

THE ROTHER VALLEY (BODIAM TO ROBERTSBRIDGE JUNCTION) ORDER

CLOSING SUBMISSIONS ON BEHALF OF THE PROMOTER

Introduction

1. The Promoter (“RVR”) seeks an Order under the Transport and Works Act 1992 to authorise the construction of a new railway and the maintenance of two existing stretches of railway lying between Robertsbridge and Bodiam in East Sussex. The Order will authorise, amongst other things, the compulsory acquisition of land and the creation of level crossings at the B2244 at Udiam, Northbridge Street and at the A21 in Robertsbridge, as well as at a bridleway.
2. The scheme which underpins the Order is the completion of the restoration of a railway branch line which was lost in the 1960s. Most of the line has been reinstated, and it is operated as the Kent and East Sussex Railway (“KESR”) between Tenterden and Bodiam Castle. It is – and will continue to be – a “heritage” or “touristic” railway. Two parts of the route between Robertsbridge and Bodiam have already been reinstated. The Order would secure the completion of the “missing link” of this railway, reconnecting it to its original mainline connection at Robertsbridge Junction.
3. These closing submissions follow, broadly, the Secretary of State’s Statement of Matters as follows:
 - a. Aims and benefits of the scheme
 - b. Level crossing safety
 - c. Highways impacts
 - i. A21
 - ii. Other roads
 - iii. Footpath and bridleway
 - d. Flood risk

- e. Ecology
- f. Heritage
- g. Landscape
- h. Car parking
- i. Mitigation measures and protective provisions
- j. Appraisal against NPPF and local policies
- k. The environmental statement and other procedural requirements
- l. Proposed changes
- m. The compulsory purchase case.

4. Each point is addressed below¹.

Aims and benefits

5. The scheme will deliver a range of benefits, many of which are not in dispute. In providing a new connection to the mainline, at Robertsbridge, it will open up a direct public transport link to the heritage railway. This will both encourage more sustainable means of transport to existing attractions – the railway itself, Bodiam Castle, and Tenterden in particular – but will also open up these destinations to new visitors. In turn, this generates economic benefits for the local and wider area. The existing KESR will be enhanced and made more efficient by the scheme, with passengers arriving at Robertsbridge to balance out the existing demand which is centred on Tenterden. The area and its attractions will be opened up to visitors in a sustainable way.
6. One of the risks in presenting any analysis of the benefits of a scheme such as this is that the true benefits to the people who will use the railway, volunteer on the railway, and work on the railway or in businesses supported by it, are lost in economic analysis. There are undoubted quantifiable economic benefits. But as Cllr Prochak asked, where is the “joy” taken into account? It is important to remember that a primary purpose of the scheme is to deliver benefits in terms of recreation. It will allow a day trip from London (or Hastings – or beyond in either direction) on the train to one of the most attractive parts of southern England; a trip on a steam train; and a visit to one of the nation’s best-preserved castles. The children and adults lifted up by such a trip are not

¹ Mitigation measures and protective provisions are not addressed separately but where relevant under each topic.

just passenger numbers, or sources of economic expenditure. There is a public good in providing such opportunities which is not readily capable of quantification. Further, in opening up a heritage railway, and destinations such as Bodiam Castle, the proposals “better reveal”² these heritage assets. These are distinct and weighty public benefits that exist regardless of any economic return.

(i) *It is agreed that the scheme delivers economic benefits*

7. There is no dispute that the scheme will deliver real economic benefits. It is instructive to properly understand the Landowners’ position on economic benefits before turning to why their position is unrealistically pessimistic. Mrs Evans recognised in her evidence that there will be economic benefits, which she valued at £2.6m over ten years, with 12,700 new passengers in the first year of operation and 6,400 extra passengers in subsequent years³. This economic assessment excluded construction benefits, and any wider transportation benefits (which she did not dispute). In XX Mrs Evans agreed that if one was to assess the benefit to cost ratio of a proposal such as this, it would be appropriate to look to a 30 year timescale (as explained by Mr Higbee in EiC). On that basis, she agreed that the scheme would deliver benefits in excess of £7m, i.e. greater than the current costs.
8. Pausing there, it is notable that Mrs Evans agreed with Mr Higbee that in delivering a benefit to cost ratio of better than 1:1, the proposal would be regarded as being capable of being invested in if it were a publicly funded project. The Secretary of State will need no persuading on this point, given the publicly funded transport schemes which he regularly considers. However, this is not a publicly funded scheme. The money will be provided by public donations, including from generous philanthropists who share the enthusiasm of many others for heritage rail. Consequently these are public benefits which will be privately funded.

² NPPF, para 206

³ Proof 6.11

(ii) *Visitor numbers and spending*

9. The careful analysis presented in the Steer Report and in Mr Higbee's evidence presents a "central case" turning on an uplift in existing visitor numbers. There are two baselines. First, there is an existing level of demand for KESR, with a main terminus in Tenterden which has no realistic public transport connections. KESR demand has fluctuated around 80,000 to 90,000 visitors a year⁴, pre-pandemic and a baseline of 88,400 has been assumed. Second, there is an existing level of demand for Bodiam Castle, a National Trust-owned treasure which, despite its relative inaccessibility and compromised parking arrangements, attracts upwards of 176,000 visitors each year.
10. Mr Higbee then applies an "uplift" on those baselines, of 15% for KESR demand and in addition 5% for Bodiam Castle demand. This generates an additional 22,000 visitors per annum. These are realistic, if conservative, assumptions. The proposal will open up both KESR and Bodiam Castle to the "London rail market". Just the south eastern boroughs of London have a population 1.86m people⁵; the wider London market has many millions more potential visitors. There is also a sizeable "South Coast rail market", which will be connected via Hastings and Robertsbridge to KESR and Bodiam. Further, the creation of a new terminus will expand the market for those that come by car.
11. Mrs Evans' "catchment" analysis confirms, rather than undermines, these demand figures. She claims that the 90 minute public transport catchment, and the 30 minute driving catchment, for KESR will increase by roughly 80%.⁶ It is wholly unclear why this is said to support a proposition that the level of demand for KESR would only rise by less than 10%. Further, and in any event, her approach is plainly excessively pessimistic:
 - a. It assumes that there is an existing public transport demand for KESR. In reality, there is not. Whilst some visitors arrive on organised coach trips, there is no convenient public transport connection to Tenterden. When scrutinised, it is apparent that Mrs Evans' public transport assumptions are made on the basis

