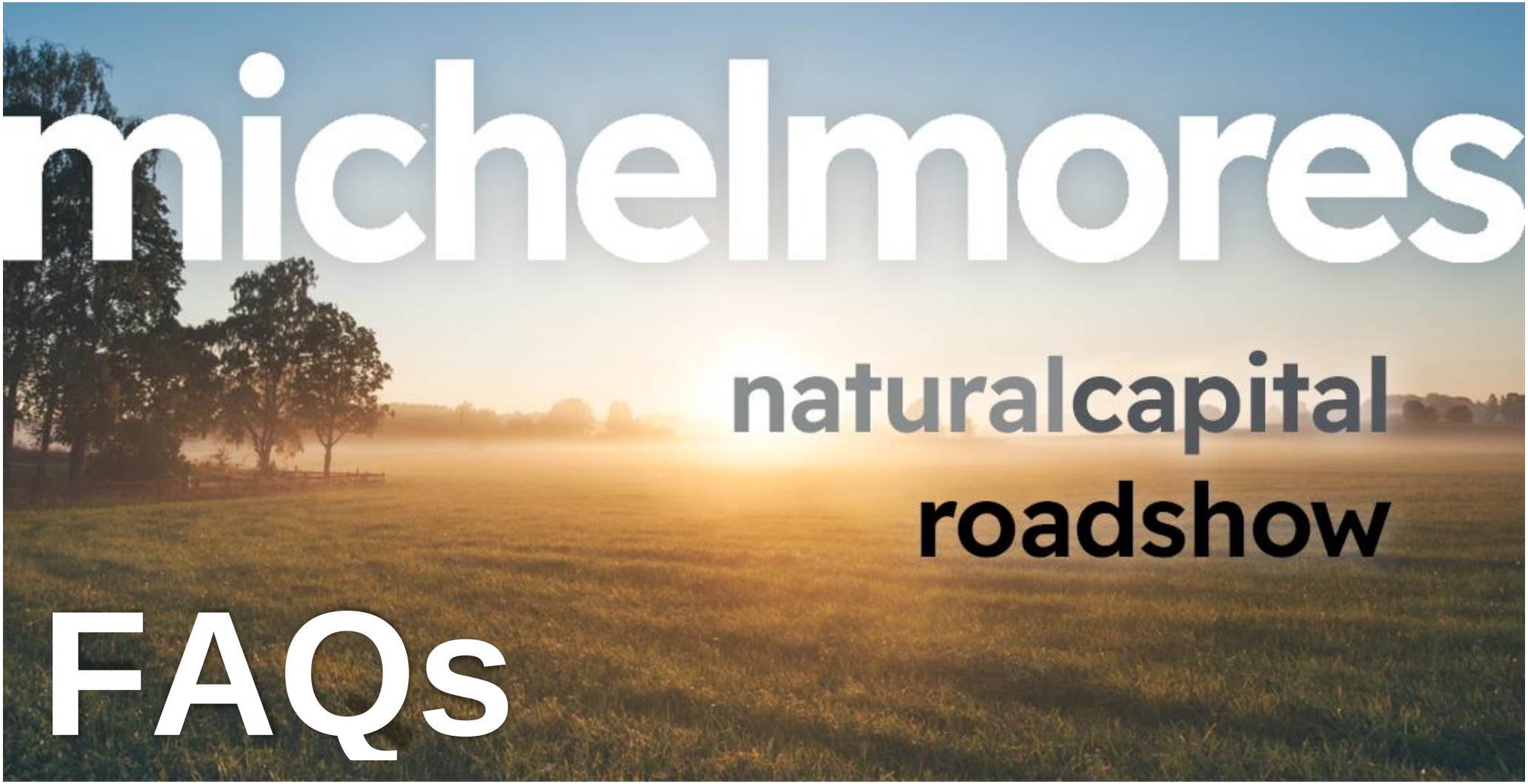
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FAQs

QUESTION	ANSWER
If landowners' structure via SPV will this provide sufficient covenant strength for developers to guarantee BNG delivery?	Delivery of the BNG habitat site/works is secured via a section 106 agreement or conservation covenant between the landowner (or long-leaseholder) and the LPA or Responsible Body. This may be the SPV if land has been transferred or leased into the SPV entity for the BNG scheme. Alternatively, it will be the underlying landowner. The agreement will be monitored by the LPA/Responsible Body who will have rights to take enforcement action or exercise step-in rights in the event of breach. Developers should take comfort in the fact that the LPA will be responsible for the enforcement and monitoring role to ensure the BNG is delivered. The risk of delivery failure will sit with the SPV (or landowner) not the Developer. The covenant strength of the SPV itself will be based on the robustness of the underlying contracts it enters into, and its own assets and governance structure.
