Government
Legal Department

Litigation Group
102 Petty France
Westminster
London
SW1H 9GL

T +442072103372

www.gov.uk/gld

DX 123243, Westminster 12

The Lifescape Project Limited
The Willows
Ipswich Road
Long Stratton
Norwich
Norfolk
NR15 2TG

By email only

Your ref: **n/a**
Our ref: **Z2612794/CNG/JD7**

14 October 2026

Dear Lifescape Project Limited

Response to Pre-Action Letter Regarding Proposed Judicial Review
Re: The National Planning Policy Framework (2026), Policies N1 and N2

1. This is the pre-action protocol response of the Secretary of State for Housing, Communities and Local Government (the "Secretary of State") to your letter before claim dated 15 September 2026 under the Pre-Action Protocol for Judicial Review. You initially required a response by 4pm on 29 September 2026 but subsequently agreed to a response by 14 October 2026.

The claimant

2. We acknowledge that the proposed claimant is The Lifescape Project Limited ("**Lifescape**").

The defendant

3. The proposed defendant is the Secretary of State, whose address is 2 Marsham Street, London, SW1P 4DF. She is represented in these proceedings by the Government Legal Department, whose address is 102 Petty France, Westminster, London SW1H 9GL.

4. The details of GLD's allocated case holders for this matter and their contact details are set out at the bottom of this letter. We confirm our reference is Z2612794/CNG/JD7 and kindly request that you use this reference and copy the case holders into all correspondence. Details for service are set out below.

Details of the matter being challenged

5. You indicate that Lifescape propose to challenge the decision of the Secretary of State to make policies N1 and N2 of the NPPF which was published on 17 August 2026. The decision to publish the National Planning Policy Framework ("NPPF") (including policies N1 and N2) was taken by the Minister of State for Housing and Planning on behalf of the Secretary of State.

Greener Litigation
Lexcel Legal Practice Quality Mark Law Society Accredited
Positive About Disabled People

Details of any interested parties

6. We note that you have copied your letter to 29 local planning authorities listed in Annex 1 to your letter together with the responsible bodies (other than Lifescape) currently designated by the Department for Environment, Food and Rural Affairs ("**Defra**") under Part 7 of the Environment Act 2021 (the "**EA 2021**") for conservation covenants.

7. We have copied our response to the local planning authorities listed in Annex 1 to your letter and the designated responsible bodies as at the date of your letter. At this stage, we draw your attention to the need for parties to assist the Court in furthering the overriding objective (CPR r1.3). That includes adopting a proportionate approach to identifying interested parties to a claim. Should you proceed to issue proceedings, our position is that any of the local planning authorities or organisations which have not responded to you, or us, to indicate their wish to be involved in proceedings should not be joined as an interested party to proceedings.

Response to the proposed claim

Summary of the key facts

8. The Secretary of State does not respond on a point by point basis to each paragraph under your heading "Factual Background" and "Legal Background" (which is not confined to propositions of law). Failure to respond to a point is not an admission that any proposition in your letter is correct.

Statutory BNG regime

9. Schedule 7A of the Town and Country Planning Act 1990 (introduced by Schedule 14 EA 2021) is entitled "Biodiversity Gain in England". The effect of Schedule 7A is to require grants of planning permission in England to be subject to a condition requiring a biodiversity net gain of 10%, subject to exceptions.

10. The statutory BNG scheme was intended to replace the policy-led approach to BNG which encouraged LPAs in their local plans to "*pursue opportunities for securing measurable net gains for biodiversity*" (NPPF 2018, para 172; retained up to and including NPPF 2024). In *Net gain: consultation proposals* (December 2018), Defra consulted upon mandatory BNG. The Foreword states that "*[w]e are proposing that a single, consistent national approach would reduce uncertainty for the environment, for the community and for the developer*" (p.2).

11. On commencement of the relevant provisions in February 2024, MHCLG published planning practice guidance entitled *Biodiversity Net Gain* (the "**PPG**"). The PPG sought to address these concerns regarding consistency in paragraphs 006 and 020:

> How should plan-makers deal with biodiversity net gain?
> 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.
>
> […]
>
> How do existing local policies apply following the introduction of mandatory biodiversity net gain?
> It would be inappropriate for decision makers to continue to give weight to aspects of existing local policies related to biodiversity gains which are inconsistent with the statutory framework for biodiversity net gain. The statutory provisions are an important material consideration that in many cases will take precedence over local planning policy. The statutory framework represents the appropriate national approach towards, and benchmark for, biodiversity gains in planning.
> […] a policy which required a gain greater than 10% on an area wide basis or for an allocation may still be relevant as the statutory biodiversity gain objective is for at least a 10% gain.
> Decision makers should not give weight to local policy which requires biodiversity gains for types of development which would now be exempt under the statutory framework. Other local biodiversity policies which require specific enhancements to support biodiversity would continue to apply to these applications where appropriate (emphasis added).

Consultation on the draft NPPF

12. On 15 December 2025, Ministers decided to publish a consultation on draft reforms to the National Planning Policy Framework. The decision was reached following consideration of (inter alia) the draft NPPF, the proposed consultation document, an equalities analysis under s.149 of the Equality Act 2010 ("**EqA 2010**") and an assessment of the proposals against the Environmental Principles Policy Statement ("**EPPS**").

13. The draft version of the NPPF was published for consultation on 16 December 2025. Draft policy N1(2) applied to plan-making and provided as follows:

> Development plans should only set local standards for biodiversity net gain which are in excess of the statutory net gain requirement where this is for specific site allocations, and is fully justified and deliverable. Any such requirements should not extend to categories of development which are exempt from statutory biodiversity net gain.

