

## CABINET

21 OCTOBER 2024

### REPORT OF THE PORTFOLIO HOLDER RESPONSIBLE FOR HOUSING AND PLANNING

#### A.3 TENDRING DISTRICT COUNCIL'S INTERIM POLICY ON BIODIVERSITY NET GAIN (BNG)

##### PART 1 – KEY INFORMATION

###### PURPOSE OF THE REPORT

To seek the Cabinet's agreement to adopt a policy statement on 'Biodiversity Net Gain' (BNG) which will serve as the Council's interim corporate position on the subject, pending detailed consideration as part of the forthcoming Local Plan review. Having an interim policy will enable the Council to respond positively and constructively in its consideration of BNG as part of the planning process; and in the consideration of proposals to set up 'Habitat Banks' by Tendring landowners and, potentially, on Council-owned land.

###### EXECUTIVE SUMMARY

Biodiversity Net Gain (BNG) is a legal requirement of the national planning system which has applied to most proposals for major development since February 2024 and most proposals for smaller developments since April 2024. It requires developers to deliver a minimum 10% uplift in biodiversity (wildlife) value over and above what was present on site prior to development. In very simple terms, it is no longer just a requirement for development to minimise or mitigate its impact on wildlife; it must now, by law, bring about an improvement – a minimum 10% net increase in biodiversity habitat which is calculated, measured and monitored using a complex biodiversity metric set out in national guidance.

To achieve 10% BNG, development proposals are required to deliver as much of it as possible on the site that is being developed. Where it is not possible to achieve all the necessary BNG on-site, developers can create the necessary habitat off-site either on other land they control (which would be tied through a legal agreement on the grant of planning permission) or by purchasing 'biodiversity units' from a 'Habitat Bank' – i.e. a wildlife habitat set up and maintained by third-party landowners for the purposes of BNG and where units can be sold to developers on the open market. In the rare cases where on-site or off-site BNG provision is not possible, developers must – as a last resort – buy statutory biodiversity credits from the Government.

To set up a Habitat Bank and lawfully enter the market for selling biodiversity units to developers, a landowner must register their site with Natural England – which first requires them to either enter into a legal agreement with the local authority or a 'conservation covenant' with another responsible body recognised by Natural England. In doing so, the local authority (or other responsible body) takes on a responsibility to monitor and enforce the obligations set

out in any legal agreement.

A number of landowners in Tendring have expressed a keen interest in setting up Habitat Banks and some have already carried out much of the preparatory work required for entering into a legal agreement with Council, registering with Natural England and entering into the market for selling biodiversity units. However, like many local authorities, this Council has not been in a position to progress discussions with landowners about entering into the necessary legal agreements because Officers have needed time to research, consider and fully understand both the Council's legal duties and implications for resources – particularly in relation to its responsibilities around monitoring.

Now that there is a better understanding of the requirements around BNG and the process for setting up Habitat Banks, Officers have designed a planning policy on BNG (attached as Appendix 1 to this report for Members' consideration) which, in summary, covers the following:

- the Council's legal obligations to secure 10% BNG – without unnecessarily duplicating the detail of legislation of national guidance;
- the ambition (which aligns with the ambition of Essex County Council) to increase the BNG requirement to 20% at an appropriate point in the future; and
- the criteria under which the Council could be willing to enter into a s106 legal agreement with a landowner for the purpose of setting up Habitat Banks for registration with Natural England and the selling of BNG units to developers on the open market which:
  - reflect the benefit of expanding and connecting up existing protected wildlife habitats;
  - promote a scale of site that could better foster the creation of viable habitats than smaller more vulnerable sites;
  - support the objectives of the emerging Essex Local Nature Recovery Strategy (LNRS) and the locations identified for their opportunity for habitat creation in that strategy;
  - support Local Plan policy e.g. strategic green gaps and protected open spaces, and avoiding Habitat Banks in locations that could prejudice the proposals and policies in the Local Plan; and
  - allows the Council to establish Habitat Banks on its own land, in due course, allowing time to carry out due internal processes in relation to assets and Member approvals – without holding up the opportunity for third-party private landowners to progress Habitat Banks on their sites, to the benefit of wildlife in the District and the diversification of the rural economy.

The intention is that the proposed policy is agreed by the Cabinet for referral to the Planning Policy and Local Plan Committee for its full consideration for inclusion in the Local Plan through the forthcoming review process; but that it be adopted, in the interim, as the Council's corporate position on BNG which, amongst other things, will enable Officers to progress discussions with landowners about setting up and registering Habitat Banks in Tendring and negotiating the necessary legal agreements. It is also recommended that the Planning Committee be invited to give consideration to how it exercises its decision-making powers in respect of relevant legal agreements; the extent to which such powers are to be delegated, if at all, to Officers; and whether any public consultation arrangements should be put in place for the consideration of Habitat Bank proposals.

#### **RECOMMENDATION(S)**

**It is recommended that the Cabinet:**

- 1) notes the content of this report which, amongst other things, explains the Council's obligations around Biodiversity Net Gain (BNG), the role of Habitat Banks and the potential consideration of Council-owned land for BNG purposes;**
- 2) agrees that proposed 'Policy on Biodiversity Net Gain (BNG)' (attached as Appendix 1) is adopted as the Council's interim corporate position pending the outcome of the Local Plan review, for the purposes of dealing with matters relating to BNG;**
- 3) refers the aforementioned policy to the Planning Policy and Local Plan Committee for its consideration for inclusion in the Tendring District Local Plan as part of its current review;**
- 4) invites the Planning Committee, at its earliest convenience, to consider and determine how it will exercise its power in respect of Council decisions on entering into legal agreements with landowners under Section 106 of the Town and Country Planning for the purposes of setting up Habitat Banks, guided by the aforementioned policy and the advice of Officers – including the extent to which the Committee deems it appropriate for such decision-making powers to be delegated to Officers; and any arrangements for public consultation on specific proposals; and**
- 5) notes that the Portfolio Holder responsible for Housing and Planning in liaison with Officers will, in due course, consider and publish details of the fees to be charged to developers and landowners to cover the Council's costs in respect of monitoring BNG in line with its statutory obligations.**

