

**THE ROTHER VALLEY RAILWAY (BODIAM TO ROBERTSBRIDGE  
JUNCTION) ORDER**

**TRANSPORT AND WORKS ACT 1992**

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**OPENING STATEMENT ON BEHALF OF OBJ/1002:**

**THE HOAD FAMILY (PARSONAGE FARM) AND THE TRUSTEES AND  
EXECUTORS OF THE NOEL DE QUINCEY ESTATE AND MRS EMMA  
AINSLIE (MOAT FARM)  
("THE LANDOWNERS")**

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1. Through the proposed Transport and Works Act Order which is the subject of this Inquiry, RVR seeks statutory authority, amongst other things, to:
  - a. construct and maintain a section of railway between Junction Road and Robertsbridge, otherwise known as "the Missing Link";
  - b. provide three new level crossings over existing highways, and a fourth level crossing over a bridleway;
  - c. divert an existing footpath;
  - d. compulsorily acquire the land and rights which it needs for the above.

2. If one looked only at the volume of the evidence before the Inquiry, it would be easy to conclude that it was the second of these (and in particular the proposed new level crossing over the A21 Trunk Road) which was the most contentious, and therefore the principal issue with which the Secretary of State need be concerned. While that would be understandable, in the Landowner's submission, it would also be a mistake: although the impact of the proposals on highway safety is a matter of profound importance, it is no more so than the principles of constitutional law which are engaged by RVR's application for powers of compulsory purchase.
3. It is well-established that these are not powers that are lightly granted. Compulsory purchase is a draconian measure, which involves the use of state powers to expropriate private rights to land and property - rights which have been jealously guarded by the common law of this country for centuries, and which have more recently been enshrined in Article 1 of the First Protocol of the European Convention on Human Rights. As Lord Denning MR observed in *Prest v. Secretary of State for Wales* [1983] JPL 112 it is (emphasis added<sup>1</sup>) a  
  
"principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands."

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<sup>1</sup> In the same case, Watkins LJ observed that "The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinised. The courts must be vigilant to see to it that that authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought."

4. The need for the public interest to decisively demand the expropriation of property is reflected in national guidance, which states that compulsory purchase powers should only be granted where there is a compelling reason, in the public interest.<sup>2</sup> The words “decisive” and “compelling” are important: as the decision in *Prest* makes clear, it is not enough that the scales are evenly balanced. If there is any reasonable doubt, the balance “must be resolved in favour of the citizen”.
5. Against that backdrop, it might generally be regarded as something of a surprise that compulsory purchase powers should even be available to further the ambitions of a private organisation. Indeed, RVR’s own Statement of Case recognises that it is “unusual” for a heritage railway to seek powers of compulsory acquisition.<sup>3</sup>
6. In those circumstances - and long before one gets to any of the other obstacles which the Scheme faces - this application is a work of extraordinary hubris. It asks the Secretary of State to sanction the enforced sale of land that is currently in good and productive use, and has been in the same families for generations, simply in order to further the aspirations of a private organisation which already struggles to keep its head above water financially without significant charitable donations.<sup>4</sup>
7. In the Landowners’ submission, that is not what compulsory purchase powers are for. Indeed, but for the fact that the “business” in which RVR is involved happens to be the running of a heritage railway, which falls within the scope of the Transport and Works Act, it would simply not be possible for RVR to seek

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<sup>2</sup> Compulsory Purchase Procedure and the Crichel Down Rules, para 12

<sup>3</sup> RVR SoC para 13.6

<sup>4</sup> Evans OBJ/1002/EE/1 para 3.15: between 2013 and 2019, KESR accounts show £2.0m expenditure as against £1.8m commercial income, and a reliance on an average of £283k p.a. in donations.

the power to require the Landowners to sell RVR the land it needs in order to expand.

8. Critically, this argument is not dependent upon the impact which the Order Scheme might have on the operation of either Moat, or Parsonage and Redlands Farms: the fundamental constitutional principle to which Lord Denning referred is engaged simply because it is the Landowners' property which RVR proposes to take. The actual impacts merely rub salt in that wound.
9. In that regard, although it is common ground that (as long as adequate worker crossings are provided<sup>5</sup>) the Scheme would not render either farm unviable, it would nevertheless impact on day-to-day operations. This is not simply because of the loss of the land beneath the line of the railway: it is also a function of the consequent artificial division of the two farms, which would render unusable some existing areas of productive land, while restricting the future use of others to pasture, and increasing the time taken for the land to drain after flood events. In addition, the need to cross the new line would expose farm workers to unnecessary daily risk, while the limited number of crossing points would impose burdens in time, and make it more difficult for the Landowners to move stock quickly in times of emergency. The fact that this might all be reflected in some kind of financial compensation does not detract from the point that there would be a permanent, adverse impact on the day-to-day lives of the Landowners.
10. What then is the "compelling reason in the public interest" which is said to justify this? RVR contends that it lies primarily in the additional spending and

