Department for Levelling Up, Housing & Communities

Our ref: APP/P4415/W/19/3220577

Stephen Bell
Head of Planning North
Turley
Bond Court
Leeds
West Yorkshire LS1 2JT

By email: stephen.bell@turley.co.uk

7 June 2022

Dear Sir,

LOCAL GOVERNMENT ACT 1972 – SECTION 250(5)
TOWN AND COUNTRY PLANNING ACT 1990 – SECTIONS 78 AND 320
APPEAL BY INEOS UPSTREAM LTD
AT LAND ADJACENT TO DINNINGTON ROAD, WOODSETTS, ROTHERHAM
APPLICATION: REF RB2018/0918

APPLICATION FOR AN AWARD OF COSTS

1. I am directed by the Secretary of State to refer to the enclosed letter notifying his decision on the appeal as listed above.

2. This letter deals with your client's application for a full award of costs against Rotherham Metropolitan Borough Council. The application as submitted and the Council's response are recorded in the Inspector's Costs Report, a copy of which is enclosed.

3. In planning inquiries, the parties are normally expected to meet their own expenses, and costs are awarded only on grounds of unreasonable behaviour resulting in unnecessary or wasted expense in the appeal process. The application for costs has been considered in the light of the Planning Practice

Mike Hale, Decision Officer
Planning Casework Unit
Department for Levelling Up, Housing & Communities
3rd Floor, Fry Building
2 Marsham Street
London, SW1P 4DF

Email: PCC@levellingup.gov.uk

Guidance, the Inspector's Costs Report, the parties' submissions on costs, the inquiry papers and all the relevant circumstances.

4. The Inspector's conclusions are stated at CR56-66. She recommended at CR67 that your client's application for a full award of costs be refused.

5. Having considered all the available evidence, and having particular regard to the Planning Practice Guidance, the Secretary of State agrees with the Inspector's conclusions in her report and accepts her recommendation. Accordingly, he has decided that a full award of costs against the Council, on grounds of 'unreasonable behaviour', is not justified in the particular circumstances. The application is therefore refused.

6. This decision on your application for an award of costs can be challenged under section 288 of the Town and Country Planning Act 1990 if permission of the High Court is granted. The procedure to follow is identical to that for challenging the substantive decision on this case and any such application must be made within six weeks from the day after the date of the Costs decision.
7. A copy of this letter has been sent to Rotherham Metropolitan Borough Council.

Yours faithfully,

M A Hale

Mike Hale
This decision was made by the Minister of State for Housing, Stuart Andrew MP, on behalf of the Secretary of State, and signed on his behalf

The Planning Inspectorate

Costs Report to the Secretary of State for Housing, Communities and Local Government

by Katie Peerless Dip Arch RIBA

an Inspector appointed by the Secretary of State

Date: 6 January 2020

TOWN AND COUNTRY PLANNING ACT 1990 - SECTION 78

APPPEAL BY INEOS LTD

ROTHERHAM METROPOLITAN BOROUGH COUNCIL

THE CONSTRUCTION OF A WELL SITE AND CREATION OF A NEW ACCESS TRACK, MOBILISATION OF DRILLING, ANCILLARY EQUIPMENT AND CONTRACTOR WELFARE FACILITIES TO DRILL AND PRESSURE TRANSIENT TEST A VERTICAL HYDROCARBON EXPLORATORY CORE WELL AND MOBILISATION OF WORKOVER RIG, LISTENING WELL OPERATIONS, AND RETENTION OF THE SITE AND WELLHEAD ASSEMBLY GEAR FOR A TEMPORARY PERIOD OF 5 YEARS

Inquiry Held on 11 - 14 & 18 - 20 June 2019

Land adjacent to Dinnington Road, Woodsetts, Rotherham

File Ref: APP/P4415/W/19/3220577

File Ref: APP/P4415/W/19/3220577
Land adjacent to Dinnington Road, Woodsetts, Rotherham

- The application is made under the Town and Country Planning Act 1990, sections 78 and 320, and the Local Government Act 1972, section 250(5).
- The application is made by Ineos Upstream Ltd for a full award of costs against Rotherham Metropolitan Borough Council.
- The inquiry was in connection with an appeal against the refusal of planning permission for the construction of a well site and creation of a new access track, mobilisation of drilling, ancillary equipment and contractor welfare facilities to drill and pressure transient test a vertical hydrocarbon exploratory core well and mobilisation of workover rig, listening well operations, and retention of the site and wellhead assembly gear for a temporary period of 5 years.

Summary of Recommendation:

Preliminary matter

1. The Appellants submitted their application in writing at the time that their closing submissions were sent to the Planning Inspectorate. The Council responded, also in writing and the Appellants then submitted final comments on this response. The full text of these documents can be found at Inquiry Documents 46, 49 and 50. The edited texts of those documents are included below

The Submissions for the Appellants (Ineos Upstream Ltd.)