Access to greenspace for health and wellbeing do we think that the planning system will legislate to make this a more significant requirement/factor?	Good question. There is already considerable pressure to allow increased public access and the current focus is on increasing biodiversity. I therefore think that in the short term there will not be formal access conditions imposed on land used for BNG. However, stacking of such wellbeing services is eminently possible provided the additionality rules are followed. The problem with that is the nice trees and calming woodland environment would have been there anyway if they are part of the BNG habitat which is a breach of additionality…
How do you manage risk around responsibility for ongoing management of features created under BNG at the end 30-year obligation?	There is no ongoing obligation at the end of the 30-year period. What you will have is a site with mature habitat which may provide an opportunity for re-basing and the provision of another environmental service. There is a theoretical risk of the site being designated in some way to protect the habitat and it is probably a safe assumption that such a site is unlikely to return to intensive agricultural use.
If you have a development which is set to run in phases over say 5 yrs, can you off set at each phase. So say phase 1 was equal to 300 acres do that in yr 1-2?	Yes, a habitat bank can be phased in the same way as a housing development which can cash flow capital expenditure in terms of habitat establishment. The statutory instruments provide for such an approach both in terms of site registration and the approach taken by the LPA. Alternatively, you could do the whole lot at once and take advantage of the advanced creation function in the metric which, simplistically, will give you more credits.
When is a conservation covenant used instead of a s106?	The two agreements are, on a basic level, interchangeable but conservation covenants have not taken off due to slow registration of Responsible Bodies through fear of onerous enforcement responsibilities. Ben's own view is that conservation covenants are tailor made for structuring environmental service agreements. They have the advantage of taking an additional burden off already stretched LPAs who won't have to spend time approving a section 106 agreement – unless of course the LPA is the Responsible Body in that case. Section 106 agreements are designed for planning obligations and can only be used in a planning context (e.g. BNG or nutrient neutrality). Conservation covenants can be used in relation to any private arrangement for conservation purposes. In addition, problems can arise in a section 106 context where the development site is in one LPA and the mitigation site is in another. There are work arounds but if you use a conservation covenant you could just have a straight deal between the mitigation site LPA and the owner of the habitat bank land.
What will happen if water treatment updates do not get completed by 2030?	They probably won't but it makes no difference to nutrient neutrality calculations under the Habitats Regulations as the LPA **must** assume that the work has been completed.

How are BNG and NN credits being treated for VAT?	Our current understanding is that they will be standard rated. That view is based on experience from other countries (Australia levied Goods & Service Tax) and DEFRA's indicative view. HMRC have said that they have yet to formally decide so it's a bit up in the air. Ben's view is VAT will be levied at the prevailing standard rate but that is a punt at best so we have drafted in a VAT neutral manner to date.
Is it advisable, where allowed, to change potential development land to arable use to reduce the biodiversity base prior to development?	No, it certainly isn't. You can change farming practices but not with a view to artificially lowering the biodiversity baseline. The Environment Act 2021 contains an anti-avoidance provision which says that if that happens then the biodiversity baseline as at 30 January 2020 will be taken as the actual condition of the site.
What would happen to the S106/CC if the landowner passes away during the 30 year agreement period?	Both Section 106 agreements and conservation covenants are registered as a Local Land Charge and so will bind successors in title and encumber the title accordingly.