14. Policy N2(1)(a) provided that development proposals should:

> Consider the environmental qualities of land proposed for development, including habitats, landscape character and the natural beauty of the countryside, and identify opportunities for those qualities to be conserved or enhanced (including through requirements for biodiversity net gain where these apply);

15. Footnote 69 then provided: "*Although development proposals may incorporate biodiversity enhancements which exceed the statutory objective for biodiversity net gain, this should only be a requirement where it is set out in up-to-date development plan policies for specific site allocations. Decision makers should not give weight to other development plan policies which require biodiversity gains which go beyond the statutory framework, including for development proposals which are exempt*".

16. The draft NPPF was accompanied by a consultation document entitled Proposed reforms to the National Planning Policy Framework and other changes to the planning system (the "**Consultation Document**").

17. Questions 179 and 180 related to Policy N1. In the Consultation Document, the proposals were explained in the following way (at p.99):

> This policy brings together elements of current Framework paragraphs 187, 188 and 192 to set out the key considerations for how the natural environment should be considered in plan-making.
> […]
> Biodiversity net gain plays an important contribution to nature recovery, but needs to be applied in a proportionate and consistent manner across local planning authorities. Reflecting this, requirements which exceed the statutory expectations are proposed to be limited to circumstances in which higher levels of gain can be justified on specific sites being allocated in the development plan, where this would not be on sites that are exempt from the statutory requirement. We are interested in views on how opportunities to provide more net gain from particular sites could also contribute to providing off-site gains for other neighbouring sites in the area, where those other sites are unable to meet the statutory requirement through their own on-site provision.

18. Question 181 concerned policy N2. In the Consultation Document, the proposals were explained as follows:

> This policy consolidates and adds to aspects of current Framework paragraphs 187, 192 and 193 to provide clearer and more comprehensive expectations for how new development should contribute positively to the natural environment. […] New development should also include improvements for nature, through the application of biodiversity net gain where relevant […]

Response to consultation

19. A total of 992 respondents answered Question 179. Of those, 21% strongly agreed, 28% partly agreed, 13% neither agreed nor disagreed, 17% partly disagreed and 21% strongly disagreed. A further 675 respondents answered question 180, which did not have an agree or disagree response. A total of 1,094 respondents answered Question 181. Of those, 12% strongly agreed, 31% partly agreed, 18% neither agreed nor disagreed, 26% partly disagreed and 12% strongly disagreed.

20. Lifescape did not respond to the NPPF consultation, whether in relation to the BNG-related questions or at all.

21. Following analysis of the consultation responses, officials recommended retaining the policy on BNG, subject to minor drafting amendments. Policy N1(2) was clarified to apply to all locally set BNG standards. Policy N2(3) was amended to clarify its application to policies requiring gains from exempt development and, in accordance with the wider drafting approach to the final NPPF, was moved from a footnote into the body of the policy.

Publication of final NPPF

22. On 17 August 2026, MHCLG published (inter alia) the final version of the NPPF, the Government response to the consultation (the "**Consultation Response**") and the updated equalities analysis ("**EqIA**"). The Minister's decision was reached following consideration of (inter alia) the EqIA and an assessment of the final policies against the EPPS.

Response to proposed grounds of challenge

23. Five grounds of challenge are advanced. None is arguable, for the reasons set out below.

Ground 1: Policies N1(2) and N2(3) are beyond the powers of the Secretary of State

24. Ground 1 contends that by formulating Policies N1(2) and N2(3) using "*stark and directive language*" the Secretary of State is unlawfully frustrating the effective operation of s.38(6) of the Planning and Compulsory Purchase Act 2004 ("**PCPA 2004**") and s.70 of the Town and Country Planning Act 1990 ("**TCPA 1990**"). In the alternative Ground 1 contends that the Secretary of State is unlawfully attempting to amend the statutory framework for planning decision-making via planning policy.

25. Policies N1(2) and N2(3) were not intended to have the effect of frustrating or amending the statutory framework, they do not have that effect, and as a matter of law they could not have that effect. The legality and lawful application of unqualified, directive, national planning policy has been conclusively established by the Court of Appeal's decision in *R (West Berkshire DC) v Secretary of State for Communities and Local Government* [2016] 1 W.L.R. 3923. Policies N1(2) and N2(3) adhere to, and must be applied consistently with, the principles articulated by the Court of Appeal.

26. In *West Berkshire*, the Court of Appeal explained the application, in the statutory planning context, of two principles: the rule against fettering discretion, and the liberty (generally) to express policy without acknowledging exceptions. When discussing the rule against fettering, the Court of Appeal noted at §20 that "*while the development plan is under section 38(6) the starting-point for the decision-maker (and in that sense there is a "presumption" that it is to be followed), it is not the law that greater weight is to be attached to it than to other considerations*" and that "*no systematic primacy is to be accorded to the development plan*".

27. In terms of the principle that a policy-maker is entitled to express his policy in unqualified terms, the Court of Appeal emphasised that it was unnecessary to include any "*health warning*" in the policy itself about non-fettering or application consistently with s.38(6) PCPA 2004 or s.70(2) TCPA 1990 because those are requirements that the law imposes on the *application* of policy. At §21 the Court of Appeal held:

> 21. The second of our two principles is that a policy-maker is entitled to express his policy in unqualified terms. It would surely be idle, and most likely confusing, to require every policy statement to include a health warning in the shape of a reminder that the policy must be applied consistently with the rule against fettering discretion—or, in the planning context, consistently with section 38(6) of the 2004 Act or section 70(2) of the 1990 Act. A policy may include exceptions; indeed the WMS did so, allowing a five-unit threshold for certain designated areas in place of the ten-unit requirement. But the law by no means demands that a public policy should incorporate exceptions as part of itself. The rule against fettering and the provisions of sections 38(6) and 70(2) are not, of course, part of any administrative policy. They are requirements which the law imposes upon the *application* of policy. It follows that the articulation of planning policy in unqualified or absolute terms is by no means repugnant to the proper operation of those provisions. (emphasis added)

