

# **CAAV NATIONAL TUTORIAL 2023**

## **Natural Capital Agreements**

## HEADS OF TERMS – BNG AGREEMENT

### **Background**

Developer requires land for use to offset the impact of a nearby housing development in accordance with the biodiversity net gain (BNG) requirements introduced by the Environment Act 2021.

The BNG objective is met in relation to a development if the biodiversity attributable to it exceeds the pre-development biodiversity value **by at least 10%**. It requires an assessment of the pre-development biodiversity value of a development site and the estimated post-development biodiversity value (using the Biodiversity Metric 4.0, published by Natural England).

The developer in this case, Shark Developers Ltd, anticipates that its development in the nearby town of Hawthorn will not deliver a 10% biodiversity gain. Accordingly, the BNG requirement of the development site will need to be delivered using additional land, and that is why the developer has approached Jill and Phil.

The Biodiversity Metric 4.0 will be used to estimate the value of biodiversity net gain on the proposed habitat / offset site and calculate the number of biodiversity units that the site can provide and therefore the number that will be available to satisfy the BNG demand for this development. These 'units' can be created by the developer and landowner collaborating to (a) make the habitat site available and (b) establish and thereafter manage the habitat site.

### **Considerations**

- i. Does the landowner have sufficient land to ensure that it will have enough land to meet its own BNG/nutrient neutrality/carbon goals after this lease? Consider, for example, any development it may plan to carry out itself and how the BNG requirements for that will be met.
- ii. Are there any existing rights over the land which might prevent the landowner achieving its obligations – consider, for example, tenants, sporting tenants, graziers or contractors?
- iii. Is the land subject to any other agreements such as ELMS / Countryside Stewardship Scheme, or an official environmental designation such as a SSSI, for example?
- iv. Has the landowner assessed the possibility of being unable to change the use of the land after the agreement?
- v. Are the restrictions which are being placed on the landowner reflected in the consideration or other terms of the agreement?
- vi. Keep in mind where value and risk lie for each party.

### **Assumptions**

In this scenario:

1. The land is in England.
2. The Landowner wishes to lease the habitat land rather than sell.
3. There are no existing rights or agreements or designations over the land in question.

4. Planning permission is still TBC. The Developer does not want to commit to a habitat lease until the development gets the go ahead, so is seeking to agree that the grant of the lease is subject to planning consent being granted.
5. The Developer is willing to take a lease of bare land and thereafter deal with creation / establishment of the required habitat and ongoing management / maintenance of it. The Landlord has decided it does not want to be involved in this.
6. It has been agreed that the Developer will pay rent, rather than a single lump sum payment.
7. Once planning permission is granted, the Developer's BNG obligations must be recorded in planning terms with the Local Planning Authority (LPA), e.g. via a Section 106 planning obligation **or** a Conservation Covenant. As the habitat land is offsite (i.e. outside the red line of the development) the landowner will also need to be a party to either the s106 agreement or the Conservation Covenant.
8. Developer must ensure the site is established and registered on the biodiversity gain site register in due course.

## **Structure of an Agreement between the Developer and the Landowner**

To satisfy the Developer's goal, there will need to be:

1. an **Agreement for Lease**, recording that the grant of the lease is subject to planning consent being granted;
2. A **Habitat Lease**; and
3. Either a **s106 Agreement** or a **Conservation Covenant**. This agreement is outside the scope of your instructions for the time being (s106 Agreements generally being drafted by the LPA).

NB. a s106 Agreement is a public document, so any commercially sensitive terms are best included in a separate, confidential, agreement(s).

