

**First-tier Tribunal  
(General Regulatory Chamber)  
Professional Regulation**



**Appeal Reference: EA/2017/0240**

**Heard at Fleetbank House  
on 20 March 2018**

**SHEPWAY DISTRICT COUNCIL**

Appellant

**and**

**INFORMATION COMMISSIONER**

First Respondent

**and**

**BRYAN RYLANDS**

Second Respondent

Before Roger Creedon, Pieter de Waal and Judge Claire Taylor.

**Decision**

The appeal is dismissed for the reasons set out below.

## Reasons

1. This appeal relates to a site known as 'Biggins Wood', in Cheriton, of Folkestone, Kent. Around December 2016, the Shepway District Council ('the Council' or 'Shepway') bought it for £1.5M. It intends to develop it for commercial use and housing. A request was made for the full Financial Viability Assessment undertaken for the site.

### **Background to transaction**

2. This account of the background facts is based on submissions and evidence provided to us. The site is a former brick works site and known to have been a receptor for waste.<sup>1</sup> It is next to junction 13 of the M20, opposite the Channel Tunnel terminal. To the west is a primary school.
3. Under Shepway's 1997 Local Plan, the site is allocated for commercial use. On 4 August 2014, the Council granted planning permission, yet to be implemented, to support redevelopment for mixed-use - commercial or office units; industrial or storage units; and 77 residential dwellings, with associated parking, open space etc. On 25 July 2016, the Council granted an amendment subject to planning conditions including: identification and remediation of any contaminants; translocation of reptiles prior to commencement of development; and restoration of the World War II pillbox located on-site. The permission was also subject an agreement under section 106 of the Town and Country Planning Act 1990 to develop affordable housing units.
4. Around August 2016, the Council was offered purchase of the site. It commissioned BNP Paribas Real Estate ('BNP') to undertake a 'residual valuation'. It valued the site at circa £1.2m, assuming a title without restrictive covenants and planning permission being implemented. It assessed development costs and made a comparison with market transactions. Certain key inputs for the valuation were:
  - a) Affordable residential values: calculated using BNP's bespoke in-house affordable housing model.
  - b) Two and Three-bed private residential units - capital and per square foot ('psf') value.
  - c) Costs of remediation and enabling works to make good the ground conditions - derived from Idom Merebrook Ltd's 'Summary of Contamination' of 27 March 2015.
5. Mr Jarrett, Head of the Council's Strategic Development Opportunities submitted an internal report to Dr Priest, Corporate Director on the proposal to acquire the land for redevelopment, dated 15 December 2016. This included:

*"An opportunity has arisen to enable the Council to acquire 4.35 hectares... the land is contaminated and the cost of remediation are a serious constraint to development... The council has had an offer to purchase the land for the sum of £1.5 million accepted and has agreed an exclusivity period with the seller which means provided that*

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<sup>1</sup> See page 144 Open Bundle.

contracts are exchanged by 23rd December 2016 the search the seller will not entertain offers from other parties. It is understood that at least one other party wishes to acquire the land, it is important therefore that the Council acts urgently....

**Value for money...**

The evaluation indicated a residual value of £1.2 million. This valuation was based in part on cost estimates of land remediation and abnormal ground conditions by the Council's advisors, Idom Merebrook... It allowed a gross sum of [~~£x~~]. Further discussions with Idom Merebrooks identified alternative methods of remediation which provide sufficient cost savings to justify a bid of £1.5 million.

It is intended that the Council will construct the affordable home commitment, 23 homes, to add to its own stock. The Councils Housing Officer is satisfied that the cost falls within the Housing Revenue Account Financial modelling requirements...

**Conclusion**

The acquisition... Will enable to meet its corporate objectives and represents good value for money.

**Appendices**

1. Letter of 27 March 2015, Idom Merebrooks
2. Valuation report... [BNP]..., September 2016".

**The Request**

6. On 6 January 2017, Mr Rylands requested from the Council as a 'public authority' for the purposes of the Freedom of Information Act 2000 and The Environmental Information Regulations 2004 ('EIR'):

"Background

*Planning Application Y13/0024/SH know as the Land at Biggins Wood, Caesars Way, Cheriton, Folkestone ... Has recently been bought by the Council for £1.5 million. Planning permission with conditions was granted on Monday 25th July 2016 according to the Council planning portal.*

The request

***Please could you provide me with the full Financial Viability Assessment undertaken for the site..." (Emphasis Added).***

7. On 23 January 2017, the Council provided part of the requested information. Under reg.12(5)(e) EIR (*confidentiality of commercial or industrial information to protect a legitimate economic interest*), it redacted what it described as the (a) estimated remediation costs and certain abnormal costs and; (b) estimates of sale values, construction costs or fees and financing costs.
8. Mr Rylands replied requesting an internal review, stating: "... as this was a former rubbish dump, and there are recent reports that emissions are still leaking from the land, [reg.] 12(5)(e) cannot and does not apply". Matters progressed leading to an investigation by the Information Commissioner ('Commissioner'). In correspondence, the Council explained to her on 22 May 2017:

*"... the owner was unable to find a developer to take on the proposal. The land is constrained, being contaminated, having difficult ground conditions and by its proximity to the M20 motorway....*

*Turning to the costs of remediation the council will be seeking tenders to undertake the work or seek to pass on the responsibility to a developer it will use the estimates as a baseline for assessing tenders received or in its negotiations with any developer. In*

*addition knowledge of the likely costs if made public would affect the council's ability to ensure a fair competition for the work. It is, one of the essences of competition that tenderers do not know what the person inviting tenders expects to pay. Similarly in any negotiations with potential developer[s] knowledge of the council's information on costs will weaken the council's negotiating position.*

*The council will be seeking to procure works and the information on the likely costs of these works is clearly, in the council's view, commercial.*

*The development appraisal sets out the likely costs and income of developing the land.*

*... publication of the likely cost would have the potential again of corrupting any tendering process with the potential that the council will not receive best value from the process. Similarly if the council seeks a third party to undertake the work as part of the development the council's negotiating position would be compromised...*

