



Development: Nature's new friend?

A report on taking forward Welsh Government planning policy to secure net benefit for biodiversity, with recommendations on how to secure off-site measures if required to achieve policy compliance.

Final Report July 2021

Front cover photo

Ffridd y Garreg Boeth near Llanwrst in the Conwy valley, carpeted in spring with the native daffodil, *Narcissus pseudonarcissus*. This iconic plant is the symbol of the Snowdonia National Park, but now is only abundant in a few locations in North Wales.

The site has benefitted over the decades from intermittent conservation measures implemented by volunteers for two environmental charities with limited resources. However the site is not designated, currently has no management plan and its unique assemblage of flora and fauna is gradually deteriorating.

Ffridd y Garreg Boeth is part of a living landscape in which connectivity between well managed habitats will be vital if the wider ecosystem is to flourish. This is the sort of asset that could be identified as a priority for conservation in Natural Resources Wales' Area Statement for North West Wales, and which could benefit from measures financed by a new Nature Recovery Fund as advocated in this report.

Author and Commissioning of Study

The author of this report is Julian Pitt MRTPI.

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Abbreviations frequently used in report

NBB	Net Benefit for Biodiversity
LDP	Local Development Plan
LPA	Local Planning Authority
NP 2040	Future Wales: the National Plan 2040
NRF	Nature Recovery Fund
NRW	Natural Resources Wales
PPW	Planning Policy Wales
SPG	Supplementary Planning Guidance
WG	Welsh Government

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Summary

1. Welsh Government planning policy requires development to provide a net benefit for biodiversity (NBB), i.e. a **better** outcome than if the site was left undeveloped.
2. Policy is to achieve NBB primarily through measures within the development site. But what if measures within or perhaps adjacent to that site, however well designed, fall short of achieving NBB? In that situation NBB can still be achieved by a combination of measures to support biodiversity within and outside the development site. This report makes recommendations to achieve measures outside the development site in cases where this will be necessary to achieve policy compliance.
3. The recommended approach in this report is to require the developer to make a proportionate financial contribution to an approved levy scheme - a new 'Nature Recovery Fund' (NRF). A NRF would be used to achieve permanently well-managed NBB measures on suitable sites across a wide area. That area should fit with green infrastructure assessments and how Natural Resources Wales works with its partners at a landscape scale through its evolving Area Statements.
4. In North West Wales, a NRF could be set up for Conwy, Anglesey and Gwynedd, including the Snowdonia National Park. A NRF for North East Wales could cover Flintshire, Wrexham and Denbighshire local authority areas. The local authorities could jointly administer each NRF. However, there would be advantages in a suitable independent organisation such as the North Wales Wildlife Trust taking on this role, with local authorities limiting their input to ensuring sound governance.
5. The report makes recommendations on how to raise developer contributions fairly and consistently, and without delaying decision-making on planning applications. For most larger developments this will be through S106 Planning Agreements. For small and many medium sized developments, the best way will usually be for developers to be offered the choice to enter into a simple agreement under Section 111(1) of the Local Government Act, instead of a more complicated S106 agreement or 'unilateral undertaking'. Section 111(1) agreements are already used by local planning authorities elsewhere in the UK to ensure policy compliance on biodiversity and other matters.
6. Recommendations also address detailed matters regarding how a NRF could operate successfully.
7. The main recommendations are summarised overleaf with cross references to the relevant parts of the report.

Recommendations

Calculation of financial contributions for off-site measures

- a) A starting figure to derive a contribution rate could be set at £45,000 per hectare of undeveloped land within the 'red line' boundary of the application site. This is based on rates recommended or required in studies and broadly comparable compensation/net benefit schemes in England and Wales. The figure relates to action needed to compensate for loss of habitat of relatively **low** existing biodiversity value, such as intensively farmed land. This safeguards against setting an unjustifiably high rate. Paragraph 5.10
- b) The LPA ecologist then makes a **qualitative** assessment of the development proposal, drawing on forthcoming Welsh Government guidance, and decides whether or not any stepped reductions in the starting rate are justified. Reduction steps are proposed at nil, 1/3, 2/3 or all of £45,000, depending on how close the on-site measures come to achieving full net benefit for biodiversity (NBB). If that is achieved, the contribution falls all the way to a 'nil rate'. 5.11 & Table 2 under 5.11
- c) There needs to be scope to vary the full rate upwards on a bespoke basis, if necessary to ensure compliance with legislation on avoiding harmful impacts to designated sites and protected species. Table 2
- d) There needs to be a quality assurance mechanism to achieve consistency of assessment between applications and between LPAs, before case officers and applicants are informed. One way to achieve this would be for LPA ecologists to operate some form of 'moderation', i.e. a process akin to moderation of school examination results before their release. 5.13 – 14

Securing contributions for off-site measures through development management

- e) As a matter of principle, no development should be exempted from the policy to seek to achieve NBB. However, some small-scale proposals and particular types of development could reasonably be excluded from any requirement for a financial contribution for off-site measures. 6.15
- f) If NBB will not be achieved on-site and there will be a need for a Section 106 Agreement covering obligations for matters other than biodiversity, then another obligation could be added to the schedule of obligations entitled 'Net Benefit for Biodiversity Contribution'. A draft obligation text is at Appendix 6. 6.44
- g) If NBB will not be achieved on-site and there would **not** otherwise be a need for a Section 106 agreement, then applicants could be offered a choice of: (a) a S106 Agreement or Unilateral Undertaking to secure only a NBB contribution as drafted at Appendix 6, or (b) an agreement under S111(1) of the Local Government Act 1972 to secure the same contribution. A draft S111(1) 6.45
6.71

agreement template is at Appendix 7. Chapter 6 goes into detail, including legal and cost issues arising. For small and many medium sized developments option (b) is to be preferred.

- h) It would be beneficial if LPA web pages provide a plain language introduction and links to PPW policy on NBB, the SPG (Rec I below), relevant WG guidance and other helpful resources for applicants. These web pages could be drawn to applicants' attention either at pre-application consultation stage or later, when a planning application is validated. 6.81 - 82
- i) WG could consider whether to amend standard planning application templates and guidance on validation requirements, in order to assist applicants for small and medium scale development to provide sufficient information about proposed on-site biodiversity measures. 6.82
- j) If a financial contribution is required to achieve NBB policy compliance, the outcome at recommendations (c) & (d) above could be communicated to applicants no later than 4 weeks from the start of the 8 week statutory target date to determine most planning applications. 6.83
- k) Additional workload could necessitate changes to how LPA ecologists work. This includes operating as a team across each of the areas identified at recommendation (o) on matters such as moderation and cover for absences. 6.86
- l) Joint Supplementary Planning Guidance (SPG) about applying policy on NBB in '*Future Wales 2040*' (FW 2040) would need to be drafted, consulted on and adopted by all LPAs in each of the areas identified at recommendation (o). There is no need to wait until LDPs are updated and SDPs produced before preparing the SDP. 6.88 - 98

Pooling and spending of financial contributions

- m) Developer contributions levied for off-site NBB measures could be paid into a new, pooled 'Nature Recovery Fund' (NRF) that:
- Covers an area that dove-tails with existing / emerging 'institutional architecture' at the regional and sub-regional scale in North Wales, so as to align with partnership working at that scale
 - Covers an area large enough to ensure optimal use of funds to achieve nature recovery goals 7.7
 - Over a period of years, though not necessarily in each individual year, achieves nature recovery outcomes spread widely and 'fairly' across all of the participating LPA areas
 - Has governance arrangements that include representation from all the participating LPAs

- n) In light of (m), NRF areas could correspond the areas for which Natural Resources Wales (NRW) produces Area Statements in collaboration with its many partners, thereby strengthening rather than complicating existing institutional and partnership arrangements. NRF priorities could also be informed by emerging green infrastructure strategies.

7.14
7.1 - 3
- o) A North West Wales NRF could comprise Anglesey, Gwynedd, the Snowdonia National Park and Conwy. A North East Wales NRF could comprise Flint, Wrexham and Denbigh.

7.15
- p) LPAs could achieve efficiency savings by outsourcing the administration and deployment of a NRF to a suitable organisation(s) that agrees to operate in line with a joint memorandum of understanding with participating LPAs. The North Wales Wildlife Trust (NWWT) would be particularly well placed to fulfil this role in North Wales. In North East Wales a partnership between NWWT and the Building Wildlife Trust might also provide an alternative arrangement.

7.17 - 22
- q) The organisation administering a NRF could take on a limited grant-making function in addition to using most incoming funds to itself acquire new sites on which to implement NBB and manage the land accordingly in perpetuity.

7.30 - 33
- r) The recommended approach will probably require an increase the number of LPA ecologists and implementation staff in the organisation(s) administering each NRF fund. There are established precedents elsewhere in the UK for charging administrative & monitoring fees that may be justified in addition to the developer contributions at recommendation (b).

7.38 - 40

1. Study aim, methodology and report structure

Study aim

1.1 The study aim is set out in the brief at Appendix 1. It is to:

Present a scheme, managed by an appropriate organisation, which can as straightforwardly as possible deliver planning authorities' requirements for the planning system to implement biodiversity enhancements (and compensation where appropriate).

- 1.2 Biodiversity enhancement, alias 'net benefit for biodiversity' (hereafter NBB) has been part of planning policy in Wales for over a decade, but to date only limited progress has been achieved in practice. The Chief Planner at Welsh Government (WG) issued a letter on interpreting the relevant policy in October 2019 (Appendix 2). How to act on the content of that letter was the spur to commissioning this study.
- 1.3 The key word in the study aim is 'deliver'. The task is to make recommendations on the 'nuts and bolts' of how local planning authorities (LPAs) engage with applicants for planning permission and other interested organisations to deliver the policy requirements. The study encompasses both 'on-site' measures, i.e. within the 'red line' area of a planning application (or other land nearby controlled by the applicant), and the more complex task to deliver NBB off-site if policy compliance cannot be fully achieved on-site.
- 1.4 This report is written primarily for local authority planning and ecology staff, and for other organisations concerned with protecting and enhancing biodiversity - alias 'nature recovery'- in North Wales. Important background matters are explained in Chapters 2 and 3 in order to make the report more accessible to ecologists, elected councillors, those who make planning applications and policy makers in other organisations including Natural Resources Wales (NRW) and WG.
- 1.5 The scope of the study is all development that requires planning permission under the Town & Country Planning legislation in Wales. The brief does not extend to how the planning system deals with avoiding harm to nationally and internationally designated nature conservation sites and protected species, which is the subject of additional legislative and policy requirements. Rather, the study is about 'ordinary' biodiversity across entire 'living landscapes'. This encompasses intensively managed farmland and the surprising range of habitats that exist within built-up areas. The aim is to ensure that new developments do not chip away at the 'ecosystem resilience'¹ of that inter-connected network of habitats, but instead always enhance biodiversity. That way, development can become nature's friend.

¹ Ecosystem resilience has been defined as '*the capacity of ecosystems to deal with disturbances, either by resisting them, recovering from them, or adapting to them, whilst retaining their ability to deliver services and benefits now and in the future*'. The concept is explained in the context of the planning system at paras 6.4.1 – 9 of PPW11.

Methodology

- 1.6 The study had to be accomplished in a tight timescale, starting in late January and completed by April 2021. Necessarily therefore, the methodology has been simple:
- A document review, focused on relevant material published by WG, LPAs, academics and conservation bodies.
 - Interviews with a range of stakeholders and practitioners. The names of interviewees and their organisations are listed under Acknowledgements on page 3. Discussions were structured flexibly to enable individuals to share their knowledge and ideas as they felt appropriate. Interviewees comprised:
 - LPA staff in North Wales including planners, ecologists and a solicitor
 - Consultants / agents acting for applicants seeking planning permission for a variety of small and medium scale developments
 - practitioners in Wales and England who work on researching and implementing well-regarded examples of best practice
 - NRW, which has relevant statutory duties, and a WG official
 - Devising recommendations for delivery, informed by the author's prior knowledge, the document review and the many helpful points made in interviews.
 - Drafting development management documentation for LPAs to draw on when preparing their own versions. These are at Appendices 4 onwards.
- 1.7 For brevity's sake, this report does not include summaries of all points made in each of the interviews. Instead, mention is made without attribution in the relevant chapter to many of the helpful points that influenced the recommendations. Interviewees had opportunity to comment on the draft report during April - May 2021. A separate tabulation of the main points raised and the author's responses is available on request.
- 1.8 Most of the documents referred to in this report are referenced using embedded web links, so there is no separate appendix on references. Some key extracts are reproduced in the relevant chapters.

Report structure

- 1.9 The report is structured as follows:

Chapter 2 examines the relevant policy and legal context, and 'unpacks' the Chief Planner's letter.

Chapter 3 considers the divergence between England and Wales regarding the merits of quantitative and qualitative approaches to securing NBB. The difficulties with both approaches are outlined, in order to inform recommendations in Chapter 5 about development proposals where NBB cannot be achieved through on-site measures alone.

Chapter 4 Briefly considers the starting point for NBB policy implementation, namely on-site biodiversity enhancement measures that are usually secured by planning conditions and/or 'S106 planning obligations'. This is a short chapter because practitioners are generally well aware of the issues and means to try to deliver such measures on-site. Moreover, this report should not overlap in any detail with guidance that WG is understood to have commissioned about securing on-site measures.

Chapters 5 - 7 consider in detail the issues arising in the calculation, securing and spending of financial contributions from developers to secure appropriate off-site measures, if needed to ensure policy compliance on NBB. The focus is on identifying potential problems and problem-solving. These chapters are not concerned with the technical work of ecologists and land managers in implementing either on or off-site biodiversity measures. Rather, they examine only the planning system and its wider interactions to facilitate off-site NBB measures to be funded, planned, implemented and reported on in line with sound governance.

Chapter 5 examines the calculation of financial contributions for off-site measures.

Chapter 6 examines how financial contributions can be secured through suitable documentation in the development management process.

Chapter 7 examines the pooling and spending of financial contributions, and the institutional arrangements to deliver this.

Chapter 8 provides brief presentations on nine case studies of recent development projects and fictitious cases on sites in North West Wales, to illustrate the study recommendations in practice. The case studies cover a range of types and scales of development, and indicate how much funding for off-site NBB projects might have been raised had the recommended approach been applied. The intention is to stimulate debate about the practical implications of WG policy on NBB, issues arising from the recommended approach and how it might need to be modified.

Chapter 9 is a short conclusion and sets out recommended next steps, drawing together the main themes in preceding chapters.

Appendices provide further information about matters arising in the main body of the report. Appendix numbers and titles are listed on page 91.

2. Relevant policy, law and the Chief Planner's letter

Genesis of policy on securing biodiversity net benefit

2.1 This report is no place for a lengthy discourse on how current national policy in Wales to secure NBB came into being. However a little background on its genesis helps to understand how we got to the current position and why the Chief Planner decided it would be helpful to issue a letter in late 2019 entitled '*Securing biodiversity enhancements*'.

2.2 The current version of Planning Policy Wales, [PPW 11](#) published in February 2021, is still supplemented by some older 'Technical Advice Notes'. These include [TAN 5](#) entitled '*Nature Conservation and Planning*', published in 2009. TAN 5 paragraph 2.1 sets out 'key principles of positive planning for nature conservation', which include that the planning system in Wales should:

*'... look for development to provide a **net benefit** [emphasis added, likewise parts of quotes below shown in bold] for biodiversity conservation with no significant loss of habitats or populations of species, locally or nationally; ...'*

2.3 TAN 5 paragraph 2.4 states that, when considering policies and proposals in local development plans and when deciding planning applications that may affect nature conservation, LPAs should:

*'... adopt a step-wise approach to avoid harm to nature conservation, minimise unavoidable harm by mitigation measures, offset residual harm by compensation measures and look for new opportunities to **enhance** nature conservation; ...'*

2.4 TAN 5 provided a longer but arguably no stronger policy approach than the corresponding policy in England at that time, in Planning Policy Statement 9 entitled '*Biodiversity and Geological Conservation*' which was issued in 2005 and withdrawn in 2012. That included 'key principles', one of which was that:

*'Plan policies and planning decisions should aim to maintain, and **enhance**, restore or **add to** biodiversity ...'*

2.5 So the language of biodiversity 'net benefit' and 'enhancement' is not new; it goes back at least to 2005 in England and 2009 in Wales.

2.6 But both TAN 5 and before it PPS9 in England used aspirational and, with hindsight, weak language – respectively only asking local planning authorities to 'look' and 'aim' to enhance biodiversity. Despite the aspiration, few would challenge the view that during more than a decade since TAN 5 was issued developments have done some harm and little to positively enhance biodiversity in either Wales or England.

2.7 More recent comparisons between Wales and England are also illuminating. The latest iteration of England's [National Planning Policy Framework](#) (NPPF) issued in February 2019 states at paragraph 170 that:

*'... planning policies and decisions should contribute to and **enhance** the natural and local environment by ...'*

*(d) minimising impacts on and providing **net gains** for biodiversity, including by establishing coherent ecological networks that are more resilient to current and future pressures;'*

2.8 However, specifically regarding development management the NPPF is more circumspect. Paragraph 175 states:

'When determining planning applications, local planning authorities should apply the following principles: a) if significant harm to biodiversity resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused;'

2.9 There is no mention there of 'enhancement', only 'harm'. NPPF para 175 (d) goes only so far as to require local planning authorities to 'encourage' opportunities for off-site biodiversity measures, especially where these can secure net gains:

'd) development whose primary objective is to conserve or enhance biodiversity should be supported; while opportunities to incorporate biodiversity improvements in and around developments should be encouraged, especially where this can secure measurable net gains for biodiversity.'

2.10 The corresponding policy language in PPW11 to which the first paragraph of Chief Planner refers is significantly firmer than in TAN 5 or the NPPF. PPW11 para 6.4.5 says:

*'Planning authorities **must** seek to maintain and **enhance** biodiversity in the exercise of their functions. This means development should not cause any significant loss of habitats or populations of species, locally or nationally and **must** provide a **net benefit** for biodiversity. In doing so planning authorities must also take account of and promote the resilience of ecosystems'*

2.11 On 24 February 2021 Welsh Government published what is now the national tier of the statutory development plan entitled [Future Wales, The National Plan 2040](#) (NP 2040). Policy 9 entitled 'Resilient Ecological Networks and Green Infrastructure' includes the following, which aligns closely with PPW11:

*'... action towards securing the maintenance and **enhancement** of biodiversity (to provide a **net benefit**), the resilience of ecosystems and green infrastructure assets **must** be demonstrated as part of development proposals through innovative, nature-based approaches to site planning and the design of the built environment.'*

2.12 At this point we should note the plain language meaning of the words 'enhance' and 'net'. In the Cambridge Dictionary:

enhance

verb [T]

UK  /ɪnˈhɑːns/ US  /ɪnˈhæns/

C1

to improve the quality, amount, or strength of something:

- 2.13 So in the context of this study, ‘enhance’ means to improve the quantity, amount or strength (= resilience) of nature = biodiversity. Likewise, ‘net’ used as an adjective in ‘*provide a net benefit*’ means an improvement on existing biodiversity.
- 2.14 Based on plain language meaning, there is no ambiguity as to what the words ‘enhancement’ and ‘net benefit’ in PPW11 policy require. It will not be sufficient to undertake on-site measures to benefit biodiversity that do not fully compensate for the harm development will cause. Rather, NBB means achieving a better outcome than if the site is left undeveloped, i.e. **improving** on the current quantity / amount / strength of biodiversity in consequence of implementing the proposed development. Otherwise, ‘net’ in NBB policy is a superfluous word. Thus a definition of NBB is:
- The concept that development should leave biodiversity and ecosystems in a **better** state than before, through securing long term, measurable and demonstrable benefit, primarily on-site.*
- 2.15 Proposed on-site biodiversity measures will need to be assessed - whether quantitatively and/or qualitatively - in order to reach a judgement about whether NBB would, or would not, be achieved as a result of development. Making that assessment and the complexities entailed go to the heart of the rest of this report.

Unpacking the Chief Planner’s letter

- 2.16 For many years the chief planners in each of the UK’s devolved nations have issued letters, the purpose of which is to ‘*provide advice, guidance and updates on planning issues to local authority chief planning officers*’.
- 2.17 We now ‘unpack’ the Welsh Government [Chief Planning Officer’s letter](#) on *Securing Biodiversity Enhancements* and the relevant law and policy to which it refers, so as to be clear why he decided to write about this matter.
- 2.18 The full text of the letter is at Appendix 2. It starts by reproducing PPW10² para 6.4.5 (the text at para 2.10 above) and says:

² PPW10 published in 2018 was the version in use when the letter was written. Paragraph 6.4.5 is unchanged in PPW11.

'This policy and subsequent policies in Chapter 6 of PPW 10 respond to the Section 6 Duty of the Environment (Wales) Act 2016.'

2.19 The Section 6(1) Duty (note - a duty, not just a power) explicitly uses the word 'enhance':

*'(1) A public authority must seek to maintain and **enhance** biodiversity in the exercise of functions in relation to Wales, and in so doing promote the resilience of ecosystems, so far as consistent with the proper exercise of those functions.'*

2.20 In the Section 6(1) Duty, the word 'enhance' must be taken by the Chief Planner to equate to 'net benefit' in PPW10 para 6.4.5. The PPW10/11 policy is therefore backed by law, albeit subject to the standard proviso that public authorities can only act within the 'proper exercise' of their functions. In practice this means adhering to planning law, including case law on such matters as interpreting policy and the use of planning conditions and S106 obligations, all of which are considered later in this report.

2.21 The letter is a high-level statement and so unsurprisingly it does not expand in detail. Yet it is noteworthy that neither PPW10/11, nor the letter, contain any hint that net benefit / enhancement should be limited to certain types of development or only proposals above a size threshold. The issue of making any such exceptions to policy is considered at paras 6.13 - 24.

2.22 The letter then describes 'its purpose' is to provide what amounts to a supplementary policy statement that is not explicit in PPW10/11:

'The purpose of this letter is to clarify that in light of the legislation and Welsh Government policy outlined above, where biodiversity enhancement is not proposed as part of an application, significant weight will be given to its absence, and unless other significant material considerations indicate otherwise it will be necessary to refuse permission.'

2.23 What is new here is the explicit instruction to refuse planning permission, though this is phrased with wriggle room familiar to planners: *'unless other significant material considerations indicate otherwise'*. The reality here is that decision makers in development management must take into account all the relevant considerations. Those in favour of a development may be judged to 'outweigh' considerations against. Nevertheless, considerations weighing against refusal if biodiversity is not enhanced must be 'significant'. We return to the issue of 'weight' at paras 2.35-40.

2.24 The Chief Planner's next point is to underline the importance of taking into account biodiversity and ecosystem resilience considerations at an early stage in development plan preparation, as well as in considering individual development proposals:

'It is important that biodiversity and ecosystem resilience considerations are taken into account at an early stage in development plan preparation and when proposing or considering development proposals. Planning authorities should be proactive and embed appropriate policies into local development plans to protect against biodiversity loss and secure enhancement.'

- 2.25 The underlying message here is that the UK, including Wales, has a 'plan led' planning system and that development proposals must accord with the development plan unless material considerations indicate otherwise.
- 2.26 Two important complications arise regarding the development plan. One is that local development plans (LDPs) become out of date. Their review cycle to reflect, for example, updated national policy in PPW11, takes years and may be subject to protracted delays. It is common for planning applications to be determined in a situation where the LDP is to some extent out of date compared with other relevant policy, notably a more recent version of PPW. This is now the situation across much of Wales regarding LDP policies on enhancing biodiversity. Planning convention, backed by the courts over many decades, is that the weight attached to relevant policy in a LDP reduces where that policy differs significantly from more up to date national policy. In practice, this means that the very up to date PPW11 policy on biodiversity (i.e. as reissued this year) should carry considerable weight in development management decision-making, as should the content of the Chief Planner's letter.
- 2.27 The second complication is that the 'development plan' in a given local authority area comprises more than one document. These are the LDP and also NP2040 quoted at 2.11. In a few years' time the development plan will also include intermediate, regional level '[Strategic Development Plans](#)' (SDPs), once these have been prepared jointly by groupings of local authorities. LPAs will need to apply the most up to date NBB policy, in whichever development plan document this finds expression.
- 2.28 The letter then states:
- 'The attributes of ecosystem resilience (PPW para 6.4.9 refers) should be used to assess the current resilience of a site, and **this** must be maintained and enhanced post development. If **this** cannot be achieved, permission for the development should be refused.'*
- 2.29 PPW10/11 para 6.4.9 sets out that building ecosystem resilience through the planning system involves addressing five matters that need not be replicated here. This part of the letter is perhaps not drafted clearly. The word 'this', used twice, must both times refer to maintaining and enhancing ecosystem resilience in the wider area around and incorporating the development site, not to the current resilience of the development site itself. (Otherwise, permission would need to be refused wherever resilience cannot be maintained and enhanced through measures restricted to within the development site. That would prevent **all** developments where NBB cannot be achieved on-site.)
- 2.30 The letter does not say who is responsible for assessing the impacts of a development proposal on ecosystem resilience. Convention is that the applicant is expected to provide all the information required for the LPA to assess whether a planning application is policy compliant. Biodiversity is a potentially significant evidence-gathering burden on applicants. However, there is no hint in the letter that smaller scale developments are exempt from the need for adequate evidence.

2.31 The last paragraph of the letter refers to the need for a *'pragmatic response to the specific circumstances of the site'* and the Chief Planner summarises the basic 'step wise' approach in PPW10/11 para 6.4.21:

*'Securing a net benefit for biodiversity within the context of PPW requires a pragmatic response to the specific circumstances of the site. Working through the step wise approach (PPW para 6.4.21 refers), if biodiversity loss cannot be completely avoided (i.e. maintained), and has been minimised, it is useful to think of net benefit as a concept to both compensate for loss and look for **and secure** enhancement opportunities. A net benefit for biodiversity can be secured through habitat creation and/or long term management arrangements to enhance existing habitats, to improve biodiversity and the resilience of ecosystems. Securing a net benefit for biodiversity is not necessarily onerous; through understanding local context, it is possible to identify new opportunities to enhance biodiversity.'*

2.32 This part of the letter makes no distinction between achieving net benefit / enhancement through on-site and off-site measures.

2.33 Drawing the above commentary together, we can see that the enhance / net benefit element of policy is now over a decade old. However, the combination of the Environment (Wales) Act 2016, the stronger policy wording in PPW10/11 and the additional steer in the Chief Planner's letter has resulted in the woolly call to 'look for' net biodiversity benefit being replaced with a clear instruction that local planning authorities **must** seek to maintain and enhance biodiversity, providing a net benefit. This policy now also finds expression in NP 2040. As the Chief Planner makes clear, where biodiversity enhancement is not proposed as part of an application, significant weight will be given to its absence and unless other considerations - which must be significant - indicate otherwise, it will be necessary to refuse permission.

2.34 Three other matters are briefly considered below because they are highly relevant to applying policy on achieving NBB:

- 'Weight' given to different policy considerations
- Developments of National Significance and Nationally Significant Infrastructure
- Section 6 duty to report

'Weight' given to different policy considerations

- 2.35 At paras 2.22 - 23 we noted use of the phrase *'unless significant material considerations indicate otherwise'* in the Chief Planner's letter. All relevant considerations will weigh in the 'planning balance' before a decision is reached on a planning application. Case law established long ago that 'weight is for the decision-maker'. This means that LPAs and appeal inspectors have wide discretion to place as much or as little weight as they consider appropriate on each of the benefits and harms of a development proposal, providing they act rationally.
- 2.36 The Chief Planner's letter does not refer to the end of PPW11 para 6.4.21, which says:
- '... where the adverse effect on the environment clearly outweighs other material considerations, the development should be refused.'*
- 2.37 Here, 'environment' must mean biodiversity specifically because the title of paragraph 6.4.21 is *'Maintaining and enhancing biodiversity'*. Para 6.4.21 presumably refers to a situation where there is judged to be no NBB from a development proposal, but rather a net adverse effect. Typically this will be because on-site avoidance, mitigation and compensation measures cannot fully address the harm and the applicant has not offered suitable off-site measures to achieve NBB³.
- 2.38 *'Other material considerations'* must include the benefits of development, such as providing homes and workplaces. The tricky phrase to interpret is *'clearly outweighs'*. A delegated case officer, planning committee in more important or controversial cases, or an inspector at a planning appeal, could conclude that harm to biodiversity does not 'clearly' outweigh substantial benefits and so grant planning permission despite the harm.
- 2.39 The balancing judgement unavoidably involves subjective evaluation and comparisons, because this is not an exercise comparing 'like for like' measured in the same quantifiable units. The decision maker is balancing harm to biodiversity - hard enough to quantify in its own terms - against benefits that are measured in totally different terms, also with difficulty and subject to uncertainties.
- 2.40 In practice, the weight given to each of the many matters under consideration in determining a planning application will be a matter of judgement for the decision maker.

