SECTION 11 TRANSPORT AND WORKS ACT 1992

SECTION 250 LOCAL GOVERNMENT ACT 1972

PROPOSED ROTHER VALLEY RAILWAY (BODIAM TO ROBERTSBRIDGE JUNCTION) ORDER

APPLICATION FOR COSTS ON BEHALF OF OBJECTORS 1002 (THE HOAD FAMILY OF PARSONAGE FARM AND THE TRUSTEES AND EXECUTORS OF THE NOEL DE QUINCEY ESTATE AND MRS EMMA AINSLIE OF MOAT FARM)

1. Introduction

1.1. This is an application for costs on behalf of Objectors 1002 ((i) The Hoad Family of Parsonage Farm and (ii) The Trustees and Executors of the Noel de Quincey Estate and Mrs Emma Ainslie of Moat Farm) – for the purpose of this application they are referred to as "the Landowners".

1.2. The application is made on the grounds of the unreasonable behaviour by the applicant, Rother Valley Railway Limited ("RVRL").

2. Legislative Background

2.1. The Secretary of State's power to make an award of costs in Transport and Works Act 1992 ("the Act") proceedings is established by virtue of Section 11(5) of the Act which applies Section 250 of the Local Government Act 1972 to the proceedings (subject to minor amendments).

2.2. Section 250(5) of the Local Government Act provides that:

"*The Minister causing an inquiry to be held under this section may make orders as to the costs of the parties at the inquiry and as to the parties by whom the costs are to be paid, and every such order may be made a rule of the High Court on the application of any party named in the order*"

2.3. The Landowners are statutory objectors for the purpose of Section 11(4) of the Act.

3. Scope of Application

3.1. The Secretary of State's guidance (as set out below) is that where a statutory objector who successfully opposes the compulsory acquisition of its land or rights at a public inquiry to consider an application under the Act, an award of costs will be made in its favour unless there are exceptional circumstances for not making such an award.

3.2. However, the Secretary of State's guidance also provides (again as set out below) that an award of costs can be made where one party behaves unreasonably. An award of costs on this basis can be made irrespective of the Secretary of State's decision on the substantive

application and separately from a statutory objector's entitlement in the event an application for compulsory purchase powers is refused.

3.3. **For the avoidance of doubt this application is made on behalf of the Landowners based on the unreasonable behaviour of RVRL. It is made even if the Secretary of State disagrees with the Landowners case and approves the application.**

3.4. **In the event that the Secretary of State refuses the application, the Landowners will make a further and separate application for costs on that basis**.

4. Department of Transport Guidance

4.1. The Department for Transport's "A Guide to TWA Procedures" (June 2006) **[INQ/005]** states:

" *4.123 Guidance on awards of costs is given in Department of Transport Circular 3/94 (ISBN 0 11 551289 6). In summary, there are two circumstances where a party to an inquiry or hearing would likely be granted an award of costs against another party. These are:*

(a) Where a party is found to have behaved unreasonably and has thereby caused another party to incur unnecessary expense;
(b) Where a statutory objector successfully opposes the compulsory acquisition of his or her land or rights in land (in whole or in part.

4.124 Examples of unreasonable conduct (category (a) above) and of any qualifying criteria attached to costs awards are set out in the above mentioned Circular…. It should be borne in mind that behaviour before an inquiry is as relevant in this regard as behaviour at the inquiry itself. In particular, parties should be aware that the procedure rules are designed to secure maximum disclosure and exchange of information before the inquiry or hearing takes place, so that the proceedings can be conducted efficiently and effectively…….

4.125 An application for an award of costs on grounds of unreasonable behaviour should normally be made to the Inspector before the close of the inquiry or hearing, to consider the costs application and any submissions by the party against whom the application has been made…..

4.127 It should be borne in mind that whilst Circular 3/94 gives guidance on awards of costs in regard to TWA applications – including examples of where costs may be likely to be awarded and the criteria that should normally be met – the Circular does not have the force of law, and the Secretary of State does have a wider discretion to award costs under section 250 of the 1972 Act. The Secretary of State would therefore wish to consider any costs application on its own merits, against the policy set out in the Circular. It might be concluded, for example, that although the criteria in the Circular were not strictly met in a particular case, the circumstances arising were so closely analogous as to merit an award of costs." (emphasis added)

4.2. Department of Transport Circular 03/94 ("the Circular") **[Appendix 1]** provides guidance on awards of costs in connection with public inquiries or hearings for orders pursuant to the Act.