2. The Appellants note that a motion for costs must be made before the end of the Inquiry which it has been. The basis for the motion is the unreasonable conduct of Rotherham Metropolitan Borough Council (RMBC) which has caused the Appellants to incur unnecessary or wasted expense in the Appeal process. "Unreasonable" is to be used in its ordinary meaning. The expenses incurred relates to the entire Appeal/Inquiry procedure which would not have been necessary had RMBC acted reasonably and not refused consent.

3. RMBC have

   - Prevented and delayed development which should clearly be permitted in accordance with the Development Plan and all material considerations.

   - Refused permission on a ground entirely capable of being dealt with by condition.

   - Led evidence outwith the strict terms of the reason for refusal to enhance the case.

4. On 8 March 2018, RMBC refused consent for permission for two reasons, namely ecology and traffic. RMBC officers recommended no objection on noise grounds.

5. On 7 September 2018, RMBC refused consent for an identical application for two reasons namely noise and traffic (CD 7.7). RMBC officers recommended no objection on noise grounds. The traffic ground was subsequently withdrawn on the basis of professional advice.

6. There was no material difference between the first application and the second application so far as noise was concerned. There was no reasoned justification for treating noise issues differently in respect of the two applications. In truth there is no justification at all.

7. RMBC had no professional advice before it to justify refusal on noise grounds and their planning officers did not object.

8. The reason for refusal is clear and unambiguous in its terms. It relates to the proximity of the access. It does not refer (expressly or impliedly) to any other noise source such as the rig.

9. RMBC stated that that *'the development would have a detrimental impact on local residents on Berne Square in terms of noise nuisance and general disturbance, particularly during the construction phase but also during operation, due to the close proximity of the proposed access, contrary to Policy SP52 'Pollution Control' of the Local Plan and the National Planning Policy Framework'*.

10. Minutes of the meeting on 7 September 2018 have been produced as Appendix 1 to the Appellants' planning witness's proof of evidence. They are incorporated here in shortened form. A consideration of the Minutes confirms:

    - There was no proper basis for a noise reason for refusal.
    - RMBC invited WAF to contribute to a reason for refusal.
    - No actual decision was taken in relation to any reason for refusal. Instead it appears to have been delegated to the Chair and Vice Chair in circumstances that are not clear.
    - It appears that the wording of the reasons for refusal were not debated or considered.
    - In any event, there was no proper reasoned basis or justification for the noise reason for refusal, nor for taking a different decision from the first application.

11. In any event the noise reason for refusal cannot be supported and is not reasonable. The issue was capable of resolution by condition. That condition should have included a Noise Management Plan (NMP). The NMP should have included a requirement (if necessary) for any sound mitigation measures to be specified and agreed. This is normal and standard practice and was as recommended by RMBC officers.

12. At the Inquiry the noise consultant for RMBC widened out the argument to include noise from the rig which was not within the reason for refusal.

13. Only one issue in RMBC's rebuttal of the application for costs needs a detailed response; that is whether RMBC were reasonable or unreasonable in refusing the application now under appeal. That is the only issue in dispute for the purposes of deciding costs. If RMBC were unreasonable costs should be awarded.

14. It is, of course, correct that RMBC's Planning Committee are entitled to take a different view to that of their officers. That is not the point and never has been. The question is whether it was reasonable or unreasonable to do so. If there had been no noise reason for refusal then there would have been or should have been no Inquiry as RMBC properly accepted there was no stateable traffic reason for refusal, albeit it took an unreasonable four months to do so.

15. The following matters should be considered:

    - No explanation has been given as to why there was no noise reason for refusal in relation to the first application. Nothing of a technical nature had changed. RMBC officers did not object to either application on noise grounds.

- RMBC failed to take any independent advice in relation to noise before taking the decision to refuse on noise grounds (unlike the traffic reason).
- RMBC officers confirmed their advice in relation to no objection and conditions at the meeting (see Minutes already referred to).
- The Minutes of the meeting confirm the nature of the meeting.
- Any concern about noise could and should have been dealt with by the imposition of appropriately wording conditions along with a NMP exactly as officers recommended.

16. That is, in effect, what the RMBC position was at the end of the Inquiry. It should have been the position at the Committee stage. This is the unreasonable behaviour.

17. Whatever the noise witnesses did or did not say does not change the decision of RMBC and whether it was, at the time, reasonable or unreasonable. The conclusion of the Appellants' witness that a fence is best practice or similar is obviously true. As stated in the earlier submission, from a noise perspective the higher the fence the better. That is not the issue. The question is whether any fence is justified as necessary, reasonable or proportionate in all the circumstances. The witness did properly accept that a predicted level of 81dB was too high and not reasonable. However, he also drew attention to mitigation which would reduce that predicted level. In that regard we refer to the Turley letter which was before RMBC at the relevant time and referred to by our witness in cross examination[1].

