

# BNG WEBINAR QUESTIONS

ANSWERED BY THE BDB PITMANS TEAM | APRIL 2022



**Tristan Ward** ([tristanward@bdbpitmans.com](mailto:tristanward@bdbpitmans.com)) for landowner-related questions

**Robert Wallace** ([robertwallace@bdbpitmans.com](mailto:robertwallace@bdbpitmans.com)) for real estate-related questions

**Chris Holmes** ([chrisholmes@bdbpitmans.com](mailto:chrisholmes@bdbpitmans.com)) for town and country planning-related questions and

**Oliver Spencer** ([oliverspencer@bdbpitmans.com](mailto:oliverspencer@bdbpitmans.com)) for infrastructure planning-related questions.

Please get in touch with them if you have any follow-up questions.

## PLANNING – GENERAL

**Does the developer have to ‘control’ the BNG land, for example by owning the freehold, or could a 30 year lease be sufficient? Presumably it has to demonstrate that the BNG land will remain ‘secure for the time required?’**

A requirement to own the freehold, or even a leasehold interest is not necessary. The key is that the developer has sufficient control over the land/landowner for the requisite period of time so that it can meet the BNG requirements, and thus lawfully implement its scheme. The Consultation Paper says (page 58) that: biodiversity gain site enhancements will be secured through conservation covenants or planning obligations which can ensure that habitats are maintained even if the land is sold’

Conservation covenants are a creation of the Environment Act 2021 and have to be entered into by the landowner and a limited number of counterparties. Planning obligations are s106 agreements, which are well known already.

BNG will be secured through section 106 agreements and conservation covenants. However, s106 agreements and conservation covenants may not be enough for developers’ needs as they will not be party to them; such documents may only be enforceable against landowners by the Council or other relevant body. Developers will, therefore, prefer to have some legal interest in the BNG land to ensure that the BNG requirements can be complied with, and thus lawfully implement their permissions. Whilst a requirement to own the freehold, or even a leasehold interest is not necessary, what is key is that the developer has some element of control over the land/landowner. An example we can add is on a site we bought recently in order to mitigate the impact of the development, an adjoining landowner was paid to enter into a deed of covenant with our developer client to plant trees when called upon. So the only interest in the land we had there was the benefit of a covenant, but that was enough control to satisfy the client, and indeed the local planning authority.

**How do temporary planning permissions factor into the metric?**

It is proposed that temporary planning permission will not be excluded from being required to deliver biodiversity net gain. However it is also proposed that the biodiversity metric allows for temporary losses to be disregarded when the original baseline habitat is restored to the same or better condition within two years of the loss. Therefore, your BNG requirements would depend on the nature of the baseline habitat and how temporary your proposed development was.

**How will development benefitting from permitted developments be affected, eg ports and airports?**

It is proposed that permitted development be exempt from BNG requirements. A specific exemption for permitted development is provided for in the Environment Act 2021 (via para 17(a)(i) of Schedule 14).

### **How does the requirement for BNG link with the requirement to provide mitigation or compensation under other statutory regimes, eg HRA (habitats regulations assessments)?**

BNG will be a separate and additional requirement to measures required to avoid, minimise, mitigate or compensate for impacts on statutory designated sites such as those protected under the Habitats Regulations.

### **How does BNG apply to areas of temporary development? Eg construction compound or buried utilities?**

In relation to temporary development, see the answer above. Buried utilities may also fall within the scope of 'de-minimis' development which the consultation is considering making exempt from BNG requirements and we await further details to be announced.

### **Does this include consideration of species – or is the assumption that habitats will support species – birds/amphibians etc?**

Individual wildlife species are not directly accounted for in the core biodiversity metric.

### **How will BNG be enforced post-development should the proposals not fulfil the required number of credits in the future?**

The Consultation Paper states (p58) that: 'biodiversity gain site enhancements will be secured through conservation covenants or planning obligations which can ensure that habitats are maintained even if the land is sold'.

We expect developers will require the landowner delivering the BNG to enter into a planning obligation or conservation covenant so as to demonstrate to the planning authority that it can deliver the BNG requirement.

We also expect planning authorities will be required to set specific and proportionate monitoring requirements, to be secured by the planning obligation or conservation covenant. The landowner or developer must ensure monitoring and reporting obligations are fulfilled, or adequately delegated to another body with necessary funding. We expect monitoring to depend on the nature of the site, but a medium sized habitat creation project might require reports in years 2, 5, 10, 20 and 30.

Ultimately the planning authority or beneficiary of the conservation covenant will actually enforce the obligation.