#### **REASON(S) FOR THE RECOMMENDATION(S)**

In the absence of a clear local policy or position on the subject of Biodiversity Net Gain (BNG)

or any published expectations or criteria for the consideration of proposals for Habitat Banks, the Council can only refer to legislation and guidance produced by the Government when dealing with planning proposals that have BNG requirements and proposals for Habitat Banks from Tendring landowners. It is therefore difficult for Officers to have constructive conversations with landowners looking to set up Habitat Banks on the necessary content of legal agreements and associated expectations around monitoring fees – which is holding up the opportunity for local landowners to contribute towards BNG and enter into the market for biodiversity units to the benefit of the rural economy.

The recommendation will address these matters by putting in place a clear policy position to guide Officers and third parties in their deliberations in the short-term whilst allowing it to be considered fully in the context of the forthcoming Local Plan review and for it to be challenged and amended as appropriate through the plan-making process prior to inclusion and formal adoption as part of the Local Plan. The recommendation also invites the Planning Committee to consider and provide clarity around the decision-making process in respect of agreeing legal agreements with landowners for the setting up of Habitat Banks.

#### **ALTERNATIVE OPTIONS CONSIDERED**

To progress the proposed policy on BNG through the Local Plan review process only - awaiting its publication as part of the first draft consultation on the Local Plan in 2025 before it can be referred to for the purposes of matters relating the BNG and Habitat Banks. The main consequence would be Officers having to discuss the setting up of Habitat Banks with interested landowners and negotiating the necessary legal agreements in the absence of any clearly agreed corporate position or direction from elected Members.

This would leave only national legislation and guidance, with no local dimension, upon which to guide discussions around BNG and Habitat Banks until some point in 2025, which is likely to delay meaningful progress in assisting local landowners in Tendring to set up their Habitat Banks, facilitate habitat creation in Tendring and benefit economically from entering into the competitive market for the sale of biodiversity units.

## **PART 2 – IMPLICATIONS OF THE DECISION**

#### **DELIVERING PRIORITIES**

BNG supports the corporate objectives for championing our local environment and working with partners to improve quality of life. It also has the potential to contribute to raising aspirations and creating opportunities by supporting opportunities in the rural economy to participate in the open market for habitat creation.

This approach will support the Council in its consideration of whether Council-owned land could be used for the purpose of BNG which, in turn, could assist in its ambitions around tackling climate change and supporting financial sustainability.

The proposed approach would support the development and review of the Council’s Local Plan and the Essex-wide ambition to explore an increase to 20% BNG in the future. It also seeks to align with the objectives of the emerging Essex Local Nature Recovery Strategy will be the subject of consultation in Summer 2024.

**OUTCOME OF CONSULTATION AND ENGAGEMENT** (including with the relevant Overview and Scrutiny Committee and other stakeholders where the item concerns proposals relating to the Budget and Policy Framework)

Full consideration and public consultation on the proposed policy on BNG will take place as part of the Local Plan review under the direction of the Planning Policy and Local Plan Committee. Hence the recommendation in this report is that the policy be referred to that Committee for consideration and adopted by Cabinet now, only to establish an interim position pending the outcome and any changes arising through the formal Local Plan review process.

Officers have however formulated the proposed policy having careful regard to legislation, national policy and national guidance, internal discussions between relevant departments within the Council and informal discussion with colleagues in Essex County Council, landowners that have indicated an interest in bringing forward Habitat Banks and contacts within Essex Wildlife Trust.

As it stands, the setting up of a Habitat Bank does not, in itself, require express planning permission (as habitat creation does not constitute development) and therefore is not bound by any requirements for publicity and public consultation for the Council to be able to enter into a legal agreement with a landowner. One of the recommendations in this report is referral to the Planning Committee for its consideration as to whether any consultation arrangements need to be put in place.

**LEGAL REQUIREMENTS (including legislation & constitutional powers)**

Is the recommendation a Key Decision (see the criteria stated here)	NO	If Yes, indicate which by which criteria it is a Key Decision	<input type="checkbox"/> Significant effect on two or more wards <input type="checkbox"/> Involves £100,000 expenditure/income <input type="checkbox"/> Is otherwise significant for the service budget
		And when was the proposed decision published in the Notice of forthcoming decisions for the Council (must be 28 days at the latest prior to the meeting date)	4 <sup>th</sup> September 2024

In England, biodiversity net gain is required under a statutory framework introduced by [Schedule 7A of the Town and Country Planning Act 1990](#) (inserted by the [Environment Act](#)

[2021](#)). This statutory framework is referred to as 'biodiversity net gain' in Planning Practice Guidance to distinguish it from other or more general biodiversity gains.

