



IN THE FIRST-TIER TRIBUNAL

Case No. EA/2014/0020

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

Appellant: Richard Thirkell

Respondent: Information Commissioner

Before

Melanie Carter
(Judge)

and

Darryl Stephenson
Michael Hake

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal decided to uphold the appeal in part.

Reasons

Background

1. The Appellant in this appeal was seeking to purchase a property in the Wealdon District Council area. As is normal, he made his local search enquiries in the standard form, Con29R, as to the Council's planning plans and policies for his property and the area. Thus, the question asked of the Council in that form was at 1.2:

What designations of land use for the property or the area, and what specific proposals for the property, are contained in any existing or proposed development plan?

2. The Council sent a response to the CON29R form on 28 September 2011. The answer to the question, included a reference to the section of the search document entitled Wealden Local Development Framework. Included in this section was information about the drafting of the Core Strategy Development Plan Document (the draft core strategy).

It states that:-

All prospective purchasers are advised to have regard to the emerging core strategy and subsequent site allocation documents as they progress through their relevant statutory stages of production and, further, that all relevant LDF documents are published on the Council's website www.wealden.gov.uk.

3. At this stage of the process, there had been no mention either by the Appellant or the Council of the applicability of the Environmental Information Regulations ("EIR"), which, by common agreement of the parties apply to this case.
4. Mr Thirkell complained to the Information Commissioner ("Commissioner") that not all disclosure had been made. The Commissioner upheld the Council's position that all necessary disclosure under the EIR had been made, in the Decision Notice dated 20 January 2014. Mr Thirkell appealed the Decision Notice to this Tribunal. The task of this Tribunal is to determine whether the Decision Notice is in accordance with law.
5. On the Council's website, at the time of the Council's response to the Con29R, were webpages containing the draft Core Strategy and supporting documents, all of which had been submitted to the Planning Inspector for consideration in August 2011.
6. The Appellant's wife, Mrs Thirkell, had visited the Council's offices a few weeks after receiving the response and specifically asked, further to their local search request, for any documents which would bear upon the planning position of their proposed purchase property. The Council did not at any point alert the Thirkells to a particular report UE Associates, the Habitats Regulations Assessment.
7. This report was listed as a background document in the actual draft Core Strategy and was included in the documents available on the website. This document proved immensely significant to both the Thirkells and other residents and developers in the area, as it contained a recommendation for significant restriction on windfall development in the Ashdown Forest 7km Protection zone. As it happened, the Planning Inspector picked this point up, required its inclusion in the Core Strategy such that it was ultimately adopted by the Council in March 2012 – the result of which was that, in the Thirkell's case, their proposed development of the property which they had by then purchased, could not go ahead.
8. Mr Thirkell argued that the Council must have been aware that the particular recommendation had a potential bearing on this property. He based this on the fact that there was a conflict between the draft Core Strategy in the way that it dealt with the Habitats Regulations and the specific recommendation referred to above, this had previously been discussed with Natural England, and it appeared a proposal may have been made on this very point to amend the draft Core Strategy to the Planning Inspector at some point between August 2011 and January 2012 (evidenced by the

hearing notes of the meeting with the Planning Inspector). Mr Thirkell also pointed out that the strategy was amended in a very short time following the Planning Inspector calling for this change to be made. The Tribunal took these points into account, but set against this the Council's credible account that there had been a change in national policy in early 2012 and that the amendment to the draft Core Strategy had not taken place until March 2012. Given this, the Tribunal accepted that it was just as likely that this was a point the Council had in fact overlooked in putting together its draft Core Strategy and that there had not been anything to disclose at the date of request, over and above the Core Strategy itself and the supporting documents.