⁴ Dewey proof, 9.1 RVR/W9/1

⁵ Higbeen proof 3.35 RVR/W2/1

⁶ Evans proof Table 6 OBJ/1002/EE/1

that visitors will make a taxi trip from train stations such as Headcorn. She confirmed after giving her evidence that she applies no such generous assumption of a mixed mode of public transport and taxi journeys when assessing the additional catchment created by the Robertsbridge connection. The result is that the public transport catchment uplift is underestimated, because either the existing catchment is overstated, or the new catchment is not treated with the same generous assumptions;

- b. To seek to confirm her analysis, Mrs Evans sets a public transport catchment at 90 minutes. If the 90-120 minute public transport catchment is considered, then large amounts of London, a market of some 4 million people, is brought into play⁷. Only a very limited penetration of that market is required to deliver a significant uplift in visitor numbers. The London market is agreed to be one which has lower car ownership levels than elsewhere and is better disposed to public transport options (given lower car and higher public transport usage). It is unrealistic to think that visitors will be dissuaded from making the trip because it would involve a change of train, or from a tube to train, and a total journey of marginally over 90 minutes;
- c. Further, the pessimism about new rail demand repeatedly ignores the nature of the visitors in question. Those who want to take a trip on KESR are predisposed to taking the train: they are coming to East Sussex for that reason. Mrs Evans' suggestion that potential KESR passengers might be put off by the length of the journey from London by train, or the need to change, lacks common sense.

12. As Mr Higbee explained in his rebuttal, many attractive day trips from London involve journey times of up to 2 hours. Part of the joy of a day out is the journey there and back, particularly when the purpose of the day out is to take a heritage rail trip. Further, the overseas tourist market is shown to be disposed to using the train to travel around England; again, visitors in that cohort will not be dissuaded from visiting KESR and Bodiam Castle by the train connection.

⁷ Higbee Rebuttal Table 1 RVR/W2/4

13. Robertsbridge offers a direct connection to four London stations: Charing Cross (Westminster), Waterloo East (LB Southwark), London Bridge (LB Southwark), and Orpington (LB Bromley). The journey time from the terminus at Charing Cross is 1 hour 19 minutes, or 1 hour 10 minutes from London Bridge. To the south, Hastings is less than 25 minutes away and there are connections to other settlements such as Bexhill and Eastbourne. As Mr Dewey explained in his evidence, departures from Robertsbridge Junction on KESR would undoubtedly be timed to ensure that passengers were able to make the train from London. In short, the Robertsbridge connection will provide excellent connectivity from a broad range of locations. The Secretary of State can be satisfied that it will enable a significant uplift in demand.
14. Whilst Mr Brown was keen to emphasise in cross examination and in closing that morning departures from London may still be in “peak” times (a) there are no peak tickets at weekends, when much of the demand would arise (b) costs of peak travel can be largely mitigated by booking ahead, as day trippers are likely to do and (c) it is contemplated that discounted fares on the mainline railway will be agreed in conjunction with ticketing for KESR, as has been done on other railways. In short, this point can go no way to justifying the pessimistic demand figures that Mrs Evans relies on, in the face of the connection to a huge rail market.
15. The next line of attack from Mrs Evans relates to (a) the interaction with other heritage railways and (b) the experience of the Bluebell railway. On the first issue, it is clear that there are other heritage railways. However, these are not simply alternative choices for the single consumer, akin to IKEA stores⁸. Each railway is distinctive in terms of the experience on the railway itself and what can be seen from it. The Bluebell, for instance, is branch line railway, not a rural light railway. Only KESR provides a link to Bodiam Castle, for instance. Those who visit one heritage railway may be inspired to visit another the next year. There is no evidence, from Mrs Evans or others, that there are constrictions on demand for these attractions which mean that they play off against each other.
16. In terms of the experience of Bluebell, there was a massive uplift in visitor numbers when the rail connection was established. Whilst it is correct to note that visitor

⁸ Higbee Rebuttal para 23 RVR/W2/4

numbers for the railway as whole dropped materially in subsequent years, a significant amount of rail demand remained. As Mr Higbee explained, it is very difficult to isolate the factors which would have affected visitor numbers for Bluebell. However, visitor demand accessing at East Grinstead has been retained in the long term: about 25,000 visitors each year. What is clear is that Bluebell – which is a similar length of railway, with a National Trust property accessible from it – commands higher visitor numbers than KESR. That is likely to be factor of its larger catchment.⁹ The very significant increase in catchment provided for by the scheme is therefore likely to produce increased visitor numbers.

17. The conservatism of Mr Higbee’s assessment – and the unrealistic approach of Mrs Evans – is confirmed when one considers the assumed “trip rate” or demand per in-scope population. Even using Mrs Evans’ catchments, the “trip rate” to achieve the passenger number uplift assumed by Mr Higbee would need to be only a third of the “trip rate” which is currently achieved.¹⁰ It follows that the assumed uplift, overall, is prudent.
18. Mrs Evans also takes issue with the existence of separate Bodiam demand uplift. However, this tends to ignore the great draw of destinations such as Bodiam, and the virtual absence of a public transport catchment at present. The strong support of the National Trust for the proposals indicates that Mr Higbee’s 5% assumed uplift in Bodiam demand is, if anything, a conservative one. And again, as a sense check, the overall uplift in KESR demand is assumed to be less than 25% (taking both the KESR and Bodiam uplift together), despite (on Mrs Evans’ own analysis) the catchment being increased by 80% and in fact by far more for all the reasons set out above.
19. Taken as a whole, the “central case” prediction of an additional 22,000 visitors per annum is one which is prudent. Mrs Evans’ assumptions are unrealistically pessimistic.
20. Finally, Mr Brown took issue with the consequences of the mode shift assumptions for visitor numbers. This is a point which goes against his client’s case. As Mr Higbee explained,¹¹ the 1% “mode shift” from existing Bodiam visitors will include, in part,

⁹ Higbee Rebuttal para 42.

