

CABINET MEETING – 14 MARCH 2024

EXECUTIVE SUMMARY SHEET – PART I

Title of Report:

Proposed Delivery Model for the provision of Biodiversity Net Gain.

Author(s):

Joint report of the Executive Director of City Development and Director of Finance

Purpose of Report:

To advise Cabinet about the introduction of mandatory Biodiversity Net Gain (“BNG”) and seek the necessary approvals to implement a delivery model for the provision of BNG in Sunderland, including the use of Council owned land and the passporting of monies secured from third party developers for the delivery of BNG to enhance the city’s natural environment.

Description of Decision:

Cabinet is recommended to:

- Note the implementation of mandatory BNG at a minimum of 10% as a condition of most planning approvals following the enactment of the requisite parts of the Environment Act 2021;
- Approve the principle of the use of appropriate Council sites for the delivery of BNG and authorise the Executive Director of City Development, in consultation with the Deputy Leader and the Director of Finance, to identify and determine which Council sites shall be made available for BNG;
- Authorise the Director of Finance, in consultation with the Executive Director of City Development and the Cabinet Secretary, to grant leasehold interests on such terms as are approved (including where appropriate the grant of rent concessions) to relevant third parties of Council land for the delivery and management of BNG;
- Authorise the Assistant Director of Law and Governance to advertise the proposed leasehold disposal for BNG purposes of any land intended for such use which is held as open space in accordance with section 123 (2A) of the Local Government Act 1972 and Authorise the Director of Finance, in consultation with the Cabinet Secretary and the Executive Director of City Development to consider and determine any objections made in response to such notice;
- Authorise the Executive Director of City Development, in consultation with the Deputy Leader and the Director of Finance, to acquire third party land for the subsequent delivery of BNG and/or wider ecological mitigation works on such terms as may be agreed, provided there is available budget provision for the relevant acquisition; and

- Authorise the provision of grant funding received via Section 106 contributions or through a Conservation Covenant to relevant third parties to deliver and manage BNG on Council sites, such funding to be provided on terms to be agreed by the Executive Director of City Development in consultation with the Deputy Leader and the Director of Finance.

Is the decision consistent with the Budget/Policy Framework? Yes

If not, Council approval is required to change the Budget/Policy Framework

Suggested reason(s) for Decision:

The delivery of BNG is to be a mandatory requirement in most planning approvals and as such the Council wishes to establish a mechanism to support the delivery of BNG in Sunderland to continue to facilitate development and promote the economic, social and environmental wellbeing of the city. The delivery model proposed will promote the delivery of BNG on suitable Council owned sites and, as a result of implementing the Environment Act legislation, assist the Council in improving the management of land for BNG purposes and enhancing the city’s natural environment. It will also enable the Council to comply with its Biodiversity duty as set out in the Environment Act and assist with delivery of the emerging South of Tyne and Wear Local Nature Recovery Strategy. Given that many of these sites have the benefit of public access, which will be retained, this provides the potential for positive health and wellbeing impacts for our residents, as set out within the Integrated Impact Assessment (Appendix 1).

Alternative options to be considered and recommended to be rejected:

1. **Do nothing** – this has been considered and rejected as BNG is now a mandatory requirement. Failure to adopt a model for delivery utilising Council land could delay development within the city as the market for biodiversity units has yet to develop at any significant scale.
2. **Alternative delivery models** – As set out in the report, the Council has considered potential alternative delivery models for BNG in the city including the establishment of a Council owned special purpose vehicle. However, at this time, it has been determined that the delivery models recommended within this report are the most proportionate and deliverable methods in terms of what the Council wishes to achieve and are therefore recommended for approval.

Impacts analysed;

Equality **Privacy** N/A **Sustainability** **Crime and Disorder** N/A

An Integrated Impact Assessment has been undertaken which is attached at Appendix 1.

