

LANDOWNERS' REPLY TO RVR'S RESPONSE TO THE APPLICATION FOR COSTS

1. This document constitutes the Landowners' reply to RVR's response to their application for costs dated 12 August 2021.
2. For completeness, the application for costs is maintained and the Landowners' note that RVR has not sought to respond to a number of points set out within their original application (as highlighted below).
3. For the Inspector and Secretary of State's ease of reference, the Landowners' Reply is set out against the specific paragraph numbers in RVR's response.

Paragraphs 5-10 – the Position of Highways England

4. In these paragraphs RVR purport to explain HE's position. They comment:
 - It was reasonable to leave matters of detailed design to be settled if/when the Order is made due to reliance on the Protective Provisions
 - HE's objection to the Order came as a surprise to RVR
 - There was nothing to suggest RVR should have known HE would object prior to making the application for the Order
 - That the Protective Provisions would not be sufficient to address HE's objection only became apparent after receipt of the Statement of Case in September 2018
 - When it became apparent that HE would maintain an 'in principle' objection a postponement was sought
5. The fact that RVR express "surprise" at HE's objection to the TWAO application perfectly illustrates the Landowners' point. There would have been (and should have been) no "surprise" if RVR had undertaken proper pre-application consultation with HE. We highlight again the observation set out at Paragraph 20 of HE's letter of objection of 31 May 2018, where HE expressly refer to the failure of RVR to properly consult with them on the draft TWAO application prior to submission. .
6. At Paragraph 8 of the response RVR comment that "the Landowners can point to nothing to suggest" HE would object. However, this ignores the fact that (as the HE's letter of objection of 31 March 2018 records) HE had requested details of the design of the proposals as long ago as June 2015 and in June 2017 had advised that a Departure from Standard would be required. Given that the Highways Agency had previously objected to the grant of planning permission on the grounds of lack of information relating to the safety of the level crossing, and that when the Highways Agency withdrew that objection and requested the imposition of conditions instead, it made it clear that this information had still not been received, it should have been obvious that there were significant issues which needed to be addressed if RVR was going to be able to demonstrate that there were no impediments to delivery of the scheme.

7. Further, and irrespective of HE's position on the planning application, it is clear that there was no proper pre-application consultation with HE on the TWAO application itself. If there had been proper pre-application consultation, RVR would not have been surprised by HE's objection and would not have sought the cancellation of the 2019 inquiry (as they would not have submitted the application until discussions with HE had been properly progressed).
8. RVR would have known from the 2015 and 2017 correspondence that HE had raised questions regarding the design and that a Departure application would be required. It could and should have engaged with these issues prior making the TWAO application – that is the whole purpose of pre-application consultation. RVR took HE's position entirely for granted without foundation.
9. In turn RVR suggest that HE's position only became clear through the submission of the Statement of Case in September 2018. Again, this ignores the contents of HE's letter of objection in May 2018 – which in terms made clear that the "Applicant must make a submission for a DMRB Departure for the proposed level crossing" (emphasis added).
10. No explanation is provided by RVR as to why it took between September 2018 (on its own analysis) and March 2019 to establish that HE's objection could not be resolved within a couple of months. Given the clarity of HE's Statement of Case this was immediately apparent upon receipt. In particular, it is absolutely clear from the Statement of Case that HE would require the Departure application to be made prior to removing its objection. In reality HE's position was known to RVR from at least May 2018 when HE's letter of objection was issued.
11. No explanation is offered as to why it took 10 months from receipt HE's letter of objection (or 6 months from receipt of its Statement of Case) for RVR to realise that HE required all of the issues raised in its objection to be addressed.
12. Against this background it remains the Landowners' position that:
 - a) The application was premature - RVR failed to undertake proper pre-application consultation with HE. Had they done so many of the issues that have caused delay over the last 3 years could have been avoided;
 - b) In turn RVR failed to seek an adjournment to the application process immediately upon receipt of HE's letter of objection of 31 May 2018. Had they done so, the Landowners could have delayed the preparation of their case until the inquiry process was activated; and
 - c) Finally, notwithstanding the failures at a) and b), RVR failed to seek an adjournment to the application process immediately upon HE's Statement of Case in September 2018.

