

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

**TRANSPORT AND WORKS ACT 1992**

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**CLOSING SUBMISSIONS 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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**Introduction/Structure**

1. These Closing Submissions on behalf of the Landowners are structured as follows:
  - a. The test for making the CPO, and its relationship to the other powers sought.
  - b. The harm/disbenefits which the Scheme will cause:
    - i. To the Landowners
    - ii. The level crossings (generally)
    - iii. The level crossing on the A21
    - iv. The level crossing on the B2244
    - v. Impacts on public rights of way
    - vi. Flood risk
    - vii. Heritage

- viii. Landscape
- ix. Biodiversity

c. Impediments

- i. The need for planning permission
- ii. Discharge of the flood-related conditions on the existing planning permission;
- iii. Discharge of the highways conditions on the existing permission;
- iv. Land needed for the worker crossings;
- v. Land needed for ecological mitigation;
- vi. Funding.

d. The alleged benefits of the scheme:

- i. Economic
- ii. Other

e. The overall balance/Conclusions

## **The Test for Making the CPO and its Relationship to the Other Powers Sought**

2. As noted in opening, under this Transport and Works Act Order RVR seeks statutory authority to do a number of things.<sup>1</sup> If taken in isolation, the question whether each or any of these powers should be granted is one which would be the subject of a separate test. Where necessary, these submissions make reference to those more specific tests, applicable to particular elements of the Scheme in isolation, but they are directed primarily to the test which is applicable to that part of the Order which is of greatest concern to the Landowners, namely the application for compulsory purchase powers.
3. As is common ground, that test is whether there is a compelling case in the public interest. And since the Scheme as a whole is dependent upon the grant of compulsory purchase powers, it is that test which, we submit, provides the overarching framework within which all the various elements of the TWAO application must ultimately be considered.
4. In opening, we touched on exactly what the test means. In particular, we pointed out that:
  - a. Compulsory purchase is a draconian measure, which involves the expropriation of private rights to land and property which have been guarded by the common law of this country for centuries, and have more recently been enshrined in Article 1 of the First Protocol of the European Convention on Human Rights.

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<sup>1</sup> In particular, to construct and maintain a section of railway between Junction Road and Robertsbridge; to provide three new level crossings over existing highways, and a fourth level crossing over a bridleway; to divert an existing footpath; and to compulsorily acquire the land and rights required for the above.

- b. As Lord Denning MR observed in *Prest v. Secretary of State for Wales* [1983] JPL 112, compulsory purchase powers should only be granted where “the public interest decisively so demands.”
  - c. The words “decisive” and “compelling” are important. It is not enough that the scales are evenly balanced. “Compelling” means there needs to be clear blue water between the public benefits and any harm caused. If there is any reasonable doubt, the balance “must be resolved in favour of the citizen” (see *Prest*).
  - d. These arguments are 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 in *Prest* is engaged simply because it is the Landowners’ property which RVR proposes to take.
5. In closing, we make the following additional submissions about the way in which the test of a “compelling case in the public interest” should be applied.
6. First, although compensation will be payable to the Landowners for the loss of land and any incidental loss of profit, that cannot and does not of itself justify the use of compulsory powers.<sup>2</sup> Rather, it is a basic requirement, without which compulsory purchase would not even make it to first base.<sup>3</sup> The “compelling case” must be something over and above the payment of financial compensation.

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<sup>2</sup> As agreed by Mr Hodges in xx

<sup>3</sup> If this were not the case, the “compelling case in the public interest” test would be redundant

7. Second, the test is one which cannot be answered simply by balancing any claimed public benefits against the impacts on the Landowners alone. Rather, the public interest involves a weighing of all relevant factors, including any aspects of the scheme which (whether or not they affect the Landowners) are not in the public interest.
8. Third, in weighing the wider impacts of the scheme, it is not enough to consider only the conclusions that might be reached on the tests which would apply to other elements of the scheme, if those aspects were considered in isolation: it is necessary to weigh all the factors which were the inputs into those tests.
9. This is important, because it appears from Mr Turney's cross-examination of Mr Fielding and Mr Highwood that RVR intends to argue (for example) that if the highway impacts of the Scheme satisfy para 111 NPPF (i.e. the impact on safety is not "unacceptable" and the impact on congestion is not "severe") this means that any actual impacts of the Scheme on the A21 which fall short of the tests of unacceptability or severity should be set at nought for the purposes of the "compelling case in the public interest" test. We anticipate that similar arguments will be advanced in relation to the safety of the proposed level crossings and flood risk.
10. If this Inquiry were simply concerned with the right to operate a level crossing, there might be some merit in that argument, but in the context of compulsory purchase it is simply and obviously wrong. The simplest way to illustrate why is by reference to the impact of the scheme on heritage assets, and the extent to which the Scheme is consistent with national policy on development in the floodplain. We make more detailed submissions on these matters below, but for present purposes the point is this:

- a. In relation to Robertsbridge Abbey, it is common ground that the Scheme will have an adverse impact on the setting of the Scheduled Ancient Monument. Under paras 200 and 202 of the NPPF, that harm requires “clear and convincing justification”, in which context the impact has to be weighed against the public benefits of the Scheme.
- b. Similarly, on RVR’s approach<sup>4</sup> to the location of the development in Floodzone 3(b), the Scheme is acceptable because it passes the Exception Test. However, the first limb of the Exception Test requires the development to “provide wider sustainability benefits to the community that outweigh the flood risk”.
- c. The “public benefits” and the “wider community benefits” on which RVR relies to address these two tests are the same: the impact of the Scheme on tourism and the local economy. However, those are also the benefits on which RVR relies in order to justify the use of compulsory purchase powers.
- d. Even on RVR’s own case, it is self evident that some part of those economic benefits will be “spent” in overcoming the heritage and flooding objections. In those circumstances, it would plainly be wrong for RVR to argue that, if the Scheme can satisfy para 202 NPPF or pass the Exception Test in isolation, the heritage and flooding impacts should be set at nought, leaving RVR free to rely on the full extent of its claimed economic benefits to counter the interference with the Landowners’ property rights. At the very least, a deduction would need to be made from the economic benefits to reflect what had

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<sup>4</sup> With which, for the avoidance of doubt, the Landowners do not agree: see below

already been “used up” in order to overcome the heritage and flooding objections.

- e. In theory, it might be possible to address this by carrying out a complicated calculation in which that part of the alleged economic benefits which is needed to overcome each of the heritage and flooding issues is deducted from the total, and only the remainder is placed on the scales when considering the “compelling case in the public interest”. However, that would be extremely complex.
- f. The only sensible solution, therefore, is that all the benefits and all the harms are placed on the scales at the same time, and the “compelling case in the public interest” is assessed by deciding where the overall balance lies. This includes weighing any harms which might not be sufficient to warrant refusal of a particular aspect of the Scheme, if that aspect was viewed in isolation.

11. In the Landowners’ submission, the same is true in relation to the highway impacts and the risk to rail safety. In particular:

- a. In relation to highway impacts, para 111 of the NPPF is the test which is prescribed for the grant of planning permission. The test itself represents a judgment on where the balance should lie in cases where the state is restricting the manner in which individuals are allowed to deal with their own land. However, the fact that that particular balance is weighted in favour of the grant of permission says nothing about the very different situation where a TWAO applicant is seeking authority to do something with somebody else’s land, to which that somebody else objects.

- b. In relation to rail safety, as Mr Raxton made clear, while the ORR starts from the position that it would prefer there are no new level crossings, it is heavily constrained in its ability to bring that about. In practice, its function is limited to ensuring that there are no reasonable alternatives which are not disproportionately expensive; and that any risks have been reduced to the lowest practicable level. If those criteria are met, the ORR has no statutory basis for refusing to agree to a new crossing. Critically, the “alternatives” placed before the ORR do not include a “no scheme” option, and it is no part of the ORR’s function to ask why a new crossing is being proposed – it draws no distinction in that regard between a private hobby railway and HS2 – nor does the ORR undertake any assessment of whether the increased risk is outweighed by any public benefits. Those matters are simply beyond its remit.<sup>5</sup>
- c. The significance of the latter point was expressly acknowledged by Mr Keay when, in response to the Inspector’s question whether there was a separate test for the Secretary of State to apply, he said:

“It has to be in the public interest – do the societal benefits far outweigh the disbenefits of putting the crossings in?”

and

“The overriding test is the public interest.”

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<sup>5</sup> Further, in the present case the ORR’s assessment is limited to the impact on rail safety: it has formed no judgment on safety impacts on the wider highway network, or on the impacts on congestion and traffic flows.



12. The Landowners could not agree more. However, that is not a question which the ORR, the EA or the HE has asked. Consequently, it cannot be answered by pointing to the lack of objection from these bodies.<sup>6</sup> It can only be picked up through the “compelling case” test.
13. In those circumstances, the argument that, if any one part of Scheme can pass the test which the relevant regulatory body is required to apply to that part in isolation, the “compelling case in the public interest” test should then ignore the wider adverse implications, simply does not stand up to scrutiny. All factors which are relevant to the public interest must be brought to bear.
14. Fourth, it is necessary to say something about the weight to be attached to the fact that the Scheme was previously supported by the Local Plan and has since obtained planning permission. Understandably, these are matters on which RVR relies, but in the Landowners’ submission, neither answers the questions which fall to be decided in these proceedings.
15. In particular, although former Local Plan Policy EM8<sup>7</sup> expressed support in principle for the extension of KESR to Robertsbridge, that policy:

- a. clearly did not provide support for the Scheme as it now stands, not least because the accompanying text<sup>8</sup> expressly recorded that:

“The Highways Agency has advised that a level crossing where the track would traverse the A21 would be unacceptable”

and

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<sup>6</sup> HE does, of course, still object.

<sup>7</sup> RVR/02

<sup>8</sup> Ibid, para 9.26

“The Local Highway Authority has similarly indicated that it does not favour a level crossing of the B2244.”

- b. was subject to 3 significant conditions – namely that the Scheme must not compromise the integrity of the floodplain and flood protection measures at Robertsbridge; that it must have an acceptable impact on the AONB; and that it must incorporate appropriate arrangements for crossing the A21, the B2244, Northbridge Street and the River Rother. As para 9.26 observed, these were “major issues that would need to be addressed.

16. Critically, it is clear from the Local Plan Inspector’s Report<sup>9</sup> that, at the time Policy EM8 was adopted, there was a complete dearth of information as to the likelihood of those criteria being satisfied. Hence:

- a. Para 9.55 notes the problems associated with crossing the A21 and the B2244, and concludes that “the actual impact on the AONB cannot be predicted without a designed scheme”;
- b. Para 9.57 notes that, if the Landowners remained opposed to the Scheme, the Council might have to consider the use of compulsory purchase powers , in which case it

“would have to weigh up the planning issues and other relevant considerations. Landowners could pursue any objections through the formal statutory process.”

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<sup>9</sup> Gillett Rebuttal: RVR/W1-5

c. Para 9.58 notes the opposition of the Highways Agency and the County to level crossings over the A21 and B2244;

d. Para 9.61 refers to the requirement not to compromise the integrity of the floodplain, and comments that

“A flood risk assessment would be needed once a scheme had been designed”

e. Para 9.63 draws these threads together, noting that there are “substantial technical and other issues to be resolved”, but that it would be “premature to conclude that the matters are incapable of resolution or that the finance could not be raised.”

17. It is clear from the Report that the Inspector was not prejudging the likely outcome of any of those issues. In that regard, it is worth bearing in mind that this was an old-style Local Plan examination, which predated the NPPF and the tests of soundness. In view of the uncertainties identified by the Inspector, it is difficult to imagine that Policy EM8 would have passed the test of deliverability if it was being examined today.

18. Similar observations apply to the grant of planning permission. Leaving aside the fact that the “Guide to Transport and Works Act Procedures” expressly states that the grant of planning permission in advance of a TWA application does not limit the issues that can appropriately be considered in the context of the TWA order,<sup>10</sup> the 2017 Permission was subject to numerous

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<sup>10</sup> INQ/005 para 1.20; see also para 1.21 “the fact that particular land use planning issues relating to the scheme may already have been considered by the local planning authority in determining a planning application does not mean that the Secretary of State cannot appropriately address such issues in considering whether to make a TWA order.”

“conditions precedent” relating to both flooding and the level crossings which have yet to be discharged.

19. In cross-examination of Mr Patmore, Mr Turney suggested that these conditions should not have been imposed unless the Council was satisfied that it would be possible to discharge them. However, what para 21a-009 of the PPG actually says is that Grampian conditions should not be used where there are “no prospects at all of the action in question being performed within the time limit of the permission”. That is a very different thing, and carries with it no implication that it will, in fact, be possible to satisfy the condition. It certainly does not demonstrate that it is likely that the condition will be satisfied.

20. In the Landowners’ submission, it is obvious that, when RDC granted permission, there was no clear evidence on the basis of which the Council could have concluded that the scheme was deliverable or that Conditions 4, 9, 11 or 20 were capable of being met. In particular:

- a. In relation to the proposed level crossing on the A21, the Highways Agency had previously issued a direction precluding the grant of permission because it had not received the information it required in order to be satisfied that the level crossing would be safe and would not have an adverse impact on the flow of traffic. At the point when the HA became the HE, and lost the power to direct, that information had still not been provided but – in what it has since described as an attempt to be helpful<sup>11</sup> – the HE simply agreed to allow that to be dealt with by condition. As Mr Harwood’s evidence to this Inquiry has since

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<sup>11</sup> Harwood proof OBJ782/W1/1 para 34

made clear, this was a mistake:<sup>12</sup> applying the guidance in the DMRB<sup>13</sup> the HA/HE should have required a stage 1 RSA before planning consent was even applied for. In the absence of that information, there was no basis for concluding that a solution was possible. HE agreed to a condition because they knew that there would be a further stage (the TWAO) at which they could still object. In essence, condition 20 simply “kicked the can down the road”.