Is the Decision consistent with the Council’s co-operative values? Yes

Is this a “Key Decision” as defined in the Constitution? Yes

Is it included in the 28 day Notice of Decisions? Yes

CABINET – 14 MARCH 2024

PROPOSED DELIVERY MODEL FOR THE PROVISION OF BIODIVERSITY NET GAIN

Joint Report of the Executive Director of City Development and Director of Finance

1.0 Purpose of the Report

1.1 To advise Cabinet about the introduction of mandatory Biodiversity Net Gain (“BNG”) and seek the necessary approvals to implement a delivery model for the provision of BNG in Sunderland, including the use of Council owned land and the passporting of monies secured from third party developers for the delivery of BNG to enhance the city’s natural environment.

2.0 Description of Decision (Recommendations)

2.1 Cabinet is recommended to:

- Note the implementation of mandatory BNG at a minimum of 10% as a condition of most planning approvals following the enactment of the requisite parts of the Environment Act 2021;
- Approve the principle of the use of appropriate Council sites for the delivery of BNG and authorise the Executive Director of City Development, in consultation with the Deputy Leader and the Director of Finance, to identify and determine which Council sites shall be made available for BNG;
- Authorise the Director of Finance, in consultation with the Executive Director of City Development and the Cabinet Secretary, to grant leasehold interests on such terms as are approved (including where appropriate the grant of rent concessions) to relevant third parties of Council land for the delivery and management of BNG;
- Authorise the Assistant Director of Law and Governance to advertise the proposed leasehold disposal for BNG purposes of any land intended for such use which is held as open space in accordance with section 123 (2A) of the Local Government Act 1972 and Authorise the Director of Finance, in consultation with the Cabinet Secretary and the Executive Director of City Development to consider and determine any objections made in response to such notice;
- Authorise the Executive Director of City Development, in consultation with the Deputy Leader and the Director of Finance, to acquire third party land for the subsequent delivery of BNG and/or wider ecological mitigation works on such terms as may be agreed, provided there is available budget provision for the relevant acquisition; and
- Authorise the provision of grant funding received via Section 106 contributions or through a Conservation Covenant to relevant third parties to deliver and manage BNG on Council sites, such funding to be provided on terms to be agreed by the Executive Director of City Development in consultation with the Deputy Leader and the Director of Finance.

3.0 Background

- 3.1 In November 2021, the Environment Act 2021 ('the Act') was enacted by the Government with the overall aim of protecting and enhancing the environment for future generations. Amongst other things, this established a legal framework for securing a mandatory measurable BNG as a result of development and strengthened the biodiversity duty placed on local authorities.
- 3.2 The Act introduces a mandatory requirement for new development to deliver a measurable minimum BNG improvement of 10% unless one of the exemptions contained in the Act can be relied on. There is also a requirement for the net gain to be managed and maintained for a minimum period of 30 years from completing the habitat and for this to be monitored. Within this context, any agreement needs to include details on how long it will take to create the habitat.
- 3.3 There are two forms of legal agreement which can be utilised to secure BNG: an agreement pursuant to section 106 of the Town and Country Planning Act 1990 (s.106 Agreement), or a new type of agreement known as a Conservation Covenant.
- 3.4 The requirement to deliver measurable BNG applies to most forms of development, and details of how the net gain will be delivered need to be secured prior to the implementation of any planning consent. It should be noted however that there are some notable exemptions, such as householder development.
- 3.5 In recognition that the introduction of BNG was a significant undertaking for both local authorities and the development industry, the Government set out a two-year transitional period, to allow sufficient time for the Government to prepare the necessary secondary legislation and guidance and to allow for affected parties to put arrangements in place to respond to the changes.
- 3.6 Due to delays in publishing Government guidance and legislation, which was not published until late November 2023, the initial implementation date was pushed back. This has now been confirmed as 12 February 2024 for major planning applications and 2 April 2024 for minor planning applications.

