

National Tutorial 2023

BNG AGREEMENTS

MODEL ANSWER

This Outline Answer Sheet is intended to be read alongside the accompanying Detailed Notes provided.

QUESTION

Consider how you might advise Jill of the likely structure to a deal with the developer, and how might the local authority ensure that the BNG requirements are met.

KEY AREAS OF KNOWLEDGE TO DEMONSTRATE IN EXAM:

- (a) understanding of what BNG is and the statutory framework underlying it;
- (b) the key priorities for each party;
- (c) what options the landowner has; and
- (d) which parties must be signatories to which agreements.

1 ADVICE TO JILL ON STRUCTURE OF A DEAL WITH THE DEVELOPER

1.1 Introduction

1.1.1 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.

1.1.2 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).

1.1.3 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.

1.1.4 As landowners, Jill and Phil can enter into a habitat lease directly with Shark Developers Ltd. However, as the habitat land is offsite (i.e. separate to the development), the landowner will be required to be a signatory an agreement with the local authority to ensure the biodiversity obligations are met.

1.2 Developer's Priorities

- 1.2.1 Presume that planning permission is still TBC, as the planning authority will need to see evidence of how the Developer is going to achieve its BNG obligations before granting permission. The Developer will not want to commit to a habitat lease until the development gets the go ahead, so consider whether an **agreement for lease** is appropriate, whereby the grant of the lease is subject to planning consent being granted.
- 1.2.2 Consider whether 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 Developer may prefer to contract this out to a third party with relevant expertise, by way of a **Habitat Management Agreement / Conservation Management Agreement**.
- 1.2.3 Developer must ensure the site is established and registered on the biodiversity gain site register in due course.

1.3 Advice to Landowner

- 1.3.1 Does the landowner have sufficient land to ensure that it will have enough to meet its own BNG / nutrient neutrality / carbon goals after this lease? Consider, for example, the research lab David is proposing and how the BNG requirements for that will be met.
- 1.3.2 Any existing rights over the land which might prevent the landowner achieving its obligations – not told of any and know land is not subject to a tenancy
- 1.3.3 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? Not told.
- 1.3.4 Note that the under the BNG rules, habitat sites are required to be maintained for 30 years after completion of the habitat enhancement works, so lease term needs to be long enough to allow for the habitat creation / enhancement works + **30 years**.
- 1.3.5 Developer is being given access to land to create habitat and in turn, BNG credits. 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.
- 1.3.6 Explain likely structure:
 - 1.3.6.a **Agreement to Lease**
 - 1.3.6.b **Habitat Lease**
 - 1.3.6.c **Conservation Covenant**

1.3.6.d **Habitat Management Agreement / Conservation Management Agreement.**

1.4 Agreement for Lease

1.4.1 Grant of full planning permission to trigger grant of the Habitat Lease.

1.4.2 Include longstop date & completion date.

1.5 Habitat Lease

1.5.1 Note the options in terms of the type of lease – **FBT** if grazing or cropping is proposed (at least at outset provided s1(4) notices are served), otherwise **common law** or **commercial lease** (ensure **contracted out of Part II of LTA 1954**)

1.5.2 Flag tax benefits of FBT in terms of availability of **Agricultural Property Relief (APR)**.

1.5.3 Clarify extent of demised land by way of a plan and a schedule.

1.5.4 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.

1.5.5 Consider what the landlord will do with the established habitat after the lease comes to an end.

1.5.6 Lease will be registrable at HM Land Registry as for a term of more than 7 years.

1.5.7 Permitted Use to link to **Habitat Management Agreement?**

1.5.8 Landlord to reserve control of other **natural capital assets**; Developer is only obtaining BNG habitat site / associated BNG credits that will be created.

1.5.9 Consider rights of access for landowner and Developer (and its agents) & any contributions to maintenance

1.5.10 Consider respective repairing & insurance obligations (particularly for fixed equipment such as gates, tracks and fencing etc).

1.5.11 Consider whether planning permission will be required for change of use and ensure tenant obliged to obtain and pay for it and all work on site / use of site must be in accordance with planning permission.

1.5.12 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).

1.5.13 Review and variation of agreement given length of term and developing area of law and knowledge.

1.5.14 Look to Developer for contribution to legal costs.

2 HOW LOCAL AUTHORITY CAN ENSURE THE BNG REQUIREMENTS ARE MET

2.1 Assuming for the purposes of this scenario that the law relating to BNG and Conservation Covenants are in full force, Conservation Covenants will enable the local authority (assuming that it is registered as a responsible body), to enforce the BNG obligations as against the Estate.

2.2 In this scenario we are concerned with off-site BNG, in that the land that the developer wants to use to reach its BNG target is not included in the development. It is unlikely when concerned with off-site BNG sites that the local authority will enter into a S106 agreement, because that agreement will only relate to the development and the obligations on the developer as part of the development.

2.3 An off-site BNG site does not relate to the development, and so the local authority will want to use a specific conservation covenant in order to enforce the obligations in respect of the BNG target against the Estate.

2.4 The local authority, as part of the planning process, will likely enter into discussions with the Estate once it has been able to establish the specific requirements of the BNG site and suggest heads of terms for the conservation covenants.

2.5 On behalf of the Estate, consideration is likely to be given to:

2.5.1 The specific type of conservation/ biodiversity gain in question.

2.5.2 The duration of such obligation.

2.5.3 Specific obligations in respect of monitoring, surveying and reporting.

2.5.4 Whether the obligation is likely to be negative, positive or a mix of both.

2.5.5 The level of involvement required from the Estate from a financial and practical perspective. Does it have the resource?

2.6 On behalf of the local authority, consideration is likely to be given to:

2.6.1 How the biodiversity target needs to be achieved.

2.6.2 The nature of the subject of the conservation covenant and how it can be protected and conserved.

2.6.3 The duration of time required to achieve the 10% net gain.

2.6.4 Whether there are any special characteristics of the land that require specific obligations or terms.

2.6.5 Whether there are any specific monitoring requirements as part of the ongoing management of the land, and whether that is achievable and by whom.

- 2.7 Given that the minimum commitment of BNG is 30 years, the Estate will need to be advised that unless it is able to agree with the local authority or responsible body that the obligation can be discharged, it is unlikely to get the land subject to the covenant back for some time.
- 2.8 There may also be a concern over the long-term value of the land if it has been used for a conservation purpose for many years and is not productive land.
- 2.9 What about the costs involved? The Estate are helping out the developer by providing the land, and apart from the rent, they are expected to not just front the cost of the preparation of this agreement (save for some other agreement to cover the costs by the developer or local authority/ responsible body), but also the future costs involved with the ongoing responsibility of the obligation (perhaps at a point in time when the developer has sold all of the houses and is long off the scene).
- 2.10 Should the Estate be looking to agree something specific on costs with the developer, as part of agreeing to help it obtain the planning permission?
- 2.11 Another issue is tax. It is unlikely to apply here as the Estate does not farm any land in-hand, but it may use it for a business (we are not told), and Business Property relief (BPR) could be available. It might be giving up any relief. On the reverse, if the land subject to the conservation covenant could be treated as agricultural (if granted under an FBT), there could be a claim for Agricultural Property relief (APR).

**Helen Bray
Jake Rostron
September 2023**