DENTONS Local Government Association PAS planning advisory service

Q: What is the difference between offsite s106 accompanying a planning permission and the habitat version? They both refer to "a development" and not the Development. Any reasons?

A: The Habitat bank agreement template is for the creation of enhanced habitats that are not registered to a specific development/planning permission. The activity to enhance land to create a habitat bank does not necessarily involve a planning application (or 'development' in the traditional sense). The Offsite template agreement has "Development" as a defined term because it's intended to be used in a scenario where a developer wants to secure offsite units prior to consent being granted.

Q: What has Denton's findings revealed as typical of 'significant' onsite enhancement for which a S106 to secure the delivery of the habitats has been warranted?

A: DEFRA has published some guidance on what may be considered non-significant. This includes private gardens or planters that, while they make an improvement in biodiversity, would not in practice benefit from being secured for a 30-year period: https://www.gov.uk/guidance/make-on-site-biodiversity-gains-as-a-developer

Q: Does force majeure apply to for the onsite if secured by condition?

A: English planning system legislation and regulations do not explicitly provide for force majeure in the context of planning conditions. The conditions are typically binding regardless of unforeseen events. The templates do not contain provisions in respect of force majeure events (acts of God). The Habitat Management and Monitoring Plan that will be appended to each deed can set out: i) force majeure limitations and/or ii) what should be done in case the Gain Site Operator is in breach of a condition obligation due to circumstances outside of its control.

In respect of the legal agreement templates: 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 as set out in the templates. If you wish to include defences to breach of obligations, the templates include optional wording in Clause 13 (offsite template) and Clause 14 (Habitat Bank template).

Q: How should the implementation of the HMMP be secured separately, given that it is needed to scrutinise the Biodiversity Gain Plan and ensure that the post-development biodiversity value can be achieved?

A: A HMMP is not required to discharge the biodiversity gain plan. It can be appended to the biodiversity gain plan but is not required to discharge the statutory condition.

The BGP needs to be approved by the LPA as per the statutory (deemed) condition. The BGP will include the post development biodiversity value and is in essence an informational document for how BNG will be delivered. The statutory deemed condition does not secure the HMMP or its equivalent. The LPA can't sign off the BGP unless the BNG, as set out in a HMMP or equivalent, has been secured by planning obligation, conservation covenant, or condition.

Q: Can LPA refuse to secure developers offsite if they do not meet their own local requirements?

A: If the habitat bank is applying for planning permission for the HB use, the authority has clear duties. The issue is what the local requirements are and whether they would be reasonable grounds for refusing to grant planning permission if not complied with.

Anything with a material effect on enforceability or effectiveness of management/ maintenance is likely to satisfy this.

The question to ask is always going to be – is what is being proposed effective to secure the required outcome? The required outcome in a mandatory 10% context is as set out in the Act / Regs for Gain Sites. Any other required outcomes would need to be expressed clearly in adopted policies.

If the Habitat Bank is simply asking the authority to enter into an agreement, there is no duty on it. However:

1) Normal public law principles apply – the authority cannot act in a way that is manifestly unreasonable or intended to achieve a collateral purpose. For example, refusing to engage with a Habitat Bank because the authority is bringing forward its own Habitat Bank SPV and does not want competition / wishes to maintain scarcity of supply to prop up a higher unit price (or higher price for certain types of units).
2) Corporate Plan and Local Plan objectives/ policies relating to Nature Recovery will be relevant considerations.

Other relevant considerations may be the effectiveness and level of certainty associated with what is proposed and the opportunity costs (although those would be better considered through the planning process).

Q: Would it be possible to use templates in conjunction with each other? e.g. where a development has onsite BNG and wants to sell credits for any surplus?

A: The condition is meant to be used with a legal agreement template (the onsite or offsite agreement templates). You could also use the condition template, onsite agreement, and habitat agreement if the offsite enhancements were not known/agreed at the time consent was granted. If the intention was to allocate back to the development, the habitat bank agreement template would need to be entered into prior to the biodiversity gain plan being submitted for approval because the offsite units need to be registered.

Q: Can you refuse consent if the freeholder will not join in (appreciate land ownership is not usually relevant but surrenders/ break clauses/ forfeiture etc)?

A: The offsite and habitat bank template assumes the freeholder and owner are the same. 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.

Q: If the BGP cannot be approved until the units are on the Gain Site Register, but the s106 needs the BGP details, what is the optimal timing of the s106?