¹⁰ Table 3/para 43 of Higbee Rebuttal

¹¹ INQ/57

visitors who do not currently use the KESR. Accordingly, these are additional visitors to the KESR. They have not, however, been treated as new visitors for the purposes of the economic assessment because they are not new visitors to the area¹², or to the combination of the two attractions being considered in the Steer assessment (i.e. Bodiam and KESR). At best, Mr Brown’s point is that there will be *more* new visitors to KESR than Mr Higbee’s economic assessment gives credit for. This is all explained in INQ/57, and was explained by Mr Higbee at the Inquiry. Contrary to Mr Brown’s submissions, there is nothing “astonishing” or to “beggar belief” in this explanation because the Steer Report expressly sets out these figures (Table 5-5, RVR/9) and separates new demand for KESR and for Bodiam from “modal” shift for existing users. The figures have been there throughout for the Landowners to consider, even if they needed further explanation.

(iii) *Visitor spend assumptions*

21. The starting point for the visitor spend assumptions in Mr Higbee’s assessment are the Visit Britain statistics for day trip expenditure, and indeed towards the bottom end of those figures. Mrs Evans agreed that there was no substantial dispute on the day trip spend figures, although she took a number of points about *where* the money should be spent. In short, it is absolutely clear that visitors will have both the time and inclination to spend the further £11.40 on top of the cost of the train whilst in the area. There are opportunities for expenditure in the range of facilities in Robertsbridge – including The Ostrich Public House whose proprietor addressed the inquiry – but the assumptions do not depend on Robertsbridge being the destination of visitor spending. Nor is there any need to assume that visitors will range far beyond the railway (although they may well do given the other attractions of the area). Money can be spent in the shop and café at Bodiam Castle, or in the attractive range of shops and facilities in Tenterden¹³. It is little wonder that Tenterden Town Council are such strong advocates of the scheme; and their investment in the new footpath connection to the Town Centre will be borne out when new visitors arrive by steam train from Robertsbridge, and walk up it to the “Jewel of the Weald”.

¹² Contrary to Mr Brown’s closing submissions at 169-170

¹³ Higbee Rebuttal para 50-55

22. Mrs Evans' more substantive line of attack is on the overnight spend assumptions. However, in truth the difference between Mr Higbee and Mrs Evans is a narrow methodological one. Mr Higbee says that if an overnight visitor is induced to visit the area because of the scheme, then their whole economic contribution to the area has been induced by the scheme. Thus a new overnight visitor is directly attributable to the scheme, even if they spend money over several days in several different places. This is a reasonable approach to assessment. The cohort being assessed is relatively small proportion of new visitors, and the assumption is that these are not people who currently come to East Sussex for an overnight trip, but will do because of the improved connectivity to, and via, KESR. Mrs Evans does not take issue with the split of overnight visitors, but treats the expenditure of such visitors as only being attributable to the scheme for one day of their trip. This ignores the true benefit of the scheme, namely that it has induced the visitor to the area rather than going elsewhere, or staying at home.

23. In short, Mr Higbee's spend assumptions are to be preferred.

(iv) Use of multiplier

24. There is no substantive dispute as to the application of a multiplier¹⁴ to the visitor expenditure figures. This reflects the fact that direct expenditure by visitors induces further expenditure in the area.

25. Further, a different multiplier – that assessed by the APPG on Heritage Rail¹⁵ - provides a helpful benchmark. As Mr Higbee explains, the ratio of expenditure on the heritage railway to local economic benefits was found to average 2.31. Applying that ratio to the present case, an economic contribution of £1,080,000 pa to the local economy could be assumed¹⁶. Whilst Mrs Evans argues that a higher outlying figure should be disregarded, there is in fact no basis for so doing,¹⁷ and there is obviously no stronger case for doing this than for excluding the lower outliers. The Secretary of State can thus

¹⁴ Higbee Proof 3.56-3.59

¹⁵ RVR/31

¹⁶ Higbee Proof 3.64

¹⁷ Higbee Rebuttal 61

take comfort from the fact that Steer’s “bottom up” assessment in the central case would suggest economic benefits of a level which reflects the average for heritage railways identified by the APPG.

(v) *Other economic benefits*

26. It is telling that a range of other economic benefits – not included in the “central case” figure – are not in dispute. There are direct economic benefits from construction. Mrs Evans did not dispute Mr Higbee’s conclusion that the local economic benefits of construction would be **c. £6.5m**, and support c 34 jobs over 18-24 months. There is no dispute that the economic benefits will deliver **jobs** for the local area, and do so in an area which has relatively high levels of deprivation.

27. Mrs Evans takes no issue with the assessment of economic transport impacts of the scheme.¹⁸ It is worth dwelling on this for a moment. Mr Higbee explains that there is an economic benefit from reducing journey times (for car trips) and from achieving a modal shift to rail. This can be set against the economic impacts of delay on the A21 (the assessment of which is not disputed) and new car journeys to Robertsbridge. Those impacts are trivial.¹⁹ Even on this assessment the economic benefits to the transport network outweigh the negative impacts²⁰. Thus even ignoring the economic benefits derived from new visitors to the area, the transportation benefits outweigh in economic terms the impact of any delay on the A21. This important and unchallenged point cuts firmly across the unevidenced assertion of others (including Mrs Hart MP) that somehow the economy of East Sussex will suffer from the railway. That is not a credible dispute in circumstances when all of the economic disbenefits of delay are outweighed by just the economic benefits in transportation terms, without even considering new visitor expenditure. There are further economic benefits for the national rail network, which are also not disputed.²¹

¹⁸ Higbee Proof 3.73-3.99

¹⁹ RVR/33, Table 31. Note that these impacts have been assessed to include a crossing down time of 112 seconds, more than that agreed with HE.