### **What will the position be for orders promoted under the Highways Act 1980?**

To the extent that planning permission is not required to implement an order authorised under the Highways Act 1980, no statutory requirement to provide BNG would apply. As noted above, development benefitting from permitted development rights will not be caught by the BNG requirement.

Further, the Town and Country Planning Act 1990 excludes from the definition of 'development' the following: 'the carrying out on land within the boundaries of a road by a highway authority of any works required for the maintenance or improvement of the road but, in the case of any such works which are not exclusively for the maintenance of the road, not including any works which may have significant adverse effects on the environment.'

### **How will the 30 year period be monitored to ensure compliance?**

We expect planning authorities will be required to set specific and proportionate monitoring requirements, to be secured by planning obligation or conservation covenant. The landowner or developer must ensure monitoring and reporting obligations are fulfilled, or adequately delegated to another body with necessary funding. We expect monitoring to depend on the nature of the site, but a medium sized habitat creation project might result in reports in years 2, 5, 10, 20 and 30.

### **The consultation mentions including enhancement of designated land up to 2km inland – how will this work in practice if the BNG land needs to be secured by the developer?**

The consultation proposes that such enhancement would be allowed in principle subject to the agreement of any consultee body (eg on a marine licence application) and provided that the enhancement proposal does not risk harming designated species or features. The practical implications of allowing such enhancement to be carried out will need further consideration given the

need for BNG to be appropriately secured. The government's response to the consultation should shed further light on this aspect.

**Can you upscale a BNG unit? Eg Development 1 raises to grassland, could a second/third development take it up to mixed habitat/woodland... and higher quality habitats/units?**

Presently it is envisaged that land registered on the BNG register can only be used to mitigate the development it is allocated to, but it may be possible to improve habitat further to benefit another development. The principle of 'Additionality' could be applied to a BNG registered site where a second development seeks to rely on the same land for its BNG requirements but this scenario is not specifically covered in the consultation.

**Do we know what the enforcement regime will be on the BNG register? Eg to check if the land is being managed appropriately?**

The BNG register is to ensure that specific BNG obligations are linked with specific developments so as to prevent 'double counting'. Monitoring and enforcement will be carried out by planning authorities or beneficiaries of conservation covenants, following requirements imposed when planning consent is granted.

**Could, in principle, the freehold owner of common land enhance the land for BNG purposes?**

There is no general exception from the BNG legislation for common land. However, the nature of enhancement that may be undertaken will need to be considered carefully having regard to the nature of any statutory rights or management plans that the land may be subject to given its common land status. For example, a proposal for extensive new woodland planting may undermine public rights of recreation or grazing on the land.

## **PLANNING – THE METRIC**

**If you have a linear project where there is temporary disturbance to land which will be reinstated (eg pipelines, cables or such mainly running through arable fields, disturbed from a couple of months) how do you work with this in the metric. Could this be discounted from the outset?**

It is proposed that temporary planning permission will not be excluded from being required to deliver biodiversity net gain. However it is also proposed that the biodiversity metric allows for temporary losses to be disregarded when the original baseline habitat will be restored to the same or better condition within two years of the loss. Therefore, your BNG requirements would depend on the nature of the baseline habitat and how temporary the impact of your proposed development is.

**If your development crosses several Local Authority boundaries do you get the 'discount' if just one is used for BNG or does it have to be them all, or in combination?**

The BNG metric requires a factor of 1 to be applied where the BNG mitigation is provided within the LPA of the development and a factor of 0.75 where the BNG mitigation is provided in a neighbouring LPA for the development. At present, the BNG requirement for the development in each LPA area would be calculated separately. Further clarity is awaited in relation to the provision of BNG for nationally significant infrastructure projects which by their nature will often cross local authority boundaries. A subsequent consultation on the detail of the BNG requirement for NSIPs is expected.

**Who is responsible for scoring areas? Will there be a regulator or some sort of independent assessor? If not scoring can be rather variable**

The assessment of habitats will be the responsibility of the applicant with their consultant's report to be approved by the LP. Guidance on the assessment of different habitats which can be found at <http://publications.naturalengland.org.uk/publication/6049804846366720> on the 'habitat condition assessment sheets with instructions'. Developers should be able to rely on suitably qualified experts' opinions.

**If you have a landscape planting scheme to screen a development, am I right in understanding this cannot all be counted as BNG too?**

We do not see why BNG should not deliver additional benefits to a development site over and above BNG itself. If this is right, planting as a screen could deliver BNG as well. The consultation paper specifically envisages (page 72) that in some cases compliance with other statutory obligations can contribute towards BNG obligations, for example in connection with a site of special scientific interest but sometimes it will not – we await the outcome of the consultation for the definitive position.

