

# Construction will build up biodiversity.

## **Womble Bond Dickinson (UK) LLP**

**United Kingdom** October 19, 2023

The Environment Act 2021 introduced significant changes for the construction industry, and it will also mean additional considerations for lenders choosing to fund construction projects. From January 2024, the new 'Biodiversity Net Gain' (BNG) requirements will apply to projects requiring planning permission with limited exemptions for small sites, which are expected to require BNG from April 2024, and DCOs, where BNG is expected to be implemented in 2025.

BNG should be at the forefront of developers' and key stakeholders' (including lenders') minds when considering developing or funding projects.

What are the BNG requirements?

Regulations and all government guidance is expected to be published by the end of November 2023. What we know so far is that relevant projects will be required to produce a 10% BNG, meaning developers have improved the biodiversity of a site by 10%. There are three ways developers can achieve this, with different financial impacts and in the following order of preference:

- 1) Onsite: delivering BNG on the development site. This is the preferred option for Local Planning Authorities (LPA). It is likely to be the most straightforward and cost effective option
- 2) Offsite: delivering BNG on other land owned by the developer, or purchased from a land manager, or by purchasing 'Biodiversity Units' on the market. The LPA will want this to take place within their local authority area, where possible
- 3) Statutory credits: purchasing 'credits' from the Government, the cost of which is then put towards developing natural habitat elsewhere. This is likely to be the most expensive option and the developer must demonstrate to LPA that this is a last resort.

Key commercial considerations

### **Site selection**

Developers should consider the difference in BNG requirements for brownfield or greenfield sites, the impact of this on the project feasibility, and whether their proposed development site allows for onsite BNG.

Where developers own unused or dormant land which could be used to provide the BNG in relation to a funded development, lenders should consider whether they also require security over this land.

### **Budget forecasts**

Developers are likely to need to appoint additional consultants to monitor and report on ecological developments and BNG.

Contractors often assume responsibility for planning. They may therefore need to be engaged at an earlier stage to assist with preparing the outline planning application. Developers need to factor in these additional costs, and lenders should expect to see higher project costs as a result.

### **Project timelines**

Work cannot begin on site unless and until the LPA approves the BNG plan, and BNG must be implemented prior to occupation. Developers should consider potential increases to project timelines and the impact on budgets, as well as who takes the risk for delays in LPA approval.

Where BNG is being delivered offsite, lenders should be aware of any potential impacts this may have on completion and occupation.

Key legal considerations

### **Drafting**

An overall obligation in the building contract to comply with planning permission may be sufficient to capture BNG obligations. However, contract drafting should be reviewed on each project to ensure the requirements are properly addressed.

### **Liability**

BNG works must be managed and maintained for 30 years, and the developer will be liable to the local planning authority during this period. The contractor's liability under the construction contract will typically be 12 years from practical completion. It is unclear at this stage how the industry will approach this difference and whether insurance will become available to cover this liability. In the meantime, developers and lenders should be aware of the potential exposure this creates.