Is there confidence in your field that LPA plan makers won't be able to seek to stifle development by setting unreasonably onerous BNG requirements?	The planning practice guidance on BNG provides that plan-makers should not seek a higher percentage than the statutory objective of 10% biodiversity net gain, either on an area-wide basis or for specific allocations for development unless justified. To justify such policies they will need to be evidenced including as to local need for a higher percentage, local opportunities for a higher percentage and any impacts on viability for development. Consideration will also need to be given to how the policy will be implemented. If the BNG requirement is not justifiable, it will be open to legal challenge.
Can you transfer BNG obligations between land during the currency of the BNG scheme because you have changed your mind about the land use?	Generally, no. If a Section 106 has been entered into, the land will be legally secured for the time period set out therein (30+ years). It would not be straight forward to "lift and shift" these obligations. The LPAs agreement would have to be sought to vary a section 106 (there will be cost involved) and there would need to be a strong justifiable reason. Even then, we think it would be a difficult argument to make.
How will planning apps post April 2024 be dealt with under PD for agricultural sheds less than 1000m2 and then what about full planning for ag sheds 1000m2+?	The mandatory net gain requirement applies to planning permissions, not permitted development, and therefore a mandatory net gain is not relevant if the shed is constructed under PD. The erection of a building or buildings where the floor space to be created is 1,000m2 or more is a major application for BNG purposes and the relevant metric would need to be used.
Given that LPAs are under resourced will this simply add further delays to planning?	Delay in the planning process is already a major constraint on development and BNG adds a further layer of complexity. We think it inevitable that there will be delay, particularly at the outset whilst LPAs get to grips with new regime.
Can LPAs only increase the 10% in an adopted Local Plan, i.e. not a draft Local Plan?	A draft local plan is considered a material consideration in the planning process. While a draft local plan is still in the consultation or preparation stage and has not yet been formally adopted, it carries significant weight in planning decisions.
Will 10+% lead to 5-year land supply issues?	Potentially, yes. The extent of the impact depends on various factors, including the availability of suitable development land, the efficiency of the LPA and the effectiveness of the enhancement measures.

Does the principle of BNG only apply to greenfield sites? What if one is developing and therefore improving a previously contaminated site or brownfield site?	Mandatory BNG applies to all development sites not just greenfield sites. In some cases, the BNG metric for brownfield sites may be higher than for greenfield sites if the proposed development includes substantial habitat restoration, creation of green spaces, or other biodiversity enhancements. However, this depends on the baseline biodiversity assessment, the proposed mitigation measures, and the overall objectives of the BNG policy.
How will the multitude of developed sites be effectively monitored over 30 years?	This requires a coordinated approach involving various stakeholders, technological tools and regulatory mechanisms. For example the use of Digital Platforms or databases for reporting, standardised monitoring protocol, stakeholder engagement and utilisation of remote sensing and satellite imagery. Under the Section 106 Agreement, a Monitoring Fee will be payable to the LPA in respect of the cost of monitoring over the relevant term.
Who is responsible for holding the BNG register? Will it be the LPA like for NN or on a national level?	The biodiversity gain site register is a national register of land used for biodiversity gains. Natural England is the 'Register Operator' on behalf of DEFRA.
If a developer wants to secure BNG off-site what legal agreement do they enter into with the landowner, when (a) the units are on the Register & (b) they're not?	If the units are already on the biodiversity gain site register, the off-site BNG will already be secured by way of legal agreement and therefore it may not be necessary to enter into a further agreement to secure the units. If the units are not on the register, a section 106 agreement or conservation covenant will need to be entered into to secure these units and then added to the register.
Can the biodiversity value calculations be challenged and by who?	Yes, biodiversity metric calculations on a planning application can be challenged by various stakeholders including, environmental organisations, local residents, public bodies or scientific experts (i.e. ecologists) by way of objection to a planning application or if granted, legal challenge.
Is there any indication yet of impact on development viability? Do you think the Secretary of State will reduce BNG requirements if it looks likely to impact housing delivery?	This is yet to be seen. The DEFRA evidence base and impact assessment considers that the 10% requirement is unlikely to significantly affect viability issues for development. The 10% set out in legislation is mandatory and therefore there is no scope for LPAs to allow a reduction on viability grounds.
