compliance with:

- (a) the Owner's obligations under this Deed in respect of the Biodiversity Gain Land[; and
- (b) compliance with condition [**] of the Planning Permission,]

for the purpose of achieving the Biodiversity Net Gain.

Drafting Note: Local authorities should consider whether it is justified and appropriate to seek a monitoring contribution to monitor compliance with a condition (being compliance with [either](#) the whole condition or just the maintenance period secured by condition). [Councils may apply different monitoring contributions or fee schedules to different habitat bank types](#). If this element is included, the trigger for payment should be considered. The works secured by condition and the works secured by legal agreement may begin at different times, may complete at different times, and the 30-year maintenance period may not perfectly overlap.

The contribution 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