18. That letter is not referred to in the RMBC submission. It may be thought to be important if not critical in relation to the current issue. It was dated 21 August 2018 and addressed various issues. It was before RMBC at the time of the decision to refuse on noise grounds on 7 September 2018. This letter considered, inter alia, noise issues.

- The letter set out proposed mitigation to benefit Berne Square.
- The letter stated *'The use of smaller plant for the construction of the access road is feasible e.g. using a CAT D9 and small 10 tonne dump truck'*
- *'In this scenario the predicted levels from those operations is likely to be 7 dBA less at Berne Square and 10 dB A lower once a more realistic on-time is assumed.'*
- *'These measures should help protect residential amenity while construction operations are underway. The resultant noise levels should therefore be close to or below the threshold for significance.'* [This is clearly a reference to BS5228.]
- *'This then means that the very worst case prediction of 81 which was a façade level is firstly reduced by 3 to make it free field. Then it was confirmed it would be reduced by 10 dB A. This then means a free field level of 68 dB A. This is less than the permitted short term limit in the PPGM of 70 dB A.'*

[1] see letter of 21 August 2018, submitted with the Appeal, reference 10.12

19. In short, at the time of the decision making by RMBC the predicted limit was less than the relevant guidelines for these purposes [PPGM]. It surely must be wrong and therefore unreasonable to refuse on noise grounds in these circumstances. This is tantamount to disagreeing with Government advice in relation to noise. This was done with no independent advice to support the decision. This was also done contrary to the clear advice of the RMBC officers. This surely must constitute a clear example of unreasonable behaviour.

20. In summary then the position is:

- RMBC refused on noise grounds contrary to the advice of RMBC officers not once but twice.
- RMBC refused on noise grounds when the information before RMBC confirmed a predicted level less than the level permitted in Government advice in the PPGM. This was accordingly a decision contrary to the PPGM.
- RMBC refused any opportunity to take other advice in the event of any doubt.
- This could easily have been achieved by an adjournment to take such advice. This must all constitute a classic example of unreasonable behaviour.

21. Finally, the suggestion in the RMBC submission that the decision taker may award expenses against the Appellants is an interesting concept. RMBC's own officers were of the opinion that permission should have been granted and somehow this has been turned to being due to the unreasonable conduct of the Appellants. The suggestion by RMBC confirms the unreasonable mind-set. The Appellants merely attempted to reach agreement to save Inquiry time in relation to background levels, predicted levels, and possible mitigation. This was partly but not entirely successful. The Appellants carried out and paid for a joint background noise survey over a total of 5 weeks in order to try to reach agreement. As explained such a lengthy period is highly unusual.

22. In summary, the conduct of RMBC as outlined above was unreasonable. It has led to the Inquiry which should never have been necessary. In these circumstances RMBC should be liable for all costs of, and associated with, the Inquiry.

The Response by Rotherham Metropolitan Borough Council

23. The Appellants' costs application is wholly without merit. It is itself unreasonable, given that it is made without properly detailed submissions or any proper reference to the evidence that the Inquiry has heard. Moreover, the manner in which it has been made is entirely contrary to good practice and the efficient management of proceedings. It is opportunistic, professionally discourteous and should be withdrawn immediately. If not withdrawn, it should be dismissed in its entirety.

24. The PPG is clear that the aims of the costs' regime include to encourage all those involved in the appeal process *"to behave in a reasonable way and follow good practice, both in terms of timeliness and in the presentation of full and detailed evidence to support their case"* Furthermore, the clear guidance in respect of hearings and inquiries is that:

a. All costs applications must be formally made to the Inspector before the Hearing or Inquiry is closed, but as a matter of good practice, and where circumstances allow, costs applications should be made in writing before the Hearing or Inquiry. Any such application must be brought to the Inspector's attention at the Hearing or Inquiry and can be added to or amended as necessary in oral submissions.

b. If the application relates to behaviour at a Hearing or Inquiry, the applicant should tell the Inspector before the hearing is adjourned to the site, or before the Inquiry is closed, that they are going to make a costs application.

The Inspector clearly, and repeatedly, urged any party intending to make an application for costs to notify the other parties (and the Inspector) at the earliest possible opportunity. However, the Appellants have flagrantly ignored the relevant guidance and the Inspector's clarion calls in this regard:

a. It provided no indication of any intention to make a costs application, whether before, during or immediately after the Inquiry adjourned.

b. The indication that was provided was entirely to the contrary; namely a direct and unequivocal assurance that no such application would be made, provided by the Appellants' representative to RMBC barrister outside of the Inquiry on the penultimate day of sitting.

c. The first indication that the Appellant gave of any such intention was by way of a telephone call from its representative to RMBC barrister on 3 July 2019, at 14.40 (i.e. a mere 1hr 20mins before the deadline for the submission of the Appellants' substantive closing submissions). That indication came a full 22 days after the Inquiry opened and a full 13 days after the Inquiry adjourned, pending receipt of closing submissions in writing.

d. The covering email that accompanied the submission of the costs application stated that RMBC's advocate barrister had been advised of it. However, this can only be a reference to a cursory telephone call, moments before the deadline for submission of the Appellants' written closing submissions. Needless to say, the Appellants' volte face in this regard is neither welcomed, nor justified on the facts.