Town and Country Planning (Development Management Procedure) (England) Order 2015 (as amended)

Section 40(2A) of the Natural Environment and Rural Communities Act 2006

The six sets of BNG implementing regulations are as follows:

- The Biodiversity Gain (Town and Country Planning) (Consequential Amendments) Regulations 2024 (SI 2024/49) - made on 17 January 2024, which make further consequential amendments to primary legislation, including the definition of a planning authority under Schedule 7A to the Town and Country Planning Act 1990 (TCPA 1990) that sets out the BNG framework.
- The Biodiversity Gain Requirements (Irreplaceable Habitat) Regulations 2024 (SI 2024/48) - made on 17 January 2024, which modify the application of the BNG requirement for onsite habitats that meet the definition of "irreplaceable habitat". They set out the alternative arrangements that must be made to minimise the adverse effect of a development on the biodiversity of the irreplaceable habitat onsite.
- The Biodiversity Gain Requirements (Exemptions) Regulations 2024 (SI 2024/47) made on 17 January 2024 - which exempt certain developments from meeting the BNG requirement and apply to development with no impact on priority habitat and where impacts fall below the specified "de minimis" threshold, to householder applications, to the high-speed railway network, to off-site gain developments and certain self-build and custom build developments. They also applied temporarily for small developments where a planning application is made or has been granted before 2 April 2024.
- The Biodiversity Gain (Town and Country Planning) (Modifications and Amendments) (England) Regulations 2024 (SI2024/50) - made on 17 January 2024, which set out provisions for information about BNG for applications for planning permission and decision notices, the contents of biodiversity gain plans and the procedure for their submission to the LPA, the eight week timescale for the LPA determining whether to approve a plan (unless an alternative period is agreed), what LPAs must consider when making a determination, the appeal process and modified arrangements for phased developments.
- The Biodiversity Gain Site Register Regulations 2024 (SI 2024/45) - made on 17 January 2024, which require Natural England (NE) to establish and maintain the new biodiversity gain site register, deal with registration applications and make sure that information in the register is publicly accessible.
- The Biodiversity Gain Site Register (Financial Penalties and Fees) Regulations 2024 (SI 2024/46) - made on 18 January 2024, which allow for fees to be charged for applications to register land in the biodiversity gain site register and allows the register operator, NE, to issue financial penalties where false or misleading information is provided.

For the purposes of Biodiversity Net Gain, planning obligations (through a legal agreement, known as a Section 106 Agreement) are one of the mechanisms under paragraph 9 of

Schedule 7A of the Town and Country Planning Act 1990, necessary to secure the maintenance of significant onsite habitat enhancements for at least 30 years. They are also required to register sites for offsite gains (unless conservation covenants are used). The purpose of planning obligations is to make development acceptable in planning terms. The Planning Advisory Service (PAS) is currently producing legal agreement templates for consideration. The power to enter into a legal agreement under Section 106 of the Town and Country Planning Act 1990 (as amended) is a function reserved for Council, delegated to the Planning Committee (a non-executive function).

X **The Monitoring Officer confirms they have been made aware of the above and any additional comments from them are below:**

The relevant primary legislation for the statutory framework for biodiversity net gain is principally set out under [Schedule 7A \(Biodiversity Gain in England\) of the Town and Country Planning Act 1990](#). This legislation was inserted into the [1990 Act by Schedule 14 of the Environment Act 2021](#), and was amended by the [Levelling Up and Regeneration Act 2023](#). The [Biodiversity Gain \(Town and Country Planning\) \(Consequential Amendments\) Regulations 2024](#) made consequential amendments to other parts of the [1990 Act](#).

The sole in-house Planning Solicitor within legal services has provided advice on the law and guidance on securing the creation/enhancement of BNG and subsequent monitoring, including reviewing the templates produced by PAS.

The legislative framework around BNG places legal duties on the Council, both as the Local Planning Authority and, potentially, as a landowner promoting the use of Council-owned land for Habitat Banks. For these duties to be fulfilled, the Council should keep under careful review the need for sufficient legal and other resources as workloads have the potential to grow significantly in the future though increases in planning applications and/or Habitat Bank submissions, requiring more complex legal agreements.

In respect of governance implications due to adopting the Policy, there are various future decisions that will be required – some of which relate to planning and the delegated functions of the Planning Committee and officers, whilst others relate to Executive functions, particularly in relation to the use of Council owned land and how it manages its assets. Future proposals for the use of Council owned land will require a further Cabinet report.

## **FINANCE AND OTHER RESOURCE IMPLICATIONS**

TDC responsibilities and resource implications include:

- Determining planning applications in line with BNG requirements – covered by existing resources/planning application/pre-application fees;
- Imposing planning conditions, discharging and enforcing those conditions as necessary – covered by existing resources, but with the likely potential for case numbers to increase;
- Entering into s106 agreements for Habitat Banks or planning permissions – legal fees would be gained, but there are potentially significant implications for specialist resources in legal services which could require increased capacity, either in-house or

procuring external support;

- Reviewing the Local Plan and incorporating appropriate provisions around BNG - covered by existing Local Plan budget and staff resources;
- Monitoring BNG – costs to be recouped through agreements with developers and landowners for the use of existing, employment of more resources or outsourcing to a third party;
- Ecological surveys for Council-owned land – already underway and covered by existing BNG funding received from DEFRA;
- Processes for establishing Habitat Banks on Council-owned land which would require Cabinet consideration and approval, and the potential need to increase resources to support these processes depending on how many, if any, sites are to be put forward as Habitat Banks;
- Revenue income through the sale of BNG units on Council-owned land – will need to cover the cost of procuring and facilitating habitat creation with monitoring and enforcement, with potential for surplus; and
- Any implications for ongoing maintenance and public liability on Council-owned BNG sites.

**X The Section 151 Officer confirms they have been made aware of the above and any additional comments from them are below:**

Reference is made to the resources and risk section of this report which highlights the need to carefully consider the resource implications of BNG, on an ongoing basis, to ensure sufficient resources across a number of services are in place to deliver, effectively, on the requirements and opportunities around BNG. This could require further decisions in the on budgets, fees and charges in the future.