Developments of National Significance and Nationally Significant Infrastructure Projects

- 2.41 PPW11 para 6.4.5 is primarily an instruction to LPAs, which operate the mainstream 'Town & Country' planning system set up in 1947. But they are not the decision makers in the case of ['Developments of National Significance'](#) (DNSs) or ['Nationally Significant Infrastructure Projects'](#) (NSIPs). Both of these types of decision are made

³ Applicants are rarely in a position to do so.

by national government ministers⁴ and different development management requirements and procedures apply. However, decisions on DNS and NSIP applications must be 'based' on the Local Development Plan (LDP) and Welsh Government planning policy, as well as all other relevant considerations in each case. This means that the PPW11 policy at para 6.4.5 is equally applicable to determining DNS and NSIP proposals in Wales as it is to applications determined by LPAs. Examples are the proposed Awel y Mor offshore windfarm extension near Llandudno and any new proposal for a nuclear power station at Wylfa on Anglesey.

2.42 LPAs will be consulted at an early stage on DNS and NSIP projects. NBB is one of the matters they should consider and potentially propose S106 obligations (considered at para 6.38 - 52) or other means to secure policy compliance. Such projects could be a significant, albeit infrequent, source of funding for the Nature Recovery Funds proposed in Chapter 7 because of the scale of off-site NBB measures that may be needed to achieve policy compliance.

Section 6 Duty to report

2.43 Reference was made at para 2.19 to the Section 6(1) Duty in the Environment (Wales) Act 2016. It is also important to bear in mind the Section 6(6) and 6(7) duties:

S6(6) says 'a public authority ... must prepare and publish a plan setting out what it proposes to do to comply with subsection (1)'.

S6(7) requires a public authority to triennially 'publish a report on what it has done to comply with subsection (1)'.

2.44 These duties are referred to in the section of PPW11 on 'green infrastructure'. Paragraph 6.2.12 says:

*'... The monitoring of success and delivery of habitat and species mitigation requirements secured through conditions and obligations can also usefully feed into this process. At the end of each reporting period they should use this data to indicate whether there has been a net gain or loss of biodiversity, and should use the trends identified to **determine future priorities for planning and decision making**, with the aim of furthering the goals of the Section 6 Duty.'*

2.45 The text highlighted in bold suggests LPAs should use the triennial reports to, among other purposes, inform priorities for any off-site measures needed for a planning application to achieve NBB policy compliance.

2.46 The S6(6) & (7) reporting requirements are yet another administrative burden on LPAs⁵. However, the recommendations in Chapters 5 - 7 of this report should assist them to fulfil these duties by making a wealth of relevant information available on action taken to fulfil the Section 6(1) Duty.

⁴ DNSs by Welsh Ministers and NSIPs by Westminster Ministers, even if the project is in Wales, because NSIPs are not a devolved matter.

⁵ These duties apply to all local authority functions, not just planning.

3. To measure or not to measure?

- 3.1 Planning is a devolved matter though, as we noted in Chapter 2, planning policy to enhance biodiversity in Wales is similar to the policy in England. However, the two nations are diverging on how best to achieve biodiversity 'net benefit' (the term used in Wales) or 'net gain' (the term used in England).
- 3.2 In England, there has been considerable research supported by DEFRA on the concept of ['biodiversity offsetting'](#), which links to the related concept of ['ecosystem services'](#), recently rebranded as ['enabling a Natural Capital approach'](#). Defra describes biodiversity 'offsets' as:
- '... conservation activities that are designed to give biodiversity benefits to compensate for losses - ensuring that when a development damages nature (and this damage cannot be avoided or mitigated) new nature sites will be created. Where appropriate, biodiversity offsetting is an option available to developers to fulfil their obligations under the planning system's mitigation hierarchy.'*
- 3.3 Offsetting is being trialled in several countries around the world. Typically it involves assessing the area and types of habitat and their 'condition' that would be destroyed or harmed, by a development. A 'metric' exercise is used to quantify losses and/or deterioration in condition, and to convert this to 'units' of loss that need to be offset by creating an equivalent number of units of new habitat elsewhere (whether equivalent in type or not), and/or by improving the condition of existing habitat elsewhere. The approach can be used to go a step further, to support a biodiversity net gain/benefit policy, by creating more units than are destroyed.
- 3.4 Welsh Government is understood to favour a different and more qualitative approach to assessing what NBB should mean in practice for each development proposal, without complex quantification of units of harm and offset gains⁶. As in England however, policy in Wales is to achieve biodiversity compensation and a net benefit primarily through on-site measures, i.e. within the development site as a whole.
- 3.5 This report does not set out to provide a lengthy critique of offsetting methodology. But it is worth briefly covering the main difficulties with a quantification-based method before turning to other issues that arise with a largely qualitative approach.
- 3.6 A Defra technical paper entitled ['The metric for the biodiversity offsetting pilot'](#) in England was published in 2012. This explains that habitat types are categorised by 'distinctiveness' and an example cited of the lowest band of distinctiveness is 'intensive agricultural'. Each distinctiveness band is attributed a number of 'units' of biodiversity value per hectare. The lowest band is ascribed just 2 units (compared with the highest having 6). Sites are also ascribed a score for their 'condition' and

⁶ Though one interviewee mentioned a major infrastructure project - the undergrounding of electricity pylons across the Dwyryd Estuary in the Snowdonia National Park - where a metric offsetting approach to biodiversity net benefit is being used. It remains to be seen whether Welsh Government will be content for such an approach to be used with other very large developments including DNS and NSIPs projects. See paras 2.41-42.

'poor condition' scores just 1. This means there is no multiplier effect on the lowest distinctiveness score of 2. The table below summarises the matrix.

Figure 4: Matrix showing how condition and distinctiveness are combined to give the number of biodiversity units per hectare⁸

		Habitat distinctiveness		
		Low (2)	Medium (4)	High (6)
Condition	Good (3)	6	12	18
	Moderate (2)	4	8	12
	Poor (1)	2	4	6

- 3.7 The technical paper then goes on to consider using the basic metric to measure the compensation needed to offset losses. Several issues are taken into account, each involving another multiplier to the number of units in the above table, depending on various complexities arising. The lowest multiplier is 1, which again leaves unchanged the score of just 2 units for low distinctiveness habitats in poor condition.
- 3.8 So, if one hectare of low distinctiveness habitat in poor condition, such as 'intensive agricultural' land, were to be lost to development, then a minimum of 2 'offset' units would need to be provided in perpetuity elsewhere to fully compensate. It seems reasonable to ascribe all farmland and all undeveloped land in urban areas, including gardens, a unit value of **at least** 2 units/ha. This assumption informs the thinking and recommendations in Chapter 5.
- 3.9 A number of pioneering local planning authorities in England are implementing an offsets 'metric' approach. Further information about the schemes in Leeds and Lichfield is given in Appendix 4⁷.
- 3.10 There are many conceptual and practical difficulties with implementing a metric offsetting approach:
- Knowledge gaps: Ecologists are expert in identifying and describing the biological features of a development proposal site and that site's role in the wider ecosystem before development. However, data and understanding can never be complete, even for large sites subject to thorough survey. With sites too small to justify the expense of detailed survey, some features may go recognised. Knowledge gaps blunt ecologists' ability to assess the extent of unavoids harm and therefore what compensation is needed even to reach 'break even', let alone net gain / benefit.
 - Soil: Soil organic matter includes complex flora & fauna that play a vital role in ecosystem services. Yet it is not clear how the biodiversity value of soil is taken into account in quantification of biodiversity units lost to development, or how that

⁷ Others schemes exist in Vale of White Horse, South Oxfordshire, Tunbridge Wells and Cornwall council areas.

loss can best be offset. This issue is picked up in some of the case studies in Chapter 8.

- 'Baseline' biodiversity value of development sites: Should the number of units lost to development be calculated on the basis of the existing biodiversity value of the development site or how that value is likely to change for the better or worse in the absence of development? This question is particularly relevant for green field development sites because of forthcoming changes in the post-Brexit [farming support system in Wales](#), as changing Welsh Government policy is set to subsidise farmers for the production of non-market environmental goods through ['sustainable farming'](#).
- Evaluation of on-site measures: Every patch of habitat, however small, is complex and unique. On-site compensation / enhancement measures cannot be exactly 'like for like' compared with harm, which includes not just on-site habitat loss or damage but also off-site impacts including light pollution, additional traffic noise and detrimental changes in hydrology. Consequently there is no way to measure with objective precision what kind and how much off-site compensation may be needed to achieve net benefit. The less any proposed off-site options are 'like for like' for on-site losses, the greater the complexity of this stage of evaluation.
- Small development sites: Interviews with practitioners in England indicated that a metric approach is particularly hard to apply on small development sites. Yet many planning applications are for small sites and there is no policy rationale for omitting to seek net gain / benefit from such proposals.
- Quantifying 'enhancement': Planning policy is to achieve enhanced biodiversity, i.e. net gain / benefit as explained in Chapter 2. But national policy in Wales as well as in England is silent on how much enhancement is justified and how this can be quantified.
- Area of search: How far away from the development site will it be reasonable for sites to be selected for off-site biodiversity compensation / enhancement measures? On what basis? Must a selected site be within the local council area in question, despite nature being no respecter of human administrative boundaries?
- Costing of compensation / enhancement measures: This is necessary to calculate the developer contribution. The task is complicated by whether or not the cost of land purchase or long term lease is involved and to what extent 'in perpetuity' habitat management costs are to be factored in as well as initial habitat creation / enhancement costs. The task is not impossibly difficult because, as we shall see in Chapter 5, there are helpful precedents elsewhere including in Wales. However, the calculations can be no more than estimates of actual costs. This is especially so if a standard charge (such as per £ per unit area of undeveloped land within a development site) is to be applied consistently to many development sites. That will probably have to be the approach if contributions from a particular development are not exclusively linked to expenditure to achieve NBB on one or more specific sites.

- 3.11 The upshot of the above difficulties is that they are cumulative - the uncertainties, approximations and judgements at each stage of assessment make the next stage more difficult to accomplish with any confident precision. There is risk of spurious over-exactitude if the realities of assessment are not candidly recognised.
- 3.12 In view of the above, a 'metric' approach to offsetting clearly involves a series of assessments that are unavoidably hard to quantify, imprecise, to an extent subjective and particularly difficult to apply in the case of smaller development sites that comprise a large proportion of planning applications. No surprise then, that Welsh Government is unconvinced about the practical applicability of offsetting as a tool to inform development management.

Alignment with Welsh Government's approach to achieving net benefit

- 3.13 The onus is on the applicant for planning permission to demonstrate that the high bar of NBB will be achieved.
- 3.14 I am advised that WG will soon be consulting on draft principles to assist developers, their advisors and LPAs to achieve NBB, and that once finalised the principles will be incorporated into the next revision of PPW. Additionally, WG is working with the Chartered Institute of Ecology and Environmental Management (CIEEM) to produce more detailed guidance to assist with achieving NBB primarily within the development site.
- 3.15 The forthcoming principles and guidance should enable LPAs to decide which of the following broad categorisations would apply to a particular development proposal:
- a) NBB would clearly be secured by on-site measures, in which case the proposal will be policy compliant
 - b) Substantial compensation measures would be secured on-site, but these do not clearly outweigh harm to biodiversity, in which case the proposal will fall short of NBB policy compliance - but not far short
 - c) Some well-designed on-site measures would be secured, but these will fall far short of full NBB policy compliance
 - d) Little if any on-site compensation secured, so no policy compliance
- 3.16 For outcomes (b) - (d), full policy compliance will only be achieved by securing off-site biodiversity measures proportionate to the extent to which on-site measures fall short of achieving NBB. This raises two questions:
- If NBB cannot be achieved on-site (and secured there in perpetuity), how does the LPA decide what is needed off-site to achieve policy compliance?
 - On what reasonable and lawful basis - if necessary to be argued at appeal or even in court - can the LPA require a financial contribution from the developer for proportionate and deliverable off-site measures?
- 3.17 Chapters 5 – 7 seek workable, timely, cost-effective and legally robust solutions to the above questions.

4. Securing on-site measures

- 4.1 As previously outlined, the PPW11 starting position is to seek to achieve NBB primarily through on-site measures, i.e. within the ‘red line’ of the planning application site boundary.
- 4.2 On-site biodiversity measures will generally be secured by planning conditions attached to a grant of planning permission. In the case of larger and more complex developments S106 planning obligations may also be used, for example to secure financial payments for creation and/or long term management of new assets such as multi-functional green infrastructure. LPA development management case officers and ecologists are familiar with the process and issues arising in devising suitable conditions and S106 obligations, their implementation, monitoring and, if necessary, enforcement. This study has nothing to add on these technical matters, which is why this chapter is so short.
- 4.3 However, two related matters are raised here.
- 4.4 A few interviewees who are not ecologists expressed hope that achieving NBB entirely through on-site measures will be possible for the majority of developments, providing there is sufficient practical guidance and goodwill. But others are less optimistic and expect a large proportion of development proposals to result in a greater or lesser degree of unavoidable net loss of biodiversity on-site, i.e. outcomes (b) – (d) at para 3.15. There is no point speculating and clearly this will be a matter for LPA ecologists’ judgement on a case by case. However, it is worth noting that a person’s expectations on this matter seems likely to influence how they respond to the recommendations in the following chapters of this report. Put bluntly, a person who is confident that policy compliance can usually be achieved on-site may be uninterested in, and unconvinced of the need for, a set of recommendations to secure off-site measures. Vice versa will apply to people who are unconfident about the adequacy and long term efficacy of on-site measures.
- 4.5 That leads to the second matter, looming difficulties with securing the ecological value of on-site measures in the medium to long term. A [study](#) led by the Durrell Institute of Conservation and Ecology and published in January 2021 examined some of the pioneering LPA offsetting schemes in England. One of its conclusions from a sample of mostly large housing developments is:
- ‘Eighty-seven percent of biodiversity units delivered in our sample come from habitats within or adjacent to the development footprint managed by the developers. However, we find that these gains fall within a governance gap whereby they risk being unenforceable.’*
- 4.6 The ‘governance gap’ arises after a developer no longer has a financial interest in, and/or legal commitments relating to, the site. This concern is important, in Wales as well as in England, because so much emphasis is being placed in both countries on achieving NBB primarily on-site. If the ‘governance gap’ cannot be resolved, then there will be a stronger case for more reliance to be placed on off-site measures to be secured by a suitable organisation having access to sufficient land and suitable

long term governance arrangements in place. This issue will be picked up again in Chapter 7.

- 4.7 We now turn to the calculation (Chapter 5), securing (Chapter 6), pooling and spending (Chapter 7) of financial contributions from the developer for off-site biodiversity measures.

5. Calculation of financial contributions for off-site measures

- 5.1 Financial contributions for off-site measures needed to achieve overall NBB would need to be raised through an approved levy scheme. Nothing is more certain to derail efforts to secure such contributions than unending debate and controversy about the method of calculation. Paras 3.10 - 12 considered the inevitable knowledge gaps, uncertainties and risk of spurious over-exactitude in calculating a contribution in each case.
- 5.2 The task is to find a method of calculation that is not overly complicated but which LPAs, applicants and - if it comes to it - appeal Inspectors, Ministers determining 'called in' applications and the courts will all consider to be transparent, reasonable and otherwise in accordance with the legal tests that will be considered in Chapter 6.
- 5.3 I have considered how financial contribution rates for off-site biodiversity measures were recommended or set in the following approaches and projects. In the cases of 3, 4, 5 and 6, one of the practitioners involved was interviewed.
- 1 *Defra research on Biodiversity offsetting in England*
 - 2 *Offsetting, as above, plus land purchase costs in North Wales*
 - 3 *Leeds and Lichfield Councils' 'Net gain for biodiversity' schemes*
 - 4 *Building Wildlife Trust, operating in Flintshire and Wrexham mainly on schemes to ensure newt populations in SACs are not harmed by development*
 - 5 *Carmarthenshire County Council's scheme to ensure the Caeau Mynydd Mawr Special Area of Conservation is not harmed by developments*
 - 6 *A joint approach by 12 local authorities to ensure the Thames Basin Heaths Special Protection Area is not harmed by housing development*
 - 7 *Wrexham – developer contributions for onsite open space management*
- 5.4 Information and helpful web links on each of the above is provided in Appendix 4. Relegation to an appendix is to maintain the pace and focus of this chapter. However, readers are asked to look at Appendix 4 and the documents it refers to. This is because well-informed decision-making on setting financial contributions in North Wales needs to take account of up-to-date studies and project experience elsewhere in Wales and the wider UK.
- 5.5 Two points need to be made that apply equally to schemes 4, 5 and 6. The first is that these schemes concern measures to avoid harm to European designated areas – either a Special Area of Conservation (SAC) or a Special Protection Area (SPA). Developers are required by legislation⁸, not just planning policy, to avoid causing harmful impacts to the ecological features that led to making these designations. That legislation is not engaged in achieving NBB where development is of a type or sufficiently distant from designated areas not to have any potential impact. However, the planning mechanisms and related processes used to achieve success in schemes 4, 5 and 6 are entirely relevant and, as we shall see in Chapter 6,

⁸ European Habitats Directives 92/43/EEC and 2009/147/EC which, post Brexit, are transposed into law in England and Wales by the Conservation of Habitats and Species Regulations 2017, as amended in 2019.

substantially transferrable to achieving this study's aims for NBB away from SACs SPAs and other such designated areas.

- 5.6 The second point is that approaches 4, 5 and 6 involve habitat creation and enhancement measures tailored to specific species and their habitats that led to the designations in question, being respectively the great crested newt (4), marsh fritillary butterfly (5) and rare, easily disturbed heathland birds (6). However, several interviewees pointed out that the types of habitat creation and enhancement measures used will enhance biodiversity **generally** for the whole range of native flora and fauna present in the project areas⁹. Likewise, the cost of the habitat creation and enhancement measures to benefit the particular species of concern are broadly comparable to the cost of measures intended to benefit biodiversity in general. This makes comparison with the other figures presented in the table below more 'like for like' than the specificity of measures for individual SACs and SPAs might otherwise suggest.
- 5.7 The approximate rates of financial contribution from the six approaches / projects are tabulated for comparison below.

Table 1: Comparison of financial contributions from different studies and projects

Study / scheme	Payment for off-site biodiversity compensation / enhancement measures (£000s) in leu of each hectare of land developed or habitat lost ¹⁰
Defra offsetting approach to compensate for loss of habitat of generally low biodiversity value, plus land acquisition in half of cases at likely purchase costs in North Wales	45
Leeds Council 'Net gain for biodiversity' scheme	40
Carmarthenshire Council SAC protection scheme	45
Building Wildlife Trust work – SAC/newts protection scheme	63
Thames Basin Heaths SPA protection scheme	65
<i>Wrexham – developer contribution for on-site open space management¹¹</i>	30

⁹ In much the same way that RSPB reserves benefit biodiversity generally, not just birds.

¹⁰ These may or may not be the same in practice. Further information in each case is in Appendix 4.

¹¹ This figure is not directly comparable with the other schemes, but is nevertheless of interest for reasons in Appendix 4.

- 5.8 It would be a statistical nonsense to add a bottom line to the table above with the 'average' of these figures. This is because they are all calculated using different methods and to achieve differing outcomes. Nevertheless, the table gives a good indication of the range of contributions sought.
- 5.9 Based on the issues explored in Chapter 3 and approaches and actual schemes tabulated above and considered in Appendix 4, I recommend the following **three stage approach** to calculation of developer contributions for off-site NBB measures:
- i. A starting point rate of contribution based on **quantification**, but this deliberately simplified compared with a full 'metric' approach
 - ii. **Qualitative** judgment to amend the starting point rate, if justified in the circumstances of the specific development proposal, in order to achieve policy compliance
 - iii. A '**moderation**' stage (akin to school exam results being moderated before issue)
- 5.10 I recommend that the **starting point** to derive a financial contribution is a rate of **£45,000**, index linked, per hectare of undeveloped land within the application site ('red line').
- 5.11 I recommend that the LPA's ecologist assesses the extent to which the development proposal achieves NBB on-site (and possibly on adjacent land outside the application 'red line' but controlled by the applicant). Drawing on WG's forthcoming guidance and the characteristics of the development site in its local context, the ecologist decides whether or not any **stepped reductions** in the starting rate are justified. Reduction steps are proposed at 1/3, 2/3 or all of £45,000, depending on how close the on-site measures come to achieving NBB. If this is achieved, the contribution falls all the way to a 'nil rate'. This approach takes forward the broad categorisations in para 3.15 and is set out in the table overleaf.

Table 2**Qualitative process to calculate contributions for off-site biodiversity measures**

LPA ecologist's assessment of planning application	Assessment category	Proportion of 45,000/ha rate charged	Charge / ha total area within application site red line boundary
Site excluded from any charge for off-site measures, arising from issues considered at paras 6.13 - 20.	0	0%	Nil
NBB is clearly demonstrated by proposed on-site measures. As this achieves full policy compliance there is no need for any off-site measures.	1	0%	Nil
Substantial compensation measures would be secured on-site, but these will not clearly outweigh harm to biodiversity. Therefore NBB is not achieved through on-site measures alone and so some off-site measures are required to achieve policy compliance.	2	33%	£15,000
Some well-designed on-site measures would be secured, but these fall far short of full compensation for harm. Therefore substantial offsite measures are required to achieve NBB and policy compliance.	3	66%	£30,000
Little or no on-site compensation secured. Therefore full compensation and enhancement measures are required off-site to achieve NBB and policy compliance.	4	100%	£45,000
Special cases where bespoke off-site measures are required to prevent harm to designated sites and/or protected species. (Additional legal requirements come into play.)	5	Bespoke charge	Potentially over £45,000

5.12 This staged approach to calculating contributions for off-site biodiversity measures has been applied to each of the case studies in Chapter 8. This should inform debate on the study recommendations in the round.

Ensuring consistency

- 5.13 The final stage I recommend is a quality assurance mechanism to achieve consistency of assessment (a) between applications and (b) between LPAs. The detail would be for LPA ecologists to decide. One way to achieve this would be for them to operate some form of 'moderation', i.e. a process akin to moderation of school examination results before their release. Moderation could involve LPA ecologists in a pooling scheme area (considered in chapter 7) cross-checking their assessment categorisation (Table 2) in each case with each other before development management case officers and applicants are informed of the assessment. It might be sufficient to apply moderation to a sample of planning applications, rather than all of them.
- 5.14 Moderation exercises and any changes made to provisional assessments could be recorded, akin to standard good practice in exam moderation. Such records that demonstrate a rigorous approach to consistency could strengthen the evidence base used by LPAs at any appeals against refusal of planning permission on grounds of non-compliance with policy on NBB.

Avoiding unintended outcomes that would damage biodiversity

- 5.15 A concern expressed about the recommended approach for sites categorised as 3 or 4 in Table 2 is that financial payments could enable a developer to seriously damage or destroy a relatively biodiversity-rich site yet still achieve NBB policy compliance by willingly funding off-site 'offsetting' measures. Moreover, it could be argued this would not be policy-compliant if the definition of NBB at para 2.14 is adopted by WG because that definition requires benefit to be secured primarily on-site.
- 5.16 If NBB is to be achieved primarily on-site, then this will provide extra protection for typically small but nonetheless biodiversity-rich sites that may not be effectively protected by 'lower tier' wildlife designations recognised in local planning policies. The extra protection arises because it will rarely be possible to seriously damage or destroy such biodiversity-rich sites and yet also achieve NBB primarily on-site.
- 5.17 However, it would seem sensible for SPG as recommended at paras 6.88 – 6.98 to identify the range of special circumstances where it would be appropriate to rely mainly on off-site measures to achieve NBB. In such cases the recommended approach for sites categorised as 3 or 4 could be followed.

Conclusion

- 5.18 Three further points are made to conclude this chapter. The first arises from the interview with an officer at Bracknell Forest District, who had many years of experience calculating developer contributions for off-site biodiversity measures (Appendix 4, paras 25 - 29). He strongly advised that an initial scheme in North Wales should be kept as simple as possible, pointing out that schemes can be made more complicated later, if justified by new evidence. Heeding his advice, I have sought to make the simplest possible recommendations in this chapter, consistent with a demonstrating a transparent and reasonable basis of assessment.

- 5.19 The second point is particularly for any readers who think the recommended approach to calculation here may be too simplistic, despite the risk of spurious over-exactitude with a more complicated approach (see 3.10-12). The point is that developer contributions for some of the off-site measures unrelated to biodiversity that are routinely covered in S106 planning obligations are more difficult to calculate with any precision than LPAs may wish to admit. To give one example, education contributions required of housing developments typically involve estimating precise changes in future school student numbers in a local education authority area if the proposed development takes place. Such calculations can be highly sensitive to changes in the assumptions underpinning population projections - a notoriously complex and controversial subject. Thus biodiversity is not a uniquely problematic topic for assessing financial contributions for off-site measures.
- 5.20 Last is the issue of the likely need for an administrative fee in addition to the financial contribution calculated outlined in the chapter, to cover additional staff costs to secure and spend financial contributions. This is briefly considered at para 7.39 - 40.

6. Securing financial contributions for off-site measures

6.1 Financial contributions for off-site NBB measures will need to be secured through the LPA's decision-making process once it receives a planning application. The process is called 'development management', formerly 'development control'. This long chapter addresses the following issues in order to successfully obtain contributions without significantly complicating or delaying the development management process:

- The struggle for the development value of land (paras 6.2 - 12)
- Exemptions from applying NBB policy (paras 6.13 - 24)
- Binding methods to secure financial contributions for off-site measures needed to make a development proposal acceptable in NBB policy terms:
 - Planning conditions (paras 25 - 33)
 - Community Infrastructure Levy (CIL) (paras 6.34 - 37)
 - S106 Obligations – agreements & unilateral obligations (paras 6.38 - 52)
 - Contracts not governed by planning legislation (paras 6.53 - 72)
- Ensuring timely information for the applicant and case officer (paras 6.73 - 82)
- The role of LPA ecologists (paras 6.83 - 87)
- Need for Supplementary Planning Guidance (paras 6.88 - 95)

The struggle for the development value of land

- 6.2 This sub section is background information. Readers familiar with it can skip to para 6.13, but for others it is an important issue to understand in order to recognise some of the tensions and controversy under the surface of this report.
- 6.3 Planning applicants and developers are likely to regard a requirement for a financial 'contribution' for off-site NBB as another tax on them. They may resist it, especially if the economic outlook darkens and the financial viability of their development declines.
- 6.4 The conflict goes back to the founding of the modern UK planning system in 1947, when the right to develop land was nationalised (i.e. the state took control of what development, if any, is allowed on a particular site), but any profit from development was to be left in the hands of the landowner and/or developer.
- 6.5 A simple example suffices to illustrate the issue. Suppose a hectare of farmland is to be developed for housing. The 'existing use' value before development is just its agricultural land value, say at most £20,000. The total of all the estimated costs to physically develop the site is say £4.98 million, so with land purchase at existing use value added the total cost would be £5 million. However, the estimated open market sale value of say 30 new houses would be £8 million, i.e. an increase of £3 million over costs.

- 6.6 After the evolution of complex planning legislation and policies, the difference of £3 million - the 'betterment' - is split three ways after what can be tortuous negotiations between the developer, the local authorities¹² and the landowner.
- 6.7 The developer wants a margin for profit, plus a substantial margin for risk because development is a risky business – estimated costs and sale values can prove very inaccurate. In recent decades, local authorities have demanded a large share of the betterment in the form of 'financial contributions' from the developer. The contributions are to fully mitigate a range of impacts, some off-site, and thereby '*make the proposed development acceptable in planning terms*'. Important examples are contributions for road capacity and safety improvements to deal with additional traffic arising from development and, in the case of housing, contributions to pay for any additional need for school places and to build 'affordable'/'social' housing. Contributions are commonly also sought for other measures, including the provision or enhancement of public open space if there is loss on site or a local deficit. The potential 'shopping list' is long, with contributions sometimes sought for such diverse purposes as bus subsidies, employment training and even public art. In theory it is the landowner who takes the 'hit' on the value of the land after factoring in LPA requirements - not the developer. Nevertheless, the landowner will insist on a 'residual' share of the betterment, sufficient to be persuaded to sell the land to a developer.
- 6.8 Off-site NBB measures will be an addition to the list of contributions sought from the betterment 'cake'. This at a time when developers regularly opine that the sum of contributions sought is more than the betterment, therefore making the development unviable - meaning they and the landowner would have no incentive to actually develop. If the proposal in one the LPA is keen to support, then loss of viability is a concern for them too.
- 6.9 Conwy Council is an example of a LPA that has candidly grappled with the issue of sharing out the betterment cake. In its supplementary planning guidance (SPG) on planning obligations adopted in 2014, the Council says, under heading 4.5 on *Prioritising of Obligations*:
- '... planning obligations will be sought to mitigate the impacts of development (i.e. to make the proposed development acceptable in planning terms). As a consequence, the Council will seek to ensure that all of the reasonable requirements set out in this SPG are secured for each development. Furthermore, the assumption is that land purchase costs are negotiated on the basis of taking on board known planning obligations as identified in the LDP and known constraints.*
- However, it is accepted that in exceptional circumstances there may be situations where the fulfilment of all of the reasonable development requirements may affect the viability of a scheme. Where an applicant can robustly demonstrate that a planning obligation would adversely affect the viability of a development, the Council will negotiate obligations in the following order of priority:*
- 1 *Works required to secure a safe environment for the community and future occupiers of the proposed development or which are necessary to meet statutory obligations (e.g.*

¹² The LPA and, in 'two tier', the local highway and local education authorities.

satisfactory access arrangements, off-site highway improvements, natural or built environment and flood risk prevention).