Paragraphs 11-12 the Abortive Work

13. On 26 June 2018 the Secretary of State notified the Landowners of his intention to hold a public inquiry and on 29 November 2018, set the inquiry date for 18 June 2019.
14. RVR's response suggests that it was somehow unreasonable for the Landowners to have commenced preparation for the inquiry prior to notification of the cancellation of the inquiry in March 2019. This assertion is wholly disputed by the Landowners. It may well be

RVR's approach to leave matters to the very last minute but in circumstances where a public inquiry had been notified, the Landowners had properly commenced preparation of their case.

15. In the Landowners' submission it is wholly unrealistic to suggest (as RVR's response implies) that preparation could have been left until after the pre-inquiry meeting – particularly as the whole point of the pre-inquiry meeting is to agree administrative arrangements for the inquiry which in part depend upon each party having formed its case, and by way of one example, know the number of witnesses they intend to call and their respective topic areas.
16. The Landowners had properly and fairly commenced preparation of their evidence based on the information then comprised within the application material. This involved the instruction of the professional team and Leading Counsel, and work on the proofs of evidence.
17. This work was abortive because by the time of the inquiry a significant amount of additional material had been placed into the public domain which was different to that comprised within the original application. This includes key information regarding the design and specification of the level crossings, the operating procedures, risk and safety assessments, cost benefit analyses, the proposed closure timings, visibility splays, and traffic modelling notes and assessments.
18. This information is plainly material to a proper assessment of the Highways impacts of the proposals – as evidenced by the importance placed on it by HE and the ORR. The Landowners had raised highways concerns in their original objection and Statement of Case. RVR was therefore well aware of the Landowners' position on highways matters.
19. If the application had not been made prematurely or if RVR had sought an adjournment earlier in the process, the original work undertaken by the Landowners professional team, which subsequently had to be aborted, would not have been necessary. The work would only have been undertaken once, based on the information now in the public domain.

Paragraph 15 - The Landowners' knowledge of the adjournment

20. Paragraph 15 of RVR's response refers to the Landowners complaint that they did not know about the adjournment until after it had been ordered. The response suggests that this was a matter for the Secretary of State not RVR.
21. This mischaracterises the Landowners' complaint. As set out above RVR was fully aware that the Landowners had raised concerns regarding the highways impacts of the proposals and the safety of the Level Crossing operation. It was aware that the Landowners were preparing for the inquiry on that basis.
22. Against this background, it was incumbent upon RVR to keep the Landowners updated as to the progress of discussions with HE and ORR and make them aware that there was a prospect that the inquiry would be cancelled.

Paragraph 16 – 24 - Late provision of information

23. First, the response selectively misrepresents Mr Fielding's evidence who also raised concerns (shared by HE) about the safety implications of traffic flowing back through the Northbridge Street roundabout on a regular basis. Further, as Mr Fielding made clear, his answers were dependent upon visibility splays being maintained, in circumstances where it is common ground that this is currently not the case.

24. In broad terms RVR makes the following points in this section of its response:

- The information within the Departures Submission was at a level of detail not required for the Secretary of State's consideration of the TWA application
- RVR was not required to share the information provided to HE and ORR with objectors
- The information in question has not been requested by the Secretary of State through a Rule 17 request
- The information was not relevant to the Secretary of State's consideration of the TWA application
- Matters of detail could be addressed through Protective Provisions and planning conditions
- There have been no changes of significance to the scheme
- The landowners were in contact with HE and were aware of the discussions
- A substantial body of information was made available on 8 March with the further environmental information

25. The Landowners strongly disagree with these assertions.

26. First, the Secretary of State's Statement of Matters, paragraph 3 (a), sets out that the Secretary of State wished to be informed about "the impact of the three new level crossings on safety, traffic flows and congestion, particularly in relation to the A21 and future plans for this road".

27. Information regarding the design and specification of the level crossings, operating procedures, closure times, safety and risk assessments, cost benefit analysis etc are plainly relevant to this matter.

28. The information provided with the Departure Submission contained numerous changes in respect of these matters in comparison with the information in the public domain when the application was made.

29. Secondly, the information was clearly material in the eyes of HE given the importance placed on the Departure submission. HE's position is clear irrespective of the Protective Provisions and Planning Conditions.

30. Thirdly, as set out above, RVR was well aware that the Landowners had raised concerns regarding highways impacts of the scheme, and were themselves instructing expert witnesses to address the issue. This was made clear at the first pre-inquiry meeting, where the Landowners explained their intention to call highways and level crossing safety evidence and Leading Counsel for the landowners expressly requested that the Landowners be involved with the share of information between RVR and HE. The Inspector strongly encouraged the sharing of information – including to the Landowners.