What are the implications of BNG for infrastructure projects, in particular acquisition of land rights where land has been integrated into BNG/ natural capital scheme?	Where an Acquiring Authority or Statutory Undertaker is seeking to purchase or exercise rights over land which is the subject of BNG or NN obligations, it will need to compensate for losses in the usual way. Compensation is likely to include the cost of agreeing a s.106 variation (noting various planning requirements for infrastructure projects will probably pick this up), and the cost of finding habitat elsewhere to replace what is lost.
What are your thoughts on how easy it is for trustees to enter into a BNG scheme? Risk of unfairly benefiting life tenant?	This is an interesting question. The answer will depend on how the payments received by the trustees under the terms of a BNG agreement will be treated for tax purposes. If they are treated as income, and under the terms of the trust the income flows to the life tenant, then there is an argument to say that the life tenant may be unfairly benefitted (particularly if the underlying capital value of the land was devalued by the terms of the BNG agreement). This is an excellent example of where tax clarity is required, so that trustees (and landowners) can assess the commerciality of the deal (and how it benefits, or unfairly benefits, their beneficiaries) with a full understanding of the likely tax consequences.
When talking about corporate SPV are you looking at Ltd Co or LLP?	In the context of the scenario, we were talking about a Private Company limited by shares as a single entity which could act as the Lead Applicant for the Scheme. The most appropriate delivery vehicle in each case will

	depend on the underlying circumstances, driven by tax and other practical considerations. We are expecting a range of vehicles, e.g. companies limited by shares or guarantee, Community Interest Companies, LLPs, General Partnerships, Bare Trusts, and even Land Pooling Trusts to all be options for delivering the larger Landscape Scale Recovery Schemes.
Is creating a habitat bank an agricultural use?	In our view, creating habitat does easily not fall within the current definition of "agriculture" for tax purposes, which (as drafted) is focussed on food production. Therefore, on the face of it, if land is taken out of agricultural use to create natural habitat, then Agricultural Property Relief (**APR**) could cease to apply to the value of the land and the landowner would potentially face a 40% charge on its value upon death. Therefore, it is important to carefully consider whether the activities required by these BNG opportunities can operate alongside agricultural usage, so as to preserve APR.
Are you anticipating that mortgage companies will consent to BNG agreements placing restrictions on land without issues or concerns?	Landowners will need to enter early communication with any lenders who have charges secured on the land. Lenders usually need to be party to any Section 106 Agreement required to secure nature covenants and will need to consent to the terms. Whether they do so will likely depend on the loan terms, LTV ratios, extent of habitat creation works and ongoing land uses. Upfront credit payments may allow charges to be discharged.
If conservation covenants are used, would they also require all interested parties including charge holders to sign up to them?	Conservation covenants will be entered into in writing between the landowner (person with a freehold estate or leasehold estate of more than 7 years) and the responsible body by way of a deed which is registrable as a local land charge. Parties with an interest in the land will be required to consent or be party to the same, including lenders with a charge on the title.
What are the implications of BNG for the promoter model and use of outline planning consent?	Promoters will be concerned with potential implications on viability and land availability. They will need to consider the effect on agreed minimum return, whether the landowner can make other land available for BNG and ensure that they can recover any BNG expenditure as a deductible cost. The statutory framework requires a Biodiversity Gain Plan to be submitted and approved by the planning authority to discharge the biodiversity gain condition prior to the commencement of development. Despite this, promoters will want to work up proposals as to how BNG requirements are to be achieved with an outline permission even though reserved matters details may be unknown.
Can BNG (if found on site) be utilised within the amenity space required for a development?	Onsite multifunctional green spaces providing both BNG and amenity spaces will likely be an attractive option for developers and local authorities. On-site BNG can help reduce the impact of new development and contribute to community well-being. It could also be incorporated as part of SuDS and other drainage scheme areas, however, sensitive habitats near houses and their dog walking occupants may be more difficult to maintain.