A: The Section 106 agreement does not need the details of the biodiversity gain plan. The biodiversity gain plan is submitted to fulfil the statutory deemed condition on the planning consent. A s106 not needed to secure that - it is going to happen by condition.

Q: Are the templates used at the planning determination stage or during the approval of the BGP?

A: The onsite template condition and agreement (or the offsite template) are resources to be used before permission is granted. If there is offsite BNG, this does not need to be secured at the time permission is granted. The offsite BNG can be secured by the standalone habitat bank agreement after permission is granted (and before the BGP is approved).

Q: If some enhancement can take years, what would you see as a trigger time in your model condition, as development may have completed well before?

A: Completion of development is not defined within the Town and Country Planning Act 1990 and should be agreed with the applicant. An LPA may take the view that the development is not completed until the habitat creation and enhancements are completed. In this case, the 30-year maintenance period would run from the completion of the habitat creation and enhancement works.

Q: Guidance seems to suggest S106 is required for significant gains. Have we got that wrong?

A: The law specifically permits LPAs to secure significant onsite BNG by condition. Paragraph 9 of Schedule 7A of the TCPA 1990 states an LPA can only consider the post-development biodiversity value of onsite habitat if the condition in paragraph 9(3) of Schedule 7A TCPA 1990. That condition is that the habitat enhancement, will, by virtue of a condition, planning obligation, or conservation covenant be maintained for at least 30 years (para 9(3) Sch 7A TCPA 1990).

Q: Is the bond returnable?

A: Bonds secured through a Section 106 agreement are typically returnable once the developer fulfils the obligations outlined in the agreement, such as completing infrastructure or providing amenities. The return of the bond is contingent on the local planning authority verifying that these obligations have been met. The specific terms, including any conditions for partial release or use of funds in case of non-compliance, are detailed in the agreement. Clear documentation of these terms helps prevent disputes and ensures a smooth release process. It is not required to have a bond but the offsite and habitat bank template agreements contain this as an option. The templates envisage the bond being reduced over time as the 30-year maintenance period matures. The exact arrangements for the bond can be amended to suit the parties' needs.

Q: Is it necessary for the developer to submit a monitoring report at year 30, even if they argue that no report is required at that stage?

A: Monitoring is at least 30 years. Year 1 is year 1, Year 30 is year 30 – a monitoring report is therefore required for year 30. It is open for the parties to agree their own monitoring arrangements; the templates give an example of how this might be achieved.

Q: Can 'completion' be defined?

A: For the purposes of onsite BNG, the works need to be maintained for 30 years from the 'Completion of development'. However, this is not defined in the Town and Country Planning Act 1990. LPAs and developers should agree the meaning of 'completion' of development to give clarity to a condition securing onsite BNG. This could be practical completion, first occupation, or some other trigger. For offsite BNG, the works will need to be maintained for 30 years from completion the habitat creation or enhancement.

Q: Can an application be determined before the s106 for significant on-site/off-site BNG has been signed. The consensus within senior planning policy team and our legal is that it can't, however applicants are disagreeing and say that it can be submitted with the biodiversity gain plan.

A: Onsite BNG can be secured by condition; if the LPA seeks wants to grant permission before it imposes an obligation to pay a monitoring fee, it can. If an LPA wishes to secure BNG by planning obligation and not condition, the BNG need not be secured at the time consent is granted; however, this will require the BNG is eventually secured so the LPA can approve the biodiversity gain plan.

The offsite BNG need only be secured and registered prior to the discharge of the statutory condition (as the biodiversity gain plan will make reference to the offsite units).

Q: In the context of a temporary 40-year planning consent for a solar farm, if development only begins partway through the consent period (e.g., year 15), creating a short overlap before the consent expires, is it reasonable or necessary to continue managing the site after the 40-year period, especially if the land is intended to revert to agricultural use? How should this scenario be treated, given that it does not seem explicitly addressed in current guidance?

A: For temporary consents (where the consent expires before the 30-year maintenance period). This maintenance could be secured by legal agreement. This ensures that the obligations run with the land and are enforceable after the expiry of the planning consent. The query above describes the requirement as onerous if the land will revert to agricultural use. When discharging a biodiversity gain plan, an LPA cannot count any significant post-development BNG unless its maintenance for 30 years is secured by planning condition, conservation covenant, or planning obligation (Sch 7A TCPA para 9(3)).

