Neutral Citation Number: [2019] EWHC 146 QB

Case No: CO/2810/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT (SITTING IN LEEDS)

Combined Court Centre
1 Oxford Row, Leeds LS1 3BG

Date; 31st January 2019

Before :

THE HONOURABLE MRS JUSTICE ANDREWS DBE

- -

Between :

MR LES BARLOW **(on behalf of Harthill Against Fracking)**	**Claimant**
- and -	
SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**Defendant**
- - - - - - - - - -	
(1) INEOS UPSTREAM LIMITED **(2) ROTHERHAM METROPOLITAN BOROUGH COUNCIL**	**Interested Parties**

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Ashley Bowes (instructed by **Leigh Day**) for the **Claimant**
Stephen Whale (instructed by **Government Legal Department**) for the **Defendant**
John Litton QC (instructed by **DLA Piper Scotland LLP**) for the **First Interested Party**
The **Second Interested Party** did not appear and was not represented

Hearing dates: 25 January 2019

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Approved Judgment

Mrs Justice Andrews:

INTRODUCTION

1. The Claimant, Mr Barlow, is a resident of Harthill in Rotherham. He is the chairman of an action group named Harthill Against Fracking ("HAF") which was formed to oppose the proposals of the First Interested Party, ("INEOS"), to construct a well site and create a new access track to drill and pressure transient test a vertical hydrocarbon exploratory well, and carry out ancillary works on land at Harthill ("the development site").

2. On 30 May 2017, INEOS applied to the local planning authority, Rotherham Metropolitan Borough Council ("the Council") for planning permission for the proposed development. The Council failed to make a decision on the application within the prescribed time, and on 6 December 2017 INEOS appealed under s.78 of the Town and Country Planning Act 1990 ("the 1990 Act"). The Secretary of State appointed a Planning Inspector, Mr Stephen Roscoe, to hold an Inquiry and determine the appeal.

3. The Inquiry opened on 24 April 2018 and closed on 3 May. The Inspector issued his decision letter on 7 June 2018, allowing the appeal and granting permission subject to various conditions. These included obtaining the agreement of the Council to a traffic management plan and to the number of passing places along the access route, which would have to be put in place before any development commenced.

4. No-one has taken issue with the Planning Inspector's conclusions, or with his reasons for reaching them. The sole issue in this challenge under s.288 of the 1990 Act is whether the refusal by the Inspector to accede to the Claimant's application on the first day of the Inquiry for a four week adjournment to enable him and HAF to further consider a report from AECOM, traffic management experts instructed by INEOS, and in particular the potential enhanced traffic management plan ("ETMP") annexed to that report, was a breach of the rules of natural justice which caused material prejudice.

5. For the reasons set out in this judgment I have concluded that the Inspector's refusal to adjourn the Inquiry and the reasonable and proportionate measures he adopted instead to cater for the position of interested parties, including the Claimant, did not deprive the Claimant of a reasonable opportunity to challenge INEOS's case and put his and HAF's opposing case on the appeal. There was no procedural unfairness, and there was no material prejudice. This statutory challenge must therefore be dismissed.

Applicable legal principles

6. The relevant legal principles were uncontroversial and are helpfully set out in the judgments of Jackson LJ and Beatson LJ in *Hopkins Developments Ltd v Secretary of State for Communities and Local Government* [2014] EWCA Civ 470 at paragraphs [62] and [85]-[88]. Procedural fairness requires that (i) a party to a planning inquiry knows the case he has to meet and (ii) has a reasonable opportunity to adduce evidence and make submissions in relation to that case, or, as Beatson LJ characterised it, a "*reasonable opportunity to put his case.*" Beatson LJ concluded at [90] that "*what is needed is knowledge of the issues in fact before the decision*

maker… and an opportunity to adduce evidence and make submissions on those issues." If material prejudice is caused by procedural unfairness, the court may quash the decision of the Planning Inspector.

7. The Town and Country Planning Appeals (Determination by Inspectors) (Inquiry Procedure) (England) Rules 2000 ("the Appeals Rules") set out the procedures to be followed in planning appeals. Whilst they are not a complete code for achieving procedural fairness, the Appeals Rules are designed to assist in promoting it.

8. Rule 14 of the Appeals Rules provides that parties appearing at an Inquiry shall furnish copies of their proofs of evidence to the Secretary of State four weeks before the date fixed for the hearing. That is an indication that four weeks would generally be regarded as sufficient to enable parties to prepare their responses to the opposing parties' evidence; however, it does not necessarily follow that a shorter period will be insufficient.

9. Rule 16(2) requires the Inspector to identify at the start of the Inquiry what are, in his opinion, the main issues to be considered at the Inquiry and any matters on which he requires further explanation from the persons entitled or permitted to appear. Rule 16(3) makes it clear that this does not preclude such persons from referring to any other matters which they consider relevant to the consideration of the appeal.

10. Rule 16 (12) provides that:

"The inspector may take into account any written representations or evidence or any other document received by him from any person before an inquiry opens or during the inquiry provided that he discloses it at the inquiry."

Thus an inspector may receive new evidence even in the course of the hearing, but his powers must be exercised in accordance with the rules of natural justice. To that end, Rule 16(13) provides that:

"the inspector may from time to time adjourn an inquiry."

11. In *Engbers v Secretary of State for Communities and Local Government* [2016] EWCA Civ 1183 Lewison LJ said at [5]:

"… *One of the principal purposes of the Rules is to make the inquiry more focussed, so that the main protagonists (i.e. the appellant and the local planning authority) know what is in issue between them. At the same time, however, the ability of the public to participate in environmental decision making is of considerable importance, as recognised for instance by the Aarhus convention".*

Thus, considerations of procedural fairness will apply to all persons who are entitled to have a say at a planning inquiry, and not just the two main protagonists or anyone with formal "Rule 6" status. It will be seen from the history of the present case that the Inspector had this well in mind.

