

Bath & North East Somerset Council	
MEETING:	Council
MEETING DATE:	21st November 2024
TITLE:	Using Council land for Biodiversity Net Gain: Delegation of Planning Enforcement function to secure a legal agreement
WARD:	All
AN OPEN PUBLIC ITEM	
List of attachments to this report:	
None	

1 THE ISSUE

- 1.1 Biodiversity Net Gain (BNG) legislation is a statutory requirement for a large number of planning applications now being received. There will be circumstances where a developer will not be able to provide all of the biodiversity required to meet the 10% gain objective within the development's boundary. The legislation requires land outside of a development used for BNG (a habitat bank) to be recorded on Natural England's BNG Register with a legal agreement, usually a S106 agreement.
- 1.2 The council is a developer and landowner, its developments, and others, will sometimes need off-site biodiversity units to discharge planning obligations before construction can commence. The council as landowner and planning authority cannot sign a S106 legal agreement in both roles, and so needs an alternative mechanism for securing the legal agreements needed for BNG off-setting. All councils will have this need where they are either the developer needing BNG units, or the landowner providing BNG units (or both). The proposal is for a reciprocating arrangement with adjacent local planning authorities to enable the signing of legal agreements and registration of BNG habitat banks for the reciprocating authorities.
- 1.3 The arrangement will result in more biodiversity on council land funded by development and enable council developments, and others, to commence construction with reduced risk of reliance on habitat banks outside of B&NES.

2 RECOMMENDATION

The Council is asked to;

- 2.1 Subject to recommendation 2.3 to endorse the arrangement for *delegating the planning enforcement function* to neighbouring authorities (Bristol City Council, North Somerset, Somerset, South Gloucestershire, Wiltshire) solely for the purposes of entering into a S106 legal agreement for use of specific council owned land as a biodiversity net gain habitat bank.
- 2.2 Subject to recommendation 2.3 to endorse the arrangement for *accepting a delegation of planning enforcement* function from neighbouring authorities (Bristol City Council, North Somerset, Somerset, South Gloucestershire, Wiltshire) for the purposes of entering into a S106 legal agreement for use of their land as a biodiversity net gain habitat bank.
- 2.3 No delegation of the enforcement function or acceptance of such a delegation from/to another Council shall take effect until that other Council has made a reciprocal Council decision and shall end as between B&NES and the reciprocating Council as from the date either council revokes its delegation of function save that any delegation or acceptance of the enforcement function entered into before the date of revocation of the enforcement function shall remain valid.
- 2.4 Note that a site specific S106 agreements will need to be agreed by officers for each habitat bank and the council is under no obligation to enter into a legal agreement following the endorsement of the proposed arrangement by Council.

3 THE REPORT

- 3.1 The Environment Act 2021 introduced the statutory framework for biodiversity net gain (BNG), requiring the many developments to provide at least 10% BNG either on-site, off-site or by purchasing biodiversity units. This BNG must be secured by planning condition, s106 agreement/conservation covenant or both.
- 3.2 The legislation requires all BNG provided outside of a development to be recorded on Natural England's BNG register with a legal agreement signed by the landowner and an organisation enforcing the legal obligations.
- 3.3 Bath & North East Somerset Council, as landowner, can use its land for off-site BNG provision. However, Bath & North East Somerset Council, as local planning authority, cannot enter into a s106 agreement with Bath & North East Somerset Council as landowner in order to secure this BNG provision. The legal 'agreement' needs to be between two separate organisations.
- 3.4 Section 101 of the Local Government Act 1972 allows a Council to delegate its functions to other local authorities as long as that function, also being a function of the other authority, is not the responsibility of the other authority's executive. Subject to that exception, the function of local planning authority could therefore be delegated to another local authority for the purposes of securing, monitoring and enforcing these s106 agreements for obligations on Bath & North East Somerset Council land. The proposal for delegation of planning enforcement function is solely to be used for council owned land identified for development as a BNG habitat bank and entering into a S106 legal agreement for the land to be secured as a biodiversity net gain habitat bank.
- 3.5 B&NES Council seek endorsement to enter into reciprocal arrangements delegating and accepting delegations of planning enforcement functions with

neighbouring authorities (Bristol City Council, North Somerset, Somerset, South Gloucestershire, Wiltshire) for the purposes of entering into a S106 legal agreement for use of specific council owned land as biodiversity net gain habitat banks only.