²⁰ Higbee Proof 3.93

²¹ Higbee Proof 3.98

28. Whilst the Landowners do not dispute these figures, they close their eyes to them. The Secretary of State will however wish to note that the economic benefits of the scheme in the local area include £6.5m in construction benefits, and a small local economic benefit in terms of the operation of the transport network. He will also wish to note the absence of any challenge to the conclusion that any economic impacts from delay on the A21 are decisively outweighed, even just by the local benefits to the transport network.

(vi) *Investment in and viability of KESR*

29. In her proof, Mrs Evans sought to argue that the scheme could somehow undermine the viability of KESR. She did not pursue this point at the inquiry, faced with Mr Dewey and Mr Higbee's evidence²². The bottom line is that the scheme can materially improve the efficiency of KESR. Coupled with increased demand, the proposal will support the viability of KESR, not undermine it. It is notable that KESR has been supported by the Culture Recovery Fund during the pandemic, recognising both its national significance and faith in its future viability.

30. It is not disputed that further investment in KESR is capable of delivering increased visitor numbers and increased economic benefits. On Mrs Evans' assessment this could deliver economic benefits of +50% over her own (unrealistically pessimistic) economic benefits case²³. However, the economic case for the scheme is not dependent on a plan for such investment, which has necessarily been affected by the pandemic and the need for heritage railways such as KESR to focus on survival. Nonetheless, as Mr Dewey explained in his evidence, there is ongoing investment in KESR including in anticipation of the construction of the missing link²⁴. There is an opportunity for further investment in the future, which will deliver yet further economic benefits beyond those assessed in the "central case".

²² Higbee Rebuttal para 6-14

²³ Evans Proof 6.15

²⁴ Dewey Proof Section 14.

(vii) Conclusion on economic and wider benefits

31. There is no dispute that the scheme delivers economic benefits. As to the scale of those benefits, the evidence of Mr Higbee contains a far more realistic, if prudent, approach than that of Mrs Evans. The creation of a rail connection at Robertsbridge opens a huge new catchment for both KESR and the attractions it serves, most notably Bodiam Castle. It will provide an attractive day trip for a market of millions of people in London and the South East. When that is seen, an overall uplift in visitor numbers of 22,000 – c. 25% of existing KESR demand, or 15% of KESR demand plus 5% of Bodiam demand – is demonstrably robust or even conservative.
32. The economic benefits need to be seen in the context of the scale of the scheme. This is not a huge of infrastructure intervention of the type hinted at by Mr Highwood in his evidence. It is the reinstatement of a single track railway over a short distance. The scheme costs of less than £6m – funded privately – give a handsome return in terms of economic benefits to the local area, even on Mrs Evans’ unrealistic assumptions. On Mr Higbee’s analysis, the ratio of benefit to cost over a standard 30-year assessment period that would be used for publicly funded projects reaches c. 3:1 – and all at no cost to the public purse. And these benefits represent only a component of the economic benefits, which include a short term boost of £6.5m to the local economy during construction. Thus when a proper approach of considering the scale of the benefits derived from the scale of the project, this is a scheme of real and profound benefit, outweighing its costs on any measure.
33. Whilst the economic benefits alone are sufficient to justify the making of the Order, they are only part of the benefits. The wider benefits, canvassed above, need also to be weighed into the balance and only serve to further confirm the strength of the proposition.

Level crossing safety

(i) Position of the parties

34. The case on level crossing safety is now relatively straightforward. There is no dispute that a level crossing introduces a risk – it is inherent in the means of crossing the railway. However, the real issue is whether that risk is tolerable. The position before the Inquiry is that the principle of such crossings is no longer disputed by the relevant authorities. The local planning authority considered the point in detail in deciding to grant planning permission in 2017, imposing conditions in respect of the proposed road crossings. Following the application for this Order, the Office of Rail and Road (ORR) considered whether it could support the proposed crossings, applying its (then) test of “exceptional circumstances”. Rightly, it required RVR to submit detailed information to satisfy that test. It concluded that that test was met²⁵. It does not object to the proposed crossings. Notwithstanding the protracted process of engagement with them, HE also do not object to the principle of the crossing of the A21, and are now concerned solely with issues relating to safety mitigation measures on the road approaches (see further below).

35. RVR’s articulation of the case for the level crossings was given clearly and succinctly by Mr Keay. Whilst Mr Keay is an RVR director, he is also a man of great professional standing in the rail industry²⁶ and the former Deputy Chief Inspector of Railways. Thus for many years, he was the man responsible for level crossing safety on the railways of Britain. He speaks on these issues from a position of experience and authority. His measured evidence was mirrored by the careful contribution of Mr Raxton, who now stands in Mr Keay’s shoes at the ORR. Thus, this inquiry has heard from the both the former and current office holder responsible for level crossing safety. Their consistent evidence is that in the case of each crossing, a tolerably safe crossing can be achieved. There is no reason for the Inspector or the Secretary of State to give anything other than full weight to their evidence on these issues. The inquiry also heard from Mr Dewey, who operates the current KESR railway and its level crossings, and from Mr Lewis whose land is crossed by the railway and who uses accommodation crossings.

²⁵ REP-017. The “exceptional circumstances” test is no longer part of the ORR policy.

²⁶ As noted e.g. by Sir Peter Hendy

36. Mr Clark’s evidence, by contrast, is not from the railway operator or a person with responsibility for the safety of railways, but from the perspective of someone engaged as a contractor on schemes for the closure of level crossings on the mainline railway. As Sir Peter Hendy explained, the considerations for Network Rail are different, because of the nature of the railway system. Mr Clark wrongly sought to transpose Network Rail standards to the proposed heritage railway. For instance, he sought to deploy “ALCRM”, a tool used by Network Rail to grade the risk of crossings for the purposes of comparative assessment. As Mr Keay explained it is a tool which in fact is only used in respect of existing crossings, and cannot sensibly be deployed to proposals such as these. The whole point of risk management is to seek to design it out – in other words, to ensure that the risk is “as low as reasonably practicable” through the design of the system. Mr Keay explained why, in each case, the design work to date had done precisely that, and that it would continue to do so as the designs are finalised.