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<sup>5</sup> A question on which RVR's position seems to vary according to its audience: compare Keay RVR/W8/1 para 36 ("RVR recognise the need for the provision of accommodation crossings") with the ORR's letter of 21 May 2021, para 24 ("RVR have acknowledged that alternatives to crossings would be considered first").

employment which would be generated by the increase in passenger numbers. However, it is difficult to reconcile this with RVR's own Environmental Statement, which candidly describes the local socio-economic benefits as "minimal, though very marginally positive amongst certain receptors".<sup>6</sup> The ES's overall assessment of the impact of the scheme is "neutral to minimal positive". Even on RVR's own assessment, therefore, it is difficult to see how the Scheme gets to first base.

11. That picture becomes even more stark once it is recognised that the economic benefits which RVR announced to the world (and to the ORR<sup>7</sup>) when garnering support for its proposals – a claimed total of £35m during the two-year construction and the first ten years of operation, and up to £4.6m p.a. in local benefits from 2030 onwards - were entirely dependent upon further investment which RVR now describes as "aspirational"<sup>8</sup> and which not even its own witness, Mr Higbee, still relies upon in any meaningful way. Rather, RVR's case<sup>9</sup> now relies on an estimated £6.5m in local construction benefits and an ongoing £1.06m p.a. – an operational amount which is less than a quarter of that previously advertised.

12. For reasons which (on behalf of the Landowners) Ms Evans will explain, even those figures are optimistic. In particular:

- a. The projected 25% overall increase in passenger numbers is significantly higher than anything which any other heritage railway has managed to sustain, following connection to a mainline station.

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<sup>6</sup> RVR/25 para 14.7.2

<sup>7</sup> RVR/75

<sup>8</sup> Dewey para 14.7

<sup>9</sup> Higbee, RVR/W2/1 para 2.20

- b. The trip spend claims of £42.55 per day are overstated, both in relation to the average spend of day-trippers and in relation to overnight visitors, for which RVR seeks to claim the benefit of expenditure over four whole days in circumstances where it is obvious that these visitors will have come to Kent for reasons other than just the railway.
13. Applying more realistic figures (and assuming that there is no leakage to other areas), Ms Evans estimates that the actual additional spend in Rother in the opening year is likely to be in the order of £470,000 – less than half of RVR’s central case, barely a tenth of the “aspirational” investment case, and a mere 0.1% of local tourism – and that (as has been the case with other heritage railways which have extended their line) this will reduce thereafter.
14. Consequently, even before one gets to questions such as whether there should be a level crossing over the A21, whether the proposal is consistent with national policy on development in the floodplain or the protection of heritage assets, or whether there is any other harm to landscape, ecology or any other interest, there is plainly not a “compelling reason in the public interest” for the exercise of compulsory purchase powers. For that reason alone, this application should be refused, and refused in no uncertain terms.
15. However, RVR’s difficulties do not end there.
16. Additionally, the Scheme now<sup>10</sup> proposes the creation of nine new level crossings – three new road crossings, one bridleway crossing and five

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<sup>10</sup> There were originally 8 proposed worker crossings, but RVR has since replaced four of the crossings proposed at Moat Farm with one and a track to provide access which, if used at times of flood, would require livestock to be moved into the flood rather than away.

uncontrolled private accommodation crossings, without which the impacts on the two farms would be much more significant.<sup>11</sup>

17. This simply adds further, significant weight to the arguments against the Scheme. As the opening sentence of ORR's "Level Crossings: A guide for managers, designers and operators"<sup>12</sup> points out, "Level crossings account for nearly half of the catastrophic train accident risk on Britain's railways."<sup>13</sup> RVR's own evidence accepts that the introduction of any new level crossing introduces a point of conflict which will increase the overall risk of accidents, and will therefore have a negative impact on safety.<sup>14</sup> It is for these reasons that, as a matter of national policy, the ORR's starting point has historically been that new level crossings should only be permitted in "exceptional circumstances". Although the words "exceptional circumstances" do not appear in the recently published update, ORR's position remains that it "does not support the creation of new level crossings where there is a reasonably practicable alternative".