28. At §22, the Court of Appeal held that it was "*plain (and uncontentious) that the Secretary of State was not entitled to seek by his policy to countermand or frustrate the effective operation of sections 38(6) and 70(2)*". Then at §23, the Court of Appeal concluded that this constraint upon the power to make policy was the underlying rationale of the observations made by Sullivan LJ at §26 of *R (on the application of Cala*

Homes (South) Ltd) v Secretary of State for Communities and Local Government [2011] J.P.L. 1458, outlining instances of possible policy statements that would have urged or instructed local planning authorities to act outside the statute.[1] But importantly, the Court of Appeal in *West Berkshire* added a qualification as regards Sullivan LJ's reference to weight. The Court made clear that the Secretary of State is "*perfectly entitled to express his view as to the weight to be given to his policy. But he cannot, so to speak, lay down the law about it*".[2]

29. In light of that analysis of the relevant principles, the Court of Appeal framed the issue as follows: "*the question for the court is whether the WMS on its face seeks to countermand or frustrate the effective operation of section 38(6) and 70(2); or does it merely express the Secretary of State's substantive planning policy in unqualified, though trenchant, terms?*".

30. On the facts, it held that the WMS did not seek to countermand or frustrate the effective operation of the statutory scheme. Crucially, at §25 the Court of Appeal held that the use of mandatory or directive language was not "*in principle repugnant to the proper operation of section 38(6)*":

> 25. The language of the WMS is in mandatory terms: "a threshold beneath which affordable housing contributions should not be sought". Once it is accepted that (as we have put it) the articulation of planning policy in unqualified or absolute terms is not in principle repugnant to the proper operation of section 38(6), this use of language is in our judgment unobjectionable. It must be obvious that, as Mr Drabble submitted in reply, the aim or goal of a policy's author is that his policy should be followed. Moreover we should bear in mind that the Secretary of State is concerned not only to make policy in the planning field, but to participate as decision-maker in concrete cases, on appeals from the local planning authority. In that role he may well prefer his own policy to that of the development plan in case of conflict. If all the procedural requirements imposed by statute and by the common law are complied with, he is entitled to do so. More generally it is important to have in mind that the Secretary of State is responsible for national planning guidance and is answerable to Parliament for his discharge of that responsibility: see the observations of Lord Clyde in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295* , paras 139–142.

31. Similarly, at §28 the Court of Appeal disapproved of Holgate J's apparent belief that "*a lawful planning policy must express its openness to exceptions – notably the application of development plans which are inconsistent with it*". It held that:

> for reasons we have given that is a legal mistake. The policy's unqualified terms do not demonstrate that it was intended to countermand or frustrate the effective operation of the statute. The Secretary of State was not obliged to assure the reader that that was not his intention, nor to state that his policy was subject to the development plan.

32. It also held in the last sentence of §28 that if Holgate J had intended "*to indicate that such policies [i.e. adopted development plan policies] in principle possessed greater force than other considerations including the WMS, that too would be a mistake*".

33. Finally, in terms of the status and application of the WMS, at §26, the Court of Appeal quoted a statement made by Leading Counsel for the Secretary of State during the first instance hearing concerning the relationship between national planning policy and the statutory scheme. At §29 it described that as amounting to "*no more than a conventional description of the law's treatment of the Secretary of State's policy in the decision-making process. It does not (though this is not suggested) save the policy. It merely explains how the law requires it to be applied*".

34. Drawing these points together, it is clearly established by binding Court of Appeal authority that:

---

[1] At §26 Sullivan LJ said: "*If the Chief Planning Officer's letter had advised local planning authorities to ignore the policies in the regional strategies, or to treat them as no longer forming part of the development plan, or to determine planning applications otherwise than in accordance with them because the Government proposed to abolish them, or if it had told decision-makers what weight they should give to the Government's proposal, then such advice would have been unlawful.*"

[2] Paragraph 38 of your letter quotes the *obiter* comment made by Gilbart J in *Cawrey Limited v Secretary of State for Communities and Local Government* [2016] EWHC 1198 (Admin), but *West Berkshire* was not cited in *Cawrey* and Gilbart J's *obiter* comment is inconsistent with *West Berkshire*.

a. The Secretary of State *may* express national planning policy in mandatory, unqualified or directive terms and that is not in principle repugnant to the operation of the statutory scheme. In particular, such language in planning policy is "*unobjectionable*" and it does not show that the Secretary of State is seeking to countermand or frustrate the effective operation of the statutory scheme;
b. The Secretary of State is "*perfectly entitled*" to express her view as to the weight that should be given to policy (or indeed any other material planning consideration). But she may not "*lay down the law about it*" i.e. prevent a decision-maker from exercising their own judgement as to what weight to ascribe in all the circumstances. As regards weight, it is also important to note that "*no systematic primacy is to be accorded to the development plan*" and "*it is not the law that greater weight is to be attached to it than to other considerations*"; and
c. National planning policy expressed in mandatory, unqualified or directive terms does not need to carry any "*health warning*" nor is the Secretary of State "*obliged to assure the reader*" that it was not her intention to countermand or frustrate the effective operation of the statute.

35. In this case, the equivalent of the statement that the Court of Appeal approved at §29 would be:
    a. As a matter of law Policies N1(2) and N2(3) are only one of the matters which has to be considered under s.70(2) of TCPA 1990 and s.38(6) PCPA 2004 when determining planning applications or formulating local plan policies under s.19(2) PCPA 2004, albeit it is a matter to which the Secretary of State considers very considerable weight should be attached;
    b. The statements in those policies concerning development plans (i) not setting standards for BNG in excess of the statutory net gain requirement except for specific site allocations or (ii) not extending local standards to categories of development which are exempt from statutory BNG, were introduced as policy, not binding law;
    c. In the determination of planning applications the effect of Policies N1(2) and N2(3) is that although it would *normally* be inappropriate to (i) set standards for BNG in excess of the statutory net gain requirement except for specific site allocations or (ii) extend local standards to categories of development which are exempt from statutory BNG, local circumstances may justify doing so as an exception to the national policy. It would then be a matter for the decision-maker to decide how much weight to give to such development plan policy justified by local circumstances as compared with the national policy; and
    d. Likewise, if in future an LPA submits for examination local plan policies setting local standards that are contrary to the national policy, the inspector will consider whether the LPA's evidence base and local circumstances justify the LPA's proposed local standards. If they conclude that the standards are justified and the local plan policy is adopted, then more weight may be given to it than to the new national policy in subsequent decisions on planning applications.