## **Outline Heads of Terms**

**1<sup>st</sup> point: ALWAYS MARK UP as Subject to Contract (STC) & Confidential**

### **A. AGREEMENT FOR LEASE**

In briefest summary:

- a. Structure will make the grant of the Habitat Lease conditional on the grant of planning permission for the main development site and any necessary planning permission for habitat creation on the habitat land.
- b. Grant of full planning permission will trigger grant of the Habitat Lease.
- c. The parties will need to carefully define the 'Planning Permission' / trigger event.
- d. Need to agree a **Longstop Date** for Developer to obtain the planning permission. If planning consent not obtained by the longstop date, either party given right to terminate the Agreement for Lease.
- e. **Completion Date** will need to be agreed – e.g. X number of weeks after the planning permission is granted. Will need to factor in any external factors relevant for both parties e.g.

- Developer will want flexibility / some ability to control date it takes the lease and commences the habitat creation work to fit in with overall development timetable etc.
  - Landowner must be mindful that vacant possession will be required on the completion date. In this scenario, the habitat land falls outside of the AHA tenancy, so vacant possession isn't an issue.
- f. The Agreement for Lease will annex a copy of the agreed form Habitat Lease.

## B. HABITAT LEASE

### 1. Parties

individual/joint/company?

- Landlord: the land is jointly owned by Jill and Phil. (You will need their surnames.)

If the contracting party providing the biodiversity land is a tenant of the land, consent of the landlord will likely be needed, especially where the tenancy might not last the full term of the agreement or there is to be a significant change made to the land.

Where relevant, it might be necessary to seek, secure and record the consent of a mortgagee either under the terms of the mortgage deed or where the agreement affects the value or marketability of the land securing the loan.

- Tenant: Shark Developers Ltd – confirm company number; registered office
- Will there be a Guarantor – whether for delivery, finance or other matter. i.e. who will pay the rent in the event of the Developer defaulting?

### 2. Identify the party's agents and solicitors

- Provide full contact details.
- As a valuer, you can only draw up leases if they are for a fixed term of less than 3 years. (**N.B.** specific exception for FBTs – *section 35 of 1995 Act* enables FAAV and MRICS (and associate members of RICS) to prepare FBTs as deeds regardless of duration. But still need to be aware of formalities / legal requirements for Deeds.)

### 3. Premises

- Identify extent of property demised.
- Refer to a plan & ideally a schedule.
- Bare land?
- Provide title documents (registered or unregistered land?) **N.B.** Need to cross-check information against the HM Land Registry title documents (or title deeds if still unregistered). Solicitors will require the title information.

## 4. Term

- Length of term:
  - Under the BNG rules, habitat sites are required to be maintained for **30 years** after completion of the habitat enhancement works: lease term needs to be long enough to allow for the habitat creation / enhancement works.
  - It is open to parties to agree a longer term for an agreement where this meets their shared objectives. However, the longer the agreement, the more need there will be for it to allow practical review to accommodate change.
  - NB. Conservation Covenants can be entered into by parties with a "qualifying estate" in land, which includes leases for fixed term in excess of 7 years.
- Fixed or periodic?
  - Developer will need a fixed term certain to be able to satisfy the BNG obligations.
  - Note that a fixed term required in any event if the parties need / intend to contract out of security of tenure under LTA 1954 Act. The contracting out process is **not available** for periodic tenancies.
- Identify commencement & termination dates – consider what is expected to happen at the end of the term.
- Term of more than 7 years means the lease will be registrable at HM Land Registry. Tenant to be responsible for registering the lease, as it is to their benefit.

## 5. Permitted Use

### (a) Creation of habitat:

- What is tenant (Developer) going to be permitted to do on site? Need to consider carefully in context of long-term habitat creation.
  - Conservation grazing?
  - Grassland / meadows?
  - Water meadows?
  - Tree planting / woodland creation?
  - Rewilding / woody scrub?
  - Public access?
- Will the permitted use / user clauses be linked to a **Habitat Management Agreement / Conservation Management Agreement (HMA)**? If so, who will

implement the HMA? Likely to be contracted out by Developer to a third party with relevant expertise, with the third party taking responsibility for monitoring and verifying the necessary BNG requirements.

- any specific restrictions on what tenant can do and where?