*The council will negotiate with developers to build the houses and a sale price for the non-social housing element. It will also set rental incomes for the commercial/office uses. The council's view is that if the income is made public it will adversely affect the council's negotiating position....*

*There are around 1,500 applicants on the housing waiting list but approximately 300 homes become available each year, increases in the social housing stock are a priority. Similarly, Shepway has a relatively low economic activity and employment rates ...*

*it is considered that the obligation of confidence can certainly be implied and in the case of the [BNP] valuation report is explicit – see section 8. Those involved in the development are aware of [the] importance and sensitivity of the information. In addition information relating to property transactions would normally be expected to import an obligation of confidence...*

*disclosure...could lead to the council paying a higher price and ensure that any competitive bids would be based on knowledge of the council's expectations ... this could result in the council not realizing the full value of the land...*

*Current baseline position suggests a total level saving of £9,048,000.00 over the period of 2017/18 to 2024/25 that will be required to balance the budgets in each of those years. It is therefore vitally important the council attempts to minimize its expenditure and maximise the value of its assets. Any prejudice to its ability to tender and negotiate competitively would undermine this..."*

9. On 27 June 2017, the Commissioner replied:

*"...the remediation work has been estimated would cost the council over £1.7 million though it has been suggested that alternative methods of remediation could be cheaper. However, these alternative methods and how much they would cost do not appear to have been considered in any detail..."*

*The projections in relation to rental income and other anticipated profits could well offset any losses from the cost of purchase and remediation. However, these would be driven by market forces in what is shaping up to be a turbulent period for the economy.*

*You may well therefore wish to elaborate on why the council considers that the purchase represents value for money ..."*

10. The letter of 27 June 2017 also raised the matter of the council's audit certificate not yet being issued. This was addressed in a reply of 7 July 2017, along with

elaboration on the arguments for value for money ('VFM') including BNP's estimated profit of roughly £2.7M where it assumed a purchased price of £300,000 less than was paid.

11. The Commissioner decided that the regulation was engaged, but that the public interest favoured disclosure.<sup>2</sup> The Council now appeals this decision on the basis that the Commissioner's conclusion on the public interest balance is wrong and was wrongly reached.

## The Law

### EIR or FOIA?

12. The parties agree that the legislative regime that applies to the request is the EIR and not FOIA because it is 'environmental information'. Reg. 2 defines of "environmental information" to include:

*"(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, ... and the interaction among these elements;*

*(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*

*(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements...*

*(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); ..."*

13. The requested information relates to a financial viability assessment undertaken in respect of a piece of derelict land. The parties agree that it is information on a measure or activity - the proposed development of the site - likely to affect the state of the elements and factors mentioned in regulations 2(1)(a) and (b) EIR. Alternatively, it is economic analysis under sub-para (e) of Reg. 2. We accept this.

### Reg.12(5)(e)

14. Regulation 5(1) EIR requires a public authority holding 'environmental information' to make it available on request. This is subject to exceptions including reg. 12(5)(e), which provides:

*"(5) ... a public authority may refuse to disclose information to the extent that its disclosure would adversely affect... (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest ..."*

*(Emphasis Added).*

15. However, information falling within the scope of the exception must still be disclosed unless:

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<sup>2</sup> See Decision Notice ref. FER0669764, summarised below.

*“(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.” (Reg. 12(1)).*

16. Regulation 12(2) provides:

*“(2) A public authority shall apply a presumption in favour of disclosure.”*

### **The Task of the Tribunal**

17. The Tribunal's remit is governed by s.58 FOIA.<sup>3</sup> This requires it to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The Tribunal is independent of the Commissioner and considers the matter afresh. The Tribunal may receive evidence that was not before the Commissioner, and make different findings of fact.

18. Our remit in this case is limited to considering whether the withheld information should be disclosed in line with the Commissioner's decision. The particular issue before us is whether in all the circumstances of the case, the public interest in maintaining the exception set out in reg. 12(5)(e) outweighs the public interest in disclosing it.

19. We have received a sizeable amount of information within bundles of documents, caselaw, submissions, and a Closed Bundle containing material and further submissions from the Commissioner. We have also benefited from hearing from the parties, during which it was agreed to disclose the confidential annex to the Commissioner's Decision Notice. The hearing included a closed session to discuss in detail the closed material. Following this, we gave a gist of what had been said to the excluded party. We have considered all that has been presented and set out below what we determine to be the key points. We have not found it necessary to issue a closed version of this decision.

### **Decision Notice**

20. The reasons in the Decision Notice include:

#### ***Reg. 12(5)(e) engaged***

- a) The exception in reg.12(5)(e) was engaged because:
  - i. The withheld information broadly comprises (a) the costs of remediation and (b) projections/assumptions on rental income, sale values, costs and anticipated profits. Rejecting Mr Ryland's argument, she found that the information is not on emissions within the meaning of reg. 12(9), but rather information on costs of treating land likely to emit gas into the atmosphere.<sup>4</sup>

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<sup>3</sup> Applicable here, by virtue of reg.18 EIR.

<sup>4</sup> We note that the requested information is not limited to costs of treating land, but the remaining information has no connection with emissions. The Commissioner has since elaborated that the redacted information itself is not “on emissions”. (See *para.s 25 to 28 of the Commissioner's response of 13.11.17.*)

- ii. It is 'commercial' in nature: The purchase was made partly to generate a return and developing the land is a commercial activity. (This disagreed with the requester's argument that the information was 'financial and not commercial').
- iii. Disclosure would harm the confidentiality and the legitimate economic interest of the public authority:
  - a. The withheld information is subject to the common law of confidence. It is clearly not trivial, not in the public domain, and was shared in circumstances creating an obligation of confidence.
  - b. The Council intends to invite tenders for the remediation work, negotiate with developers to construct the houses and commercial spaces, and put up some of them for sale and lease. Information on costs and projected profits is reasonably considered confidential to the public authority.
  - c. The confidentiality is protecting a legitimate economic interest - namely, the Council's bargaining position in future negotiations on developing the land for public and commercial use, and the sale and lease of property on the land. Disclosure would adversely affect this interest. That the land is contaminated and would be expensive to remedy has already been revealed. Arguably, this would adversely affect its negotiation position. This does not detract from the view that revealing the decontamination costs and projections for sale values and rental income, would place the Council in a weak position in negotiations with bidders, developers, potential buyers and leaseholders. If they knew the actual costs to the public authority and its projected profits, they would submit bids/offers they consider the authority is unlikely to be able to afford to refuse. This would clearly place the public authority at a commercial disadvantage, to the detriment of [rate] payers.