**When you say that you cannot replace an area with a habitat of lower distinctiveness, is this allowed for with the calculation process?**

The principle of not permitting the 'trading down' of a higher scoring habitat for a larger area of lower scoring habitat is a policy decision which the metric should prevent – it is Rule 3 on page 17 of the User Guide (the rules being on top of the purely numerical calculations). In any event, the LPA should not approve a BNG plan which proposes to trade down habitat.

**Is there a concern that this will encourage landowners to reduce the quality of their land ahead of applying for new developments so that it is easier for them to achieve the required BNG? Is there a mechanism to prevent this from happening?**

Yes, there is a concern that unscrupulous landowners will degrade their land. Government proposes that regulations will require that 'core biodiversity gain information' must be provided with the application for planning permission. This information will, among other things, allow the planning authority to understand the baseline biodiversity value of the site, and take into account degradation since 30 January 2020.

**Who measures 'condition' and by what criteria? How reliably can post-development condition be measured in advance?**

Condition will be assessed by the applicant (or their consultant – developers should be able to rely on the opinion of suitably qualified consultants) by reference to the guidance on 'condition' set out in the habitat condition assessment sheets (which can be found here <http://publications.naturalengland.org.uk/publication/6049804846366720>). As for post- development condition, it will be interesting to see what promises BNG plans make in relation to post-development condition and we expect LPAs to require additional obligations on monitoring of condition and requirements for remedial works to be carried out, secured most likely through s106 obligations.

**Are you aware of any similar plans for BNG in marine developments?**

The consultation invites comments on the proposal to allow for the enhancement of habitats within statutory protected sites within the coastal, intertidal and marine environment. The current consultation suggests that a further consultation on the principles for marine net gain is in the pipeline. The biodiversity metric does not currently extend to marine developments but there will be a consultation on how it will apply later this year.

**The Environmental Act says that 'Biodiversity value attributable to the development is the total of a) the onsite habitat ; b) the offsite habitat; and c) the biodiversity credits purchased' Does this mean that a) could =0, b)=0, and c)=100% of the BNG?**

Yes this is correct, however, it is anticipated that the government will try to disincentivise the purchase of credits by making them expensive in comparison to either providing onsite BNG or securing offsite BNG.

## **COMPULSORY PURCHASE**

**Can a promoter CPO the land required for BNG?**

The consultation document recognises that compulsory acquisition of land to provide BNG may be necessary for some nationally significant infrastructure projects but is currently proposing not to make it a specific purpose for which land can be compulsorily acquired. The general expectation is that promoters will deliver BNG within the development boundary or through the purchase of off- site biodiversity units, rather than resorting to compulsory acquisition powers. Compulsory powers may be necessary where it is necessary to deliver a gain in close proximity to the development site but the promoter cannot secure the land by other means. There not planned to be a standalone compulsory purchase power for BNG (although respondents may call for one and so it may be brought in), so for now promoters will need to consider whether land can be acquired compulsorily under other existing enabling powers.

### **What are the implications for compulsory acquisition of land and justification for it?**

As the market for off-site biodiversity units matures over time, it is likely that it will become more difficult to make out a compelling case in the public interest (the test for compulsory purchase of land) that a particular parcel of land should be subject to compulsory acquisition to deliver BNG, other than in very specific circumstances.

In the early period of the BNG requirement for nationally significant infrastructure projects, compulsory purchase powers may be more widely sought in the likely absence of a wide range of off-site biodiversity units which may be necessary to meet the BNG requirement for that project.

## **FINANCIAL**

### **What are the potential capital tax implications from allowing BNG on your land? ie availability of APR or BPR?**

To oversimplify, Agricultural Property Relief (APR) is available if and only if land or buildings are used for agricultural purposes as defined in the Inheritance Act 1984, broadly in connection with the production of food. If land can be used for such agricultural purposes as well as for delivery of BNG, then we think BNG will not necessarily mean agricultural property relief is not available.

However, the land will need to be improved to deliver the 'net gain'. We suspect there may be relatively few opportunities to deliver habitats that increase biodiversity but which are still genuinely agricultural.

Business Property Relief (BPR) may be available as an alternative, but only to the extent the land is not held as an investment, or where it qualifies under the Farmer case as part of the wider activity of an estate. Unless Farmer applies, we suspect it will be difficult to claim BPR unless the provision and maintenance of a BNG site can properly be called a business activity carried on for profit.

Government recognises that farmers need to understand these issues before committing land to habitat creation or enhancement and states 'work is underway to provide clear guidance on this.'

This may be revised following the responses made to the consultation so should be monitored.