- b. Like the Highways Agency, East Sussex County Council had previously objected to the proposed level crossing on the B2244. When the HA modified its position, ESCC simply rolled over and did the same. It had not received any evidence that its objection was capable of being addressed.
- c. Similar considerations apply to the flooding conditions where the EA had at least received RVR’s FRA, but – as Mr Gillett confirmed - had been presented with no information to indicate where, whether or how RVR would be able to provide any compensation which might be required.<sup>14</sup>

21. It follows that, like Policy EM8, the planning permission did not carry with it any necessary implication that the conditions precedent were capable of being satisfied. Still less did it make any judgment on whether there would be a compelling case in the public interest for the exercise of CPO powers.

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<sup>12</sup> Para 34

<sup>13</sup> See in particular para 5.46 as quoted at para 31 of Mr Harwood’s proof

<sup>14</sup> This point is highly relevant in the light of para 166 of the NPPF: “the exception test may need to be reapplied if relevant aspects of the proposal had not been considered when the test was applied at the plan- making stage”

22. Finally, it is necessary to say something about the position of the ORR, the EA and HE. Each of these bodies views the TWAO through the prism of its own particular powers. We have already commented on the fact that the ORR's position does not involve any assessment of the need or justification for the scheme. Like the ORR, neither the EA nor HE has undertaken a holistic assessment of the Scheme as a whole. Hence:

- a. HE approaches its task through the prisms of para 111 of the NPPF and para 5.36 of its Licence.<sup>15</sup> Like the ORR, it has carried out no assessment of whether any adverse effects which fall short of "unacceptable impacts on safety" or "severe congestion" are justified or outweighed by the alleged public benefits.
- b. The EA is (understandably) concerned solely with the impact on flood risk. In that regard, it has consistently taken the view that its interests are protected by criterion (ii) of PolicyEM8, the conditions attached to the planning permission, and (now) the Protective Provisions. However (and as we return to below) at no stage has it explained how it reconciles its position of "no objection in principle" with the government's guidance on development in Flood Zone 3(b).<sup>16</sup> Moreover, while the protective provisions may be enough to satisfy the EA, they provide cold comfort to the Landowners, whose land can be taken from them under the TWAO, irrespective of whether the EA has been satisfied or the conditions attached to the planning permission have been discharged.

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<sup>15</sup> Quoted at Harwood proof, OBJ782/W1/1 para 48

<sup>16</sup> Indeed, it has positively refused to attend this Inquiry to answer questions so as to provide any such explanation.

23. In summary, this Inquiry is the first occasion on which all these matters have been brought together. It is the first time that any decision-maker has been asked to grapple with the question whether the global package of powers sought by TWAO is justified. And it is the test for the making of the compulsory purchase order – whether there is a compelling case in the public interest – which brings all those things together.

24. With those observations in mind, we turn to the balance, beginning with the respects in which the Scheme will cause harm.

### **The Impact on the Landowners**

25. The first, and most important point to make in this regard is that the Landowners will be adversely affected simply because it is their land which will be taken from them. Of itself, that is an interference with fundamental property right protected by Article 1, First Protocol, and to which Lord Denning referred. It is significant, adverse, and not overcome merely because they will be compensated financially.

26. Beyond this, although it is common ground that (if adequate worker crossings are provided<sup>17</sup>) the Scheme would not render either farm unviable, it would nevertheless impact on day-to-day operations. In particular, in addition to the loss of what Mr Turney may describe as a “sliver of land” beneath the line of the new railway (and, at Moat Farm, that taken for mitigation works):

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<sup>17</sup> If crossings were not provided, Mr Hodges recognises the potential for significant adverse effects: RVR/W10/1 para 8.3

- a. The enforced division of existing fields will render unusable some existing areas of productive land,<sup>18</sup> while restricting the future use of others to pasture.<sup>19</sup> In so doing, it will reverse the work undertaken by the Hoads at Parsonage Farm, where the old embankment was removed specifically in order to improve the productivity of the land.
- b. The limited number of crossings will make it more difficult for the Landowners to move stock quickly in times of emergency.
- c. The crossings will expose farm workers to inevitable delays, every time they need to cross the line. And this will be true, irrespective of where the gates are located.<sup>20</sup> The Inquiry will note that, while Mr Lewis (of Morghew Park Estate) insists that this is a minor inconvenience, at harvest time even he has to hire additional staff to open and close the gates.<sup>21</sup>
- d. Significantly, farm workers will also be exposed to the daily risk of having to use the crossings. If these are designed in the same way as the existing crossings at Morghew Park Estate, workers will have to cross the line 5 times for every vehicular crossing. RVR's solution to this (which would still require a driver to dismount from the vehicle four times to open and close gates) would require the Landowners to surrender areas of land which – although not included in the Order lands – would effectively become fenced off from the farms and included within the boundaries of the railway.

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<sup>18</sup> RVR/67 paras 2.6.1 – 2.6.4

<sup>19</sup> RVR/67 paras 2.6.6, 2.6.8

<sup>20</sup> See sub-para (d)

<sup>21</sup> SUP-121-0



In all these respects, the effects of the Scheme will be greater than just the land taken.

27. RVR argues that this will do no more than return the farms to the position they were in between 1900 and 1961, but:

- a. There is no evidence that this was a burden which the farms happily accepted, even in 1900;
- b. There is no guarantee that the farms will be supplied with the crossings which existed when the line was last in use. At Moat Farm (contrary to Mr Hodges' advice that at least two crossings are necessary) RVR is proposing to reduce the previous four crossings to one;
- c. In any event, farming methods have changed dramatically since 1900. Things that may have been acceptable or bearable then will have a very different impact today.

28. Ultimately, the scale of the actual impacts will depend upon the number of crossings which are actually provided. While this will be a matter for discussion between them and RVR under the terms of the Railway Clauses Consolidation Act 1845, the Inquiry will note that this is not a "silver bullet" which solves all problems. In particular:

- a. In those discussions, RVR will inevitably be seeking to balance the needs of the Landowners against their commitment to the ORR to try and reduce the number of crossings to a figure which is as low as possible. The implications of this can readily be seen from RVR's own

position on this issue: in its effort to placate the ORR, RVR has already reduced its initial proposal to provide 8 farm-worker crossings to 5, (only one of which will serve Moat Farm, notwithstanding Mr Hodges' clear evidence<sup>22</sup> that Moat Farm requires at least two).

- b. Under the somewhat antiquated provisions of the 1845 Act, the resolution of any dispute is left to the local magistrates – a jurisdiction with which they are unlikely to be familiar, and in which their expertise is doubtful.
- c. In addition to the inconvenience of having to use the crossings, the Landowners will be required to provide the land necessary for the ramps which will be needed to allow vehicles to negotiate the crossings without grounding. They will also be required to decide whether to give up the additional productive area in order to obtain the safer, and marginally less inconvenient form of crossing proposed by Mr Keay,<sup>23</sup> or follow the example of Mr Lewis at Morghew Park.

29. What these points demonstrate is that there is an adverse impact on the Landowners, either way. The reason why the ORR seeks a reduction in the number of crossings is because of the inherent risk in using them. In essence, the Landowners must either accept that risk, or accept a further reduction in the land which is available to them to farm. Either way, they lose.

30. In terms of the loss of productive land, Mr Hodges argues that the UK's exit from the EU and the Agriculture Act 2020 may provide opportunities for the Landowners to obtain subsidies for turning those parts of their and which are

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<sup>22</sup> RVR/67 para 3.2.2; RVR/68 para 1; Hodges xx

<sup>23</sup> Keay Rebuttal, RVR/W8/4 para 12

rendered unusable by the Scheme to environmental management.<sup>24</sup> However, as Mr Highwood points out,<sup>25</sup> these subsidies may not be available for land which has already been severed and is no longer capable of productive use. In any event, as Mr Hodges accepted,<sup>26</sup> the details of the new scheme are still to be settled. In those circumstances, this is simply not a matter on which any weight can be placed.

31. Further, the fact that some adverse impacts might be reflected in financial compensation does not detract from the point that these would be permanent, adverse impacts on the day-to-day lives of the Landowners. As Mr Hodges recognises<sup>27</sup>, a number of the impacts are simply not susceptible to financial compensation. In particular, money can never address the personal risks which farmers will have to take, the simple inconvenience they will suffer, or the heartbreak (poignantly expressed by Mrs Ainslie) of seeing something one loves taken away and destroyed.

### **The Level Crossings (Generally)**

32. The ORR's recently replaced "Guide for managers, designers and Operators"<sup>28</sup> begins with the words,

"Level crossings account for nearly half of the catastrophic train accident risk on Britain's railways."<sup>29</sup>

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<sup>24</sup> RVR/W10/1 section 9

<sup>25</sup> Highwood Proof, OBJ/1002/AH/1 para 8.15

<sup>26</sup> Hodges xx

<sup>27</sup> Hodges xx

<sup>28</sup> Appended to ORR Statement of Case, Rep 017/0

<sup>29</sup> Para 1

33. Although Mr Raxton indicated that this figure had since reduced to about a third,<sup>30</sup> that figure is still soberingly high. It is not for nothing that Network Rail has observed that:<sup>31</sup>

“If we were to build the railway from scratch today, we wouldn’t include level crossings ... Simply put, the safest level crossing is a closed one”

34. Against that backdrop, it is scarcely surprising that the ORR’s position remains<sup>32</sup> that it does not support the creation of new level crossings where there is a reasonably practicable alternative. It is why Network Rail is currently spending hundreds of thousands of pounds trying to close existing level crossings up and down the country.

35. In stark contrast to that endeavour, the Scheme presented to this Inquiry involves the creation of nine new level crossings.<sup>33</sup> As the ORR has made abundantly clear, <sup>34</sup> each and every one of these will introduce a risk of (potentially fatal) accident which the ORR would prefer to avoid.

36. In the circumstances, all the proposed new crossings are problematic. We deal with the particular implications for the A21 and the B2244 separately, below, but for the moment focus on the proposed worker crossings, which the ORR has described as “the most significant issue” because

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<sup>30</sup> Raxton xx

<sup>31</sup> Quoted in Clark proof, OBJ/1002/PJC/1 para 9.3.1.2

<sup>32</sup> Principles for Managing Level crossing Safety , 15 June 2021 para 27

<sup>33</sup> Three new road crossings, one crossing for the bridlepath, and five uncontrolled private accommodation crossings, without which the impacts on the two farms would be much more significant.

<sup>34</sup> And as RVR’s own evidence to the Inquiry accepts: see Hamshaw para 5.4.3

“experience on other railways suggests that user compliance with safety procedures can be extremely poor leading to collisions with serious consequences.”<sup>35</sup>

37. Mr Clark’s evidence explains why those concerns are well-founded in this case. Based on comparisons with crossings which have been assessed by Network Rail using the ALCRM tool, he concludes that, even with low train speeds and low frequency, the user worked crossings required in the present case would pose an Individual Risk in the High to Very High category.<sup>36</sup>

38. On behalf of RVR, Mr Keay criticises Mr Clark’s use of ALCRM, arguing that this is an internal tool for Network Rail of no relevance to a heritage railway. However, Mr Keay did not challenge the conclusions Mr Clark reached, merely the relevance of the exercise. As to that, Mr Clark’s point was not that ALCRM itself is a mandatory assessment tool, but that it is a useful way of understanding the scale of the risks inherent in the crossings which RVR propose – an exercise which RVR has not carried out.

39. In the present case, Mr Clark’s concerns are compounded by issues relating to the Level Crossing Sighting Distances achievable at the proposed farm worker crossings.<sup>37</sup> The importance of good visibility was confirmed by Mr Lewis, whose evidence indicates that the Morghew Park Estate rarely use three of their four crossings precisely because of the limited visibility. The point is significant in view of RVR’s position that, on a heritage railway, “removal of trees and hedgerows is not a solution”.<sup>38</sup> Mr Keay’s answer is that, if

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<sup>35</sup> ORR Rep 017/0 para 44

<sup>36</sup> OBJ/1002/PJC/1 section 8.6

<sup>37</sup> OBJ/1002/PJC/1 paras 7.2.1-7.2.5

<sup>38</sup> Keay Rebuttal RVR/W8/4 para 35

necessary, the trains will simply travel more slowly, but if that is the case, it will inevitably place further limitations on KESR's schedule.<sup>39</sup>

40. Ultimately, RVR's response to all these concerns is that it has now satisfied the ORR, to the extent that the ORR does not object to the Scheme. However, RVR's tactic throughout has been to play one objector off against the other. In dealing with the Landowners, it has argued that the impact will be minimised through the provision of worker crossings where necessary; while in its dealings with the ORR, it has promised to seek to reduce the number of crossings and to explore alternatives.<sup>40</sup>

41. RVR cannot have this both ways. In view of Mr Hodges' evidence to this Inquiry<sup>41</sup> that all five farm crossings are necessary (and indeed, that there should be a sixth at Moat Farm), and of RVR's wider position that tunnels beneath the embankment are not feasible and bridges over it are prohibitively expensive, one can only wonder at the value of the undertaking given to the ORR. The practical reality, on the basis of Mr Hodges' evidence, is that at least 6 worker crossings will be "necessary" for the purposes of the Railway Clauses Consolidation Act, and that these will need to be level crossings.

42. In any event, the fact that the ORR does not now object overlooks the fundamental point that – as we have already observed – the regulator is constrained in what it can do. In particular, once the ORR is satisfied that there is no reasonable alternative, and that the risks have been reduced to the lowest level reasonably practicable, it has little choice other than to approve.

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<sup>39</sup> As to the importance of which, see discussion of economic impacts, below

<sup>40</sup> Indeed, the latter was an undertaking which the ORR specifically sought from RVR before updating its Statement of Case: see e-mail of 6 April 2021, appended to Addendum to Statement of Case REP/017-1 p. 7

<sup>41</sup> Hodges xx

At no stage in the process is there any room for them to ask “why do this at all?”<sup>42</sup>

43. However, as Mr Raxton observed, that question arises squarely in the these proceedings. This is not a situation where we are dealing with the legacy of Victorian infrastructure which we have little choice but to accept. We are dealing with a proposal to create a new risk.

44. In the Landowners’ submission, it is no answer to this to say “there is no more cost effective way of extending KESR to Robertsbridge”. It is common ground that this scheme will introduce risks to the users of all of the proposed level crossings, which do not exist at present. These risks are not insignificant. Somewhere, somebody needs to ask the question: so why create them? That “somewhere” is here, and now, through the assessment of the compelling case in the public interest.