4.3. The Appendix to the Circular sets out a summary of the criteria for what amounts to unreasonable behaviour. This provides that "*Applicants are at risk of an award of costs*

against then if, for example, they …. (4) introduce new or amended evidence late in the proceedings"

4.4. Annex 1 to the Circular sets out the general principles for an award of costs for unreasonable behaviour. Paragraph 3 confirms that the word "unreasonable" is used in its ordinary meaning, as reflected in the High Court's judgement in the case of Manchester City Council v Secretary of State for the Environment and Mercury Communications Limited [1988] J.P.L 774.

4.5. Paragraph 7 of Annex 1 provides:

"Before an award of costs is made, the following conditions will normally need to be met:

(1) One of the parties has sought an award at the appropriate stage of the proceedings (as explained in Annex 4);
(2) The party against whom costs are sought has behaved unreasonably; and
(3) This unreasonable conduct has caused the party seeking costs to incur expense unnecessarily because of the manner in which another party has behaved (for example because the arranged inquiry or hearing had to be cancelled, adjourned or extended, resulting in abortive preparatory work or unnecessary additional expense)."

4.6. Paragraph 4 of Annex 2 sets out examples of what may be regarded as unreasonable behaviour on behalf of an applicant. These include:

"*- failing to provide adequate pre-inquiry or pre-hearing statement of case – for example unclear presentation of facts or arguments. This might cause another party to undertake identifiable abortive work in preparing for the inquiry or hearing; or it might lead to an adjournment*;" (emphasis added)

4.7. Paragraph 1 of Annex 4 provides that an application for costs on the basis of unreasonable conduct should be made to the Inspector before the end of the inquiry.

4.8. To supplement the circular the Department for Transport has published "Costs Awards – A guide for Applicants and Objectors" (December 2007) **[Appendix 2]**. This provides further guidance on what will constitute unreasonable behaviour at "Q2". It states:

""*Unreasonable" behaviour can include the way in which one party conducts his or her part in proceedings, although due allowance will be made for persons who are unfamiliar with the statutory procedure and are not professional represented. Examples of unreasonable behaviour are:*

- *Deliberately uncooperative behaviour, such as the late submission of evidence, which causes an inquiry or hearing to be adjourned or unnecessarily prolonged;*
- *Failure, without good reason, to attend or be represented at an arranged inquiry or hearing*."

5. RVRL's Unreasonable Behaviour

5.1. This application for costs is made under two heads of "unreasonable behaviour" on the part of RVRL:

(i) The application was prematurely made, at a time when a number of matters of principle which were fundamental to its assessment had yet to be resolved, with the result that RVR was forced to seek the late adjournment of public inquiry originally scheduled for 2019; and

(ii) The failure to provide highly relevant design and technical information and other supporting evidence until very late in the proceedings.

A. Premature Application and the 2019 Adjournment

5.2. The relevant chronology as follows:

2014	RVRL submits application for Planning Permission to Rother District Council
27 March 2015	Highways England withdraws holding direction and directs conditions be added to grant of planning permission relating to Construction Site Access, Construction Traffic Management Plan, Delivery Times, Queue Length Monitoring, Level Crossing Operational Maintenance Plan, Level Crossing Design and Departures from Standard, Restrictions on Level Crossing Operation Times, Insurance Requirements, Safety Auditing
22 March 2017	Rother District Council grants Planning Permission RR/2014/1608/P subject to all the conditions directed by the Highways England
April 2018	RVRL submits TWA application to the Department of Transport
31 May 2018	Highways England, ORR and Landowners submit letter of objection. Paragraph 20 of the Highways England letter notes "Whilst Highways England has attempted to be as comprehensive as possible in our comments, the failure by the Applicant to consult us on the draft TWAO puts us unreasonably at a disadvantage and we reserve the right to raise other matters as discussions between ourselves and the Applicant progress" (emphasis added)
26 June 2018	Department for Transport confirms Secretary of State's decision to hold a public inquiry. The letter advises Statements of Case must be prepared and issued by 20 September 2018
20 September 2018	HE, ORR and Landowners issue Statements of Case
29 November 2019	Department for Transport confirms the public inquiry set for 18 June 2019 and the Pre-Inquiry Meeting set for 27 March 2019
8 March 2019	RVRL requests adjournment of public inquiry
13 March 2019	Department for Transport writes to the Landowners to confirm postponement of public inquiry

5.3. The Winckworth Sherwood letter of 8 March 2019 sets out the reasons for the request for postponement **[Appendix 3]**. In broad terms this was stated to be necessary to address issues raised by Highways England and the ORR.