4.0 Proposals

- 4.1 In preparation for the introduction of BNG through the Act, the Council set out a policy requiring biodiversity net gains to be delivered where possible as part of new development proposals through Policy NE2 of the adopted Core Strategy and Development Plan (CSDP). The Council has also commenced preparation of a Biodiversity Supplementary Planning Document (SPD) which will set out further guidance on how BNG will be delivered within the city.
- 4.2 Policy NE2 has been utilised when determining planning applications since its adoption in January 2020, but given the absence of a minimum required uplift and Government guidance on how to deliver net gain, the policy has generally only been used to secure net gains on the largest applications since its adoption. The Council has also been able to apply the requirement flexibly where necessary.
- 4.3 However, for major planning applications submitted after 12 February 2024 and minor planning applications submitted after 2 April 2024, there will be a statutory requirement for development to deliver at least 10% net gain as part of their proposals.

- 4.4 The legislation requires the developer to demonstrate how they will deliver their 10% net gain, including identifying where any off-site compensation will be located, and to set this out within a net gain plan which will be submitted to and approved by the local planning authority, prior to implementation of any planning consent. Compensation land to be used for BNG purposes must also be registered on a national register before the net gain can be approved. It is the responsibility of the organisation delivering the net gain to register the site.
- 4.5 In terms of delivering BNG, national policy encourages developers to deliver any enhancements on-site where possible, but it is recognised that it will not always be possible to deliver improvements on-site and therefore delivery of biodiversity enhancements off-site will be required in many instances.
- 4.6 Whilst it is the Government's intention to establish a marketplace for the sale of biodiversity units which will assist developers in delivering the net gain requirements, given the early stage in policy implementation, the marketplace for biodiversity units has yet to establish on any significant scale. Officers are not aware of any private sector compensation sites having been identified in Sunderland.
- 4.7 There is therefore a real risk that development activity will stall within the city, if the developer is not able to demonstrate the ability to deliver 10% net gain in order to meet their statutory requirement to do so.
- 4.8 In response to this risk, and as a mechanism to secure positive change for nature on Council owned sites, the Council is looking to utilise its own landholdings within the city to allow appropriate areas to be enhanced through BNG. By establishing a delivery model for BNG using its own sites, the Council would support continued development within the city, and would provide much needed third party funding (through monies secured from developers over time) to deliver enhancement and ongoing maintenance to many of our Council owned greenspace and nature conservation sites. As BNG enhancement would need to be delivered over a 30 year time period, this would secure long term funding for the ongoing management and maintenance of these sites and an enhanced natural environment.
- 4.9 This would directly support the Council in discharging its enhanced biodiversity duty, which has also been brought about by the introduction of the Act and improve the biodiversity and nature conservation value of sites with many of these having the benefit of public access. It is the intention that any existing public access rights would be retained. This therefore offers the opportunity to deliver potential positive health and wellbeing impacts for our residents, by providing access to enhanced natural infrastructure as set out within the Integrated Impact Assessment (Appendix 1).
- 4.10 The proposals would also allow the Council to align enhancement sites with areas prioritised for nature through proposals within the emerging South of Tyne and Wear Local Nature Recovery Strategy which is being prepared in partnership with Gateshead and South Tyneside Councils.
- 4.11 The proposed focus for delivering BNG would be on utilising appropriate greenspace and nature conservation sites. In order to identify potential sites which could be enhanced through BNG, Council officers considered areas of land within Council ownership, which offer minimal potential for future built development while enabling delivery at some scale and which could be improved for nature. In order to consider

their potential for biodiversity enhancement, baseline habitat surveys have been undertaken on a number of the sites. Whilst no decision has yet been taken on which sites would be utilised first within the proposed approach, which will be agreed in consultation with the Deputy Leader, baseline surveys have been undertaken on the following sites which may be utilised within the early years of implementation: Tunstall Hills, Silksworth, Barnes Park and Grindon Sand Hills, Hylton Castle Dene, Downhill, Barmston Pond, Princess Anne Park, and Low Moorsley. It is recommended that the final determination of which Council sites should be made available for BNG should be delegated to the Executive Director of City Development, in consultation with the Deputy Leader and the Director of Finance.