45. The fact that this Scheme will introduce a previously non-existent risk at 9 (or more) separate points along the line of the railway is a clear disbenefit of the Scheme, and it is one to which significant weight should be attached.

## **The A21**

46. If all the level crossings are problematic, none is more so than that over the A21. In particular, the A21 forms part of the Strategic Road Network; it is the major strategic connection between London and Hastings; it carries between 16 and 18,000 vpd; and - as Highways England explain - it is a “critical national asset”. And it is across this nationally significant road that RVR

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<sup>42</sup> Or, as Mr Raxton put it in xx, the ORR “don’t consider ‘just don’t do it’”

proposes to introduce a new level crossing which all parties agree will introduce delays to users, and a new safety hazard.

### *Delays*

47. Although Condition 21 seeks to prevent use of the level crossing between 5 and 7pm on weekdays and Bank Holidays, these are not, in fact, the times when traffic flows on the A21 are at their highest: peak flows on the Bank Holidays tend to occur earlier in the day, and are significantly higher than the normal week-day peaks;<sup>43</sup> while flows throughout the rest of the Bank Holiday are often of the same order as the weekday peaks, but are again not caught by Condition 21.<sup>44</sup>

48. Against that backdrop, it is common ground that the Scheme will introduce delays to traffic. In particular, when the level crossing is in use, I-Transport's Technical Note:<sup>45</sup>

- a. Shows southbound queues ranging from 143m on a March weekday to 178m on an April weekday, and northbound queues of 109m (increasing to 144m in the March weekend).<sup>46</sup> Despite previous assertions that this would be a rare event, RVR's original Departure from Standards Application<sup>47</sup> recognises that queueing of southbound traffic is "expected to regularly extend through the [Robertsbridge] roundabout when the barrier is lowered".

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<sup>43</sup> Fielding proof OBJ/1002/IF/1 Table 3-1 at p. 17: the Bank Holiday peak (which occurred between 11am and 12) was 1567, some 180 vehicles more than the weekday PM peak. The same conclusion emerges from I-Transport's 2019 data, as summarised at Table 3-3 on p. 18

<sup>44</sup> Ibid. The Bank Holiday average of 1382 compares with the weekday PM peak of 1384.

<sup>45</sup> RVR/W3/2

<sup>46</sup> Table 2.2 at RVR/W3/2 p. 289

<sup>47</sup> RVR/78



- b. On the busiest Bank Holiday, shows southbound queues of up to 420m and northbound traffic predicted to tail back for up to 500m, with corresponding queues of 236m and 276m on the April Bank Holiday.

49. Mr Hamshaw accepted that these would be adverse impacts,<sup>48</sup> but argues that these queues arise only in the worst 15 minute periods. However, while that may be true, it does not mean that they will be infrequent, or that there will not be more queues which are nearly as long:

- a. On weekdays, traffic flows remain high on either side of the worst 15 minutes, and in particular in the late afternoon before 5pm, when RVR will necessarily be seeking to get visitors back to Robertsbridge Station.<sup>49</sup> Queuing back through to the Robertsbridge roundabout is therefore likely to be a daily occurrence.
- b. On bank holidays, flows are high throughout the day – and only marginally below the PM peak hour flows on a normal weekday. These are precisely the days when RVR is likely to be running a maximum service. On the basis of the current “Gold service”<sup>50</sup> (but assuming KESR can “squeeze up” its timetable to avoid the 5pm cut-off) this would mean 16 closures in the 6 hour period between 11am and 5pm – producing significant queues of vehicles virtually every 20 minutes.

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<sup>48</sup> Hamshaw xx

<sup>49</sup> For example, the southbound peak on a March weekday occurs at 1645-1700, when a queue of 26 cars (149.5m) is predicted. However, an hour earlier (at the time of the northbound peak) the southbound queues are only marginally lower, at 25 vehicles or 144m: see Table 2.2 at RVR/W3/2 p. 289

<sup>50</sup> Hamshaw Appendices RVR/W3/2 p. 45

50. Further, it needs to be borne in mind that the I-Transport figures are based on a predicted delay of 72 seconds. RVR argue that this should be treated as a maximum, but for the reasons set out by Mr Clark,<sup>51</sup> 72 seconds should, if anything, be regarded as a minimum:

a. That was the conclusion of Atkins in their assessment of the level crossing closure times on behalf of HE: Atkins describe 72 seconds as a “minimal timing” at which “specific consideration must be given to increased level crossing risk and lower functionality”;<sup>52</sup>

b. RVR’s argument that it could be less is premised on the ability of trains to accelerate away from the crossing once the locomotive has passed.<sup>53</sup>

However, this is:

i. contrary to RVR’s own updated (Feb 2021) Narrative Risk Assessment, which states<sup>54</sup> that “the highest permissible line speed of trains over the crossing will be 10mph”;

ii. contrary to the Updated ES;<sup>55</sup>

iii. explicitly rejected by Atkins, whose Technical Note<sup>56</sup> describes it as a “non-standard driving technique, as drivers should not typically accelerate until the rear of the train has passed the speed restriction” and “would require the track sections ... to be categorised and maintained for the higher line speed”;

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<sup>51</sup> See in particular Table 2 at OBJ/1002/PJC/1 p. 27

<sup>52</sup> RVR/HE/05 section 2 (Executive Summary)

<sup>53</sup> Keay Rebuttal RVR/W8/4 para 9

<sup>54</sup> Clark Appendices, OBJ/1002/PJC/2 p. 107

<sup>55</sup> RVR/70-01 para 16.5.5

<sup>56</sup> RVR/HE/05 p. 7

- iv. impossible in the case of westbound trains, which will have to negotiate the Northbridge Street crossing shortly after the A21 and are most unlikely to accelerate away from the A21, only to have to decelerate shortly thereafter;
  - v. improbable in the case of eastbound trains, given the Scheme drawings which show that, shortly after the A21 level crossing, the line will cross the proposed farm worker crossing. Again, if that is the case, trains will need to be moving at 10mph.<sup>57</sup>
- c. For the reasons outlined by Mr Clark in relation to situations in which the train crew or the signal box may be required to intervene, or where there are degraded operations, the “barrier down” time could be very much longer.

51. In the circumstances, 72 seconds should be regarded as a minimum. However, although Mr Hamshaw accepts that a longer barrier closure would result in longer queues,<sup>58</sup> there has been no sensitivity testing using LINSIG which demonstrates what the consequences might be; nor has there been any analysis of the implications of future growth in background traffic levels.<sup>59</sup> As with longer barrier times, should background traffic increase, the impact of a closure will result in longer queues through both peak periods and day to day conditions. Combined with the potential for longer barrier closures, this could result in a greater impact on the highway network. The lack of an updated

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<sup>57</sup> It is no answer to this to say that the precise location of the crossing has yet to be determined: it is clear from Mr Hodges’ evidence that there will need to be a farm crossing in this vicinity.

<sup>58</sup> Hamshaw xx

<sup>59</sup> Unlike the earlier work by Mott McDonald, which did include an assessment based on growth to 2027.

future year assessment is contrary to DfT Circular 02/13 and downplays the potential impacts that could occur under forecast traffic conditions.

52. In any event, even with only a 60 second closure, I-Transport predict southbound queues of up to 120m (extending right up to the exit from the Robertsbridge Roundabout) on a weekday afternoon.<sup>60</sup>

53. Having regard to the evidence of Mr Fielding, the Landowners recognise that the delays predicted by I-Transport would not meet the NPPF standard of “severe congestion”. Mr Turney will doubtless argue that Mr Fielding’s position means you should strike a line through all the arguments set out above. However, as Mr Highwood pointed put, Mr Fielding was considering a different question. Like Highways England, he (Mr Fielding) was looking at the Scheme through the prism of para 111 of the NPPF, and was considering the question whether, viewed in isolation, the level crossing was acceptable. He was not commenting on what could or should be placed on the scales when deciding whether there is a “compelling case in the public interest”.

54. In that context, Mr Hamshaw agreed that congestion does not need to be “severe” before it is adverse.<sup>61</sup> He also agreed that the increased delays on the A21 were an adverse effect. Both these are common sense. It is also common sense that, when considering the public interest, an adverse effect should not be ignored, simply because it falls short of the NPPF threshold of being “severe”.

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<sup>60</sup> Table 2.3 of Hamshaw App E in RVR/W3/2 @ p.37

<sup>61</sup> Hamshaw xx

## *Safety*

55. Similar arguments apply to the issue of safety. Again, we start from the point that RVR's own evidence recognises that the crossing on the A21 will introduce a new point of conflict which will increase the overall risk of accidents on the Robertsbridge bypass.<sup>62</sup> RVR's Costs Benefit Analysis indicates<sup>63</sup> that the accident rate on this stretch of the A21 would increase by a factor of four. Although Mr Hamshaw has subsequently sought to distance himself from this calculation on the basis that it was an overly cautious assessment based on comparison with a signalised junction, Mr Bowie for HE disagreed, and considered the Cost Benefit Analysis was "more or less right".<sup>64</sup> Whether or not it is "unacceptable", a fourfold increase in risk is plainly a significant disbenefit of the Scheme.

56. Further, when dealing with the A21, the safety implications are not limited to the risks of a car colliding with a train, because the queues will themselves increase the risk of accidents elsewhere on the A21. In particular, the Scheme will result in both north and southbound traffic facing sudden and unexpected queues of stationary traffic. In so doing, it will increase the risk of:

- a. Rear shunts as northbound traffic comes down the long, gently curving stretch of the bypass towards the level crossing; and during the build-up of queues as southbound vehicles exit the roundabout only to find themselves heading into the back of the queue;

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<sup>62</sup> Hamshaw, RVR/W3/1 paras 5.4.3, 5.5.5

<sup>63</sup> Hamshaw RVR/W3/2 App F p. 298

<sup>64</sup> Bowie xx

- b. Traffic queuing back over the roundabout, with east-west drivers performing ill-advised manoeuvres in order to work their way between cars;
- c. Frustrated drivers “rat-running” through Robertsbridge;
- d. Interference with the use of the pedestrian crossing to the north of the roundabout, potentially leading to pedestrians making ill-advised crossings through stationary traffic.

57. RVR argue that there is adequate Stopping Sight Distance to prevent these things from happening, and that the Scheme makes provision for the extension of the existing 40mph speed restriction. However, accidents happen, even on roads which are properly designed and maintained. Introducing additional hazards and distractions increases the risk of such accidents. In that context:

- a. It is clear from HE’s Closing Statement that they remain concerned about the adequacy of Stopping Sight Distances and the implications of queueing back from the level crossing.<sup>65</sup>
- b. While Mr Fielding agrees<sup>66</sup> that it is technically possible to obtain the necessary visibility over land within the highway, the practical reality is that the sight lines are not maintained. Mr Hamshaw recognised that northbound visibility is currently restricted by vegetation on the verge, and it is agreed that the SSD through the Robertsbridge Roundabout requires the tree in the centre of the roundabout to be

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<sup>65</sup> HE Closing paras 12-14

<sup>66</sup> INQ/105

pruned. If these things are not currently being done, it is difficult to see why the public should have any confidence that they will be done in future.

- c. Similarly, it is a matter of record that a significant proportion of traffic already flouts the existing speed restrictions on this stretch of the A21. In circumstances where the Robertsbridge bypass was designed for vehicles travelling at the national limit, there can be little basis for believing that this is likely to change, simply because the restriction is extended.

58. RVR also argue that KESR is just a heritage railway, which will only be in operation for less than half the year.<sup>67</sup> However, crossings may still be closed for operational or private use purposes during non-timetabled time periods.<sup>68</sup> There is no suggestion that these will be at set times, e.g. avoiding peak periods not controlled by Condition 21. Furthermore, crossings being called with a sporadic nature may result in driver confusion, as they will not be expecting a level crossing closure.

59. In any event, 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:

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<sup>67</sup> In the Landowners' submission, the fact that it will only operate for less than half the year itself calls into question the extent to which there is a compelling case for it.

<sup>68</sup> RVR/W9/1 para 13.2

- a. Mr Hamshaw lists 12 collisions between trains and vehicles on heritage railways in the period between 2011 and 2019<sup>69</sup> – a rate of one and a half such accidents a year. Mr Clark produces a similar list.<sup>70</sup>
- b. Although Mr Hamshaw concludes<sup>71</sup> that this is a “considerably better” safety record than the 81 collisions at mainline crossings in the same period, that conclusion fails to reflect either the fact that there are nearly four times the number of level crossings on the mainline,<sup>72</sup> or the much higher frequency with which those crossings will be used. If expressed as a ratio of accidents to crossing closures, it is obvious that heritage railways would come off worse.
- c. Mr Nick Young’s very poignant evidence was a powerful reminder, not only that accidents can occur on heritage lines, but that they can have tragic consequences.

60. Once again, having regard to the evidence of Mr Fielding, the Landowners recognise that these risks do not reach the NPPF threshold of being “unacceptable”. However, that does not alter the fact that the scheme will introduce risks to the safety of motorists on the A21 and passengers on the railway which currently do not exist.

61. These points need to be put in context. Over the last 40 years, both Highways England and its predecessor (the Highways Agency) have spent hundreds of

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<sup>69</sup> RVR/W3/1 para 5.3.1

<sup>70</sup> OBJ/1002/PJC/1 section 8.1

<sup>71</sup> Ibid para 5.3.3

<sup>72</sup> Ibid para 5.3.1: 5,800 level crossings on the mainline network as against 1500 on heritage “and minor” railways.



millions of pounds<sup>73</sup> in upgrading the A21 in order to improve safety and ease congestion. Introducing delays and new risks to safety runs entirely counter to everything that HE is trying to achieve. When Mr Hamshaw was asked about this, he accepted that - whether or not the delays were “severe” - they undermined the rationale for the Robertsbridge bypass.<sup>74</sup>

62. In those circumstances, there is obvious sense in Mr Hardwicke’s question:

“What was the point of building the Robertsbridge bypass if RVR is just going to turn it into an obstacle course?”