**Public interest test**

- b) The Commissioner judged that the following arguments did not add to the weight of public interest in disclosure:
  - i. That the Council's 2015/16 accounts had not been signed off by the external auditors. (She accepted that the auditors had issued an unequivocal statement that the objections do not materially impact on the accounts.)
  - ii. The suggestion that the Council's due diligence could have been lacking because of an allegation that a shareholder of the sellers of the land had been convicted of hacking offences. She also rejected the argument that disclosing the information would place the Council "*above the plausible suspicion of any wrong-doing*" given this allegation. (She noted that (a) she had seen no evidence of wrongdoing by the Council or that due diligence was inadequate; (b) the redacted information would not shed significant light on the point; and (c) she did not understand how disclosure would place it above 'plausible suspicion'.)

- iii. That disclosure would aid the significant public interest in knowing whether there was a risk to human health and safety from the land. (She reasoned that the disclosed information had already revealed the cost of the land; and the need for decontamination and that this would be expensive. The withheld information would not add substantively to the information already released.)
- c) The Commissioner accepted a strong public interest in not releasing the information, because:
- i. Disclosure was highly likely to cause harm to the Council's ability to negotiate competitively in developing the land and marketing properties on it in the future.
  - ii. This was likely to affect its ability to maintain a balanced budget for the benefit of its residents.
  - iii. However, the public authority's bargaining position was not very strong as a result of the information that had been revealed publicly; the state of the land and the difficult conditions it would present to a potential developer. It was not the most attractive option for developers which is why the Council had struggled to attract them in the first place. The Council had purchased the land in order to explore other options to attract developers and there was a strong public interest in not undermining its ability to explore those options effectively.
- d) The public interest in maintaining the exception did not outweigh the public interest in disclosure.
- i. Disclosure would enhance accountability and transparency in respect of how the public authority spends ratepayers' money and on how Council manages its finances. She acknowledged that most of the information in scope had been released in recognition of this public interest. This had revealed the cost of the land; that it requires decontamination and that this would be expensive.
  - ii. The key consideration was whether the purchase represented VFM for ratepayers. This was a significant public interest in the circumstances of this case which narrowly outweighed the strong public interest in maintaining the exception.
- e) The confidential annex, reasoning elaborated on her analysis of what she considered the key question of whether the purchase represented VFM. Reasons included:
- i. The land was valued at £1.2M and purchased for £1.5M. In addition, the remediation work would cost over £1.7M (as itemised by Idem Merebrook). It had been suggested that alternative methods of remediation could be cheaper, but there was no recorded evidence of these alternative methods and or any great detail on how they would reduce it.
  - ii. Even if the cost could be reduced by £300,000, the land would still have been purchased for a £100,000 more than the cost of remediation, and £300,000 more than its actual value.



- iii. The rental income and sale values could well offset any losses from the cost of purchase and remediation. However, these would be driven by market forces in what is shaping up to be a turbulent period for the economy so there is no guarantee as such. The Commissioner noted that the projected profit was estimated at circa £2.7M, based on the value of the land rather than the purchase price. If based on the purchase price, then the total cost of purchase and remediation would be £2.9M which clearly exceeded the projected profit.
- iv. The Commissioner noted that although the purchase may not lead to a financial return, bringing the derelict land back into use could lead to other benefits for residents such as increase in housing stock and employment opportunities. However, given the nature, and extent of the financial risk (which could end up being considerable) to [ratepayers], there was a significant public interest in being open and transparent to residents regarding the potential financial benefits to them as well as the actual and likely costs to them. There were no guarantees that the Council would receive a bid to offset costs or that rental income and sales would offset costs if it decided to develop the land on its own. The chances of the public authority not being able to offset costs was much higher. Therefore, by failing to provide residents with a full picture of the costs associated with the purchase and development of the land, the public authority had not been completely open and transparent to those it owed a fiduciary duty.

### ***Submissions and Evidence***

21. Arguments advanced by the Appellant include the following, which we have categorized using headings, purely for ease of reference.

#### **Ground 1: VFM**

22. Ground 1 concerned whether the purchase represented VFM. The Appellant claimed:

#### **Reducing £300,000 costs**

- a) The decision to pay an extra £300,000 was a calculated risk based on discussions with Idom Merebrook Ltd that informed Mr Jarrett's view that costs could be reduced by at least £300,000. These discussions were not recorded. Idom Merebrook's letter shows that certain assumptions had been made in the itemised remediation costs. Whilst it might be striking that the Council paid £1.5M for land valued at £1.2M, this was a fact already in the public domain. Further disclosure would not assist in knowing the robustness of the figure.

#### **Disclosure sufficient**

- b) To ensure transparency regarding the purchase, a redacted version of the valuation report had been disclosed including the amount paid for the land. It was unclear how transparency would be enhanced by disclosing more information.

- c) Given the quality and extent of information already disclosed, the redacted information added little, if anything, to the public's ability to evaluate VFM.

#### **A profit-making investment**

- d) It would not be possible to know until the land was developed or sold whether the purchase would ultimately generate a profit.<sup>5</sup> However, this risk was shared with private developers. Disclosure would therefore put the Council at a disadvantage with developers which would ensure that it did not get the best price, and consequently, not the best value for taxpayers' money. Whilst the outlook for the economy was uncertain this ought not prevent the Council pursuing its corporate objectives (set by elected members), provided that the risks were understood.

#### **Other statutory functions**

- e) Whilst the Council must take care not to lose money, it had other statutory functions that should also be borne in mind. Therefore, the public interest in enabling ratepayers to see the extent of profit and how it has been calculated ceases to be a public interest of the importance which the Commissioner has attributed to it.