#### **USE OF RESOURCES AND VALUE FOR MONEY**

The following are submitted in respect of the indicated use of resources and value for money indicators:

A) Financial sustainability: how the body plans and manages its resources to ensure it can continue to deliver its services;

In its responsibilities as Local Planning Authority (LPA), the Council has duties around BNG as part of the Local Plan review process, decision making on planning applications, legal agreements for the establishment of Habitat Banks and monitoring and enforcement in respect of all of the above. The Council will be better-placed to administer these duties in an efficient and cost-effective manner in accordance with a clear policy position and associated decision-making arrangements than in the absence of such a policy and arrangements.



<p>B) Governance: how the body ensures that it makes informed decisions and properly manages its risks, including; and</p>	<p>This report puts forward a proposed policy for agreement by the Cabinet for application in the interim as the Council’s corporate position on BNG albeit pending full and thorough consideration by the Planning Policy and Local Plan Committee as part of the Local Plan review and consideration and agreement by the Planning Committee of how its powers will apply in the consideration of proposals for Habitat Banks.</p>
<p>C) Improving economy, efficiency and effectiveness: how the body uses information about its costs and performance to improve the way it manages and delivers its services.</p>	<p>Having a clear policy and associated decision-making processes in place in respect of BNG will provide clarity on the process for dealing with planning applications with BNG implications and approaches from landowners looking to set up Habitat Banks.</p>

**MILESTONES AND DELIVERY**

The Council’s duties in respect of BNG are already in place, as introduced through the Environmental Act 2021 and enacted from February 2024 in respect of major development and 2 April 2024 for minor development proposals. The Council is therefore already considering and determining planning applications in line with statutory requirements set out in legislation and details within national guidance.

The proposed Policy on Biodiversity Net Gain, designed to assist the Council in its approach to the above, is recommended for immediate adoption as the Council’s interim position on BNG with the Cabinet’s approval.

The policy is proposed for referral to the Planning Policy and Local Plan Committee for its consideration, in due course, for inclusion in the Local Plan as part of the forthcoming Local Plan review. The timetable for the Local Plan review is due to be revisited by the Planning Policy and Local Plan following significant changes being proposed by the newly elected Government to the National Planning Policy Framework in respect of housebuilding targets – although it is expected that there will be public consultation on the Local Plan throughout 2025 including consultation on the proposed BNG policy.

It is recommended that the Planning Committee is invited, at its earliest convenience to clarify how it wishes to exercise its decision-making powers in respect of s106 legal agreements for Habitat Banks including any requirements for public consultation or delegation of powers to Officers.

Overall, it is intended that the above actions will enable the Council to work smoothly and constructively with landowners to put necessary legal agreements in place for the registration and establishment of Habitat Banks in Tendring and for those Habitat Banks to enter the market for the sale of biodiversity units by the end of 2024 or early 2025. Decisions on the introduction of Monitoring fees will be taken by the Portfolio Holder responsible for Housing

and Planning in liaison with Officers as soon as is practicable following agreement of the interim policy.

The timing of whether the Council, as a landowner, establishes Habitat Banks on its own land will be considered by Officers and the Cabinet in the coming months.

## **ASSOCIATED RISKS AND MITIGATION**

The main risk of not having clear policies and decision-making processes in place in respect of BNG is the potential for undue delay in the Council carrying out its legal and administrative duties for BNG and putting in place the necessary legal agreements and monitoring arrangements and enabling landowners in Tendring to set up Habitat Banks for the purposes of aiming to deliver habitat creation in our district – to the benefit of the district's environment, the rural economy and the objectives of the emerging Local Nature Recovery Strategy. The measures recommended in this report mitigate that risk.

There are also financial and resource risks to the Council if workloads relating to BNG increase to an extent that has not been fully considered, accounted and budgeted for. In particular there are implications for the resources within legal services with the potential for a large number of legal agreements needing to be either drafted or reviewed with potential for complex content. At present the Council has only a small legal team with one solicitor specialising in planning and s106 legal agreements. Whilst the Council is able to, and does recover costs from developers and landowners to cover existing costs, the situation will need to be kept under very close review in order to determine, in a timely manner, whether additional staff resources or external support need to be employed in order to cope with any potential workload increase.

The ability to effectively resource the processes for bring forward Habitat Banks on Council-owned land and carrying out the necessary physical and ongoing maintenance and monitoring works will require further consideration as it becomes clearer how many, if any, sites are put forward by the Council, their size and nature of works required. Failure to adequately resource these processes and works could leave the Council unable to fulfil its duties under any future legal agreement or conservation covenant or as an authorities responsible for monitoring BNG.

## **EQUALITY IMPLICATIONS**

Whilst there are no identified equality implications in respect of residents or communities with protected characteristics or other groups in society, there is potential for Tendring landowners and the Tendring District to be disadvantaged if the Council is unable to process requests to establish Habitat Banks in an efficient and timely manner. The recommendations in this report look to minimise that risk.

Because the trade in biodiversity units can cross administrative boundaries, the risk of delay could result in Habitat Banks in other districts being better placed to meet the BNG

requirements of Tendring developments and, likewise Habitats Banks in Tendring not able to compete in the market for selling units to meet the BNG requirements of developments outside of Tendring.

### **SOCIAL VALUE CONSIDERATIONS**

Biodiversity Net Gain (BNG) and the objectives around Local Nature Recovery, as being progressed by Essex County Council through the Local Nature Recovery Strategy (LNRS) are critical to the sustainable future of humankind, tackling climate change and the health and wellbeing of residents. The opportunities afforded by BNG and the setting up of Habitat Banks can support the rural economy and the sustainability of income for our farming communities.

### **IMPLICATIONS FOR THE COUNCIL'S AIM TO BE NET ZERO BY 2030**

The overall objectives of Biodiversity Net Gain (BNG) support both national and local objectives around tackling climate change and achieving net zero. Whilst the Council has legal obligations around the administration and monitoring of BNG through its planning responsibilities and entering into any legal agreements in respect of Habitat Banks, it also has the opportunity as a landowner to participate in BNG and the potential to establish Habitat Banks on Council-owned land is actively under consideration.

