



Appeal Decision

Site visit made on 21 May 2024

by Juliet Rogers BA (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 23 July 2024

Appeal Ref: APP/A1720/W/23/3332174

23 Bridge Road, Park Gate, Southampton, Hampshire SO31 7GD

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a grant of planning permission subject to conditions.
 - The appeal is made by Mr Paul Zieba against the decision of Fareham Borough Council.
 - The application Ref P/23/0349/FP was approved on 19 October 2023 and planning permission was granted subject to conditions.
 - The development permitted is the construction of a detached chalet bungalow with associated bike and bin storage.
 - The condition in dispute is No 12 which states that:
No works shall take place (including demolition, site clearance and ground preparations) until a Biodiversity Gain Plan setting out the measures that will provide net gains for biodiversity of at least 10% has first been submitted to and approved by the local planning authority in writing. The submitted plan shall:
 - a. Quantify the pre and post development biodiversity value of the site using the DEFRA biodiversity metric / the Small Sites Biodiversity Metric, unless the local planning authority first agrees in writing that another metric may be used, with an explanation of the condition scores set out in the DEFRA guidance. Plans of the site must be provided together with Excel spreadsheet copies of the completed relevant metrics to demonstrate how the metric conclusions were reached;*
 - b. Identify how a gain of at least 10% Biodiversity Net Gain can be achieved through a series of measures. The proposed habitat must be provided on-site in the first instance. If on-site provision cannot be achieved this must be evidenced before off-site measures are proposed. Off-site measures should be in reasonable proximity to the development;*
 - c. Demonstrate that the proposed habitat is on a 'like for like' basis and avoids the 'trading down' of habitat type i.e., replacing rare habitat with much more common habitat;*
 - d. Demonstrate that proposals have followed the 'mitigation hierarchy': avoiding habitat loss where possible; minimising the extent of negative impacts that can't be avoided; restoring degraded ecosystems where negative impacts can't be avoided or minimised and as a last resort compensating for any residual negative impacts;*
 - e. Demonstrate that proposals maximise the connectivity of the proposed habitat with habitat in the wider area to avoid fragmented or isolated habitat;*
 - f. Confirm how the proposed measures to secure 10% Biodiversity Net Gain will be managed, maintained, monitored and funded for a minimum of 30-years.**The development shall be carried out in accordance with the approved details and the Biodiversity Net Gain measures shall be provided prior to the first occupation of the development hereby permitted. Thereafter the approved Biodiversity Net Gain measures shall be managed, maintained, monitored and funded in accordance with the approved details.*
 - The reason given for the condition is:
To secure at least 10% net gains for biodiversity.
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Decision

1. The appeal is allowed and the planning permission Ref P/23/0349/FP for the construction of a detached chalet bungalow with associated bike and bin storage at 23 Bridge Road, Park Gate, Southampton, Hampshire SO31 7GD granted on 19 October 2023 by Fareham Borough Council, is varied by deleting condition No.12 and replacing it with the following condition:

- 1) Prior to the occupation of the development hereby approved, a Biodiversity Net Gain Plan setting out the measures that will provide net biodiversity gains of at least 10% shall be submitted to and approved in writing by the local planning authority.

The development shall be carried out in accordance with the approved Biodiversity Net Gain Plan and any timescales therein. Thereafter, the approved measures shall be maintained and monitored in accordance with the Biodiversity Net Gain Plan.

Applications for costs

2. An application for costs was made by Mr Paul Zieba against Fareham Borough Council. This is the subject of a separate decision.

Preliminary Matters

3. Since the Council determined the planning application, an updated version of the National Planning Policy Framework (the Framework) came into effect. As the Framework's policy content insofar as it relates to the main issues has not significantly changed, I am satisfied no party would be prejudiced by determining the appeal in accordance with it.
4. Within the description of development in the decision above I have taken out the details that are not acts of development.
5. The planning application indicates that, at the time of its submission the construction of the dwelling had not commenced. During my site visit, I observed that, although construction had started, it had not been completed and the dwelling was not being occupied. I have therefore determined the appeal as proposed.

Background and Main Issue

6. Planning permission for an alternative scheme for Plot 3 (the proposed development), originally approved as part of a three-dwelling development in January 2021¹ (the original permission), was granted subject to several conditions in October 2023 (the alternative permission). This included a requirement to provide measures to achieve a biodiversity net gain (BNG) of 10% on the site. The appellant wishes to have this condition removed.
7. Therefore, the main issue is whether the condition is reasonable or necessary in the interests of biodiversity.

Reasons

8. Policy NE2 of the Fareham Local Plan 2037 (the Local Plan) requires, in line with the Environment Act 2021, the development of one or more dwellings,

¹ Council ref: P/21/0391/FP January 2021

amongst other uses, to provide at least 10% net gains for biodiversity from the existing baseline value of the site. The main objective of this policy is to halt the loss of biodiversity and provide net gains across the Borough. Aside from certain brownfield sites, there are no exceptions to this policy. The proposed development relates to the construction of a new dwelling and, as the Local Plan was adopted when the Council determined the application, Policy NE2 of the Local Plan applies.