#### **Misunderstanding of BNP valuation on remediation**

- f) The confidential annex indicates a misunderstanding of how BNP dealt with the cost of remediation. The Commissioner had mistakenly measured VFM by adding the cost of purchase and remediation and comparing that with the value of the land so remediated. It had not factored in once developed the site would be disposed of, for a profit.
- g) The Commissioner had also laboured under the misapprehension that the costs of remediation had not been accounted for in that report, leading to a public interest in that being disclosed. In fact, in the BNP Paribas Report, the valuation of £1.2M for the site was achieved having allowed for both developer profit and the estimated costs of remediation. There was no question of Shepway having made a loss on the site and thereby exposing its constituents to a cost to which they must contribute through their council tax payments.

#### **Ground 2: Context of other statutes**

23. The second ground concerned the claim that the Commissioner did not take any account other statutory mechanisms for ensuring any expenditure represents VFM were "*ample and superior*" in serving the public interest. Accordingly, the Council questioned how necessary the disclosure was to achieve ensuring expenditure represents VFM. The Appellant claimed:

- a) The Tribunal has recognised the importance of an independent, statutory regime in which complaints about such expenditure and "best-value" can be investigated in detail by an independent auditor. See for instance, *Warwick District Council v IC, FTT, 10 June 2016 at [18]* ("*Warwick*"); and *Pycroft v*

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<sup>5</sup> In later submissions, the Council seemed to amend the position put in the Ground of Appeal that it stated that it was apparent that the transaction would not result in loss and a sale of the site would result in profit. For the avoidance of doubt, the panel were not persuaded by arguments that the transaction would not make a loss as this is speculative.

*IC and Stroud District Council, FTT, 11 February 2011 at [40]-[41].('Pycroft').*

- b) Under NAO criteria, the Council was satisfied that it had spent 'well and wisely'. Maximisation of profit was not paramount for a local authority. It was not a company and its constituents were not shareholders. Its objective was not simply to make profit. The purchase would bring into use a derelict urban area that did not impinge on the countryside; and would overwhelmingly serve the planning and housing functions of Shepway, providing much needed social housing and employment.

### **Local Audit and Accountability Act 2014**

- c) Accountability and securing VFM was amply met through the operation of the Local Audit and Accountability Act 2014 ("2014 Act"), and s.10 of the Local Government Act 1999. This provided real opportunity for Mr Rylands to ventilate his concerns. It put in the hands of an independent auditor with financial and accounting expertise, coercive investigative powers that were actually designed to ensure a public authority secured VFM. As such, the public interest imperative in disclosure under the EIR to achieve these objectives was diminished. If those public interest objectives were already secured through other legislative mechanisms (and in a superior way), then the need for them to be met through disclosure under the EIR fell away. The audit regime in the 2014 Act provided:
- i. The local authority auditor is to satisfy him/herself "by examination of the accounts and otherwise" that "that the authority has made proper arrangements for securing economy, efficiency and effectiveness in its use of resources." (S.20(1)(c) 2014 Act.)
  - ii. The auditor has a wide-ranging power to inspect documents and information and to require officers to explain matters. (S.22 2014 Act).
  - iii. For involvement by a local government elector (ss 25-26), including questioning the auditor about the local authority's accounting records where any person may inspect the records and see how the council has been spending its money<sup>6</sup>; there is an interaction between the council, taxpayer and auditor with the ratepayer making objections to the auditor which it then follows through on (s 27). If discontent with the auditor's decision on the objection, that person has a right to appeal. (S. 28 2014 Act).

### **Shepway Accounts**

- d) The conclusion on VFM in Shepway's auditors' report was that "*the Council had proper arrangements in all significant respects to ensure it delivered value for money in its use of resources.*" (As regards the allegation that its 2015/16 accounts had not been signed off, the Appellant explained the

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<sup>6</sup> We note that within the 2014 Act, section.25 provides for the inspection of any public interest report; section 26 provides for the inspection of contracts; and section 44 broadly defines a "local government elector" as a person registered as a local government elector in the register of electors in accordance with the Representation of the People Acts (but see subsection (6)).

background to this and that the Council has no reason to believe that the objections would be upheld or that the 2015/2016 certificate will not be issued.)

### **Ground 3: Weightier Public Interest in Non-disclosure**

24. Thirdly, the Appellant claimed that the Commissioner had under-estimated the public interest in upholding reg.12(5)(e). It noted that the Commissioner had agreed that releasing the withheld information was “highly likely” to cause harm to Shepway’s ability to negotiate competitively in developing the site and marketing the properties, with knock-on effects to maintaining a balanced budget for the benefit of its residents. Given that the Commissioner had acknowledged that the public interest in disclosure narrowly outweighed the strong public interest in maintaining the exception, once the “key consideration” (of whether the purchase represented VFM) was properly understood, including the existence of more sophisticated regimes for determining this, the public interest balance tipped decidedly in favour of allowing the appeal. Further, the reasons advanced by Mr Rylands did not add to the weight of the public interest in disclosure.
25. The Council argued that there was a public interest in:
- a) **Not devaluing investment:** Ensuring that an investment made by Council was not devalued by unnecessary disclosure. The public interest could not be served by reducing the Council’s ability to obtain VFM. Its ability to make profit depended on it being able to reduce the costs as much as possible. It needed to be able to function effectively in a commercial sphere and had a duty to negotiate the best possible financial deals to protect the public purse, which in turn enabled it to provide the best possible service. If potential contractors were aware of what it was prepared to spend they would price accordingly, driving up the costs and reducing the benefit.
  - b) Of key importance, disclosure of the information would jeopardise its position in any negotiations concerning the tendering for the work or developing the land and marketing it. It needed to be able to negotiate a scheme that maximised the price it could secure from the site. The Council argued that if a developer were to learn of all the numbers in the table on page 312 of the Open Bundle, this would help them gauge their offer. If they considered that BNP had, say, over-estimated costs, there would be no profit for them in informing the Council of this. They would ensure that an over or under-estimation of costs or receipts would be used to their advantage, such that the residual land value and profit would also be affected. From the developer’s perspective, the more information disclosed, the better. If they thought that BNP had over-estimated costs it would affect their bid. The key appraisal inputs (redacted at page 312 of the Open Bundle) were by convention confidential matters.
  - c) **Third-party confidence:** Respecting the legitimate interest of a third party who had disclosed its confidential information to a public authority for a specific purpose and in not seeing the Council compelled to breach the confidence, bearing in mind that confidential information is “property” within the meaning of Art. 1 of Protocol 1, ECHR.
  - d) **Making Positive Use of Land:** In seeing the development of land in a populous part of the country which has laid derelict for over 30 years and

which would see the provision of much-needed housing, which the maintenance of the exception was more likely to help than to hinder. This was a powerful public interest.