- 4.12 It should be noted that the list above is not exhaustive and that there may be the opportunity to utilise other Council owned sites for enhancement in future phases. This could potentially include a range of sites within the Coalfield area, including Elemore, which are already due to benefit from investment in biodiversity improvements through the Link Together project which is being developed in partnership with Durham Wildlife Trust (DWT). It is proposed that any BNG enhancement on these sites would build upon the new baseline established through the Link Together project.
- 4.13 As set out within the proposed decision, any decision to dispose of sites for BNG enhancement, will be agreed in consultation with the Cabinet Secretary. It is also proposed that consultation will take place as standard with respective Ward Councillors, as per the normal protocol for the agreement of long-term leases on Council owned land.
- 4.14 Given the technical expertise involved in managing the sites and the need for the Council to retain its oversight and enforcement powers as a local planning authority (which requires separation of responsibilities), it is considered that the most appropriate initial approach would be to work with DWT to deliver and maintain any habitat improvements through BNG on Council owned land. Given the role of DWT as the leading conservation organisation within our area and the longstanding relationship that the Council has with the Trust in relation to the management of the Rainton Meadows Nature Reserve, it is considered that DWT are uniquely positioned to deliver the BNG requirements at scale. As a Charitable Trust, it is proposed that DWT will make no profit from the delivery and management of BNG on Council sites, with the costs they incur being reimbursed from the Section 106 funds received by the Council from the developer for BNG purposes on an open book and transparent basis.
- 4.15 The Council will keep its delivery model under review and if other suitably skilled and experienced organisations are identified or express a wish to work with the Council in respect of the provision of BNG on the same terms as those set out above, those options will be explored.
- 4.16 The responsibility for delivering the net gain would sit with the lease holder, and they would be required to register any net gain sites for which they take on responsibility on the national register.
- 4.17 In order to allow appropriate Council owned land to be used for the purpose of BNG for the duration needed, as set out in 4.8, it is envisaged that the Council would be required to enter into long-term lease and funding agreements with relevant third parties of the Council identified for the delivery and management of BNG to facilitate the delivery of BNG on the sites. Given the need to be able to respond in a timely

manner to development proposals as they are submitted and enable the associated BNG requirements in the most appropriate location, it is considered necessary for delegated powers to be given to the Director of Finance, in consultation with the Executive Director of City Development and Cabinet Secretary, and the Executive Director of City Development in consultation with the Deputy Leader and the Director of Finance to allow the respective lease and funding agreements to be entered into promptly. It is considered that the Director of Finance would be the most appropriate officer to authorise any lease agreements given their corporate responsibility for Council land. This would also ensure a degree of separation with the Council's role as Local Planning Authority, responsibility for which sits with the Executive Director of City Development.

- 4.18 It is important to note that the grant of any lease to external parties of the Council, where the purpose of that lease is to facilitate the delivery of BNG, will not materially impact the public's use and enjoyment of that land. The terms of any lease granted will ensure that any pre-existing public rights of access and use are maintained, and that ongoing public use of the land continues to be promoted and facilitated. Access to certain areas of specific parcels may need to be restricted at certain times, to enable habitats to flourish or become established, but such restriction would be limited in duration and would only be possible with the prior agreement of the Council. The introduction of BNG and use of Council owned land to deliver it presents a real opportunity for the Council to use external funding from developers to enhance green spaces within the City and invest in the natural and local environments. It is hoped that over time, as more and more BNG projects take place across the City, residents will increasingly benefit from enhanced green spaces which they can access and enjoy.
- 4.19 Any funding for habitat improvements in line with BNG requirements on Council owned land are expected to be collected through s106 Agreements with developers and would therefore be at no cost to the Council. The Council may also use Conservation Covenants as a mechanism to secure contributions towards the costs of delivering net gain, which would also be at no cost to the Council.
- 4.20 Whilst the habitat improvements would be delivered at no cost to the Council, the Council would be required to comply with its obligations of best consideration under section 123 of the Local Government Act 1972. It is therefore envisaged that an appropriate land charge fee will be paid by the leaseholder to the Council for the use of land for BNG purposes in line with delivery. This will be included within the costs secured from the developer as part of the s106 Agreement.
- 4.21 All contributions secured through s106 Agreements will be subject to the Council's normal procedure, as set out in Appendix 2 to this report.
- 4.22 In further preparation for mandatory BNG requirements coming into effect, the Council intends to submit an application to the Department for Environment, Food & Rural Affairs to be registered as a designated Responsible Body for the purpose of acquiring the power to enter into Conservation Covenants with landowners to support the delivery and regulation of BNG in the City. This will strengthen the Council's ability to react to different scenarios that may occur with regards to land ownership or delivery options as the BNG delivery models become operational.
- 4.23 Whilst the proposals set out within this report would provide a model for developers to utilise Council owned land to deliver BNG, it should be noted that the Act provides that no developer can be compelled to use Council owned sites and it will be open to