12. A planning inspector (or a planning authority) is entitled to grant planning permission which is different to that sought, provided that it does not result in a development which is substantially or significantly different from that which the application

envisaged: see *Bernard Wheatcroft Ltd v Secretary of State for the Environment* (1980) 43 P & CR 233. The Planning Inspectorate has indicated that its inspectors will take account of the *Wheatcroft* principles when deciding if proposed amendments will be accepted: see *Planning Inspectorate Procedural Guide – Planning Appeals (England) 2018, Annex M,* at paragraph M 2.2.

13. However, even if proposed changes to the application do not appear to involve a substantial or significant difference, procedural fairness may still require that persons other than the applicant be consulted upon and afforded a reasonable opportunity to make representations about them. The importance of not conflating the substantive and procedural constraints upon the powers of a local planning authority (or an inspector on an appeal) was emphasised by John Howells QC in *R (Holborn Studios Ltd) v Hackney London Borough Council* [2017] EWHC 2823 (Admin) at [72] and [73].

Factual Background

14. The Council published INEOS's application documents online in June 2017. They included an Environmental Report with a section devoted to traffic and transport. One of the appendices to the Environmental Report was a draft Traffic Management Plan ("TMP") drawn up by INEOS's original traffic consultants, Curtins Consulting Ltd., which Curtins indicated was to be developed in consultation with the Highway Authority. The Council is a unitary authority, and so it was also the relevant Highway Authority. It had a separate Transportation Unit which provided it with the relevant expertise in this area.

15. Curtins set out the likely traffic flows (including construction HGVs) along Bondhay Lane, Packham Lane and Common Road which were needed for access to and from the development site. The traffic flows were estimated both on an average basis and on a maximum number of vehicle movements per day during each of the various stages of the development project. The estimated maximum number of vehicles peaked at 70 per day during the site development and establishment stages, reducing to a maximum of 60 such movements during subsequent stages. The development traffic flow rates set out in the Traffic and Transport chapter of the Environmental Report and supporting spreadsheets appended to it, have not changed. Nobody has challenged the underlying estimates of traffic volumes (though there has been debate as to whether it is more appropriate to use maximum figures or averages) and all the highways safety evidence has proceeded on an assumption that they are reliable.

16. The initial TMP proposed the introduction of a temporary one-way system on local roads to alleviate concerns about highway safety. It also made provision for six new passing places within the highway boundary along Bondhay Lane and Packham Lane. Two addenda to the TMP were produced by Curtins prior to the appeal, one in August 2017 and the other on 1 December 2017. The latter increased the number of new passing places to seven. It was that version of the TMP that accompanied INEOS's case on its statutory appeal, which was served on 6 December 2017.

17. The TMP in its various manifestations did not meet with the approval of the Council's Transportation Unit. One of their original concerns was the feasibility of creating passing places along the route because of their understanding that the roads were too narrow to accommodate them. That understanding later turned out to be mistaken.

18. On 22 December 2017, HAF's then solicitors wrote to the Planning Inspectorate explaining that they objected on grounds of traffic, but would await the decision of the Council before making detailed representations.

19. On 24 January 2018 the Council resolved to resist the appeal on transport and ecology grounds. It filed a statement of case for the appeal on 8 February 2018 indicating that if it had made a decision on the INEOS application, it would have refused planning permission on those two grounds ("the putative grounds of refusal"). It highlighted the limited number of passing places and the lack of forward visibility at certain parts of the access route. It also contended that the use of a temporary reversible one-way traffic system would be legally incompetent.

20. On 13 February 2018, the Inspector held a pre-inquiry meeting to discuss the procedural aspects of the Inquiry. The Council confirmed its position that the appeal should be dismissed on highway safety grounds and due to deficiencies in the supply of ecological information. The Inspector advised that these were likely to be the main issues at the Inquiry, although he stressed that these were his preliminary views, expressed before the parties had lodged their proofs of evidence, and that they did not prevent other issues from being raised. In the event, as the Inspector recorded in paragraph 2 of the decision letter, the Council withdrew its objection on ecological grounds in the course of the Inquiry. Since nothing in this challenge concerns that aspect of the appeal, I need say nothing more about it.

21. Mr Barlow attended the pre-Inquiry meeting on behalf of HAF and registered an interest in attending the Inquiry and presenting evidence. The record of the meeting indicates that INEOS was keen to encourage HAF to apply for formal Rule 6 status, as that would allow for a comprehensive statement of case to be submitted by them and responded to in evidence. If HAF had become a Rule 6 party, they would have been formally served with any documents which were served on the Inspector prior to the Inquiry. The Inspector made it clear that until any application was made by HAF for Rule 6 status, they would remain interested parties. That meant they could request to be heard at the Inquiry, and if that request was accepted, they could make a statement to the Inquiry and ask questions of witnesses on the side they opposed.

22. In line with Rule 14 of the Appeals Rules, the Inspector directed that all proofs of evidence and supporting documentation should be submitted to the Planning Inspectorate's case officer by 27 March, which was four weeks prior to the first day of the Inquiry. He directed that proofs of evidence and supporting documents would be made available for inspection at the Council's offices. The Council also agreed to publish all proofs and supporting documents on its website.

23. On 19 February 2018 INEOS, having discovered that the relevant individual at Curtins was unable to attend the Inquiry because of ill-health, commissioned Mr Kevin Martin of AECOM to undertake a review of traffic and transport matters associated with the planning application.

24. On 26 February, HAF elected not to apply for formal Rule 6 status. Instead, it relied upon the Council to make the running in terms of opposing the appeal and calling expert evidence in opposition to INEOS on the two putative grounds of refusal. It did instruct its own expert on the issue of noise, considering that to be the best use of its limited resources.

25. Coincidentally on the same day, there was a joint site visit between INEOS and the Highways Authority, in the course of which they reached agreement on the widths of the roads. This was of some significance to the question whether viable passing points could be created in certain parts of the access route. Following the site visit, the Council now accepted that this was feasible. On 14 March 2018 the Council published on its website a Statement of Common Ground, which included the agreed access road width measurements. The Statement of Common Ground also recorded the main parties' agreement that any traffic management plan could be made the subject of a condition requiring the Council's approval pre-development.