Grounds of appeal

9. Mr Thirkell's ground of appeal was that the Commissioner had erred in concluding that the Council had complied with regulation 5(1) of the EIR by only providing, it was argued, the draft Core Strategy (via the Council's website) in response to the request. More particularly, it was argued first, that the Habitats Regulation Assessment was within the scope of request and second that disclosure of this document had not been made as required under EIR taken with the statutory Environmental Information Regulations Code of Practice.
10. The Commissioner's position was that the document was not within scope, but if it was, it had been disclosed by virtue of the reference in the Con29R response, at paragraph 2 above, to the need to refer to documents available on the website, in the Local Development Framework.
11. Mr Thirkell had originally raised a number of arguments that the Commissioner's investigation had been deficient. It was accepted by him, by the date of the hearing that these were outside of the Tribunal's jurisdiction.
12. The Council had not been joined as a party and the Commissioner did not attend the oral hearing. The Tribunal were very grateful to the Thirkells for attending and explaining what, whilst simple in terms of the law and the issues to be decided, involved a not entirely straightforward factual matrix.

Was the Habitats Regulation Assessment within scope of the request?

13. Mr Thirkell argued that as the recommendation in the Habitats Regulation Assessment referred to above specifically related to his property and the ability to develop the land, that document was clearly within scope of the request. He also pointed out that as a background document to the draft Core Strategy and that strategy, by the Council and the Commissioner's own admission, was in scope, the background documents, including the Assessment report, must by definition be included in the request. As noted above, the Council took the view that being just a background document and as the Council had not picked up this recommendation and included it within its own draft proposals (ie: in the draft Core Strategy) it did not fall within the "plans" requested in question 1.2 of Con29R.
14. The Tribunal concluded that the Habitats Regulation Assessment was within scope on the basis that it was listed as one of 9 background documents to the draft Core

Strategy and therefore had a clear and direct relationship to the “plans” referred to in the request. To construe the request as meaning just the draft Strategy itself and none of the supporting documents would be to unreasonably narrow the request when its meaning was arguably not clear. It would not have been reasonable for the Council to have decided to interpret this request as being narrowly related to just the Strategy itself and not to include the 9 background papers. Either the Council should have clarified the scope of request or interpreted this in such a way as to include within scope, the one document which it seemed obvious to the Tribunal must have had most relevance to the Thirkell’s proposed purchase.

15. It was noted that the Council had told the Commissioner, see the email from the Council to the Commissioner dated 21 March 2014, that the Habitats Regulation Assessment was not a document which would normally be covered by a local search request. This, in the Tribunal’s view, went to the heart of the issue in this appeal – that the Council had been considering disclosure under its land and planning obligations and not under EIR.

Was disclosure made?

16. The Tribunal saw evidence provided to the Commissioner by the Council, that the Habitats Regulation Assessment was, at the date of request, available on the Council’s website. Without the Council joined as a party and the Commissioner present at the hearing, it had to rely upon Mr Thirkell’s recollection of ease of locating this document, to assess whether disclosure had been made.

17. Mr Thirkell explained that, although he did not have a clear memory of this, he had gone to the Council’s general website then by a process of deduction worked out how to find “Planning”, “Development” and then the draft Core Strategy. He told the Tribunal that he had not known to check the draft Strategy supporting documents (including the listed background documents) which he did accept were available. He argued that there were thousands of pages of supporting documents in the list and that no one could be expected to wade their way through all this in the hope of finding something relevant to a particular property.

18. In particular, he prayed in aid the following from the statutory guidance:

5. Consideration should be given to making web sites accessible to all and simple to use, so that information can be readily found, for example by enabling search functions and having an alphabetical directory as well as tree structures. Information should not be ‘buried’ on a site.

19. The Tribunal did not accept that the document in question had been “buried” in the website as it was apparent that there was a logical route through from the Council’s home webpage to the draft Core Strategy and that, being listed in that important document as a background document, it must have been relatively simple then to locate the Habitats Regulation Assessment, in the list of supporting documents available on the webpage. It appeared to the Tribunal, that in reality, the complaint

which might be levelled by the Thirkells at the Council was that the Council had not highlighted or emphasised this potentially important document to them, out of the thousands of pages which they would otherwise have had to read.