5.4. In respect of Highways England the letter stated:

"*Following the submission of the application, however, HE submitted an objection to the proposed Order which was followed by a Statement of Case on 20 September 2018. RVR and HE have been engaged in constructive dialogue to establish whether, and, if so, how HE's concerns about the crossing might be addressed so as to facilitate the withdrawal of its*

objection. The parties have, together, identified a scope of work, which once completed, is expected to provide HE with the information, and comfort, it requires."

5.5. In respect of ORR the letter stated:

"*The position with the ORR is that, if it is to comply with its internal guidance as currently drafted consideration must be given by its expert panel as to whether, in its opinion, there are exceptional circumstances to justify the creation of new level crossings……..Despite its long-standing engagement with ORR, RVR was not advised of its intention to hold an expert panel hearing and the requirement was not mentioned in ORR's letter to the TWAOU 29 May 2018. It was only recently that the intention of the panel was discussed with RVR. In particular, it was only at a meeting on 13 February 2019 that ORR advised RVR's representatives of the full extent of information that it requires on options/alternatives for each proposed crossing……."*

5.6. The 8 March 2019 letter failed to explain that Highways England had requested much of the additional information from the applicant long before the TWA application was even submitted and subsequently repeated that request in detail in its objection to the application (dated 31 May 2018 – OBJ/782). The Highways England letter of objection contained the following statements:

- "the failure of the Applicant to supply relevant information suggests a clear case to prohibit connection of the proposed railway to the A21 Trunk Road on the basis of safety and/or economic impacts existing"
- "the state of preparation of the design of the works to the A21 Trunk Road is insufficient for Highways England to be satisfied that the proposed level crossing of the railway over the A21 Trunk Road would not result in a server adverse impact on the SRN"
- "Many matters relating to the design, construction and operation of the level crossing remain to be agreed between the Applicant and Highways England"
- "the application has been inadequately prepared"
- "On 21 April 2015 RVR wrote to Highways England enclosing designs for the level crossing over the A21 Trunk Road and on 16 June 2015 Highways England responded with a number of questions. <u>To date the Applicant has not answered these questions</u>"
- "On 1 June 2017 Highways England responded noting that the [Stage 2 Road Safety] Audit was premature in the absence of an agreed Departure from Standard"
- "A brief for the RSA has not been provided"
- "Highways England submits that the information about road traffic provided in the Application is not of suitable quality for use by the expert panel"
- "Highways England submits that the Applicant must review the Traffic and Transport impacts of the proposed impact of the proposed development taking into account current flows on the A21 Trunk Road and the current programme for implementation of the proposal"
- "The Personal Injury Accident Data at Section 3.3.3 of the 2011 Traffic Impact Study is in need of updating"
- "The Applicant should clarify the construction method to be used and the ES should reflect the consequent construction impacts including those relating to traffic diversions"
- "It is a requirement of DMRB that a Walking, Cycling and Horse Riding Assessment should be carried out in accordance with HD 42/17/. The Applicant has not provided one"
- "the Applicant must make a submission for a DMRB Departure for the proposed Level Crossing"
- "The Applicant should redesign the proposed works so that the railway and the A21 Trunk Road cross on the same plane…."

- "The Applicant should provide plans demonstrating that it is possible to provide at least one layout confirming with DMRB"
- The Applicant should provide "detailed engineering drawings showing what is proposed by way of earthworks and structures"
- "When the design of the A21 works is complete the Applicant should carry out a Stage 1/2 RSA" (emphasis added)

5.7. These points were, in turn, repeated in Highways England's Statement of Case dated 20 September 2019 [OBJ/0782].

5.8. Highways England had been requesting significant information from RVRL since as early as June 2015 – almost 3 years before the application was submitted and almost 4 years before the request for the postponement of the inquiry was made [see paragraphs 10 and 11 of Highways England's initial letter of objection OBJ/782].

5.9. In turn RVRL would have known following the imposition of conditions attached to the Planning Permission of the substantive details required by Highways England from at least March 2015 when Highways England issued its direction.

5.10. RVRL had been (or should have been) fully aware of Highways England's requirements for several years. This is made clear in the Statement of Case of Highways England [OBJ/0782].

5.11. RVRL should have engaged in proper meaningful pre-application consultation with Highways England and sought to address its concerns within the actual application documentation at the point of submission of the TWA application in April 2018. It was entirely RVRL's choice to submit and pursue the application prior to proper pre-application discussions with Highways England. As set out above, Highways England's initial letter of objection they records RVRL's failure to properly consult with them prior to submission of the TWA application.