18. In the circumstances, all nine of the proposed new crossings are problematic. However, none is more so than that over the A21. As part of the Strategic Road Network, the A21 is the major strategic connection between London and Hastings; over the past 55 years it has – at considerable public expense - been the subject of numerous improvement schemes designed to increase its capacity;<sup>15</sup> it currently carries between 16 and 18,000 vpd; and - as Highways England explain - it is a "critical national asset"<sup>16</sup>. And it is across this critical

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<sup>11</sup> See RVR/68

<sup>12</sup> Appended to ORR Statement of Case, Rep 017/0

<sup>13</sup> Para 1

<sup>14</sup> Hamshaw para 5.4.3

<sup>15</sup> 1966 Sevenoaks Bypass; 1971 Tonbridge Bypass; 1988 Pembury Bypass; 1989 Robertsbridge Bypass; 2005 Lamberhurst Bypass; 2017 North Farm section linking Pembury to Tonbridge Bypasses.

<sup>16</sup> Harwood Obj/782/W1 para 7

asset that RVR proposes to introduce a new level crossing, which the RVR's Costs Benefit Analysis indicates<sup>17</sup> will increase the accident rate on this stretch of the A21 by a factor of four and produce queues up to half a kilometre long.

19. If it were not for the fact that RVR is so obviously serious, this would be laughable. Indeed, if the Secretary of State were able to take the time to come down and ask anyone who lives locally and knows the road, he would discover that the almost universal reaction to being told of RVR's plans is: "you are joking, aren't you?"
20. Sadly, RVR is not. Rather, it seeks to overcome the obvious objections to the introduction of a new hazard and source of delay on this nationally significant road by arguing that the risks can be managed.
21. Even if that were true, it could not alter the fact that the scheme will introduce a risk to the safety of motorists on the A21 and passengers on the railway which currently does not exist, and will introduce further delays to motorists on a stretch of road which – on precisely the days when RVR is likely to operate most trains – carries significant volumes of traffic. Of itself, that would add yet more harm to the already substantial disadvantages of the scheme which need to be decisively outweighed before the Order can be made. However, in the Landowners' submission, and for reasons which will be explained by Mr Fielding and Mr Clark, RVR has significantly underestimated the risks. Although heritage railways carry fewer trains and travel at a more sedate pace, they are not immune from the problems of increased risk to safety, and RVR will be no exception to this. Hence (for example):

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<sup>17</sup> Hamshaw RVR/W3/2 App F p. 298



- a. Existing northbound traffic approaching the Robertsbridge roundabout already experiences queues of up to 105m,<sup>18</sup> only just short of the proposed new level crossing.
- b. Whether travelling northbound or southbound, traffic on the A21 will face sudden and unexpected queues of stationary traffic, which can only add to the risk of accidents. Despite previous assertions that this would be a rare event, RVR's recent Departure from Standards Application<sup>19</sup> now recognises that queueing of southbound traffic is "expected to regularly extend through the [Robertsbridge] roundabout when the barrier is lowered", while northbound traffic is now predicted to tail back from the level crossing for up to 500m, creating long queues on the fast, downhill bend as the A21 approaches the crossing.
- c. The proposals are dependent upon the extension of the existing 40mph speed restriction, in circumstances where 92% of traffic already does not adhere to the existing speed limits;
- d. The realignment of the carriageway in order to accommodate the 1:150 incline of the level crossing is contrary to DMRB standards for superelevation and longitudinal gradient.<sup>20</sup>

22. RVR's response is that these are all matters which will be addressed through its Departure from Standards Application. However, in order to confirm the compulsory purchase orders, the Secretary of State needs to be satisfied that there are no likely impediments to delivery of the scheme. In the Landowner's

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<sup>18</sup> Fielding Obj/1002/IF/1, Table 7-1

<sup>19</sup> RVR/78

<sup>20</sup> Clark, Obj/1002/PJC/1 section 7.3

submission, the fact that RVR still does not have Highways England's agreement to the Departures that would be necessary in order for the Scheme to proceed is telling.

23. In this regard, we point out that discussions with the Highways Agency (as predecessor to Highways England) commenced in 2011.<sup>21</sup> Five years later, when RVR made its application for planning permission, the HA was still objecting that it did not have sufficient information to be satisfied that the proposals were safe. When the HA became HE and the power to direct refusal was lost, HE made clear that it had still not been presented with the information it required. However, (for reasons which have never been clear to the Landowners, and which HE's own evidence to this Inquiry now indicates were misguided<sup>22</sup>) HE was content for its concerns to be kicked into the long grass of planning conditions which ensured that the scheme could not be carried out until the information had been supplied.