26. The Council acknowledged that each case must be determined on its own facts. However, it still asserted that the First-tier Tribunal ('FTT') had repeatedly accepted a powerful public interest in upholding the reg. 12(5)(e) exception where there was risk that disclosure would damage the public authority's economic interests in a proposed development; and that this could suffice to outweigh the interests in scrutiny, transparency, accountability, public understanding and further of debate.
27. Mr Jarrett, a qualified town planner and member of the Royal Town Planning Institute stated:
  - a. From the late 19th Century the site was used as a brick works. This use ceased in the 1970s, and buildings were demolished. It had since been derelict. It is understood that part of the site was filled with waste. Consecutive Local Plans had identified it as suitable for redevelopment and used for employment purposes. It had not proven to be an attractive proposition for employment purposes. In 2014, the Council granted planning permission for a mixed-use scheme including 77 houses and a mix of commercial and industrial uses. It was intended that by allowing the residential use this would attract interest from developers.
  - b. The site has been marketed since 2014 and drawn some interest but the nature of it, its immediate surroundings, the need for remediation and the complication of developing the land were significant complications for many housebuilders.
  - c. Since the grant of planning permission, the Council maintained a dialogue with the landowner to monitor progress and to see if it could assist in enabling implementation of the project. He received enquiries from people interested in developing the site or seeking land or premises for relocation or expansion of their businesses.
  - d. Over time, different values had been placed on the land by the owner in his discussions with the Council. When the Council bought the land, he considered the price to be the lowest the owner would find acceptable. The offer was considerably lower than the owner's original aspirations, but less than BNP's valuation. If the Council had not made the purchase, it seemed likely that the land would be banked.
  - e. He had recommended the purchase because:
    - i. He considered the estimated costs of remediation conservative. He had undertaken redevelopment of other sites where remediation had been a factor and specialists tend to take a precautionary view.
    - ii. He spoke with the Council's geo-environmental consultant at Idom Merebrook Ltd and was satisfied that the difference between the BNP valuation of £1.2m and the £1.5m offer could probably be met through savings through the remediation process. A more recent independent report by Aspinall Verdi has indicated a lower estimate for undertaking the necessary remediation work.

- f. He accepted that there were risks in estimating remediation costs, but he regarded this as an acceptable risk because:
- i. BNP indicated a substantial developer profit, such that the Council ought make a significant profit if it undertook the development itself even after allowing for remediation costs.
  - ii. He took into account both the positive value and the non-pecuniary benefits arising, and considered that the acquisition represented good VFM and serves the local community well.
  - iii. In response to a question at the hearing, he explained that the private sector had not taken on the development because the margin of profit was less than normally expected and they had greater choice.
- g. The Council's aims were much broader than simply turning a profit. Its Corporate Plan 2017-2020 had six strategic objectives, four relevant to the purchase:

i. **Objective 1: To provide more homes and enable the right amount, type and range of housing:**

The Council was committed to build 250 new affordable home in 10 years. The proposal provides 77 new houses including 23 affordable homes.

Suitable land was scarce and this site will accommodate almost one year's delivery in an area of identified need. In this location the development will help to meet an acute need for low cost and starter homes of good quality.

ii. **Objective 2: To work with businesses to provide jobs in a vibrant local economy:**

The proposal provides the opportunity for an estimated 170 new jobs. The Council currently did not control any land suitable for employment uses within the Folkestone area. The purchase put it in a strong position to intervene in the market and support its economic development. The Council was currently in confidential discussions with a local employer about their possible relocation to the Biggins Wood site. There was clearly unmet demand for commercial units that could be built at this site.

iii. **Objective 3: To achieve financial stability through a commercial and collaborative approach:**

According to BNP and Aspinall Verdi the proposal would achieve a profit for the Council. The Council may yet decide to retain some of the private homes for rent through its regeneration company. This was an opportunity for the Council to improve its revenue income.

iv. **Objective 4: To provide an attractive and clean environment:**

The proposal would approve the appearance of this derelict site. The site was not attractive in its current state and the main

access to it was particularly poor from an aesthetic perspective. Plans had been prepared to provide good quality landscaping which would be delivered as part of the proposal.

- h. These reasons had been summarised as part of Dr Priest's Report of 15 December 2016, on the decision to acquire the land.
  - i. BNP's valuation of £1.2M was achieved having allowed for both developer profit and estimated costs of remediation. The Commissioner laboured under the misapprehension that the costs of remediation had not been accounted for. (They were in three phases under the heading "Other Construction"). The valuation estimated a substantial profit of circa £2.7M, based on acquisition costs at circa £1.2M. Taking into account the actual purchase price, then the profit would approximate £2.4M.
  - j. To the extent it was thought that there was a premium to be put on disclosure of information that evidenced "bad deals" by a local authority body, there was a well-established annual local audit procedure (in which the public could and did participate) for achieving this in which a qualified, external auditor with coercive information acquiring powers is charged with identifying the same and bringing people to account.
  - k. He agreed with the Decision Notice that the disclosure would harm Shepway's confidentiality and legitimate economic interest and its negotiation position, "*placing the council in a weak position in negotiation with bidders, developers, potential buyers and leaseholders*" on the basis that "*if they knew the actual costs to the public authority and its projected profits, they would submit bids/offers they consider the authority is unlikely to be able to afford to refuse*". (See para. 35 of the Decision Notice).
  - l. In response to a question from the Commissioner, he could not recall whether Idom Merebrook Ltd had visited the site, but thought that they had relied on earlier reports.
28. The Commissioner's submissions include the following, which we have categorized, using headings purely for ease of reference:

- a) Agreeing with the Appellant, the point in time at which the Tribunal must consider in the public interest balance is the date of the Council's refusal of Mr Rylands' request, but that subsequent evidence could nevertheless be considered insofar as it illuminated the position as at that date.
- b) In considering the weight of public interest, it would ultimately, be for the Tribunal to form its own view on the public interest balance, having regard (inter alia) to its view as to the degree of harm to economic interests that would result from disclosure of the redacted information, and the extent to which it will assist in achieving transparency as to the VFM obtained by the Council in respect of the site.