63. Whether or not they fail the NPPF test for the grant of planning permission, the impacts of the Scheme on safety and congestion on the A21 add yet more harm to the disadvantages of the Scheme. Because the A21 is a “critical national asset”, those disadvantages should be given significant weight.

64. Finally, in relation to the A21, we ask the Secretary of State to note the concerns which have been expressed about the potential for the Scheme to prejudice the future dualling of the road.

65. As the Inquiry has heard, there has been longstanding political support from almost every MP on either side of the constituency boundary for the dualling of the A21 down to the coast. It is clear that what local residents have described as “the Snail Trail” is seen as a real impediment to the economic regeneration of Hastings.

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<sup>73</sup> Huw Merriman MP cited the figure of £130m on the recent dualling between Tonbridge and Tunbridge Wells alone, together with a further £20m which has been set aside as part of the latest programme of road safety improvements on the A21.

<sup>74</sup> Hamshaw xx

66. RVR argues that HE has no plans for dualling. At present, that is true, but the history of improvements to the A21 has been a long and slow one, with various sections being proposed and then shelved, only to be brought back to life years later.<sup>75</sup> Slowly, inexorably, the improvements have happened, and have worked their way south. It is clear from the evidence of both Sally-Ann Hart MP and Huw Merriman that the campaigning for that to process to continue will not stop.

67. In the Landowners' submission (in keeping with Greg Clark and Sally Ann Hart MP) the creation of a level crossing puts that possibility at risk. Even if, as Huw Merriman MP has suggested, a technical solution could be found, the existence of a level crossing would inevitably impose significant design constraints which are likely to make any design solution significantly more expensive.

### **The B2244**

68. In all the discussion of the A21, it would be easy to forget that the Scheme also depends upon a level crossing over the B2244. It is a matter of record that East Sussex County Council originally objected to a level crossing here as a matter of principle, and that its decision to withdraw that objection was not because it had received any information to demonstrate that a safe crossing could be achieved, but simply because the Highways Agency had withdrawn its objection to the crossing on the A21. In circumstances where HE now recognises that the latter decision was a mistake, it is questionable what reliance can be placed on the County Council's position.

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<sup>75</sup> The recent dualling of the A21 between Tonbridge and Tunbridge Wells is a prime example.

69. The point is important, because it remains the case that very little work has been done on the B2244. Despite its poor accident record and the fact that, in Mr Coffee's words, it is a "threatening and intimidating environment characterised by speeding cars and motorcycles"<sup>76</sup> there has been no survey of vehicle speeds, nor any engagement with the County on design.

70. Again, whether or not the risks are "unacceptable" for the purposes of the NPPF, a level crossing at this location is a disbenefit.

### **Public Rights of Way**

71. In addition to the level crossings over the A21, the B2244 and Northbridge Street, the Scheme will introduce changes to two other public rights of way: the Bridlepath, and Footpath 31.

72. In terms of the Bridlepath, the proposal is that there should be a new level crossing. Given that other such crossings already exist elsewhere on the rail network, the Landowners do not suggest that this cannot be designed in a way that (to use the ORR's language) is "tolerably safe". However, the ORR remains undecided as to whether RVR has demonstrated that there is no reasonably practicable alternative, and in particular whether a bridge crossing would have been possible.

73. On this issue, RVR points to the letter from a planning officer at RDC indicating that a bridge would not be supported, but that issue has never been tested by an application for planning permission.<sup>77</sup>

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<sup>76</sup> Coffee, evidence in chief

<sup>77</sup> It would, of course, have been open to RVR to include such an application in the TWAO

74. Even if a bridge is not a reasonably practicable alternative, it is clear that that the level crossing will introduce an additional risk to users which does not currently exist. This may not be fatal on its own, but it is an undoubted disbenefit of the Scheme.

75. Similar arguments apply to FP31. As the ORR has observed:

“Footpath crossings on other railway systems do not generally have a good safety record on average”,

Consequently, the ORR would have

“significant reservations if there were proposals to create an at-grade foot crossing in such close proximity to the A21 crossing location”<sup>78</sup>

76. In answer to the Inspector’s questions, Mr Raxton drew particular attention to the proximity of the FP to the A21 level crossing and the farm crossing, commenting that this was something they would “want to avoid strenuously”.

77. It is presumably for this reason that RVR’s proposal, as initially presented to this Inquiry, was to divert FP31 so that it ran under the embankment, in a culvert alongside the Mill Stream. However, as a diversion, this is something the Secretary of State can only approve if satisfied that it is a suitably convenient alternative to the existing footpath. It is therefore somewhat surprising that this is a matter on which RVR has produced almost no evidence.

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<sup>78</sup> ORR Statement of Case REP/017-0 para 39

78. In the Landowners' submission, and for the reasons outlined by Mr Clark, RVR's proposal fails this test, in particular because lowering the footpath will mean it is more susceptible to flooding, and because placing it in a narrow channel alongside moving floodwater is inherently unsafe.<sup>79</sup> It also creates a darker, less attractive underpass with poor forward visibility at the point at which the user has to make a decision whether to enter it.

79. Without expressly saying so, RVR has implicitly accepted the force of at least the first two of those criticisms through its modified proposals, which are either to provide the option of a higher path which would flood no more frequently than the existing footpath, or to provide a level crossing over the railway adjacent to the worker crossing. However:

- a. while the former would address the concerns about the extent to which the footpath would be passable, it compounds the concerns about the attractiveness of the route and the poor forward visibility. In particular, at both the upper and lower level the footpath would now be narrower than the previous proposal, while the 850mm wide upper ledge would have restricted headroom. Although it may be physically possible to squeeze past another user, not everyone will feel comfortable doing this, but they will already have committed themselves to entering the culvert before the need to do so will have become apparent.
- b. The latter is not an option on which the ORR has commented. However, it is clear from Mr Raxton's evidence that it is not an option they would favour.

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<sup>79</sup> See in particular the DEFRA Supplementary Note on Flood Hazard, quoted in OBJ/1002/PJC/1 para 7.5.11

80. How much any of this matters will depend on how well used the footpath is, and by whom. Regrettably, RVR has produced no evidence which helps with that. In the circumstances, whether the revised proposal is suitably convenient is a matter we leave to the Secretary of State, but on any analysis, the solution will be less attractive than the current path. The only other alternative is the level crossing, which the ORR “want to avoid strenuously”. Either way, there is a downside.

## **Flood Risk**

81. National policy on development in the floodplain is clear:

- a. Inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk. Where development is necessary in such areas, the development should be made safe for its lifetime without increasing flood risk elsewhere: NPPF para 159;
- b. The sequential approach should be used in areas known to be at risk from any form of flooding. Development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding: NPPF para 162;
- c. If it is not possible for development to be located in areas with a lower risk of flooding (taking into account wider sustainable development objectives), the exception test may have to be applied. The need for the exception test will depend on the potential vulnerability of the site and

of the development proposed, in line with the Flood Risk Vulnerability Classification: NPPF para 163.

- d. To pass the exception test it should be demonstrated that the development would provide wider sustainability benefits to the community that outweigh the flood risk; and that it will be safe for its lifetime taking account of the vulnerability of its users, without increasing flood risk elsewhere, and, where possible, will reduce flood risk overall. Both elements of the exception test should be satisfied for development to be allocated or permitted: NPPF paras 164-165.

82. Planning policy guidance (“the PPG”)<sup>80</sup> puts flesh on the bones of this. In particular:

- a. Para 7-001 describes the NPPF as setting “strict tests to protect people and property from flooding”;
- b. Para 7-018 describes the aim of the sequential test as being “to keep development out of medium and high flood risk areas (Flood Zones 2 and 3) and other areas affected by other sources of flooding where possible.”
- c. Para 7-19 states (emphasis added):

“The Sequential Test ensures that a sequential approach is followed to steer new development to areas with the lowest probability of flooding. The flood zones as refined in the Strategic Flood Risk Assessment for the area provide the basis

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<sup>80</sup> INQ/009

for applying the Test. The aim is to steer new development to Flood Zone 1 (areas with a low probability of river or sea flooding). Where there are no reasonably available sites in Flood Zone 1, local planning authorities in their decision making should take into account the flood risk vulnerability of land uses and consider reasonably available sites in Flood Zone 2 (areas with a medium probability of river or sea flooding), applying the Exception Test if required. Only where there are no reasonably available sites in Flood Zones 1 or 2 should the suitability of sites in Flood Zone 3 (areas with a high probability of river or sea flooding) be considered, taking into account the flood risk vulnerability of land uses and applying the Exception Test if required.

Note: Table 2 categorises different types of uses & development according to their vulnerability to flood risk. Table 3 maps these vulnerability classes against the flood zones set out in Table 1 to indicate where development is 'appropriate' and where it should not be permitted."

- d. Para 7-023 effectively restates the NPPF policy in relation to the Exception Test;
- e. Table 3<sup>81</sup> and the Key indicate that "less vulnerable" development should not be permitted in Flood Zone 3(b), while "Essential Infrastructure" should only be permitted following the application of the Exception Test.

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<sup>81</sup> INQ/099



83. The status of Table 3 has given rise to considerable debate at this Inquiry. It is fair to say that this is an issue on which neither the NPPF nor the PPG is entirely clear. Ultimately, the point is one of law. On that basis, the Landowners make the following submissions:

- a. Whether it is called “policy” or “guidance”, Table 3 is intended to form part of an overall suite of tests which sit within the overall policy of the NPPF, and which we are told are “strict”.
- b. In that context – and wherever Table 3 fits in terms of the Sequential Test or the Exception Test - the words “should not be permitted” are plainly intended to have some meaning. An interpretation which deprives them of any meaning is one which cannot, logically, be correct.
- c. The solution lies in para 7-019. In a section which is squarely dealing with the Sequential Test, para 7-19 advises that:
  - i. Where there are no suitable sites in Flood Zone 1, authorities should consider “reasonably available sites in Flood Zone 2, applying the Exception Test if required”. That is consistent with Table 3, under which (subject to the exception test for highly vulnerable development) all development can be permitted in Zone 2;
  - ii. Where there are no reasonably available sites in Flood Zones 1 or 2, the suitability of sites in Flood Zone 3 should be considered “taking into account the flood risk vulnerability of land uses”.

- iii. Table 3 “maps [the] vulnerability classes ... to indicate where development is ‘appropriate’ and where it should not be permitted”.
- d. The difference in wording here (“consider reasonably available sites” and “consider the suitability of sites”) is not an accident. What it reveals is that Table 3 is more than just a guide to when to use the Exception Test: it answers the question whether development is even “appropriate” or “suitable” in Flood Zone 3. In essence it tells us that, for certain categories of development, the Sequential Test can only be taken so far. As Mr Patmore explained it,<sup>82</sup> Table 3 shows where the Sequential Test “hits the buffers”.
- e. There is no conflict between this and the note to Table 3 which advises that the Table “does not show the application of the Sequential Test”. As the note says, there is nothing in Table 3 itself which states that sites in a higher flood zone must first be eliminated before one is able to move to a lower zone. In that sense, the table does not show “the application” of the Sequential Test. That does not mean it cannot show the limits to which that test can be taken.

#### 84. Applying Table 3:

- a. It is common ground that the majority of the proposed new line lies within the functional floodplain, i.e. Zone 3(b).<sup>83</sup>

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<sup>82</sup> Oral x-in-c

<sup>83</sup> See 2013 Capita FRA (for the ES) RVR/26 App 7 para 3.2.3; 2016 Capita FRA, RVR/28 App A para 3.3.2; RVR/76 para 3.5.1

- b. Throughout all of RVR's Flood Risk Assessment work, up to and including the 2021 Update to the Environmental State, RVR has recognised that a heritage railway should be classified as a "less vulnerable" use.<sup>84</sup> That is also the basis on which it was assessed by the Local Planning Authority when granting planning permission.<sup>85</sup>

85. In those circumstances, Table 3 is categorical: development should not be permitted. RVR seeks to argue its way around this by reference to the Exceptions Test, but it is very clear that the exceptions test is not an escape route that is available to "less vulnerable development" in Zone 3(b).

86. Mrs Callaway's belated attempt, in her rebuttal evidence, to escape this conclusion by distancing herself from Capita's own previous (and repeated classification) of the Scheme as "less vulnerable" is unconvincing and should be rejected. In particular:

- a. The ES Update specifically considers and rejects any suggestion that the Scheme could be considered "essential transport infrastructure".<sup>86</sup> Mrs Callaway does not seriously contend otherwise.
- b. Although Mrs Callaway suggests that the Scheme could be classified as "water compatible", that is plainly wrong, given that the only way in which RVR can ensure that it remains safe in a flood event is to cease operation. A clearer indication that it is not "water compatible" would be difficult to find.

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<sup>84</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>85</sup> RVR/56 para 6.5.3

<sup>86</sup> RVR/70 para 9.3.18

- c. As Mr Patmore observed, it would make no sense for the Scheme to be regarded as “water compatible” when even land and buildings used for agriculture are treated as the higher risk “less vulnerable” development.

87. On this basis, the Landowners’ primary submission in relation to flood risk is that the Scheme is fundamentally contrary to the PPG, and thus the NPPF.

88. Significantly, RVR has no reasoned answer to this. Its only response is to repeat the mantra that neither the Local Planning Authority nor the EA has raised any objection. The difficulty with that is that there is nothing to indicate that either the EA or the LPA has actually grappled with the issue: nowhere in the material before this Inquiry is there anything which explains either why RDC or the EA do not consider that Table 3 applies, or (if it does apply) why an exception should be made. Disappointingly (and in sharp contrast to the ORR) the EA has specifically declined to come to the Inquiry to explain its position.

89. In those circumstances, this is an issue which the Secretary of State cannot simply sidestep on the basis that the responsible authorities are satisfied. The conflict with Table 3 demands an answer, and it would be an error of law not to provide one.

90. In any event, even if there were some way around Table 3 and the classification of the development as “less vulnerable”, RVR’s problems would not end there.

91. First, the footnotes to Table 3 clearly state that, in order to be acceptable within Zone 3(b), essential infrastructure and water compatible uses need to

be designed and constricted to remain operational and safe for users in times of flood. It is self-evident that the Scheme fails the first of these tests: as we have noted, the only way in which RVR can ensure that the Scheme remains safe during a flood event is if the railway ceases to operate.