26. On 22 March 2018, AECOM produced its report which included, at appendix B, an enhanced traffic management plan ("ETMP"). This made a number of revisions to the original plan which were intended to address the highways safety issues that the Council had identified in its statement of case. These comprised the relocation of the access route further away from the village of Harthill, and an increase in the number of new passing places from 7 to 23 in order to remove the need to introduce a temporary one-way system on local roads. It was also proposed to include two temporary traffic Stop/Go board-controlled sections, with banksmen along the route.

27. The report used the same development traffic levels data as the original Traffic Management Plan, but Mr Martin preferred to use average daily construction traffic flows, which he contended provided a more accurate representation of the likely traffic impact than the maximum traffic flow figures preferred by Curtins (in the event, the Inspector used both maximum and average figures when reaching his decision).

28. Although the AECOM report was 140 pages long, there were only 9 pages of operative text describing the changes in the ETMP. Very little apart from the ETMP was new; the appendices largely consisted of documents that were already in the public domain, plus 29 pages of correspondence with the Council, the agreed road widths, and photos illustrating what the proposed passing places would look like if a grass reinforcement construction technique were used. The report was accompanied by tables showing the traffic flows drawn from the data in the original Environmental Report, and a helpful drawing at Appendix C indicating the precise location of each of the proposed passing places along the access route. That drawing would not have been difficult for anyone with local knowledge to interpret.

29. On 23 March 2018, a few days before the deadline for submitting evidence, INEOS emailed the AECOM report and its annexures to the Planning Inspectorate and to the Council. HAF were unaware of this. They would have received a copy of the report at that time if they had been Rule 6 parties. INEOS described the ETMP as a "refinement" of the original TMP, a characterisation with which the Council initially disagreed. Its immediate reaction was to object to the submission of the report, on the basis that the revisions were significant and "arguably" represented a revision to the development proposal itself, as well as to the mitigation measures.

30. The Council complained to the Planning Inspectorate that it had insufficient time to read, digest and respond to the AECOM report before it had to serve its own evidence. It did not publish the AECOM report on its website at that time. Its explanation at the Inquiry was that the Inspector had not yet decided whether he was going to admit it in evidence. The Council also took the view that it was up to INEOS

to inform interested parties about any proposed changes to its plans and consult with them.

31. On 27 March 2018, INEOS and the Council submitted their proofs of evidence to the Planning Inspectorate in accordance with the Inquiry Rules and the Inspector's initial directions. The Council's proofs were submitted on the basis of the application as it stood prior to the submission of the AECOM report. INEOS' proofs of evidence included a proof from Mr Martin, which accurately summarised the contents of the ETMP, with cross-references to the relevant passages in the AECOM report and ETMP in which the corresponding detail was to be found. Mr Martin also explained why he preferred to rely on comparative average daily traffic construction flows. As the Inspector subsequently pointed out in his decision letter, it would have been relatively easy and infinitely better for INEOS to have annexed the operative 9 pages of the ETMP to a proof of evidence (Mr Martin's being the obvious choice) instead of leaving it as an annexe to the AECOM report, but they did not do so.

32. The Council published the inquiry proofs of evidence, including Mr Martin's, on its website. Although it was possible to understand the broad thrust of Mr Martin's evidence without looking at the ETMP, one would need to refer to the ETMP and the drawing indicating the locations of the passing places, in order to fully comprehend the details of the differences between the original proposals and the new proposals for traffic management.

33. On 29 March, the case officer wrote to the parties conveying the Inspector's decision as to how to deal with INEOS's application that he should receive the AECOM report in evidence:

"*There is too much detail to be considered outside the inquiry and in the context of the remainder of the evidence. He will consider these matters after opening when the parties have the opportunity to request adjournments and make applications for costs."*

In paragraph 5 of his decision letter, the Inspector explained that he decided to take this course "*in view of the size and technical basis of the report and the nature of the Council's objection"*. He said that after opening the Inquiry, he could hear evidence as to the extent of and background to the revisions, as well as giving other parties the opportunity to request adjournments and make other applications to him. That was a perfectly sensible and pragmatic decision to have taken, bearing in mind that the Inspector was going to have to evaluate whether the proposed changes fell within the *Wheatcroft* principles.

34. Although it would have been apparent to anyone reading Mr Martin's proof that INEOS was seeking to rely on a revised TMP, nobody from HAF contacted the Council or INEOS to request a copy of the AECOM report or the ETMP. On 10 April 2018, two weeks prior to the Inquiry, INEOS's planning consultant Mr Bell emailed the AECOM report to various interested parties, including Mr Barlow. He posted a copy to another local objector, a farmer named Helen Wilkes, for whom he had no email address. On 13 April, HAF raised concerns with the Planning Inspectorate about their ability to review the ETMP. However, they took no steps to instruct an expert to advise them on the AECOM report, continuing to place reliance on the Council.

35. On 16 April the Council sent an email replying to Mr Bell's email of 10 April, copying in Mr Barlow and the other interested parties to whom the AECOM report had been sent. It said that it had now published the ETMP on its website. It was going to hold an emergency meeting on 19 April to consider the Council's response to what it described as the "late submission of the AECOM report" and put it forward to the Planning Board members as an urgent agenda item.

36. On 17 April, a week before the Inquiry was due to begin, HAF received an email from the case officer in substantially the same terms as the one she had sent to the main protagonists on 29 March, quoted in paragraph 33 above, informing them that the Inspector was going to rule on the admissibility of the AECOM report on day 1 of the Inquiry and hear submissions from interested parties, including any application for an adjournment.

37. On the same date, the Council indicated that it was no longer minded to object to the submission of the AECOM report as evidence before the Inquiry. Its highways expert, Mr Ferguson, had updated his report in the light of the ETMP, which he considered addressed many of the Council's reasons for resisting the appeal. In consequence, its officers recommended to its members that the putative highways reason for refusal be withdrawn. This news came as a deep disappointment to the members of HAF, including Mr Barlow.