31. As set out in the original application for costs, this information provided to HE was promised by RVR's solicitors "within a matter of weeks" in July 2020 and then later promised to be provided with the Further Environmental Information in March 2021.
32. We note that the response to the application for costs does not address the express acknowledgement by RVR's solicitors in July 2020 that the information would need to be provided to allow the Landowners to finalise their evidence. RVR plainly acknowledged the relevance and importance of the information at that stage.
33. It is correct that the Landowners had attempted to seek information direct from HE, but HE were unwilling (or felt unable) to provide any information provided to them by RVR. The Landowners discussions with HE elicited no substantive information. In any event, HE's reluctance (in the absence of RVR's consent) to share information which had been provided to them by RVR is no answer to RVR's own failure to make this information available.
34. The Further Environmental Information was supplied on 8 March 2021. Accompanying the information were a small number of revised drawings. However, none of the detailed technical reports or assessments were provided at this time. As is clear from Mr Hamshaw's appendices there were numerous reports in existence at that time that could have been provided.
35. Furthermore, the response again ignores the confirmation from RVR's solicitors in January 2021 that accompanying the Further Environmental Information would be a suite of technical reports including RSA Audit 1 brief, a new WCHAR, an Approval in Principle Submission and a DMRB Departure submission. The Landowners were assured by RVR that this information would be provided in early March 2021.
36. The Landowners maintain that:
- (i) the information supplied to HE and ORR is clearly material and relevant to the Secretary of State's consideration of the TWA application – it is not simply a matter of detail that can be ignored or overlooked at this stage;
 - (ii) RVR was well aware that the information was also relevant to the Landowners' case from their objection, their Statement of Case and their comments at the first PIM;
 - (iii) RVR's own solicitors expressly acknowledged that the information would need to be provided to enable the Landowners to finalise their evidence;
 - (iv) RVR failed to meet its own indications to the Landowners as to when the information would be provided
 - (v) RVR were aware from the first pre-inquiry meeting that the Inspector strongly encouraged the sharing of information between the parties – including to the Landowners.
37. The majority of the information was only provided very late in the inquiry process, in some cases a matter of days before the deadline for the exchange of evidence.
38. Prior to the submission of this information the Landowners' professional team had no choice but to substantially prepare their evidence based on the information in the public domain at

that stage. They were required to review new material at great speed and re-write sections of their proofs of evidence at very late notice. Lots of the original preparatory work was therefore rendered abortive.

Paragraph 24 – late provision of information

39. The Landowners maintain that the matter listed in paragraph 5.44 of the application for costs are all relevant to the Secretary of State's consideration of the TWA application. In many cases the Landowners had raised their concerns on these subjects in their original objection in May 2018.
40. RVR cannot complain that it had insufficient time to address these matters. They had over 3 years.
41. RVR's approach to these matters in its response is illustrative of its approach throughout the application process – a slow and late drip feed of incomplete information.
42. By way of one example, in respect of Floodplain compensation storage and ecology mitigation, we note that even since the adjournment of the inquiry (and directly contrary to RVR's Counsel's indication that RVR was simply seeking to consolidate the information which it had provided to the Inquiry, and that no new material would be produced) RVR has now put forward further additional land south of the river Rother for this purpose. At no point in the lead up to the inquiry or during any of the numerous discussions regarding flooding matters throughout the inquiry, did RVR give any indication that they were in the process of negotiating a lease for other land. This is notwithstanding the fact that the Landowners raised the issue of the need for compensation land in their Statement of Case in September 2018.
43. The implications of this for the normal process of producing evidence and rebuttals is obvious: issues raised in the Landowners' Statement of Case and in Mr Patmore's proof of evidence were not addressed by RVR until after both flooding witnesses had completed their "normal" evidence, necessitating further exchanges of notes, the additional "round table" session which has already taken place, the adjournment of the Inquiry in order to allow the production and review of further notes, and another roundtable discussion. Whilst this is not pursued as part of the application it perfectly illustrates the problems which RVR's approach has caused.
44. Against this background the Landowners maintain that RVR has behaved unreasonably and that their unreasonable behaviour has directly resulted in the Landowners incurring unnecessary abortive costs.