- 3.6 In the absence of a mechanism for securing biodiversity units from council land, the council as a developer will be less able to offset biodiversity impacts close to the impact area. This would both result in lost opportunity for biodiversity and delivering for local people linked to the area being impacted. In addition, using council land for BNG provides a funding stream for maintaining the land, subject to an agreed management plan, for 30 years.
- 3.7 It is proposed that by having s106 agreements in place, for BNG, on B&NES council owned land and therefore the ability to register these units on the Natural England register, these units can be used by Bathnes's development schemes and potentially also sold to private developers in certain circumstances. Therefore B&NES housing delivery and other schemes requiring off-site BNG units will be able to reserve and legally secure specific off-site BNG delivery to enable the discharge of planning conditions and allow the commencement of development.
- 3.8 In the longer term another option to secure a legal agreement may become available with the West of England Mayoral Combined Authority (the MCA). The MCA have started the process of applying to become a 'responsible body' which would enable B&NES to apply for a deed with a conservation covenant. This may become the preferred solution once established, but it is anticipated that the process to become a Responsible Body will be lengthy and is untested for the MCA. The process could take in excess of 12mths. Without the reciprocal arrangements proposed here it will be unviable for the council to use its land to provide BNG units because the private Responsible Bodies established so far are unaffordable for the council's BNG schemes.

4 STATUTORY CONSIDERATIONS

- 4.1 The Natural Environment and Rural Communities Act 2006 (NERC Act) section 40 duty, provided for in the Environment Act 2021, extends the biodiversity duty on public authorities to include the enhancement of biodiversity. The use of council land as biodiversity net gain habitat banks will contribute to this duty.
- 4.2 The legal power to delegate or accept a council function arises from Section 101 of the Local Government Act 1972

The Local Government Act 1972 (section 101(1)(b)) states that "...a local authority may arrange for the discharge of any of their functions – [.....] (b) by any other local authority".

5 RESOURCE IMPLICATIONS (FINANCE, PROPERTY, PEOPLE)

- 5.1 There aren't direct negative financial implications from the endorsement of delegating or accepting the planning enforcement function between councils for habitat banks. Whether to enter into a s106 agreement with another council for a specific site is a delegated decision to planning officers with advice from specialist officers, the likelihood of enforcement action is considered as part of the process.

- 5.2 All S106 agreements resulting from planning applications or otherwise carries a risk of enforcement action with associated cost. The s106 agreements for habitat banks will be between councils with a legislative biodiversity duty and therefore the risk of costs due to enforcement action is expected to be low.
- 5.3 The costs incurred in setting up a site as part of a council habitat bank are covered by the project and are expected to be recovered through the sale of biodiversity units.
- 5.4 The outcome will result in a new income stream to enhance and maintain council owned land for 30yrs+ contributing to Council ecological emergency objectives.
- 5.5 The outcome will provide biodiversity units to council developments reducing the need to purchase units from outside the authority area which incurs a financial disincentive.

6 RISK MANAGEMENT

- 6.1 A risk assessment related to the issue and recommendations has been undertaken, in compliance with the Council's decision making risk management guidance.

7 EQUALITIES

- 7.1 An EIA has not been carried out. The transfer of a regulatory function from one local planning authority to another will not result in a change to the function. An indirect outcome will be that due to the location of council owned land, biodiversity will be provided closer to communities and therefore increase public access to nature.

8 CLIMATE CHANGE

- 8.1 The delegation of planning enforcement function will enable council land to be used as a habitat bank resulting in ecological mitigation and 10% biodiversity improvement being provided within the same local authority as the development impacting biodiversity. This approach contributes to resilience of habitats within B&NES to climate change.

9 OTHER OPTIONS CONSIDERED

- 9.1 It is possible to enter into a conservation covenant (deed) with a private registered 'responsible body' who can then enforce the covenant. At the time of writing there is 1 such organisation operating in our area which provided their fees. Option rejected due to high costs likely to make projects unviable and funds not available to cover the upfront fees.
- 9.2 Wait and see whether WECA are successful in an application to become a responsible body. Option rejected due to no timescales available or certainty of outcome.
- 9.3 Solely using private habitats was considered, this option would give less control over cost, when and where units are available and doesn't provide the additional benefits of co-locating nature where communities can access it. Option Rejected.

10 CONSULTATION

Consulted:

Head of Planning Department – Louise Morris (agreed)

Planning Enforcement Manager – Neil Howat (agreed)

Development Management Team Manager – Chris Griggs-Trevarthen (agreed)

Head of Sustainable Economy – Jackie Clayton (agreed)

S151 Officer – Andy Rothery (agreed)

Monitoring Officer - Michael Hewitt (agreed)

Contact person	Andrew Pearce (Biodiversity Net Gain Officer)
Background papers	
Please contact the report author if you need to access this report in an alternative format	