25. As per the PPG, parties are expected to behave in a reasonable way and follow good practice, *"both in terms of timeliness and in the presentation of full and detailed evidence to support their case"*.

26. As to timeliness, the allegations upon which the Appellants' costs application is made relate to matters known to the Appellants long ago. Nothing new arose in relation to any of those allegations that would provide any proper basis for (or materially strengthen) an application for costs. Yet, the Appellants make no attempt whatsoever to justify the extreme and unreasonable lateness of their costs application.

27. As to the evidential basis for the Appellants' costs application, given the extensive evidence heard by the Inquiry and RMBC's detailed and comprehensive closing submissions, it is extremely surprising that the Appellants' costs application makes no meaningful reference to either. Indeed, the Appellants' costs application proceeds as if in a vacuum, ignorant of the evidence that their own witnesses gave on the points raised.

28. Indeed, the decision taker may consider all of the above to warrant an award of costs against the Appellants, given that it is exemplifies the Appellants' unreasonable, unhelpful and obstructive approach. Of course, the decision maker would be fully entitled to reach such a conclusion – and to make such an award – entirely of their own volition.

29. **Allegation 1:** that RMBC prevented and delayed development which should clearly be permitted. In this regard, the decision taker will also note the materially different tone adopted by the Appellants in their closing submissions in relation to the evidence of their witnesses tendered by other parties. The Appellants insist that the implications of the oral evidence given by those witnesses must be given full recognition. It is therefore ironic that, on the one hand, the Appellants invite the decision taker to adopt the oral evidence of the witnesses of opposing parties when helpful to their case, whilst, on the other, fail to even acknowledge, let alone engage with, the evidence of their own witnesses when it lends no support whatsoever to the allegations now being made as to RMBC's conduct.

30. The Appellants allege that:

    a. There is no reasoned justification for treating noise issues differently in respect of the two applications;

    b. RMBC had no professional advice before it to justify refusal on noise grounds;

    c. Officers did not object;

    d. The noise reason for refusal cannot be supported and is not reasonable.

31. However, it is an absolute prerequisite of a fully functioning, and democratic, planning system that members may depart from the advice of their officers. Officers advise and members decide. In this instance, no possible criticism can be made of the fact that RMBC Planning Board arrived at a different decision from that recommended by officers. It is inappropriate for the Appellants to go further and to suggest that for members to have done so is in some way unreasonable. If that allegation were to sound in costs, then it would be an extreme departure from the usual (and proper) approach. It would be highly vulnerable to challenge.

32. Indeed, the hollow basis of the Appellants' allegations in this regard are highlighted when one notes that, during his questioning, the Appellants' advocate described RMBC's members as having been *"absolutely entitled"* to either depart from, or follow, the advice of their officers.

33. Members were clearly also absolutely entitled to hold and voice concerns as to the impact of the proposal upon local residents, including as to noise, whether or not those concerns were shared by officers. The minutes from the Planning Board meeting illustrate that a debate as to those concerns ensued, a vote was taken and a resolution to refuse permission on certain grounds was reached. As is entirely common practice, the reasons for refusal were drafted in consultation with the Chair and Vice Chair of the Planning Board and are reflective of the substance and content of the Board's resolution. No point has ever been taken to the contrary by the Appellants, until many months after the event and (it would seem) solely for financial gain.

34. Further, and in any event, the allegation that RMBC's refusal of the application was unreasonable per se is equally and entirely devoid of substance given that:

    a. The clear evidence of the Appellants' own noise consultant was that it was *"perfectly proper"* for RMBC to have refused the application based upon the levels predicted in the documentation submitted in support of it, which predicted unacceptably high noise levels, as contained in the Environmental Report[2].

    b. Although the suggestion on behalf of the Appellants, at that time, was that levels of this magnitude would only persist for around 2-3 weeks and so, therefore, the *"effects are not likely to be significant"*, it is now common ground between the noise experts that such levels would *"far exceed the noise threshold in BS 5228"* and would *"clearly be unacceptable"*. Indeed, the Appellants' consultant suggested that those predicted levels would indicate that the Appellants had approached things back to front, which has required the retrofitting of mitigation proposals.

    c. Indeed, their witness went even further and confirmed during cross-examination that, had he been advising the Council at that stage, he would have advised that the application be refused because of the proposal's unacceptable noise impact.

    d. Therefore, all three noise experts spoke in unison as to the fact that RMBC's refusal on noise grounds was *"perfectly proper"* and, therefore, patently reasonable.