developers to offer up alternative private owned sites for the delivery of BNG should they choose to do so.

5.0 Reasons for the Decision

5.1 The delivery of BNG is to be a mandatory requirement in most planning approvals and as such the Council wishes to establish a mechanism to support the delivery of BNG in Sunderland to continue to facilitate development and promote the economic, social and environmental wellbeing of the city. The delivery model proposed will promote the delivery of BNG on suitable Council owned sites and, as a result of implementing the Environment Act legislation, assist the Council in improving the management of land for BNG purposes and enhancing the city's natural environment. It will also enable the Council to comply with its Biodiversity duty as set out in the Environment Act and assist with delivery of the emerging South of Tyne and Wear Local Nature Recovery Strategy. Given that many of these sites have the benefit of public access, which will be retained, this provides the potential for positive health and wellbeing impacts for our residents, as set out within the Integrated Impact Assessment (Appendix 1).

6.0 Alternative Options

6.1 **Do nothing** – this has been considered and rejected as BNG is now a mandatory requirement. Failure to adopt a model for delivery utilising Council land could delay development within the city as the market for biodiversity units has yet to develop at any significant scale.

6.2 **Alternative delivery models** – As set out in the report, the Council has considered potential alternative delivery models for BNG in the city including the establishment of a Council owned special purpose vehicle. However, at this time, it has been determined that the delivery models recommended within this report are the most proportionate and deliverable methods in terms of what the Council wishes to achieve and are therefore recommended for approval.

7.0 Impact Analysis

7.1 **Financial Implications** – The cost of the management, maintenance and monitoring of BNG sites will be paid for entirely through s106 developer contributions entered into as part of the planning application process or through Conservation Covenants. Any acquisition of third party land necessary for the subsequent delivery of BNG and / or wider ecological mitigation works will require agreed funding to be in place in prior to any such acquisition.

7.2 **Legal Implications** – The delivery of BNG and selling biodiversity credits on council owned land means that an enforceable contract needs to be in place to be compliant with the Act. However, the Council cannot enter into a contract with itself as landowner for the location of the BNG delivery and local planning authority ('LPA') or as Responsible Body, if using a conservation covenant. Therefore, the above proposal enables the Council to enter a s106 Agreement or Conservation Covenant as LPA or Responsible Body to legally enforce the s106 Agreement or Conservation Covenant, with the relevant third parties identified for the delivery and management of BNG, such as Durham Wildlife Trust, entering into the agreement acting in its capacity as leaseholder. This provides the appropriate legal separation between the Council as LPA and the delivery and management of BNG.

The Council can not compel developers to deliver BNG on Council owned land and therefore third party land may also be offered up by developers for BNG mitigation purposes. The use of this land for BNG purposes would also need to be secured in accordance with the Act.

The Biodiversity Gain Site Register Regulations 2024 confirm that if a s106 Agreement or conservation covenant is used to secure BNG on land, only the person responsible for carrying out the works or maintaining the works under the s106 Agreement can apply to register the land as a biodiversity gain site. Therefore, the responsibility to register the land would sit with the relevant third party tenant of the Council site identified for the delivery and management of BNG, such as DWT, as they would be the organisation responsible for managing the habitats. Under the Biodiversity Gain Site Register (Financial Penalties and Fees) Regulations 2024, the register operator (Natural England) if satisfied on a balance of probabilities can impose a fine of £5000 if false or misleading information is provided in the application to register the biodiversity gain site. This risk would not sit with the Council.