### **OTHER RELEVANT CONSIDERATIONS OR IMPLICATIONS**

**Consideration has been given to the implications of the proposed decision in respect of the following and any significant issues are set out below.**

<b>Crime and Disorder</b>	No specific identified implications.
<b>Health Inequalities</b>	The opportunity to facilitate the delivery of as much Biodiversity Net Gain (BNG) in Tendring as possible will be beneficial to the health and wellbeing of residents in Tendring – tied in with the overall objectives of the emerging Essex Local Nature Recovery Strategy.
Subsidy Control (the requirements of the Subsidy Control Act 2022 and the related Statutory Guidance)	No implications
<b>Area or Ward affected</b>	All wards have the potential to accommodate or contribute towards BNG and relevant proposals could come forward for consideration in any part of the district.

## **PART 3 – SUPPORTING INFORMATION**

### **BACKGROUND**

Biodiversity Net Gain (BNG)

The Environment Act 2021, and associated regulations, has amended the Town and Country Planning Act 1990 (TCPA) to make Biodiversity Net Gain (BNG) a mandatory condition of planning permission (subject to exemptions). The requirements for BNG have applied to major development proposals since 12 February 2024 and to small sites proposals since 2 April 2024 (subject to exemptions or transitional arrangements apply).

Under Schedule 7A of the Town and Country Planning Act 1990 (as inserted by Schedule 14 of the Environment Act 2021) relevant developments must deliver at least 10% uplift in biodiversity value, when compared to the pre-development biodiversity value of the application site to meet the biodiversity gain objective. Uplift is calculated with the statutory biodiversity metric with biodiversity measured in standardised biodiversity units. Development cannot commence until BNG has been both demonstrated and secured.

To achieve this, developers will need to submit a biodiversity gain plan (BGP) to local planning authorities for approval prior to the commencement of development, required as a mandatory planning condition. The BGP document via planning condition will evidence what measures are being provided to achieve the required uplift in biodiversity value demonstrating that the biodiversity gain objective is met.

The Biodiversity Gain Hierarchy and its effect for the purpose of the statutory framework for BNG is set out in Articles 37A and 37D of the Town and Country Planning (Development Management Procedure) (England) Order 2015. This hierarchy (which does not apply to irreplaceable habitats) sets out a list of priority actions:

- first, in relation to onsite habitats which have a medium, high and very high distinctiveness (a score of four or more according to the statutory biodiversity metric), the avoidance of adverse effects from the development and, if they cannot be avoided, the mitigation of those effects; and
- then, in relation to **all** onsite habitats which are adversely affected by the development, the adverse effect should be compensated by prioritising in order, where possible, the enhancement of existing onsite habitats, creation of new onsite habitats, allocation of registered offsite gains and finally the purchase from the government of statutory biodiversity credits.

Both significant on-site enhancements and registered off site biodiversity gain must be maintained for 30 years and secured through planning condition, planning obligations or conservation covenant (as appropriate).

LPAs must take into account how the biodiversity gain hierarchy has been applied when determining whether to approve the BGP.

Delivering BNG on-site will not always be possible (within the red line boundary of the planning application), even when applying the Biodiversity Gain Hierarchy. Statutory

biodiversity credits are pitched as a last resort and have purposefully been priced to be unattractive to developers, so it does not discourage the development of local market schemes and non-credit habitat creation projects which could otherwise cut the registration of land in the biodiversity gain site register (see below). Further in order to buy credits, developers will have to demonstrate that they cannot deliver habitat onsite or via the off-site market. As such, it is anticipated that there will be demand for 'registered offsite biodiversity gain', within the district to enable developers to meet mandatory BNG requirements.

The Council's legal and planning teams have been working together to clarify the process for securing BNG from development proposals from the point an application is submitted through to the point it is determined – and the need for relevant planning conditions and legal agreements to be put in place, either pre-decision or post-decision depending on the scale and nature of the development. However, the legal and planning process for securing BNG is but one part of the overall picture.

### Habitat Banks

Under the Biodiversity Gain Hierarchy, developers are expected to deliver as much of the mandatory 10% net gain in biodiversity on the development site itself – which would normally be secured through a legal agreement, either put in place before or after the planning decision or secured by planning condition. However, where a developer cannot meet its full BNG quota on site, it can then consider, in accordance with the Biodiversity Gain Hierarchy, making provision offsite (or a combination of onsite and offsite BNG) – either on its own land outside of the development site (to be tied into a legal agreement), or by buying offsite biodiversity units on the market from a Habitat Bank (also secured by legal agreement). In both cases the site would need to be registered on the biodiversity gain site register held and administered by Natural England and allocated to the development on the register, with evidence provided to the Council, of that allocation.

If developers cannot achieve on-site or off-site BNG, they must buy statutory biodiversity credits from the government as a last resort, from which the government can use the revenue to invest in habitat creation anywhere in England.

Habitat banks are parcels of land where habitats have been created or enhanced, in advance, to provide an uplift of biodiversity units. These surplus biodiversity units can then be sold to developers to meet their BNG requirements 'off-site' and allocated to the development in question on the biodiversity gain site register to avoid double counting. The sale of surplus biodiversity units will give landowners a return on their investment in creating or enhancing habitats. In order to sell off-site biodiversity units, there are a number of criteria set out in the Biodiversity Gain Site Register Regulations 2024 (SI 2024/45) that must be met.