38. The Council's Planning Board met to discuss the AECOM report on 19 April 2018. The meeting was streamed online, and Mr Barlow watched it. He would therefore have seen and heard the explanation given by the transport experts within the Council for their change of heart. Another member of HAF, Diana Gibson, represented HAF at the meeting and spoke in objection to the officers' recommendation.

39. In the event, the Council's Planning Board decided to reject that recommendation, and submitted a supplementary statement to the Inquiry outlining its updated position. As recorded in paragraph 7 of the decision letter, the Council's position on traffic matters at the Inquiry was as follows. It accepted the advice of its officers on the suitability of the traffic measures proposed, "in themselves". However, it said that the AECOM report did not satisfy its concerns in relation to highway safety "as a whole". The Council's position on the appeal therefore remained one of opposition to the grant of planning permission on grounds of highway safety.

40. There was daily coverage of the Inquiry by an organisation named "Drill or Drop" which published a blog written by an independent environmental journalist, giving a detailed commentary on events as they unfolded. This means that the Court has had the advantage of seeing a more accurate contemporaneous record of what was said and done at the time than is usual in cases of this nature.

41. At the start of the Inquiry, on 24 April 2018, the Inspector heard representations from interested parties and submissions from the Council and INEOS before giving a ruling on whether the AECOM report should be accepted in evidence. Four interested parties spoke, all of them complaining about the insufficiency of consultation with local people about the amended plan. Two of them were from HAF. Ms Gibson complained about the extra time that the new submissions had caused local residents to expend in dealing with them, in addition to working on the original submissions. She pointed out that most people had no choice but to do their work on this matter in the evenings.

Mr Barlow said he had received an email about the revised traffic management plan on 10 April and that "*people have not had time to review this document"*. He asked the Inspector for a 4-week adjournment to review the ETMP and make any further changes to HAF's submissions. He did not tell the Inspector that he or HAF wished to consult an expert, and that wish was never mentioned at any stage in the course of the Inquiry.

42. Nor did Mr Barlow indicate that he or HAF wished to consider applying for Rule 6 status in the light of the AECOM report, or any change in the Council's position regarding it. Mr Barlow's recollection is that he said that HAF had not had enough time to consider the ETMP or review it in the necessary level of detail or with a sufficiently expert eye. Quite understandably, the Inspector appears to have interpreted that as meaning that, as lay people without access to expert technical assistance, HAF felt they needed more time to get to grips with the substance of the ETMP and make sure they understood it before they made representations to the Inquiry.

43. The Council did not support the request for an adjournment. It said that it did not consider the AECOM report to amend the proposed development scheme, but that it had concerns about [the sufficiency of] public consultation. Mr Darby, the barrister representing the Council, said that whilst a week had been enough for the Council's professional officers, it was not enough for third parties. However, he saw no real need for four weeks. INEOS opposed the application to adjourn, but their counsel, Mr Steele QC, agreed that there should be some flexibility if local residents perceived they had been disadvantaged. He suggested that INEOS should call its evidence, and that interested parties should give their evidence a week later, when they had had the opportunity to digest it.

44. The Inspector ruled that the AECOM report should be accepted in evidence without an adjournment. He said in his decision letter that he gave "great weight" to the Council's position (supported by its experts) that the AECOM report did not change the scheme as originally proposed. The Inspector accepted that although there were what he characterised as "*significant differences*" between the TMP and the ETMP, "*these do not however change the proposal or materially alter the nature of the application, they offer an amended option to potentially satisfy a condition, the content of which has been agreed between the two main parties. Moreover, the operative text in the AECOM report amounts to some 9 pages out of 140 in total"*.

45. However, the Inspector said he was conscious of the position of interested parties having not had the benefit of technical expertise to interpret some of the aspects of the report. Therefore, his ruling to admit the report was made conditional upon Mr Martin explaining the ETMP and answering factual questions on it. He directed that interested parties' representations on the ETMP should be made the following week, after they had considered Mr Martin's explanation. He obviously felt that the extra week would be enough to give them a fair chance to refine their submissions once the ETMP had been clearly explained to them, and they had a sufficient grasp of the relevant facts.

46. If and insofar as it is contended that the Inspector fell into the trap identified in *Holborn Studios* of conflating the question whether the ETMP made a substantive difference to the underlying application with the question whether there had been a

fair opportunity for interested parties to address the changes, I reject that suggestion. Indeed, in fairness to Mr Bowes, who represented Mr Barlow, he did not really press that argument. Once the Inspector was satisfied that the ETMP did not significantly change the scheme as originally proposed, he turned his mind specifically to the question whether local people had been given sufficient opportunity to understand it and formulate their response to it.

47. In accordance with the Inspector's directions, on the morning of day 1 of the Inquiry Mr Martin explained the ETMP and answered factual questions on it from local people, including a question from Mr Barlow about the use of banksmen. He said that the passing places were to be used by local background traffic to allow the construction traffic to pass through. He also explained that the reason why temporary traffic controls (stop/go boards and banksmen) were proposed was because of lack of inter-visibility between passing places at that part of the route. These controls would be used only during the first eight months of the construction project. In answer to a question from another local objector, Mr Martin said that horse riders would be expected to use the passing places.

48. Mr Martin was not the only highways expert who gave evidence at the Inquiry. Mr Ferguson, from the Council's highways department, gave evidence on the afternoon of the first day, explaining why he had changed his professional opinion. He said that, whilst he understood the concerns expressed by some local councillors, he had no doubt that the appropriate professional recommendation was to support the application. In answer to questions from Mr Darby, he confirmed that local people would have the opportunity to comment on the final traffic management plan before it was approved by the Council in discharge of the agreed condition.

49. On 26 April 2018 (day 3 of the Inquiry) the Inspector carried out an accompanied site visit and walked the proposed traffic route in its entirety. As well as Mr Martin and Mr Ferguson, Mr Barlow was among the people who accompanied the Inspector on that site visit, at which all the passing places were pointed out and the ETMP was further explained. The Inspector refers to this in paragraph 10 of the decision letter, pointing out that the site visit occurred in advance of statements being made to the Inquiry by interested parties and the opportunity for interested parties to question the appellant's witnesses. He said he was satisfied that, in addition to the matters raised in his ruling, interested parties had a sufficient, and indeed good, opportunity to understand the ETMP prior to presenting their statements to the Inquiry.