(ii) *The principle*

37. The threshold for deciding whether a level crossing is acceptable is whether there is a reasonably practicable alternative to it. This was previously phrased as “exceptional circumstances” in ORR policy; that phrase has been abandoned although the Inquiry heard that it was intended to refer to the same test of reasonable practicability which is now the only threshold in policy. Even if the test remains the same, it is worth noting that the new policy recognises the potential need for new, or reopened, level crossings. That is a consequence of the growing interest in reopening railways, and the reality that the costs of so doing could be prohibitive if grade separation had to be achieved.

38. On each of the highway crossings, the test of no reasonably practicable alternative has been met. At the A21, Mr Portlock’s assessment of the costs of alternative means of crossing the road confirms:

- a. The costs of crossing other than at the level are considerably higher;
- b. That is true even on a like-for-like comparison of costs, applying all of the same assumptions to the proposed scheme as for the alternatives;

- c. In fact, because the proposed scheme has been worked up in detail and can be delivered (in part) through RVR's proven more efficient construction methods (including through suitably skilled volunteers), the costs of the proposed scheme are very significantly less than any of the proposed alternatives which would require significant civil engineering;
- d. Any underpass proposal would encounter issues regarding flood risk and may require an expensive and complex drainage system. It would also require the reconstruction of the road and a temporary road whilst the "top down" construction was carried out. In one scheme it would also require changes to the vertical alignment of the road;
- e. A bridge over the A21 is unlikely to be acceptable in planning terms, as well as being very costly. Since the A21 is elevated as it crosses the flood plain, a considerable height would be required to cross it. The vertical alignment of the section of the railway would also have to be raised, increasing wider visual impacts and land take.

39. It is thus no surprise at all that, following the detailed Arup assessment, the ORR was satisfied that there was gross disproportion in the costs of the alternatives, even assuming the RVR "real world" costings were not used. That conclusion is not, in fact, seriously challenged in this inquiry.

40. The same conclusions follow for the less trafficked roads at Northbridge Street and Junction Road. There is no suggestion, by Mr Clark or anyone else, that grade separation in those locations would be a realistic prospect.

41. Turning to the bridleway crossing, it is right to note that ORR has been more circumspect on that issue. However, in answer to the Inspector's questions Mr Raxton properly accepted that one has "to be realistic as to what is achievable in the context". It is very clear that a bridge in that location would be a significant intrusion into the AONB. To meet bridleway standards it would require long approach ramps, with a further significant effect on the character of the area. The clear advice of the local planning authority is that a bridge is unlikely to be acceptable [REF]. It is not necessary for that to be tested by pursuing an application for a scheme which will not realistically

succeed.²⁷ Mr Clark does not advocate a bridge solution in this location, and notwithstanding the ORR's circumspection, there is no serious case made for grade separation of the bridleway crossing. Indeed, in closing the Landowners accepted that a "tolerably safe" crossing could be constructed in this location.²⁸

(iii) *Detail of highway crossings*

42. The detail of the highway level crossings is a matter which will be settled with ORR through the making of Level Crossing Orders. These orders will govern, for instance, the detail of fencing and warnings. But in any event, the proposed crossings have been considered in detail already. The road crossings will have automatic full barriers with obstacle detection – the best road level crossing solution available. Despite the attempts by Mr Brown (and to a lesser extent Mr Clark) to suggest otherwise, this system manages risk the lowest possible level. It ensures that the barrier system is automated so that the barrier closure sequence will not be followed if the crossing is obstructed. The train is held at a signal until the barrier is closed. This means that until the rail is clear and fully protected by the barrier, the train cannot cross the road.

43. There were various attempts to cast doubt on this system. First, it was suggested that the presence of CCTV indicated that it was remotely controlled by a signaller. That was a misunderstanding: the purpose of the CCTV is to allow monitoring and if necessary to collect evidence of misuse. The purpose is not to control the crossing. Second, it was suggested that there was some sort of manual intervention in the crossing operation by the driver of the train. Of course there is a means of manually controlling the barriers should there be some unprecedented failure. But in its normal operation there is no manual intervention. Even where there is a fault, the fault position is for the barriers to be open and the train held on a red signal. The same goes for the presence of a signal for the train driver to confirm that the crossing has been cleared and the reopening sequence triggered. Such a mechanism does not suggest a manual intervention: it is a prudent further protection for the crossing. Third, it was suggested that earlier proposals for "red light" cameras on the crossings suggested that there was

²⁷ It is nonsense to suggest that such an application should have been included in the TWAO application (Landowners' Closing FN 77). It would have simply been refused by the Secretary of State on the same grounds, thus leaving the bridleway without a means to cross the railway.

²⁸ Paragraph 72

a need for them because of some safety risk. It is not the position that such cameras are needed, and nor are they proposed. Fourth, Mr Clark sought to argue that extensive lighting would be required because of the presence of CCTV cameras, but he confused the need for illumination of CCTV controlled crossings (where the operator must have good visibility to initiate the crossing sequence) and the requirements where CCTV is present simply for remote monitoring.

44. In respect of the bridleway crossing, Mr Keay explained the anticipated system which would include interlocking gates with push button operation to allow a horserider to open the gates without dismounting. There was no suggestion by anyone that this was anything other than the best system for the crossing. It undoubtedly creates a tolerably safe crossing solution.