36. Paragraphs 41 and 45 of your letter seek confirmation that Policies N1(2) and N2(3) cannot seek to countermand or frustrate the effective operation of *inter alia* ss.19, 19(1A) and 38(6) of the PCPA 2004, s.70 of the TCPA 1990, s.4 of the Natural Environment and Rural Communities Act 2006 ("**NERCA 2006**") or the Environment (Local Nature Recovery Strategies) (Procedure) Regulations 2023. In light of *West Berkshire*, it is agreed that Policies N1(2) and N2(3) cannot do that. For the reasons set out above, the Secretary of State does not disagree with the propositions in those paragraphs of your letter.

37. In terms of the other relief sought, there is no arguable basis for requiring the Secretary of State to "*withdraw, amend or clarify policies N1.2 and N2.3 accordingly*". As explained above, the Court of Appeal in *West Berkshire* expressly held at §§21 and 28 that the law does not require the Secretary of State to include a "*health warning*" reminding readers that the policy must be applied consistently with s.38(6) of the PCPA 2004 or s.70(2) of the TCPA 1990. Neither does the law require the Secretary of State to assure readers that she does not intend to countermand or frustrate the effective operation of the statute. In short, the Court of Appeal held that the requirements which the law automatically imposes upon the application of policy do not have to be spelled out in the policy or any accompanying guidance. Further, and in any event, footnote 2 to the NPPF unambiguously states that "*The National Planning Policy Statement does not displace the statutory obligations placed on decision makers by virtue of, among other things, section 38(6) of the Planning and Compulsory Purchase Act 2004…*"

38. Accordingly, should your client issue a claim on the basis intimated under Ground 1, the Secretary of State will argue that permission should be refused with costs because: (a) there is no dispute as to the legality or application of Policies N1(2) and N2(3) following *West Berkshire* and the assurances given in this letter; and (b) your client's request for further relief in the form of the policies being withdrawn, amended or

clarified, goes beyond what the law requires (see the express conclusions to that effect at §§21 and 28 of *West Berkshire*).

Ground 2: Failure to comply with the duty under section 19(1) of the Environment Act 2021 (EPPS)

39. Under this proposed ground, you allege a failure to comply with the duty under s.19(1) EA 2021 to have "due regard" to the EPPS when making policy.

40. The duty under s.19(1) does not require a particular result or outcome. As Holgate LJ explained in *R (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government* [2026] P.T.S.R 864 at §93, provided there has been "*a proper focus on the relevant principles, the court cannot interfere simply because it would have given greater or less weight to particular matters*." Moreover, the EPPS itself requires that environmental principles be applied "proportionately" (s.17(2) EA 2021), and s.19(2) provides that nothing in s.19(1) requires a Minister to act where this "*would have no significant environmental benefit*" or "*would be in any other way disproportionate to the environmental benefit*."

41. At paragraph 53 of your letter you assert that there is "no evidence" of compliance. That assertion is unfounded. An EPPS assessment was prepared for each Ministerial submission on the draft NPPF and on the final NPPF. We enclose an extract of the EPPS relating to Chapter 19. The disclosure of that document is dispositive of Ground 2.

42. The EPPS assessment addressed each of the five environmental principles - integration, prevention, rectification at source, polluter pays, and precautionary - iteratively, at each stage of policy development. It considered the cumulative effect of Chapter 19 as a whole, informed by consultation responses and evolving evidence. This approach was appropriate: the NPPF operates as an integrated policy framework, and it was neither necessary nor appropriate to assess N1(2) and N2(3) in isolation.

43. In relation to the challenged policies, the EPPS assessment:
    a. recognised that the BNG policy represented a deliberate change from the approach in the 2024 NPPF;
    b. noted that there were divergences from the statutory framework in some cases, but that most local plan policies were broadly aligned with the statutory regime;
    c. identified that the policy could result in fewer sites delivering biodiversity enhancements above the statutory minimum, but noted that statutory BNG would continue to apply to eligible development and that authorities would retain the ability to require additional gains for specific site allocations where justified and deliverable;
    d. recorded consultation concerns that the policy could constrain local ambition and strategic nature recovery, including delivery linked to Local Nature Recovery Strategies ("**LNRS**");
    e. acknowledged that the impact could be wider than the evidence available before consultation had initially suggested, due to the prospect that more local planning authorities had produced draft policies which would require more than statutory minimum BNG when adopted; and
    f. explained the balance between additional biodiversity gains and a proportionate, consistent national approach, particularly for smaller sites; and
    g. confirmed that the Secretary of State's duty under s.40 NERCA 2006 to conserve and enhance biodiversity had been taken into account.

44. The Minister accordingly complied with the duty under s.19(1). There was proper and iterative engagement with the relevant environmental principles at each stage of policy development. It is not for the court to substitute its own view of the weight to be given to particular matters: *Rights: Community: Action* at §93.

45. There is no legal requirement, contrary to the implied suggestion at paragraph 52 of your letter, for the Secretary of State publicly to "justify" the policies with reference to the EPPS in the Consultation Response. The duty is to have due regard; that duty was discharged. Ground 2 is unarguable.