50. The day after the site visit, 27 April, HAF made their representations to the Inquiry. One of its members, Mr Marsden, presented the inquiry statement which Mr Barlow had lodged on behalf of HAF on the opening day, accompanied by a powerpoint presentation. HAF's inquiry statement had been updated to contain comments upon aspects of the AECOM report before it was lodged on 24 April. No changes were made to the statement in the light of Mr Martin's explanation and the accompanied site visit.

51. A considerable segment of the statement is devoted to "Traffic Plan Management Concerns" and there is a critique of the ETMP and of Mr Martin's use of average figures instead of peak traffic flow figures. HAF took points about the implications of moving large pieces of equipment along the proposed access routes. They also raised a variety of safety concerns, which they submitted the new traffic management

proposals did not allay. So far as the proposal for the creation of 23 passing places was concerned, HAF submitted that this would change the character of the country lanes, encourage speeding and result in traffic conflicts, delay and accidents.

52. Further representations were made by other interested parties, including Mr Barlow personally, on 1 May 2018. Mr Barlow said that INEOS could submit as many traffic management plans as they wished, but they could not get away from the fact that access to the proposed site was via single track lanes never intended for HGVs. He pointed out that hedges and grass verges grew upwards and outwards from spring onwards, which had an impact both on road widths and on visibility. He expressed fears for the safety of pedestrians, cyclists and horse riders having to make way for convoys of development traffic.

53. Mr Barlow confirmed that he had read the ETMP. He did not say that he was unable to understand it, and his submissions indicated that he understood it very well. It was his view that the stop/go areas, banksmen and additional passing places would not make the traffic issue any safer, but would cause frustration and confusion whilst giving INEOS exclusive rights of way over the road network. He raised detailed issues of concern regarding the use of banksmen and the stop/go areas. Mr Barlow also objected to the idea that the detail of the traffic management plan should be left for discussion with the Council as part of the conditions imposed on any grant of permission (as the main parties envisaged) rather than being dealt with as part and parcel of the Inquiry itself.

54. On 2 May 2018, Mr Martin gave his evidence to the Inquiry as part of INEOS' case. He was cross-examined extensively by Mr Darby on behalf of the Council, mainly on the issue of traffic safety. He also answered questions from interested parties, including several questions from Mr Barlow concerning passing places, liaison with local residents, and load widths. He was also asked and answered several questions from Ms Gibson.

55. In his closing statement, Mr Barlow thanked the Inspector for allowing HAF the chance to give its evidence to the Inquiry and to explain its concerns. He made no complaint that the time he had been given was inadequate to formulate a response to the ETMP. Immediately after the Inspector closed the Inquiry, Mr Barlow thanked him again for his conduct of the Inquiry and for his fairness towards the interested parties. At no point in the course of the Inquiry was there any complaint about the course which the Inspector had taken with regard to the requested adjournment, and there was no overt suggestion that members of HAF or Mr Barlow personally felt aggrieved by his ruling.

56. The Inspector made his decision on 7 June 2018. His decision letter discussed the highways issues in detail, and gave careful consideration to the objections on those issues (paragraphs 16-65). The Inspector concluded that the proposal would not necessarily have an unacceptable impact on the existing uses of the highways in the surrounding area, and that it would not conflict with the NPPF. He pointed out that it would be for the Council to ensure that detailed matters, such as agricultural access, were fully taken into account when the final TMP is approved.

The Section 288 challenge

57. Mr Bowes' submissions concentrated on the second aspect of procedural fairness identified in *Hopkins Developments*. Mr Bowes contended that, although HAF knew the case they had to meet on day 1 of the Inquiry, they were not afforded a reasonable opportunity to make submissions about it and to put their case. Mr Bowes did not demur from the Inspector's assessment that the interested parties had been given a good opportunity to *understand* the ETMP prior to presenting their arguments to the Inquiry, but he pointed out that that was only one aspect of procedural fairness. He submitted that in the circumstances they needed far longer than the additional week that the Inspector gave them, to digest the report and formulate a response to it.

58. The question whether someone has had a fair opportunity to respond to new evidence will depend on the following factors:

    i) the nature, volume and complexity of the evidence in question,

    ii) its importance to the issues to be determined on the planning application or appeal, as the case may be;

    iii) how much time that person in fact had to assimilate and understand the evidence and to prepare a response to it (irrespective of whether he actually availed himself of that time);

    iv) the resources available to the party concerned and whether they had access to relevant expertise. A lay person is likely to need longer to digest and assimilate information of a technical nature and respond to it than someone who has access to expert assistance, but how much longer will naturally depend on the nature of the information and its impact on the applicant's proposals.

    v) what responses the party concerned was able to put forward in the time that they were given, and

    vi) what else they might have said or done if they had been given a longer time to prepare their response.

    The last of these factors is also relevant to the issue of whether there has been material prejudice.

59. Mr Bowes submitted that the ETMP was substantial and significant new evidence, and was treated as such by both the Council and the Inspector. He relied on the fact that, even with its in-house expertise, it took the Council's highways department three weeks (from receipt of the AECOM report on 23 March, to publication of their report on 17 April) to decide that it was not going to object to the admission of the report or to its contents. He pointed out that the Council's highways department had the additional advantage of the joint site-visit with AECOM on 17 February, which led to agreement being reached about the width of the roads. That had been a contentious issue at the time of the original TMP, which had a significant bearing on whether passing places could be created along the route.

60. Mr Bowes submitted that Mr Barlow and the HAF were given far less time than the Council was to get to grips with the changes, and to make submissions about the

ETMP. They only had sight of the AECOM report two weeks before the Inquiry, whereas the Council had it a little more than four weeks before, and they were complaining even then about the inadequacy of time to respond to it. Mr Bowes contended that the Inspector's decision not to adjourn failed to pay sufficient regard to the importance of public participation in environmental decision making which was emphasised by Lewison LJ in *Engbers*.