35. On the facts and evidence, therefore, the Appellants' first allegation discloses no proper basis for an award of costs against RMBC. Indeed, the wholesale failure of the Appellants to acknowledge the evidence of its own noise consultant (and that of both other noise experts) in this regard is itself unreasonable and would justify an award of costs against the Appellants for the wasted expense incurred by RMBC in having to respond to the same.

36. **Allegation 2:** that RMBC refused permission on a ground capable of being dealt with by condition. The Appellants allege that:

    a. The issue was capable of resolution by condition and

    b. That condition should have included a NMP. This should have included a requirement (if necessary) for any sound mitigation measures to be specified and agreed.

37. Again, the Appellants' allegations in this regard are baseless. They (again) proceed in a vacuum, with no reference whatsoever to either the chronology of the application and appeal or the evidence before the Inquiry. That background and evidence is compelling:

    a. RMBC's conduct of the application and, later, the appeal has been paradigm reasonable.

    b. RMBC has continually kept under review the merits of its reasons for refusal / grounds of objection. Indeed, this is precisely the reason why the earlier highways objection to the proposal was removed.

[2] CD 1.7

c. RMBC has continually kept under review the potential for conditions to overcome its reasons for refusal / grounds of objection. Its planning witness has stated in his proof of evidence that he concurs with RMBC's noise consultant's view and does not consider that suitable noise mitigation or management had been presented in sufficient detail by the Appellants. He considered whether planning conditions could potentially overcome the remaining objections but concluded that the Appellants had not provided sufficient detail in relation to any noise mitigation and/or management measures that would demonstrate that conditions could alleviate RMBC's concerns.

d. Notwithstanding that this was laid bare in RMBC's evidence, the Appellants neither i) suggested that this approach was unreasonable; nor ii) took up RMBC's invitation to formally provide further detail in relation to any noise mitigation and/or management measures.

e. Indeed, the Appellants elected to serve no rebuttal evidence on the point whatsoever.

f. RMBC then repeated that – entirely reasonable - position in its rebuttal evidence.[3]

g. If the Appellants considered RMBC's approach to have been unreasonable it was incumbent upon it to raise that allegation in a timely fashion and/or to respond to what the Council was saying in its evidence about the lack of clarity and information as to noise mitigation and management. The Appellants did neither.

h. Moreover, it was incumbent upon it put its case to RMBC's witnesses during cross examination. Notably, not a single question was put to either of RMBC witnesses in relation to any of the above evidence.

i. Instead, the Appellants elected to evolve its mitigation proposals in a piecemeal manner, with each step giving rise to more questions than answers:

(i) The Appellants' *"Inquiry Note: Detail of proposed noise attenuation fence"* on 5 June 2019 did not take things materially further from a technical perspective – i.e. no new data was produced.

(ii) The Appellants' *"Inquiry Document: Further noise fence details"* on 10 June 2019 included further noise calculations based upon further embedded mitigation (i.e. vehicles and movements), as well as a range of options in relation to the acoustic barrier. Not only was the timing of that document unreasonable (given that it was not received until after the close of business the evening before the Inquiry opened) but it added to, rather than reduced, the uncertainty as to what the Appellants were actually proposing, not least because the nature and detail of the further 'embedded mitigation' was, at best, opaque.

j. Yet, rather than objecting to the extremely late provision of that information, RMBC adopted a wholly reasonable and pragmatic stance, which was expressly endorsed in open Inquiry by the Appellants' advocate and echoed by the Inspector, who generously accommodated the need for the three respective noise

[3] See Mr Lowe's proof of evidence paragraphs 3.1 – 3.9 and 4.1

experts to retire for not just one but two full days of discussions. A need that only arose because of the Appellants' unreasonably late submission of that further information, an approach adopted by the Appellants despite it having known of RMBC concerns in relation to a lack of information relating to noise mitigation and management since the exchange of proofs on 14 May 2019, at the very latest, if not much earlier.

k. Following those discussions, the noise experts produced a Technical Statement of Common Ground (SoCG(N)) on 17 June 2019. On the basis of the information contained therein, the evidence of RMBC and WAF's witnesses was that a 3m high, 270m long acoustic barrier is required, with the Appellants' witness agreeing that, in the circumstances of this case, such a barrier would represent "best practice"14.

l. Yet, it now appears that the Appellants' position is that no such barrier is required: see, for example, Appellants' closing submissions, at pages 33 and 34. Of course, the merit and consistency (or otherwise) of the Appellants' position in this regard is a matter for the decision taker, but it is relevant to note that the very same lack of clarity as to what is actually being proposed by the Appellants remains even now, and even after all of the time and expense expended by all parties to the Inquiry, much of which could readily have been avoided or reduced had the Appellant got its own house in order before belatedly casting aspersions as to RMBC conduct.