Ground 3: Failure to take into account a material consideration

46. Under this proposed ground, you allege that the "adverse economic impact" of policies N1(2) and N2(3) on habitat providers (habitat banks) was a material consideration which the Secretary of State failed to take into account.

47. For this ground to succeed, the alleged matter must have been so "obviously material" that it was irrational not to have taken it into account: *R (Friends of the Earth) v Heathrow Airport Ltd* [2020] UKSC 52 at §§118–120. The test is stringent. In *Keep Chiswell Green v Secretary of State for Communities and Local Government* [2026] P.T.S.R. 492 at §82, Lewis LJ held that "*it is not enough that the new matter might be capable of causing a decision-maker to reach a different conclusion. It must be a gamechanger*."

48. That threshold is plainly not met. The alleged economic impact was not an obviously material consideration, still less a "gamechanger," for the following reasons:

    a. Lifescape did not raise economic impacts during consultation. Your client chose not to respond to the NPPF consultation in relation to Policies N1 or N2 or at all. As Lewis LJ held in *Keep Chiswell Green* at §82, the fact that a party knew about an alleged consideration "*but did not take steps to inform the decision-maker of it, is also likely to be a powerful indicator that the new material is not a material consideration*." Your client cannot now contend that a matter it did not raise was so obviously material that it was irrational to omit it.
    b. Notwithstanding your lack of response to the consultation, MHCLG officials have undertaken a search of the consultation responses to Questions 179, 180 and 181 which aimed to identify responses which raised points relevant to your arguments under this proposed ground. Officials necessarily took a proportionate approach to the search, given the number of responses received to these questions and the time available. Officials initially undertook a free-text search of consultation responses relating to Policies N1 and N2 for the terms "market", "off-site", "off site", "offsite", "economy", "economic" and "financial". That exercise identified a number of consultation responses, which officials reviewed to identify concerns relating to the alleged adverse economic impact of policies N1(2) and N2(3) on habitat providers under proposed Ground 3 of your letter. The review identified sixteen respondents who raised these issues, either directly or indirectly. To put that into context, as recorded in the Government's consultation response, there were a total of 992 responses to question 179, 675 responses to question 180 and 1,094 responses to question 181 and 20,572 responses to the consultation. Whilst the search undertaken was not exhaustive, it clearly demonstrates that the issues you raise were not a key theme in the responses to the consultation.
    c. The statutory BNG scheme is undisturbed. The Defra analysis you cite at paragraph 60 of your letter concerned the positive economic effects of mandatory 10% BNG. Policies N1(2) and N2(3) do not alter the statutory obligation to deliver at least 10% biodiversity net gain. Nor do they alter the statutory exemptions. Any benefits flowing from the statutory requirement to achieve a net gain, subject to exemptions, are therefore preserved.
    d. The PPG states 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*." That guidance has the same legal status as the NPPF: *Mead Realisations Ltd v Secretary of State* [2025] EWCA Civ 32 at §29. Neither Lifescape nor any other stakeholder has challenged the PPG on economic impact grounds.

49. In those circumstances, there is no arguable basis for the contention that the Secretary of State acted irrationally. This ground is without merit.

Ground 4: Failure to comply with the public sector equality duty (section 149 of the Equality Act 2010)

50. Ground 4 alleges that the EqIA did not (i) evidence a proper understanding of the negative impacts; (ii) provide the Secretary of State with adequate evidence to exercise her duty under s.149 of the Equality Act 2010 (para 70.2) or (iii) evidence that the Secretary of State complied with that duty (para 70.3).

51. Your criticisms under this Ground fail to read the EqIA as a whole, and the context in which it was produced. The PSED does not prescribe a fixed methodology, and compliance is not a "one size fits all" exercise: *Powell v Dacorum Borough Council* [2019] H.L.R. 21 at §44.

52. In this case, the context was the formulation of a lengthy piece of national policy, some of which involved a re-statement of existing policy, involving a consultation giving rise to 20,572 responses (Consultation Response, p.1). As above, that policy is applied as a whole. The EqIA therefore considered the policies on a thematic and collective basis, applying the three limbs of the section 149(1) duty to each thematic chapter of the NPPF in sequence and identifying effects on specific protected characteristics. That approach was appropriate to the nature and scope of the policy being assessed, demonstrating precisely the "*specific*

regard, by way of conscious approach to the statutory criteria" that the PSED requires (*R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 at §25(6)).

53. Section 2.2 contained the substantive analysis. In the introductory paragraphs, it stated (at p.7-8):

> Through the mitigations identified in this PSED assessment, and in considering the NPPF as a whole, it is considered that, on balance, these policies deliver more positive benefits for individuals with protected characteristics and for society overall. (emphasis added)

54. Under the heading "Conserving and enhancing the natural environment", the EqIA separately addressed age, disability, and race under the "Advance equality of opportunity" heading. The analysis identified both the positive effects of the NPPF's environmental policies (increased green infrastructure, nature recovery through LNRS, opportunities for people with lower mobility to access nature closer to home, and improved access to green infrastructure for ethnic minority communities) and the potential limitation on those benefits.

55. Your letter criticises the EqIA's approach to assessing impacts on different protected characteristics (para 67). The approach taken is entirely consistent with *R (Addison) v Southwark LBC* [2022] EWHC 3406 (Admin), where an express reference to every protected characteristic in a single report was not invariably required where the relevant impact was considered in substance through the whole decision-making record (at §62).