61. Mr Bowes submitted that it was a strong indicator of unfairness that interested parties did not get the ETMP until two weeks before the hearing, which was half the normal time for service of proofs of evidence under the Appeal Rules and in accordance with the Inspector's directions. This unfairness was not cured by events at the Inquiry or by the imposition of conditions on the grant of permission. In practical terms, HAF had no chance to instruct an expert and they had an inadequate time to digest Mr Martin's oral explanations and formulate questions for him, particularly as they were also interested in hearing what other witnesses had to say in the intervening period. Mr Bowes emphasised the fact that HAF is a group of local residents, some of them retired, but many of them workers who could only devote the evenings to consideration of this proposed development and the materials relating to it, and their financial resources are necessarily limited.

62. As for the conditions imposed on the grant of permission, although in theory HAF would have the opportunity to make further submissions before the Council decided to approve whatever traffic management plan INEOS eventually submitted (which may or may not be the proposed ETMP, or a refinement of it), Mr Bowes submitted that this afforded them little protection in practice. He said that the Council were likely to be satisfied with whatever AECOM proposed in terms of traffic management in the light of the Inspector's findings, and therefore the opportunity for local people to have a further say about any TMP that was eventually proposed by INEOS afforded them no real safeguards, at least in the absence of some material change of circumstances.

63. Mr Bowes pointed out that if HAF raised new objections prior to consideration of whatever TMP was eventually placed before the Council for approval, or tried to introduce expert evidence at that stage, INEOS would be able to submit to the Council that little weight should be given to points that could and should have been raised by them at the time of the Inquiry. He also made the fair point that if there was procedural unfairness at the Inquiry, leading to the approval of a proposal for which permission might have been refused had the interested parties been able to articulate their objections, then the damage to the interests of objectors was already done. That prejudice could not be cured by giving them an opportunity to make further submissions at a later stage when conditions imposed on the grant of permission fell to be discharged.

Nature, quality and complexity of the evidence

64. Although the Inspector described the AECOM report as being "of a technical nature", the only technical aspects of it were the construction traffic flows data included at Appendix A, which had been available since June 2017 as part of the original Environmental Report. The proposed changes to the traffic management plan were not complex or technical. They would not have been particularly difficult for any lay person of reasonable intelligence to digest or to understand, even without the benefit

of expert assistance. They consisted of scrapping the proposed one-way system; moving the route further away from the village; greatly increasing the number of passing places along the route; and adding two stop/go signs and more banksmen.

65. Although the size of the AECOM report may have appeared daunting at first sight, (hence the initial reactions of both the Council and the Inspector to INEOS's request that it be admitted in evidence) it would not take very long, especially with Mr Martin's proof as a guide, to appreciate that only nine pages of the text were relevant and that the proposed changes in terms of traffic management were limited in nature and scope. A local person aware of the proposed sites of the passing places or the Stop/Go signs and armed with a copy of the drawing annexed to the ETMP would not need several weeks to be able to form a view as to whether those traffic control measures would create a hazard in terms of visibility or congestion, and whether they would suffice to overcome concerns about road safety.

66. The changes would have no impact on the ability of a local objector to raise more general objections based on the overall volume of traffic or the impact on pedestrians, cyclists and horse riders of having to cope with convoys of HGVs in country lanes, or the impeding of access to the Golf Club or local farms. The information about the likely volume of traffic that would pass through the access route had been available since the original application, including the Environmental Report, was published on the Council's website. The ETMP also had no bearing on the ability of interested parties to make points about whether averages or maximum volumes were a more apposite measure of the impact of the increased traffic on the local community and environment.

The significance/importance of the evidence to the issues to be determined

67. The Inspector rightly assessed the significance of the new proposals as relating to the ability of the proposed TMP to satisfy conditions which it was accepted by both main protagonists would be imposed on the grant of permission. He decided, as a matter of planning judgment, that they did not significantly change the underlying proposals.

68. The Inspector made a fair evaluation of the nature and extent of the changes in the ETMP and how they affected the issues that he was required to determine in the Inquiry. The real question for him to determine was whether there was a fundamental objection to the proposed development on highway safety grounds (which no traffic management plan, including the indicative ETMP, could overcome). If the answer to that question was no, then the adequacy of any proposed future traffic management plan, which would have to be published ahead of approval, would be something for the Council to consider on another day, and it would be open to interested parties to make further submissions about the adequacy of the plan before any decision was taken to approve it.

69. Those were relevant considerations to take into account when assessing how much time opponents of INEOS's application needed to respond to the ETMP at the Inquiry itself. Whilst their submissions at the Inquiry might be the last opportunity they had to persuade the Inspector to refuse permission altogether on highways grounds, they would not be the last opportunity they had to raise objections to the detail of the ETMP (or any refinement of it or substitute for it) if the appeal were allowed.

70. Against that (correct) assessment of the situation, the further opportunity that the Inspector afforded interested parties to make sure they understood the proposals in the ETMP and to amend their proposed responses to it if they so wished was, in my judgment, entirely reasonable. The additional week that the Inspector gave them cannot be seen in a vacuum. They had three weeks from the receipt of the AECOM report, and five weeks from the receipt of Mr Martin's proof, against a background in which, in substantive terms, the Council was still making the running in terms of objecting to the appeal on highways grounds and interested parties were still playing a supporting role.

The time that Mr Barlow/HAF had to respond to the ETMP

71. For those reasons, I do not accept the premise that HAF only knew the case they had to meet on day 1 of the Inquiry. HAF had access to the original proposals for the development when those proposals were initially lodged with the Council in May 2017. They also had access to INEOS' statement of case for the Inquiry and the Council's response to it, both of which were in the public domain. They then had access to Mr Martin's proof at the same time as everyone else, four weeks before the Inquiry, and that proof contained an accurate synopsis of what the AECOM review set out in greater detail, together with Mr Martin's reasons for the changes. As Mr Litton QC, on behalf of INEOS, pointed out, the fact that HAF got the AECOM report later than the Council did was a direct consequence of their decision not to seek Rule 6 status, which in turn was based on their decision to let the Council make the running.