38. As the party responsible for such a pervading lack of clarity, it is absurd and unreasonable for the Appellants to now suggest that all of this was capable of being resolved by condition long ago. That absurdity can readily be tested by recalling it is not a local planning authority's job to design an appropriate scheme for an applicant. That being the case, since the barrier did not feature in any proposal until 24 April 2019, its potential benefit could not possibly have been assessed and/or taken into account before the decision was made. Without sufficient information having been provided by the Appellants, RMBC had no practical way of determining what could (or should) have been included in any noise conditions. This could well have given rise to the imposition of conditions that could not be complied with, which no doubt the Appellants would have sought to criticise as well.

39. Likewise, the suggestion that all of this could have been rolled up as part of a NMP and addressed through the discharge of conditions so as to avoid the need for the Inquiry is obtuse. It wholly fails to acknowledge the following:

a. The unchallenged evidence of RMBC's witness that the local planning authority had never been in possession of sufficient information to permit such an approach to be effective or appropriate. As noted above, the Appellants' noise mitigation and management proposals evolved during the appeal process. It was only upon RMBC having made repeated requests for further information that the Appellant produced its *"Inquiry Note: Detail of proposed attenuation fence"* (dated 5 June 2019) and *"Inquiry Document: Further noise fence details"* (dated 10 June 2019).

b. Rather than objecting to the Appellants' unreasonably late provision of information, the Council reasonably and pragmatically sought comments from its landscape, highways and rights of way departments. Indeed, the Appellants

have never challenged the need for the input of those departments, instead welcoming *"the further consultation efforts of the Council"*.[4]

c. On the basis of those consultation efforts and the views of their witness, RMBC's position was that the provision of a 3m high, 270m long barrier would cause harm to the openness of the Green Belt. This then gave rise to the need to consider whether very special circumstances existed to justify that, and any other, harm to the Green Belt. Clearly, the polar difference between RMBC and the Appellants on that point alone underlines the fact that addressing the matter through discharge of conditions would be extremely challenging and inappropriate in circumstances where extensive evidence has been heard as to the need (or otherwise) for an acoustic barrier.

Of course, all of this is before one even gets to the many other points of difference as to the technical noise evidence that the decision taker will need to resolve, which plainly would also be inappropriate to address through the discharge of conditions.

d. The unchallenged submission that *"[n]otwithstanding the conclusion the Inspector reaches as to the above, the fact that the issue requires to be grappled with at all means that it would be inappropriate for the Inquiry to have heard extensive evidence as to the need for such an acoustic barrier but then to hold over the decision in relation to how permission is to be granted for the same to the point of discharge of conditions. Hence why* [the Appellants' planning witness] *agreed… that, at the very least, the description of development requires to be amended so as to include reference to the acoustic barrier":*[5]

e. The detailed evidence and submissions on behalf of WAF highlights the significance of the suggested provision of the barrier in relation to public engagement with the planning process. This would largely be circumnavigated if dealt with through a NMP; all of which goes to support RMBC approach, rather than to undermine it.

Added to all of the above, the Appellants' noise mitigation and management proposals still continue to evolve. Therefore, RMBC and the decision taker remain in no better or more informed position to conclude that all of these remaining issues could properly and lawfully be addressed through the discharge of conditions than prior to the Inquiry.

40. Thus, the Appellants' own, repeated, failure to provide sufficient information in a timely manner entirely undermines the substance of its allegations as to RMBC conduct:

a. Insufficient information was before members at the time they refused the Application (indeed, nothing meaningful or effective was being offered by way of mitigation at that time at all, hence the suggestion by their witness that suggestion the Appellant had got things '*back to front*').

b. Nothing additional was formally provided as an appeal document before exchange of proofs.

[4] see Appellant's Closing Submissions, at page 35.
[5] see Council's Closing Submissions, at para 101.

c. Nothing additional was provided upon receipt of RMBC's rebuttal proofs of evidence (despite the absence of sufficient information having been laid bare in RMBC's main and rebuttal proofs).

d. Nothing additional was provided at all until RMBC (again) requested it in advance of the Inquiry opening.

e. That which was supplied came in a piecemeal manner, in relation to which the underlying assumptions and calculations were opaque and did not permit proper interrogation.

f. That which was produced arrived unreasonably late and resulted in significant amounts of wasted time and expense both in, and outside of, the Inquiry, including, but not limited to: i) the need for lengthy oral and written submissions on the issue of consultation per Wheatcroft / Holborn Studios; ii) the need to accommodate two full days of discussions between the respective noise experts, which gave rise to timetabling difficulties and the calling of evidence out of the usual order; iii) the need for lengthy expert evidence as to the provision (or otherwise) of an acoustic barrier and the benefits / disbenefits thereof.

g. That which was produced is now said to justify an entirely different approach to that which was suggested in the Appellants' proofs of evidence and oral evidence.