(iv) Accommodation crossings

45. The position on accommodation crossings has been largely misrepresented by the Landowners. The effect of the Article 3 of the Order is to apply provisions of the Railways Clauses Consolidation Act 1845 in respect of, amongst other things, accommodation works. The effect of the 1845 Act is summarised in [INQ/011-1] and not repeated in full here. Section 68 requires the railway undertaker to make and maintain such accommodation works as “shall be necessary” for the mitigation of severance. The nature of such works is not limited to level crossings: it could include for instance, the provision of new tracks alongside the railway. The requirement is based on need, but is subject to qualifications that the company shall not be required to provide accommodation works where this would prevent or obstruct the working or using of the railway, or in circumstances where the owners and occupiers of the lands have agreed to receive compensation instead. The provisions are therefore capable of mitigating any severance effects: if accommodation works are not provided, the landowner is entitled to be compensated for such severance. Mr Highwood’s evidence was predicated on a false assumption that RVR could simply decide not to provide accommodation crossings, in the face of a need for them. In fact, RVR must provide accommodation works where they are necessary, unless it would prevent or obstruct the operation of the railway.

46. RVR has expressly contemplated the provision of accommodation crossings, and identified locations on the plans where they might be provided. Whether they are provided in those locations, or elsewhere, and whether more or less are provided, is a matter to be settled with the Landowners. Their recourse, in the case of dispute, is to refer the matter to court (s 71). The same goes for works which are required in connection with such crossings, such as ramps. Their size and location is a matter to be settled with the landowners. It is nonsensical to say that the Order land does not include space for ramps, because ramps are only required where the landowner in question requires that the railway provides accommodation works in a particular location. No doubt if the Order provided for vast swathes of land to be acquired speculatively on the basis that it might be required for accommodation works, the landowners would object more vociferously.

47. The role of ORR in respect of accommodation crossings also needs to be properly understood. ORR's consent is not required, unless it finds that there is a need to require a level crossing order – which is said to be rare in the case of private UWCs. Thus whilst ORR would rather reduce the number of individual crossing points, it does not opine on the specifics. Its supervisory jurisdiction of course extends to the safe operation of the railway more generally, and if the presence of crossings rendered the railway unsafe it could prohibit its operation. However, in the present case we are dealing with a heritage railway which in its current operational stretch includes 27 user worked accommodation crossings. The Inquiry has heard from Mr Dewey as to how these crossings are managed, and as to the good relations with the users. Mr Lewis's evidence, which carefully explains each of crossings on his land and how they are used, supports this evidence. It is thus unsurprising that ORR observes "*Many crossings similar to those that might be required by RVR exist on other heritage railways, and on the mainline network, and these can be constructed and used in a tolerably safe manner*".²⁹ It has further stated "*If the railway can demonstrate that it is not reasonably practicable to either eliminate the need for a crossing, or construct a grade separated alternative to an accommodation crossing, and demonstrate that the use of an at-grade accommodation crossing is ALARP, and that the residual risks are tolerable, then at*

²⁹ REP/017-1, paragraph 20.

*this point it is not clear on what grounds we could take action to prohibit the construction or use of such crossings under our HSWA powers”.*³⁰

48. Whilst there is an operational impact for farm workers using a crossing, it is something which is readily capable of being managed. Operational impacts on farming which affect the value of the land holding would be the subject of compensation. So far as risk is concerned, the presence of UWCs on the proposed railway needs to be seen in context of the low frequency and slow line speeds of the services – a point agreed by Mr Highwood in XX. There is no reason to think that accommodation crossings cannot be constructed and operated safely, and Mr Keay explained in his evidence how he would envisage them operating.

49. For those reasons, the Inspector and Secretary of State should conclude that:

- a. Accommodation crossings can be provided where necessary;
- b. That they can be operated safely; and
- c. That they can mitigate the impact of severance to the landowners.

(v) *Potential for level crossing at FP31*

50. Without prejudice to its position that the proposed diversion of FP31 beneath the railway is suitable and convenient (see further below), RVR have demonstrated that there are alternative provisions, capable of being delivered without a further order, that would enable the footpath to cross the railway at the level. In answer to the Inspector’s questions, Mr Raxton did not convey any substantial concerns about a footpath crossing in this location, save to note that it should be consolidated with any accommodation crossing in that location. That is precisely what the alternative provisions would achieve. If there is a need for specific measures to deal with the relationship between the footpath and accommodation crossing, and the A21 crossing (e.g. interlocking), then this could be achieved through the Level Crossing Orders that would be necessary

³⁰ RVR/69

for the footpath and A21 crossing points. It follows that, if necessary, a safe level crossing for FP31 could be delivered.

Highways

The A21

51. The impact on the A21 had very significant prominence in objections to the Order, and in the written evidence to the Inquiry. However, in fact, the concerns in respect of the A21 level crossing have largely not been substantiated.

(i) Congestion etc.

52. None of the parties to the Inquiry makes any argument that the Order should be refused on the grounds of congestion on the A21, or any economic impact on the strategic road network. This concession was confirmed by Highways England in its oral and written evidence and, belatedly, by Mr Fielding for the Landowners. It was agreed that by all highways witnesses that the relevant test is found in the NPPF: whether the residual cumulative impacts on the road network would be severe.³¹ The impact of the proposed level crossing comes nowhere near meeting that threshold.

53. It is important to bear in mind that even on the busiest day, there would only be 20 occasions during the course of a day that the crossing closure sequence would be initiated. For the purposes of assessment, HE and RVR agreed that a 72 second closure sequence should be assumed. The Landowners had no reason to challenge that closure period for these purposes, save to argue (strenuously) that it should be regarded as a minimum.³² The railway is only expected to operate on less than half the days of the year. Further, by planning condition the operation of the crossing is prevented during week day peak hours.

³¹ NPPF para 111. A similar test is set in HE's licence conditions for refusing to permit a "connection": "a presumption in favour of connection, except where a clear case can be made to prohibit connection on the basis of safety or economic impacts."

³² Even if it was slightly longer – which is not anticipated – the conclusions of all of the assessments would not materially change.