72. Although the Inspector rightly criticised INEOS for failing to annex the ETMP to Mr Martin's proof, even without it, that proof would have alerted anyone reading it to the fact that INEOS was changing its proposed TMP to try and meet the concerns about the original proposals that had been articulated by the Council in its position statement. The fact that INEOS might wish to try and address those concerns should not have taken anyone by surprise. The absence of the detail did not preclude the reader of Mr Martin's proof from obtaining a general understanding of what the AECOM review entailed, and what the new proposals were.

73. That meant that once HAF had access to the AECOM report itself, two weeks later, they would not be reading the detail or considering how it might affect their statement to the Inquiry without having had the benefit of some forewarning or guidance about what the changes entailed. There was nothing to prevent them from at least beginning to think about how to amend their statement to the Inquiry to cater for the proposals introduced by the amended traffic mitigation scheme.

74. On any view, even if one ignored the two weeks he had to read and digest Mr Martin's proof before he saw the AECOM report or the ETMP, Mr Barlow had three weeks from receipt of the AECOM report to compile, amend, and finalise his response to the ETMP, comprising two weeks prior to the Inquiry and the further week granted by the Inspector after Mr Martin explained the ETMP on day 1, during which time Mr Barlow walked the route with both experts and the Inspector and saw exactly where the passing points and stop/go signs were going to be put.

75. I do not accept Mr Bowes' proposition that obtaining evidence after the date on which the Appeals Rules provide that it should normally be made available, points towards procedural unfairness, let alone that it is a strong indication of it. Nor does the fact

that the main protagonists happened to have a longer time to consider the ETMP than members of the public did. As I have already pointed out, the fact that the Appeals Rules envisage that 4 weeks will normally be sufficient advance notice of the evidence to be called at an Inquiry to enable the main protagonists and any interested parties to prepare their submissions, does not mean that a shorter period is likely to be regarded as inadequate for that purpose. That is always going to be a question of fact and degree. The Appeals Rules envisage that an Inspector may admit evidence that is produced for the first time even during the course of the Inquiry itself.

76. Whilst it is factually correct that the Council took three weeks from receipt of the AECOM report to make a decision on whether to maintain its objection to its admission by the Inspector, it did not take the Council three weeks to understand the ETMP or take a view on it. Their Counsel told the Inspector at the Inquiry that they were in fact able to take a view about it in a week, though he characterised it as "far from ideal". It appears from evidence given to the Inquiry by Mr Lowe, the Council's planning officer, that the Council decided to address the new document on 10 April, which is when it was sent to their highways department. That was also the date on which the Council became aware from Mr Bell's email that INEOS had disseminated it to interested parties. As the Council conceded, the public would have needed longer than they did, but not necessarily four weeks, especially four weeks in addition to the two weeks they had already had to consider the ETMP prior to the commencement of the Inquiry (i.e. six weeks from the date of receipt of the ETMP - eight from the date of publication of Mr Martin's proof).

77. The additional opportunity that the Inspector afforded interested parties to listen to Mr Martin's oral explanation and ask further questions gave them a further layer of protection, ensuring as it did that they truly understood the ETMP and its implications before they finalised their submissions about it. That additional week was given against a background in which HAF's statement had already been lodged; their reasonable time for responding to the ETMP did not begin on the first day of the Inquiry.

Resources/access to expert assistance

78. It is also significant, when considering whether a fair opportunity was given to respond, that HAF were not just left to their own devices in trying to get to grips with the ETMP. Mr Barlow and Ms Gibson had had the advantage of listening to the Council's expert, Mr Ferguson, explaining to lay people – specifically, the local councillors on the Council's Planning Board, and any interested member of the public who was present or watching online – why he considered the new traffic mitigation proposals to be acceptable, which necessarily involved explaining what those proposals entailed and why he found them to be sufficient to allay his original concerns. They also had a copy of Mr Ferguson's written explanation a week before the Inquiry. Thus, unlike other local objectors, they did have the advantage of hearing about the new traffic management proposals from the very expert that they had been content to rely upon up till then, and would have relied upon at the hearing if he had not changed his professional opinion.

79. Two weeks earlier, when they had both Mr Martin's proof and the AECOM report, HAF took the decision not to consult an independent traffic expert about the ETMP, because they continued to rely on the Council to deal with the highways and traffic

issues. That does not mean that they were deprived of the opportunity to seek expert advice, it means that they chose not to avail themselves of that opportunity at that time. That observation is not intended as a criticism. It is entirely understandable why HAF decided to rely on the Council to make the running on highways issues, in circumstances in which highway safety formed one of the two main pillars of resistance on which the Council was relying in opposition to the appeal, and where, unlike HAF, the Council had easy access to expert advice.

80. However, that stance carried with it a risk that the Council might change its position, or that the Council's expert might take the view that the proposals in the ETMP were enough to overcome his initial objections. HAF took that risk. Procedural fairness did not require HAF to be given more time simply because matters took a turn that they did not expect.

81. In the event, this was not a case where the Council considered the ETMP had solved all the problems it had identified as regards highway safety. By 19 April, HAF knew that even though it no longer opposed the admission of the AECOM report, including the ETMP, as evidence in the Inquiry, the Council had not changed its stance in relation to the substance of the appeal itself. Therefore, there was no reason for HAF to have taken the view that the Council had put itself in a position where its interests no longer coincided with those of HAF. Mr Barlow and the members of HAF were therefore less disadvantaged by the Council's change of attitude to the ETMP than they now contend they were. The Council was maintaining its highways objection, and HAF was still playing a supporting role. They were not left to make all the running. The only problem was that the Council no longer had support from its experts. Yet their barrister was still equipped to challenge Mr Martin in cross-examination about the highways safety issues, and he did so at some length.

What responses were HAF/Mr Barlow able to make to the ETMP?