20. In the Tribunal's view, all the background documents were within scope, such that the Council had properly disclosed all of them via the website. The real problem in this appeal, in the Tribunal's view, was with regard to the Council's duty to provide advice and assistance.

Should the Council have provided advice and assistance?

21. Regulation 9 of the EIR provides as follows:

9 Advice and assistance

- (1) *A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.*
- (2) *Where a public authority decides that an applicant has formulated a request in too general a manner, it shall—*
- (a) *ask the applicant as soon as possible and in any event no later than 20 working days after the date of receipt of the request, to provide more particulars in relation to the request; and*
- (b) *assist the applicant in providing those particulars.*
- (3) *Where a code of practice has been made under regulation 16, and to the extent that a public authority conforms to that code in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with paragraph (1) in relation to that case.*

22. The Tribunal noted the following section in the Code of Practice:

III THE PROVISION OF ADVICE AND ASSISTANCE TO PERSONS MAKING REQUESTS FOR INFORMATION

9. Every public authority should be ready to provide advice and assistance, including but not necessarily limited to the steps set out below. This advice and assistance should be available to those who propose to make, or have made requests and help them to make good use of the Regulations. The duty on the public authority is to provide advice and assistance "so far as it would be reasonable to expect the authority to do so".

10. Appropriate assistance might include:

- providing an outline of the different kinds of information that*

- might meet the terms of the request;*
- providing access to detailed catalogues and indexes, where these are available, to help the applicant ascertain the nature and extent of the information held by the authority; and*
- providing a general response to the request setting out options for further information that could be provided on request.*
- advising the person that another person or agency (such as a Citizens Advice Bureau) may be able to assist them with the application or make the application on their behalf.*

11. This list is not exhaustive and public authorities should be flexible in offering advice and assistance most appropriate to the circumstances of the applicant.

.....

15. A request for information under the EIR can be in any form and need not be in writing. However, for a response to be made by the public authority it will need contact details to either provide the information or refuse the request. A request in writing includes a request transmitted by electronic means. Where a person finds it difficult to specify very clearly the nature of their request, the public authority should ensure that appropriate assistance is given to enable that person to make a request for information. For example, if a request is formulated in too general a manner the public authority shall, as soon as possible and not later than 20 working days after receipt of the request, ask the applicant to provide more particulars and shall assist them in doing so. However, Public Authorities should be aware of the dangers of over bureaucratising procedures when responding to requests for routine information.”

23. The Tribunal was clearly of the view that the Council had failed in its duty under regulation 9(1) and insofar as this had not been a finding in the Decision Notice, the Commissioner had erred in law. The Council should have offered advice and assistance and highlighted the relevance of the Habitats Regulation Assessment in amongst all the disclosure made, alternatively suggested to Mr Thirkell that he clarify his request. It should have been apparent to the Council that the property in question was within the Ashdown Forest 7km Protection Zone and that, the Core Strategy being in draft, and subject to the Planning Inspector process and thereby amendment in the next few months, the background documents that directly related to that Zone, were properly at the heart of the request. Disclosure of a very large volume of documentation, albeit strictly required, was clearly not going to provide the information that was truly sought and appropriate advice and assistance would have alerted Mr Thirkell to the background papers that had the potential to have a direct impact on the property in question.
24. The Tribunal was also of the view that the Council should have decided that the request had been formulated in too general a manner such that the duty under regulation 9(2) would have been triggered.

25. The Council's argument that such documents were not normally disclosed in response to a local search request, was not an adequate answer. This request was, in law, made under the EIR as well as being a routine house purchase and planning matter - it was widely known by 2011 that the EIR applied to property searches (see ICO guidance on property searches from 2009).

Conclusion

26. The Tribunal upheld the appeal insofar as it found that there had been a breach of regulation 9 of the EIR.

27. The Tribunal's decision was unanimous.

Signed: Judge Melanie Carter

Date: 23rd June 2014