41. Therefore, the reality is that the above would (again) be wholly supportive of an award of costs against the Appellants. The Appellants assertions as to the unreasonableness of RMBC's behaviour are unsupported by properly detailed submissions and/or evidence. They are opportunistic, wholly inappropriate and reflect very poorly indeed upon the Appellants.

42. **Allegation 3**: that RMBC led evidence outwith the reason for refusal. The allegations being made as to the scope and nature of RMBC's noise objection were raised for the first time during cross- examination of RMBC's noise witness. Moreover, the point was addressed directly, and with reference to the evidence that the Inquiry heard, in RMBC's closing submissions, at paras 2 to 4.

43. Given that evidence and those submissions, it is extremely surprising that the Appellants' costs application does not even pay RMBC (or the decision taker) the courtesy of making any reference to either. Indeed, the Appellants have (again) decided to proceed as if in a vacuum, again ignorant of the evidence that its own witness gave on the point.

44. That evidence is a complete answer to the allegations now being made. It bears repetition as follows:

a. The scope of RMBC's objection has always been abundantly clear as relating not only to the construction of the access track during stage 1, but also the operational aspects of Stage 2, particularly including, but not limited to, site traffic due to proximity of access track. Plainly, as the Inquiry heard from all 3 noise experts, adverse impacts during Stage 2 arise as a result of a combination of drilling and other activities, including site traffic;

b. The scope of RMBC's objection was clearly set out in its Statement of Case;

c. The scope of the objection was repeated and fully reasoned in RMBC's Proofs of Evidence;

d. The Appellants served no rebuttal evidence to suggest that the scope of RMBC's objection was in any way inappropriately broad;

e. No point was taken in the Appellants' opening submissions as to the scope of RMBC's objection;

f. The scope of RMBC's objection was covered at length in the evidence from all 3 noise experts, without any apparent confusion or complaint.

45. Indeed, as the Appellants' planning witness acknowledged (as an experienced planning professional), if he had harboured any reasonable doubt about the scope of RMBC's objection then he would have raised the point at one of the numerous opportunities he had to do so. He did not, nor did his client.

46. Furthermore, given that the allegation is that *"the Noise Consultant for* [RMBC] *widened out the argument to include noise from the rig which was not within the reason for refusal"*, the proper, professional, approach would have been for the Appellants' advocate to put that allegation to RMBC's witness. A party (and advocate) is required to put its (and his/her) case to the appropriate professional witness. The Appellants (and their advocate) failed to do so.

47. In light of the above, it is unreasonable in the extreme – and wholly contrary to good and proper, professional, practice - for that allegation to now be raised in the manner in which it is.

48. Based upon the manner in which the Appellants' case was presented during the Inquiry, RMBC is in no doubt whatsoever that had the shoe been on the other foot with reference to whether points were put to the appropriate witness or not put at all, then the Appellants would have, quite properly, objected.

49. Therefore, it is unacceptable and unreasonable for the Appellants to, belatedly and inappropriately, raise the allegation now for its own (financial) benefit. Therefore, the reality is (again) that the Appellants' conduct would be wholly supportive of an award of costs against it.

50. Further to the above, and in any event, even if there was any merit whatsoever in the complaint, in order to justify an award of costs the decision taker would have to be satisfied that the Appellants' costs application has '*clearly demonstrate*[d] *how* [the] *alleged unreasonable behaviour has resulted in unnecessary or wasted expense*'. It does nothing of the sort.

51. Indeed, no suggestion is even made as to how the assertion that RMBC's witness *"widened out the argument to include noise from the rig"* has given rise to any wasted expense. It is inconceivable that it could have done so in circumstances where the point was being taken with full and appropriate force by WAF and its noise expert. To the extent that the Appellants were required to respond to the point, it would have been required to respond to it whether RMBC raised it or not.

52. No additional work would have been (or was) required as a result of RMBC's witness raising it as a concern in the manner alleged. In any event, from a practical perspective, the Inspector's own note will confirm that very little, if any, time was taken up by either RMBC's witness or advocate pursuing points in relation to the drilling rig itself.

53. Again, therefore, more time and expense has been wasted by requiring RMBC to respond to the Appellants' baseless allegations than could conceivably be said to have been wasted or expended as a result of RMBC's conduct.

54. For the above reasons, the Appellants' costs application is entirely without merit. It should be withdrawn immediately. If not withdrawn, it should be dismissed in its entirety.