- 2 *In the case of residential development, the provision of affordable housing to meet the needs of the local community.*
- 3 *Measures required to meet the needs of the future occupants of the proposed development where the failure to provide the measure would impose unacceptable impacts on the local community (e.g. public open space provision and education).*
- 4 *Measures required to mitigate the impact of the proposed development on the local community or matters of acknowledged importance (e.g. community safety, public art, employment and training.)*

- 6.10 The dry technical language above sets out the aspiration to ensure all contributions sought will be secured. But the underlying message is clear that if the betterment cake is inadequate, then some planning requirements are a higher priority for the Council than others.
- 6.11 Across the UK, developers sometimes seek to renegotiate planning obligations because they argue these threaten development viability due to changing economic circumstances. Decisions on priorities are ultimately for elected politicians, providing they act within the law. The Conwy document was written before the climate and biodiversity emergencies came to the fore. We shall have to see, not just in Conwy but in all council areas in Wales, what prioritisation NBB - alias *nature's recovery* - will be given. Will it be no higher a priority than relegation to the bottom of the list, where '*matters of acknowledged importance*' are lumped together as a lower priority than affordable housing and education?
- 6.12 Another issue is precedent if biodiversity joins the list of impacts of development for which contributions may be sought. LPAs may be concerned that yet more demands may be made. Imagine yourself as the leader of a mental health charity and the need for your service to local communities is increasing due to population growth linked to new housing. Would you think biodiversity is a more deserving cause to ask for additional developer contributions than your charity?

Exemptions from applying policy

- 6.13 It will not be possible to apply policy on NBB to development under [permitted development rights](#). Where a planning application **is** required, PPW11 does not even hint that policy on biodiversity enhancement should be disapplied for particular types of development, types of applicant or development size below a particular size threshold. As a matter of principle, no development should be exempted from NBB policy. Interviewees mentioned various ways and new ideas to secure on-site measures, including on small sites. The forthcoming WG guidance will doubtless address this, including the use of conditions where appropriate and, for very small scale proposals, exhortation to the good will of applicants to act on the guidance.
- 6.14 However, some interviewees cautioned that individual councils may want to use discretion to exclude certain types of planning application from any consideration of whether to seek contributions for off-site NBB measures. This could apply especially

if the administrative cost of securing contributions would be disproportionate compared with the sum secured.

- 6.15 Examples cited of development it would be appropriate to exclude include householder applications for minor external alterations including extensions, small scale changes of use of existing buildings, town centre development, previously developed sites elsewhere with little or no vegetated land and proposals that would obviously result in NBB¹³. I recommend that the joint Supplementary Planning Guidance considered at paras 6.88 - 98 should provide a consistent basis for deciding on any categories of development to be excluded.
- 6.16 Nevertheless, the simpler the arrangement for collecting developer contributions, and therefore the lower the administration costs, the less difficult it will be to justify collecting relatively small contributions. This is important because a large proportion of planning applications are for small developments. Cumulatively, many small contributions could provide a substantial source of funding each year for off-site NBB. The first case study in Chapter 8 is a two-storey extension to a house. The harm to biodiversity in that case is arguably **not** de-minimis and the sequence of tasks outlined at paras 8.6 - 13 to secure a proportionate contribution could be cost-effective even for such small scale development.
- 6.17 It is not difficult to envisage different stakeholders pleading for a range of exemptions in addition to small scale householder applications such as the above case. Specific cases may involve overlaps between proposed exclusion categories. The following overview must be sufficient for this report.

Large extensions and changes of use

- 6.18 The case to exclude all building extensions and changes of use is questionable. Large extensions and changes of use of larger buildings such as surplus institutional property can have significant new parking requirements, cause additional traffic and other noise, and increase light pollution. The combined impact on biodiversity in the locality could be substantial.

Previously developed land

- 6.19 There is a persuasive body of research showing that previously developed sites including derelict land may have significant biodiversity value. Redevelopment of such sites can result in direct loss of biodiversity and a significant increase in traffic noise and light pollution extending beyond the site boundaries.

Garden infill

- 6.20 Garden infill development proposals are usually small scale. However, research has also underlined the biodiversity value of established gardens. They are typically a more valuable habitat, per hectare, than intensively managed farmland. Moreover, additional dwellings and therefore more households in a suburban or urban fringe area will result in more pets. Their predation and disturbance can impact negatively on birds and other wild animal species in the wider locality.

¹³ One interviewee cited two examples - a large new pond for wildlife purposes but which required planning permission, and alterations to a farm silage/slurry facility to reduce water pollution.

Public sector development

- 6.21 Local authorities and other public sector bodies including social housing enterprises are themselves developers. Their projects include new roads, education facilities, affordable housing, care homes, business parks, hospitals, clinics and other community facilities.
- 6.22 Some LPA councillors and other public sector leaders may regard financial contributions as something to be charged on 'profitable' private sector development, notably open market housing, to raise funds to meet new demands on local authority services and needs for social housing. However, the Section 6 Duty in the Environment (Wales) Act 2016 reproduced at paragraph 2.19 clearly **does** apply to all the functions of all public bodies. This is why two of the case studies in Chapter 8 are scenarios involving recent public sector development - a new school and a new road. The implications for future public sector planning applications may not be universally welcomed in local authorities. This is because their over-stretched budgets will face yet another cost - contributions for off-site NBB measures if policy compliance cannot be achieved entirely through on-site measures.
- 6.23 Intentionally blank
- 6.24 Intentionally blank

Planning conditions

- 6.25 The use of planning conditions is covered in a [Welsh Government Circular](#) issued in 2014. Conditions 'run with the land'. This is to ensure they remain enforceable whenever, and however often, the development site or any part of it is sold to a new owner.
- 6.26 As noted in Chapter 4, conditions can be used to require biodiversity mitigation, compensation and enhancement measures within the development site itself. Typically, areas left undeveloped as part of the overall design may be managed to combine recreation, landscape, sustainable drainage and biodiversity functions. A condition can refer to agreed plans & work schedules, and require that such work is completed to the Authority's satisfaction by a particular stage(s) in development.
- 6.27 However, conditions must meet six tests that have been subject to much case law. They must be:
- necessary
 - relevant to planning
 - relevant to the development to be permitted
 - enforceable
 - precise
 - reasonable in all other respects
- 6.28 Conditions cannot be used to demand financial payments, even for specified purposes relevant to planning policy and the application in question. Nor can they be

used to require action on land not controlled by the owner of the development site. This is because such action would unreasonably depend on the cooperation of 3rd parties and so would not meet some of the tests. Consequently, it will not be possible to use conditions to require the owner of the development site to make a financial contribution towards biodiversity compensation/enhancement outside that site, except in limited circumstances outlined below.

6.29 In principle, conditions can be used to require a developer to implement biodiversity enhancement measures on land that they control outside the application site, whether through ownership or a suitable long lease. Such land preferably should be adjacent or close to the application site (and shown within a blue boundary line on the planning application location plan). A template for a planning condition used by Lichfield Council to secure off-site NBB measures on other land controlled by the applicant is at Appendix 3. However:

- There will be few cases where an applicant is in a position to propose such measures on other land they control.
- A LPA interviewee foresaw problems in enforcing a condition if the land ownership or conditions of lease were to change. Despite a condition 'running with land', the enforcement complexities increase with time passing, especially if a new owner of land outside a development is not cooperative.
- LPAs are likely to be concerned about the resource-intensive nature of drafting and enforcing such conditions, as indicated by the complexity of the condition at Appendix 3.
- Conditions should normally be 'dischargable' (i.e. implemented) within the expected period of a development's construction, or at most a few years after. Other than for particularly large developments phased over many years, it is hard to see it being practicable to enforce completion of off-site NBB conditions within that timescale.
- Conditions such as that at Appendix 3 require that applicants and/or their agents be knowledgeable, interested and prepared to invest significant time in order to successfully implement an off-site NBB scheme.

6.30 For these reasons I cannot recommend such conditions to secure off-site measures in those cases where a developer does control, or is willing to gain control of, land outside the development site.

6.31 LPAs sometimes navigate the constraints on the use of conditions by considering whether they can impose what are called 'Grampian' conditions. The 2014 Welsh Government Circular says:

3.46 Although it would be ultra vires to require work to land over which the developer has no control or which requires the consent of a third party, to carry out, it may be possible to achieve a similar result by a condition worded in a negative form, prohibiting development until a specified action has been taken. Such conditions are often called 'Grampian' conditions In Grampian R.C. v City of Aberdeen (1984) it was held that a condition can be negatively phrased i.e. it can provide that a development is not carried out, or is not occupied, until certain works have been carried out on land that is not in the control of the applicant.

3.47 *These conditions should not be imposed if there is no reasonable prospect of the required action being performed within the time limit imposed by the permission [normally 3 years].*

And later ...

5.63 *By their nature, Grampian conditions are drafted negatively and require that the development permitted should not be commenced, or occupied, until a specified obstacle to that development has been overcome on land that is not in control of the applicant. As with other conditions, Grampian conditions must be constructed having regard to the particular circumstances that exist and which affect or are affected by the development. ...*

5.65 *The use of Grampian conditions should generally not be considered where there is no prospect of them being delivered. This is however, a matter of policy and the decision maker has discretion as to whether Grampian conditions should be attached, depending on the individual circumstances.*

6.32 The use of Grampian conditions was discussed with some interviewees, as a possible approach to secure off-site NBB measures. However they could not see a way to draft such a condition in such a way that it would meet the six tests. I agree and accordingly cannot recommend this type of condition to achieve the study aims.

6.33 To conclude on conditions, in practice these cannot be used to achieve NBB outside the planning application site.

Community Infrastructure Levy

6.34 The Community Infrastructure Levy (CIL) was introduced in England and Wales in 2008. WG produced [guidance](#) in 2011 and elsewhere CIL is [summarised](#) as:

'... a charge which can be levied by local authorities on new development in their area. It is an important tool for local authorities to use to help them deliver the infrastructure needed to support development in their area. The levy only applies in areas where a local authority has consulted on, and approved, a charging schedule which sets out its levy rates and has published the schedule on its website. Most new development which creates net additional floor space of 100 square metres or more, or creates a new dwelling, is potentially liable for the levy. There is still a role for development-specific planning obligations to enable an LPA to be confident that the specific consequences of development can be mitigated. Unlike the CIL, contributions under Section 106 agreements are negotiable.'

6.35 The CIL charging schedule may include 'green infrastructure', which can encompass biodiversity enhancement. However, as with other forms of infrastructure this would require at least some specific projects to be identified in advance and fully costed, and then consulted on through the lengthy process to adopt a charging schedule.

6.36 Progress with implementing CIL in Wales has been slow, even in large urban areas. For example, Cardiff City Council's website explains the current state of play there:

'Once the Welsh Government set out their approach to Community Infrastructure Levy, the Council will then consider how best to progress a CIL for Cardiff. The

Council will continue to seek all developer contributions through Section 106 until further notice.'

6.37 The CIL initiative is similarly stalled across local authority areas in North Wales. Consequently there is no scope to utilise CIL in the short to medium term. Only in the longer term might CIL offer a means to secure off-site NBB measures as part of new or improved existing green infrastructure. The introduction of Strategic Development Plans (para 2.27) could be an opportunity to promote this in North Wales, possibly with the backing of NRW in the context of Area Statements as these are refined.

S106 Obligations – Planning Agreements and Unilateral Undertakings

6.38 The use of planning obligations in development management is addressed by a 1997 [Welsh Government Circular](#) which is still largely up to date. Senedd published a useful [guide](#) in 2019 which succinctly summarises their purpose:

'S106¹⁴ agreements are intended to mitigate the negative impacts of a development to make it acceptable in planning terms. They require developers to meet specified planning obligations when implementing planning permissions and are the result of negotiations on these matters between the parties. An agreement may be entered into to prescribe the nature of development, secure a contribution from a developer to compensate for any loss or damage caused by a development, or mitigate a development's wider impact.'

6.39 S106 obligations can also take the form of a 'Unilateral Undertaking' offered by the owner, without the Council having to be party to an agreement. If either form of S106 obligations document is required to make a development acceptable in planning terms, the decision notice granting planning permission will not be issued until the S106 document has been signed. Such documents usually come into force either when permission is granted or when development commences.

6.40 Section 122(2) of the Community Infrastructure Levy Regulations 2010 codifies in law a long-standing planning policy that a planning obligation may only constitute a reason for granting planning permission if the obligation is:

- (a) necessary to make the development acceptable in planning terms
- (b) directly related to the development; and
- (c) fairly and reasonably related in scale and kind to the development

6.41 As with conditions, a S106 Agreement or Unilateral Undertaking cannot be used to require the owner of a development site to do things on land they do not have control over. However, they may be used to secure financial contributions from the developer for off-site measures, including NBB, undertaken by a third party(s).

6.42 In practice there are several complications and potential difficulties with using S106 obligations:

- **Justification:** Contributions must be justified and calculated in a transparent way to show that they meet the three criteria above. Otherwise, planning applicants can reasonably argue that the council wants to impose what amounts to an unfair

¹⁴ This being the relevant section of the Town and Country Planning Act 1990 (as amended).

tax. LPAs often address the need for different types of obligation when reviewing their local development plan (LDP). Detailed supplementary planning guidance (SPG) may be prepared or updated at that stage. SPG may include schedules where calculations on contribution rates are set out and regularly updated to reflect new information such as cost changes including inflation.

- Timescale: LDP reviews take years and even preparation of an SPG can take a year or more, partly because of the need to consult. Developers understandably seek certainty about the various planning obligations they are likely to be asked for, especially any substantial contributions, so that these costs can be factored into land valuation and purchase negotiations with landowners (referred to at para 6.6 above). It may not be reasonable for a LPA to require a substantial contribution for off-site NBB measures after land purchase has been negotiated if the additional contribution could impact significantly on development viability. However, this issue does not arise for development proposals that an existing landowner wishes to pursue and where land transactions are not involved.
- Administration costs: S106 documents require solicitors in drafting and related work, including background checks on land ownership and registering obligations as local land charges. They also result in other work for LPA staff, who have to log, monitor and enforce implementation of the document provisions. There may be little extra administrative cost in securing a biodiversity contribution if this is to be added to a list of other contributions, as would typically be the case for large and complex developments. However, for small developments where S106 obligations would not otherwise be needed, the cost of preparing documentation covering only off-site NBB could be prohibitive and disproportionate compared to the relatively modest contribution sought.
- Pooling restriction: Current law in Wales¹⁵ imposes a restriction preventing local authorities from ‘pooling’ more than five separate Section 106 obligations to fund a single ‘infrastructure’ project. The definition of ‘infrastructure’ includes ‘open spaces’¹⁶. However, ‘open spaces’ can be interpreted as meaning land which is to be used primarily for public recreation, rather than to a project to enhance biodiversity on land where there may or may not be public access. Thus there appears to be doubt about whether the pooling restriction would apply to developer contributions raised via S106 obligations to fund off-site NBB projects. If it does apply, the restriction could be problematic if many small S106 contributions are to be raised, but relatively few ‘recipient’ NBB projects can be identified. In England the pooling restriction was removed in 2019. Welsh Government has yet to decide what to do. The pooling restriction is considered further at paras 7.41 - 43.
- Development by local councils: For such proposals, ‘Chinese walls’ are usual between officers making the proposal and officers advising councillors on whether to grant permission. A LPA cannot enter into a S106 Agreement with ‘itself’, because these documents were not intended for this purpose. Whether a

¹⁵ Section 122(3) of the Community Infrastructure Levy Regulations 2010 and Localism Act 2011, devolved through the Wales Act 2017.

¹⁶ Section 216(2) of Planning Act 2008, as amended by Regulation 63 of the CIL Regulations 2018.

council (which may not be the LPA) can instead enter into a Unilateral Undertaking to fund off-site NBB measures is a matter on which legal advice would be needed.

- DNS and NSIPs: Para 2.41-42 refers. Local planning authorities are not the determining authorities for these projects, but they are expected to [consider entering into planning obligations](#) with the applicants where appropriate. Any proposed obligations must then be taken into account by the decision maker (a government minister). A financial contribution for off-site NBB measures could reasonably be required via a S106 obligation if policy compliance cannot be achieved on-site. Indeed, LPAs would be failing in their S6(1) duty not to consider this matter when DNS and NSIP proposals are consulted on.

6.43 There was consensus among interviewees that for developments where:

- the LPA takes the view that NBB is not achieved on site, and
- there will in any case be a need for a Section 106 Agreement covering obligations about matters other than biodiversity

the sensible approach will be simply to add another obligation into the schedule of obligations. This could be entitled a 'net benefit for biodiversity contribution.'

6.44 I agree and recommend:

- The draft text of a standard biodiversity enhancement contribution at Appendix 6. The text uses phraseology drawn and adapted from two standard S106 agreement templates. One is Conwy Council's [standard template](#) and the adapted text relates to an 'open space contribution'. The other is produced by Bracknell District Council and the adapted text relates to a contribution for off-site biodiversity measures outlined in Appendix 4 para 27.
- All LPAs in a pooling scheme area (considered in Chapter 7) agree a finalised standard wording for the biodiversity enhancement contribution and this is used consistently across the pooling scheme area.
- Where the applicant decides to submit a S106 Unilateral Undertaking instead of entering into an Agreement with the LPA, the LPA advises the applicant to use the standard wording for the biodiversity enhancement contribution. The LPA could warn that if the applicant chooses a different form of wording, then this could result in delay in determining the application due a need for input from legal advisors.

6.45 For all planning applications where there would **not** otherwise be a requirement for a S106 document, I recommend there are two S106 options to secure a contribution for off-site NBB measures:

- A single topic S106 **Agreement** – This should include the biodiversity enhancement contribution as drafted (or improved upon) in Appendix 6. The rest of the template could be adapted from the single topic S106 Agreement template used by Bracknell District Council for the purpose outlined in Appendix 4 para 27. This template is used for developments as small as a **single**

dwelling. Alternatively, an agreement template could be adapted from a single topic template used by Carmarthenshire County Council for offsite biodiversity measures outlined in Appendix 4 para 24. Their template is used for a wide range of development types and sizes, including housing proposals as small as a **single** dwelling. The texts of the Bracknell Forest and Carmarthenshire templates are not appended, but are available from the author on request.

- A single topic S106 **Unilateral Undertaking**. This could be based on Denbighshire Council's standard template and guidance for applicants to complete a Unilateral Undertaking for just an open space contribution¹⁷ but adapted, and incorporate the same or similar biodiversity enhancement contribution text as in Appendix 6. Many other LPAs also produce standard Unilateral Undertaking templates, including a single issue [Undertaking for an open space contribution](#) produced by Hull City Council which is only two pages long. That could be readily adapted to be used to secure a biodiversity enhancement contribution. A draft of guidance, checklist and template for a Unilateral Undertaking that provides a financial contribution only to secure off-site NBB measures is at Appendix 8.

Administration costs and dealing with S106 risks in a proportionate way

- 6.46 A standard Unilateral Undertaking template for the single purpose of securing an off-site biodiversity enhancement contribution would need to be provided to the applicant with a guidance sheet on completing it. Such an Undertaking has the advantage over an Agreement that it would take less time and no legal expertise to prepare, so should be completable within the 8 week target for determination. It will also save LPA legal staff from having to liaise with the applicant to draw up a S106 Agreement.
- 6.47 One LPA interviewee said in his experience Unilateral Undertakings do not necessarily save time. However there is a way to address this concern. It is to make clear to applicants that, where an Undertaking is only to facilitate a single contribution for biodiversity enhancement, the LPA will not countenance any variation in the form of wording whatsoever, unless the applicant agrees to meet the LPA's legal costs for the time involved in considering any differences in text. Junior admin staff or the case officer will be able to check there is no variation in wording without having to involve a LPA solicitor.
- 6.48 Normal practice with S106 Agreements and Unilateral Undertakings includes the LPA legal department checking the adequacy of the undertaking, which will include checking the title to the land and registering the Undertaking as a local land charge. For this and any other legal work entailed, the LPA often charges the applicant a fee. However, to keep legal input and therefore costs down - costs that may be disproportionate in relation to the contribution raised from small developments - I recommend that consideration be given to dispensing with the normal checks in at least some if not all cases. My reasoning is as follows.

6.49 [intentionally blank]

¹⁷ This template does not appear to be available on the web, but a copy can be provided by the author on request.

6.50 As regards title, the issue is one of risk management. Whereas a LPA understandably will wish to make diligent checks with undertakings involving large sums of money for council services, affordable housing etc, the worst that can happen if no checks are undertaken for a relatively small contribution for off-site NBB measures is that a small proportion of undertakings prove unenforceable. However, that is a far less severe outcome than LPAs declining to accept single purpose Undertakings for off-site NBB measures, simply because of inflexible administrative routines that would be disproportionately costly compared with the sums raised. Moreover, if an applicant were to give false information about title they could be pursued in the courts. For law-abiding applicants, the harm to their reputation would be a significant disincentive to such fraud.

Logging and monitoring of S106 obligations

6.51 LPAs will have in place a system for logging and tracking developer contributions via S106 Agreements and Unilateral Undertakings. Interviewees from Carmarthenshire and Bracknell Councils have shared their Excel spreadsheets for tracking contributions for their developer-funded biodiversity/open space programmes. These documents may be of interest to other LPAs in Wales to avoid 'reinventing the wheel'. However, the pooling organisation(s) considered in Chapter 7 will also need to keep track of all contributions for off-site NBB measures. The documents will include S111-based agreements considered at paragraph 6.58 as well as S106 Agreements and Undertakings. To avoid administrative duplication I recommend that:

- LPAs email a copy of all such completed documents to the pooling organisation when decision notices are issued, and
- consideration is given to the merits of the pooling organisation taking on **sole** responsibility for tracking and ensuring payments are made.
- Commencement of development is probably the best trigger point to require payments.

6.52 Depending on the precise wording of a S106 agreement or Unilateral Undertakings, or a S111(1) agreement, it may be necessary for decision notices to include an **additional condition** requiring the applicant to notify the LPA when development commences. This would enable the LPA or NRF administrator to prompt for payments to be made when due.

Contracts not governed by planning legislation

6.53 In view of the potential difficulties and costs with S106, the study has investigated the merits of various forms of contract that could be drawn up between the LPA and planning applicant that would not be governed by planning legislation.

Letters of agreement

6.54 Some LPA interviewees were asked about the idea of using informal '*letters of agreement*' that fall short of a formal contract recognisable in law. None could think of instances where such agreements had been used to achieve a planning purpose and they advised that such an approach would be unenforceable. I agree.

Community benefit contributions

6.55 '[Community benefit contributions](#)' are being pioneered by Anglesey Council. The Council's strategy for these is at pains to say that the offer of such contributions, and their acceptance by the Council via a 'memorandum of understanding' is entirely outside the planning system. This means that such contributions cannot lawfully be considered in the determination of normal planning applications decided by the Council, NSIPs or DNSs. The annexes to the Council's strategy walk a legal tight rope concerning what is, and what is not, permissible to consider in statutory planning. Protocols are set out to avoid any appearance of maladministration.

6.56 One of the annexes includes the following text in relation to off-site 'community' benefits, but the text seems equally applicable to biodiversity benefits:

'2.3 In the statutory context a developer may also offer community benefit where, although the offer is not directly needed to overcome what would otherwise be a legitimate objection, there is still a sufficient link between the offer and the development to enable the decision maker to attach such weight as they see fit to that offer of community benefit.'

*2.4 Outside these classes, where the decision maker will not take into account that offer when deciding on the grant of the development consent it will be for the developer to consider whether it sees any reasons for making such an offer but those reasons may include the creation of a more positive environment in which its development aspirations could be achieved or in addressing a need within a local community **as a proxy for addressing some impact from its development that is incapable of fully effective mitigation** [emphasis added].'*

6.57 It seems that the reference in the second paragraph above to 'impacts' is to negative impacts that are themselves 'material' planning considerations and so **are** weighed in the planning balance. Yet the '*proxy for addressing*' those impacts is not to be taken into account by the planning decision maker. Thus a development may cause unmitigable environmental harm (and/or the risk of harm), but nevertheless be permitted because benefits outweigh the harm. Yet in that scenario the developer nevertheless may want to offer community benefits that somehow create a 'positive environment' as a proxy for addressing the harm - even though apparently that offer has no bearing on the planning decision. I consider this to be problematic, both conceptually and perhaps in practice. Consequently I do not recommend such memoranda of understanding to secure off-site NBB measures.

Agreements under Section 111(1) of the Local Government Act

6.58 I asked LPA interviewees if they could think of any kind of simple but legally enforceable agreement between a LPA and a planning applicant other than via [Section 106](#). One example was identified - an 'Open space contribution agreement' that Denbighshire Council offers to applicants as an alternative choice to entering into a Unilateral Undertaking under Section 106. Denbighshire's combined guidance and template agreement document¹⁸ is based on provisions in [Section 111 of the Local Government Act 1972](#) entitled 'Subsidiary powers of local authorities'. Section 111(1) states:

'... a local authority shall have power to do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.'

6.59 But Section 111(3) states:

'A local authority shall not by virtue of this section raise money, whether by means of rates, precepts or borrowing, or lend money except in accordance with the enactments relating to those matters respectively.'

6.60 Section 111(3) seems to rule out the use of agreements to 'raise money' for off-site NBB measures because there are already 'enactments' relating to raising money for planning purposes, notably S106.

6.61 However, Denbighshire Council evidently sees no legal impediment to using an agreement under S111(1) to secure open space contributions from developers. Denbighshire's approach is grounded in relevant LDP policy and [SPG on public open space](#).

6.62 On further investigation, it transpires that Portsmouth City Council is using agreements under S111(1) to raise developer contributions towards its '[Solent Recreation Mitigation Strategy](#)' which is intended to fully mitigate the impacts of development on three estuarial Special Protection Areas for birds. There is [guidance](#) to applicants on completing a [template](#) for such an agreement. Because these contributions are raised for off-site biodiversity measures to achieve planning purposes, they are even more relevant to this study than Denbighshire's use of agreements under S111(1).

6.63 At Appendix 7 Denbighshire Council's template for an agreement under S111(1) is adapted to create a template for an '*Offsite biodiversity enhancement contribution agreement*'. Like Denbighshire's template for an open space contribution agreement, the adapted document fits comfortably onto only 2 sides of paper. It would be easy to prepare a document such as that at Appendix 7, but based on the Portsmouth template.

6.64 Presumably both Denbighshire and Portsmouth Councils sought legal advice before taking the S111(1) route. A key to its lawfulness in light of S111(3) seems to that a **choice** is offered to applicants, as indicated in this extract from Portsmouth Council's

¹⁸ This is not available on the web, but can be provided on request to the author.

agreement template which is almost identically worded to the corresponding paragraph in the Denbighshire template:

*'I [that is the applicant] have been informed of the opportunity to complete a unilateral planning obligation (in accordance with Section 106, Town and Country Planning Act 1990) undertaking to make the habitats mitigation contribution when development commences and I have **chosen** to make direct payment as an expeditious alternative to relying on such a unilateral planning obligation.'*

- 6.65 For planning applicants, the great attraction of an agreement under S111(1) is that it saves the professional / administrative costs in preparing a S106-compliant Undertaking. For LPAs, an agreement under S111(1) likewise offers a much less cumbersome administrative burden than even the most basic legally compliant S106 Agreement or Unilateral Undertaking.
- 6.66 Unlike S106 obligations, an agreement under S111(1) would not 'run with the land' and so could not be enforced if the development site changes ownership. However, most applications for small development are submitted by householders or small businesses who intend to develop themselves. So only a small proportion of such agreements would be likely to become unenforceable for this reason. Providing the vast majority of such agreements are effective, it would not be disastrous if a few fall away. It is far more important to avoid administrative costs on both sides that could arise with the S106 route if small contributions are to be raised.
- 6.67 One interviewee pointed out that S111 agreements would seem not to be bound by the pooling element of S106 (para 6.42 refers). However it would be wise to get a legal opinion on this.
- 6.68 It could be argued that if UK or Welsh Government had intended agreements under S111(1) to be used as an alternative to S106 obligations, then national level guidance would have been issued long before now on circumstances where it may be appropriate to use the S111(1) power to this end. No such guidance exists. Moreover, just because some innovative councils have used agreements under S111(1) to achieve particular planning policy requirements in a cost-effective way is not sufficient argument alone to justify using the S111(1) power for the off-site NBB outcomes sought by this study.
- 6.69 Nevertheless, just because a particular use of the S111(1) power has not been tried before is not itself a reason to reject a new idea and insist on sticking to 'tried and tested' S106 means - particularly if those means have significant limitations and disadvantages in achieving policy compliance in a proportionate and timely way. It seems to me appropriate to assess whether using the S111 (1) power for the purposes of this study would:
- Comply with the three legal tests for planning obligations at Section 122(2) of the Community Infrastructure Levy (CIL) Regulations 2010, reproduced at para 6.40. This matters because S111(1) would be used to achieve precisely the same ends as a S106 obligation (as the Portsmouth template extract at para 6.64 makes clear).