## (b) Creation of BNG credits

- o Developer is being given access to land to create habitat and in turn, BNG credits.
- o If the site produces more BNG credits than Developer requires, will Developer or the Landlord have the right to sell / deal with those spare credits? If the Landlord is concerned about meeting its own BNG obligations, this could be an important negotiating point.

## 6. Type of lease?

- FBT **or** commercial **or** common law lease?
- Is grazing or cropping in any form still proposed / possible on site? For FBT to be appropriate, it must be primarily or wholly agricultural at beginning of tenancy (*section 1, ATA 1995*), although the notice conditions could be utilised to allow move away from agriculture during the Term.
- If site will be used for 're-wilding' and no agricultural production or use possible, not in FBT territory. In that scenario, grant a common law or standard commercial lease **contracted out of Part II of LTA 1954** – required because developer using site for purposes of a business.
- FBT may be more attractive for Landlord from Agricultural Property Relief (APR) POV.

## 7. Reservations for landlord

- Access, services / connections to existing service media
- Right to inspect
- Other natural capital assets, apart from BNG e.g. water, carbon, nutrient credits
  - o Landlord will want to control other natural capital assets and be clear that Developer is only obtaining BNG habitat site / associated BNG credits that will be created.
  - o Landowner's ability to exploit those other assets during term of this lease likely to be nil or at the very least, severely restricted, but key thing is to ensure control is maintained for future. Any future opportunities will need to be consistent with guidance/rules on the *Additionality principle* at relevant time.

## 8. Consideration

- Premium to be paid by Developer?
- Starting rent?

- Advance or arrears?
- Method of payment?
- Rent Days – monthly/quarterly/annually?

## 9. *Rent Review*

If rent review is appropriate, consider:

- Mechanism incl. frequency / review dates
- Formula / valuation basis:
  - o Linked to RPI (Retail Prices Index) / CPI (Consumer Prices Index)?
  - o Upwards only? **N.B.** won't be permitted if an FBT is utilised.
- Dispute resolution process?

## 10. *Break clauses*

- The objectives of the agreement and its statutorily required minimum terms might make it unusual to have effective terms providing for early termination or resumption within the term, save perhaps only on strong commitments for the provision of equivalent or further gain.
- Developer BNG obligations could be prejudiced if this lease terminates early, over whole or part.
- If a break right is appropriate, consider:
  - o Exercisable by LL or T? or both?
  - o Frequency?
  - o Break date(s)? On happening of specific event? e.g. termination of habitat management agreement.
  - o Of whole or part?

## 11. *Forfeiture clause*

- Include to protect landlord in event of:
  - o Tenant insolvency; or
  - o Failure to pay rent; or
  - o Failure to comply with tenant's obligations under lease.

## 12. *Anti-alienation clause*

- Impose appropriate restrictions on assignment and sub-letting.

- Consider if restrictions or express provisions required re. parting with or sharing possession – will habitat management plan be implemented by a third party, or require third party use (e.g. grazing or mowing)?
- Not without landlord's prior consent.
- "*Consent not to be unreasonably withheld*": LTA s.19. Can include conditions for when consent will be given. If an FBT is utilised, an absolute prohibition on assignment can be imposed.
- Landlord's obligations to run with the land and may only be assigned to a person in occupation of the land (so a successor owner or tenant).

### 13. *Rights of way & easements*

- Access:
  - o Include provision for access rights granted to tenant to extend to tenant's agents – i.e. the third-party signatory to any Habitat Management Agreement/Conservation Management Agreement (HMA).
  - o Does tenant need access rights over landlord's retained land?
  - o If there are access tracks/drives, are they shared?
  - o Is tenant required to contribute to cost of maintenance/repairs?
- Water
- Connections to service media on adjoining land?
- Provide suitable plan(s)

### 14. *Consent for change of use / planning permission / tenant's improvements*

- What incoming works / habitat creation work is tenant being given specific consent for?
- If planning permission required, ensure tenant obliged to obtain and pay for it and all work on site / use of site must be in accordance with planning permission.
- consider any future restrictions / obligations re. such matters, including appropriate *compensation provisions*.