56. In relation to policy addressing biodiversity enhancements above the statutory minimum (Policies N1(2) and N2(3)), the EqIA recognised at p.37 that:

> While the BNG policy provides a clearer position on when biodiversity enhancements above the statutory minimum should be sought, some respondents were concerned that this approach may reduce the scale of additional biodiversity enhancements in certain locations. We note that this could have potential to reduce opportunities to target enhanced provision in areas with the greatest need, including locations where communities with protected characteristics currently experience poorer access to nature. (emphasis added)

57. This passage was (as the drafting makes clear) informed by evidence obtained during the consultation.

58. In its overall conclusions on p.47, the EqIA reiterated the point made on p.7-8. Whilst there were some impacts that had not been mitigated, overall the policies would have a beneficial impact:

> There remain some ongoing risks of differential treatment relating to traveller sites, as set out in section 2.2, as well as some areas which may negatively impact older people or disabled people, such as the digitisation of planning. Through the mitigations identified in this PSED assessment and the aims of NPPF policies as read as a whole, we would assess that, on balance, the planning system would deliver more positive benefits for individuals with protected characteristics and on society overall. (emphasis added)

59. The EqIA approached mitigation on a holistic basis, consistent with its thematic assessment of the NPPF as a whole. The mitigations referred to in these conclusions are not confined to BNG-specific measures. It is not, therefore, the case that the identified negative impact of the BNG policies "disappears from the analysis" (para 70 of your letter). As you acknowledge at paragraph 66, that impact was identified in the EqIA. This point was specifically drawn out in the introductory paragraphs to section 2.2: "*some groups with protected characteristics may have less access to nature than others*" (p.8). It was incontrovertibly taken into account by the Secretary of State in discharging her duties under s.149 EqA 2010.

60. In reality, this ground is simply a criticism of the assessment of the impacts of Policies N1(2) and N2(3) in the EqIA. That is a matter with which the court will not interfere save on limited grounds. As Underhill LJ held in *R(Unison) v Lord Chancellor* [2016] I.C.R. 1 at §116:

> …to the extent that views are expressed on matters requiring assessment or evaluation the Court should go no further in its review than to identify whether the essential questions have been conscientiously considered and that any conclusions reached are not irrational. Inessential errors or missed judgments cannot constitute evidence of the breach of the duty.

61. The Minister took the decision to make Policies N1 and N2 of the NPPF with the criteria in section 149 properly in mind, including the acknowledged impacts of those policies on communities with protected characteristics who currently experience poorer access to nature. Her conclusions were plainly rational.

62. Ground 4 is unarguable.

Ground 5: Irrational justification for Policies N1(2) and N2(3)

63. Ground 5 is styled as a rationality challenge. In *R (Law Society) v Lord Chancellor* [2019] 1 W.L.R. 1649 at §99, the Divisional Court confirmed that "the test of unreasonableness is a high one". You fail to identify any flaw in the Consultation Response under Ground 5 which would reach that high bar. As we understand your letter, the alleged rationality is apparently based on four limbs which we will address in turn below.

64. The Consultation Response addressed Policy N1(2) in the response to Questions 179 and 180. In the paragraph following that is partially quoted at paragraph 72 of your letter, it provided as follows (p.123):

> The government has considered these responses and has retained the overall direction of policy N1. It remains clear that development plans should safeguard and enhance the natural environment, supported by relevant environmental evidence to guide development. Local Nature Recovery Strategies will play a central role in identifying and mapping areas of importance for nature and targeting action where it will deliver the greatest benefit. However, the government has made targeted amendments to improve clarity and consistency. References to species have been aligned with policy N2 and its glossary definition to broaden the scope of species considered. References to geology have been amended to 'geodiversity' to reflect its importance in habitat restoration.
>
> A minor amendment has also been made to clarify that policy N1(2) applies to all locally set biodiversity net gain standards. BNG will continue to support nature recovery, but requirements above the statutory minimum should only be set where justified and deliverable on specific allocated sites. This approach is intended to provide greater consistency while allowing higher gains when supported by appropriate evidence. The government will provide guidance to support implementation, including on the evidence needed to justify higher requirements. (emphasis added)

65. In response to Question 181, which related to Policy N2, the Consultation Response stated:

> Views on BNG were similar to those made in response to questions 179 and 180, with some supporting the proposed approach to improve consistency and avoid duplication with the statutory framework, while others were concerned it could limit local discretion to secure higher gains when justified.

66. Plainly, the response to Question 181 is to be read together with the preceding paragraphs. Those paragraphs are clear that the Secretary of State considered a balance was being struck between providing greater consistency for developers (a matter identified as a key objective for what would become the statutory scheme in Defra's 2018 consultation on mandatory BNG) whilst allowing higher gains where appropriate. That is aligned with the rationale for the proposals initially presented in the Consultation Document.

67. At paragraphs 74 and 75 of your letter you advance four alleged reasons why the justification for Policies N1(2) and N2(3) contained in the Consultation Response is irrational. None is arguable:

    a. Paragraph 74.1 re-states the arguments made under Ground 1. The Secretary of State may lawfully use national planning policy to promote consistency in the application of the statutory BNG scheme. As we have explained under Ground 1, she may do so in unqualified terms. The fact that Lifescape would prefer a different balance does not render the Secretary of State's policy irrational.
    b. Paragraph 74.2 refers to alleged duties under ss.1–3 EA 2021 and Schedule 7A TCPA 1990. Neither imposes any obligation that is infringed by the challenged policies. The targets in ss.1–3 are exercised by the Secretary of State for Environment, Food and Rural Affairs. Schedule 7A applies on grant of planning permission; it imposes no substantive obligations on the Secretary of State in her capacity as policy-maker. As above, the EPPS recorded the Secretary of State's compliance with NERCA 2006.
    c. Paragraph 74.3 contends that the Defra impact assessment showed that 10% is "the absolute minimum" to achieve no net loss. That assessment supports the statutory floor of 10%, which the challenged policies do not disturb. Your characterisation of the policies as imposing a "cap" on

BNG is wrong: Policy N1(2) expressly permits higher requirements for specific site allocations where justified and deliverable.

d. As to paragraph 75, the Secretary of State's assessment of how best to balance BNG and LNRS is a matter of policy judgment, not law. In any event, off-site BNG is market-led; while the statutory BNG metric incentivises offsite contributions which support the LNRS through the strategic significance factor (pages 20-22 of the metric), contributions do not necessarily have to be aligned with LNRS. Accordingly, there is no logical inconsistency in the Secretary of State's approach, as you contend in your letter.