54. It follows that the actual interference with the free flow of traffic on the A21 is extremely limited – far more limited than a signalised junction or pedestrian crossing. Any slight delay caused by a level crossing closure would not have an effect on overall journey times on the A21. Concerns in this regard from other objectors (e.g. from Sally Ann Hart MP) were misplaced.
55. RVR nonetheless assessed an “extreme” worst case for the purposes of identifying queue lengths. This was to assume that the closure occurred in the busiest 15 minutes of the most heavily trafficked day of the year. The traffic data used was from a busier part of the A21. Whilst a closure in that period is of course possible – since the busiest days on this part of the network fall on bank holidays when the train may well be operating – it is not a regular event. Even then, whilst relatively long queues would be caused, no driver would be delayed by more than the closure sequence – i.e., 72 seconds. Drivers joining the back of the queue would only be delayed momentarily before the queue moved off. Whilst such ultra-precautionary analysis may be appropriate for assessing safety impacts (see below), it does not fairly represent the impact of the development on the road network in normal circumstances. In most closures, relatively few drivers would be delayed for a relatively short period of time. On most days, there would be no closures at all.
56. The absence of any material impact on the network is confirmed in the economic analysis of delay (see above)³³. The financial impacts are insignificant, and indeed are outweighed simply by the transport benefits of the scheme. In those circumstances, it is unsurprising that HE withdrew its objection to the scheme on the grounds of the impact on the flow of traffic on the A21 in the Statement of Common Ground [INQ/60].
57. The Landowners position on this issue was somewhat confused. Mr Fielding readily accepted that it was appropriate to apply the NPPF test; and he readily accepted that there was no case for withholding consent for the scheme having applied that test. However, the Landowners (through Mr Brown) persisted with an argument that the delay caused by level crossing closures was an adverse effect of the scheme that nonetheless weighed against it. Such an approach undermines the clear direction given in the NPPF that highway impacts such as delay should *not* hold back development

³³ And see RVR/33, Table 3.1

unless the residual cumulative impacts reach a level of severity. Accordingly, the Secretary of State should give little weight to those arguments that such lesser impacts weigh materially against the scheme. In any event, as the detailed traffic assessment and economic analysis confirms, the impacts are occasional, short lived, and minor.

(ii) *Highway safety*

58. Both HE and the landowners maintain an objection on the grounds of highway safety. However, on proper scrutiny, those objections were simply not substantiated at the Inquiry.

59. HE's painstaking approach to the design of the A21 might be applauded, but it was wholly unnecessary for it to pursue an objection to the Order. HE has wholly failed to identify any reason in principle why a safe crossing of the A21 in this location could not be achieved. Indeed, if it had done so, it is inconceivable that it would have withdrawn its holding objection to the planning application and expressed itself content with conditions which prevented the development from occurring until necessary "departures" had been approved. For reasons which remain difficult to fathom, HE has elected to deal with the Order in a different way, namely to maintain an objection *until* a "departure" has been approved. It has done so in the face of protective provisions which prevent the crossing from being constructed until the detailed design (which includes/requires the departure) is approved by it.

60. The chronology of the engagement with the departure process does not need to be repeated in these submissions. It suffices to note that a position has now been reached where HE and RVR are discussing further mitigation measures. As Mr Bowie confirmed in his evidence, these matters are capable of being satisfactorily resolved. There is no "showstopper". The Order process should not be concerned with such levels of detail. Indeed, the points of concern to HE were not even fully enumerated by Mr Bowie in his evidence and he could not speak for the panel that were dealing with the departure ("SES").

61. It follows that HE has failed to substantiate any safety objection to the principle of the A21 crossing, which is what would be settled by the Order. The detail – including mitigation measures – are for subsequent agreement with between RVR and HE. If

HE's objection on paper is maintained at the time that the Inspector reports to the Secretary of State, he should report that all of HE's concerns can be addressed through the departure process (agreed by Mr Bowie), that they do not present impediments to the scheme (again, agreed by Mr Bowie), and that the terms of the protective provisions (and indeed the planning conditions) ensure that the crossing cannot be constructed until these matters have been settled to HE's satisfaction (again, agreed by Mr Bowie and by Mr Harwood).

62. The Landowners' evidence on highway safety had even less substance to it. Despite his lengthy written evidence, in cross examination Mr Fielding was bound to concede that he had only two points: compromised sight stopping distance (SSD) on the northbound approach to the crossing, and lack of visibility across the A21 roundabout. Both of these points describe existing highway conditions; any deficiencies exist regardless of whether the scheme comes forward. More fundamentally, both are readily capable of being addressed through minimal interventions within the highway boundary to clear vegetation. If HE does not procure those works in any event, then they can be secured in the approvals under the protective provisions.
63. Mr Fielding also appeared to be concerned in respect of pedestrians crossing queuing traffic near the A21 junction. However, he seems to have disregarded the fact that the junction is fenced in this location, forcing pedestrians to walk to the signalised crossing just to the north of the junction. Accordingly, to pass between queuing vehicles in the vicinity of the A21 roundabout other than at the crossing, it would be necessary to climb over the pedestrian barrier.
64. Accordingly, despite the vigour of the Landowners' attention to the A21, and their repeated demands to interrogate the detail of submissions made to HE on matters of detailed design which could have no bearing on the *principle* of the level crossing, their case has come up entirely short. Belatedly, Mr Brown recognised as much in closing: "the Landowners recognise that these risks do not reach the NPPF threshold of being

“unacceptable””³⁴. The crossing does create a new stopping point on the road, but it is capable of being delivered in a way which meets all relevant safety requirements³⁵.

65. There is no highway safety objection of substance just as there is no objection of substance on the grounds of congestion. There is nothing that cannot be addressed under the well-established mechanisms in the protective provisions and in the planning permission. The protective provisions establish, amongst other things, a “detailed local operating agreement” which will govern the management and maintenance of the crossing once built. In the circumstances it is regrettable that so much time, before and during the Inquiry, was spent on the A21.

Northbridge Street and Junction Road

66. Northbridge Street and Junction Road can be dealt with shortly. There is no objection from the relevant highway authority. There is no suggestion from any party that the crossings would cause material impacts on the flow of traffic. Like at the A21, any delay would be occasional and minimal. On Junction Road, Mr Fielding sought to pursue an argument about the road speed. However, the argument was without substance. RVR has agreed with the highway authority that a speed limit change should be introduced, and indeed agreed a traffic regulation order to which no objections were made. This will deliver wider safety benefits as well as ensuring that the crossing can be introduced without any safety objection. For those reasons, there is no highways case against these two crossings.