Q: Can a planning permission remain exempt from the statutory BNG condition if a self-build development changes during construction or occupation?

A: A local planning authority could instead choose to include some informative on the permission stating that the permission was granted on the basis that the development would be self-build as defined in the Act. If the development is no longer self-build during construction or upon occupation, the permission is no longer exempt and the statutory BNG condition is deemed to be imposed.

Q: How should councils approach complex cases where on-site and off-site Biodiversity Net Gain are combined within a single Section 106 agreement, particularly in appeal scenarios, given requirements around separate monitoring clauses, Natural England registration of off-site land prior to submission of biodiversity gain plans, and the uncertainties created by timing and appeal processes?

A: The off-site template was designed to support Local Planning Authorities with these types of situations. Please refer to the drafting notes set out within the off-site template.

Q: Is there potential to 'move' or reallocate the land intended to deliver BNG if the original parcel that had been secured is subsequently proposed for development?

A: BNG whether it is onsite (secured by condition or obligation) or offsite can be varied but will require agreement by the local planning authority or responsible body depending on how the BNG is secured.

Q: To what extent are officers encountering legal concerns around force majeure provisions in habitat bank agreements, and are PAS templates adequately addressing these risks?

A: LPAs can exercise their discretion on how open or restrictive their force majeure clauses are. Force majeure provisions can be included in the HMMP. When considering what flexibility they wish to provide, officers should be considering provisions in the legal agreement as well as the HMMP to scope, the legal agreement has for force majeure, officers and their legal teams should be considering the HMMP too to understand the full picture.

Q: Are there other legal instruments besides S106/Conservation Covenants, which could be used to secure BNG?

A: Discussions on the PAS BNG forum have highlighted risks associated with legal instruments other than bilateral or multi-party planning obligations and Conservation Covenants, as they may weaken obligations, impact legal ambiguity of trying to self-contract and reduce enforceability, potentially leading to non-delivery of post-development habitat changes and undermining policy objectives.

Q: What is the local authority role in habitat banks for BNG?

A: Although LPAs are encouraged to support the establishment of local habitat banks, typically through s106 agreements to enable registration on the national net gain register; they are not legally required to do so. It is entirely at their discretion whether they choose to offer this service.

Where landowners have been unable to engage an LPA, they may wish to consider securing a conservation covenant with a responsible body as an alternative to a s106 planning obligation. Both mechanisms are equally valid for securing habitat banks and enabling their registration. In this case, the responsible body would approve the HMMP and receive and act on monitoring reports.

While Natural England is listed as a responsible body, it does not offer conservation covenants for BNG to avoid potential conflicts of interest. However, most other responsible bodies do provide this option, although some operate only within specific geographic areas.

Q: Will the notes on drafting a conservation covenant address the situation where two Responsible Bodies (who are LPAs) work together on a reciprocal arrangement to bring forward their habitat banks?

A: No. While the drafting for this would not be complicated (as each LPA would enforce the obligations within its jurisdiction) the template would need to be adapted to include an additional LPA throughout – that could make the template less user friendly (or more confusing when seeing it for the first time).

Q: How should S106 monitoring fees be handled in phased schemes when it's unclear whether each phase will deliver significant on-site habitat? If obligations flow down to later phases as ownership transfers, is there any alternative approach?

A: There is nothing prescriptive under statute that dictates when payments must be received. You could agree a site-wide monitoring fee for all phases and then apportion this on a pro-rata basis as phases come forward. The payments of monitoring fees could become payable upon (or shortly after) a phase biodiversity gain plan being approved.

Q: If a monitoring contribution for significant on-site gain is secured through a S106, does this also need to include a clause for long-term maintenance (e.g., HMMP)? How is this enforced after the planning condition expires?

A: Where on-site BNG is secured using a condition, that condition must set out the full 30-year maintenance period from completion. Monitoring contributions are separate and relate to the LPA's costs in checking compliance with the condition. A monitoring fee can cover the first stage of compliance, the full 30 years, or a specific part, the key is clarity. The S106 can define exactly what the contribution covers, referencing the relevant condition. The main requirement is to ensure it is clear what is being monitored.

Q: Have bonds been used to secure significant on-site habitat creation?

A: Financial security (such as a bond) is generally associated with off-site BNG, particularly habitat banking, where the LPA cannot enforce against a development. For on-site BNG, bonds are not typically needed because the LPA can enforce against the development itself. Introducing a bond for standard on-site habitat delivery can impact viability and is usually not justified.