24. Despite this reprieve, when RVR applied for this Order, those matters had still not been resolved, leading to HE's entirely predictable objection to the TWAO, and RVR's subsequent request to you to postpone the Inquiry in order to allow further time for discussion with HE and ORR. But if one winds the clock forward to today, the position is still no clearer: HE remains an objector to the Scheme.

25. The practical reality is that RVR has now had 10 years to solve the problems of crossing the A21, but has singularly failed to do so. The frantic and last minute changes to the Scheme which have been presented to this Inquiry are testimony to the difficulties it still faces. We ask you to bear that in mind when you

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<sup>21</sup> Gillett para 20.2

<sup>22</sup> Harwood, Obj/782/W1/1 para 34

consider RVR's arguments that anything which is still outstanding is capable of resolution, or that the necessary safeguards are provided in protective provisions. Protective provisions may address HE's concerns, but they are small comfort to the Landowners if RVR is able to compulsorily acquire their land for a scheme which may never be built.

26. The second significant additional problem which RVR faces is that the vast majority of the proposed new line lies within the functional floodplain.<sup>23</sup> Throughout all of RVR's Flood Risk Assessment work, right up to the 2021 Update to the Environmental State, RVR has consistently recognised that a heritage railway should be classified as a "less vulnerable" development.<sup>24</sup> In those circumstances, national policy on the location of new development in the floodplain is categorical: development should not be permitted. RVR seeks to argue its way around this by reference to the exceptions test, but in the case of "less vulnerable" development in the functional floodplain, the exceptions test simply does not apply. Consequently, on RVR's own analysis, the Scheme is clearly and inescapably in conflict with national policy.

27. However, even if that were not the case, the flood-related issues would not end there. There are a number of key issues on which RVR will need to reach agreement with the Environment Agency before it can discharge the conditions attached to the planning permission, and it is highly uncertain that it will be able to do so. Amongst other things, Condition 11 attached to the 2017 planning permission<sup>25</sup> sets out the standard EA requirement for like-for-like replacement of any loss of storage capacity. Reinstatement of the embankment across Parsonage Farm self evidently involves a loss of existing capacity, and

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<sup>23</sup> See 2013 Capita FRA (for the ES) RVR/26 App 7 para 3.2.2; 2016 Capita FRA, RVR/28 App A para 3.3.2

<sup>24</sup> See 2013 Capita FRA (for the ES) RVR/26 App 7 para 3.2.2; 2016 Capita FRA, RVR/28 App A 3.3.2; ES Update RVR/70 para 9.3.18

<sup>25</sup> RVR/7

although RVR asserts that no compensation will be required, that is not what Condition 11 says, nor has the EA yet agreed. Critically, if compensation is required, RVR brings no evidence to this Inquiry that it has land within its control or ownership where that compensation could be provided.

28. Third, RVR's ES recognises that the proposals will have an adverse impact on the setting of Robertsbridge Abbey. As a Scheduled Ancient Monument, the abbey is a heritage asset of the highest significance<sup>26</sup> and the harm to its setting is a matter to which great weight must be given. Similarly, although they may be less significant, RVR's Landscape and Visual Review identifies the potential for significant negative visual effects in views along Church Land, together with conflicts with two of the objectives of the High Weald AONB Management Plan.<sup>27</sup>

29. Fourth, as Mr Highwood and Mrs Ainslie will explain, since it was acquired by the de Quincey family, Moat Farm has been farmed in an ecologically responsible manner, and today falls within Natural England's Higher Stewardship Scheme. It is home to a number of red-listed species, including skylarks and nightingales whose habitat includes the mature trees which now grow along the line (and out of) the old railway embankment.

30. RVR's ES recognises<sup>28</sup> that the Scheme will result in the permanent loss and fragmentation of this habitat. The construction effects are described as "major adverse effect at local level", with the knock-on effects for birds, bats and dormice ranging from "minor negative", through "major adverse at district level" to "moderate adverse at a County level". Although RVR proposes

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<sup>26</sup> NPPF para 194(b)

<sup>27</sup> CD70 App B

<sup>28</sup> CD24 para 4.5.4

mitigation to reduce those effects, mature trees are not a habitat which can be replaced overnight.<sup>29</sup> It is therefore difficult to see how there could not be adverse effects on protected species and biodiversity.