### 15. *Tenant covenants*

- Include appropriate obligations for upkeep / management of land.
- May be appropriate to link to a **Habitat Management Agreement**.

### 16. *Repairing obligations + Insurance*

- Consider extent of both parties' obligations across whole demise, including any buildings and fixed equipment (including gates, tracks, bridges etc).



## 17. Ability to claim subsidy / enter into schemes

- How will habitat creation on this site interact with ELMS / other schemes?
- If use of site doesn't preclude claims, who would be potential claimant(s)? In this scenario, Tenant will have exclusive possession and therefore management control, not Landlord.
- the Tenant could be obliged to enter into schemes at the Landlord's direction, provided doing so does not interfere with the Agreed Use of the land.

## 18. Reinstatement provisions / yielding up on termination

- What obligations might need to be imposed on Tenant re. condition of site on termination? Landlord needs to appreciate will regain an established 'habitat' after 30+ years.
- *"In a condition consistent with proper performance of tenant's obligations under the agreement"*. Linked also to compliance with any Habitat Management Agreement?

## 19. Liability for Legal & Professional costs

- Who is paying what and when?
- Developer making a contribution to Landlord costs?

## 20. Schedule of Condition?

- Consider if appropriate to provide accurate record of baseline at commencement.
- May be appropriate to link to a **Habitat Management Agreement**.

## 21. Review & Variation

- Consider including provision for regular review of the respective obligations in the agreement, either at regular 5-year intervals, for example, or in response to changes in legislation etc. Able to be invoked on unilateral application?

While any agreement can be varied by the consent of the parties to it, a biodiversity gain agreement is a long-term agreement for a land management prescription over a period in which much might change, including knowledge and scientific understanding, circumstances, the climate, and public objectives. A closer understanding of the working of the required prescription on that site will also be gained as it is applied, testing initial assumptions in ways that might surprise or confound intentions.

- Link to the dispute resolution method.

## 22. Dispute resolution clause

- Single method to be prescribed for all issues?
  - o Expert determination reserved for some points, perhaps those of ecological importance.
  - o Arbitration, with the broad framework of the Arbitration Act, to be used for some fundamental points in this long-term agreement affecting land.

- Appointing body? CAAV/ RICS
- Include provision for voluntary mediation.

## 23. Stamp Duty Land Tax

- SDLT return needs to be filed by Tenant, even if no SDLT payable. SDLT is a tenant liability.

## 24. Advance Notices

- Need to note requirement to exchange LTA 1954 contracting out / advance notices before agreement is signed, to ensure that LTA security of tenure does not apply.
- If FBT utilised, section 1(4) notices required.

### **SIGNED AND DATED by both parties**

### **Conclusion**

These heads of terms are based on biodiversity net gain agreements under the Environment Act 2021. However, many of the points raised would be transferable to other agreements where off-site land is used to compensate for an environmental issue (involving, for example, phosphate, carbon, nitrates etc).

All agreements will be fact specific, with additional and particular issues arising which will need to be considered.