5.12. Alternatively, upon receipt of Highways England's objection in May 2018 (or following receipt of its Statement of Case in September 2018), RVRL should either have withdrawn or sought a postponement of the inquiry at that stage to avoid any parties incurring further expense.

5.13. In respect of ORR, it had long been its policy to only support new level crossings in "exceptional circumstances" and to require consideration of any reasonably practicable alternatives. This policy had been in place since December 2014 – over 3 years prior to submission of the TWA application.

5.14. In turn, ORR's letter of representation in respect of the application [REP/17] dated 29 May 2018 sets out in full ORR's requirements. Amongst other matters it explained that the application would "need to demonstrate that it is not feasible for the railway to bridge the A21, or conversely for the A21 itself to be reconstructed to cross over the new railway"

5.15. Highways England's Objection and Statement of Case reiterated ORR's request. Paragraph 22 of Highways England's Objection states: "*TWAO Applicants are expected to consult ORR prior to submission of the application so that ORR's expert panel can consider whether exceptional circumstances apply to justify the provision of a level crossing*".

5.16. The Statement of Matters issued by the Secretary of State in November 2018 identified that the Secretary of State would wish to be informed on "the main alternative options considered by RVR and the reasons for choosing the proposals comprised in the scheme".

5.17. The request for the postponement in March 2019 gave an entirely false impression that it was required to address points only raised by Highways England and ORR very shortly before the request was made. This is incorrect, at the very latest RVRL became aware in May 2018 of the need to address all these matters. In reality, it was aware, or should have been aware, well in advance of submission of the TWA application.

5.18. **Against this background it is the Landowners' case that RVRL behaved unreasonably by:**

- **(i) Failing to undertake appropriate pre-application consultation with Highways England and the ORR prior to the submission for the application;**
- **(ii) Failing, as a result of (i) to include within the application all necessary technical information to inform a proper assessment of the impacts of the proposals – some of which, as set out in Highways England's letter of objection had been requested since June 2015;**
- **(iii) Failing to request an adjournment immediately upon receipt of the objections from Highways England, the ORR and the Landowners (which raised similar points) in May 2018;**
- **(iv) Failing to request an adjournment immediately upon receipt of the Statements of Case of Highways England, the ORR and the Landowners in September 2018; and**
- **(v) Waiting until 8 March 2019 to request the postponement in light of the above chronology.**

5.19. **The Landowners were entirely unaware that the cancellation of the 2019 inquiry was being contemplated until receiving notification from the Department for Transport on 13 March 2019.**

5.20. **In contrast to the options available to RVRL, the Landowners had no choice but to comply with the statutory procedures and deadlines for submission of objections and Statements of Case, based on the information provided within the application material.**

5.21. **Likewise, they had no choice but to prepare for the public inquiry entirely in good faith following notification of the Secretary of State's intention to hold a public inquiry. They incurred significant costs as a result.**

5.22. **Following the first (and as set out below the second postponement of the inquiry), RVRL engaged in discussions with ORR and HE. This resulted in successive changes to the proposals and a multitude of additional technical reports and assessments. The direct consequence of the late request for the postponement was that the Landowners were required to incur additional costs reviewing the revised design material produced as part of these discussions (as set out below very late in the proceedings) after their evidence was already well advanced.**

5.23. **If the discussions between RVRL and Highways England and ORR been undertaken pre-submission of the application, the application documentation would have included the latest (and necessary) up to date design and material.**

5.24. **Alternatively, if the adjournment had been sought at an early stage following receipt of the objections and/or Statements of Case from HE and ORR (and the Landowners), the Landowners professional team could have waited to prepare their evidence until the updated information was made available.**

5.25. **In these circumstances the Landowners' professional team would not have been required to undertake significant additional duplicated work reviewing the revised material as it was only made available very late in the proceedings. This additional duplicated work resulted in unnecessary and avoidable costs for the Landowners.**

B. Late provision of Information

5.26. At the First Pre-Inquiry Meeting on 24 February 2020, RVRL indicated its intention to continue to work with Highways England to seek to explore common ground and to overcome its objection. Mr Paul Brown QC, on behalf of the landowners, requested that the Landowners be kept up to date of these discussions and be party to the share of technical information as such information was directly relevant to their case.