92. Second, unless the Scheme is “water compatible”, it should only be permitted if it satisfies the Exceptions Test, the second limb of which is that it

“will be safe for its lifetime taking account of the vulnerability of its users, without increasing flood risk elsewhere, and, where possible, will reduce flood risk overall.”

93. RVR argue that the development will be safe because they will simply cease operating trains. However, as Mr Dewey confirmed,<sup>87</sup> none of KESR’s three flood alert warning levels, or even the presence of water on the tracks, necessarily triggers the trains stopping: it is in each case a decision for the controller. If it became necessary to evacuate a train once there was water over the tracks, it is extremely difficult to see how the evacuation route could be described as “safe”.

94. In any event, the word “safe” applies not only to the safety of users, but also to the safety of the development itself. While it may be possible to employ techniques which will reduce the risk of the embankment being eroded or undermined, Mr Dewey has confirmed<sup>88</sup> that “the embankments are particularly vulnerable”. The Inquiry has been told of occasions on which RVR has had to bring out equipment to replace the sheet-piling associated with the culverts on its existing line.

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<sup>87</sup> In response to the Inspector’s questions

<sup>88</sup> In response to the Inspector’s questions

95. The Landowner's point here is reinforced by the recent amendments to the NPPF, and in particular the requirement now added to para 167(b) that development must be appropriately flood resilient such that "it could be quickly brought back into use without significant refurbishment". There is no evidence that the Scheme would meet that requirement.

96. In addition, far from demonstrating that the Scheme would not increase the risk of flooding elsewhere, the latest FRA demonstrates that there will be areas where it could increase flooding. As Mrs Callaway accepted,<sup>89</sup> the fact that this may "only" be on agricultural land is no answer.

97. Further, the modelling is reliant on a large number of culverts (currently 27) in order to allow water to flow from one side of the embankment to another. Should any of those become blocked, the results are likely to be very different. While KESR is no doubt capable of keeping the culverts clear in between flood events, it is flood events themselves which are likely to bring down the debris which will cause blockage. At such times, with the track under water, there will be no easy way for KESR to clear the obstructions. Significantly, the consequences of this have not been tested or modelled by RVR.

98. Finally (in terms of the second limb of the Exceptions Test), RVR has yet to demonstrate that it will not be required to compensate for the loss of floodplain storage. We return to this issue under the heading of "Impediments", below.

99. In summary, even if the fact that the Scheme is "less vulnerable" development is not fatal, the Scheme is still contrary to national policy, because it fails the Exception Test.

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<sup>89</sup> Callaway xx

100. Even if all the above arguments are rejected, we reiterate that, in order to pass the Exceptions Test, the development must also provide wider sustainability benefits to the community that outweigh the flood risk. This is a separate, freestanding element of the Exceptions Test, and both limbs must be satisfied. It follows that it is not enough for an applicant to demonstrate that the development will be “safe for its lifetime ... without increasing flood risk elsewhere”<sup>90</sup> - even where that is the case, the mere fact that the development is located in Flood Zone 3(b) creates a risk which needs to be offset by public benefits.

101. In the present case, RVR seeks to answer that requirement by reference to the economic benefits of the development. However, those are the same benefits that RVR relies upon to justify the use of compulsory purchase powers. For the reasons we have outlined above, RVR cannot rely on the same benefits twice: anything that is needed to offset the flood risk is “spent”, and is no longer available to counterbalance the interference with the Landowners’ Article 1 rights. Alternatively, all these matters – including the flood risk – must be taken into account when considering the “compelling case in the public interest”.

### **Heritage Assets: Impact on Robertsbridge Abbey**

102. RVR’s ES recognises that the reinstatement of the railway embankment will have a significant adverse impact on the setting of Robertsbridge Abbey.<sup>91</sup> Contrary to Mr Turney’s suggestion to Mr Slatcher,<sup>92</sup> the ES does not conclude that this will be eliminated over time: rather, it confirms that mitigation will

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<sup>90</sup> If that were the case, the first limb of the test would be redundant

<sup>91</sup> INQ/24 para 4.7.5;

<sup>92</sup> Slatcher in chief

be “difficult to achieve”<sup>93</sup> and that the effects “could reduce to moderate or slight over time”.<sup>94</sup> Mr Slatcher’s proof echoes this, noting that there will be a “moderate negative effect” which “will remain significant, albeit declining over time”. When asked by the Inspector how or why (given the acknowledged difficulties of mitigating the impact) the impact might decline, the best that Mr Slatcher could manage was to suggest that the ballast used to construct the embankment might mellow with age. That, of course, assumes that it will not need to be replaced as a result of scouring caused by flood events.

103. Mr Slatcher’s evidence also refers to the fact that “the area would return to the state when trains last ran”<sup>95</sup>. This appears to pick up on RVR’s much-repeated contention that the Scheme is reinstating an historic 19<sup>th</sup> Century line which used to serve the farms and mills of the Rother Valley.<sup>96</sup> That is both factually flawed, and irrelevant to the impact on the Abbey:

- a. It is factually flawed, because the line did not open to the public until 1900 and only operated a passenger service until 1954.<sup>97</sup> It therefore crept in to the very last year of Victoria’s reign and operated entirely in the 20<sup>th</sup> Century. It has been closed now for as long as it ever operated.
- b. It is irrelevant because Robertsbridge Abbey predates the railway by almost 800 years. As Mr Slatcher accepted,<sup>98</sup> there is no suggestion that

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<sup>93</sup> RVR/25 para 12.6.1; see also Slatcher RVR/W5/1 para 2.6.5

<sup>94</sup> See also the Updated ES RVR/70 para 11.3.6

<sup>95</sup> See also Updated ES, RVR/70 para 11.3.7

<sup>96</sup> RVR Opening Statement, INQ/03 para 6

<sup>97</sup> Gillett proof RVR/W1/1 para 2.2.2 (though Mr Gillett seemed unaware of this in xx); RVR/25 paras 8.1.2 12.3.18; evidence of Mr Paul Smith

<sup>98</sup> Slatcher xx



the railway makes, or has ever made, any contribution to understanding the significance of the Abbey.

104. In circumstances where RDC has granted planning permission for the Scheme, we do not suggest that the impact on Robertsbridge Abbey would be enough on its own to warrant refusal. However, as a Scheduled Ancient Monument the abbey is a heritage asset of the highest significance.<sup>99</sup> The harm to its setting is a matter to which great weight must be given. Under para 200 of the NPPF, that impact requires a “clear and convincing justification”. Under para 202, the harm has to be weighed against the public benefits of the proposal.

105. This is highly important when assessing the compelling case in the public interest: the harm to the Abbey needs to be included in that overall balancing exercise. As such, it eats into any socio-economic benefits to which RVR might lay claim, well before one comes to the question whether the use of compulsory purchase powers is justified.

### **Landscape and the AONB**

106. Although they may be less significant than the impact on the Abbey, RVR’s Landscape and Visual Review identifies the potential for significant negative visual effects in views along Church Lane, together with conflicts with two of the objectives of the High Weald AONB Management Plan.<sup>100</sup>

107. It is a matter of judgment whether this underestimates the actual impacts. Although this is not an issue on which the Landowners have

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<sup>99</sup> NPPF para 194(b)

<sup>100</sup> CD70 App B

produced expert evidence, the Inquiry has heard the views of Mr David Webster, with whom we agree. In that context, we draw attention to the fact that RVR's ES recognises that parts of the original railway are "defined by linear stands of mature vegetation which contribute positively to the existing character of the area"<sup>101</sup> and that the Scheme would remove these where it passes through Moat Farm. Additionally, we now know that RVR will need to extend the existing lighting on the A21, and light the level crossing at Junction Road. The effect of the former is picked up in the Updated ES, but the latter is not.

108. Whatever the level of impact, the AONB is a landscape which enjoys "the highest status of protection", and "great weight" should be given to conserving and enhancing it. On RVR's own analysis, the Scheme does not do that.

## **Biodiversity**

109. As Mr Highwood and Mrs Ainslie have explained, 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. Their evidence as to the value of Moat Farm is supplemented by that of Mr Flint.

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<sup>101</sup> RVR/25 para 8.1.2

110. The Scheme will involve the felling of hundreds of mature trees along the line of the old embankment. RVR's ES recognises<sup>102</sup> that this will result in the permanent loss and fragmentation of 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".

111. Despite this being a point the Landowners have made throughout, it was not until mid-way through the Inquiry that the land on which RVR is proposing to provide mitigation for these impacts was identified. In particular, Mr Coe's "Note on Tree Planting"<sup>103</sup> proposed four "areas" for ecological planting. However:

- a. Reflecting the fact that the concern identified in the original ES relates not only to the loss, but also to the fragmentation of a habitat which "provides ecological connectivity through the landscape",<sup>104</sup> the Updated ES states<sup>105</sup> that 1.5ha would be planted "in a single block within adjacent arable fields". In contrast, the four areas proposed by Mr Coe are not in a single block, are not in adjacent fields to the trees proposed to be removed, and are not all currently arable fields. This mismatch is not addressed anywhere in Mr Coe's evidence.
- b. Of the four areas, the largest - Area 1 - is already an area of scrubland, in circumstances where the ES also requires the provision of 1ha of new scrub as compensation for the loss of existing scrub.<sup>106</sup> As Mr

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<sup>102</sup> RVR/24 para 4.5.4

<sup>103</sup> INQ/74

<sup>104</sup> RVR/25 para 9.3.49 and Table 9.6 at p. 108

<sup>105</sup> RVR/70 para 8.8.5

<sup>106</sup> RVR/25 paras 9.5.4 and 9.5.5

Highwood pointed out<sup>107</sup>, planting trees on Area 1 is simply robbing Peter to pay Paul.

- c. Since INQ/74 was first produced, the Inquiry has also been told that this land will be used to provide compensation for any loss of flood-plain storage. The Inquiry has not been presented with any analysis of the extent to which those two things are compatible.

112. Presumably in response to the above, on 13 August 2021 (after the adjournment of the Inquiry) RVR wrote to the Inspector referring to an “in principle agreement” with New House Farm Bodiam Ltd for the provision of a 4ha field between the railway and the river at Junction Road to provide the ecological mitigation.

113. This belated and further moving of the goalposts (at a point in time at which the Inquiry was supposed to have concluded) is typical of the way in which RVR has gone about the preparation of the whole of its case, namely to ignore objections made by the Landowners unless and until the Inspector has expressed any interest in them. Even then, the location of the field was not shown on the plan attached to the letter. We can only ask that this is included in the site visit, so the Inspector can form his own impression.

114. However, even if it is potentially suitable, mature trees are not a habitat which can be replaced overnight.<sup>108</sup> It is therefore difficult to see how there could not be adverse effects on protected species and biodiversity. Indeed, even with mitigation, RVR’s ES recognises that there will.

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<sup>107</sup> X-in-chief

<sup>108</sup> The time-lag in the replacement of habitat is recognised in paras 9.6.1-9.6.2 of the ES: RVR/25

## Impediments

115. Para 15 of the government's Guidance on Compulsory Purchase and the Crichel Down Rules states that:

"The acquiring authority will also need to be able to show that the scheme is unlikely to be blocked by any physical or legal impediments to implementation. These include:

- the programming of any infrastructure accommodation works or remedial work which may be required; and
- any need for planning permission or other consent or licence"

116. The rationale for this is straightforward: if there are impediments to delivery of a scheme, there is a risk that the public benefits which that scheme is expected to deliver may never be realised. If that is the case, then the justification for compulsory purchase evaporates.

117. Critically, the test in para 15 is very different to that which governs the imposition of Grampian conditions on a planning permission. Whereas a Grampian condition should not be imposed if there are "no prospects at all of the action in question being performed within the time limit of the permission", para 15 requires the applicant to demonstrate that the Scheme is unlikely to be blocked.

118. In the present case, there are a number of obstacles which RVR will need to clear before the Scheme can be delivered.

### *The Need for a New Planning Permission*

119. Although RDC has already granted planning permission for the extension of the line, that permission is subject to the standard time limit on commencement of development, together with a number of pre-commencement conditions which have still not been satisfied. Although RVR argues that it has already successfully implemented the permission, the local planning authority does not agree,<sup>109</sup> and (for the reasons set out in their response to RVR's Note on Implementation<sup>110</sup>), the Landowners agree with that. In our submission, the permission will lapse unless RVR is able to discharge all the remaining pre-commencement conditions before 22 March 2022.

120. For the reasons set out in greater detail below, the Landowners submit that there are significant questions over whether RVR will be able to discharge those conditions at all, but on any analysis the prospects of doing so before the permission has lapsed are becoming increasingly thin. In particular, it is common ground<sup>111</sup> that Conditions 3, 5, 6, 9 and 11 will (or are at least very likely) to require access to the two farms before RVR can apply to discharge them.

121. In any event, RVR now accepts that its proposed changes to the height of the embankment will require amendments to the planning permission. RVR cannot do that under a s96A non-material amendment unless and until they have control of the Landowners' land, and neither a s. 73 application nor a non-material amendment can change the date for implementation of the permission.

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<sup>109</sup> See RDC's letter of 8 February 2021, INQ/052 p. 4

<sup>110</sup> INQ/104

<sup>111</sup> RT and PBQC answers to Inspector, Day 16

122. In the circumstances, RVR will, at the very least need to make a s. 73 application, and may well need to make an entirely new application for planning permission. As and when that application is made, it will be objected to by the Landowners, who will (amongst other things) demand a clear answer from Rother District Council to issues such as the conflict between the proposal and Table 3 of the PPG. Unless the Secretary of State finds against us on our substantive objections on grounds of conflict with national policy on flood risk, there is no basis on which he could conclude that the need for a new permission is not a potentially significant impediment to the Scheme.

*Discharge of the flood-related conditions attached to the existing permission*

123. Even if it was able to proceed under the current permission, RVR could only deliver the Scheme if it first satisfies the pre-commencement conditions requested by the Environment Agency. In the Landowners' submission, there is no certainty that RVR will be able to do this.