68. At paragraph 76, you contend that devolution arrangements under the English Devolution and Community Empowerment Act 2026 were an "obviously material" consideration.[3] That contention is unarguable: (i) devolution arrangements do not constrain the Secretary of State's power to make national planning policy; (ii) the identification of "environment and climate change" as an area of competence for strategic authorities does not mandate that every element of environmental policy be devolved, nor does it render national consistency unlawful; and (iii) Policies N1(2) and N2(3) expressly permit LPAs to set higher BNG requirements on specific site allocations where justified.

69. Ground 5 is unarguable.

Relief sought

70. We note that the relief sought at paragraphs 77 and 78 of your letter is apparently confined to your proposed Ground 1. We have addressed that relief under our response to that ground above.

71. Should your client bring a challenge on the procedural grounds you have set out in your proposed Grounds 2–5, even if (which is denied) those Grounds were made out, the Secretary of State will resist the grant of relief on the basis that:
    a. the policies contained in the PPG have been in force since 2024, have the same legal status as the NPPF (*Mead Realisations*), and have not been challenged, such that any challenge on Grounds 2–5 is academic;
    b. any deficiency in the EPPS or Equality Analysis is capable of being cured by retaking those assessments, after which the decision to make Policies N1(2) and N2(3) could be the same; and

72. The lack of any relief is a further argument in favour of the refusal of permission.

Information and documents requested

73. The Secretary of State is of course mindful of her duty of candour, as is set out in among other things the Administrative Court Guide. We are also mindful that paragraph 13 of the pre-action protocol for judicial review indicates in no uncertain terms that requests at this stage should be proportionate.

74. We respond to your requests using the same sub-paragraphs as set out in paragraph 79 of your letter:
    a. The Secretary of State's decision making has been outlined above. There is no need at this stage for disclosure of submissions or advice.
    b. This is legally privileged and will not be disclosed.
    c. This is legally privileged and will not be disclosed.
    d. The analysis of the potential effects of Policies N1 and N2 on the BNG market has been outlined above. For completeness, we enclose copies of the consultation responses identified by the search exercise described in para 48 (redacted to remove personal data), on which we would rely if a claim were brought in support of our position that your arguments under Ground 3 are misconceived.
    e. The information you have requested would not appear to have any bearing on the legal arguments you have put forward in your letter.
    f. We enclose an extract of the text of the EPPS relating to Chapter 19 which was prepared for the decision to publish the final NPPF in August 2026.
    g. The information you have requested would not appear to have any bearing on the legal arguments you have put forward in your letter.

[3] Your letter refers to the English Devolution and Community Empowerment Bill. The Act received Royal Assent on 29 April 2026.

h. As to LNRS, as you identify in para 72 of your letter, the Consultation Response identified that some respondents suggested higher requirements may be appropriate where supported by local evidence, including through LRNS. The Department's analysis of consultation responses identified the following theme for question 179: "BNG requirements should be informed by locally evidenced ecological need to support habitat connectivity and alignment with LNRS." A similar theme was also noted for question 180. The point was reflected in the analysis of consultation responses, which stated "[a] number of respondents consider LNRSs should provide a key evidence base for higher BNG requirements, particularly where sites are identified as important for habitat creation, connectivity, nature recovery priorities or strategic ecological networks". This was carried through to the Government response. The information you have requested would not otherwise appear to have any bearing on the legal arguments you have put forward in your letter.

i. The EqIA has been published. That document is sufficient for the legal arguments you propose to make under ground 4.

Aarhus convention

75. We do not dispute that your proposed claim, if issued, would be an Aarhus claim. The Secretary of State reserves her position on any application by your client for a costs cap following receipt of your client's schedule of financial resources.

Address for further correspondence and service of court documents

76. Service of proceedings must be effected by sending the claim to GLD's dedicated email address in relation to new proceedings, as set out in GLD's GOV.UK webpage: newproceedings@governmentlegal.gov.uk. Please also copy all correspondence to:
Charlotte Gannon – charlotte.gannon@governmentlegal.gov.uk
Gemma File – gemma.file@governmentlegal.gov.uk

77. We draw your attention to *R (Good Law Project Ltd) v Secretary of State for Health and Social Care* [2022] EWCA Civ 355 on the likely consequences of failing to serve a sealed claim form to the correct email address, and of failing to serve the claim form on time.

78. Please note that GLD's server limit is 20MB per email – any larger files will require prior special arrangements for transmission/reception, e.g. using a nominated secure document-sharing platform such as GLD's "drop-box"-style system, Egress. GLD would be grateful if, when serving new proceedings electronically, hard copy documents are not also sent to GLD's postal address (unless requested otherwise).

Conclusion and next steps

79. For the reasons set out above, the proposed grounds of challenge included in your letter are unarguable. The Secretary of State has given assurances as to the legal status of Policies N1(2) and N2(3) which are consistent with the settled law as explained by the Court of Appeal in *West Berkshire*. Accordingly, we trust that your client will reconsider its intention to bring proceedings. The Secretary of State will otherwise defend any claim and will seek recovery of her reasonable legal costs.

Yours sincerely

Charlotte Gannon

Charlotte Gannon
For the Treasury Solicitor

D +442072103372
E Charlotte.Gannon@governmentlegal.gov.uk

Conserving and enhancing the Natural Environment

Integration

Opportunities to reflect and embed environmental protection have been considered throughout the preparation of this chapter. The fundamental aims of the policies are to influence the design and location of new development to help drive nature's recovery and contribute to wider environmental outcomes, safeguarding our most important habitats, species and landscapes. The plan-making policy (N1) sets out how this should be achieved through plans, with the decision-making policies (N2, N3, N4, N5 and N6) outlining how this should be addressed through decision making. The chapter incorporates new legislative requirements brought through the Environment Act 2021, and the Planning and Infrastructure Act 2025. There are also interactions with a range of environmental policies and legislation across protected landscapes, habitats and species and the policies explicitly promote nature restoration and the use of nature-based solutions.