5.27. On 13 July 2020 Richard Max & Co, on behalf of the Landowners wrote (via e-mail) to Winckworth Sherwood to request copies of the information provided to Highways England. Winckworth Sherwood replied on 15 July to confirm that:

"*I am instructed that the material resulting from the meetings [between RVRL and Highways England] will be shared more widely – as a package – once HE has everything it has asked for in a final form. The RVR team is working hard to develop the detailed additional information requested by HE, and hope that this will be finalised within a matter of weeks. <u>It is recognised that any progress in discussions with HE will need to be shared with your client before proofs of evidence are finalised</u>*" (emphasis added) (a copy of this e-mail trail is attached as Appendix 4

5.28. No information was provided within the "matter of weeks" suggested in the e-mail of 15 July 2020.

5.29. On behalf of the Landowners, WSP attempted to obtain the shared information from Highways England but were advised they were unable to share anything provided to them by RVRL or its professional advisors.

5.30. On 7 January 2021, Richard Max & Co again wrote to Winckworth Sherwood to request an update on the discussions with Highways England and to request confirmation as to when the additional information would be made available to the Landowners.

5.31. On 11 January 2021 Winckworth Sherwood responded to Richard Max & Co as follows:

"*I am instructed that, since we last corresponded, regular and productive meetings have been (and continue to be) held with Highways England. I understand that the parties have now agreed barrier down times and other relevant information relating to the level crossing and that the RVR team has prepared, in consultation with Highways England, a new Road Safety Audit 1 brief, a new updated Walking, Cycling and Horse Riding Assessment and Review ("WCHAR") report, an Approval in Principle ("AIP") submission and a DMRB departure in accordance with Highways England's processes for third party developments. The final forms of these are due to be delivered shortly, and will mean that RVR has provided all the new and updated information requested by Highways England in the format, and with the content, that Highways England has stipulated.*

RVR intends the information submitted to Highways England (final forms), together with the environmental information requested by the Inspector, to be made available in a single package on 8 March. This is consistent with the Inspector's direction, in September, that he saw no merit in information being published piecemeal and that such approach would complicate consultation."

5.32. The revised Environmental Information was published on 8 March 2021. It contained none of the documents referred to in the Winckworth Sherwood email of 11 January 2021.

5.33. On 15 January 2021 the Department for Transport confirmed the postponed public inquiry would open on 6 July 2021 and that proofs of evidence were to be exchanged on 7 June 2021.

5.34. The Second Pre-Inquiry Meeting took place on 19 May 2021. At the meeting Counsel for Highways England explained that a Departures Submission had been made to Highways England which was in the process of being considered by Highways England. Mr Warman again raised concern that the long-promised information had still not been provided to the Landowners and requested that the information provided to Highways England be provided to the Landowners at the earliest opportunity.

5.35. Following the Second Pre-Inquiry Meeting, various information was drip fed to the Landowners as set out in Mr Fielding's Proof of Evidence Table 2.1 [OBJ/1002/IF/1].

5.36. This included the original Departures Submission which was provided on 24 May 2021. This information made clear that the application was submitted on 20 April 2021 but attached a variety of technical reports dating from March 2020 to April 2021.

5.37. On 28 May 2021 ORR issued an Addendum to its Statement of Case. Appended to the Statement of Case were a large number of technical reports, including updated Narrative Risk Assessments dating from January 2021 to February 2021. These reports which were directly relevant to the Landowners' case were only made available as a result of ORR appending them to the Addendum to its Statement of Case.

5.38. On 1 July 2021 the Landowners were provided with a copy of RVRL's revised Departures Application and supporting information.

5.39. Further information was provided and clarified in the Proofs of Evidence and Rebuttal Evidence provided on behalf of RVRL. For example, the provision of red light cameras as part

of the Level Crossing design and operation changed between the production of Mr Keay's original proof of evidence and his rebuttal proof of evidence two weeks later.

5.40. Appendix A to Mr Hamshaw's Proof of Evidence [RVR/W3/2 -A] sets out a schedule of RVR's engagement with Highways England between August 2018 and May 2021 (covering the period after submission of the TWA application up to shortly before the deadline for the exchange of proofs of evidence). This explains that there were 35 "issues" of information to Highways England over that period. None of this information was shared with the Landowners until the end of May 2021 at the very earliest as set out above.