124. In particular, Condition 11<sup>112</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 storage capacity, and although RVR asserts that compensation may not be required, that is not what Condition 11 says, the amounts involved are not small,<sup>113</sup> and the EA has not agreed that no compensation is necessary.<sup>114</sup>

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<sup>112</sup> RVR/7

<sup>113</sup> Mrs Callaway estimates that the volume of the embankment to the west of the A21 at between 2500m and 3360m: INQ/114. Mr Patmore puts it at c. 3200 but agrees that the difference is not significant: INQ/132. To the east, Mrs Callaway has estimated that a further 5000 cubic metres may be required. Mr Patmore's initial estimate was of the order of 11,000 cubic metres. Following

Indeed, the fact that RVR is now (apparently) in discussion with the EA about possible sites, and is taking active steps to acquire land on which compensation might be provided indicates that it accepts that compensation may well be necessary. In the circumstances, there is clearly no basis on which the Secretary of State could conclude that compensation will not be required.<sup>115</sup>

125. Accordingly, this is at the very least a potential impediment to delivery of the Scheme, and the Secretary of State needs to be satisfied that it is unlikely to be a problem. RVR therefore needs to demonstrate that, if compensation is required, it has or will be able to obtain control of the land needed.

126. Significantly, this is not simply a matter of finding any old piece of land somewhere along the Rother Valley: the requirement is for volume for volume and level for level compensation, and the location will need to be one which is suitable.

127. Despite the fact that this is an issue which the Landowners have been raising for some time,<sup>116</sup> it was not addressed at all in any of RVR's written evidence to this Inquiry. Only in re-examination of Mrs Callaway (and after she had specifically said she was unaware of any document before the Inquiry which showed where compensation might be provided) were we told that the answer lay in INQ/074 – a document headed "Note on Tree Planting".

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discussions with Mrs Callaway, he recognises that it is now likely to be less than that, but is unable to say by how much. Both he and Mrs Callaway agree that the actual amount will depend upon the detailed design: INQ/113.

<sup>114</sup> RVR70 para 9.4.28; RVR/70-07 para 4.6.3

<sup>115</sup> See agreed note of meeting between Capita and Mr Patmore on 24 August 2021

<sup>116</sup> See Statement of Case OBJ/1002-0 paras 7.8-7.10



128. This frantic, last-minute scrabbling around to re-badge land which was presented to the inquiry as mitigation for the loss of trees as all-singing-and-dancing tree and flood compensation reveals just how little proper thought RVR has given to the matter. As Mr Highwood observed, this is particularly strange, given that RVR has owned Area 1 since 2013.

129. Even now we have it, INQ/074 does not adequately answer the question: as Mr Patmore explains,<sup>117</sup> while Area 1 might be capable of providing the compensation needed for the embankment to the west of the A21, it is too high, and therefore not suitable for compensating for the embankment to the east, nor will any of the other areas identified be suitable or sufficient for that purpose.

130. Once again, it appears that some at least of these points are now accepted by RVR. In particular, following the adjournment of the Inquiry, in a Note which was supposed merely to consolidate material which it had already put in evidence (and which Mr Turney specifically assured the Inquiry would not contain anything new) RVR has now produced details of a further five areas of land (which neither RVR nor its witnesses have ever previously mentioned) which are apparently subject to the “agreement in principle” with New House Farm Bodiam Ltd. and on which they say compensation for the loss of floodplain could be provided,

131. Again, for the reasons set out by Mr Patmore,<sup>118</sup> we question whether even this latest moving of the goalposts is anything more than a desperate clutching at straws. Although we are told that RVR has agreed heads of terms with New House Farm. Mr Turney confirms that there is as yet no binding agreement in place. RVR therefore does not yet have control of the

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<sup>117</sup> INQ132, pp. 2-3

<sup>118</sup> INQ152

land in question. Even if it did, there is no planning permission for significant engineering works in any of these areas, and the impact of such works has not been assessed. More importantly, these new areas are within or adjacent to an area of the floodplain which is currently shown to benefit from the appeal scheme, because the embankment will hold back water to the north. Put simply, they are on the wrong side of the railway line to provide compensation where it is needed. In addition, Area 2 is already susceptible to waterlogging and ponding, such that they are unlikely to be able to provide additional storage during a flood event. The volumes which Areas 3, 4 and 5 might be able to contribute are small.

132. In short, it is far from clear that these areas can provide what is needed.

133. RVR's response to this is to say that the EA has accepted that a solution is feasible. However, as Mr Patmore observed,<sup>119</sup> this observation was almost certainly made in a way which was blind to land ownership. A technical solution may exist, but that is not enough to make the Scheme deliverable, unless RVR can show that it controls the land needed to implement it.

134. In any event:

- a. The flood modelling work which the EA has seen predates the revisions to the Scheme which will raise the level of the embankment in the vicinity of the A21 (and, possibly, the bridge required to accommodate RVR's alternative proposals for FP31);

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<sup>119</sup> Answer to Inspector's question; and INQ152 p. 2

- b. The flood modelling work makes no allowance for the ramps which will be needed to accommodate the worker crossings.<sup>120</sup>

The impact of both these matters therefore remains to be assessed.

135. In the Landowners' submission, this is a significant impediment. RVR has had ample time to address it, but has failed to do so. It has not discharged the burden of demonstrating that the need for compensation is unlikely to block delivery of the Scheme.

#### *Discharge of Conditions Relating to the A21*

136. Under Condition 20, no part of the development shall commence until a level crossing design and Departure from Standard has been approved. This will require HE to accept the Departures Application and the Stage 1 RSA.

137. We have already made the point that this is information which should have been provided before planning permission was ever granted, and that HE has belatedly recognised that it was a mistake not to insist on this. As Mr Harwood made clear<sup>121</sup> it should certainly have been obtained before the TWAO was applied for.

138. It may be that this matter is resolved before the Secretary of State comes to make a decision. However, this cannot be assumed. In particular, for the reasons explained by Mr Clark, the realignment of the carriageway in order to accommodate the 1:150 incline of the level crossing is contrary to

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<sup>120</sup> Which, if all built to the same dimensions as those at Morghew Park Estate, could result in a requirement for an additional 927 cubic metres: see INQ/132 p. 2

<sup>121</sup> X-in-c

DMRB standards for superelevation and longitudinal gradient.<sup>122</sup> No-one at this Inquiry has suggested that Mr Clark is wrong in this regard. We are therefore still unclear how RVR proposes to address this, or why HE should not regard it as a problem.

139. The practical reality is that RVR has now had 10 years to resolve this issue, but has still not managed to do so. The Landowners echo HE's submission that the Order should not be made until it has been overcome. Either way, unless and until the Departures application is approved, this remains an impediment to the Scheme.

#### *Land for the worker crossings*

140. It is now accepted by RVR that farm vehicles will not be able to negotiate the embankment at the proposed crossing points unless a properly graded approach is provided. It is therefore noteworthy that there has been no assessment<sup>123</sup> of whether there is actually space to provide them in the locations where they are likely to be needed. RVR explains the failure of the Order to make provision for this on the basis that the precise locations have yet to be agreed, and that the burden to make land available will fall on the Landowners under the duty to mitigate. That is, however, only a partial answer.

141. Although the precise location of the farm crossings may yet be unknown, the general areas within which they will be needed are identified in Mr Hodges' evidence. In some cases, the options available are limited. The Inspector has himself drawn attention to some of the "pinch points" – in particular in relation to the farm crossing near the point where it is proposed

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<sup>122</sup> Clark, Obj/1002/PJC/1 section 7.3

<sup>123</sup> Hodges xx

to divert FP31. In such cases, RVR's argument that "it will be all right on the night" is simply not good enough.

### *Ecological Mitigation*

142. The ES indicates that the Scheme will need to provide 3ha of new native broadleaved woodland to compensation for that which will be lost as a result of the scheme, together with a minimum of 1ha of scrub.<sup>124</sup>

143. From the outset of this process, the Landowners have been asking where this compensation will be provided.<sup>125</sup> After Mr Coe had given evidence, RVR produced its Note on Tree Planting<sup>126</sup>, which proposes an area of land just to the north of Robertsbridge. In addition, the Inquiry now has RVR's letter of 13 August 2021, indicating that there may be a further 4 ha of land in the vicinity of Junction Road.

144. We have set out our submissions on these areas above, and do not repeat them here. Subject to the Inspector's views, following any site visit, on the land referred to in the letter of 13 August 2021, the Landowners stand by their objection that RVR has not demonstrated how it will provide the ecological mitigation which its own ES (and Updated ES) recognise is necessary. Without that mitigation, Conditions 5 and 7 of the Permission cannot be discharged and the Scheme cannot be delivered.

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<sup>124</sup> RVR/25 paras 9.5.4 and 9.5.5

<sup>125</sup> See Statement of Case OBJ/1002-0 para 8.5

<sup>126</sup> INQ/74

## *Funding*

145. 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.

146. The importance of this is clearly flagged up in the Guide to Transport and Works Act Procedures, where:<sup>127</sup>

- a. Para 1.31 advises that the capability of a scheme to attract the funding necessary is a relevant factor in the Secretary of State's decision;
- b. Para 1.32 refers to the right of those whose land is being acquired to expect the applicant to be able to raise the necessary finance, and the Secretary of State's wish to have regard to the prospects of funding the works;
- c. Para 1.33 states that the applicant should be able to demonstrate that the proposals are capable of being financed in the way proposed.

147. In addition, para 14 of the Guide to Compulsory Purchase Process and the Crichel Down Rules<sup>128</sup> states that the acquiring authority should provide substantive information as to the sources of funding available both for acquiring the land and implementing the scheme for which the land is required.

148. In the present case, RVR is not a 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 consistently runs at a loss

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<sup>127</sup> INQ/005

<sup>128</sup> INQ/008

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.

149. Presumably recognising the difficulties in which that placed RVR, one of those two benefactors has belatedly broken cover,<sup>129</sup> but the identity and resources of the other remains a mystery. In the Landowners' submission, this remains an unacceptable position: if the anonymity of both donors was a valid objection, it is not removed by the fact that one of them has chosen to be named. Moreover:

- a. Although we now know who one of the benefactors is, there is no contractual or other binding commitment to provide the money needed: delivery of the scheme is still entirely dependent upon that person's goodwill.
- b. There is nothing to indicate that, if the donor who remains anonymous decides to withdraw, the named benefactor is willing to foot the whole of the bill himself.
- c. There is no evidence as to what the position may be if RVR's cost estimate is exceeded (as may, for example, be the case if HE does not agree to the use of RVR's own appointed workforce).
- d. There is no commitment to contribute towards the ongoing costs of maintenance.

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<sup>129</sup> Gillett Rebuttal App 4 (RVR/W1/5-4)

150. Even assuming these impediments can be overcome, there still needs to be a “compelling case in the public interest”. Accordingly, we turn to consider the benefits on which RVR relies.

## **The Alleged “Benefits”**

### *Economic*

151. RVR’s argument that there is a compelling case in the public interest is founded principally on what it claims are the socio-economic benefits of the Scheme. However, it is difficult to reconcile this with RVR’s own ES, which candidly describes the local socio-economic benefits as “minimal, though very marginally positive amongst certain receptors”.<sup>130</sup> The ES’s overall assessment of the impact of the scheme is “neutral to minimal positive”. Significantly, even after consideration of the Steer Report, the Updated ES does not suggest any change to this conclusion.<sup>131</sup> Even on RVR’s own assessment, therefore, it is difficult to see how this Scheme passes muster.

152. 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>132</sup>) when garnering support for its proposals – a claimed total of £35m during construction and £4.6m p.a. in local benefits from 2030 onwards (figures which are still quoted by a number of supporters in their representations to this Inquiry) - were entirely dependent upon further investment which RVR now describes as “aspirational”<sup>133</sup> and which not even its own witness, Mr

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<sup>130</sup> RVR/25 para 14.7.2

<sup>131</sup> RVR/70 para 13.5.4 “the conclusions of the ES chapter remain valid”

<sup>132</sup> RVR/75

<sup>133</sup> Dewey para 14.7



Higbee, relies upon. Rather, RVR's case<sup>134</sup> now relies on an estimated £6.5m in local construction benefits and an ongoing £1.06m p.a. – less than a quarter of that previously advertised.

153. Even if these figures were reliable, they would still fall woefully short of a “compelling case in the public interest”. But, for the reasons explained by Mrs Evans, even they are not reliable.

154. First, they rely on a projected 25% overall increase in passenger numbers. This is significantly higher than anything which any other heritage railway has managed to sustain, following connection to a mainline station.

155. In particular, both Mr Higbee and Mrs Evans agree that, of all the heritage railway lines in operation in the country, the best comparator is the Bluebell Line.<sup>135</sup> It is therefore highly pertinent that KESR's 25% increase it is not even remotely supported by the experience of the Bluebell Line, following its connection to the mainline station at East Grinstead. Despite a 32% increase in patronage in the first year after the connection, passenger numbers on the Bluebell line have since plummeted to a level which is even below that experienced before connection.<sup>136</sup>

156. In cross-examination, Mr Higbee sought to dismiss this on the basis that there might be “other factors” at play in the case of the Bluebell Line. However, when asked what those factors might be, he had no answer. If the Bluebell Line is a meaningful comparator, the drop in numbers there calls for

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<sup>134</sup> Higbee, RVR/W2/1 para 2.20

<sup>135</sup> See also the Steer Report, RVR/9 para 4.38: the uplift is based inter alia on “the experience of the Bluebell Railway”

<sup>136</sup> Evans Table 8: OBJ/1002/EE/1 p. 17

some investigation and explanation before there can be any confidence that those same “other factors” would not also affect KESR.

157. In this regard, it will be noted that KESR has already had a similar experience to the Bluebell Railway: in 2000, when the KESR was extended to Bodiam, passenger numbers leapt to 107,992.<sup>137</sup> They have never reached the same heights since. The Bluebell Railway is patently not the only line to be affected by “other factors”.

158. In a world where he could not point to any persistent growth in the overall number of passengers on the Bluebell Railway, Mr Higbee’s fell back on the argument that 25,000 passengers still access the Bluebell Line via East Grinstead. However, that figure is an irrelevance. For the purposes of calculating the economic benefits to the area, the question is not how many people might access KESR from Robertsbridge, but how many of those will be additional visitors to the area. What the Bluebell Line figures show is that, while some existing visitors may change the point at which they access a heritage line, there is unlikely to be any significant and persistent net increase in patronage overall.<sup>138</sup> Without that persistent net increase, there can be no economic benefits to the area.