The following criteria must be met and the sites in question must be formally registered by Natural England on the biodiversity gain site register through approval of a Habitat Management and Monitoring Plan (HMMP) and secured by legal agreement. For Natural England to formally register a Habitat Bank, the landowners must have first, either entered

into a s106 legal agreement with the Council (that, amongst other things, will define the nature of proposed habitat creation and put in place long-term arrangements for management and monitoring for 30 years from the creation of the habitat); or enter into a 'conservation covenant' with another responsible body recognised by Natural England. The Local Planning Authority or Responsible Body (as appropriate) will be required to monitor and enforce the obligations in the legal agreement and may charge a reasonable monitoring fee to do so.

In Tendring, a number of landowners in the District have already expressed a keen interest in setting up Habitat Banks and entering into a legal agreement with the Council. To date Officers have urged them to be patient while the Council is still in the process of understanding the rules and processes around BNG and determining whether it needs to put some local criteria in place for the consideration of Habitat Banks – particularly given that Habitat Banks will essentially be private businesses competing against one another in the open market to sell BNG units. Such consideration requires the Council to determine its proposed policy for adoption through formal decision making.

Essex County Council is also considering the setting up of a Habitat Bank at St. Martin's Country Park in St. Osyth as a pilot scheme.

#### Council-owned land

Like any other landowner, the Council and other public bodies can play a role in facilitating the delivery of BNG by setting up Habitat Banks on their land. There are a number of benefits to Councils in using their own land in this way including:

1. To ensure that BNG enhancements are retained in the area;
2. To reduce the shortfall in offsite units and offer developers more choice;
3. To use plots of land that may not be suitable for any other purposes and generate income;
4. To create green space in urban areas; and
5. To support the Local Nature Recovery Strategy and comply with the duties under the Natural Environment and Rural Communities Act 2006 ("NERCA") to conserve and enhance biodiversity.

Like other landowners, Councils have to register their sites with Natural England – however because a Council cannot enter into a s106 legal agreement with itself, it could consider entering into a s106 with another authority (such as Essex County Council); delegate its s106 powers to another local authority; create an arms-length Special Purpose Vehicle (SPV) and lease land into that SPV to then enter into a s106 with the Council; lease the land to a trusted third party; or enter into a 'conservation covenant' with a 'responsible body' registered with Natural England. These options would need to be considered by Cabinet in the exercise of its functions.

As it stands at the moment, there are only a handful of designated responsible bodies registered with Natural England, none of whom operate in Essex; and the Essex Wildlife Trust (EWT) has indicated to Officers that it would not be interested in leasing land from the Council (as it prefers freehold in order to protect wildlife in perpetuity). It may be therefore that a partnership with ECC or another local authority, or the setting up of an SPV might be the better options which can be explored further in due course.

The Council is currently having ecological surveys carried out on its land by Essex Place Services and Geosphere Environmental to determine what the 'baseline' ecological value of each site is, in order to be able to create and measure BNG increases in the future.

If the Council does set up Habitat Banks on its land, it will essentially be entering the market for the sale of BNG units as off-site biodiversity gains for developers to purchase and allocate to their development to meet the biodiversity objective, in competition with other landowners both in the district and outside of the district. There will of course be internal processes for the Council to seek Member approval for the use of certain sites for Habitat Banks.

#### Cross-boundary BNG

So long as a Habitat Bank falls within the same 'National Character Area' of the country as the developments that are delivering off-site BNG, it is possible for BNG units to be bought from Habitat Banks in other districts and for developers in other districts to buy BNG units from Habitat Banks in Tendring.

Officers have been in discussion with the Essex Wildlife Trust (EWT), which is in the process of setting up a Habitat Bank next to its headquarters and Abbots Hall in Great Wigborough, in Colchester. It is highly likely that the EWT site at Abbots Hall will be one of the first to be set up and ready to sell biodiversity units to developers – with a possibility that developments in Tendring could buy their off-site units there. The EWT is in the process of finalising its s106 agreement with Colchester City Council and has helpfully shared details of a similar agreement from another authority as an example of good practice.

Clearly for the Council and other landowners in Tendring to benefit from being able to set up Habitat Banks for the sale of BNG units, they will need to follow a similar process and, on registration, will be entering a market in competition with EWT in Colchester – so there is a degree of urgency now in progressing to a position by which Tendring landowners can seek registration – with the first of Tendring's planning permissions requiring BNG already in the system and under consideration.

#### Responsibility for Monitoring

For any Biodiversity Net Gain created in the District under the recent provisions:

- a) on-site (secured by planning condition or s106 agreement with the LPA);

- b) off-site by a developer on land in their ownership (secured by s106 agreement with the LPA); or
- c) off-site on third party land via a Habitat Bank (secured by s106 agreement with the LPA);

the Council will be responsible for the monitoring and enforcement of the creation, management and maintenance of BNG for 30 years where the land concerned is within our district.

Therefore, it is important that through s106 legal agreements – the arrangements for long-term monitoring and enforcement, over a 30-year period are put in place; and that the Council can secure funding to cover the cost of carrying out the necessary monitoring and enforcement of planning conditions and obligations. Monitoring is likely to involve a commitment from the landowners/developers to produce a survey and report on a periodic basis (possibly in years 1, 2 and 5 and every 5 years thereafter which are periods being considered by other authorities) for the Council to scrutinise and, with professional advice where necessary, agree.

The fee required to cover the cost of this work has been considered by Officers across the services, taking into account likely resource costs, the need for professional advice and levels of inflation over a 30 year-period – whether carried out in-house or out-sourced to another appropriate body with specialist knowledge. This work suggests that the cost of discharging this work per year (at 2024 levels) would be in the order of £500-£600 (rising to around £2,000 at anticipated 2054 levels). The total compounded cost of monitoring a 30-year project at the intervals suggested above would be in the order of £8,500 for a BNG site/Habitat Bank of up to 50ha; £12,500 for sites between 50 and 100ha; and £17,000 for sites greater than 100ha. For smaller BNG schemes related to smaller developments where £8,500 might not be affordable or viable, Officers are considering a set of lower fees that go up in stages up to circa £8,500 – which would be commensurate with scale and complexity of the proposals under consideration. Officers have considered the approaches and ranges of fees published by other authorities across England.