#### **Presumption in Favour of Disclosure**

- c) The presumption in favour of disclosure to be applied (*reg. 12(2)*) reflected the importance attached to transparency about environmental information

under EU and international law and encouraging, inter alia, effective public participation in environmental decision-making.

#### **Disclosure sufficient?**

- d) The redacted information represented the critical inputs that influenced the decision to purchase at a particular price. As the FTT observed in *Royal Borough of Greenwich v Information Commissioner & Brownie (EA/2014/0122)* ('Greenwich'): at para.18, the assumptions embedded in a viability assessment are "the public's business" since they are the "central facts determining the difference between viability and non-viability". They contained certain critical "building blocks" in BNP's assessment of the potential profitability of the site, such that disclosure would self-evidently help to answer the question of VFM. If the revenue and hence profit figures were too optimistic, then, all other things being equal, even the estimated residual land value of £1.2M would be too high, let alone the actual purchase price of £1.5M.

#### **Misunderstanding of BNP valuation on remediation?**

- e) She had not mistakenly assumed that the Council would keep the site after development. She considered the public interest balance by reference to both receiving a bid for sale, and the Council itself developing the land.
- f) The confidential annex showed that she did not assume BNP had not accounted for remediation costs. Allowing for those costs, the purchase price was still substantially more than BNP's estimated site value.

#### **A profit-making investment?**

- g) It was apparent that the transaction would not result in loss without seeing the detailed revenue, cost and profit projections.

#### **Other statutory functions**

- h) The Commissioner had had proper regard to the Council's planning and housing functions. (See para. 5 of the confidential annex). This did not detract from the public interest in understanding whether the Council has obtained VFM in respect of a particular transaction, especially one made at a price that substantially exceeded its own assessment of the value of the land purchased.
- i) Whilst maximising profit may not be a paramount concern for the Council, there was a public interest in knowing whether the Council has made a loss on its purchase, and the extent to which the site represented VFM more generally. For instance, were there better value investments that could have been made with the same money? It is critical that a local authority obtain the best deal that can properly be achieved. As noted in *Warwick* at para. 18: "In a non-forensic sense, a council's electors are its shareholders..."

#### **Context of other statutes?**

- j) Neither the Council's expenditure being audited nor the existence of the generally-worded provisions of the 2014 Act materially affected the weight of public interest. Those provisions were not an alternative avenue for



obtaining redacted information. Parliament enacted a specific regime - the EIR – that involved a presumption in favour of disclosure of environmental information for the purposes of encouraging and enabling the public to participate effectively in environmental decision-making. The suggestion that the need for disclosure under the EIR fell away in light of other statutory mechanisms drove a coach and horses through the regime.

- k) The purpose of the EIR was precisely to facilitate public participation in environmental decision-making. As noted in *Pycroft at para. 41*), “*the level of scrutiny afforded by an auditor is likely to have a different focus to that undertaken by a concerned council tax payer who may be less concerned with the financial propriety and more interested in the moral justification for any such agreement*”.
- l) Further, the audit regime looked at the transactions after they had occurred.

### **Public Interest in Non-disclosure**

- m) Whilst it was highly likely that disclosure would harm the Council’s ability to negotiate competitively, the severity of that harm needed to be considered:
  - a) The strength of public interest in ensuring that a Council’s investment was not devalued by unnecessary disclosure depended on the extent to which disclosure would devalue it.
  - b) It was not clear from the evidence why disclosure would harm the overarching public interest in the successful development of the site and the Appellant’s assertion is based on speculation. The requested information was not trade secrets, but rather estimates arrived at from publicly available data, the value of which diminished over time. There would be a substantive period of time before the construction took place. As regards construction costs, the figures had been derived from off the shelf construction costs of nearby developments, in a similar way to in *Greenwich*. As regards the remediation data, these figures were taken from a report made on 27 March 2015.
  - c) The factors such as the extent to which disclosure would devalue the Council’s investment, or hamper the development of land in a populous part of the country listed are all pitched at a high level of generality.
  - d) There was an inevitable risk that council witnesses may be “somewhat partisan” notwithstanding relevant knowledge and experience.<sup>7</sup>
  - e) The Council’s grounds of appeal did not grapple with the consideration that its bargaining position in respect of the site was already weakened by what was already publicly known about the quality of the land, which was why there had been a struggle to find a developer. It was important to distinguish between the harm allegedly resulting from disclosure, and

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<sup>7</sup> See *Gloucestershire CC v IC and Costas Ttofa, FTT*, 10 Mar 2017 (‘Gloucestershire’) at para. 55.

the commercial difficulties in which the Council was placed by the objective characteristics of the site itself.

- f) The Council did not explain why and to what extent the disclosure of estimated remediation costs would harm its bargaining position in respect of a site that was already known to be contaminated. As to the revenue, cost and profit figures, previous FTTs had been sceptical about the degree of commercial harm that would result from disclosure of, for instance, information about estimated residential sales values within financial viability assessments.

### **Third-party confidence**

- g) As regards “respecting the legitimate interest of a third party who has disclosed its confidential information to a public authority”, the relevant “third party” was not identified. In any event, recourse to a general public interest in the maintenance of confidences was not a factor that ought to carry any (or any significant) weight in the public interest balance. (See *Greenwich*, at para. 14.)