- Be robust in terms of the common grounds on which legal challenges to planning decisions may be brought to the Courts¹⁹. This matters because a novel use of a local authority power may be challenged unless that use plainly complies with requirements arising from planning case law.

6.70 Tables below and overleaf consider these questions. The tables are not relegated to an appendix because their content is central to achieving the study aims.

Table 3: Compliance with CIL Section 122(2) tests

Would an agreement under S111(1) be necessary to make the development acceptable in planning terms?	Yes. The purpose of the agreement - to comply with PPW11 policy on achieving off-site NBB measures if on-site measures will not be sufficient - is necessary to make the development acceptable in planning terms.
Would an agreement under S111(1) be directly related to the development?	Yes. A S111(1) agreement, like a S106 obligation to achieve the same outcome, would be directly related to the environmental impact of the development proposal under consideration.
Would an agreement under S111(1) be fairly and reasonably related in scale and kind to the development?	Yes. The financial contribution secured would be calculated by a qualified ecologist on a basis set out in SPG that has been adopted by the Council after public consultation on a draft version. The SPG will be updated as necessary.

Table 4: Robustness against common grounds of legal challenges to decisions on planning applications

Would the LPA be 'misdirecting' itself in law by exercising the (S111(1) power wrongly?	<p>The S111(1) power allows LPAs to do '<i>anything ... calculated to facilitate the discharge of any of their functions</i>'. This is a broad, unrestricted power and an LPA's functions obviously include statutory planning. It is one of their main functions.</p> <p>S111(3) does not appear to prevent agreements under S111(3) for planning related purposes, providing a choice is offered to applicants – see para 6.64. Portsmouth City Council is unlikely to have erred in law by not obtaining sound legal advice.</p>
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¹⁹ By judicial review in the case of a challenge to a LPA's decision to grant planning permission, or by a challenge under Section 288 of the Town & Country Planning Act if the applicant has lost a planning appeal.

<p>Would use of the S111(1) power be irrational?</p>	<p>No. It is entirely rational for the reasons in Table 1.</p>
<p>Would the LPA be taking into account irrelevant matters or failing to consider relevant matters?</p>	<p>No, the matters in Table 1 would be entirely relevant to the LPA's functions and to a planning application where a financial contribution for off-site NBB is required to achieve policy compliance.</p> <p>An LPA would not be failing to consider the relevant matter of the alternative S106 route to securing a financial contribution. Rather, the LPA and the applicant would be rationally choosing to use S111(1) to achieve the same outcome as with using S106, but at lower cost to both parties and less risk of delay to determination of a planning application. These are entirely reasonable grounds to use S111(1), unless a S106 agreement is in any case to be used to secure contributions to achieve other planning objectives. This report recommends the use of S106 in those circumstances.</p>
<p>Would the LPA authority be properly following relevant statutory procedures or principles of natural justice?</p>	<p>Paras 6.76 - 82 address the need for applicants to be informed about policy on NBB and the possible need to make a financial contribution early in the development statutory management process. This respects natural justice in the development management process.</p> <p>Paras 6.71 - 72 recommend that applicants are always given the choice whether to commit to a financial contribution under S111(1) or S106. This also demonstrates natural justice, as there is no improper compulsion to use S111(1).</p>
<p>Is there a legitimate expectation that the LPA, by its own statements or conduct, would act in a certain way, but they have failed to do so?</p>	<p>There is a risk if, in the effort to save costs, LPAs do not comply with PPW11 and their own SPG on NBB when determining planning applications for the council's own developments - schools, road etc. Making other developers pay a financial contribution but exempting the Council itself without rational grounds would offend natural justice. But nobody is suggesting this sort of exemption. See paras 6.21-22.</p>

6.71 I recommend:

- A planning barrister's advice (an 'opinion') is sought about the legal robustness of using agreements under S111(1) for the purpose of securing contributions for off-site NBB measures in cases where net benefit cannot be achieved on-site. The barrister should be referred to Portsmouth City Council's use of S111(1).
- Subject to an affirmative opinion, unless S106 obligations are required for other purposes (in which case the recommendation at para 6.45 applies) a template agreement under S111(1) should be offered to planning applicants if a financial contribution for off-site NBB measures will be needed to achieve policy compliance. A draft S111(1) agreement template is at Appendix 7, but a template could also be modelled on Portsmouth Council documentation. The template should be made available on LPA web pages.
- A common template and accompanying guidance should be used by all LPAs in each Nature Recovery Fund pooling area recommended in Chapter 7.

6.72 However, I recommend that agreements under S111(1) are only 'one tool in the toolbox'. Applicants will be able to choose to complete a Unilateral Undertaking instead (para 6.64), or a S106 agreement if they are prepared to pay the LPA's administration costs. But why would applicants opt to use S106 if the easier, cheaper and quicker S111(1) option is open to them?

Ensuring timely information for the applicant and case officer

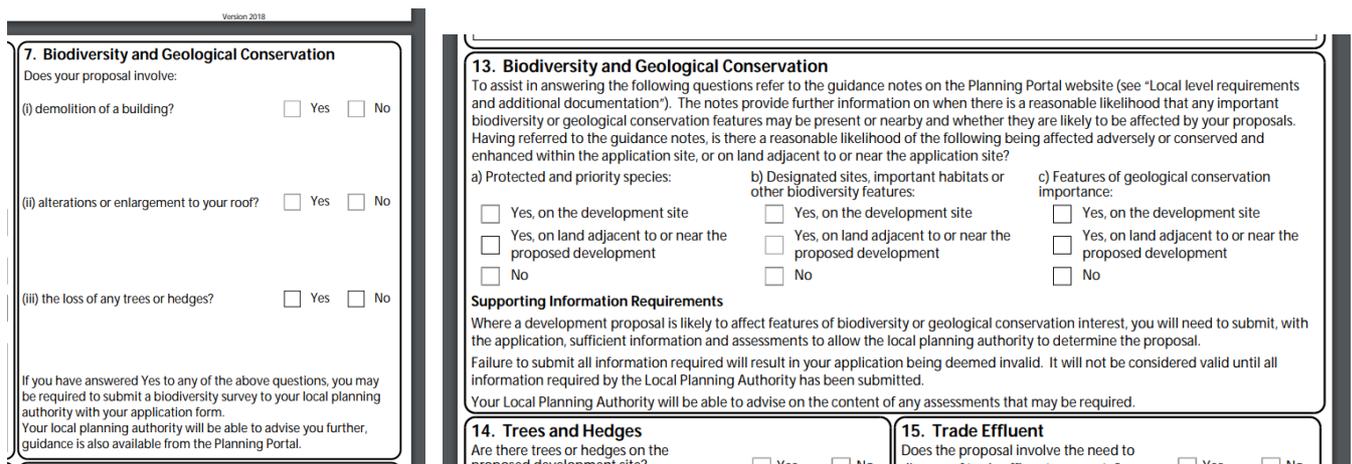
6.73 LPA interviewees were concerned that the process required to implement policy on NBB, especially if off-site measures are required, will require additional work and therefore time, leading to slower decision making. They thought this most likely to become problematic for smaller development proposals where, typically, the applicant does not employ professional advisors. Slower decision-making could result in the statutory target period to determine applications being missed.

6.74 For the applicant, delay itself can impose additional costs. If applicants are aggrieved at any aspect of development management process they may be more likely to lodge an appeal or even make a legal challenge. Both would put additional pressure on LPA resources. Moreover, avoidance of delay and risk of appeal or legal action could provide a perverse incentive for LPAs to do only the minimum to comply with NBB policy, or even to avoid consideration of any need for off-site enhancement rather than apply the policy with rigour.

6.75 The recommendation above to use simple agreements under S111(1) will go a long way to minimising delays and saving costs, notably legal fees. However, other measures will also be needed to enable applicants, case officers and LPA ecologists to fulfil their roles without causing significant delays or inadvertently causing grounds for appeal.

What applicants need to know and do

- 6.76 Most planning applications must to be determined within an eight week statutory target from the date of ‘validation’²⁰. Successfully completing the development management process by the target date will depend on timely provision of all information needed to determine the application. It is vital that adequate information on proposed measures to achieve NBB is provided with the application form, not weeks after validation. This is underlined by a recent planning appeal case in North Wales that one interviewee mentioned. The LPA lost the appeal in part because a condition about biodiversity measures was judged unreasonable; the appellant had not been given sufficient notice of what the LPA required of them.
- 6.77 Obtaining information ‘up-front’ may not be problematic for larger and more complex developments²¹, which in any case may have a longer statutory period for determination. Typically, there will be pre-application discussion and the applicant will use consultants with ecological expertise who will be aware of policy requirements and will submit an ecology report with the planning application.
- 6.78 Inadequate information is far more likely to be a problem with smaller developments, including householder applications, for which the applicant may not employ professional assistance to prepare their application and may not take advantage of procedure to obtain pre-application advice from the LPA.
- 6.79 These days most applicants will download a planning application template from the LPA’s planning webpages. One interviewee made the point that the standard planning application templates that *WG guidance* recommends (and which can be found on the Planning Inspectorate Portal) do not include a space for the applicant to provide information the LPA can use to assess impact on biodiversity except in certain limited respects. The screenshots below show the part of standard application forms used in Conwy Borough for ‘householder development’ (left) and ‘full planning permission – minor development’ (right).



²⁰ An LPA validates an application when officers are satisfied that all necessary information has been submitted with the application form.

²¹ For these, the target may be 16 weeks, or an agreed bespoke timescale.

6.80 These screenshots show that only information requirements on biodiversity are in relation to protected species such as bats, trees & hedges and proximity to designated sites.

6.81 To address the information deficit, I recommend that LPA web pages that advise applicants before they make their planning application need to have prominent additional text in plain, jargon free language on how to comply with policy on NBB. It is not for me to advise LPAs on precisely how to draft messages on their websites. However, the ‘signposting’ text below is an example of the sort of message that could be added on a page such as the screenshot below, which is the text that someone will see if they go to the first planning page on the Conwy Council website and then click on ‘Submit a planning application’.

‘Welsh Government recently advised that it will normally be necessary to refuse planning permission if biodiversity enhancement is not proposed as part of a planning application. You can find out about the policy and what this means for you [here](#)’ [taking the person to guidance and other relevant documents].

Submit a Planning Application
The simplest way to submit a planning application is online via the Planning Portal. Registration is easy and you can complete your application form, upload supporting documents and pay fees online.

Submit a Planning Application Online via the Planning Portal

New fees for planning and related applications come into force on 24th August 2020.

The benefits of applying online include:

- You can work on your applications in draft before submission
- Immediate delivery and acknowledgement
- Savings on postage and printing costs
- Online help function when completing applications
- Online record of your completed applications

If you prefer you can complete your application form online and submit supporting documents and fees by post.

Please note a planning application cannot be progressed until all the necessary supporting information and the appropriate fee is received.

In this section

- > Planning
- > Annual Planning Performance Report
- > Appeal a planning decision
- > Pre-Application Advice
- > Changes to Development Management Processes
- > Comment on a Planning Application
- > Fortnightly List of Planning Decisions
- > Local Validation List (LVL)
- > Validating and determining applications
- > Pay Planning Fees
- > Planning Explorer
- > **Submit a Planning Application**
- > Extensions to seasonal Occupancy of Cravan Sites

6.82 Doubtless other places on each LPA’s relevant web pages may be suitable for such text. But in one place or another, applicants must be suitably signposted to guidance enabling them to provide sufficient information with the application. At Appendix 5 is a draft of brief text in plain, jargon free language that might be appropriate for the applicant to read when they click ‘[here](#)’. Clearly each LPA must decide on appropriate text and the appended draft is offered just to indicate what may be needed. However, I recommend that:

- all LPAs in North Wales, and indeed in Wales as a whole, use similar web text.
- WG consider (a) what the text should include and (b) whether the suite of standard planning application forms should also be amended to make it easier to provide fuller information on biodiversity enhancement on the form itself. This is particularly important for small and medium sized developments.

The role of LPA ecologists

6.83 In cases where an eight week statutory target for determination applies and S106 obligations are not required for purposes other than to achieve off-site NBB measures, I recommend:

- The LPA ecologist should get their recommendations (following the approach in Table 2 under para 5.11) back to the planning application case officer within 3 weeks of validation.
- If the ecologist recommends that a financial contribution is required for off-site NBB measures, then no later than 4 weeks after validation the case officer sends to the applicant an email. This would need to explain what contribution is sought and why, together with templates and guidance to complete either a S106 Unilateral Undertaking or S111(1) agreement, as recommended at paras 6.71-72. Applicants could have 2 weeks to return the document, taking the case to 6 weeks from validation.
- If LPAs do want legal staff to check on Unilateral Undertakings (in cases where the applicant chooses this rather than a S111 agreement), then the case officer should forewarn legal colleagues when applicants are emailed at about 4 weeks. On return of documents at about 6 weeks, it should be possible for admin staff to check title to the land, register the Undertaking as a local land charge (if really necessary) and log S106 Undertaking & S111(1) agreements on a tracking spreadsheet (see para 6.51).

6.84 The above timings are only suggestions, but it is important that LPA consider the scheduling issues that will arise with applying NBB policy.

6.85 Para 6.83 above sets out an important additional role for LPA ecologists. In many other respects their role in support of development management case officers need not change in order for the study aim to be achieved. In particular, ecologists will want to continue to give due priority to advising on larger or for other reasons important or complex developments. See para 4.2.

6.86 However, the assessment categorisation process recommended at para 5.11 and Table 2 will place significant extra demands on LPA ecologists if all unexempted applications are to be so assessed. There is a risk that ecologists may be overwhelmed by the additional workload. It is not the role of this report to instruct LPA ecologists on how they go about their work, but I recommend they:

- Devise a protocol with development management colleagues to be clear on what basis any planning applications are to be exempted from consideration of

whether a financial contribution for off-site NBB measures is required (see para 6.15).

- Consider how best to make swift biodiversity assessments of unexempted small development proposals, perhaps based on accumulated experience of similar proposals and relying on desk assessment aided by Google satellite view images, without having to make a site visit.
- Devise standardised short explanations for why some common development proposals, such as garden infill schemes, are generally considered not to achieve NBB through on-site measures alone.
- Due to the recommendation for a quality assurance stage at para 5.13 - 14, they consider how best to work as a team across LPA boundaries. In view of the workload pressure imposed by statutory determination targets, teamwork could include covering for each others' absences on leave etc to ensure case officers receive ecological assessments no later than about 3 weeks after an application is validated.
- Consider propriety issues regarding advice on their own council's development proposals, such as new schools, roads etc. LPA ecologists could come under inappropriate pressure to amend their professional advice in order to reduce the level of any substantial financial contribution for off-site NBB measures they consider necessary to achieve policy compliance²². One solution could be for council development always to be assessed by an ecologist working for a different council. In the case of the very large and controversial projects it might be appropriate to bring in a panel of independent ecologists charged with applying NBB policy.

6.87 In time, there may be a need to bolster the number of LPA ecologists working in a multi-LPA area pooling scheme. Para 7.39 raises the possible need to add an administrative fee into the calculation of contributions for off-site NBB measures required to achieve policy compliance.

Need for Supplementary Planning Guidance

6.88 The consensus among interviewees was that if LPAs are to have the option to require financial contributions for off-site NBB measures, then this will need to be explained and justified in a new document adopted by the LPA. I agree. Without such a document, any such requirement would be vulnerable to a successful planning appeal on the grounds that the three tests reproduced at paragraph 6.40 are not met.

6.89 The relevant form of document is 'Supplementary Planning Guidance' (SPG). The purpose of SPG is not to introduce new policy, but to explain Development Plan policy requirements in detail and guide the applicant so they can try to meet those

²² I have been asked why I think LPA ecologists might be particularly vulnerable to pressure - more so than other LPA officers who make recommendations on a council's own development proposals. Perhaps my concern is misplaced. However, the ecologist would be called on to make potentially difficult judgements on qualitative matters that are arguably harder to advise on than what is needed to comply with, say, highway design codes or parking standards.

requirements. Where a policy may require a financial contribution the SPG typically explains the basis and justification for calculating the contribution, depending on the circumstances of the development proposal in question (see para 6.42, first bullet).

6.90 WG procedural policy on preparing SPG is set out in the latest edition of its [Development Plans Manual](#), pages 208 – 211. The text starts:

‘Only the policies in the adopted development plan have special status under section 38(6) of the PCPA 2004 in deciding planning applications. However, Supplementary Planning Guidance (SPG) can be taken into account as a material consideration provided it is derived from and is consistent with the adopted development plan and has itself been the subject of consultation, which will carry more weight.

SPG does not form part of the development plan and is not subject to independent examination, but it must be consistent with the plan and with national planning policy. SPG cannot be linked to national policy alone; there must be an LDP policy or policy criterion that provides the development plan ‘hook’ whilst the reasoned justification provides clarification of the related national policy.

9.1 All SPG should be derived from an LDP policy ...’

6.91 On first reading of the above extract, there appears to be a difficulty in producing SPG *‘derived from an LDP policy’* and having an LDP policy *‘hook’*. This is because policies on biodiversity enhancement in LDPs across North Wales are out of date compared to more recent WG policy to achieve NBB in PPW11, reproduced at para 2.10. There is no point preparing SPG for out of date LDP policies that do not explicitly require development to result in NBB. Also, the above extract states that SPG cannot be linked to national policy alone.

6.92 However, the term *‘national planning policy’* in the Manual must refer to PPW, not to NP 2040 because the latter had not been issued when the Manual was last updated in March 2020. The point of SPG is to assist with interpreting and implementing policies in the Development Plan. Crucially, NP 2040 is now the top tier of the Development Plan, so there seems to be no reason why SPG cannot be prepared for NP 2040 policy on NBB (reproduced at para 2.11). Such SPG can have LDP *‘hooks’* by referencing relevant LDP policies, but should focus on implementation of NP 2040 policy ahead of LDPs being brought up to date regarding NBB.

6.93 There is no need for SPG to await the review of LDPs, or the production of SDPs (para 2.27) for North Wales. That way lies needless delay in implementing NP 2040 policy on NBB. Rather, the process of preparing SPG to apply NP 2040 in North Wales can help inform LDP reviews and emerging SDP policy on NBB.

6.94 I recommend that an SPG entitled *‘Planning for Net Biodiversity Benefit’* is drafted and consulted on during 2022, with the intention that it be adopted by all of the LPAs taking part in the pooling scheme(s) recommended in Chapter 7.

6.95 Consultation on a draft SPG is required by the Manual. An SPG that has been consulted on and improved in light of consultation responses will carry more weight in decision-making compared to a document on which there has been no consultation.

- 6.96 The SPG will need to be kept under review and, in due course, adapted to become SPG to updated LDPs and new SDPs, as well as to policy in the national tier of the Development Plan.
- 6.97 Drafting the SPG will not be ‘rocket science’. A number of SPGs that address off-site biodiversity measures already exist. These provide ideas for the structure and content of a SPG for North Wales. Examples include SPGs produced by [Carmarthenshire Council](#), [Flintshire Council](#), jointly by a partnership of 12 LPAs in [Berkshire & Surrey](#) and by [Lichfield Council](#). All but one of these examples stem from a need for developers to fulfil legislative requirements on protecting internationally designated wildlife sites and/or protected species, which are not directly relevant to the broader scope of SPG on ‘ordinary’ biodiversity and achieving NBB which is called for here. Nevertheless, all four examples are worth looking at before a SPG is drafted. Moreover, the RTPI has produced useful advice entitled [‘Biodiversity in Planning’](#) which includes links to other examples of good practice from which to learn.
- 6.98 I recommend that the SPG should be jointly badged by all the adopting LPAs, that it need not be long and should be structured to include the following:
- Background: briefly, the ‘biodiversity emergency’ in Wales and relevant legislation, particularly Section 6 of the Environment (Wales) Act 2016.
 - The PPW policy framework on NBB, stressing that this carries significant weight in determining planning applications.
 - The relevant local plan policies in each of the LDP areas covered by the SPG, identifying the extent to which they need to be revised in due course to conform to PPW. (This could be an appendix.)
 - Cross reference to forthcoming Welsh Government guidance and policy principles (para 3.14 - 15) and other helpful guidance on seeking to achieve NBB on-site. There should be no duplication of other good practice guidance in the SPG.
 - Any categories of development to be exempted from consideration of whether to require a financial contribution for off-site NBB measures. (Para 6.15)
 - The basis for calculating financial contributions, where considered necessary, for off-site NBB measures. This is a vital part of the SPG, so that applicants can understand and, if they wish, challenge the level of any contribution they are required to make.
 - How the policy requirement for NBB is taken into account in the development management process, including what information applicants are be expected to provide and by when (paras 6.76 - 82) and the choices available to them regarding S106 and S111 documentation and where to get templates and guidance (6.71 - 72).
 - How financial contributions will be pooled and spent, and where up to date information about this can be found. This is considered next, in Chapter 7.

7. Pooling and spending of contributions for off-site measures

Pivotal role of green infrastructure assessments

- 7.1 PPW11 includes policy that is highly relevant to identifying appropriate locations and specific sites on which to spend financial contributions for off-site NBB measures. Paras 6.2.1 – 12 cover ‘green infrastructure’, defined as:

‘... the network of natural and semi-natural features, green spaces, rivers and lakes that intersperse and connect places. Component elements of green infrastructure can function at different scales. At the landscape scale green infrastructure can comprise entire ecosystems such as wetlands, waterways and mountain ranges. At a local scale, it might comprise parks, fields, public rights of way, allotments, cemeteries and gardens. At smaller scales, individual urban interventions such as street trees, hedgerows, roadside verges, and green roofs/walls can all contribute to green infrastructure networks.’

- 7.2 PPW11 paras 6.2.6 - 7 require that:

‘Planning authorities should adopt a strategic and proactive approach to green infrastructure and biodiversity by producing up to date inventories and maps of existing green infrastructure and ecological assets and networks. Such Green Infrastructure Assessments should use existing datasets, and the best available information, to develop an integrated map-based evidence resource. Doing so will facilitate a proactive approach and enable contributions towards the well-being goals to be maximised.’

*The Green Infrastructure Assessment should be used to develop a robust approach to enhancing biodiversity, increasing ecological resilience and improving well-being outcomes, and should **identify key strategic opportunities where the restoration, maintenance, creation or connection of green features and functions would deliver the most significant benefits.** [emphasis added]*

- 7.3 Thus there can be no doubt that green infrastructure assessments should, in due course, play a pivotal role in deciding how to use levied financial contributions for off-site NBB measures. However, the production of these assessments and corresponding updating of LDPs will take years. As the biodiversity emergency is happening now, there is good reason to set up arrangements for pooling and spending of contributions as soon as possible, in parallel with preparation of green infrastructure assessments rather than afterwards. The following issues arise, with a need to make decisions soon.

Individual LPA-managed pooling schemes?

- 7.4 One way forward would be for each of the seven LPAs in North Wales to run its own separate scheme to spend financial contributions for off-site NBB measures located entirely within its council area boundary. Every LPA will already have an administrative system to track the collection of S106 contributions, bank them in suitable restricted accounts, audit expenditure on a range of projects such as school building and affordable housing, etc, and report on outcomes (para 6.51). So biodiversity enhancement could be added to that system. Councillors could exercise control over choice of projects and, if they wish, could seek as far as possible to locate NBB projects close to the developments from which contributions have been

raised. They could try to identify some projects on Council-owned land and also offer grants, for example to local community organisations as well as conservation charities.

7.5 However, this approach has significant disadvantages:

- Nature is no respecter of local authority boundaries. Limiting the range of opportunities to spend contributions to within an LPA's administrative boundaries would cut across ecosystems resilience principles and most likely lead to sub-optimal use of collected contributions. Two examples will suffice. A development site may be near a LPA boundary, and the best option for a NBB project nearby might be not far away, but in the adjacent LPA.²³ Arguably much worse, in a given year the 'stand out' strategic opportunity to invest in a particular biodiversity project of immense value for nature recovery could be thwarted if the LPA in question has not generated sufficient contributions to take action such as land purchase. Pooling could make the project quickly fundable, and the LPA area in question might 'wait its turn' for a few years for another substantial project within its boundaries to be resourced from pooled funds.
- LPA ecologists are already under considerable pressure, and administering the selection, design, implementation, monitoring and if necessary follow up actions on NBB projects would require additional staff resources and corresponding overheads.
- LPA ecologists would doubtless liaise and seek a degree of consistency, but inevitably there would be differences between LPA approaches that could be problematic, for example fuelling controversy in planning appeals about whether a contribution is justified and will be well spent.

Or a joint pooling scheme?

7.6 Interviewees asked about this subject all saw the benefits of a joint approach, whereby a group of contiguous LPA's work together through a pooled fund to implement projects in the wider area covered by the grouping. However, one interviewee had experience of a development management officer being intransigent in insisting that contributions for off-site biodiversity measures raised from one large development should be spent very close to that development. Several interviewees cautioned that many local councillors would want to see contributions spent in the 'patch'. That is understandable, as the main impacts of a development would be felt by the local community in question. Clearly there are important stakeholders who will need to hear convincing - and indeed inspiring - reasons to take a joint, multi-LPA approach.

7.7 In view of all the above considerations I recommend the best way forward would be a joint pooled scheme designed to:

²³ The inside cover of this report describes a site that is just within the Snowdonia National Park, but also in Conwy Borough, which is the local council for many functions such as education.

- Cover an area that dove-tails with existing and emerging ‘institutional architecture’ at the regional and sub-regional scale in North Wales, so as to align with partnership working at that scale rather than add further institutional complexity.
- Cover an area large enough to ensure optimal use of funds to achieve nature recovery goals.
- Over a period of years, though not in individual years, achieve nature recovery outcomes spread ‘fairly’ across all of the participating LPA areas
- Have governance arrangements that include representation from all the participating LPAs.

7.8 The first of the above criteria requires consideration of the regional and strategic planning context in North Wales. As noted at para 2.11, WG has published what is now the national i.e. top tier of the statutory development plan entitled [‘Future Wales, The National Plan 2040’](#) (NP2040). This splits Wales into four regions and includes spatial policies for each. The North Wales Region comprises the seven LPA areas of Gwynedd, Anglesey, Conwy, Snowdonia National Park, Denbighshire, Wrexham and Flintshire.

7.9 WG intends that self-selected groupings of LPAs in North Wales produce sub-regional SDPs that will provide a middle tier of the development plan applicable to each LPA area (para 2.27). LPAs in North Wales have not yet agreed on groupings, still less started work on drafting SDPs. However, it seems likely that there will be separate SDPs in North West and North East Wales, and that strategic level green infrastructure will be among the topics covered. This is because Policy 19 in NP2040 entitled *‘Strategic Policies for Regional Planning states’*:

‘Strategic Development Plans should ... establish for the region (and where required constituent Local Development Plans):

1., 2, 3, etc ...

10. ecological networks and opportunities for protecting or enhancing the connectivity of these networks and the provision of green infrastructure ...’

7.10 It may be that LPAs will decide to undertake joint green infrastructure assessments at the SDP level, rather than individual assessments for each LPA area.

7.11 One interviewee suggested that SDP preparation would be the appropriate place to introduce new policy addressing the aims of this study. However, as with green infrastructure assessments, the adoption of SDPs is some years away and there is an urgent need to get moving. A pooling scheme that gets underway soon could easily be amended later to respond to emerging SDP priorities and content on green infrastructure.

7.12 Ahead of work on green infrastructure assessments and SDPs, Natural Resources Wales (NRW) recently published the first iterations of ‘Area Statements’ for different parts of Wales. Areas Statement boundaries conveniently follow LPA boundaries. The [North West Area Statement](#) covers Gwynedd, Anglesey, Conwy and Snowdonia National Park, as indicated in the map from that Area Statement below left. The [North East Area Statement](#) Covers Denbighshire, Wrexham and Flintshire, as indicated on the right.