31. Fifth, the Scheme is dependent upon the diversion of FP31, so that it passes under the line of the railway. This will involve lowering the line of a path which is already in the floodplain, but is even more likely to suffer from flooding at the level proposed. This is patently not a suitable or reasonable alternative to the existing route.

32. Sixth, there are fundamental inadequacies in the way the Order has been drafted. Simply by way of example:

- a. (As noted above) in the event that the scheme needs to provide compensation for the loss of floodplain storage capacity, there is no land within the Order to do this;
- b. Farm vehicles will not be able to negotiate the embankment at the proposed crossing points unless a properly graded approach is provided. The Order makes no provision for the land required to do this, nor have the impacts of providing such ramps been assessed.
- c. The proposed line of the railway does not allow enough space for the 8m buffer between the railway embankment and the top of the riverbank required by Condition 4.

33. Finally, we question the extent to which the Secretary of State can be satisfied that funding will be in place to carry out the development. RVR is not a

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<sup>29</sup> The time-lag in the replacement of habitat is recognised in paras 9.6.1-9.6.2 of the ES: CD25

company with any significant assets or income of its own: it is simply a vehicle to deliver the Missing Link, after which the line will be handed over to KESR which - as we have already commented – consistently runs at a loss in any normal commercial sense. Delivery of the scheme is therefore entirely dependent upon donations, and in particular the generosity of two wealthy benefactors, neither of whom was (until recently) willing to be identified. In short – and in flat disregard of the Secretary of State’s guidance on the evidence required to justify a CPO<sup>30</sup> – RVR was simply asking the Secretary of State to take the existence, means and generosity of these people on trust.

34. Presumably recognising the difficulties in which that placed RVR, one of those two benefactors has very belatedly broken cover,<sup>31</sup> but the identity and resources of the other remains a mystery. In the Landowner’s submission, that remains an unacceptable position.

35. In short, in addition to the absence of any compelling reason for the grant of compulsory purchase powers, this Scheme brings with it material harm not only to the interests of the Landowners, but to the residents of Robertsbridge, and the wider travelling public. It is contrary to national policy on the location of development in the floodplain. It will harm numerous other interests of acknowledged importance in ways which, even though Rother District Council may not have considered them sufficiently serious to justify refusing planning permission, must still be placed on the scales in the heightened balancing exercise which is required to justify the use of compulsory purchase powers. There are also serious impediments to its delivery, which RVR has still not managed to overcome, despite having had years in which to do so.

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<sup>30</sup> As set out in both Circular 6/2004 and the “Guide to Transport and Works Act Procedures”

<sup>31</sup> Gillett Rebuttal App 4 (RVR/W1/5-4)

36. It is in those circumstances that we will be asking you to recommend that the Order is not made.

37. Finally, we ask you to note the extraordinary manner in which RVR has gone about the sharing of information needed in order to prepare for this Inquiry. From the very outset of this process, the Landowners and HE have contended that the Environmental Statement supporting the TWAO application was out of-date and no longer fit for purpose. However, that argument was consistently ridiculed by RVR until last year, when you directed RVR to update the environmental information. Many of the things you asked for were requests we had been making for some time.

38. As a result, and at both the Pre-Inquiry Meetings you have conducted, we pointed out that the Landowners have instructed independent professional experts to advise them on issues such as highway safety, railway safety and flooding. We requested that we be kept fully informed of any developments. RVR has pointedly refused to do this. Instead, we have been faced with a deluge of information – much of it contained in documents which are up to a year old and were shared with Highways England, the ORR and the Environment Agency many months ago – a matter of days before our evidence was due. On behalf of RVR, Mr Hamshaw alone refers to 34 documents shared between RVR and Highways England and the ORR, between August 2018 and June 2021. The first time that we saw any of these was at the end of May 2021. Still more has arrived less than 3 working days before the opening of the inquiry, and the flood has continued since then.

39. The arrogance of this is breathtaking. The Landowners are not a minor third party. They are statutory objectors, and they have that status because it is their land which will be taken if this application succeeds. It is their lives which will

be at risk every single time they have to navigate a crossing in order to farm the land which is their livelihood. RVR's persistent refusal to keep them in the loop has necessitated considerable extra work, including the late and last minute rewriting of significant parts of our evidence. We have incurred significant additional expense as a result. That conduct is entirely unreasonable, and it will be the subject of an application for costs, which we will submit in due course and before the close of the Inquiry.

**PAUL BROWN Q.C.**

**6 July 2021**

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