

# Habitat creation can bank returns for environmental measures

With Biodiversity Net Gain emerging as a tradeable intangible asset, **Hugh Townsend** examines self-build exemptions and habitat bank creation

**A**S we await the budget and what rates will be set for the tail end of BPS payments, the emergence of Biodiversity Net Gain (BNG) as a tradeable intangible asset after a number of years is picking up pace as demand from developers increase.

More landowners are engaging with local planning authorities (LPA) and responsible bodies (RB) to create units and agreeing Section 106s and conservation covenants.

However, landowners need to be wary of some LPAs' own or PAS templates for s106s which are not providing as fair and reasonable protection or flexibility as we are achieving with our own clients' agreements.

At the time of writing, there are 12 BNG Habitat Banks listed on the Natural England Register with six allocations of 0.13, 1.20, 3.78, 4.24, 5.30 and 10.44 units under the "mandatory" rules since it was introduced in February. Sales from the "voluntary" market continue.

We will discuss two topics below – the BNG exemptions for self-builds, and the impact Secondary Habitat Creation can have on the numbers of BNG units a habitat bank can produce.

## Self-build and custom build exemptions

The self-build and custom exemption raises the question – could developers circumvent the requirements of BNG? If splitting their plans into a series of smaller developments consisting of less than nine dwellings, which are sold or leased to the prospective homeowners prior to development with a limited range of small-scale modification offered to purchasers, the houses could be marketed as custom house builds.

The legislation may prevent this with "self-build and custom housebuilding" under s.1(A2) Self-build and Custom Housebuilding Act (2015) meaning the building or completion by:

- (a) individuals,
- (b) associations of individuals, or
- (c) persons working with or for individuals or associations of individuals, of houses to be occupied as homes by those individuals.

Government guidance recently clarified/confirmed that this definition applies when considering BNG, and that the exemption does not include 'the building of a house on a plot acquired from a person who builds the house wholly or mainly to plans or specifications decided or offered by that person' (s.1(A2) Self-



build and Custom Housebuilding Act 2015).

When considering whether a home is a self-build or custom build home, relevant authorities will therefore be looking at whether the initial owner of the home will have 'primary input' into its final design and layout and it is likely that off-plan housing, homes purchased at the plan stage prior to construction and without input into the design and layout from the buyer, will not be considered self-build and custom housing as defined under current legislation.

It will be up to the LPA to enforce the requirements of BNG and interpret the approach of developers.

Interest in this has come to the attention of DEFRA, who on August 21 republished their guidance.

## Secondary habitat creation

When creating a Habitat Bank to

provide BNG, the key concept is that you will be creating or enhancing habitat, represented by units, which then have a value when sold. Higher distinctive habitats are generally represented by more units, although these are then affected by risk/time/difficulty modifiers.

It will often be best to aim for a conservative approach to habitat creation, going for lower distinctive habitats that are more likely to successfully establish.

However, this does not necessarily mean you are giving up the chance to maximise unitary output on your land. All our section 106s are carefully drafted to allow for further habitat works to occur on the same land. Once the habitats in your bank achieve their stated aims, eg once you have enhanced moderate condition modified grassland to moderate condition neutral grassland, there is scope to enter a new agreement to

enhance the habitat further to a higher condition or distinctiveness such as 'good' condition neutral grassland or moderate/good condition lowland meadow. Note that you cannot downgrade a 'condition' even if enhancing to a higher distinctiveness habitat.

There are advantages to this. A 'safer' initial habitat may be selected rather than a high-risk habitat which may have produced more units but carries a greater risk of failure. You can then produce these extra units by creating the additional habitat as long as these further enhancements are not detrimental to any previously created habitat.

Due to the risks of creating certain habitat areas (creation), using an intermediary habitat then enhancing it further in a secondary agreement may result in greater overall net units. This is illustrated in the tables below.

This type of further enhancement work (secondary creation agreements) is most effective in a site involving creation of new habitat rather than just enhancement of existing habitat (although both result in a gain in units). By doing it in stages, there is a lower risk and difficulty modifier rather than going straight to the final habitat, resulting in higher overall net units.

As you can see there is significant net gain when using two agreements

if your site is one that involves a stage of habitat creation (ie a change of broad habitat such as cereal to grassland in Scenario 2) rather than just enhancement (eg to a different grassland type in Scenario 1). Note that this is dependent on achieving the first agreement stage. This also means the first initial agreement will also usually have a lower net result, relying on the second agreement to provide the bulk of the gain.

It should be pointed out that when creating habitat as in scenario 2, you are likely to have to use this initial stage of works (creating grassland) by default as going from a nutrient rich arable field to Lowland Meadow poses some risks, therefore it is essential that your s106 allows for this "second bite of the cherry".

Negatives include the cost of producing a new HMMP and potentially a further set of monitoring agreements. Some LPAs may insist on a new s106 (hence the benefit of using our s.106s which will continue to cover the project for the extra term). When creating further habitat, for timeframes you are in essence starting a new bank from scratch, this resets the term and so the legal obligation will then be for 30 years from the point that the initial works for the new enhancement have completed. If your initial works will take 15 years to reach their condition, then your land will be committed to this project for at least 45 years.

In some specific circumstances unit production can achieve 10 units per ha, therefore it is important this aspect is fully explored and your s106 is drafted appropriately.

**■ Hugh Townsend, FRICS, FAAV, FCIARB is the land agent/surveyor expert of the WMN Farming supplement and he may be contacted on 01392 823935 or htownsend@townsendcharteredurveyors.co.uk.**

### Habitat Bank with one HMMP/s106 covering one enhancement/creation stage

Scenario 1: Modified Grassland to Meadow - 30 years term (after completion of initial works)				
Baseline Habitat (1ha)	Units	Post-development Habitat	Units	Net Units
Modified Grassland (Moderate)	4	Lowland Meadow (Good)	11.85	7.85
Scenario 2: Cereal crops to Lowland Meadow - 30 years term (after completion of initial works)				
Baseline Habitat (1ha)	Units	Post-development Habitat	Units	Net Units
Cereal Crops	2	Lowland Meadow (Good)	5.11	3.11

### Habitat Bank where a further separate agreement (secondary creation) is used after the initial Habitat Bank agreement completes, to reach the same final habitat from the same baseline as in Scenario 1

Scenario 1: Modified Grassland to Meadow incorporating a secondary creation agreement of Neutral Grassland as the intermediary enhancement: 42 years term after initial works complete (assuming agreement 1 achieves Moderate condition in 10 years with 2 years estimated secondary commencement works)								
Baseline Habitat (1ha)	Units	Agreement 1	Units	Net Units	Agreement 2	Units	Net Units	Total Net Units
Modified Grassland (Moderate)	4	Neutral Grassland (Moderate)	6.8	2.8	Lowland Meadow (Good)	14.28	6.28	9.08
Scenario 2: Cereal crops to Meadow incorporating a secondary creation agreement of Modified Grassland as the intermediary enhancement: 34 years term after initial works complete (assuming agreement 1 achieves Moderate condition in 4 years with 2 years estimated secondary commencement works)								
Baseline Habitat (1ha)	Units	Agreement 1	Units	Net Units	Agreement 2	Units	Net Units	Total Net Units
Cereal Crops	2	Modified Grassland (Moderate)	3.82	1.82	Lowland Meadow (Good)	11.85	7.85	9.67