Q: What about large strategic sites where residents will eventually be responsible for open space delivering BNG? Could financial security help ensure long-term delivery?

A: This is a different scenario. For very large schemes with substantial open space, a bond or other financial security may be justified; not because it is BNG, but because it relates to stewardship and long-term management of essential open space. This is similar to how financial security might be required for other key infrastructure. The question becomes one of whether the stewardship model and service charges are adequate to secure long-term maintenance. In some large schemes, controls have been used to ensure BNG-related revenue supports stewardship rather than being sold externally.

Q: A condition template requires all habitat works to be completed before development finishes, but seasonality means some works can only be done later. Can timing be adjusted?

A: Yes. It is reasonable to adjust timing where seasonality or construction logistics make immediate delivery impractical. Some LPAs use a requirement such as delivery within 6–9 months after completion. Template conditions include restrictive wording intentionally, so LPAs can decide whether it is appropriate for a specific scheme. The key is checking whether the Habitat Management and Monitoring Plan aligns with the timing.

Q: Can a S106 agreement be signed before the Biodiversity Gain Plan (BGP) or HMMP is submitted?

A: Yes. The BGP is a pre-commencement requirement, so it is submitted and approved after permission is granted. The S106 secured at the permission stage provides the framework (e.g., monitoring contributions), and the BGP then provides detailed delivery information later. There should be no conflict if BNG delivery is secured through conditions and the S106 focuses on the monitoring fee.

Q: Instead of using a bond to secure delivery of the required biodiversity units, could a S106 clause say that if the target number of units is not achieved by year 30, the shortfall must be purchased from a Habitat Bank?

A: Such a clause would impose a very significant obligation at the end of the 30-year period. Most habitat banks will be exhausted long before year 30, meaning there may be no remaining value or available units for purchase at that point. Current drafting practice for off-site agreements explores other forms of financial security, such as security deposits that build up over time (e.g., a capped fund where a percentage of each sale contributes until a threshold is reached). This approach is more practical

because habitats tend to stabilise after a certain number of years, and the financial risk reduces. A year-30 trigger could leave LPAs with no viable enforcement route if habitat banks no longer hold value.

Q: Are step-in rights sufficient for off-site units, or is an alternative fallback needed?

A: Step-in rights can help but come with risks, including whether the LPA would realistically exercise them. This is why some authorities may look for alternative financial security mechanisms (e.g., deposits, insurance, or partial bonds). Such mechanisms ensure that funds exist if the LPA needs to intervene without placing the entire burden upfront on the habitat bank provider.

Q: For large residential developments where public open space is delivered, is it expected that ongoing costs would be covered by a resident service charge?

A: Large schemes often rely on a service charge to fund long-term maintenance of public open space. However, LPAs are entitled to see service charge modelling to ensure:

- The charge is sustainable for residents,
- It realistically funds the long-term stewardship of the space, and
- It does not unfairly subsidise BNG units that may be sold to third parties.

Service charges should not be used to fund off-site unit sales or commercial revenue streams unrelated to the residents' benefit.

Q: How should stewardship and BNG obligations be distinguished in such cases?

A: Stewardship (i.e., managing public open space) is separate from the regulatory requirements of the BNG regime. LPAs should evaluate:

- Whether the stewardship model is financially robust over the long term, and
- Whether BNG obligations are appropriately secured without shifting costs unfairly onto residents.

BNG compliance should not rely solely on residential service charges where the space is also being used commercially for off-site BNG sales.

Q: We have signed S106 agreements for habitat banks to register biodiversity units. We frequently receive pushback on the force majeure wording, with providers asking to include events like flooding or compulsory purchase. What advice is there?

A: There is wide variation nationally in how force majeure is handled in both S106s and conservation covenants. It is not essential for force majeure wording to appear in the legal agreement itself. Instead, it can be included directly in the Habitat Management and Monitoring Plan (HMMP). A recommended approach is to begin the conversation ecologist-to-ecologist. If technical specialists can agree what constitutes force majeure for habitat failure or loss, this can be embedded in the HMMP and avoids much of the pressure to expand legal wording. If issues arise that fall outside technical ecological matters (such as compulsory purchase) the areas of disagreement within the legal drafting should be narrower and easier to negotiate. Ultimately, flexibility is at the discretion of the LPA and the responsible body, and there is no single "right" national model.

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