55. In light of the wholly inappropriate, discourteous and unreasonable nature, timing and content of the Appellants' costs application, the decision taker is invited to consider making an award of costs against the Appellants for the wasted time and expense that RMBC has incurred as a result of having to respond to the same.

INSPECTOR'S CONCLUSIONS

56. The Governments Planning Practice Guidance (PPG) advises that costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.

57. Firstly, RMBC complain that the application for an award of costs was submitted at a very late stage in the proceedings, without any indication that one was likely to be forthcoming. Despite the fact that this was, indeed, the case, the application was made before the Inquiry was closed (in writing) and is therefore valid. Nevertheless, it should be noted that the Appellants have not acted within the spirit of the guidance on such applications in the PPG and this has not been helpful to those dealing with the matter.

58. I would not, however, consider that this behaviour could be deemed unreasonable to an extent that it would warrant another application of costs to be instigated against the Appellants by the Secretary of State, as requested by RMBC, and I make do not recommend that any such application should be considered.

59. Turning to the grounds cited by the Appellants, which they consider warrant a full award of costs, firstly it is alleged that RMBC prevented and delayed development which should clearly be permitted in accordance with the Development Plan and all material considerations and refused permission on a ground entirely capable of being dealt with by condition.

60. This partly relates to the fact that noise was not cited as an issue when the first application for an exploratory well was refused but was introduced into the decision to refuse the second application by members of the Development Control Committee. The Appellants note that no expert advice was commissioned by RMBC before the decision was issued and that they were told that noise levels would be below the limits recommended in PPGM. The Appellants also complain that the reason for refusal on noise was unsubstantiated and taken against officers' advice without good reason.

61. Nevertheless, I consider that the refusal has not been shown to be unsubstantiated. It is plainly acceptable for committee members to go against the advice of their officers, as was the case here, provided that the reasons for doing so can be supported at appeal. The conclusions of the SOCG(N), produced by all 3 parties, and revisions to the Airshed Report have been necessary to enable the Inquiry to have a detailed understanding of the likely situation during the construction, operation and dismantling of the proposed well.

62. Whilst I have ultimately decided to recommend that, on balance, planning permission should be granted, this does not mean that the reasons put forward by RMBC in opposition to the proposal were baseless or that they were not supported by cogent evidence. In addition, it is the case that the many of the objectors to the application raised the issue of noise as they sought to protect the amenities of the vulnerable residents of Berne Square and RMBC committee members were entitled to give these view weight during their consideration of the application.

63. Turning to the submission that the matters in dispute could clearly have been dealt with by conditions, despite the voluminous submissions by both parties, the reality of the situation is that the wording of those conditions relating to the noise

limits to be achieved could not be agreed by the parties before the close of the Inquiry. In fact, I have recommended that the limits suggested by RMBC are those that would be appropriate and consider, therefore, that the case put forward by RMBC on those grounds was robust and that the noise limits need to be set lower than those suggested by the Appellants.

64. These limits rely on the erection of a noise attenuating barrier, which was not proposed in the original application and which the Appellants still submit is not necessary. Details of the fence evolved only during the Inquiry and I do not, therefore, find it unreasonable for RMBC to have refused the application on noise grounds when there was no detailed proposal for a noise barrier within it.

65. I also consider that, at that time, the matter could not have been resolved through reliance on the inclusion of a NMP or other conditions. The Inquiry had to consider whether the proposed fence needed planning permission and I have concluded that it did. Consequently, it could not have been included in the application through the imposition of a condition without the proper publicity and detailed consideration that it has been accorded through the appeal process and the Inquiry.

66. The Appellants also complain that RMBC introduced additional reasons for refusal relating to the operation of the drill rig that were not included on the decision notice. Taking the wording of the refusal notice literally, this is factually correct but I do not consider that this has led to the Appellants wasting unnecessary expense. It was a point that was not raised until late in the Inquiry proceedings and could have been addressed at a much earlier point in the appeal process. In any event, once again, this is an issue raised in detail by WAF and which would have needed to be addressed at the Inquiry in any event. In these circumstances, I find that the Appellants have incurred no additional expense as a direct result of the wording of the decision notice.

RECOMMENDATION

67. I conclude that it has not been demonstrated that RMBC has behaved in an unreasonable manner that has caused the Appellants to waste expense unnecessarily. It is therefore recommended that the application for an award of costs be refused.

Katie Peerless

Inspector

GLOSSARY AND ABBREVIATIONS

dB	**Decibel**
ER	**Environmental Report**
NMP	**Noise Management Plan**
NPPF	**National Planning Policy Framework (the Framework)**
PPG	**Planning Policy Guidance**
PPGM	**Planning Policy Guidance Minerals**
RMBC	**Rotherham Metropolitan Borough Council**
SoCG	**Statement of Common Ground**
SoCG(N)	**Statement of Common Ground (Noise)**
WAF	**Woodsetts Against Fracking**