159. Critically, there is no good reason why KESR should be more successful than the Bluebell Line. Even before its connection to the mainline, the Bluebell Railway was attracting more than twice the number of visitors to

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<sup>137</sup> See KESR Annual Accounts for FY2013, Evans Appendices OBJ/1002/EE/2 p. 5

<sup>138</sup> In this regard, it is irrelevant whether the 25,000 Bluebell passengers who use East Grinstead were existing customers who now simply access Bluebell at a different place, or whether they are new visitors from London who have displaced pre-existing customers: the simple point is that the number of people being brought into the area by the Bluebell Line has gone down since connection with the mainline.

KESR.<sup>139</sup> Moreover, East Grinstead is only 55 minutes away from London Victoria, and benefits from a half-hourly service, as compared with Robertsbridge, which is 1hr 20 from Charing Cross and has only an hourly service from London (and one which, as Mr Le Lacheur has pointed out,<sup>140</sup> is often replaced with a bus service at weekends while Network Rail carry out essential repairs). As Mrs Emma Watkins observed,<sup>141</sup> East Grinstead is also a much larger settlement, with significantly more to attract visitors than Robertsbridge. If either was likely to appeal to the “untapped London market”, it is the Bluebell Line.

160. In addition, the scope for encouraging visitors to travel down by rail to Robertsbridge will be limited by the practical and legal restrictions which will “bookend” any schedule KESR produces:

- a. As the Steer Report notes,<sup>142</sup> the journey down from London is much less likely to be attractive if visitors are travelling at peak time and paying peak fares. Under current fare arrangements, this would mean a departure from London after 9.30, placing visitors in Robertsbridge between 10.40 and 11.00. Allowing time to transfer from the mainline station to KESR and buy a ticket, it is difficult to see how it will be possible to leave Robertsbridge much before 11am.
- b. The return journey will be constrained by Condition 21 of the planning permission, which prohibits use of the level crossing between 5 and 7pm on weekdays and bank holidays. As Mr Dewey recognised,<sup>143</sup> in order to ensure that passengers were back at Robertsbridge in time,

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<sup>139</sup> Evans Table 8: OBJ/1002/EE/1 p. 17: in FY13 Bluebell had 190,000 visitors

<sup>140</sup> INQ/095

<sup>141</sup> Oral evidence

<sup>142</sup> RVR/9 para 4.24

<sup>143</sup> Answer to Inspector’s question

without breaching the condition, KESR would need to allow a 15-20 minute buffer, so return trains would need to depart Bodiam by 4.15 in order to be back in Robertsbridge by around 4.45.

- c. RVR has produced no timetable to illustrate how it expects to operate. However, based on Mr Dewey's estimate<sup>144</sup> that it might take half an hour to get from Robertsbridge to Bodiam, it is apparent that, if the line were extended to Robertsbridge, KESR would struggle to run the last of its current services on either "Red" or "Green" days, and potentially the last two of its current services on "Gold" days, as set out on the schedules appended to Mr Hamshaw's evidence.<sup>145</sup>

161. This takes us to Mr Higbee's reliance upon a 2 hour journey time to unlock a catchment of around 5 million potential new customers, as opposed to the 90 minute catchment which Mrs Evans has used, and which (on RVR's figures<sup>146</sup>) would result in a much smaller increase of 674,000.<sup>147</sup>

162. As Mrs Evans was at pains to point out, she was not suggesting that no-one would spend 2 hours travelling to Robertsbridge – merely that, once one goes above 90 minutes, the penetration rate is likely to drop significantly. In the Landowners' submission, this is no more than common sense. Indeed, the principle that a smaller proportion of people will be willing to travel for up to 2 hrs is accepted by Mr Higbee.<sup>148</sup>

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<sup>144</sup> Dewey, re-x

<sup>145</sup> RVR/W3/2 pp 43-45

<sup>146</sup> Higbee Rebuttal, Table 1: RVR/W2/4 para 17 (37,800 + 177,200 + 459,200 = 674,200)

<sup>147</sup> See Appendix 1 to these submissions for journey times from the parts of London identified by Mr Higbee as the most likely points of origin for new visitors

<sup>148</sup> Higbee Rebuttal, RVR/W2/4 para 20

163. However, unlike the destinations listed in the Time Out “Top 10 Days Out” to which Mr Higbee refers,<sup>149</sup> Robertsbridge is not a destination in its own right. The sole purpose for going there would be to visit KESR. In the Landowners’ submission, the idea of spending up to 2 hours on a train, simply in order to go on a different (steam) train for the 2 hours it would take to get to Tenterden and back, before spending a further 2 hours on the mainline train journey home is not one that many parents with young children are instinctively likely to find attractive. Significantly, before undertaking such a journey, one of the things they would almost certainly do is look around to see what other heritage railways were accessible.

164. In that regard:

- a. As we have already observed, for a large part of the catchment area identified by Mr Higbee, there is already a quicker, more frequent service to the Bluebell Railway East Grinstead;
- b. Any train going down to Robertsbridge will also call at Tunbridge Wells, where a walk from the mainline station through the Pantiles will take you to the Spa Valley Railway, and similar scenic delights of the line to Groombridge Place.

165. In his rebuttal, Mr Higbee suggests that heritage steam trains do not compete with one another in this way, but that evidence is contradicted by both RVR<sup>150</sup> and Sir Peter Hendy.<sup>151</sup> Indeed, Mr Higbee’s own suggestion that

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<sup>149</sup> Higbee Rebuttal. RVR/W2/4 para 20 and Table 2

<sup>150</sup> See RVR accounts for FY19 in Dewey Appendices, RVR/W9/1 p. 46 “the market in which the Charity operates is relatively competitive”

<sup>151</sup> In evidence in chief, Sir Peter commented that “individual heritage railways compete for visitors from the general tourist market”

visitors who have been on the Bluebell line might prefer to do something different the following year<sup>152</sup> simply makes the point that choice dissipates use.

166. In cross-examination of Mrs Evans, Mr Turney suggested that, if the Bluebell line is put to one side, the experience of North Norfolk and the North Yorkshire Moors supported an uplift of between 12 and 15%. On this basis, he criticised Mrs Evans assumption of only 7½% growth. However:

- a. The Steer report specifically chose the Bluebell Line as a comparator because it is the most similar to KESR. Mrs Evans agreed with that. Mr Turney's hypothesis thus involves abandoning the underlying premise of the Steer Report, which is agreed by both expert witnesses.
- b. Mrs Evans 7 ½ % was arrived at having regard to RVR's own evidence that, of the total 88,000 passengers p.a., 39,800 were on "special" services which were already fully sold out and which KESR was not expecting to expand.<sup>153</sup>
- c. Mr Higbee's rebuttal of this is confused and contradictory: on the one hand (and contrary to what the Steer Report suggests) he indicates that RVR "would seek to operate more 'specials' or 'themed' events, while in the next breath he notes that the proportion of passengers on special services has reduced.<sup>154</sup> There is no explanation of how this ties in with RVR's case that one of the main benefits of the Scheme is that it would allow KESR to balance the existing tidal flows, nor any analysis

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<sup>152</sup> Higbee Rebuttal, RVR/W2/4 para 23

<sup>153</sup> Evans Proof, OBJ/1002/EE/1 para 3.3

<sup>154</sup> RVR/W2/4 paras 27 and 29

of the extent to which “special” visitors are likely to contribute to expenditure in the local region in the same way as “regulars”.

- d. In any event, even if one takes 12% or 15%, the consequence is still significantly less than the overall increase of 25% assumed by Steer.

167. RVR’s contention that a 25% uplift is justified is thus wholly dependent upon the additional 8,800 passengers (based on 5% of existing visitors to Bodiam) which they claim as a distinct source of growth. In the Landowners’ submission, there is no justification for this:

- a. It is evident that a significant number of KESR’s existing customers combine their trip on the railway with a visit to Bodiam. On the assumption that the same will be true of anyone accessing KESR from Robertsbridge, the 15% increase in KESR customers will itself include new visitors to Bodiam. There is no logical basis for treating these people as distinct from and additional to the 15%.
- b. In so far as Mr Higbee points to the Bluebell line as a comparator, precisely the same argument could have been made in relation to Sheffield Park Gardens. With visitor numbers ranging between 195,000 and 289,000 p.a.<sup>155</sup> Sheffield Park and Gardens is consistently more popular than Bodiam. It is also within walking distance of one of the stops on the Bluebell line. Consequently, if RVR’s arguments about the “Bodiam uplift” are correct, one would have expected to see a corresponding increase in passenger numbers on the Bluebell Line attributable to people wanting to visit Sheffield Park and Gardens.

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<sup>155</sup> See NT Annual Accounts, Evans App 32-37, OBJ/1002/EE/2 32-37

However, as noted above, the figures for the Bluebell line simply do not support that.

168. In the circumstances, the Secretary of State should be extremely cautious before accepting that the Scheme will result in anything like a 25%, year on year increase in patronage on KESR. That has not been the experience of any other heritage railway in the country, and the experience of what both Mr Higbee and Mrs Evans agree to be the most relevant comparator has, if anything, been the reverse.

169. There is a second problem with the Steer analysis, which is that it assumes that all 22,000 passengers who are new to KESR will also be new to the area. However, in the section of the Steer Report dealing with transport benefits, Steer claim the benefit of a 1% modal shift from existing KESR customers, and a 1% modal shift from existing visitors to Bodiam. We make the following points about this:

- a. In so far as there are separate allowances for existing KESR customers and visitors to Bodiam, it is clear (and Mr Higbee confirms) that the 1% modal shift for Bodiam are customers who do not currently use KESR.
- b. The Steer Report works on visitor numbers to Bodiam of 176,000. 1% is 1760 people.
- c. If those existing 1760 Bodiam visitors are in future going to come via train, they will inevitably need to use KESR in order to access Bodiam.
- d. Since they are not existing KESR customers (see (a) above) they will be new passengers on KESR.



e. If they are new passengers on KESR, then one of two things must follow. Either:

i. They are included within the 22,000 uplift in the number of KESR customers; or

ii. They are additional to the 22,000, in which case the increase in patronage on KESR is in fact 23,760.

f. If they are part of the 22,000, then (since these people are already coming down to Bodiam) they are, by definition, not new or additional visitors to the area, and the calculation of benefits should not be based on 22,000 new visitors but on  $(22,000 - 1760 =) 20,240$ .

170. Belatedly realising the difficulties that this creates for his overall claim that RVR would introduce 22,000 new visitors to the Rother Valley, Mr Higbee's supplementary note<sup>156</sup> argues that these 1760 Bodiam visitors are not included in the 22,000.<sup>157</sup> In the Landowners' submission, that argument lacks all credibility:

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<sup>156</sup> INQ57

<sup>157</sup> INQ57 paras 6-7. Mr Higbee also argues that the actual figure should be 1410 rather than 1760, because the "reality" is that "a proportion of 'existing' Bodiam demand already accesses Bodiam via Tenterden/KESR": INQ57 footnote 2. However, that argument is inconsistent with Mr Higbee's acceptance in cross-examination that the 1% Bodiam allowance must be new customers to KESR, because existing KESR customers were already accounted for in the separate modal shift allowance for 1% of existing car-based trips to KESR who currently access the railway at Tenterden, but would in future do so by mainline rail at Robertsbridge: see INQ/57 para 6. In any event, even if the figure of 1410 is correct, the basic criticism still applies: either the number of new visitors is smaller than Mr Higbee has assumed  $(22,000 - 1410 = 20,590)$  or the total number of new visitors on KESR is still greater than 22,000 referred to in the Steer Report  $(22,000 + 1410 = 23,410)$ , and therefore more unlikely.

- a. It is inconsistent with Table 5-4 of the Steer Report, which clearly shows the modal shift within the overall increase of 22,000.
- b. If correct, it would mean that the actual increase in visitors to KESR is not 22,000, but 23,760. That being so, it is astonishing (indeed, it beggars belief) that there is no reference to that level of increase anywhere in the Steer Report or Mr Higbee's proof, still less any explanation of how it is justified or said to be consistent with the evidence from other heritage railways.
- c. If correct, it would mean that that actual overall increase in the number of visitors to KESR is not 25%, but 27%. Such an increase is even more unlikely than 25%.

171. In the circumstances, we invite the Secretary of State to conclude that these 1760 visitors are in fact part of the overall 22,000 increase – in which case they are not new to the area, and Steer's calculation ought to have started on the basis that the actual increase in visitors to the area is 20,240. Of itself, that would reduce the claimed £1.06m benefits p.a. to  $(20,240/22,000 \times £1.06m) = £0.9752m$ .

172. Third, the figure of £1.06m depends upon an average spend of £42.55 per visitor, which is based on a blended average of £31 per day tripper and £196 per overnight visitor. In the Landowners' submission, both these are overstated.

173. In relation to day-trippers, the figure of £31 includes an average of £20.70 being spent on KESR, which includes the price of the ticket, an allowance for food and beverage and a visit to the KESR shop. This then begs

the question: on what, and where, is the balance to be spent? Mrs Evans recognises that it would be possible for some visitors (such as those going to Bodiam or all the way to Tenterden) to get up to £31, but beyond this, the opportunities will be limited:

- a. In order to mitigate the disincentive of the comparatively infrequent mainline service to Robertsbridge, KESR proposes to schedule departures from and arrivals at Robertsbridge to coincide with mainline services to London. This will necessarily limit the potential for spending in Robertsbridge, other than at KESR itself.
- b. Although the RVR evidence is littered with references to a number of other attractions in the Rother Valley, the reality is that almost none of these are within convenient walking distance of any KESR (or mainline) station.<sup>158</sup> RVR's own ES recognises that "there is no clear evidence that these attractions will directly benefit from the Scheme."<sup>159</sup> In cross-examination, Mr Gillett airily suggested that it might be possible to provide bus connections to some of these, but there is nothing before the Inquiry to indicate that this is what KESR intends, or how it might work (indeed, if RVR seriously considers this a sensible way of conveying people to local attractions, it begs the question why - given that the number of people they expect to attract to KESR is far greater than that which will visit any of the more minor attractions along the line - they and the National Trust do not simply lay on a bus service for the relatively short journey from Robertsbridge to Bodiam, so people could visit the Castle and connect with KESR

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<sup>158</sup> see Appendix 2 to these submissions for details

<sup>159</sup> RVR/25 para 14.4.9

without any need for a level crossing over the A21 or the use of compulsory purchase powers).