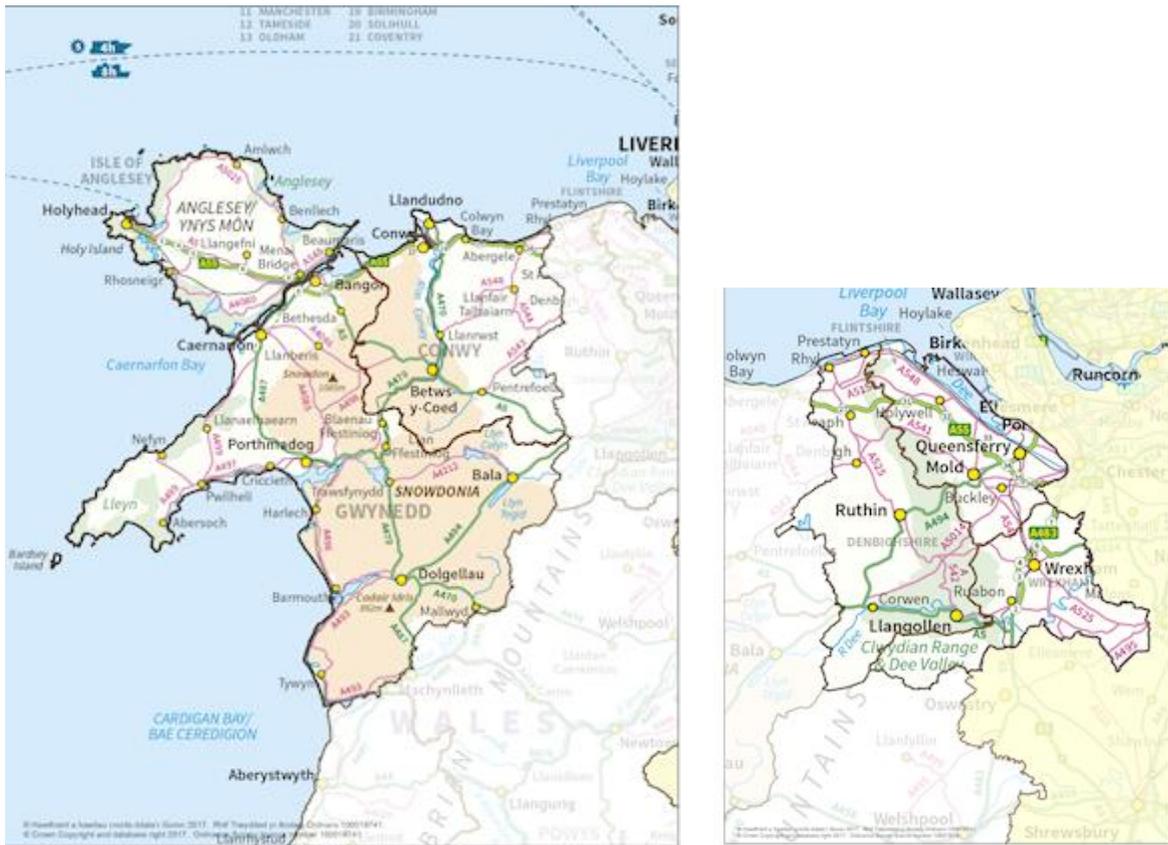


Figure 2: North West and North East Wales Area Statement boundary maps

7.13 It will be important to take account of what NP 2040 says about Area Statements in Policy 9, entitled *Resilient Ecological Networks and Green Infrastructure*:

Page 76: In collaboration with our partners, including Natural Resources Wales and local authorities, we require strategic action to safeguard ecological networks and secure biodiversity enhancements (net benefit).

Page 78: Area Statements ... [identify] ... key challenges and opportunities to strengthen ecological networks and ecosystem services. They provide local scale evidence and mapping of key environmental themes, and identify areas where action at the right scale can maximise benefits. Any priority areas for action identified in Area Statements are a material planning consideration and development plans should set out appropriate policies to safeguard and connect these areas. Plans should also protect and enhance their identified key ecological functions and features.

7.14 Intuitively, the whole of the North Wales Region seems too large an area for a single pooling scheme. However, each of North Wales’ two NRW Area Statement areas comprise clusters of LPAs that have much in common including cross-LPA boundary landscape-scale ecosystem characteristics. Moreover, they already work jointly on many aspects of council business and are set to work jointly on preparation of sub-regional Strategic Development Plans. With these facts in mind about the evolving institutional architecture of sub-regional planning and NRW engagement, I recommend that the clusters of LPAs in the diagrams above form suitable areas for

two separate pooling schemes - North West Wales and North East Wales. This will enable each scheme to reflect and help to deliver outcomes for nature's recovery in the corresponding Area Statements once those documents gain detail and traction. It should also be possible to dovetail outcomes sought with policies in SDPs as well as future LDP reviews.

7.15 I recommend draft working titles for these pooling schemes:

- The **North West Wales Nature Recovery Fund** (NRF) covering Gwynedd, Anglesey, Conwy and Snowdonia National Park
- The **North East Wales NRF** covering Denbighshire, Wrexham and Flintshire

7.16 If these recommendations find support from key stakeholders, then either:

- (a) separate SPGs as considered at paras 6.88 - 95 could be produced jointly by LPAs operating in each of the above NRF areas, or
- (b) a single SPG could be produced to cover the North Wales Region in NP 2040.

The latter could prove over-ambitious, as it would require seven LPAs to agree on content. However, a single SPG does make sense to provide overall consistency across North Wales, particularly to calculate financial contributions for off-site NBB measures.

Which organisation(s) would be best placed to administer a NRF?

7.17 In order to achieve optimal nature recovery outcomes, minimise administration costs and gain the trust and goodwill of LPAs and applicants for planning permission, I recommend that a NRF administrator must meet all the following criteria:

- Keen to take on this role and have an established reputation in promoting nature's recovery.
- Have sufficient staff (and/or, in principle, a sufficient number of highly committed volunteers) expert in the full range of ecology and land management skills needed to identify, select, plan, implement, monitor and report on NBB projects spanning the range of habitat types in, and across the whole area of, the NRF area.
- Be capable soon of publishing an initial 'pipeline' of suitable projects to be part or entirely funded through a NRF, and to start drawing up site management plans and costings to implement these projects. The list would need to be agreed by LPAs, kept under review and expanded. Projects could involve either land purchase or a long lease.
- Be capable and willing to administer grants from the NRF to award to suitable applicants for other projects (paras 7.30 - 33 below refers).
- Have in place suitable accounting and related governance arrangements to administer a restricted fund into which pooled contributions can be paid and spent. (All charities need to comply with charity law and Charity Commission [Guidance](#) and standards.) A planning applicant from whom a financial contribution is required needs to be confident that they can get a clear, informative

and indeed inspiring answer to the question *‘what are you going to do with my money?’*

7.18 One option for choice of administrator would be a partnership of all the LPAs in each NRF area, as listed at para 7.15. This might reduce some overheads compared with individual LPA schemes. However a joint scheme would require new formal governance relationships to be agreed and new resources committed to staff a joint implementation team²⁴. Moreover, one or more LPAs might decide not to participate and ‘go it alone’ instead. That reminds me of a situation in Hertfordshire, where I worked in an LPA environment team throughout the 1990s. Ten of the 11 LPAs in the county agreed to set up a jointly funded and governed Countryside Management Service (CMS), but one LPA did not join in. The CMS operated effectively nevertheless, with an invitation to the 11th LPA to join left open and continuing liaison with that LPA on matters of common interest. I see no reason why a joint LPA-administered pooling arrangement could not be set up in North Wales if one or even two LPAs did not want to join, at least initially. However, that would clearly be far from ideal and the case would be stronger for a single NRF covering the whole of the North Wales Region providing at least five of the seven LPAs were to join from the start.

7.19 The other option would be for LPAs to appoint an independent administrator that satisfies the criteria at para 7.17. Because this study was commissioned by the North Wales Wildlife Trust (NWWT) I have been careful to consider all the organisations that might be suitable and willing to take on this role, and to reach an independent-minded view on the suitability of the following organisations:

NRW – It is currently unclear what role NRW could play in directly administering the Nature Recovery Fund. However local staff have expressed an interest in being involved in conversations around the best way to manage this funding, and can explore NRW’s potential role once more details of any scheme are developed.

The **Woodland Trust** fulfils some of above criteria, but as its remit is mainly limited to woodlands and trees it would not fulfil at least the second criterion.

The **RSPB**’s remit encompasses all biodiversity on each of their reserves, not just birds. One interviewee queried whether a nationally based organisation such as the RSPB would wish to lead a scheme covering only a small proportion of its operational area without a compelling reason. However, RSPB could be approached and asked to consider whether the aims of a NRF in North Wales would fit with its UK-wide role and modus operandi.

The **National Trust** also fulfils some of the criteria, but remit is wide and biodiversity is only one important strand. I doubt it has sufficient staff expert in the full range of ecological skills specifically, as identified in the second criterion. Nevertheless the Trust could be approached and asked to consider the same question as that posed above in relation to the e.

The **Building Wildlife Charitable Trust**, information on which is Appendix 4 paras 16 - 20, might be interested in taking on the administration of a North East Wales

²⁴ Though there will be the potential to raise administration fees, considered at para 7.38 - 39.

NRF. However the Trust has no paid staff and relies on the efforts of volunteers, including its Board of trustees. There is a question therefore about whether it would have the capacity, on its own, to set up and manage an expanding NRF. Also, to date it has operated primarily as a grant-giving body and for reasons at para 7.32ff this should only be a subsidiary role for an NDF.

The North Wales Wildlife Trust (NWWT) has already been approached by ecologists from two North Wales local authorities to see whether the Trust can assist them in achieving policy compliance on NBB in cases where this cannot be achieved by on-site measures alone. Further discussion and NWWT's enthusiasm resulted in this co-funded study. NWWT together with its subsidiary consultancy, Enfys Ecology, employs about 40 staff. The Trust already manages a network of 36 local nature reserves across North Wales and is seeking to acquire more reserves, resources permitting. It therefore already operates at the scale appropriate to the NRF task. NWWT already welcomes LPA ecologists onto its NE and NW Wales conservation committees and has a track record of working with LPAs on the non-statutory wildlife sites systems which are recognised as a development constraint. The Trust's latest [annual report and accounts](#) demonstrate that suitable governance, accounting and reporting arrangements are in place and would require only limited refinements in order to administer a NRF. Information from the Trust's existing reporting arrangements could be used by LPAs to help them fulfil their Section 6(7) duty to report (see paras 2.43 - 46). NWWT interviewees have been clear that, subject to further discussions, they believe the Trust can ably offer the service of managing a NRF(s). I consider that NWWT would undoubtedly meet all the above criteria for administering a NRF on behalf of a group of LPAs.

- 7.20 Nevertheless, NWWT recognises that other organisations may wish to offer a similar NRF service, either exclusively or in parallel, and it will be for LPAs to decide what arrangement would best serve their needs.
- 7.21 One way forward would be for LPAs jointly to ask NWWT to set up and administer a NRF in North **West** Wales, and for NWWT to work in partnership with Building Wildlife to do likewise for North **East** Wales. That would enable full use to be made of Building Wildlife's knowledge and existing working relationships, including with LPAs in the North East on projects that fulfil developers' legal duty to avoid harmful impacts on designated sites and protected species.
- 7.22 It is possible that one or more LPAs might decide not to operate a NRF via a third party such as NWWT, while other LPAs endorse the idea. This would be similar situation to that described at para 7.18. It would not be ideal, but I see no reason why a joint approach across much but not all North Wales could not work. The door could be left open to initially non-participating Councils to join later, if they become satisfied that the arrangement is a sound and advantageous one.

7.23 A number of other topics are relevant to this part of the report, as follows.

How much money could a NRF raise for off-site NBB measures?

- 7.24 One of the interviewees raised this question and it is an important one. The simple 'back of envelope' calculation below gives some idea what quantum of pooled funds could be raised in North Wales.
- 7.25 First let's consider housing development. I have looked at the most up to date LDP documents for each the seven LPAs in North Wales. Some of these are recently adopted plans and others are emerging review documents. Across North Wales as a whole, the seven LDPs are set to make provision for development of about 2,200 dwellings each year during the next 10 - 15 years²⁵. At an average density of 30 units/ha, this equates to development of about 73 ha of new housing each year. Most housing development in the next 3 years or so will already have planning permission and negotiations on such matters as S106 agreements will have been completed. NBB contributions from housing developments in this initial period will therefore be low, mainly from small 'windfall' schemes. However such schemes will allow an NRF(s) to be set up and its operational procedures tested.
- 7.26 After about 3 years, the number of contributing housing developments could rise sharply, based on newly granted permissions and associated S106 or other legally binding documents such as S111(1) agreements with developers.
- 7.27 Suppose that housing developments are assessed as averaging category 2 in Table 2 under para 5.11, then about **£1.1 million** might be raised each year²⁶. To housing developments must be added all other developments for which contributions are sought, including DNSs and NSIPs. If only 30ha of non-housing developments are completed each year in the whole Region then using the same calculation as for housing approximately a further **£0.45 million** might be raised. Adding all types of development, a cautious 'guestimate' therefore would be that at least **£1.5 million** could be raised annually. Perhaps slightly less than half of this could be raised in North West Wales and slightly more than half in North East Wales²⁷.
- 7.28 This estimate is not out of line with scheme that a **single** Welsh Council, Carmarthenshire (see Appendix 4, paras 21 - 24), expects to raise for off-site biodiversity measures based on forecasts of planned development there - being about £125,000 per annum cited during an interview, but this only relating to developments that could impact on a designated area.
- 7.29 The above cautious 'back of envelope' calculations may help LPAs and organisations that are interested in administering NRF to think about the scale of the task and

²⁵ 1,000 in North West Wales and 1,200 in North East Wales, assuming local authority split as at para 7.15.

²⁶ 73 ha x £15,000 per for Category 2. This is a deliberately cautious estimate, as it assumes that most housing development will secure substantial compensation measures on-site, though not sufficient to clearly outweigh harm. Some of the case studies in Chapter 8 suggest some large housing developments may not achieve higher than Assessment Category 3.

²⁷ Because there is more development overall in North East Wales than in the more rural North West.

whether they will have sufficient staff resources to deliver. The Carmarthenshire Scheme requires a full time LPA project officer. This issue is picked up at para 7.38.

Grant making – a useful tool in the toolbox?

7.30 We noted at para 7.19 above that the Building Wildlife Trust operates a grant-making scheme and invites applicants to come forward with potentially suitable projects. NWWT, on the other hand, is a charity that receives and itself uses grants, but does not at present disburse grants to other organisations.

7.31 At present a number of organisations including WG, NRW and independent trusts of various kinds distribute grants for conservation projects. However, typically these are for short term action, are not available for land acquisition or long leases and do not secure funding for long term monitoring and ongoing site management. I do not recommend use of an NRF for short term and small scale projects for which other sources of funding are available.

7.32 Nevertheless, on balance I recommend that an organisation such as NWWT taking on the role of NRF administrator should have a grant-making function to assist other organisations to take forward NBB projects, in addition to using levied developer contributions to itself to set up and manage NBB projects. However, any grants should only be for long term projects subject to the same stringent eligibility criteria as prospective projects that the NRF administrator would itself wish to set up and manage for the long term.

7.33 The reasons to incorporate such a grant-making capability are:

- Flexibility - there could be long periods when the scheme administrator's own portfolio of 'ready to go' new NBB sites is insufficient to fully utilise incoming NRF contributions, but other organisations are able to identify other suitable projects. For example, the LPA or a town or village council might get an unexpected opportunity to bid to purchase a new area where their long term land management proposals would fit well with NRF aims and with outcomes sought in NRW's relevant Area Statement.
- Local politics - LPAs may find it easier to wholeheartedly support a large scale NRF spanning three or four council areas if their councillors have opportunity to encourage their ward constituents to recommend grants for local projects²⁸.
- Linked to the above point, grant-making is a means to 'even out' the disbursement of funds between the participating LPA areas. This would not on an annual basis, which would be a burdensome constraint, but over a period of years of scheme operation.

²⁸ This could include a local town or village council proposal for their organisation to purchase a suitable site for NBB, probably coupled with new public access, providing there would be an approved long term management plan and a restricted fund to finance ongoing management by a competent organisation. Grants from a NRF should **not** be awarded in small sums, piecemeal, e.g. for local groups to receive a bundle of trees or bulbs to plant – on potentially unsuitable land and with no provision for long term management.

- Grant-making is a good way to publicise the NRF and engage with communities on the wider nature recovery agenda, including how local communities can themselves get involved for example through volunteering.

Local Authority briefing and representation as part of NRF governance

- 7.34 If the NRF administrator is not an 'in house' LPA consortium but an independent charity / trust, then it will be important to hold regular seminars etc for LPA councillors. This will enable those of them who are interested in this aspect of their Council's role to keep in touch with progress and raise ideas and concerns.
- 7.35 I am reluctant to recommend bureaucratic complications to the governance arrangements of an independent charity / trust administering a NRF scheme. Guarding their reputation should be strong incentive to a board of trustees to act wisely and to make full, candid annual reports. However, a light touch way to bring in LPA leadership would be to appoint a councillor to the trustee board. Such a position could rotate each year between nominees from participating LPAs.
- 7.36 The Thames Basin Heaths scheme (Appendix 4 paras 25 - 29) has its own Partnership Board. If NRFs in North Wales are successfully established and take on a rapidly growing role, then a partnership board could be set up with all participating LPAs represented along with NRW and other key stakeholders.
- 7.37 Another part of the public sector institutional architecture in North Wales is the [Public Service Boards](#), such as the joint one for [Conwy and Denbigh](#). These Boards may also provide an appropriate means to ensure wide 'ownership' and sound governance of a joint NRF.

Administration costs

- 7.38 The Carmarthenshire scheme employs a dedicated project officer. The Thames Basin Heaths Partnership employs a substantial team. It seems likely that a NRF administrator in North Wales would need to do likewise assuming its existing staff complement has little additional capacity. This matter does not require any decisions at the present time because a NRF would only build up slowly in the first few years for reasons at para 7.25. But in the medium term it may be necessary to raise an administration fee, either (a) as part of the calculated contribution rate / ha or (b) as an additional surcharge. A surcharge of 10% on £1.5 million annual income would raise £150,000 each year, sufficient to employ at least 3 project staff.
- 7.39 Leeds Council's [Net Gain scheme](#) sets out detailed requirements on fees, under the heading 'Monitoring and Facilitation Fee'. Fees start at a minimum of 10% of the 'Net gain for biodiversity' Sum agreed.
- 7.40 At para 6.51 it was recommended that the NRF administrator may want to play a role in logging and tracking developer contributions to a NRF. If so, this task need not be duplicated by LPA staff.

Pooling restriction in legislation

- 7.41 Para 6.42 noted legislation applicable in Wales (though no in longer England) that defines ‘open spaces’ as a form of ‘infrastructure’ for which a specific project cannot lawfully be funded from more than 5 S106 planning obligations, i.e. 5 separate contributing developments. This is referred to as the ‘pooling restriction’.
- 7.42 WG has considered a report by the Law Commission that makes numerous recommendations on consolidating and simplifying the planning legislation in Wales. WG’s full response is silent²⁹ on whether they intend to remove the pooling restriction, as in England. If the restriction remains when WG issues a new ‘Code’ of consolidated planning legislation in Wales, then that could complicate and limit the operation of NRFs.
- 7.43 It is to be hoped that the pooling restriction will be removed in Wales. However, even if it stays in place:
- As noted in para 6.42, there is doubt about whether the restriction would apply to developer contributions raised via S106 obligations to fund off-site NBB projects. It would be prudent to obtain legal advice on this matter.
 - Financial contributions for NBB projects secured by agreements under Section 111(1) appear not to be subject to the S106 pooling restriction. This could be particularly helpful if LPAs in North Wales use these agreements to raise many relatively small individual financial contributions for off-site NBB projects. It would also be prudent to obtain legal advice on this matter.

Difficulties identifying sufficient sites for off-site measures to secure NBB

- 7.44 Several interviewees engaged on ‘offsetting’ projects in England spoke of their difficulties in finding sufficient sites where landowners are willing to enter into long term leases and/or other arrangements to enable biodiversity gain measures to be implemented, monitored and enforced (Appendix 4 para 6 - 7). This suggests that NRFs in North Wales will probably need to focus on opportunities involving land acquisition by an appropriate conservation charity such as NWWT if not the LPAs³⁰. Acquisition issues and costs are briefly considered at Appendix 4 paras 8 - 9 and the independent report mentioned at para 4.5 provides further, evidence-based rationale for a focus on projects involving land acquisition.

Can a NRF be built-up for a period of years ahead of starting to disperse funds?

- 7.45 There would appear no legal impediment to prevent a new NRF being built up for say 3 - 4 years before any substantive disbursements from it. This is because it would be entirely reasonable to seek to optimise use of the NRF by waiting until it is possible to choose between a number of prospective projects and then select those

²⁹ Page 28 of WG’s response. One would have hoped to see S123 of the CIL regulations addressed after recommendation 10-3.

³⁰ Non-permanent land management agreements cannot compensate in perpetuity for what are essentially permanent developments. This has been one of the major criticisms of some schemes agreed by the Environment Bank and similar organisations.

that offer the best benefits for biodiversity. I see no reason why the courts would reject this reason in the event of a legal challenge to a planning decision on grounds that one or more legal tests (para 6.40) would not be met if the NBB contribution were banked for a period of a few years.

Linkage between individual financial contributions and individual projects supported by a NRF

- 7.46 The recommendations in this report will not readily enable financial contributions from individual developments to be linked directly to individual NRF supported NBB projects. Developers would not be able to see precisely how their Fund contribution is spent. However, this could be addressed imaginatively to maintain goodwill. For example, a single particularly large contribution of say £100,000 could be partly earmarked for a project estimated to cost say £70,000 and the remainder put towards other specific projects. Likewise, a small contribution of just £500 could nominally be put towards a project costing more than this. However, such linkages would incur an administrative cost. What would be the point?
- 7.47 A useful precedent for **not** seeking to allocate specific contributions to specific projects is provided by developer contributions for new school development. It is normal for a formulaic method to be used to calculate education contributions, based on impacts of development on the need for additional primary and secondary school places. But those contributions may or may not be earmarked in a S106 Agreement to specific school building projects. Secondary school expansions may be at some distance from a particular development and the reality of school admissions policies mean that children from that development may or may not attend a particular secondary school identified in a S106 Agreement. Similar issues arise with contributions for off-site open space projects - individual projects may or may not be identified in advance and listed in S106 obligations. There is no point in unnecessarily complicating the operation of a NRF in ways that do not necessarily apply to other purposes for which developer contributions are sought.

Reimbursement of unspent financial contributions

- 7.48 This issue need not to be resolved now. It is most unlikely that it will prove impossible to spend all the developer contributions to a NRF on demonstrably worthwhile NBB projects, especially if substantive land purchases are involved.

8. Applying the recommendations – some case studies

8.1 This chapter briefly examines nine case studies, all at locations in North West Wales. These are not in-depth presentations. Most are retrospective - looking at what might have been the outcome for biodiversity enhancement had the policy been applied when planning applications were determined. One is a fictitious proposal to illustrate a particular site type. None of the case studies provide any detailed ecological assessment, which is not within the remit of this study. All are intended simply to highlight issues and judgements arising with different types and scales of development proposal if the recommendations in this report are to be taken forward.

8.2 The case studies as follows:

- (a) A two-storey house extension
- (b) Garden infilling with one new dwelling
- (c) A development of 110 dwellings on previously agricultural land
- (d) A mixed use 'strategic allocation' in an emerging Local Plan Review
- (e) Demolition of house and infill of large garden with residential care home
- (f) A new supermarket on a previously developed site
- (g) Redevelopment and enlargement of equestrian facility within existing paddock
- (h) A new school on previously agricultural land
- (i) A new road – the Llanbedr bypass/business park access road

(a) A two-storey house extension

8.3 The site, outlined in red in this photo, is a semi-detached house in a 1950s' council-built estate. The photo overleaf shows a 2 storey extension under construction during 2021. The extension and its outdoor access arrangements will result in 'concreting over' almost all the existing grassed area of garden.

8.4 What might have happened had the recommendations in this report been enacted?

8.5 Let us suppose the LPA ecologist was on leave when the application was validated. To avoid delay in the development management process, the application was



immediately passed to an ecologist colleague in an adjoining LPA under a joint-working protocol to avoid delay.



- 8.6 The stand-in ecologist considers the development description and site plans, and looks carefully at Google Earth satellite view. She does need to make a site visit to quickly reach her assessment. The development, albeit at the smallest end of the scale of development impact, would clearly cause net harm to biodiversity. The main reason she gives in her one paragraph report to the case officer is loss of garden vegetation and soil with its micro flora & fauna providing ecosystem services. The site is too small for native tree or shrub planting and, being adjacent to a road junction, probably too noisy and floodlit to successfully install bird or bat boxes as an integral feature of the extension roof structure. In any case the applicant has not proposed any measures. The application is a classic case of harm to biodiversity 'by a thousand tiny cuts'. The harm is clear and not to be dismissed as *de-minimis*³¹.
- 8.7 Whether the harm in such cases is too small to justify the administrative cost of securing a small financial contribution for off-site NBB measures proportionate to the on-site harm is different matter. That will depend in part on how simple and robust the administrative process can be made. In particular, the key to simplicity will be use of S111(1) agreements for small developments, considered at paras 6.58 - 72.

³¹ The photo illustrates another aspect of the harm. It is questionable whether the transport and landfill disposal of construction waste will have zero harmful impact on biodiversity in the wider North Wales environment.

Moreover, had this development been to squeeze in an additional dwelling onto the site instead of an extension, then the additional household occupying the new dwelling would result in an incremental increase in dogs & cats, with implications for bird & reptile disturbance including those breeding on an SSSI just 150 metres away.

8.8 The ecologist concludes her short report with:

'In this case the site area is just 0.02 ha, of which only about half is not already built over or existing hard surface. I consider that Assessment Category 4 applies [see table at para 5.11]. Consequently the applicant's financial contribution to achieve biodiversity net benefit off-site should be $0.01 \times £45,000 = £450$ '.

8.9 That sum can be compared with the planning application fee in this case, which is £230.

8.10 The ecologist emails her report to the case officer that day, along with a partially completed Agreement under S111(1) (draft template at Appendix 7) with the required sum of £450 inserted together with the applicant and site details.

8.11 Later that week the case officer emails the applicant, attaching the ecologist's report, a NBB guidance note for householder applicants (paras 6.81), relevant web links to WG guidance and the partially completed S111(1) agreement.

8.12 The template for the covering email includes a standard paragraph saying:

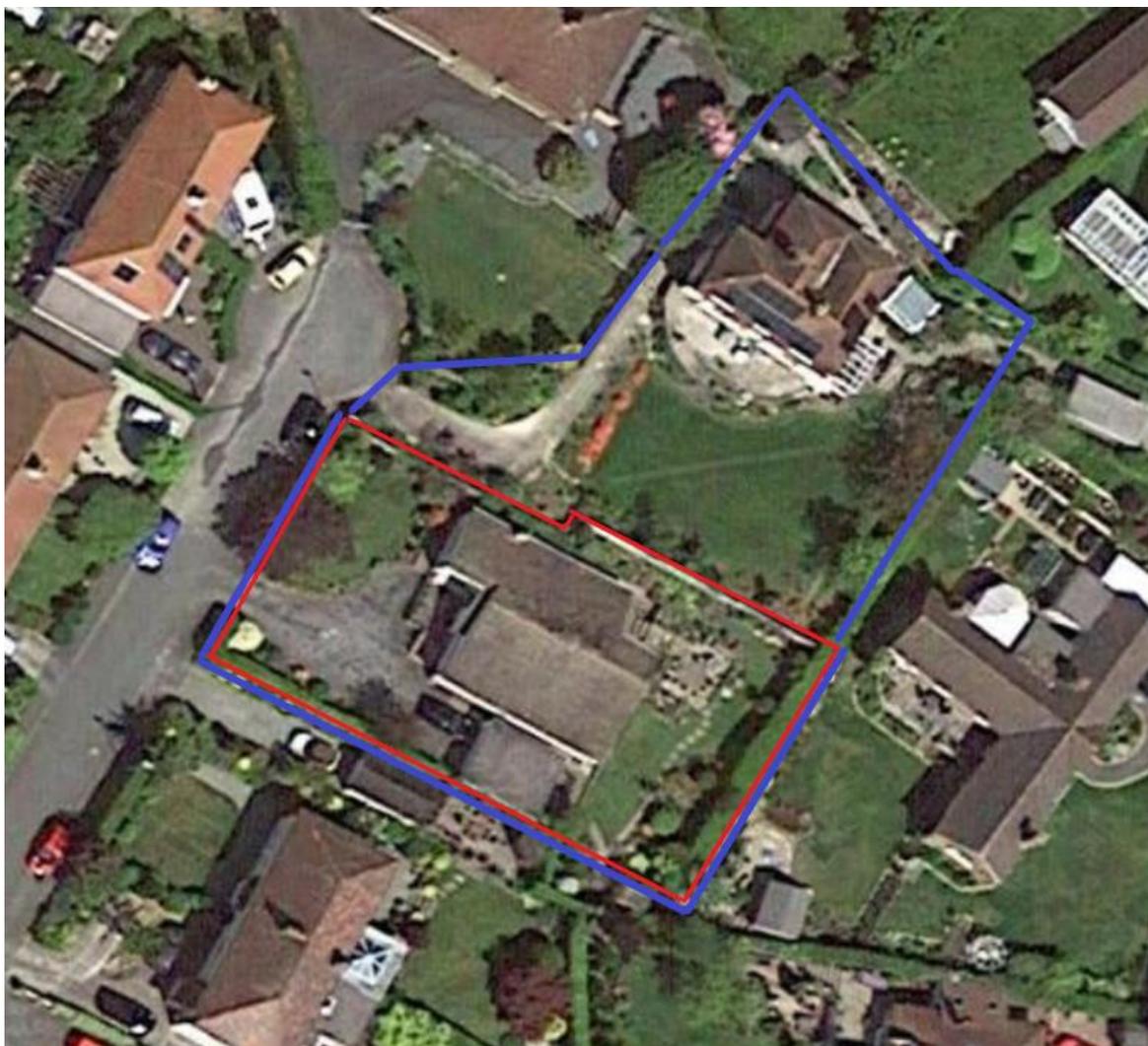
- If planning permission is to be granted, the applicant will be informed and must pay the fee by electronic bank transfer, on receipt of which the decision notice will be issued.
- If planning permission is granted but development is not commenced and the permission lapses (after 3 years), the applicant can apply to have the fee returned.
- If planning permission is not granted the Agreement document will be returned to the applicant.