The Council would be required to comply with its obligations in respect of best consideration under section 123 of the Local Government Act 1972 in relation to any lease granted pursuant to the approvals to be sought in this report.

Section 123(2A) Local Government Act 1972 states that a Council may not dispose of any land consisting or forming part of an open space unless before disposing of the land in question it is advertised for two consecutive weeks in a local newspaper and any objections to the proposed disposal which may be made to them have been considered. Any land identified for the delivery of BNG, which forms open space, will therefore need to be advertised before a lease could be granted to a third party to facilitate BNG on the site. This advertisement is required even though the use of the property as open space would be unaffected by the proposed disposal.

Further, in relation to the potential acquisition of additional land by the Council for the subsequent delivery of BNG and/or wider ecological mitigation works, the Council has the power under Section 120 of the Local Government Act 1972 to acquire land by agreement for the purposes of any of their functions or for the benefit, improvement, or development of their area. In this case, any such future acquisitions would be to facilitate the carrying out of development and to promote the economic, environmental and/or social wellbeing of the area in the public interest. In addition, any such land acquired for the purposes of BNG would then be subject to the delivery model as set out in this report.

- 7.3 **Property Implications** – The delegations sought within this report with regards to the granting of leases are consistent with the delegations already available to the Director of Finance under the Council’s delegation scheme and are therefore sought for completeness only.
- 7.4 **Equalities Analysis** – It is not anticipated that there would be any negative impact. As many of these sites already have the benefit of public access, that would be retained, they may provide benefit to the residents that use them. An Integrated Impact Assessment has been undertaken which is attached at Appendix 1.
- 7.5 **Health Outcomes and Health Inequalities** – The proposals would enhance the quality of the habitats in a number of sites across the city. Many of these sites also have public access, which would be retained, and therefore would provide benefit to

the health and wellbeing of the residents that use them. An Integrated Impact Assessment has been undertaken which is attached at Appendix 1.

- 7.6 **Sustainability** – The proposals would enhance the quality of habitats in a number of sites across the city. These sites will help to provide a carbon store and it is likely that any BNG being delivered on sites will provide an opportunity to increase the amount of carbon sequestration that these sites provide. Consideration will also be given to the potential to also utilise the sites for carbon credits. An Integrated Impact Assessment has been undertaken which is attached at Appendix 1.
- 7.7 **Co-operative Values** – At Annual Council in May 2015, it was resolved that the following statement be included in the Constitution to reflect the values of the “Co-operative Council”. “Sunderland City Council is a co-operative council and in being so will act ethically in all its actions while adhering to and actively promoting its co-operative values of self-help, self-responsibility, democracy, equality, equity and solidarity. These values will underpin its decision making and actions.”
- 7.8 **Policy Implications** – The proposals would allow development to proceed within the city, by providing a means of delivering BNG in accordance with the National Planning Policy Framework (NPPF) and Policy NE2 of the Council’s adopted Core Strategy and Development Plan (CSDP). The proposal will also be consistent with the mandatory BNG requirements coming into effect from 12th February 2024, and will be a key means of delivering the South of Tyne and Wear Local Nature Recovery Strategy, which is currently in development in partnership with Gateshead and South Tyneside Councils.
- 7.9 **The Public/External Bodies** – The proposed approach envisages that the Council will work closely with Durham Wildlife Trust or other external third parties. The Council is also working closely with Gateshead and South Tyneside Councils who are investigating the implementation of similar arrangements with the Trust, given the linkages to the emerging South of Tyne and Wear Local Nature Recovery Strategy which covers the administrative areas of the three authorities.

8.0 Background Papers

Appendix 1: Integrated Impact Assessment
Appendix 2: S106 Process