### **Public interest in disclosure**

- n) There was unquestionably a strong and specific public interest in the public being able to have sight of the constituent parts of the commissioned valuation to enable a fully informed interrogation by the public of the decision to purchase the site. This was because:
  - i. The disputed information informed the Council’s decision-making in making a large financial outlay in respect of a problematic site that has been derelict since the 1970s.
  - ii. The Council accepted that the site’s characteristics were such as to create “*significant complications for many housebuilders*”, as reflected by the site having been on the market without securing a developer, since 2014 prior to its purchase. (See *para 27(b)above*).
  - iii. The Council’s own constitution emphasised that citizens had the right to “[see] reports and background papers, and any records of decisions made by the Council and the Cabinet”. The Council had pointed its a fiduciary duty to the community that it served.
  - iv. The Council paid £1.5M, a substantially greater sum than the £1.2M valuation provided by BNP Paribas. There was plainly a powerful public interest in understanding the basis for, and the robustness of, the valuation in circumstances where the Council subsequently expended a substantially greater sum in respect of the site.

29. Arguments advanced by the Second Respondent included:

- a) The very fact that the land had not been purchased for over 10 years was due to the fact of its contamination and high risks associated with it. There had been three contamination reports, two by the former owner and a third undertaken for the Council. The reports made clear that the land was not at

or close to normal levels of contamination. The cost to the ratepayer would be higher than normal.

- b) The build rates used for the residential and commercial elements of the scheme were based upon the Building Cost Information Service (BCIS) rebased for Kent. Any developer could use BCIS to come up with a cost per unit and thus for the whole project and be within 5% accuracy. Therefore, the costs could not be that sensitive.
- c) It was in the public interest to know that the ratepayer would receive VFM and the costs be transparent as the Council had a debt currently at £58m and only had a limited amount more that it can borrow. For these reasons the requested information should be released.

30. Mr Ryland's earlier representations made to the Commissioner include:

- a) It was not known if the Council had the right software and expertise to interrogate the viability assessment. A quick Google search gives current sale values. Yet time after time developers and local authorities spent huge resources fighting to keep the figures in these assessment secret.
- b) Factors in favour of disclosure in the public interest would:
  - i. Foster accountability and transparency in respect of how the Council spend [rate-payers] money;
  - ii. Inform the public understanding of how much money the Council will spend considering it already has a £58M debit;
  - iii. Increased public understanding of the Council general approach to handling planning issues, particularly in respect of any new s.106 agreement;
  - iv. Inform the public more fully about the assistance given to the Council by external consultants in the planning process, both in the specific case and more generally.

## **Our Findings**

- 31. To the extent that the Second Respondent also sought to argue that reg.12(5)(e) was not actually engaged, we agree with and adopt the Commissioner's analysis in the Decision Notice, and find that Mr Rylands has provided no new compelling reasons. (*See para 20(a) above*). Accordingly, as the Commissioner rightly stated, our role here is to form our own view on the public interest balance in this case.
- 32. In considering the weight of public interest, the Commissioner additionally discounted certain arguments advanced by the requester. Again, we agree with the Commissioner's analysis, and find that the Second Respondent has not provided any new compelling reasons. Whilst he gave a focus at the hearing to his concern of the degree of contamination of the land, we were not satisfied that disclosures would help increase understanding of the issues he focused on (*See para 20(b) above*.)

## Public Interests in Disclosure

33. The public interests favouring disclosure are:

### **Transparency and Accountability:**

- a) The withheld data informed the Council's decision-making in entering into a transaction. The Council's project involved an initial outlay of £1.5M, with likely subsequent substantial costs including for remediation and enabling and Council manpower in overseeing the venture. We find a public interest in providing residents with a full picture of the costs associated with the purchase and development of the land.
- b) By the nature of the industry, the project involves speculation and risk. Whilst BNP's valuation, implies good reason to hope for profit and even a sizeable one, the assessment is expressly (and naturally) based on assumptions. The transactional risk indicate a considerable public interest in having as much information as possible to understand the decision-making process and allow rate-payers to come to their own conclusions as to the robustness of the valuations and benefits of the transaction. This falls within generic interests in transparency and accountability.
- c) These interests are further strengthened by the Council's particular position of having very limited financial means. This favours an interest in seeing all data that might shed light on the Council's expenditure. Assumptions underlying the viability assessment relate directly to questions of viability.

### **Value of Information and Debate**

- d) As referred to above, there is an interest in the public (both residents and the broader public) having as much information as possible for the intrinsic value of having information. This may facilitate scrutiny; effective participation in decision-making; promoting public understanding; and furthering debate and potentially research concerning environmental issues. It may also enable individuals to assess for themselves VFM and whether the Council has spent well and wisely.
- e) We accept the Second Respondent's point that the disclosure may inform public understanding of (a) the Council's general approach to handling planning issues, where these involve a new s.106 agreement; and (b) the assistance given to the Council by external consultants in the planning process. However, given the information already disclosed in response to his request, we consider this to be only to a very limited degree.

34. We additionally take into account the following:

- a) The Commissioner notes that it is striking that the Council paid circa £300,000 above BNP's valued purchase price. This is not an insignificant amount. In our view, in circumstances where a Council spends more than the estimated value of land, the public interest in disclosure of all the redacted information is particularly heightened. (This is notwithstanding the other benefits that the Council has clearly explained the project would bring and that BNP had indicated a substantial developer profit at some point in the future.)