8.13 There are then about 6 weeks to run until the statutory target date to determine the application. So the process to secure the £450 should not have delayed the process. The applicant has plenty of time to contact the case officer if an explanation or discussion is sought, and to complete and return a paper copy of the Agreement.

8.14 Some of the points above apply to case studies that follow, so are not repeated again.

(b) Garden infilling with one new dwelling

8.15 The photo shows a suburb of mainly detached housing. The house within the red line was built in the 1960s, within what had been the very large garden of the house at the top of the area outlined in blue.



8.16 Suppose this infill scheme were to be proposed **now**³² instead of the 1960s, with current PPW11 policy applying and the study recommendations being applied.

8.17 The ecologist makes a brief site visit, sees a pond which (in the 1960s) occupies part of the red outlined planning application site and notes that the whole blue outlined area owned by the applicant is managed with wildlife in mind. She notes that the garden is part of a wider continuum of connected and diverse garden habitat. Bats are recorded as present in this part of the suburb and she is told of frogs, hedgehogs and a wide variety of garden birds being present. She considers that the ecological value of the red line site should not be assessed in isolation, but should take into account its contribution to the wider suburban habitat.

8.18 The applicant is happy for a condition to be imposed on a planning permission, but is vague about proposals to enhance biodiversity. The ecologist faces a familiar

³² The owners of the two houses are members of the North Wales Wildlife Trust and are pleased to use their homes as a case study.

problem. Devising a suitable condition would be time consuming, with no certainty that the owner of the new house will implement it and inadequate Council resources to enforce such a condition on small sites like this in the future. Time and time again she has seen bird boxes placed in inappropriate places, or disintegrate after a few years. On-site NBB is all very well in principle, she muses, but the reality in the mid to long term often falls far short of initial aspirations.

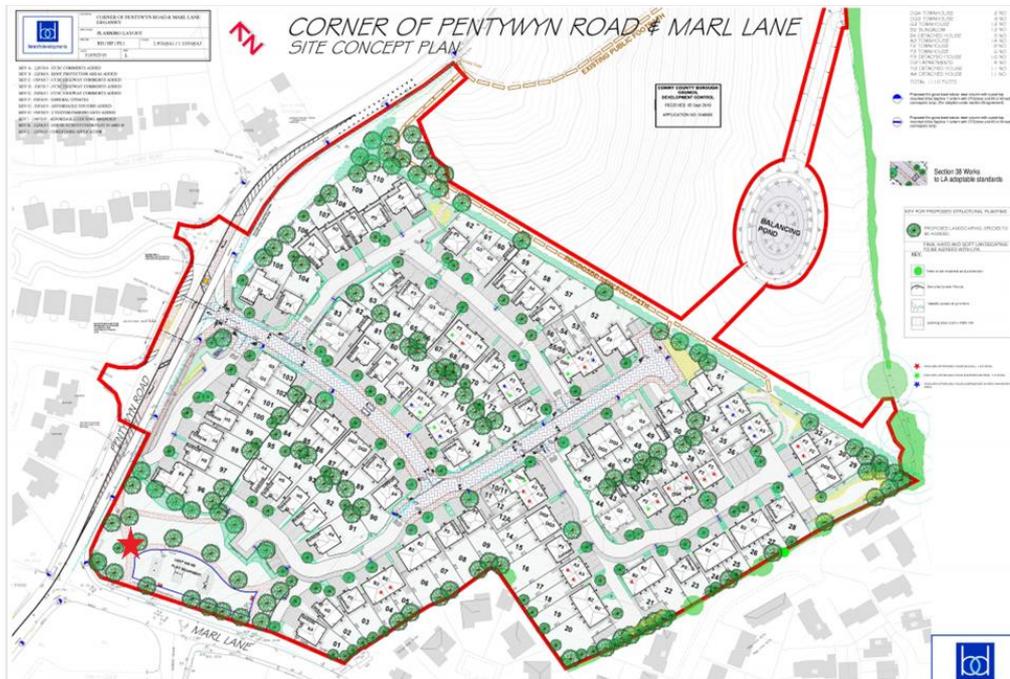
8.19 The ecologist's half page report, adapting standard text for such infill development proposals concludes:

'In this case the application site area [within red line] is just 0.06 ha, of which about half will be built on or covered by concrete/tarmac. Giving the applicant the benefit of the doubt, I consider that substantial compensation measures could be secured on parts of the site to be left as garden, but these gains will not clearly outweigh harm to biodiversity through loss of about half the undeveloped area. Therefore Assessment Category 2 should apply [see table at para 5.11], in which case the applicant's financial contribution to achieve NBB through off-site measures should be $0.06 \times \pounds 15,000 = \pounds 1,800$ '.

8.20 That sum can be compared with the planning application fee in this case, which is £460.

(c) A development of 110 dwellings on previously agricultural land

8.21 The application was submitted in 2016, refused in 2017 and won on appeal in 2019. Biodiversity was not one of the appeal issues. The 'concept plan' below shows the dense layout of housing, access roads and parking.



8.22 The photo below shows this development under construction in March 2021. The inserted red star in the lower left of the concept plan is the position from which the photo was taken.



8.23 The site area is 4.55 ha, so density is 24 dwellings / ha.

8.24 Headline points on biodiversity and related issues include:

- Prior to development the site was improved pasture with generally low conservation value.
- Public space provision is limited to a children's play area at the lower left side.
- A new balancing pond to the north shown on the plan will have ecological value.
- Remnant hedges around the perimeter could be reinforced. However lengths of internal hedges were inevitably lost. Almost none of the tree positions shown on the concept plan have sufficient space to provide for larger species such as oak. The actual plantings will typically comprise small ornamental varieties of exotic species.
- The diggers at the back of the photo provide scale to indicate the vast amounts of topsoil removed to facilitate house and road building, pavements and parking areas³³. Considerably less than half the original area of grassland will morph into re-soiled and vegetated gardens and other open space of any biodiversity value, say 40% of the total site area.
- The foreground of the photo shows landscape planting. All the species planted are exotic species including Leyland Cypress, pictured. So opportunity was not taken to integrate the housing into a rural fringe setting with a hedge comprising locally native species. Of course, the poor decision on using exotic species does not reflect the better decision that could have been to create a traditional hedge.
- Part of the harm relates to the site's role in its wider context, including the impacts of light and noise pollution intruding further into the wider countryside and reduced connectivity of adjacent habitats.

8.25 Gardens can be diverse and rich habitats, as is clear from myth-busting information on the website of the [Wildlife Gardening Forum](#). However, it is important to be realistic about how beneficial re-soiled areas in the front and back gardens of new housing developments can be for biodiversity. The photo below shows the front semi-detached housing in a development completed in 2021 near the case study site. It illustrates how car/hard surface-dominated such areas typically are in order to meet off-street parking standards. There is little scope to reduce the proportion of such hard surfaces without reducing development density. That in turn would require more green field land to be developed in order to meet LDP housing targets.

³³ A ball park figure for loss of top soil with its constituent seed bank and micro flora & fauna providing a range of ecosystem services is 4.55 ha x 10,000 m²/ha x 0.6 proportion lost x 0.3m depth, = top soil volume of about 8,000 sq metres.



8.26 The newly formed back gardens are shown in the photo below. Existing trees on the site periphery have been retained, and new street verge trees planted just out of view in the foreground. However, the gardens are small and divided by fences treated with chemical wood preservative poisonous to fauna and which break connectivity between the individual rye grass-sown lawns. 'Wildlife gardening' is to be encouraged, but planning is an evidence-based process and there is no evidence to think there will be an exceptional upsurge in sustained wildlife-friendly gardening in such gardens. Moreover, the impact of decking/concrete patios, severance of connectivity within the site due to internal roads, noise disturbance from human proximity and artificial light should all be taken into account. Consequently it is hard to see how parts of the site occupied by back gardens such as these can fully compensate for the biodiversity value of agricultural land lost, let alone contribute to net benefit and thereby offset the large proportion of a site lost under buildings and hard surfaces.



- 8.27 Given the large proportion of the site lost to buildings and hard surfaces, and the limited ecological value of most small new back gardens, it seems likely that a LPA ecologist would conclude that although there are some well-designed on-site measures, these fall far short of full compensation for harm. This equates to Assessment Category 3 (see table at para 5.11). It seems doubtful that the developer would originally have wanted to 'sacrifice' a higher proportion of the site to biodiversity-friendly open space, on grounds of development viability. If that is correct and the Assessment Category of 3 is sound, then this is a case of typical medium scale development where NBB is clearly not achieved through on-site measures alone.
- 8.28 The applicant's financial contribution to achieve NBB partly through off-site measures would be calculated as **£136,000**³⁴.
- 8.29 That sum, used via a Nature Recovery Fund, could enable purchase of, say, 3 hectares at £20,000/ha, leaving a 'commuted sum' of about £76,000 for its conservation management in perpetuity. This is of course a ball park approximation, but it gives an idea of what could be achieved - or not - depending on whether the recommendations in this report are broadly accepted.

(d) A mixed use 'strategic allocation' in an emerging Local Plan Review

- 8.30 A proposed 'strategic allocation' is included here because some interviewees thought such large developments should be less difficult places to achieve NBB on-site compared with smaller scale proposals. A linked idea is that achieving NBB will be facilitated by the 'master-planning' that such large proposals receive early on, typically as part of the LDP review. (In contrast to other developments where key

³⁴ 4.55 ha x 30,000 (assessment category 3).

design issues are left until the pre-application discussion stage, when there may be less flexibility to substantially amend proposals in the interests of biodiversity.)

8.31 Conwy Council is reviewing its LDP and in 2019 consulted on a Preferred Strategy which included some 'strategic allocations'. One of these, an expansion of the village of Llanrhos near Llandudno, provides this case study. A schematic masterplan is reproduced below. The site is currently intensively farmed grassland with vestiges of some hedges remaining. Proposals for the 13 hectare site³⁵ include:

- 8 ha of residential, providing about 250 dwellings
- new primary school on a 2 ha site (north side, shown pink)
- 1 ha of employment land (shown light green, south east part of site)
- 2 ha of recreation space (south west side, plus triangle on east side)
- 0.2 ha for allotments (south west corner, adjoining main area of open space).



8.32 Clearly the proposals could change substantially as the LDP review process unfolds. And it is possible that following an LDP review inquiry process the whole proposed allocation will not make it to the adopted LDP Review document. Here however, we shall consider the draft masterplan as if this will be implemented largely unchanged.

8.33 Several considerations, outlined below, suggest that even for large developments considered early in our 'plan-led' planning system it may still be hard to achieve net benefit through measures entirely within the strategic allocation area:

³⁵ The proposed site surrounds an existing holiday caravan park shown in the masterplan air photo. It seems likely this area will be developed for housing in due course, but that is not part of the current proposal.

New recreation areas – In principle the 2 ha of new open space represents a significant opportunity, in line with the idea of ‘multi-purpose green infrastructure’, to combine biodiversity measures with management for public open space and sustainable urban drainage. However, the masterplan shows this area as including a ‘multi use games area’, younger two children’s play areas and a skate park. Whatever the final proposals here, the message is clear that the first priority is to meet recreation needs. This means that most of the area will need to be managed as short mown tough ryegrass and there will be a lot of dog exercising / disturbance to wildlife, plus cat predation from nearby new housing. A large new pond would be a hazard for children. These factors limit the scale of opportunity for biodiversity benefits, which may be limited to hedge reinforcement, small patches of less regularly cut grass and fitting in a few new park trees. The outcome would fall far short of creating 2 hectares of new habitat managed primarily for biodiversity and its public enjoyment.

New housing – Economic viability considerations (especially in view of the requirement for about 30% affordable housing) along with off street parking standards mean that new housing developments are inevitably very dense and car-orientated in layout. A policy on biodiversity net benefit cannot magic a different reality, one with large gardens, wide streets and other generous spaces for large trees. Economic reality will result in similar limitations on the wildlife value of gardens identified in the previous case study (paras 8. 24 – 26).

The housing areas in the masterplan are shown dotted with many new trees. But for reasons outlined in the previous case study there will be little if any space for medium to large size trees within front and back gardens. The photos overleaf show two recent housing developments close to Llanrhos. The top photo shows a development completed in the last couple of years, where ornamental trees have been planted at intervals in front gardens. However some of these are likely to fail and homeowners may prefer to remove other trees imposed on them in the original landscape design but which block sunlight to windows and/or frustrate parking. The photo below is a development now nearly a decade old and, apart from the cypress on the left, there is not a single tree in any of the front gardens in this 28 house cul-de-sac. All the back gardens are small, typical of modern housing layouts and in contrast to the larger gardens commonly found in older suburbs.

Within the strategic allocation, one idea would be to thicken up existing peripheral hedges on the western margin, including more trees. However, this runs up against the problem that some of the most profitable houses to build will be those with ‘countryside views’. Prospective owners will not want to pay a premium only for those views to be progressively blocked by growing trees, impacting on house resale value. Likewise, where new housing will abut existing housing on the north side of the strategic allocation, any substantial tree planting / hedge reinforcement would block south facing light into the gardens and windows of existing homes. Similar considerations apply with all the trees indicated along the back garden to back garden boundaries within the new development. These detailed points further illustrate the complexities on the ground in attempting to integrate large tree species of benefit to wildlife within and on the periphery of dense residential

layouts. In fact the start of master-planning demonstrates constraints as much as any opportunities to achieve biodiversity benefits as part of a financially viable development. Individual residents may care about wildlife in principle, but their primary concerns as home owners include not blocking sunlight or parking opportunity.

New school and employment land – these will involve intensive development for buildings and parking, and a need for external security lighting. For both areas, the constraints on opportunities for biodiversity benefit will be similar to those outlined at paras 8.53 - 58 in relation to another new school.



8.34 An ecologist might conclude:

- The recreation space including allotments would clearly achieve net benefit (i.e. Assessment Category 1), but for the reasons given at para 8.33 above would not generate much 'excess' net benefit to compensate significantly for loss of biodiversity in the 11 hectares of the strategic allocation area that are to be densely developed.

- In the remaining 11 hectares, the assessment may be no better than the previous case study, see paras 8.24 - 27. Applying the same assessment categorisation here, the developer's financial contribution to achieve off-site biodiversity benefit would be calculated as $11.0 \times \text{£}30,000 = \text{£}330,000$. That sum might (or might not) come down to as little as, say, **£250,000** in view of any on-site measures that might be identified when detailed plans are prepared, but which do not spring to mind looking at the provisional masterplan.

8.35 Based on similar calculations to those at para 8.28, £250,000 would be approximately sufficient to purchase 5 ha of grassland and manage it in perpetuity as, say, a hedged hay / wildflower meadow and/or unintensively grazed pasture. This type of habitat was once common in the Llanrhos area, but has now virtually disappeared. Such a project, perhaps also incorporating a small new orchard and/or woodland, would mean clear net benefit for biodiversity arising from the strategic allocation through a combination of on and off-site measures. Overall benefit could be increased further by providing peripheral public access³⁶ to enjoy the new nature reserve.

Alternative approach - pushing the boundaries of what is 'on-site'

8.36 It would have been possible to earmark land to be managed primarily for biodiversity gain within the strategic allocation. For example, the amount of housing could be reduced from 250 to say 150 units thereby freeing up about 3 ha to be managed as suggested above. However, the Council would then have to allocate 3 ha for housing somewhere else in order to achieve their overall Borough housing target. This seems rather pointless and would arouse opposition to development from another local community.

8.37 A variation to that approach in order to achieve clear net benefit arguably 'within' this strategic allocation area would be to make the allocation larger from the start. For example an extra field of say 5 ha could be identified to be managed primarily for biodiversity, as suggested above. Development quanta could then remain unchanged. However, this would require the agreement of the same or different landowner(s), which might not be forthcoming or introduce new risks, for several reasons we need not explore here. Moreover, ecologists might advise that another location in the general area of the development but further away from the strategic allocation itself could provide a better opportunity for biodiversity gain. This suggests that achieving net benefit entirely 'on site' could become a somewhat contrived goal, and that a mix of genuine on-site measures and off-site measures achieved through the approach described in Chapter 7 may be a better strategy.

³⁶ Dogs would need to be excluded from the main area managed for hay, pasture and/or orchard.

(e) Demolition of house and infill of large garden with residential care home

8.38 The 19th century house in the photo below is set in 0.45 ha of grounds, now surrounded by a modern suburb. The house is not listed. There are no bat roosts in the roof, but the garden is locally known as a haven for wildlife in the locality.



- 8.39 Suppose that a social housing provider proposes to demolish the house and redevelop the site for a residential care home and prepares a planning application. This allows for the largest existing trees and the boundary hedge to be retained. However, development viability considerations mean the rest of the site would need to be intensively developed for buildings, parking and other hard standing.
- 8.40 If the LPA ecologist were to conclude that Assessment Category 3 should apply, then the applicant's financial contribution to achieve biodiversity net benefit through off-site measures would be calculated as $0.45\text{ha} \times \text{£}30,000 = \text{£}13,500$. Intuitively this figure seems too low to achieve overall NBB. This is because loss of wildlife-rich garden space such as this would require more than just two 2 'offset' units/ha³⁷. However, even if NBB were not achieved due to not applying a full 'metrics' approach on a case-by-case basis, any off-site compensation will be better than no compensation. The latter would be the outcome if the study recommendations are not accepted and only on-site measures were to be taken.

(f) A new supermarket on a previously developed site

- 8.41 The photo shows derelict industrial units prior to complete demolition and redevelopment for a new supermarket that opened in 2020. The site area within the red application site boundary is about 1.1ha.



³⁷ See Appendix 4, para 3. This explains the cautious basis for setting the starting rate at £45,000/ha, which assumes the pre-development habitat is of low distinctiveness and poor condition, such as intensive farmland rather than a wildlife-rich mature garden.

8.42 The only biodiversity feature of note on the site was a row of trees along the northern perimeter. The roadside verges just to outside but adjoining the north and east sides of the site are moderately species-rich.

8.43 The low pre-existing biodiversity value of the site meant that it should have been relatively straightforward to clearly demonstrate NBB on-site, i.e. Assessment Category 1 in the table at para 5.11. Consequently there should be no requirement for a contribution for off-site NBB measures.

8.44 Unfortunately, the supermarket landscaping scheme missed opportunities to significantly enhance biodiversity, including:

- Using non-native shrub species in all planting areas, an example of which is shown in the photo below, instead of a mix of native species.
- Turfing peripheral areas to become conventional rye grass 'lawn', rather than reseeding with a varied seed mix with the aim to expand the area of herb-rich grassland around the site periphery.
- Not designing the car park to incorporate suitably prepared and protected soil 'islands' within the large expanse of tarmac, these island to be planted with large trees species.

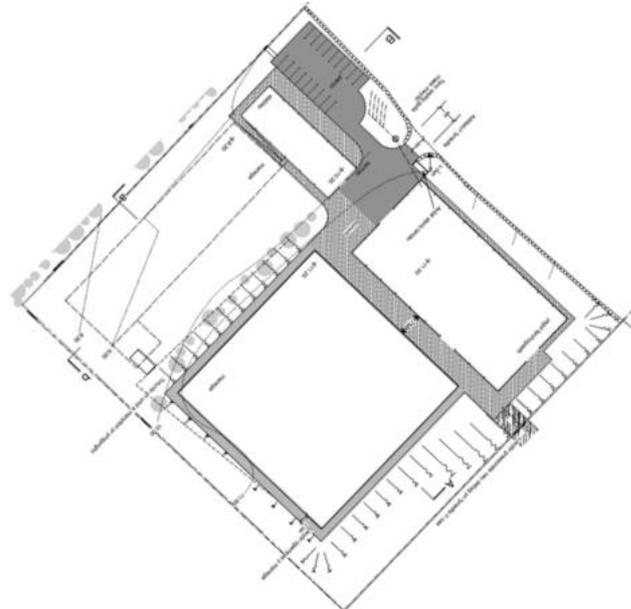


8.45 Arguably the landscaping scheme does achieve a modest NBB, and therefore Assessment Category 1, but only because the pre-development site had such low biodiversity value. This case raises at least two issues relevant to this report:

- Whether LPAs are sufficiently resourced with ecologists in order to engage with all planning applications at a sufficiently early stage in site design.
- Whether policy on NBB is satisfied by proposals that do achieve a small net benefit on-site, but in circumstances where much greater net benefit could have been achieved through better design.

(g) Redevelopment and enlargement of equestrian facility within existing paddock

8.46 The air photo below left shows an existing equestrian facility as it is at present. It comprising stables, an all weather non-grass 'manege' and the remainder of the site used as a paddock. The site area within the red line is 0.17 ha, but the applicant owns a larger area around the application site.



8.47 The site plan on the right accompanied a recent planning application for a complete redevelopment scheme comprising larger stables, and indoor riding area, additional parking and a much larger, all weather manege area occupying much of the rest of the site. Planning permission was granted in 2020.

8.48 An ecology report submitted with the application concluded:

'Under Chapter 6 of Planning Policy Wales 10, planning authorities must seek to maintain and enhance biodiversity in the exercise of their functions. To satisfy this condition ... the planting of

trees and provision of nest boxes on the new buildings is recommended to provide biodiversity enhancement on the site.'

- 8.49 To my knowledge no condition was imposed to secure the recommended measures. Indeed that would have been difficult because the measure are expressed in such general terms, lacking detailed specification.
- 8.50 The ecologist's report did not compare the biodiversity benefits of the proposed measures with the harm development would cause. There was no consideration of the intended policy meaning of 'net benefit' and 'enhancement' (see paras 2.12 - 15) and no conclusion on whether the proposed measures would result in NBB. Consequently, the LPA had no basis to judge if the proposal was compliant with NBB policy.
- 8.51 Without going into inappropriate detail here, it could be argued that as the existing paddock has relatively low biodiversity value it would be possible to clearly demonstrate NBB on-site by using a planning condition to secure not only specified nest box provision but also the planting of a hedge comprising native species around most of the periphery of the site. We do not know if the applicant would have agreed. But without securing these measures, arguably the planning permission will result in no better than Assessment Level 3 in the table at para 5.11. Using the simple approach recommended in this report, the financial contribution need to achieve biodiversity net benefit through off-site measures would be 0.14 ha (which excludes the already built/parking area footprint) x £30,000 = **£4,200**.
- 8.52 That sum feels to be the same ball park as the cost of the on-site measures suggested here, notably hedging the perimeter.

(h) A new school on previously agricultural land

8.53 Ysgol Awel Y Mynydd is a new school on the edge of Llandudno Junction. It occupies a 1.5 ha site that was formerly agricultural land cut off by the A470 bypass, shown on the right in the photo.



8.54 A new school development such as this provides an exciting opportunity for on-site biodiversity measures that dovetail with educational opportunity for children to learn about the environment within the safety of their school grounds.

8.55 However, as the photo shows, the buildings, parking areas and other hard standing occupy at least half of the site and the sport field is intensively managed as short rye grass with limited biodiversity value. The photo suggests that no more than about a quarter of the site is available as undeveloped land capable of being managed with biodiversity benefit and corresponding educational opportunity in mind.

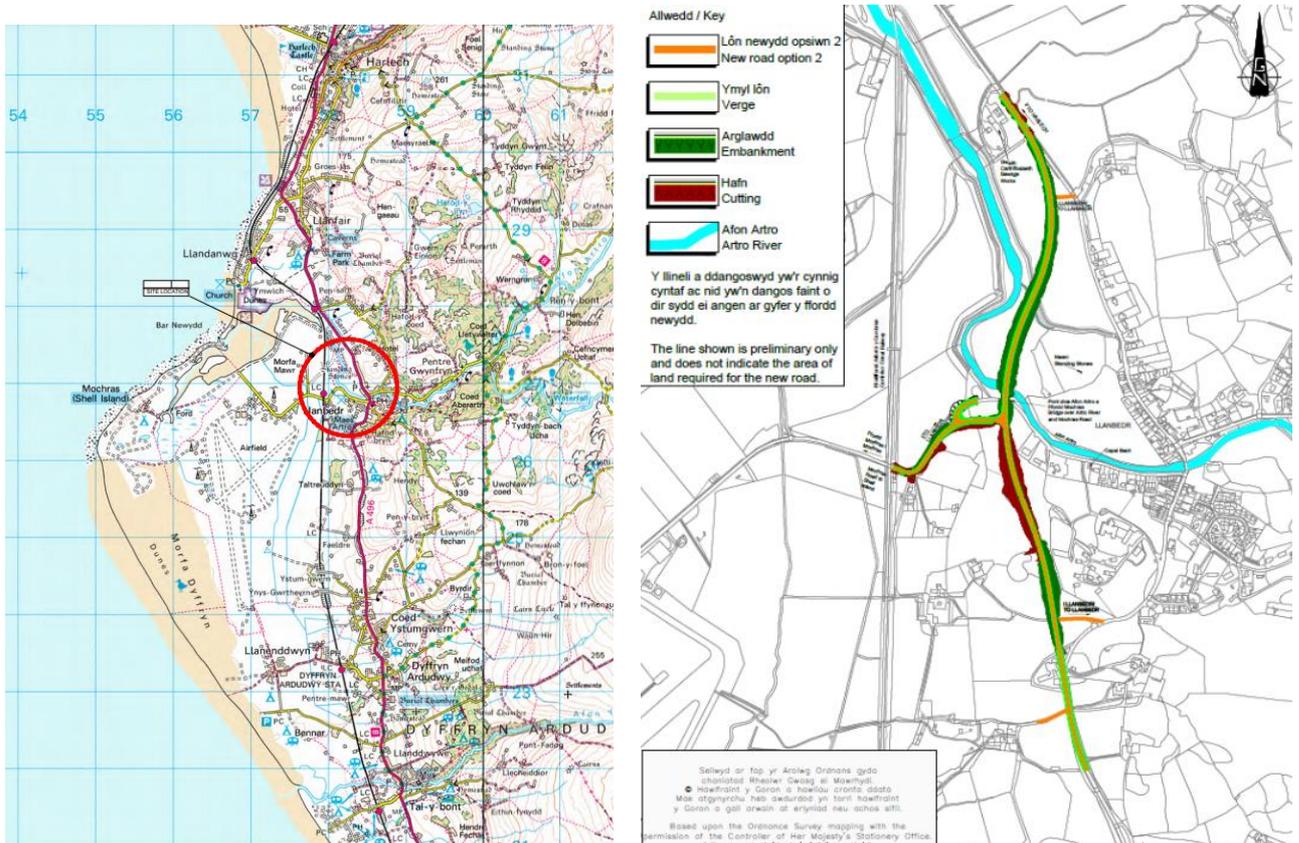
8.56 If an LPA ecologist (arguably not the ecologist working for the LPA in question on propriety grounds - see para 6.86) were to rank the development's impact on biodiversity, they might judge the scheme to achieve no better than Assessment

Category 3 (from Table 2 under para 5.11.). On that basis the applicant's financial contribution to achieve net benefit through off-site measures would be calculated as $1.5\text{ha} \times \text{£}30,000 = \text{£}45,000$.