Someone selling normal ag land and wishes to impose BNG overage what will be the trigger & how could the overage be imposed if planning permission not required.	Planning consent has often been a traditional trigger event for overage agreements; however, the generation and sale of natural capital credits may be possible within the existing agricultural use without the need for a planning permission. Natural capital overage agreements are becoming more common with trigger events such as entering a BNG S.106 agreement/ conservation covenant, registering and selling credits, entering into certain environmental schemes or even using the property to discharge planning conditions on a development

	scheme. These agreements are at an early stage and present valuation and drafting challenges, however, may be useful where land has considerable potential as a habitat bank.
How many Landscape Recovery schemes have been developed to date? How many landowners have been involved?	To date, 56 projects have been awarded DEFRA funding to commence a 2-year "Development Phase". The 22 projects accepted in round 1 are now approx. 12 months into the process and in our experience, are reaching the stage of considering their structuring and governance model in detail. DEFRA has indicated a 3rd round of funding will be launched in 2024. The number and nature of landowners and stakeholders involved vary significantly between projects. More information available here: An update on the first round of Landscape Recovery projects - Farming (blog.gov.uk) Landscape Recovery: sharing the successful second round projects - Farming (blog.gov.uk)
A challenge we often face is resistance to change. Do you believe the collaboration between freeholds & tenants will only take off with a generation change?	Josie really hopes that isn't the case! She anticipates that it will be more event and opportunity driven, with one of the parties having a clear driver to start the conversation. If well advised, both parties should appreciate that collaboration is going to be vital to unlock natural capital opportunities – She thinks instances where one party can impose a scheme on the other will be very rare.
In a situation where a tenant wants to enter into BNG on an FBT with over 30 years remaining - will the tenant need landlord consent for the entry into this?	It will depend on the contractual terms of the FBT. Legally, the tenant will have the requisite legal standing to enter a conservation covenant under the Environment Act 2021 but the terms of the FBT may prevent the tenant from doing so without the landlord's prior consent. If a section 106 agreement is proposed to secure the BNG habitat, the LPA is likely to insist on the freeholder being a party in addition to the long-leaseholder to ensure it is fully binding and enforceable against the superior freehold estate/interest.
Is there a minimum size for a landscape recovery scheme?	In the last DEFRA funding round, projects had to be a minimum of 500 hectares in size.
Is an SPV advising landowners about possible investors subject to FCA registration and compliance? I.e is it acting as a broker?	At a high level, advising on investments and broker activities (arranging/bringing about; and making arrangements with a view to transactions in investments) are FCA regulated when these related to "specified investments" (eg shares, debt instruments, futures etc). Even when certain activities are regulated there are also many exemptions and exclusions in play. Financial promotion is also regulated. This does not necessarily mean that the SPV's activities are going to be regulated in that way. We have extensive experience in this area and would be pleased to advise upon any specific schemes or proposals.

Do the revised suitability criteria apply to live succession applications or those submitted / received after 01/09/24?	The new suitability criteria applies to cases where the date of death or the date of the giving of the retirement notice is on or after 1 September 2024.
With a view to taking land out of a tenancy when planning is granted, do you have any thoughts on the scale of what might be considered a change of use for BNG?	When considering the process for taking land out of an AHA 1986 Tenancy (i.e. serving a Notice to Quit pursuant to Case B or S27(3)(f) (part or whole)), it is not the scale of the intended use (BNG or otherwise) that is important. The central consideration is about whether it is non-agricultural. Where a Notice to Quit includes grassy, landscaped areas that may be capable of being grazed, for example, there is a risk that these areas are agricultural. The landlord must be able to demonstrate that all of the land is required for a non-agricultural use.
How can a landowner with an AHA enter an option with a developer?	They can and they do - but the AHA 1986 Tenancy is an overriding interest. The access provisions afforded to the landlord under the Tenancy agreement (and if none the statutory default) are absolutely KEY to understanding how the landlord and the developer can proceed. Often the best way to progress is to involve the tenant.
What are the risks to tenant of a failed retirement application?	If the succession application fails at Tribunal stage, then the applicant cannot make a further application for succession on the death of the tenant. However, the applicant can withdraw the application prior to the Tribunal hearing and avoid losing the opportunity to make a further application for succession on death.