174. Accordingly, the assumption that, on top of the cost of the return fare from London, day trippers (including families with young children) will spend an average of £31 per person is unrealistic.

175. In relation to overnight visitors, RVR seeks to claim the benefit of expenditure over an average stay of four whole days. In the Landowners' submission, there is simply no basis for this:

- a. The average stay is based on existing holidays in the area, most of which will be by visitors with cars, who would thus be perfectly capable of visiting KESR and local attractions in any event.
- b. Mr Higbee recognises that visitors are unlikely to travel on KESR more than one of the four days. It follows that there must be enough in the area to hold them here for three additional days, all of which they are able to access by some other form of transport. But if that is the case, it is hard to see why they would not come anyway.

176. The difference this makes to the overall economic benefits is significant: as Mrs Evans pointed out, these overnight visitors make up 25% of the expenditure on which Mr Higbee relies.

177. Finally, Mr Higbee's figures also make no allowance for displacement. As Mrs Evans pointed out, in reality some of the new visitors to KESR will have been displaced from trips to other attractions in the area.

178. Applying more realistic figures (and assuming that there is no leakage to other areas), Ms Evans estimates that the actual additional spend in Rother is likely to be in the order of £470,000 for the year the connection is made and then £2.6m over the following 10 years in the central case – less than half of RVR’s central case, barely a tenth of RVR’s “aspirational” investment case, and a mere 0.1% of local tourism.

179. These sums are totally insignificant. However, the weight to be attached them is still further reduced by the relative strength of the economy in the area where they will be spent. Although RVR has made extensive reference to the extent of deprivation across East Sussex as a whole, RVR’s own ES concludes<sup>160</sup> that the economic benefits are unlikely to accrue to an area much wider than the Salehurst ward, which is characterised by very low unemployment; is “extremely robust in socio-economic terms; and (as the ES Update confirms) “is not deprived by national standards” .<sup>161</sup>

180. Similarly, in terms of employment, Mr Higbee’s rebuttal indicates that KESR itself is seeking to reduce staffing costs<sup>162</sup> and the ES concludes<sup>163</sup> that the scale of any wider employment which the extension is likely to generate:

“is only a small positive in the context of the very robust labour market and very low local unemployment levels”

181. In short, the Scheme will not benefit those parts of East Sussex which are deprived. However, as you have heard from Sally-Ann Hart MP, there are deep concerns that it will disadvantage places such as Hastings, which are deprived, by increasing their severance from London.

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<sup>160</sup> RVR/25 paras 14.2.3, 14.2.6, 14.3.3, 14.3.7, 14.4.1, 14.7.1-2

<sup>161</sup> RVR/70 para 13.4.10

<sup>162</sup> RVR/W2/4 para 9

<sup>163</sup> RVR/25 para 14.4.11

### *Other Benefits*

182. Although the socio-economic benefits are the principal benefit on which RVR relies, it also argues that the Scheme will deliver benefits in terms of sustainable transport, an increase in volunteering and benefits to Network Rail. Given their relative status in the hierarchy, we address these more shortly.

183. In terms of the alleged transport benefits:

- a. It is common ground that the introduction of new level crossings will introduce delays to existing motorists. RVR argue that this will be more than offset by the benefits of their scheme, in particular by encouraging modal shift of existing visitors to KESR. However, this argument is premised on the assumption that only 15% of new visitors will drive to Robertsbridge.
- b. No explanation has been given for how this figure has been arrived at – it appears to be a “finger in the air” exercise. In the Landowners’ submission, it is wholly unrealistic, since:
  - i. much of the new catchment for KESR will be the area to the west of Robertsbridge, which has no way of accessing Robertsbridge by train. Those people will necessarily arrive by car;
  - ii. in terms of the catchment areas to the north and south, Robertsbridge enjoys excellent access from the A21. The Steer

Report recognises that a station at Robertsbridge will make KESR “significantly more accessible by car” and has “significant potential to attract more visitors by road”<sup>164</sup>.

- c. Much more realistic is the updated ES, which recognises that any reduction in vehicle distance travelled by existing visitors who will switch to Robertsbridge will be “largely offset by new car trips generated by the widening of the catchment the Robertsbridge connection would provide”.<sup>165</sup>
- d. While it is very easy to make the assumption that travel by rail is more sustainable than travel by car, it needs to be remembered that the baseline for that assumption is that rail will involve modern, and normally electric locomotives. In contrast, RVR will be running steam trains and vintage diesels. RVR’s Updated ES recognises that, in terms of the overall CO2 emissions and climate change:

“as a reasonable worst case, the operational emissions will be no worse than a small increase in carbon emissions, leading to a negligible effect”

- e. Even if Mr Higbee is correct, the amounts involved are “small beer”: Mr Higbee assesses them at a value of £18,100 p.a..<sup>166</sup>

184. As to the benefits to Network Rail, according to Mr Gillett Network Rail already uses RVR for training purposes, storing equipment prior to possessions and borrowing equipment for repairs. It is not clear what the

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<sup>164</sup> RVR/9 paras 3.19 and 4.14

<sup>165</sup> RVR/70 para 17.7.23

<sup>166</sup> RVR/W2/1 para 3.92

extension would add to this. In the circumstances, it is not surprising that Mr Gillett acknowledged that they were “not the main benefits” on which RVR relies.<sup>167</sup>

185. As to the benefits of volunteering, it will be noted that this is a matter mentioned for the first time in RVR’s proofs of evidence. The Landowners do not doubt that some social benefit may be derived from opportunities to volunteer on KESR. However, that opportunity already exists, both at the existing stations along the line from Tenterden to Bodiam and at Robertsbridge. There is no evidence that KESR will cease to exist if the Scheme is refused – indeed, RVR’s evidence is that KESR is and will remain viable. There will, therefore, still be a heritage railway in Kent and East Sussex which people can enjoy. The Scheme may enhance the opportunities for volunteering slightly, but the difference it will make is marginal.

## **Conclusions/The Overall Balance**

186. In opening, we commented on the fact that, in most cases, compulsory purchase powers would not even be available to a private organisation such as RVR<sup>168</sup> and that, but for the fact that RVR’s particular “business” happens to involve the running of trains, which fall within the scope of the Transport and Works Act, there would be no vehicle for them to seek compulsory purchase powers without the active participation of some other statutory body, such as Rother District Council. The fact that RVR is technically able to take advantage of this legal “loophole” does not detract from the

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<sup>167</sup> Answer to Inspector’s question

<sup>168</sup> Indeed, RVR’s own Statement of Case recognises that it is “unusual” for a heritage railway to seek powers of compulsory acquisition: RVR SoC para 13.6



Landowners' submission that this is not what compulsory purchase powers are for.

187. In order to enlist the might of the State to expropriate property against the will of its owners, there needs to be a compelling case in the public interest. In the present case, RVR falls woefully short of this target. On the basis of its own assessment, the socio-economic and other benefits of this Scheme are paltry, and do not come remotely close to a justification for depriving the Landowners of their land. That shortfall is only magnified when one adds in the additional harm which the Scheme will cause, not just to the Landowners, but to the public interest as a whole.

188. In particular, and to varying degrees, the Scheme will cause harm to the safety and free flow of traffic on the A21, the setting of Robertsbridge Abbey, and the AONB. These are, all of them, assets of national significance, the harm to which requires clear and convincing justification. In addition, the Scheme is in fundamental conflict with national policy on the location of development in functional floodplain.

189. As a matter of policy, any one of these things in isolation would require clear public benefits before they could be sanctioned. Taken together with the impacts on the amenity of users of the public rights of way and the biodiversity of Moat Farm, they are a hurdle which the benefits of this Scheme do not even begin to mount.

190. As demonstrated by RVR's 2019 request for an adjournment, and the parade of changes which has followed (including those made immediately before and during the course of the Inquiry itself), this is an application which was poorly conceived and under-prepared from the outset. Frankly, it should

never have been allowed to get this far.<sup>169</sup> It is time to put a stop to this nonsense, once and for all. We urge the Secretary of State to refuse the application, and to do so in terms which make it clear that the Scheme is not just flawed, but is and always was hopeless, so the Landowners may finally go back to the land that they love, and get on with their lives in peace.

**PAUL BROWN Q.C**

**2 September 2021**

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<sup>169</sup> Indeed, had the Local Plan Inspector been required to apply a test of deliverability, or had Environment Agency properly addressed the implications of the Scheme being less vulnerable development in Flood Zone 3(b), or had the Highways Agency stuck to its original guns and followed the DMRB in responding to the application for planning permission, it might not have done.

## Appendix 1

### Connections and Journey Times to Robertsbridge for Catchment Areas Referred to by RVR

Catchment	Tube or Train Station Serving	Journey time to Robertsbridge	Changes	Landowners' Comment
Croydon	East Croydon	1hr 43	London Bridge	Beyond 90 minutes. Approaching 2 hrs if journey time from home included
	West Croydon	1hr 54	London Bridge	Beyond 90 minutes, and likely to be beyond 2 hrs if journey time from home included
Bromley	Bromley South	1hr 38	Orpington	Beyond 90 minutes. Dependent upon change at Orpington, which RVR/9 para 2.31 indicates will be axed from the London-Hastings service from 2022
	Orpington	54min		Under 90 minutes. However, RVR/9 para 2.31 indicates that Orpington will be axed from the London-Hastings service from 2022
Southwark	London Bridge	1hr 10 min		Under 90 minutes. Query how many people live within walking distance of London Bridge Station

Lewisham	Lewisham	1hr 29	Orpington	Under 90 minutes, but dependent upon a change at Orpington, which RVR/9 para 2.31 indicates will be axed from the London-Robertsbridge service from 2022
Greenwich	Greenwich	1hr 37	London Bridge	Beyond 90 minutes
Bexley	Bexleyheath	1hr 52	Lewisham and Orpington	Beyond 90 minutes, and likely to be beyond 2hrs if journey time from home is included. Dependent upon a change at Orpington, which RVR/9 para 2.31 indicates will be axed from the London-Hastings service from 2022

## Appendix 2

### Accessibility of Other Attractions Referred to in RVR Evidence

Site	References in evidence	Nearest mainline station (where relevant) and distance	Nearest KESR station and distance	Landowners' observations
Bodiam Castle	RVR/W1/1 para 4.1.2; RVR/W9/1 para 11.9; OBJ/1002/EE/1 para 5.66-68		Bodiam, ½ mile	Within walking distance, though the footpath is sub-standard (see Fielding proof OBJ/1002/IF/1 paras 7.4.9-11
Oastbrook Vineyard, Bodiam	RVR/W1/1 para 4.1.3		Bodiam, 1 ½ miles	Not within easy walking distance for most visitors
Great Dixter	RVR/W1/1 para 4.1.3; RVR/W2/1 para 3.5 RVR/W9/1 para 11.9; OBJ/1002/EE/1 paras 5.69-72		Northiam, 1 ½ miles	It is unlikely that anyone would walk to Great Dixter from Northiam Station. The 27 min walk is along a main road with no footpath. There is a bus, but it only runs every two hours. Mr Dewey's evidence describes Great Dixter as a "short taxi ride away" from Northiam. In xx he agreed that "not many" people would walk from Northiam Station.
Rolvenden Motor	RVR/W1/1 para 4.1.3		Rolvenden, 1 ½ miles	At 1 ½ miles from Rolvenden, the Motor

Museum	OBJ/1002/EE/1 paras 5.73- 5.77			Museum is a similar distance to Great Dixter, which Mr Dewey considers a “short taxi ride away”. The route is up a long hill on the A28, with no footpath. It is most unlikely that many people would walk there from KESR.
Chapel Down Vineyard	RVR/W1/1 para 4.1.3		Tenterden, 2 ½ miles	Chapel Down Is not accessible from KESR. The walk (which is beyond normal walking distance for most people) is along a busy road with no footpath.
Biddenden Vineyard	RVR/W1/1 para 4.1.3	Headcorn, 5 miles	Tenterden, 3 ½ miles	Biddenden Vineyard is not accessible from KESR. It is very difficult to visit without a car.
Sissinghurst Castle	RVR/W1/1 para 4.1.3 RVR/W2/1 para 3.5	Staplehurst, 6 miles	Rolvenden, 8 miles	Sissinghurst is not accessible from any KESR station without a car. Staplehurst is not on the London/Robertsbridge line. Sissinghurst is only accessible from there by car or taxi
Battle Abbey	RVR/W1/1 para 4.1.3 RVR/W2/1 para 3.5	Battle, ½ mile	Robertsbridge, 5 miles	Battle Abbey is not within walking distance of any KESR station. It is within

				walking distance of Battle Station, which is on the Robertsbridge line. KESR would add nothing to its accessibility by rail.
Old Brewery, Tenterden	RVR/W9/1 para 11.9 OBJ/1002/EE/1 paras 5.78-79		Tenterden, 0.2 mile	Accessible from KESR, but tours take 1 ½ hrs, making them an unlikely option (or at the very least, a long day out) for most people
Rye	RVR/W1/1 para 4.1.3	Rye Station, 0 miles	Northiam, 8 miles	Rye is not accessible from KESR. It has its own station, which is not on the Robertsbridge line
Winchelsea Beach	RVR/W2/1 para 3.3	Winchelsea, 2 ½ miles	Northiam 11 miles	Winchelsea Beach is not within walking distance of any train station. The closest station is the mainline station at Winchelsea, which is not on the Robertsbridge line.
Camber Sands	RVR/W2/1 para 3.3	Rye, 5 miles	Northiam, 12 miles	Camber Sands is not within walking distance of any station. The closest station is the mainline station at Rye, which is not on the Robertsbridge line.