82. It is clear from the evidence I have seen that HAF understood INEOS's proposals under the ETMP sufficiently well to be able to articulate a detailed and intelligent response to them in the form of the amended position statement that they handed in on day 1 of the Inquiry. That statement was then presented without further amendment by a representative of HAF after the accompanied site inspection. HAF must have felt that Mr Martin's evidence and the site visit had confirmed that their understanding of the ETMP was correct. There were certainly no further complaints to the Inspector that HAF felt disadvantaged in responding to the ETMP.

83. Mr Barlow had even longer to respond, and his objections were well presented. They, too, addressed the detail of the proposed changes. Mr Barlow criticised the ETMP and the traffic management strategy without expressing any reservation as to his understanding of that document. HAF and Mr Barlow were also able to formulate questions for Mr Martin and put them to him. HAF and other local residents, including Mrs Wilkes (who received the ETMP later than HAF did) criticised Mr Martin's use of average (rather than maximum) traffic flows and demonstrated that they understood the data.

What difference would it have made if the interested parties had been given more time to respond?

84. I consider it to be significant that at no stage during the Inquiry did Mr Barlow say to the Inspector that he or his action group wished to have the opportunity to instruct their own traffic expert in the light of Mr Ferguson's change of position. In those circumstances, the Inspector was entitled to approach the question of what procedural fairness required on the basis that the interested parties were going to put in their responses without the benefit of any further expert assistance, which is exactly what they did.

85. Mr Barlow said in his first witness statement that HAF tried to interpret the information in the AECOM report but that they "*largely had to accept the new information and take it at face value"*. Yet he has provided no evidence to suggest that there was any reason not to take it at face value. The Council's highways experts, who had had longer to consider it, provided no such reasons. It is not good enough to speculate that such reasons might have been found if the objectors had been given more time. They have had more than sufficient time now to articulate such reasons, and none have been forthcoming.

86. Indeed, one of the striking features of this case is that the challenge is not based on any complaint that the objectors might have been able to say something specific or draw something to the Inspector's attention in their response, over and above what they did say, or put some additional point to Mr Martin, which might have had a material impact on the outcome of the Inquiry. In all the time that Mr Barlow has had to consider the ETMP since the decision letter, he has failed to produce any evidence that there was some fundamental flaw in the ETMP which the Council's traffic experts overlooked, or that there was some specific criticism that he would have made that he did not articulate at the time, which might have made a difference to the outcome of the appeal.

87. The question whether Mr Barlow's or HAF's response to the ETMP would have been any different if they had been afforded more time to prepare that response is relevant both to the question whether there was a reasonable opportunity to respond and to the question whether there was material prejudice. In assessing whether there was a reasonable opportunity to respond, it is obviously relevant to consider what response was made in the time available and whether, and if so how, that response would have differed if the interested party had had longer to formulate it.

88. The obligation of procedural fairness requires that a *reasonable* opportunity be given, no more, no less. Reasonableness is an objective standard. If the interested party was able to convey the essence of his objections and to address the key aspects of the new evidence, then he has had sufficient time to put his case, even if he might have been able to produce something more polished or elaborate if he were given more time. On the other hand, if he is able to demonstrate that there were important points of objection he was unable to make that he would have wished to make, either because his presentation was cut short or because no-one in his position would have had enough time to identify and articulate them, then there may be grounds for concluding that he did not have a reasonable opportunity to put his case.

89. By contrast with the case of *Holborn Studios*, there was no evidence of what other arguments or materials the opponents of the INEOS proposal would have wished to put before the Inspector had they been given a longer time to consider the ETMP. In *Holborn Studios*, one of the objectors had subsequently obtained a structural report

which indicated that the ceiling height that the planning authority had considered acceptable could not be achieved. That information could well have made a difference to the outcome of the application, if the objector had been afforded sufficient opportunity to obtain it before the decision was taken. There was therefore both a lack of reasonable opportunity to put the opposing case, and material prejudice.

90. In fact, the objectors in that case had not been allowed the time to articulate *any* objection on the merits, because they were only given enough time to protest that they had not been consulted about the changes to the proposed development. *Holborn Studios* was a case of obvious and gross procedural unfairness. By contrast, in the present case the interested parties were given ample opportunity to articulate their objections, and to put their case to INEOS's expert Mr Martin. They extracted a fair number of useful concessions. They were not required to put their case at the Inquiry until every opportunity had been afforded them to make sure they understood the ETMP, and there was no suggestion when they gave their evidence or put questions to the opposing party's key witness that they did not understand it. The Inspector plainly took their objections into account in reaching his decision.

91. Even now, HAF have not instructed an expert to comment on the AECOM report; there was no evidence that they have even taken the preliminary step of approaching one to find out how much he would charge. This means that there is no evidence that an expert consulted by HAF would have taken a different view of the ETMP from that of Mr Martin and Mr Ferguson. There is no evidence as to who Mr Barlow might have instructed, nor is there any evidence of what, if anything, more the expert would have said if he had been instructed.

92. The Court is therefore not in a position to evaluate whether Mr Barlow's or HAF's case would have been materially different if they had been given more time to consider the AECOM report before responding to it at the Inquiry. I appreciate that funds are scarce, but that leaves an unsatisfactory evidential lacuna. It means that there is no basis on which this Court could possibly conclude that there has been material prejudice, even if the interested parties had not been afforded a reasonable opportunity to put their case.

CONCLUSION

93. Taking all these factors into consideration and standing back and looking at the matter in the round, I am satisfied that Mr Barlow and HAF were afforded a reasonable opportunity of putting their case to the Inspector in opposition to the ETMP specifically, and the appeal in general, and that they took that opportunity. Accordingly, there was no procedural unfairness.

94. Even if I am wrong about that, there is no evidence that having three weeks in which to respond to the AECOM report instead of four, in circumstances in which they had two weeks' prior access to Mr Martin's proof, were afforded a further opportunity by the Inspector to hear his explanation of the ETMP and ask him factual questions by way of clarification, and then went on an accompanied site visit before they had to present their objections, caused the Claimant or HAF any prejudice, let alone any material prejudice. Accordingly, there is no basis upon which the Court would interfere with the decision reached by the Inspector, and this challenge must fail.