## **CONSERVATION COVENANTS**

### **1 INTRODUCTION**

- 1.1 Conservation Covenants are a specific type of covenant affecting land. It is a species of the existing system of existing freehold covenants: restrictive and positive covenants. Conservation Covenants have been created to relate solely to agreements relating to landowner's obligations to the environment and eco-systems that may arise out of planning schemes or other natural capital agreements.
- 1.2 What follows is a commentary on the position as it pertains to the law in England. A short summary of the position of Wales is at the end of these notes.
- 1.3 The Law Commission (the body who reviews and suggests reform to the law) produced a report in 2013 that recommended to the Government that in order for the Government, its departments and other public bodies to be able to enforce environmental agreements against landowners, a new, purpose-built type of statutory system of covenants, known as Conservation Covenants should be created.
- 1.4 After some delay, it was not until 2018 and 2019 that DEFRA, following production of its 25 Year Environmental Plan, consulted on the Conservation Covenants report. Conservation Covenants were then included in the draft of the Environment Bill.
- 1.5 When the Environment Act received royal assent in November 2021, Conservation Covenants became law in England. Part 7 of the Environment Act 2021 ("EA 2021") sets out provisions for voluntary Conservation Covenants.
- 1.6 Section 117(2)(a)(i) EA 2021 refers to a Conservation Covenant agreement being an agreement requiring the landowner "to do, or not to do, something on land in England".

### **2 WHAT IS A CONSERVATION COVENANT?**

- 2.1 A Conservation Covenant is a private voluntary agreement between a landowner and a "responsible body" (such as a conservation organisation or public body) to do, or not do, something on their land for a conservation purpose for the public good. This could be to conserve the natural or historical environment of the land.
- 2.2 The requirements that there are a conservation purpose and a public good particularly differentiate Conservation Covenants from other private interests in land, such as easements.
- 2.3 A Conservation Covenant could contain positive or restrictive obligations, or both. A positive obligation would require the landowner to do something, such as manage the land to secure a conservation outcome. A restrictive obligation would secure a conservation outcome by requiring the landowner not to do something.
- 2.4 Conservation Covenants can run with the land and bind future landowners as well as the person who entered into the agreement. They have the potential to deliver lasting conservation benefits for the public good. Conservation Covenants offer flexibility as the parties negotiate the terms to suit their particular circumstances, including the covenant duration.

### **3 KEY REQUIREMENTS**

- 3.1 The EA 2021 describes the conditions that an agreement must meet for it to be a

statutory Conservation Covenant. It must:

- 3.1.1 Be an agreement between a landowner and a responsible body. The landowner must be a freeholder or have a leasehold estate of more than seven years (and excludes any statutory continuation period). Responsible bodies will need to apply to be designated by the Secretary of State.
- 3.1.2 Be executed as a deed by the parties.
- 3.1.3 Be an agreement containing provision that is of a qualifying kind, which is either that it may require the:
  - 3.1.3.1 landowner to do, or not to do, something on specified land in England or require them to allow the responsible body to do something on such land; or
  - 3.1.3.2 responsible body to do something on such land.
- 3.1.4 Have a conservation purpose.
  - 3.1.4.1 "Conservation" means conservation of:
    - 3.1.4.2 the natural environment (such as plants and animals and their habitats) or the land's natural resources (such as water on the land);
    - 3.1.4.3 places of archaeological, architectural, artistic, cultural or historic interest; or
    - 3.1.4.4 the setting of land with a natural environment or natural resources or which is a place of archaeological, architectural, artistic, cultural or historic interest.
    - 3.1.4.5 "natural environment" is defined, in relation to land as including its plants, animals and other living organisms; their habitats; its geological features.
- 3.1.5 Be intended by the parties to be for the public good.
  - 3.1.5.1 The general guidance states that public good means that the covenant must benefit the public in some way. For example, you could conserve land as a place of archaeological, architectural, artistic, cultural or historic interest that the public can enjoy.
- 3.1.6 Be registered as a local land charge by the responsible body to be effective.
- 3.1.7 Unless stated otherwise, run for the default period:
  - 3.1.7.1 for a freehold, of a period of indefinite duration; or
  - 3.1.7.2 for a leasehold, of the remainder of the term.

## 4 RESPONSIBLE BODIES

- 4.1 Responsible bodies are designated so by DEFRA under S199 EA 2021.