5.41. During the inquiry itself further information long requested by the Landowners has been provided. For example, the Landowners have raised concerns regarding the absence of any identified land for ecological mitigation or floodplain compensation. In respect of the former, Mr Coe's rebuttal proof of evidence mentioned some suggested locations but a plan identifying these areas was only provided after he had completed his evidence. Similarly, the Landowners have long raised concerns in respect of the need and availability of land for floodplain compensation. Notwithstanding the fact that the need for this was expressly raised in Mr Patmore's Proof of evidence, Mrs Callaway's rebuttal provided no indication of how or where such compensation might be provided. In her cross-examination, she indicated that she was unaware of any document before the Inquiry which showed where it might be provided. In re-examination that Mrs Callaway advised that this was proposed to be provided in part in the same location as the ecological mitigation land shown on INQ/074 ("Note on Tree Planting").

5.42. The TWAO application and public inquiry are governed by the Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006 and the Transport and Works (Inquiries Procedure) Rules 2004. These rules require and encourage the early sharing of information through requirements for detailed Statements of Case and supporting documents to be provided at an early stage. The purpose of these rules is to ensure a fair process and hearing for all parties, and to ensure no party is disadvantaged through the late provision of information. This is particularly the case when such applications seek authority to interfere with Human Rights.

5.43. This is reflected in paragraph 4.124 of the DfT Circular set out above which states:

"In particular, parties should be aware that the procedure rules are designed to secure maximum disclosure and exchange of information before the inquiry or hearing takes place, so that the proceedings can be conducted efficiently and effectively"

5.44. The information that has been provided extremely late in the process has included (but not limited to):

- Changes to the detailed design of the railway (now acknowledged as necessitating a variation to the planning permission)
- Changes to the Level Crossing specification and operating procedure (even between the revised Statement of Case and the inquiry itself)
- Revised Safety Risk Assessments
- Updated costs estimates

- Revised traffic modelling and associated reports (including numerous technical reports shared between RVR and Highways England over the preceding 3 years)
- New highways visibility drawings
- Changes to the proposed Footpath 31 diversion proposals
- Locations of proposed ecological mitigation land
- Locations of proposed floodplain compensation land
- Partial (but incomplete) details of the proposed funding for the scheme
- Late recognition that the farm worker crossings will require the provision of ramps and/or the setting back of gates, the implications of which had not be addressed in RVR's assessment of the impacts on the farms

5.45. All this information has been provided either very shortly before or during the public inquiry itself. In circumstances where the original application was made over 3 years before the opening of the public inquiry and the points to which the information responds were raised at the very earliest objection stage by the Landowners and others.

5.46. RVR's position has been that this information is simply a matter of detailed design and they have gone above and beyond what they are required to provide. This assertion is strongly disputed by the Landowners. These matters are directly material to the Secretary of State's consideration of the impacts of the proposed scheme – in circumstances where RVRL seeks authority for the compulsory acquisition of the Landowners' property. This is illustrated by the importance placed on the information by Highways England and the ORR.

5.47. Furthermore, Winckworth Sherwood expressly acknowledged in their e-mail of 13 July 2020 (quoted above) that the information would need to be shared with the Landowners to enable them to finalise their proofs of evidence.

5.48. RVRL was fully aware that the information was directly relevant to the Landowners case. It had previously indicated that the information would be provided much earlier in the process but failed to meet those promises and deadlines. The information could and should have been shared when it was provided to the other statutory bodies far earlier in the process.

5.49. **The consequence of the failure to share this information is that the Landowners have incurred additional unnecessary costs. Their professional team had substantially prepared their evidence based on the information provided up to the end of May 2021. They were required to review new highly material information to a number of aspects of their case extremely late in the inquiry process very shortly before the exchange of evidence**.

5.50. **These costs could have been avoided if RVRL had shared the information on the same basis as it had been shared with Highways England and ORR or otherwise provided to the Landowners much earlier in the inquiry process.**

5.51. **The Landowners maintain that the late provision of this information therefore represents unreasonable behaviour for the purpose of the DfT Circular 3/94.**

6. Conclusion

6.1. The Landowners position is that RVRL has behaved unreasonably within the scope of DfT Circular 3/94 – by:

i. **Applying for the TWAO prematurely, having failed to undertake adequate pre-application consultation and/or failing to request an early adjournment following receipt of Highways England, ORR and the Landowners objections and Statements of Case; and/or**

ii. **Failing to provide highly relevant information (directly material to the Secretary of State's consideration of the application and previously raised by the Landowners) until extremely late in the inquiry process**

6.2. The consequence of these failures is that the Landowners have incurred unnecessary additional costs, which would have been avoided in the absence of such unreasonable behaviour.