- 8.57 The full capital cost of building the school was about £11.5 million. So an extra £45,000 would increase the total cost by just 0.4%.
- 8.58 An important question in this case is how a local education authority would formally commit to making such a financial contribution to a NRF. A council could not enter into a S106 or S111(1) agreement with itself, as such agreements require two parties. A S106 Unilateral Undertaking might suffice if LPAs can lawfully make such an Undertaking. Legal advice would be needed on this matter, which also applies to the last case study, a new road.

(i) A new road – the Llanbedr bypass/business park access road

8.59 The map below left shows the location of a new 1.5 km long combined bypass and employment site access road at Llanbedr in the Snowdonia National Park. The scheme has been promoted by Gwynedd Council, the local highway authority. The plan on the right shows the route taken, to the west of the village. The scheme got planning permission in 2020. The area within the red line application site is 11.9 ha.



8.60 Clearly a 1.5 km long section of new 'A' road in a national park raises complex environmental and design challenges. Here the assumption is made that the road is as well designed as it could possibly be in terms of minimising impacts on the environment, including biodiversity as well as landscape.

8.61 The verges, embankments and cuttings either side of the carriageway will include substantial areas of native tree and shrub planting, and other stretches are to be left as unintensively managed grassland. These measures will go some way to compensating for harm to biodiversity, as well as mitigating landscape impact. However, it would be bizarre to claim that a new road like this can possibly result in NBB. If that were so, then leaving aside impacts on landscape, biodiversity gain would provide an argument in favour of more such road building, whether inside or outside of national parks. Nobody suggests that road building in national parks can be actually beneficial for biodiversity.

- 8.62 A Habitats Regulations Assessment concluded that the road would not result in any harmful impact on designated sites in the locality. However, despite the on-site measures referred to above, net harm to biodiversity arises mainly from:
- Loss of grassland and top soil, including the ecosystem services provided by its micro fauna
 - Severance of habitat either side of the road and therefore loss of connectivity
 - Increased light and traffic noise pollution detrimentally affecting fauna in a swathe of land either side of the route
- 8.63 If an LPA ecologist³⁸ were to assess this road scheme as achieving at best Assessment Category 3, then the applicant's financial contribution to achieve overall biodiversity net benefit off-site would be $11.9 \times \text{£}30,000 = \text{£}357,000$. This would add about an extra 1.8% to the overall cost of the project currently estimated at about £20 million.
- 8.64 It could be argued that the approach tabulated at Table 2 under para 5.11 is too simplistic to assess the impacts of a road scheme such as this and that a full blown offset metric would be more appropriate³⁹. Nevertheless, without any assessment of the extent to which the scheme falls short of providing NBB on-site, it is impossible to assess what financial contribution for off-site measures would have been appropriate to achieve NBB policy compliance. As it is, the local highway authority will contribute nothing to achieving off-site biodiversity measures.
- 8.65 A contribution of £357,000 to a Nature Recovery Fund might have purchased land in the general locality of the new road for a new nature reserve. Using a similar ball park calculation to that at para 8.29, this sum could have enabled purchase of, say, 6 hectares at £20,000/ha, leaving a 'commuted sum' of about £237,000 for its conservation management in perpetuity.

³⁸ In this case the LPA is the National Park Authority, not Gwynedd Council which made the planning application. So on propriety grounds there would be no reason for the National Park Authority ecologist to pass assessment onto an ecologist from another LPA.

³⁹ See footnote to para 3.4.

9. Conclusion and next steps

- 9.1 The main recommendations in this report are tabulated after the introduction and so need not be repeated here.
- 9.2 The recommendations, subject to any changes that may be appropriate, should enable WG policy on achieving NBB to be implemented in cases where this cannot be fully achieved on-site.
- 9.3 This report has been written on the basis of the definitions of 'enhance' and NBB given at paras 2.12-15. To recap, development should leave biodiversity and ecosystems in a **better** state than before, through securing long term, measurable and demonstrable benefit, primarily on-site. However, remarks by some interviewees and the case study outcome reported at para 8.50 suggest there may be a widespread understanding that NBB means something fuzzier - no more than doing whatever seems reasonable for biodiversity on-site, but without assessing in a consistent and transparent way whether **net** benefit would or would not be achieved through on-site measures alone - and if not then securing proportionate measures off-site.
- 9.4 Consequently, it may be wise to seek confirmation from WG soon that NBB means what this report takes it to mean. [Wales Environment Link](#) and / or [Association of Local Government Ecologists](#) might be the best organisations to approach WG about this matter, as both have a strong interest in establishing clarity on NBB policy requirements.
- 9.5 Discussion could usefully cover some related technical appraisal issues identified in this study, such as how to take into account the contribution to biodiversity from the soil resources before and after development.

Is there a need for more work on methodology to calculate financial contributions?

- 9.6 Chapter 3 outlined the issue of spurious over-precision in any quantification. However, a reasonable and otherwise legally compliant basis for requiring financial contributions for off-site measures must rest on some form of transparent quantification. There may be calls for more work to investigate the robustness and reasonableness of the £45,000 figure and 1/3, 2/3, 3/3 steps at paras 5.9 -11. But the biodiversity crisis is unfolding now. We cannot afford to wait and I recommend against delaying the start of implementation pending more studies that most likely will achieve no more consensus than at present. If a strong justification for a different approach to quantification does emerge later, then the methodology for calculating financial contributions can and should be adjusted.
- 9.7 Apart from the need for confirmation about policy intentions identified at 9.3 - 5, the urgent steps during 2021/22 seem to be:

Task	Leads
Seek LPAs' support in principle for a joint NRF approach	LPA officers, NWWT
Decide on NRF areas, e.g. for North West and North East Wales, to tie in with fleshing out and delivering NRW Area Statements	LPAs, NRW, NWWT, Building Wildlife Trust (BWT)
Decide administration of NRFs – either individually or jointly by LPAs, or – as recommended - outsourced to a suitable third party such as NWWT	LPAs
'Road test' the recommended NBB assessment categorisation (table at 5.11) and amend this if it can be improved	LPA ecologists, acting jointly
Obtain legal advice about using agreements under S111 and draft S106 document templates	LPAs
Start to identify and prepare management plans & costings for initial projects to draw funds from a NRF(s).	LPA ecologists, NWWT, BWT
Prepare consistent text for LPA websites & additional procedural guidance (supplementing WG guidance) to inform applicant)	LPAs – agree consistent texts

9.8 Drafting of a jointly badged SPG should probably wait until 2022, after decisions and progress on the above tasks in order to avoid potentially abortive work.

Appendices

1. Study brief
2. Chief Planner's letter issued in October 2019 entitled '*Securing Biodiversity Enhancements*'
3. Template for planning condition used by Lichfield council to secure off-site net gains for biodiversity.
4. Further information on different approaches to calculating financial contributions for off-site measures needed to secure overall NBB.
5. Indicative text on biodiversity enhancement to place on LPA planning webpages
6. Draft text of a standard template to secure a financial contribution to achieve overall NBB, for use in all S106 agreement or unilateral undertakings documents in which such a contribution is required
7. Draft template for a complete agreement under S111(1) of the Local Government Act 1972 to secure a financial contribution to achieve overall NBB, as in Appendix 6.
8. Draft text of guidance, checklist and template for a Unilateral Undertaking that covers only a financial contribution to secure overall NBB.

Appendix 1

Study brief

‘North Wales Biodiversity Fund’: feasibility study specification

Commissioned by North Wales Wildlife Trust (NWWT), Conwy County Borough Council (CCBC) and Isle of Anglesey County Council (IoACC)

Context

In view of instructions from the Chief Planner to Heads of Planning (Oct 2019) on application of Welsh County Councils’ duty under the Environment Wales Act (2016) to seek to maintain and enhance biodiversity whilst carrying out their functions, in planning cases, there is a need to provide for off-site solutions for development proposals where on-site mitigation and enhancement is not possible.

Brief

The feasibility study should present a scheme, managed by an appropriate organisation (hereafter the ‘scheme administrator’), which can as straightforwardly as possible deliver planning authorities’ requirements for the planning system to implement biodiversity enhancements (and compensation where appropriate); undertaking all necessary background research and consultation with stakeholders to this end.

As matters of principle, the proposed scheme should:

- Aim to deliver both *compensation*, where adequate on-site compensation for biodiversity impacts cannot be delivered, and biodiversity *enhancement*, where this cannot be appropriately delivered on site (although these are distinct from a development control perspective, there is no ecological distinction – both aspects of requirements could be delivered by a single scheme)
- Demonstrate outcomes for off-site action that are clear and auditable, and clearly separate from already existing projects and actions

The proposed scheme should address:

- Whether it is appropriate/possible to seek payment for biodiversity enhancement separately from other planning obligations which are now routinely required (although not for householder applications) – the goal is that it should be
- What payments will be deemed appropriate and how this level will be determined in individual cases (for example, a flat rate, rate per unit area or other appropriate metric)

- The financial scale of payments – and to what extent future predictions are possible⁴⁰
- To what extent a fund could build-up (after administration expenditure has been incurred) prior to biodiversity outcomes being delivered; and over what period site management costs for new sites should reasonably be eligible for funding through the scheme (exploring possibilities of Section 106 agreements or similar arrangements being in place for the lifetime of the development proposal).
- To what extent a fund could operate without sites for compensation and/or enhancement having been identified (or prescriptions produced for identified sites) at the point of application submission and/or commencement of development
- How/whether it would operate across Local Planning Authority boundaries
- What legal mechanism would enable payments to be received from applicants and paid to the scheme administrator, and when such payments would be made
- What (legal and other) costs would be associated with the payments – the goal is to ensure that they don't dwarf the value of the payments themselves
- How the scheme administrator would itself organise such a scheme in line with its own governance arrangements to the satisfaction of its stakeholders

Consultation and research should include:

- A rapid review of comparable schemes currently operating in the UK, to the extent that they can inform a scheme in North Wales⁴¹
- Consultation with Local Planning Authority biodiversity leads, planners and legal teams
- Consultation with developers and planning agents to assess interest in using such a scheme to deliver relevant obligations

⁴⁰ The feasibility study should present this information not only under its recommended mechanism but in a range of scenarios based on variations in, for example, how the level of payment will be calculated

⁴¹ The feasibility study should *not* attempt a detailed review or critique of 'off-setting' schemes in general, but focus on the elements that could practically be implemented in North Wales

Appendix 2

Chief Planner's letter issued in October 2019 entitled *Securing Biodiversity Enhancements*

Prif Gynllunydd, Y Gyfarwyddiaeth Gynllunio
Chief Planner, Planning Directorate



Llywodraeth Cymru
Welsh Government

To: Heads of Planning

23/10/19

Dear Colleagues,

Securing Biodiversity Enhancements

Planning Policy Wales (PPW) 10 sets out that *“planning authorities must seek to maintain and enhance biodiversity in the exercise of their functions. This means that development should not cause any significant loss of habitats or populations of species, locally or nationally and must provide a net benefit for biodiversity”* (para 6.4.5 refers). This policy and subsequent policies in Chapter 6 of PPW 10 respond to the Section 6 Duty of the Environment (Wales) Act 2016*.

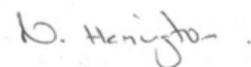
The purpose of this letter is to clarify that in light of the legislation and Welsh Government policy outlined above, where biodiversity enhancement is not proposed as part of an application, significant weight will be given to its absence, and unless other significant material considerations indicate otherwise it will be necessary to refuse permission.

It is important that biodiversity and ecosystem resilience considerations are taken into account at an early stage in development plan preparation and when proposing or considering development proposals. Planning authorities should be proactive and embed appropriate policies into local development plans to protect against biodiversity loss and secure enhancement.

The attributes of ecosystem resilience (PPW para 6.4.9 refers) should be used to assess the current resilience of a site, and this must be maintained and enhanced post development. If this cannot be achieved, permission for the development should be refused.

Securing a net benefit for biodiversity within the context of PPW requires a pragmatic response to the specific circumstances of the site. Working through the step wise approach (PPW para 6.4.21 refers), if biodiversity loss cannot be completely avoided (i.e. maintained), and has been minimised, it is useful to think of net benefit as a concept to both compensate for loss and look for and secure enhancement opportunities. A net benefit for biodiversity can be secured through habitat creation and/or long term management arrangements to enhance existing habitats, to improve biodiversity and the resilience of ecosystems. Securing a net benefit for biodiversity is not necessarily onerous; through understanding local context, it is possible to identify new opportunities to enhance biodiversity.

Yours faithfully,



Neil Hemington
Prif Gynllunydd, Y Gyfarwyddiaeth Gynllunio
Chief Planner, Planning Directorate

*Section 6 – Biodiversity and resilience of ecosystems duty

Section 6 under Part 1 of the Environment (Wales) Act 2016 introduced an enhanced biodiversity and resilience of ecosystems duty (the S6 duty) for public authorities in the exercise of functions in relation to Wales.

6. Biodiversity and resilience of ecosystems duty

(1) A public authority must seek to maintain and enhance biodiversity in the exercise of functions in relation to Wales, and in so doing promote the resilience of ecosystems, so far as consistent with the proper exercise of those functions.

Appendix 3

Template for planning condition used by Lichfield council to secure off-site 'net gains' for biodiversity

Secure Net-Gains Off-site (beyond the Red line)

Before the development hereby approved is commenced, a scheme for the offsetting of biodiversity impacts at the site shall be submitted to and approved in writing by the Local Planning Authority. The proposed offsetting scheme, as detailed in document XXX, shall provide for the creation and/or improvement of habitat/s of a value no less than XXX Biodiversity Units & shall include:

- i. Details of the offset requirements of the development, in accordance with a recognised biodiversity offsetting metric,
- ii. The identification of a receptor site or sites which generates a minimum of XXX Biodiversity Units;
- iii. The provision of arrangements to secure the delivery of offsetting measures, including a timetable for delivery;
- iv. A management and monitoring plan, to include for the provision and maintenance of the offsetting measures for a period of no less than 25 years from the commencement of the development. The management and monitoring plan is to include:
 - v. Description of all habitats to be created/enhanced with the scheme including expected management condition and total area;
 - vi. Review of the ecological constraints;
 - vii. Detailed designs and/or working methods (management prescriptions) to achieve proposed habitats and management conditions, including extent and location of proposed works;
 - viii. Type and source of materials to be used, including species list for all proposed planting and abundance of species within any seed mix/planting scheme;
 - ix. Identification of the persons responsible for implementing the works;
 - x. A timetable of ecological monitoring to assess the success of all habitat creation/enhancement.
 - xi. A timetable of future ecological monitoring to ensure that all habitats achieve their proposed management condition as well as description of a feed-back mechanism by which the management prescriptions can be amended should the monitoring deem it necessary. All ecological monitoring and all recommendations for the maintenance/amendment of future management shall be submitted to and approved in writing by the Local Planning Authority.

The offsetting scheme shall thereafter be completed in accordance with the approved details.

Appendix 4

Further information on different approaches to calculating financial contributions for off-site NBB measures

1. This appendix provides further information on the approaches and existing schemes listed at para 5.3:
 - 1 *Offsetting plus land purchase in North Wales*
 - 2 *Leeds and Lichfield Councils' 'Net gain for biodiversity' schemes*
 - 3 *The 'Building Wildlife' Trust, operating mainly in Flintshire and Wrexham*
 - 4 *Carmarthenshire County Council's scheme to ensure the Caeau Mynydd Mawr Special Area of Conservation is not harmed by developments*
 - 5 *A joint approach by 12 local authorities to ensure the Thames Basin Heaths Special Protection Area is not harmed by housing development*
 - 6 *Wrexham – developer contributions for onsite open space management*

Offsetting to compensate for loss of existing habitat, plus land purchase in North Wales

2. An 'impact assessment' commissioned by Defra and published in October 2019 entitled: *Biodiversity net gain and local nature recovery strategies* examined what should be the cost to a developer of 'buying' an offsetting unit. Paragraph 6.2.5 of that assessment stated:

'To estimate the costs to developers, we assume that the costs for both on-site and off-site habitat creation are £900 per ha for site surveys and £19,698 per ha for 30 years' creation and maintenance costs taken from a joint RSPB, National Trust and Wildlife Trusts study. The latter is discounted to a net present value (NPV) lump sum at the HM Treasury Green Book⁸⁵ rate of 3.5%. For where a developer is required to offset through the market for biodiversity units, the indicative price for a biodiversity unit is assumed to be £11,000. For comparison, if a developer were to pay this to offset the biodiversity units they accumulated from an average 1 ha development (4.46 units, see line (B3) in Annex 2), they would pay £49,060 per ha.'
3. If the figure of £11,000 were to be used, then the offsetting charge for loss to development of 1 hectare of 'low value' habitat in 'poor condition', therefore rated at 2 units⁴², would be £11,000 x 2 = £22,000/ha. However, note the reference above to 4.46 units of biodiversity value on an 'average' 1 ha development. For that the corresponding figure would be £11,000 x 4.46 = approximately £49,000.
4. For the purposes of this study the midway point between a low figure of £22,000 and the mid-range figure of £49,000, is chosen, i.e. a rounded figure of **£35,000**, equating to just over 3 offsetting units. The rationale is that the majority of 'green field' sites in

⁴² See table inserted at para 3.6.

Wales that are allocated for development are intensively managed farmland not far off the low end of the range of biodiversity value based on offset matrix methodology.

5. Of course national policy is **not** to destroy pre-existing biodiversity on development sites. On the contrary, it is to compensate as far as possible and to achieve net benefit primarily on-site. Thus if, in a particular case, about half of the pre-existing biodiversity value on a development site can be retained / compensated on-site, then the sum sought for off-site measures would be £17,500 per gross hectare of development site, not £35,000.
6. However, the Defra-based figures above assume no change in landownership. One of the recurring issues raised in interviews with practitioners in England is their difficulty in identifying land in private ownership for offsetting. Basically, most landowners do not want 'their hands tied' in the long term. Also, many ecologists are concerned about enforcement of agreed land management prescriptions in the medium to long term (see para 4.5).
7. This study assumes that in North Wales it will often be necessary for a suitable organisation such as NWWT (see para 7.19 - 22) to purchase land on the open market in order to implement whatever quantum of off-site measures may be needed to ensure a development achieves overall NBB.
8. A cursory web-investigation of agricultural land sale prices at present in North Wales identified the case of a 262 ha farm is for sale at Nebo in Conwy Borough, asking price £2,950,000. That equates to an asking price of about £11,000/ha. Another farm is for sale near in Caernarvonshire comprising 80 ha and mostly rough grazing, asking price £750,000. That equates to £9,300/ha. However, smaller areas of land are often sold with uses such as equestrian activity in mind and attract much higher prices. For example 8.1 ha for sale on Anglesey has an asking price of £195,000, equivalent to £24,000/ha. A 3.7 ha holding near Caernarfon is advertised for £19,000/ha. Landowners may also see an element of development 'hope value' in such land (however misguided) and/or be looking to sell in the 'lifestyle properties' market rather than mainstream farming.
9. Many of the sites that an organisation such as NWWT may aspire to purchase for new nature reserves are likely to be relatively small parcels of land and often close to towns or villages. If correct, that suggests a land purchase price of about £20,000/ha is realistic in North Wales. Adding this to the Defra-based figure of £35,000 above gives a total of £55,000/ha inclusive of land purchase. However, it may be possible to set up many biodiversity enhancement projects without the need for land purchase, for example if a local council or other benevolent land owner donates or leases land on a 'peppercorn' rent. If we assume that no more than about **half** of projects would require land purchase, then just £10,000 should be added rather than £20,000, giving a rate of £35,000 + £10,000 = **£45,000**. That is the figure tabulated under para 5.7.

Leeds and Lichfield Councils' 'Net gain for biodiversity' schemes

10. There are now several schemes in England where LPAs have sought to develop a workable biodiversity net-gain scheme. These includes a scheme run by Leeds

Council, for which there are very informative and up to date web pages entitled '[Achieving net gain for biodiversity - guidance for developers](#)'. I recommend this as an excellent description of how the Defra offsetting metric approach is currently being applied by a LPA.

11. What is of particular interest is Leeds' text under the heading '*What is required where 10% net gain for biodiversity cannot be achieved on-site?*' It is well worth reading the full extract here, including the discussion of different rates used or proposed in different schemes in England.

'The LPA wants to encourage high quality biodiversity enhancements on-site and will scrutinise applications that do not appear to have sufficiently demonstrated this through the input of an Ecological Consultant at the Design stage of the layout. However, it is acknowledged that there will be times where a 10% Net gain for biodiversity cannot be delivered on-site. Where it has been demonstrated that it is not possible to achieve a 10% Net gain for biodiversity on-site there will need to be consideration of off-site measures – it should be noted that by designing the layout through input of an Ecological Consultant, to deliver on-site biodiversity enhancements, there should be a smaller requirement for compensation off-site.'

The LPA does not have to offer to take on responsibility of delivering the off-site Net gain (as per Option 2 below) instead of the developer – it should be the responsibility of the developer to try and deliver the Net gain even if it requires purchase of land to deliver the off-site requirements. However, in order to try and facilitate development in Leeds the LPA is considering how it can provide a role in this process that does not hold up planning applications whilst also considering its statutory Biodiversity duties under the Natural Environment and Rural Communities Act (NERC Act 2006) and the NPPF (and emerging Environment Act).

Therefore, we are in a transitional period where the LPA may not be able to fulfil Option 2 below (until a Habitat Bank and Delivery Partner/s have been identified) and therefore if Option 2 is being considered the EclA report submitted should fully cost out the possible scenario below and confirm in writing whether the developer is willing to fund this option, and then seek confirmation with the LPA whether this can be agreed. Other options are for the developer to purchase or use other land they own in Leeds (provided it is in a strategic ecologically-beneficial location agreed by the LPA) or approach a third party Habitat Bank (again ensuring any land to be used is in a strategic ecologically-beneficial location agreed by the LPA).

The LPA is currently investigating setting up a formal Net gain for biodiversity system (backed by SPD, Policy and/or the Environment Act) but until this has been set up the LPA may accept one of the following two Options where 10% Net gain for biodiversity cannot be achieved on-site:

Option 1 *Off-site land under control of the applicant can be used for Net gain for biodiversity provided it (all the bullet points should apply):*

- Is in the same Ward (or immediately adjacent Ward subject to agreement of the LPA) as the development site where the impacts occur*
- Is located in an area of deficiency as per Natural England's "Nature Nearby" Accessible Natural Greenspace Standards or is within or immediately adjacent (and physically connected) to part of the Leeds Habitat Network (including any Habitat Network Extensions mapped in Neighbourhood Plans)*
- Will have full public access and have signposting and interpretation to make this clear*

- Will be subject to a S106 Agreement or similar unilateral undertaking to ensure delivery of public access and positive biodiversity management for a minimum period of 30 years

Option 2 A Net gain for biodiversity Sum (Biodiversity Credit) is calculated based on the Biodiversity Units required for the LPA or another third party Habitat Bank (to be approved by the LPA) to take on responsibility to deliver the Net gain for biodiversity Works through biodiversity projects/measures in line with the following (all the bullet points should apply):

- Biodiversity Units to be delivered in the same Ward (or immediately adjacent Ward subject to agreement of the LPA) as the development site where the impacts occur
- A S106 Agreement will be used to transfer the Sum alongside a trigger point
- The Sum required for 1 Biodiversity Unit will be £20 000 index-linked (and pro-rata i.e. 0.4 Biodiversity Units = £8 000) – this is considered to be reasonable in relation to the costs that would be required by the developer to re-create habitat such as woodland or semi-improved grassland through site preparation, establishment, management and monitoring – and potentially purchase of land to carry out such measures on for a minimum period of 30 years. The recent consultation by Defra (December 2018) considered the range of £9 000 to £15 000 per Unit (see page 37 Defra Net gain Consultation), and other local authorities such as Warwickshire County LPA’s own Sum calculations are higher than this range (up to £50 000 per Unit). The Defra Net gain Consultation Response (July 2019) stated that professional bodies such as IEMA (Institute of Environmental Management and Assessment) considered the £9 000 to £15 000 range to be too low, and CIWEM (Chartered Institute of Water and Environmental Management) stated that the figure should be above £12 000, and one local planning authority cited an average local authority tariff of £19 700. Therefore, in Leeds the figure of £20 000 per Biodiversity Unit has been set for May 2020 (subject to being index linked annually) and will be used during a trial period of two years and revised thereafter depending on uptake of Option 2 by developers and success of uptake by Net gain for biodiversity Delivery Partners.
- A Biodiversity Credit Certificate will be passed to the applicant to confirm the LPA (or third party Habitat Bank) will deliver the appropriate number of Biodiversity Units.’

12. The second to last bullet point above demonstrates the huge range in estimates of what would be a reasonable charge / tariff per Biodiversity Unit. This alone underlines the point made at para 3.11 about avoiding spurious over-exactitude. Leeds have opted for a figure of £20,000 / unit after consideration of the evidence. So 2 units = **£40,000** and this is the figure inserted into the table at para 5.7 in order to be consistent with the rationale in paragraph 6 above. For housing developments with an average density of, say, 30 dwellings / ha, this works out at about £1,300 per dwelling.
13. However, using the Defra reference to an ‘average’ hectare of development requiring 4.46 units, the corresponding figure would be £89,200 / ha. The range of these figures also reinforces the point made at para 3.11 about avoiding spurious over-exactitude.
14. I also looked into schemes being developed by [Warwickshire County Council](#) and a longer established and RTP1 award winning scheme run by [Lichfield District Council](#). Lichfield’s LDP adopted in 2015 includes policy E3 which, among other

requirements, says that Development will only be permitted where it delivers a net gain for biodiversity. Relevant SPG seeks a 20% gain above the value of all habitats lost to development. The Council's ecology team have shared an informative [presentation](#) on how the Council seeks to implement its approach.

15. I interviewed an ecologist with Lichfield Council about their 20% Net Gain policy and scheme:
- All protected/priority species and all habitats are fully considered when their ecologists are consulted on a development in the Lichfield District.
 - Every habitat has a value (with the exception of sealed surfaces). The metrics require the impacts of a development on every habitat within the red line of an application must be considered and calculated (pre and post development), measured, avoided, mitigated where possible and compensated for (last resort) and then finally the provision of biodiversity net gain of habitat must be included within a development scheme. All habitat restoration, creation and enhancement we advise should adhere to the Council's Nature Recovery Network Mapping.
 - The Council does not have its own biodiversity metric – they utilise the national Defra metric, prior to the release of that it was the Environment Bank metric which was predominantly utilised by developers.
 - Smaller sites: She used the phrase 'death by a thousand cuts', referring to development prior to mandating biodiversity net gain in the District and adopting biodiversity metrics. The Council is currently only able to use the metric on smaller sites in certain scenarios (dependant on size/type/condition of habitat). A large proportion are currently assessed using a bespoke qualitative approach (without the use of a metric) where innovative solutions and enhancements are presented in the form of boosting a sites green infrastructure, natural capital and providing species specific enhancements. The Council currently does not have a method of measuring those sites at present. However we await the release of the new Defra smaller sites metric to ensure we can deliver measurable biodiversity net gain and welcome this going forward.
 - The Lichfield scheme involves no pooling of funds from different developer contributions. S106 agreements reflect bespoke calculations for each scheme. Costs include administrative costs running the scheme.

Building Wildlife Trust, operating mainly in Flintshire and Wrexham

16. Information about the charitable trust 'Building Wildlife' (BW) can be found on its [website](#). BW was originally set up to:

'... receive monies resulting from development having the potential to impact on Special Areas of Conservation (SAC) and European Protected Species (EPS) where there is no suitable alternative and to distribute the monies to projects which will benefit the SAC and the species.'

17. BW recently expanded its charitable aims as follows, to support nature recovery generally and not limited to the SAC and protected species:

‘... to promote for the benefit of the public the conservation and protection of species and their habitats including great crested newts considered of principal importance through current wildlife legislation in Wales in areas of North East Wales (Conwy, Denbighshire, Flintshire, and Wrexham).’

18. BW pools financial contributions from developers in North East Wales, collected via the LPAs and usually raised through S106 planning agreements. Pooled funds are spent by:
 - (a) implementing biodiversity enhancement measures on sites identified in partnership with the LPAs and developers, and
 - (b) offering grants to a range of community organisations. Further details including the application process for grants can be found on BW’s website.
19. BW works in line with Flintshire Council’s Supplementary Planning Guidance 8a: Great Crested Newt Mitigation Requirements, issued in 2018, includes a summary of costs at page 15. This says:

‘For the creation of a hectare of high quality fenced mitigation land containing 2 ponds and hibernacula and a mix of shrub and grassland creation the initial creation cost is £16295. For continued management and monitoring of the site the annual cost will be £2500 thereafter or based on 30 homes per ha £83.33 per property.’
20. The SPG says the costs are ‘a basis for negotiation as situations vary widely’. An annual cost of £2,500 ‘in perpetuity’ interpreted as 30 years equates to a ‘commuted’ sum of £47,000 using the 3.5% Treasury discount rate. £16,000 plus £47,000 is **£63,000 / ha**. However the interview with a representative of BW indicated that actual sums secured are somewhat lower. Separately, an interview with a LPA representative cited a figure of £2,500 per dwelling raised from a recent S106 agreement for SAC-related conservation measures in the Connah’s Quay area in Flintshire. At 30 dwellings per hectare that equates roughly to £75,000/ha. That suggests a figure of at least **£63,000** is a reasonable comparison to make with other figures tabulated at para 5.7.