- 4.2 In July 2023, Defra launched its application process for organisations to become responsible bodies for the purposes of Conservation Covenants and published application guidance<sup>1</sup>.
- 4.3 Defra's guidance on its criteria for being a responsible body briefly sets out requirements against four key requirements relating to:
- 4.3.1 **Eligibility** - to become a responsible body, the applicant organisation must have an operating base in the UK that allows it to properly carry out its conservation covenant functions. This means that the main activities to deliver Conservation Covenants and the people delivering them must be located in the UK. The applicant must be:
- 4.3.1.1 a local authority;
  - 4.3.1.2 a public body or charity, where at least some of its main purposes or functions relate to conservation; or
  - 4.3.1.3 a body other than a public body or charity, where at least some of its main activities relate to conservation.
- 4.3.2 **Financial security** – DEFRA will check the applicant organisation has:
- 4.3.2.1 a UK bank account;
  - 4.3.2.2 secure financial situation; and
  - 4.3.2.3 adequate internal financial and administrative control for long term viability.
- 4.3.3 **Operational capacity and capability** - DEFRA will check that the applicant has the capacity and capability to manage and enforce the types of covenants it expects to enter into. Defra may check expertise, workforce, contingency planning, monitoring and enforcement, dispute resolution, structure and governance and track record.
- 4.3.4 **Ongoing suitability** - Once designated as a responsible body, the applicant must continue to meet the criteria for being one. If it subsequently fails to meet any of the criteria, the applicant must inform DEFRA. Changes in circumstances may include unresolved disputes with landowners over delivery, being subject to any new criminal prosecution, civil sanctions, fraud or insolvency proceedings, being subject to a new Charity Commission inquiry or any new conflicts of interest that affect delivery. Failure to notify Defra of any changes in circumstances, may lead to them removing the organisation from the list of designated responsible bodies.

## 5 REGISTRATION AS A LOCAL LAND CHARGE

- 5.1 A Conservation Covenant is a local land charge. The responsible body has a duty to apply for its registration as a local land charge.
- 5.2 It is effective against subsequent owners of the land only once it has been registered

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<sup>1</sup> <https://www.gov.uk/government/publications/conservation-covenants-apply-to-become-a-responsible-body>

as a local land charge. This differs from the general position where the enforceability of a local land charge is unaffected by whether or not it is registered.

- 5.3 The obligations for variation and cancellation of the local land charge are on the responsible body (or the Secretary of State) (rather than "the person by whom the charge is enforceable", which could include the landowner).

## 6 DURATION

- 6.1 S121 of the EA 2021 provides that an obligation under a Conservation Covenant has effect for the default period, unless the covenant provides for a shorter period.

- 6.2 The default period is:

- 6.2.1 For a freehold estate, a period of indefinite duration.

- 6.2.2 For a leasehold estate, a period corresponding in length to the remainder of the period for which the term of years was granted i.e., the remaining term on the lease.

- 6.3 Bear in mind that the rules on biodiversity net gain require a minimum commitment of 30 years (Schedule 7A, Town and Country Planning Act 1990), and for nutrient neutrality, there is a minimum commitment of 80 to 125 years.

## 7 THE TERMS

- 7.1 Obligations can be both positive (requiring the party to do something on the land) or restrictive (requiring them to refrain from doing something). Regardless, both will bind the land and apply to successors in title.

- 7.2 This makes Conservation Covenants different from the existing law on freehold covenants. Presently, there are certain rules on whether or not restrictive or positive covenants can pass to future owners. These do not apply to Conservation Covenants.

- 7.3 The EA 2021 focuses on the parties right to freedom of contract. The intention of the legislation is that there is an infinite number of scenarios in which Conservation Covenants could apply, and it is really for the responsible body to decide what terms it may wish to have in the agreement, having regard to the specific requirements of the subject of that agreement.

## 8 REPORTING AND MONITORING

- 8.1 In relation to the monitoring of the subject to the Conservation Covenant, that is a matter for the contracting parties. The responsible body may not have the resource to regularly monitor the land, particularly if the nature of the conservation requires constant surveying and tracking of a protected species.