#### Local Nature Recovery Strategy (LNRS)

The Environment Act 2021 also introduced the requirement for Local Nature Recovery Strategies (LNRS) to be introduced by responsible bodies across the country (in our case Essex County Council) to set out coordinated strategies for bringing about nature recovery and BNG. Section 40(2A) of the Natural Environment and Rural Communities Act 2006 (duty to conserve biodiversity) makes provision about the duties of public authorities in relation to local nature recovery strategies. The primary purpose of the LNRS is to identify locations where the creation or enhancement of habitats has the potential to maximise the environmental benefits for people, nature climate adaptation and mitigation. There are three key aims across all habitats, increase their size, improve their quality and enhance connectivity between them.



The ECC Local Nature Recovery Strategy team have been working on county wide maps that indicate where these areas for nature recovery are. The data used to inform this map has come from existing open sources such as The Forestry Commission, the Environment Agency, Essex Wildlife Trust and Local Authorities. The consultation on the LNRS has recently commenced and closes on 25<sup>th</sup> October - officers at TDC are preparing a response. Throughout the consultation it is possible to access the Stakeholder Opportunity Maps that highlight spatial opportunities for nature recovery within the district. Whilst the maps are the headline element of the draft, the strategy itself offers an overview of the issues that have depleted biodiversity and proposes location specific measures to reverse the decline

The draft outlines how this strategy is designed around having the most positive impact possible on nature at a District and County level. It identifies habitat and species priorities and suggests practical ways to make them bigger, better and increase connectivity.

#### The proposed policy

The proposed policy entitled 'Biodiversity Net Gain in Tendring' has been drafted in the form of a planning policy for inclusion in the Council's Local Plan which sets out the approach recommended for the Council to adopt in respect of BNG and the setting up and monitoring of Habitat Banks. The policy essentially covers the following:

- the Council's obligations, under the Environment Act and the planning system, to secure 10% BNG – without unnecessarily duplicating the detail of legislation of national guidance;
- the ambition (which aligns with the ambition of ECC) to increase the BNG requirement to 20% through planning policies (albeit this would have to be justified, through evidence, as part of the Local Plan review process and is therefore suggested for 'phasing in' from April 2027 – at which point 1) the Council will know if it has succeeded in getting the Planning Inspector's approval; and 2) puts developers on a year's notice to get ready for the increased requirement. Naturally, if the Council fails to defend the soundness and viability of an increase to 20%, it will not feature in the Local Plan and the statutory 10% requirement will remain);
- the criteria under which the Council 'could' be willing to enter into a s106 legal agreement with a landowner for the purpose of setting up Habitat Banks for registration with Natural England and the selling of BNG units to developers on the open market (these include criteria from national guidance, but also include 'preferred' locations (without needing to identify specific sites in the Local Plan) for Habitat Banks which:
  - reflect the benefit of expanding and connecting up existing protected wildlife habitats;
  - promote a scale of site that could better foster the creation of viable habitats than smaller more vulnerable sites;

- support the objectives of the emerging Essex Local Nature Recovery Strategy (LNRS) and the locations identified for their opportunity for habitat creation in that strategy (it is proposed that these locations offer 15% greater BNG unit value than other locations);
- support Local Plan policy e.g. strategic green gaps and protected open spaces, and avoiding Habitat Banks in locations that could prejudice the proposals and policies in the Local Plan; and
- allows the Council to establish Habitat Banks on its own land, in due course, allowing time to carry out due internal processes in relation to assets and Member approvals – without holding up the opportunity for third-party private landowners to progress Habitat Banks on their sites, to the benefit of wildlife in the district and the diversification of the rural economy.

#### PREVIOUS RELEVANT DECISIONS

Planning Policy and Local Plan Committee 20 December 2023 – Minute No. 22. The Committee agreed to commence the Local Plan – the focus and approach for which to be underpinned by a set of agreed overarching ‘guiding principles’. One of the agreed guiding principles is:

***“ECOLOGY AND BIODIVERSITY NET GAIN: The Council will specifically review its policies on the protection and enhancement of ecology and biodiversity to ensure they properly reflect government requirements for Biodiversity Net Gain (BNG) with the aim of increasing BNG expectations to above 20%. This could include the identification of specific sites for the creation and enhancement of ecology and biodiversity.”***

#### BACKGROUND PAPERS AND PUBLISHED REFERENCE MATERIAL

None.

#### APPENDICES

**Appendix 1: Proposed Policy on Biodiversity Net Gain in Tendring**

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## **A.3 Appendix 1: Proposed Policy on Biodiversity Net Gain in Tending**

### **Biodiversity Net Gain in Tending**

Biodiversity Net Gain (BNG) is an approach to development that ensures habitats for wildlife are left in a measurably better state than they were before the development. In England, BNG is mandatory under Schedule 7A of the Town and Country Planning Act 1990 (as inserted by Schedule 14 of the Environment Act 2021). Under this legislation, developments are required, as a minimum, to deliver a BNG of 10% to meet the biodiversity gain objective (save where exemptions apply).

Relevant developments are deemed to have been granted subject to a pre-commencement condition that the biodiversity gain objective is met (the biodiversity gain condition). To discharge this condition developers will need to demonstrate that proposals can deliver a minimum 10% uplift in biodiversity value, when compared to the pre-development biodiversity value of the application site. Uplift is calculated with the statutory biodiversity metric, with biodiversity measured in standardised biodiversity units. Development cannot commence until BNG has been demonstrated and secured.