When formulating these policies, environmental considerations, including the need to conserve and enhance biodiversity, have been taken into account. However, the changes to biodiversity net gain (BNG) policy represent a deliberate shift from NPPF 2024, which encouraged BNG through plan-making and decisions (though in general terms, rather than in relation to statutory BNG requirements). Evidence from emerging local plans prepared since commencement of the statutory BNG framework indicates that in some cases there is divergence from the statutory framework. However, most local BNG policies are broadly aligned with the statutory regime or apply higher levels of gain only to specific site allocations. The policy which was consulted upon seeks to limit enhancements beyond the statutory net gain objective to specific site allocations set out in up-to-date development plans (and not for sites which are exempt under the statutory framework), which may result in fewer sites delivering enhancements through BNG where LPAs had previously sought gains above statutory levels outside allocations. Available evidence prior to the consultation suggested that these instances are limited.

Some respondents to the consultation indicated that the proposed approach may constrain locally-led ambition to secure higher levels of biodiversity gain, and may limit the ability of local planning authorities to plan for and deliver strategic nature recovery in line with local environmental priorities, including through Local Nature Recovery Strategies. One respondent cited evidence that a further 30 local planning authorities had draft policies which, if adopted, would require more than the statutory minimum net gain. Other respondents also referred more generally to adopted or emerging local plans seeking high levels of BNG, including those informed by wider environmental and climate commitments. As such, the impact of the policy may be felt more widely where these approaches are not able to be taken forward.

In recommending that the proposed policy is carried forward into the final version, a balance is being struck: between recognising that higher BNG than the statutory minimum can in some instances be achieved on specific sites, and limiting blanket approaches which could apply costs which are difficult to bear, especially on smaller sites, and which apply inconsistently across the country. The policy would continue to recognise the important contribution BNG plays to nature recovery, but will mean BNG requirements are applied in a proportionate and consistent way across all areas. Local planning authorities will still be able to target specific sites for additional gains where justified and deliverable.

A similarly balanced view has been taken in correcting an error in the consultation draft of the NPPF, which inadvertently changed the definition of ancient or veteran tree, from being exceptional in terms of "age, size and condition" to "age, size or condition". The change would have brought more trees into scope of the definition, and by extension subject to the policy on irreplaceable habitats in policy N6(2). This could have environmental benefits, especially in relation to applying the prevention principle discussed below, but would also create additional barriers to development as a number of respondents pointed out. We have taken views both supporting and opposed to the change into account in determining that the error should, on balance, be corrected.

Prevention

The fundamental aim of these policies is to ensure that as far as possible environmental damage from development is avoided, areas of high environmental value are protected, and development contributes positively to wider environmental outcomes. They embed considerations of environmental impacts into the plan-making and decision-making process to guide development, for example by identifying opportunities for the conservation and enhancement of landscapes and habitats and for development to connect to and strengthen ecological networks, using sustainable green infrastructure and nature-based solutions to limit environmental damage. There are also protections for designated landscapes, areas of particular importance for biodiversity, priority and threatened species, and features of high environmental value such as trees, hedgerows and chalk streams. In that way, the impact of development on the natural environment is limited and, in some cases, prevented; in other cases, the effect of the policy may be to enhance the natural environment.

Rectification At Source

Environmental damage can occur as a result of development. The focus of the policies set out is to protect as far as possible areas which have environmental designations and other environmental features of value so that harm to them I avoided or, where this is not possible, to ensure that appropriate mitigation is provided. At a strategic level, the policies ask plan-makers to use a range of environmental evidence to steer site

allocations away from the most sensitive areas for nature and pursue opportunities to off-set environmental impacts using measures such as green infrastructure provision. Similarly decision-making policies require proposals to consider the existing environmental aspects of the land and incorporate design features which enhance those qualities, as well as setting out protections for nature.

Polluter Pays

The natural environment policies seek to conserve and enhance the environment. They contain measures which seek to avoid harm, and to mitigate, or at a last resort compensate, for instances where significant harm to biodiversity cannot be avoided. The planning system, through planning conditions and obligations, is designed to ensure that the developer (the 'polluter') pays for any mitigation or compensation that may be required.

The more restrictive plan-making policy for BNG enhancements above the statutory gain objective makes it likely that fewer sites overall will deliver biodiversity net gain. Consultation responses specifically highlighted that restricting the scope for local plans to require enhancements above the statutory minimum may reduce opportunities to secure additional biodiversity gains that support wider environmental objectives, including strategic habitat creation, ecological connectivity, and nature recovery priorities. However, the principle remains embedded, developers must mitigate or compensate for harm to onsite habitat where statutory BNG obligations apply and local planning authorities will still be able to target specific sites for additional gains where justified and deliverable.

Where proposals could affect internationally or nationally designated sites, the policy reflects the new legislative provisions for Environmental Delivery Plans as a mechanism for securing contributions towards strategic-scale mitigations.

Precautionary Principle

The natural environment policies seek to conserve and enhance the environment and are unlikely to cause serious or irreversible environmental harm. The plan-making policies guide plan-makers to identify environmental opportunities and safeguards. The decision-making policies set out measures proposals can incorporate to mitigate environmental impacts such as features for species, and the level of protection which decision-makers

need to give to impacts from development on protected landscapes, undeveloped coasts, sites of international, national or local importance, and irreplaceable habitats.

Other Considerations

There are no other considerations that will conflict with applying the environmental principles to improve environmental outcomes.