- 8.2 Alternatively, if the landowner is expected to do too much, without much reward, there may not be an incentive for them to carry out extensive monitoring.

- 8.3 The EA 2021 leaves it to the parties to agree specific terms on monitoring.

- 8.4 On reporting, s136 EA 2021 imposes an obligation on responsible bodies to make an annual return to the Secretary of State stating whether, during the period to which the return relates, there were any Conservation Covenants under which an obligation was

owed to it as the responsible body.

- 8.5 The annual return must state the number of Conservation Covenants and state, for each Conservation Covenant, the area of the land in relation to which the body was owed any obligation.

## 9 MODIFICATION AND DISCHARGE

- 9.1 Sections 127 to 129 of the EA 2021 provide that where the parties agree, a conservation covenant can be modified or discharged.

- 9.2 Such a scenario may arise where the purpose to which the covenant was created no longer applies (e.g., a protected species moving on), or where the terms need to be altered.

- 9.3 Where no agreement from either side is forthcoming, a party may apply to the Upper Tribunal for such an order. This is the same for how one can modify or discharge an existing freehold covenant.

## 10 ENFORCEMENT OF A BREACH OF TERM

- 10.1 The EA 2021 makes provision on breaches of an obligation and the position on enforcement.

- 10.2 S124 provides that a person bound by a negative obligation under a Conservation Covenant breaches the obligation by doing something which it prohibits or permitting or suffering another person to do such a thing.

- 10.3 A person bound by a positive obligation under a Conservation Covenant breaches the obligation if it is not performed.

- 10.4 In proceedings for the enforcement of an obligation under a Conservation Covenant, the available remedies are:

10.4.1 Specific performance – an order made by the court requiring the breaching party to carry on and perform the term it is in breach of.

10.4.2 Injunction – a court order requiring a party either to do something or not to do something.

10.4.3 Damages – a payment of money as a result of the innocent party's loss caused by the breach.

10.4.4 Order for payment of an amount due under the obligation – if for example, one of the parties has agreed to pay to the other party a sum of money in compliance of an obligation, or as a contribution to the maintenance of the obligation.

### Defences

- 10.5 S126 provides a range of statutory defences that may be available to a party faced with an argument that they are in breach of an obligation.

- 10.6 It could be a defence to show:

- 10.6.1 That the breach occurred as a result of a matter beyond the defendant's control.
- 10.6.2 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.
- 10.6.3 That at the time of the breach—
  - 10.6.3.1 the land to which the obligation relates was, or was within an area, designated for a public purpose, and
  - 10.6.3.2 compliance with the obligation would have involved a breach of any statutory control applying as a result of the designation.

## **11 COMPARISON TO S106 AGREEMENT**

- 11.1 Conservation Covenants are considered an important tool in delivering mandatory biodiversity net gain (BNG) for planning applications under the Town and Country Planning Act 1990 process, which is due to be introduced in England in November 2023.
- 11.2 Until the introduction of conservation covenants, the main way of securing planning obligations, such as mandatory BNG, was using a Section 106 Agreement.
- 11.3 While the final details are still awaited for mandatory BNG, either a section 106 Agreement with the local planning authority or a Conservation Covenant with a responsible body could potentially usually be used as the legal agreement to secure BNG on a site.
- 11.4 The advantages and disadvantages of using a Section 106 Agreement as against a conservation covenant will depend on the particular circumstances. Both are tools to deliver the conservation outcomes, but with obvious differences most notably that the Conservation Covenant is a private law agreement involving a responsible body. Considerations include whether:
  - 11.4.1 It is an outline of full planning application.
  - 11.4.2 The BNG will be secured onsite or offsite.
  - 11.4.3 There are suitable (independent) responsible bodies to deliver the BNG.
  - 11.4.4 Credits may have to be used.
- 11.5 The responsible body will be better long term in monitoring and enforcing the outcomes compared to a local authority which may have insufficient resources.