9. As no details of how the proposed development would achieve the BNG were submitted as part of the planning application, a condition was imposed on the alternative permission requiring a Biodiversity Net Gain Plan (the BNG Plan) to be submitted to and approved by the Council. This condition required the BNG Plan to be approved before any works took place on the site. In the absence of this condition, any biodiversity on the site would be lost and there would be no mechanism in place to provide net gains across the Borough. This would, therefore, conflict with Policy NE2 of the Local Plan.
10. When the alternative application was determined, the legislation requiring mandatory BNG for minor development had not been enacted. Additionally, the types of development which would be exempt from the requirement had not been confirmed. Nevertheless, the version of the Framework² in place at this time established that plans should, amongst other things, identify and pursue opportunities for securing measurable net gains for biodiversity. This wording remains in the latest version of the Framework³. Therefore, while Policy NE2 of the Local Plan is more specific regarding the application of BNG it is broadly consistent with the Framework's objective to protect and enhance biodiversity. Furthermore, no substantive evidence has been presented that precludes the Council from adopting its BNG policy.
11. I conclude that the condition is reasonable and necessary in the interests of biodiversity. Its removal would be contrary to Policy NE2 of the Local Plan which seeks to provide BNG across the Borough and from achieving the biodiversity objectives set out in the Framework.

Other Matters

12. Regulations⁴ mandating BNG, along with details of the types of development exempt⁵ from the requirements came into effect on 12 February 2024 including types of self-build and custom-built developments⁶. The Council have suggested that, were I minded to delete the BNG condition, it would be appropriate to impose a condition requiring the dwelling to be carried out and retained as self-build housing. However, there is limited evidence before me confirming the alternative permission relates to a self-build or custom-built development. Indeed, the planning application form indicated that the proposed dwelling would be market housing.
13. Nevertheless, my attention has been drawn to a Liability Notice and Grant of Self-Build Exemption⁷ received from the Council. However, this relates to another, varied permission⁸. Furthermore, no substantive evidence has been

² Published 5 September 2023

³ Published 19 December 2023

⁴ The Biodiversity Gain (Town and Country Planning)(Modifications and Amendments)(England) Regulations 2024

⁵ The Biodiversity Gain Requirements (Exemptions) Regulations 2024

⁶ As defined by the Self-build and Custom Housebuilding Act 2015

⁷ Council ref: CIL-1250, dated 23 January 2024

⁸ Council ref: P/23/1537/VC, dated 11 January 2024

provided which demonstrates how the varied permission development will be secured as self-build.

14. Noting there is no dispute between the main parties regarding the proposed condition, even if I were to conclude that the proposed development meets the relevant self-build criteria and would, consequently be exempt from mandatory BNG compliance, I have significant concerns about its enforceability. Although the condition sets out that the person/s that build or complete the dwelling should occupy it as their home, it is not possible to be sure that this would occur. Until the dwelling is occupied, enforcement action would not be possible.
15. If someone other than the person building the dwelling occupies it during the three years following completion they would be in breach of the condition. Any enforcement against this third party is unlikely to be reasonable. Moreover, any action the third party take to address the breach would not achieve the condition's planning and policy objective, namely that the dwelling is occupied by the person/s who built it.
16. The evidence before me indicates that the original permission has been implemented and I observed the dwellings on Plots 1 and 2 had been constructed when I visited the site. On this basis, the original permission represents a fallback scenario that the Appellant highlights can be built if they so choose. Consequently, there is a greater than theoretical possibility that the Plot 3 dwelling from the original permission could be built. As a BNG condition was not imposed on the original permission, the construction of the Plot 3 dwelling which formed part of that scheme would be more harmful to biodiversity than the proposed development. However, given the size of the site and the marginal difference in scale between the two dwellings, it would not be significantly more harmful. As a result, I attach moderate weight to the fallback scenario in my decision.

Conditions

17. Whilst I concluded that the condition is necessary and reasonable, given the development has already commenced, the appropriate actions cannot be undertaken before any works take place. Therefore, I have replaced the condition with a new version which requires the BNG Plan to be submitted and approved by the Council prior to the occupation of the dwelling. I have removed the detailed list of matters to be included in the BNG Plan as they are not necessary to make the condition precise or enforceable. This approach enables the parties to agree on the most suitable method of compliance based on the best practices at the time it is discharged.
18. Having had regard to the advice contained within the Framework and the National Planning Practice Guidance, I have not imposed the self-build condition suggested by the Council due to the concerns expressed above regarding its enforceability.

Conclusion

19. For the reasons given above, I conclude that the planning permission should be varied as set out in the formal decision.

Juliet Rogers
INSPECTOR