Carmarthenshire County Council's scheme to ensure the Caeau Mynydd Mawr Special Area of Conservation is not harmed by development

21. The RTPI's practice advice note referred to at para 6.97 commends a scheme run by Carmarthenshire County Council, saying:

'Carmarthenshire County Council has adopted a landscape-scale approach to conservation. The council has published supplementary planning guidance for the Caeau Mynydd Mawr Special Area of Conservation. The guidance establishes a management strategy to ameliorate for the loss of and secure the ongoing and future management of habitats used by the marsh fritillary butterfly.

... In the guidance developers are required to make a financial contribution to mitigate for their development impacts, as a condition⁴³ of granting planning permission for specific classifications of development within the area. The funds raised through development are invested in the long-term upkeep of the conservation area and protection of the butterfly.'

22. The SPG in question was adopted in 2014 and sets out the Council's approach in detail, including a schedule of contribution. The original charges were £1,043 per net additional dwelling, equivalent to £31,290/ha, and a flat rate of £31,290 per hectare of habitat lost (i.e. not simply the red line area of a development site) for most other types of development including but not limited to employment, education & community uses, transport/highways. Other papers provided by the Council for this study explain the basis of calculation:

'The levy schedule is developed from, and supported by, the Payment Justification Paper developed by the Council in partnership with Natural Resources Wales (NRW). This paper sets out a land management cost for typical hectare where planning permission is granted. This evidence is based upon land valuations within the SPG area with independent advice provided by chartered surveyors.'

23. The Council has recently updated the basis for the level of contribution sought, drawing on inflation and greater emphasis on actual costs of individual projects since the scheme's inception, with less reliance on estimates as at scheme inception. The charge is now understood to be about £1,500 per dwelling, equating to about **£45,000** per hectare for housing using their assumed density of 30 dwellings /ha. This rate / ha is applied to most other forms of development. This rate understood to be calculated to achieve a mix of projects, some involving land purchase and some grants or other direct support to existing landowners.
24. All contributions are raised through S106 agreements. These span a range of development scale as well as type. In the case of housing, S106 agreements have been secured with developments of just one additional dwelling.

⁴³ This is incorrect. Financial contributions are made via S106 agreements.

A joint approach by 12 local authorities to ensure the Thames Basin Heaths Special Protection Area is not harmed by housing developments

25. In 2005 the Thames Basin Heaths Special Protection Area (SPA) was classified under the EC Birds Directive. It includes areas of heathland across Surrey, Hampshire and Berkshire covering 11 different local authority areas. Information about the joint approach can be found in the original 2009 Delivery Framework the website of the Thames Basin Heaths Partnership and in SPGs and linked documents such as those produced by Bracknell Forest Council.
26. Bracknell Forest's web pages summarise the initiative:

'The European and national legislation that underpins the SPA seeks to make sure that any proposed development scheme or development plan will not adversely affect the integrity of the SPA. Natural England ... have advised us, and the other 10 local authorities with land in the Thames Basin Heaths, that new housing within 5km of the SPA may harm the rare bird populations. Larger developments located between 5 and 7km of the SPA may also be affected. This harm can be caused by disturbance to the birds from a growth in the number of walkers, cats and dogs frequenting the heathland, and other recreational uses created by additional housing. ... Developers wishing to promote additional housing in the 400m to 5km zone (and possibly the 5 to 7km zone) will be required to demonstrate that their proposals can avoid any likely significant adverse effect on the SPA. This can be done using the mitigation measures known as SANG (Suitable Alternative Natural Greenspace) and SAMM (Strategic Access Management and Monitoring Measures).'
27. SANG measures create new recreation areas outside the SPA, in order to reduce recreation pressure within the SPA heaths but in the process also creating new habitats. SAMM measures involve managing & enhancing existing habitat and seeking to influence visitor behaviour within the SPA.
28. When contributions were first sought from housing developers in 2007, the flat rate was £1,536 per dwelling and contributions were secured exclusively via S106 agreements with each of the Councils, and the individual contributions 'pooled' by Hampshire County Council acting as scheme banker. The scheme has subsequently become much more complex, with differing rates for different dwelling sizes (measured by bedroom number), a reduction for affordable housing and contributions being sought via both S106 agreements and CIL, each being directed to different purposes for the SANG and SAMM programme as a whole. The average contribution per dwelling now sought is significantly higher than was the case in 2007, though the interviewee from Bracknell Forest Council pointed out that development in the South East is more profitable than in North Wales, raising differing development viability issues.
29. For simplicity in view of the purpose of this study, the original £1,536 contribution adjusted using the Consumer Price Index would be equivalent to £2,181 in 2020. At 30 dwellings/ha that equates to about **£65,000** per ha. This figure is inserted in the table at para 5.7.

Wrexham – developer contributions for onsite open space management

30. It is worth comparing the developer contributions sought through the above biodiversity enhancement initiatives with the contributions that LPAs seek from developers in order for the LPA to agree to 'adopt' and then manage areas of open space within developments (i.e on-site). An example is Wrexham Council, which published a guidance note on public open space in new housing development which was last updated in 2008. This says:

'Developers will be required to maintain the public open space provided on their sites for a period of twelve months from satisfactory completion, and as a condition to any approval, must enter into a legal 'commuted sums' agreement with the Council for the future maintenance of the site, for a ten year period. The current charge is £1000 per dwelling to cover maintenance costs for a ten year period.'

31. This charge, which is only for maintenance, only for 10 years and only for the proportion of an overall development site that becomes public open space (i.e it is not a charge per hectare of open space) equates to £30,000 per hectare assuming a housing density of 30 dwellings / ha. If the costs of creating the open space were to be added, and the maintenance period extended to 30 years / in perpetuity, then the sum would fit within the rest of the range of figures in the table at para 5.7.

Appendix 5

Indicative text on biodiversity enhancement & securing NBB to place on LPA planning web pages

Your planning application and achieving a Net Benefit for Biodiversity: What you need to know and do

Biodiversity is a word used to describe the enormous variety of life on Earth. Biodiversity comprises all plant and animal species, including the diversity of microscopic life in the soil.

National planning policy in Wales requires development to provide a **net benefit** for biodiversity. This means a development proposal must result in a better outcome for biodiversity than the situation before development. You can read the relevant national policy [here](#)⁴⁴. If net benefit is not proposed as part of your application, then the Council will place significant weight on its absence. Unless other considerations indicate otherwise, it will be necessary to refuse planning permission.

Net benefit should be achieved primarily **within** the development site shown in your planning application and accompanying plans. However, it will not be enough for your proposal to provide some practical measures to benefit biodiversity if those measures are insufficient to result in a net benefit overall. In that situation, a net benefit can be secured by additional measures outside the development site, through new habitat creation and/or action to improve existing habitats.

You need to provide information with your application form that describes what measures you propose to take to benefit biodiversity. Welsh Government has published practical [guidance](#)⁴⁵ to assist applicants to try to achieve net benefit within the development site. Other helpful guidance produced by [organisation(s)] is [here](#)⁴⁶. You should consider getting advice of a professional ecologist, particularly if your development is large or complex. Also, be aware of separate information requirements which are explained in your application form about trees and protected species.

The Council's ecologist will look at your application and the information about biodiversity that you provide. They will advise the case officer whether the measures you propose are sufficient to clearly demonstrate net benefit. If not, the Council will contact you within about three weeks of getting your application to require you to make a financial contribution. This will be to pay for biodiversity gains to be secured elsewhere in North Wales, so that your proposal will provide net benefit overall. Payments go into a Nature Recovery Fund operated by [organisation] and you can find out more about this [here](#)⁴⁷.

⁴⁴ Link to relevant parts of PPW11 and other relevant WG policy/guidance documents.

⁴⁵ Not yet available.

⁴⁶ Insert here, such as guidance produced by the [Wildlife Gardening Forum](#).

⁴⁷ This could be a link to a new supplementary planning document, when adopted.

Appendix 6

Draft text of a standard template to secure a financial contribution to achieve overall NBB, for use in S106 agreement or unilateral undertaking documents in which such a contribution is required

Under 'DEFINITIONS'

'Net Benefit for Biodiversity Contribution' means a financial contribution of £..... , Index Linked, having been calculated in accordance with the methodology in Section X of the *Planning and Biodiversity Enhancement Document*, to be paid by the Developer to the Council for onward payment into the North West/East Wales Nature Recovery Fund.

Planning and Biodiversity Enhancement Document means the Supplementary Planning Document with this title adopted by the Council on [date].

North West Wales Nature Recovery Fund means a restricted fund managed by the [organisation] with the Council's agreement, to be spent exclusively on the purposes and within the geographical area set out in Sections Y and Z of the *Planning and Biodiversity Enhancement Document*.

Under 'OWNER'S COVENANTS'

NET BENEFIT FOR BIODIVERSITY CONTRIBUTION

Prior to the Commencement of Development on the Site the Owner shall pay the Net Benefit for Biodiversity Contribution to the North West Wales Nature Recovery Fund.

The above texts have been incorporated in red into the full draft Unilateral Undertaking template at Appendix 8.

Appendix 7

Draft council guidance and template for a complete agreement under S111(1) of the Local Government Act 1972 to secure a financial contribution to achieve overall NBB, as in Appendix 6

Text is partially based on a document produced by Denbighshire Council and is partially new text drafted for this study. An alternative format to the Denbighshire text can be found on [Plymouth City Council's website](#) (see para 6.62).

Guidance on completing a Net Benefit for Biodiversity Agreement

IMPORTANT: please read these notes before completing a Net Benefit for Biodiversity Contribution agreement

Biodiversity is the biological variety and variability of plant and animal life on Earth. National planning policy in Wales requires that development must provide a net benefit for biodiversity. A short guide entitled '*Planning and Biodiversity*' and a longer Supplementary Planning Document (SPG) with the same title on the Council's website explain how this requirement is being implemented in [Council area]. These documents explain that the aim is to achieve a net benefit for biodiversity on the development site itself. However, if this is not possible then the Council requires the developer to pay a financial contribution to pay for measures to benefit biodiversity elsewhere in North Wales so that the development will achieve a net benefit overall.

The SPG explains how the Council calculates a financial contribution for off-site measures, if needed, depending on the development proposed and its impact on biodiversity.

Payments should be made into the Nature Recovery Fund for North West Wales, which is administered on behalf of councils in the area by [organisation]. You can find out how the Fund is managed and how your contributions to it will be spent by going to [organisation]'s website.

A Net Benefit for Biodiversity Contribution is an Agreement to pay this contribution without the need to complete a longer and more complicated Unilateral Undertaking to achieve the same outcome. However the choice is for person applying for planning permission. In order to complete this Agreement, you must complete the form overleaf and return it with the payment due.

A completed agreement should be to sent to [name and address at the Council]. The agreement will then be signed and returned to you as your receipt, and copied to [the organisation].

‘NET BENEFIT FOR BIODIVERSITY’ CONTRIBUTION AGREEMENT

Application Reference Number (“the Application”):

Address:

Description of development:

Payment ref (if known):

I am contributing a sum of £ towards the cost of measures to ensure this development will comply with planning policy that development achieves a net benefit for biodiversity.

I hereby acknowledge and agree that:

- [Name] Council’s assessment that the above application is a proposal that will not achieve net benefit for biodiversity on the development site itself and that a contribution of £ [.....] for off-site biodiversity enhancement measures is required to comply with policy in the Welsh Government’s national planning policy, to be implemented as set out in [name of SPG].
- The Net Benefit for Biodiversity Contribution is to be paid to [name] Council (“the Council”) as a proportionate contribution for this particular development towards achieving a net benefit for biodiversity in accordance with policy.
- I have been informed of the opportunity to complete a Unilateral Undertaking, in accordance with Section 106 of the Town and Country Planning Act 1990 (as amended), to make the Net Benefit for Biodiversity Contribution when development commences and I have chosen to make this direct payment as an expeditious alternative to relying upon a unilateral undertaking.
- No refund of this Net Benefit for Biodiversity contribution will be made unless the Application does not receive approval or is later withdrawn⁴⁸.
- In respect of any refund (including where an application is withdrawn) I further acknowledge that:

⁴⁸ This may not be appropriate. With S106 obligations, developers rarely pay contributions until immediately prior to commencement or later. The model S111(1) agreement could easily be adapted to require the contribution to be paid before commencement of development or within X days of commencement. If so, there would need to be a condition saying that the Council will be notified when development commences.

- A request for a refund will be made to the Council in writing;
- The total amount refunded will be the sum of the original contribution payment less an administration fee of £30 (including VAT)
- No interest will accrue to be refunded; and,
- No refund will be made until the period for appeal has passed or an appeal has been dismissed or six months has elapsed since the date of withdrawal of the Application.

Signature of applicant _____ **Date:** _____

Full name of applicant: _____

Witnessed by

Name _____

Address _____

Occupation _____

Signed on behalf of [name] Council: _____

[name] – Development Manager

This receipt signifies the agreement on behalf of [name] Council to the terms in which the open space contribution is made by the applicant as set out in this form and in accordance with Section 111 Local Government Act 1972.

Please send a hard copy of this document to the following address: -

[Relevant name and address at Council, with option to send via email]

Appendix 8

Draft text of guidance, checklist and template for a Unilateral Undertaking that covers only a financial contribution to secure overall NBB

Text is partially based on a document produced by Denbighshire Council and is partially new text drafted for this study.

Guidance on completing a Unilateral Undertaking to pay a Net Benefit for Biodiversity Contribution

IMPORTANT: please read these notes before completing a Unilateral Undertaking

Biodiversity is the biological variety and variability of plant and animal life on Earth. National planning policy in Wales requires that development must provide a net benefit for biodiversity. A short guide entitled '*Planning and Biodiversity*' and a longer Supplementary Planning Document (SPG) with the same title on the Council's website explain how this requirement is being implemented in [Council area]. These documents explain that the aim is to achieve a net benefit for biodiversity on the development site itself. However, if this is not possible then the Council requires the developer to pay a financial contribution to pay for measures to benefit biodiversity elsewhere in North Wales so that the development will achieve a net benefit overall.

The SPG explains how the Council calculates a financial contribution for off-site measures, if needed, depending on the development proposed and its impact on biodiversity.

Payments are made into a Nature Recovery Fund for North West Wales which is administered on behalf of councils in the area by [organisation]. People can find out how the Fund is managed and how their contributions to it will be spent by going to [organisation]'s website.

A Unilateral Undertaking is often referred to as a Section 106 Agreement or Planning Obligation. Such an Undertaking is one way to make this financial contribution.

In order to complete an Undertaking, you must use the template and checklist overleaf.

Once you have completed and signed your Unilateral Undertaking it must be returned to the Council, with all the supporting documents for the checking, together with the legal fee.

The contributions will be spent in accordance with the Council's Supplementary Planning Document entitled '*Planning and Biodiversity*'.

CHECKLIST FOR COMPLETING A UNILATERAL UNDERTAKING

In order to complete a Unilateral Undertaking please provide the following information:

1. Proof of Ownership Documents:

- An up to date Official Copy of the Land Registry Title Register and
- Title Plan relating to the property/land that is the subject of the Planning Application.

Details about ordering the official copy documents can be found on the official Land Registry Website at <https://www.gov.uk/search-property-information-land-registry>

You need to provide the Council with the above documents to prove your ownership of the Property, and your ability to complete the attached legal document as the owner. It will be apparent from the Title Register if anyone else has an interest in the Property that ought to be a party to the deed, such as a Mortgagee. If title to your property is unregistered then you need to contact the Council for further advice.

2. Payment:

The payment for the legal checking fee currently £X00. This payment should be made by cheque made payable to [name] Council

3. Other Supporting Documents:

- A plan showing the boundaries of the Property **edged red**. You may use the location plan that accompanied your Planning Application with the consent of copyright owner.
- If the mortgagee is signing by way of Power of Attorney a copy of the Power of Attorney showing the name of the person who has signed the deed **must** be provided.

COMPLETING YOUR UNILATERAL UNDERTAKING

Note 1. Date and Execution

This is the date that you sign the Unilateral Undertaking. It should be kept blank until the legal department has finalised the draft and sent it out for signature. You will then be able to sign and date the Unilateral Undertaking and return to the legal department.

Note 2. Name and Address

2.1 The full name(s) and addresses of both the person(s) who own the land and all other persons (if any) who have any other interest in the land (e.g. pursuant to a conditional contract or option agreement) should be entered here in capital letters.

If the applicant does not own the land but is to develop it then they should be a party to the agreement.

2.2 References to mortgagee/mortgage is only required where there is a charge on the land. If there is no mortgage delete references to them throughout.

Note 3. Application Number

Complete the planning application number – this is the unique reference number given to you by the Council.

Note 4. The Land

This should be the full postal address as stated on the planning application and should correspond with the address in the title deeds.

Note 5. The Plan

A plan showing the boundaries of the property **edged red**. You may use the location plan that accompanied your planning application.

Note 6. Title

- 6.1. This information should be taken from up to date office copy entries obtained from HM Land Registry (not more than 21 days old) for registered land or from the title deeds if unregistered land.
- 6.2 Please ensure that proof of title by way of either up to date office copy entries and filed plans (registered land) or an epitome of title (unregistered land) is submitted to the Council with your draft undertaking.

Note 7.

The Planning Obligations must consist solely of the payment of financial contributions.

Note 8.

Once approved the document must be executed. Please ensure that the correct wording is used, eg if a company is to sign choose the clause which refers to the company seal, if appropriate. If an individual is to sign his/her signature must be witnessed by an independent witness who must sign and print his/her name, address and occupation

If a mortgagee is signing by way of a Power of Attorney a copy of the Power of Attorney showing the name of the person who signed the deed must be provided.

Please indicate which wording is applicable by highlighting which one is appropriate.

PLANNING OBLIGATION

Under Section 106 of the Town & Country Planning Act 1990

Dated

Note 1 [N.1]

(1) (“the Owner”)

[N.2]

(2) (“the Developer)

(3) (“the Mortgagee”)

Given to:

(3) [Name] Council

Relating to land at

[N.3]

Planning Application

Name

Title e.g. Head of Legal, HR and Democratic Services

[Name] Council

Council Address

UNILATERAL UNDERTAKING

This Unilateral Planning Obligation is made the day of 20.. [N.1]

and given by

(1)("the Developer")

(2) **MORTGAGEE** [N.2]

(3) **[Name] COUNCIL** of [Council's address] ("the Council")

1. Definitions and Interpretation

1.1. In this Unilateral Planning Obligation the following expressions shall where the context so requires or admits have the following meanings:

"Act" the Town and Country Planning Act 1990 (as amended) or any re-enactment or modification thereof for the time being in force;

"Application" the application made by the Developer to the Council for planning permission to develop the Application Site under reference number [N.3]

"Application Site" land at the shown edged red on the Plan in respect of which the Developer made the Application and as registered under title number [N.4];

"Commencement of Development" in the case of implementation of the Planning Permission

the carrying out of any of the material operations listed in Section 56 of the Act pursuant to the Planning Permission provided that for the purposes of determining whether or not a material operation has been carried out there shall be disregarded site clearance, demolition, site surveys and investigations and "commence" and "commenced" shall be construed accordingly;

"Development" such development as may be authorised by the

Planning Permission;

“Dwelling(s)” properties to be built pursuant to the Planning Permission

“Indexation” means indexation in accordance with Schedule 1.

“Net Benefit for Biodiversity Contribution” [means a financial contribution of £..... , Index Linked, having been calculated in accordance with the methodology in Section X of the *Planning and Biodiversity Enhancement Document*, to be paid by the Developer to the Council for onward payment into the North West/East Wales Nature Recovery Fund.

“Planning and Biodiversity Enhancement Document” [means the Supplementary Planning Document with this title adopted by the Council on [date].

“North West Wales Nature Recovery Fund” [means a restricted fund managed by the [organisation] with the Council’s agreement, to be spent exclusively on the purposes and within the geographical area set out in Sections Y and Z of the Planning and Biodiversity Enhancement Document.

“Plan” the plan attached hereto; **[N.5]**

“Planning Permission” the Planning Permission granted pursuant to the Application;

1.2 In this Unilateral Planning Obligation, unless the context otherwise requires:

1.2.1 any reference to a statute or a provision of a statute shall be construed as a reference to that statute or provisions as amended, re-enacted or extended at the relevant time;

1.2.2 any reference to a person shall be construed as a reference to any person, firm, company, corporation, government, state or agency of a state or any association or partnership (whether or not having separate legal personality) or one or more of the foregoing;

1.2.3 any reference to the singular shall include the plural and vice versa;

1.2.4 any reference to the masculine gender shall include the feminine and neuter and vice versa;

1.2.5 the table of contents and headings are inserted for ease of reference only and shall not affect the construction of this Agreement;

- 1.2.6 where any party comprises two or more persons, any obligations of that party in, under or arising from this Unilateral Planning Obligation is undertaken by or binding upon such two or more persons jointly and severally;
- 1.2.7 references to any party to this Unilateral Planning Obligation include its successors-in-title and permitted assignees and in the case of any local authority shall also include any successor in function;
- 1.2.8 references to numbered clauses, schedules or paragraphs are references to the relevant clauses or schedules in this Unilateral Planning Obligation or the relevant paragraph of this Unilateral Planning Obligation respectively;

2. Background

- 2.1 The Council is a local planning authority as defined in the Act and a Local Planning Authority for the purposes of planning obligations imposed pursuant to the provisions of Section 106 of the Act.
- 2.2 The Owner is the owner in fee simple in possession of the Application Site with title absolute registered at HM Land Registry under title number
[N.6]
- 2.3 The Developer intends to carry out the Development
- 2.4 The Application was submitted to the Council by the Developer for planning permission for the development of the Application Site as described in the Application.
- 2.5 The Developer is willing to give an undertaking to perform the obligations set out in this Unilateral Planning Obligation.
- 2.6 The mortgagee holds the benefits of a legal charge dated and consents to the terms of this Agreement

3. Condition Precedent

- 3.1 This Unilateral Planning Obligation (with the exception of Clauses 4, 6, 7, 8, 9 which shall take effect on the date hereof) is conditional on and shall only have effect on the date six weeks after the grant of the Planning Permission in circumstances in which no legal proceedings shall have been issued by any person to challenge the validity of the Planning Permission;
- 3.2 If on the expiry of the period referred to in Clause 3.2 the Planning Permission is not extant then this Unilateral Planning Obligation shall absolutely determine and become null and void.
- 3.3 In the event that the Council shall at any time hereafter grant a planning permission pursuant to an application made under Section 73 of the Act in respect of conditions attached to the Planning Permission, save and in so far as this Agreement has been amended by way of a deed of variation prior to

the grant of such planning permission, this Unilateral Planning Obligation shall remain in effect.

4. Statutory Provisions and Covenants

- 4.1 This Unilateral Planning Obligation is entered into pursuant to the provisions of Sections 106 of the Act and Section 111 of the Local Government Act 1972 and shall be deemed to be planning obligations in respect of and binding the Application Site for the purposes of that section but without prejudice to all and any other means of enforcing them at law or in equity or by statute.
- 4.2 The covenants and obligations created by this Unilateral Planning Obligation are planning obligations for the purposes of Section 106 of the Act and are enforceable by the Council as local planning authority.
- 4.3 This Agreement is a Deed
- 4.4 This Unilateral Planning Obligation shall cease to have effect in respect of any then outstanding obligations in the event that the Planning Permission is revoked, or is modified without the Developer's consent.
- 4.5 No person will be liable for any breach of this Unilateral Planning Obligation unless they hold an interest in that part of the Application Site in respect of which such breach occurs or hold such an interest at the date of the breach provided that the person shall remain liable for any antecedent breach.

5. Obligations

[N.7]

The Owner and Developer covenant as follows:

- 5.1 To give the Council 7 days advance written notice of the Commencement of Development.
- 5.2 To pay to the Council the Council's legal costs involved in the negotiation and approval of this Deed prior to completion of this Unilateral Planning Obligation together with monitoring costs if so required.
- 5.3 To pay to the Council the Net Benefit for Biodiversity Contribution prior to commencement of development on the Application Site.

6. Mortgagees Consent

The Mortgagee consents to its interest in the Application Site being bound by the terms of this Unilateral Undertaking PROVIDED that it shall no liability under this Unilateral Planning Obligation unless and until it becomes a mortgagee in possession of the Application Site save for any pre-existing breach.

7. Notices

- 7.1 Any notice or consent required to be served upon the parties to this Unilateral Planning Obligation shall be in writing and shall be sent by first class registered post, hand delivery or fax. There shall be no right to serve notices or consents by email but if a party chooses to do so and the other party agrees email may be used.
- 7.2 Subject to Clause 7.4 below any such notice, consent or other document shall be deemed to have been duly received:
 - 7.2.1 if dispatched by first class, registered post – 48 hours from the time of posting to the relevant party; or
 - 7.2.2 if dispatched by hand delivery – at the time of actual delivery; or
 - 7.2.3 if dispatched by email – 24 hours after the time of the dispatch.
- 7.3 Unless otherwise notified by one party to the other in writing from time to time, for the purposes of this Clause the postal addresses of each party are those set out at the beginning of this Unilateral Planning Obligation.
- 7.4 In proving service by post it will be sufficient (unless any relevant part of the postal service is affected by industrial action) to prove that the envelope containing the notice was duly stamped addressed and posted to the addresses specified herein. In proving service by email it shall be sufficient to prove that it was properly addressed and dispatched to the numbers or address specified herein.
- 7.5 A party shall not attempt to prevent or delay the service on it of a notice under this Unilateral Planning Obligation.

8. Waiver

- 8.1 No delay or failure on the part of any party in enforcing any provision in this Unilateral Planning Obligation shall be deemed to be a waiver or create a precedent or in any way prejudice any party's rights under this Unilateral Planning Obligation.
- 8.2 The rights and remedies provided in this Unilateral Planning Obligation are cumulative and are additional to any rights or remedies provided by law.

9. Miscellaneous

- 9.1 The Owner hereby consents to the registration of this Deed as a Local Land Charge and as a Notice at HM Land Registry against Title Number
- 9.2 If any provision in this Unilateral Planning Obligation shall be held to be invalid illegal or unenforceable the validity legality and enforceability of the remaining provisions hereof shall not in any way be deemed thereby to be affected or impaired.

10. Third Parties

The Developer declares and confirms that with the exception of any person who becomes an Owner, Lessee, or Mortgagee of the Application Site no term of this Unilateral Planning Obligation is enforceable under the Contract (Rights of Third Parties) Act 1999 by a person who is not a party to this Unilateral Planning Obligation.

IN WITNESS whereof this Deed has been duly executed by the parties the day and year first before written.

SCHEDULE 1

INDEXATION

1. In this Schedule:-

“Index” means the All in Tender Price Index of Buildings Cost Information Services (“BCIS”) as published by the Royal Institution of Chartered Surveyors (“RICS”) or in the event that the RICS shall change the basis of compilation or cease to compile or publish the said Index such other Index as the parties hereto shall agree or in default of agreement such Index as shall be determined by an Arbitrator appointed by the President of the RICS for the purposes of this Agreement in all cases to ensure as nearly as possible that the sums of money involved shall fluctuate in accordance with the general level of the building industry costs. [Or use CPI or RPI rather than BCIS?]

“Base Index Date” means the date of this Deed or the date of the grant of planning permission whichever is the earlier.

“Base Index Figure” means the figure published in respect of the Index immediately prior to the Base Index Date.

“Final Index Figure” means the figure published or otherwise agreed or determined in respect of the Index immediately prior to the respective dates upon which the Open Space Contribution is paid.

2. The Net Benefit for Biodiversity Contribution shall be increased by such sum, if any, in pounds sterling as shall be equal to the sum calculated according to the following formula:-

$$\text{Increased Sum} = \frac{A \times C}{B}$$

B

Where “A” equals the Net Benefit for Biodiversity Contribution

“B” equals the Base Index Figure

“C” equals the Final Index Figure

3. If after the Base Index Date there should be any change in the Base Index Figure

by reference to which changes in the Index are calculated, the figure taken to be shown in the Index after such change shall be the figure which would have been shown in the Index if the said Base Index Figure had been retained and the appropriate reconciliation shall be made.

SIGNED AS A DEED by

acting by a Director and its Secretary or

two Directors: -

Signature :

Name :

Director/Company Secretary

Signature :

Name :

Director/Company Secretary

Executed as a deed by the said

(name of individual) _____

in the presence of:-

Witness signature: _____

Witness name: _____

Witness address: _____