### **How will BNG Land be valued? Govt guidance on this?**

The government intends an open market approach to BNG land value and so land value will be market dependant. The government's market analysis study can be found here: <http://randd.defra.gov.uk/Default.aspx?Menu=Menu&Module=More&Location=None&ProjectID=2 0608>

## **DEVELOPER-RELATED**

### **How will promotion agreements and options cover BNG? Is there an expectation that a developer/promoter will seek additional land to be within the agreement with a rural landowner to allow BNG?**

It is site-specific, and in particular depends on whether the parties feel that BNG should be secured (i) onsite, (ii) offsite, or (iii) through government credits. Your question relates to (ii) and in these circumstances, yes it would be expected that the developer takes the initiative to try to find mitigation land within the vicinity in the same way as offsite SANG – Suitable Alternative Natural

Greenspace, and this may captured in a 'reasonable endeavours' obligation in the contract. The developer would wish to recover its expenditure for securing offsite BNG land though, for example as a deductible cost in a promotion agreement coming off the sum the landowner is to receive. If there is a management company monitoring costs could be secured by way of a rent charge payable by the house holders.

In terms of management and monitoring post-completion we reckon this could take different forms. The developer might be required to pay a competent body a hefty endowment as is the case for some SANG. There will likely need to mechanism dealing with the management and monitoring costs post-acquisition, whether this be a service charge or endowment.

## LANDOWNER-RELATED

### Can farmers be paid to improve biodiversity of farmland for 30 years?

Government proposals envisage that biodiversity improvements are delivered soon after the implementation of the development (12 months is mentioned in the consultation paper) and capital costs paid at that time. We doubt that complex ecological systems can be fully delivered so quickly, thought they can of course be initiated. Under the proposals sites will be monitored, and (presumably) enforcement action taken if the monitoring reveals that the specified biodiversity has not been delivered, or if the site has declined. There must be provision for the cost of monitoring, but the scheme does not appear to envisage regular payments for improvement of biodiversity over the longer term, which looks like a missed opportunity.

### If you plant up a site as an orchard/country park now ie publicly accessible, can you claim this as BNG in the future?

The Consultation Paper envisages 'Habitat Banking' where a landowner might invest in increasing biodiversity with a view to selling Biodiversity Credits to developers. If the new orchard /country park has delivered a net gain in biodiversity over the habitat present before and satisfied all other relevant criteria, it might be possible to bring it into the scheme.

### Do you think this will promote the development of arable land which has very little initial biodiversity value whilst brown field sites with mosaic habitats will be avoided?

It may well. Brownfield sites are usually more complex to develop, and are therefore usually more expensive to develop. If there is additional expense in 10% net biodiversity gain over the brown field mosaic when compared with the 10% gain on a greenfield site, that is an additional incentive to prefer the greenfield site option. Government has considered a partial exemption for brownfield sites from the biodiversity net gain requirement, but that option has been rejected.

### Do you think consideration has been given to the possibility of there being a maximum amount of land available for BNG improvement, assuming we still want to use land for food production?

There is no sign in the consultation paper that a ceiling on land available for BNG has been considered, and government policy seems to deprioritize the importance of food security as part of the opportunities of Brexit and depend on availability of food under global free trade instead.

Russia's invasion of Ukraine (the two countries together are forecast by ING to account for 27% of world trade in wheat in 2022 for example) may prompt a rethink.

*This publication is not meant as a substitute for advice on particular issues and action should not be taken on the basis of the information in this document alone.*

*This firm is not authorised by the Financial Conduct Authority (the FCA). However, we are included on the register maintained by the FCA ([www.register.fca.org.uk](http://www.register.fca.org.uk)) so that we can offer a limited range of investment services (including insurance distribution activities) because we are authorised and regulated by the Solicitors Regulation Authority (the SRA). We can provide these services if they are an incidental part of the professional services we have been engaged to provide. Mechanisms for complaints and redress if something goes wrong are provided through the SRA and the Legal Ombudsman.*

*BDB Pitmans LLP processes your personal data in connection with the operation and marketing of a legal practice and in accordance with our privacy policy at [www.bdbpitmans.com/privacy](http://www.bdbpitmans.com/privacy). We will occasionally send you information relating to the firm however if you would prefer not to receive this information or would like us to amend your contact details and/or mailing preferences, please notify us by email: [briefings@bdbpitmans.com](mailto:briefings@bdbpitmans.com).*

*BDB Pitmans LLP is a member of Lexwork International and Interact Law, both associations of independent law firms. [www.lexwork.net](http://www.lexwork.net) | [www.interactlaw.com](http://www.interactlaw.com). Printed on sustainable paper.*