To achieve this, and discharge the biodiversity gain condition, developers will need to submit a biodiversity gain plan (BGP) to local planning authorities for approval prior to the commencement of development. The BGP document will evidence what measures are being provided to achieve the required uplift in biodiversity value demonstrating that the biodiversity gain objective is met. There are special modifications for phased development and the treatment of onsite irreplaceable habitats.

The Biodiversity Gain Hierarchy (which does not apply to irreplaceable habitats) sets out a list of priority actions to deliver BNG:

- first, in relation to onsite habitats which have a medium, high and very high distinctiveness (a score of four or more according to the statutory biodiversity metric), the avoidance of adverse effects from the development and, if they cannot be avoided, the mitigation of those effects; and
- then, in relation to all onsite habitats which are adversely affected by the development, the adverse effect should be compensated by prioritising in order, where possible, the enhancement of existing onsite habitats, creation of new onsite habitats, allocation of registered offsite gains and finally the purchase from the government of statutory biodiversity credits.

Both significant onsite enhancements and registered offsite biodiversity gain must be maintained for 30 years and secured through planning condition, planning obligations or conservation covenant (as appropriate).

Local planning authorities must take into account how the biodiversity gain hierarchy has been applied when determining whether to approve the BGP.

The Council is committed to improving the natural environment of the district and contributing to nature's recovery more widely. Consistent with Council's corporate objectives and statutory duties placed on local authorities, the Council is taking action to facilitate the creation and enhancement of natural habitats where possible and appropriate.

Establishing Habitat Banks within the district will provide an efficient planning process, ensure best value for developers looking to discharge mandatory planning requirements, and deliver habitat creation and enhancement in areas subject to development pressure. Tendring District Council will support the creation of habitat banks to sell off site biodiversity units within the district. Those that encourage connectivity between existing sites in the Local Nature Recovery Strategy will be supported.

In the delivery of off-site BNG and the setting up of Habitat Banks, the Council will work with landowners and developers with the aim of delivering as much BNG as is possible within the Tendring District, recognising that BNG outside of Tendring, but within the same wider 'National Character Area' identified by Natural England can be achieved where options for BNG in Tendring are not available.

## **BIODIVERSITY NET GAIN IN TENDRING**

Alongside the requirements in relation to Biodiversity and Geodiversity set out in Policy PPL4 [of the Council's existing Local Plan], development in Tendring will be subject to the legal and national requirements for 'Biodiversity Net Gain' (BNG). For planning applications submitted to the Council on or before 31 March 2027, development proposals that qualify for BNG will be expected to deliver a minimum 10% increase in biodiversity value relative to the pre-development biodiversity of onsite habitat within the development site to meet the biodiversity objective in line with the national minimum requirement. From 1 April 2027 onwards, the requirement will be a minimum of 20%, as established through this policy.

The method by which developers are required to calculate the existing biodiversity value of a site and thereafter calculate and deliver BNG are set out in full within national guidance.

In line with the Biodiversity Gain Hierarchy as set out in legislation and national guidance, the Council will expect as much of the necessary BNG as possible to be delivered on-site (within the red line boundary of a development site), through measures that will be secured through legal agreement and/or planning condition.

Any residual BNG requirement that cannot be met on-site can be delivered off-site either on land in the control of the developer/landowner outside of the development site (to be tied into a legal agreement and registered), or by the purchase of offsite biodiversity units from a registered site. In both cases the offsite BNG must be allocated to the development and the Council would need to be provided with official certification of registration of that allocation to the development.

If developers cannot achieve on-site or off-site BNG, they must buy statutory biodiversity credits from the government as a last resort. The government may then use the revenue to invest in habitat creation anywhere in England.

To enable off-site BNG provision to be delivered in a coordinated way that brings about the creation of bigger, better and more connected habitats that are resilient, manageable and contribute effectively to the aims and objectives of the Essex Local Nature Recovery Strategy; the Council will support the setting up of 'Habitat Banks' in the District from which biodiversity units can be bought – so long as:

- 1) the applicant has the legal right to sell biodiversity units for the purpose of mandatory BNG;
- 2) the habitat creation/enhancement proposals are appropriate and likely to succeed;
- 3) the uplift in biodiversity units is genuinely additional (i.e. there is no double-counting with conservation schemes in place or funded by other means):
- 4) the applicant enters into a legal agreement with the Council or a conservation covenant with a responsible body, detailing the arrangements for provision, management, monitoring, remediation and enforcement;
- 5) the location would not prejudice either the integrity of existing habits or the planned growth of the District proposed in the Local Plan; and
- 6) the site meets the criteria for registration and is subsequently registered on the biodiversity gain site register.

The Council will give particular support to the establishment of Habitat Banks in the following locations:

- a) on land adjoining existing sites designated for their international, national or local importance that will bring about expansion of and/or connectivity between those habitats;
- b) on land within the District's 'Strategic Green Gaps' (see Policy PPL6);
- c) on land at or adjoining the District's Registered Parks and Gardens, Local Green Spaces and safeguarded open spaces; and
- d) sites within locations identified in the Essex Local Nature Recovery Strategy as strategic opportunities for habitat creation.

To formalise these Habitat Banks, they need to be officially registered with Natural England which would first require landowners to either enter into a legal agreement with the Council (that, amongst other things, will define the nature of proposed habitat creation and put in place long-term arrangements for management and monitoring); or enter into a 'conservation covenant' with another responsible body recognised by Natural England.

Any legal agreements or covenants required either to discharge the BNG requirements for individual planning permissions or to establish Habitat Banks where the Council is the responsible for monitoring and enforcement will include the provision for the payment of

monitoring fees which will be used by the Council, or a nominated body, to cover the cost of monitoring BNG over a minimum 30-year period, in line with legislative requirements.