- b) We accept that Mr Jarrett had thought the purchase price was the lowest price achievable. He states that the difference between the BNP valuation of £1.2m and the £1.5m purchase price “could probably” be met through savings through the remediation process. The Commissioner submits that we need to take a critical approach to the evidence. BNP’s valuation was based on older figures from Idom Merebrook Ltd. Idom Merebrook had in turn relied on earlier reports. The Council indicated a more recent report, but we have not been provided with any analysis or breakdown of how the savings would be made. Therefore, notwithstanding Mr Jarrett’s experience of conservative estimates, we are not persuaded by the strength of his evidence on this point, which Mr Jarrett himself seems to admit is “probable” rather than certain. In the absence of more, we find there to be a strong possibility that it will not be possible to make such a saving. In any event, even in the future if it did transpire that the Council managed to reduce the costs, at the point of purchase, the Council paid more than the value estimated by the experts it instructed, and were apparently unable to provide any worked up figures to explain how it would make up the difference.
- c) The land is contaminated. It was valued at circa £1.2M. The remediation and enabling costs are estimated to exceed the estimated land value by circa £500,000. As such, there is a clear interest in the public being able to evaluate the detailed figures for remediation and enabling; and also assess how comprehensive those figures are. Further, disclosure would enhance understanding in circumstances where environmental risk could cause unforeseen additional cost to remedy. The Respondents consider that the public interest in being able to assess whether the transaction represented VFM is fortified because the site had sub-optimal conditions that had made it difficult to attract developers and there are high risks associated with the contamination. Notwithstanding the public value in remediating contaminated land, we agree with the Respondents as to the importance in understanding the costs related to doing so.
35. We note that the Respondents argue that as the Council has already revealed information about the state of the site and the difficult conditions it would present to a potential developer, it has already weakened its negotiation position. If so, this is not a good reason to disclose information. The Commissioner seemed effectively to acknowledge this in the Decision Notice. (*See para 20(c)(iii) above*). The key issue is whether the information not disclosed ought to have been withheld under EIR. The relevant consideration to factor into the balance of public interests is the extent to which disclosure of what has been redacted would weaken it further.

#### Public Interests in Maintaining the Exception

36. We turn to the question of public interests in withholding the redacted information.
37. The Council asserts that given the quality and extent of information so far revealed, further disclosure adds little. Having reviewed each part of the disputed information, we agree with the Respondents that the remaining information represents ‘critical inputs’ or details to enable fuller understanding of BNP’s conclusions. We note that disclosure would be unlikely to help reveal whether there were better value

investments that could have been made with the same money, but it would allow for proper interrogation of the figures.

38. The Council claims that other statutory mechanisms are “*ample and superior*” to ensure any expenditure represents VFM. The fact of other statutory mechanisms to ensure VFM may support that finding to some extent. However, we still find merit in generic transparency and openness, and the public interest in having as much information as possible for individuals. There is intrinsic value in individuals having information. There is also value in them being able to assess for themselves VFM.<sup>8</sup> This reflects the essence of the EIR, which as the Respondents have highlighted facilitates “*more effective participation by the public in environmental decision-making*” where “*disclosure of information should be the general rule*”.<sup>9</sup> Further, as stated in *Greenwich*, at para. 34 “... *It is increasingly open to question whether the public should be expected to accept the “expert view” without opportunity to see the supporting factual evidence.*”
39. We find that there is an inbuilt public interest in maintaining commercial confidences and in not seeing the Council compelled to reveal confidential information. However, in this case, the weight of this is too minimal to alter the balance. The Appellant argues a public interest in respecting the legitimate interest of a third party so as not to breach its confidence. It explains that BNP disclosed its confidential information (“property” within the meaning of Art. 1 of Protocol 1, ECHR), to a public authority for a specific purpose. However, we were not given compelling arguments to indicate any particularly strong emphasis on the point. BNP would be aware that there is not an absolute exception restricting disclosure of the information under the relevant regulation of EIR. This indicates that the legislature envisaged it would not always be in the public interest to keep the information confidential. Section 8 of the report does state that it is confidential. However, we have seen very little to indicate why the material is commercially sensitive to BNP or why its disclosure would have such a substantive adverse effect on the third party. We have seen no compelling indication of harm to its economic interests. In any event, the Council has already disclosed part of the report notwithstanding section 8.
40. As regards the argument that there is powerful public interest in seeing the development of land which has laid derelict, or in the Council being able to carry out its statutory functions. This is clearly true. BNP rightly identified a strong public interest in affordable housing; and the other objectives also have own intrinsic value and seem to us very important. However, it is difficult to see why these represent a discrete public interest that could be harmed by the particular disclosure.
41. We turn to arguments as to a public interest in non-disclosure based on not devaluing the Council’s investment. BNP acknowledges the importance of the date of its valuation due to property values being susceptible to change over a relatively short period of time. Nonetheless, the requested data would still indicate the likely amounts the Council has estimated to set aside. Further, percentage values of fees may be less likely to change over time.

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<sup>8</sup> For this reason, we do not find *Warwick* or *Pycroft* relevant to this finding. In *Pycroft* (which did not concern EIR), the Appellant argued that there would be no effective challenge from auditors. We find an effective challenge from auditors, but a discrete value in the individual’s access to information.

<sup>9</sup> See recitals to the Council Directive 2003/4/EC on Public Access to Environmental Information.

42. The Council claims disclosure would undermine competitive negotiations; and result in higher prices in relation to bids based on knowledge of the Council's expectations; and the Council not realizing the full value of the land. (See *also para.s 25(a) and (b) above.*) In considering whether disclosure represents a real and relatively substantive risk to the Council's commercial interests, we take into account that a substantial amount of information has been disclosed. We find that it is clear that there will always be a risk that the data disclosure will help third parties such as bidders. However, on balance we do not find it likely that disclosure will compromise the Council to a significant extent that it will tip the balance towards non-disclosure.
43. To conclude, on balance, when considering all the factors set out above and in all the circumstances of the case, the public interest in disclosing the information that is the subject of this appeal outweighs the public interest in maintaining the exception that is set out in reg.12(5)(e). We find disclosure of the disputed information would both be unlikely to have caused and to cause such a degree of commercial prejudice so as to justify withholding it in the public interest. Conversely, on the facts of this case, there is an overriding public interest in the disclosure of the disputed information to ensure public participation in environmental decision-making. This is heightened by considerations of VFM where legitimate questions are raised in respect of significant costs spent by a public authority that clearly has limited means. The interest is additionally weighty given the nature and history of the land in question, which has been contaminated and neglected.
44. By a majority of panel members, we dismiss this appeal.
45. (We note that The Council and Commissioner have given some emphasis to previous FTT decisions. We agree with the Commissioner that these are of limited value given that cases are fact-specific. Accordingly, we have not found it necessary to explore these in detail beyond that set out above.)

Judge Taylor  
Date 4 October 2018

Promulgated: 31 October 2018