Footpath and bridleway users

67. Aside from a temporary diversion during construction, the bridleway will not be diverted by the proposals. The proposed crossing is addressed above, and it can be constructed and operated in a “tolerably safe” way. The impact on users of the bridleway will not be material.

68. The Order provides for the stopping up and replacement of part of footpath 31. By virtue of s 5(6) TWA:

³⁴ Paragraph 60

³⁵ For instance, queues would not “sudden and unexpected” given the presence of signage, etc. There are many junctions on the A21, including at the Robertsbridge roundabout. Stationary traffic is thus expected in places on roads such as this.

“(6) An order under section 1 or 3 above shall not extinguish any public right of way over land unless the Secretary of State is satisfied—

- (a) that an alternative right of way has been or will be provided, or
- (b) that the provision of an alternative right of way is not required.”

69. Annex 2 of the TWA Guide [INQ005] provides commentary on Schedule 1 to the TWA. In respect of paragraph 4 it states: “If an alternative is to be provided, the Secretary of State would wish to be satisfied that it will be a convenient and suitable replacement for existing users”. It is important to recall that this is a statement of policy; it is not a condition precedent for making the Order. In other words, the Secretary of State may approve a diversion even if he had concerns about its convenience, if it was concluded that the public interest justified such an approach. The only legal condition is in s 5(6), namely that the Secretary of State must be satisfied that, if required, an alternative right of way will be provided.

70. The diversion proposed here would take the footpath under the railway adjacent to the River Rother. It is a short diversion which would have no material effect on journey times. The highway authority has not objected to the proposal, nor has any user of the footpath or representative bodies such as the Ramblers. Further, the proposed diversion has the benefit of planning permission, demonstrating that the local planning authority is satisfied with what is proposed. The issue raised by the Landowners relates to the risk of flooding of that footpath. As explained in [INQ81], the proposal as shown on the planning drawings would mean that the footpath would flood more frequently than it does at present (2-3 times per year). However, a solution is proposed which would allow a split-level footpath, the higher level being flooded no more frequently than the existing path. Whilst the upper path would have limited headroom, it would be passable when the lower path was flooded. Both levels of footpath would be relatively narrow (1.2m in the lower level, 0.85m in the upper level) but the context is a rural footpath which is already constrained e.g. where it meets Church Lane. Further, even when the footpath does flood (as happens now), there are diversionary routes available to ensure that users can reach their destination (see INQ 81 at Figure 6).

71. RVR's clear view is that this solution is a convenient and suitable replacement, and it can be provided to meet the s 5(6) test. This is not a comparable situation to that relied on by Mr Clark (in Ely), where (a) there was no existing risk of flooding (b) the frequency of flooding had not been assessed and (c) the diversion route, if a flood was encountered, would be substantial. The situation is far closer to a scheme which Mr Clark himself worked on, namely the Gipsy Lane level crossing diversion. There, a footpath was diverted from level crossing to a river culvert running beneath the railway, with 2m headroom, constrained width, and a propensity to flood at certain times of the year. Notwithstanding these constraints, it was considered an appropriate diversionary route.
72. Further and in any event, RVR has indicated that if the Secretary of State is not satisfied as to the underbridge route, then provision could be made within Order limits for the diversion of the footpath over the railway at the level, adjacent to the indicative accommodation crossing. This would be a short diversion, crossing on a level crossing. The acceptability of that crossing is addressed above. In short, this provides an acceptable alternative if it is considered that the proposed diversion is not suitable and convenient for users. Without prejudice to its primary case, RVR has supplied to the Inquiry plans and a draft order which would secure this alternative solution.

Flood risk and hydrology

(a) The planning tests

73. Whilst the extent of the debate at the Inquiry might suggest these proposals were somehow breaking new ground, the basic policy tests on flood risk are well-established and familiar to the Inspector and the Secretary of State.

74. The first test is the sequential test (“ST”). The purpose of the ST is to drive development to areas of the lowest flood risk³⁶:

“The aim of the sequential test is to steer new development to areas with the lowest risk of flooding from any source. 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. The strategic flood risk assessment will provide the basis for applying this test. The sequential approach should be used in areas known to be at risk now or in the future from any form of flooding.”

75. That test was in place at all material times in the determination of the planning permission. There is a simple answer to the application of the ST here: there is no other location in which the railway can be reinstated, other than in the flood plain where it was originally instated. It is for that reason that the principle of development in the flood plain was found to be acceptable by both the EA and the local planning authority.

76. The application of the ST is further explained in the PPG. Importantly the PPG states: “The Sequential Test does not need to be applied for individual developments on sites which have been allocated in development plans through the Sequential Test”. The development is proposed on a site allocated for that purpose by Policy EM8. Again, it is thus unsurprising that the ST was not a basis for resisting the grant of permission. Despite his attempts to evade them, Mr Patmore in truth had no answer to these points in cross examination.

77. The Landowners’ case on the ST, set up by Mr Patmore and then renewed again by Mr Brown in closing, turned on Table 3 in the PPG. Table 3 is not part of the ST. Indeed to make their case, the Landowners are driven to ignore the “Notes to table 3” which state “**This table does not show the application of the Sequential Test**”. Mr Brown

³⁶ NPPF para 162

ambitiously argues (Closing 83e) that this “does not mean that [Table 3] cannot show the limits to which [the ST] can be taken”. But that is precisely what it does mean: it is not about the ST at all. Table 3 is about the application of the exception test (“The Exception Test should only be applied as set out in Table 3 and *following* application of the Sequential Test”³⁷).

78. In truth, therefore, the ST does not mandate any particular answer. If it did, the NPPF would say so. The Landowners’ arguments seek to take a table which is not part of the NPPF, but rather a hyperlink from the PPG, and suggest that it imposes a deterministic policy test on how the ST should be concluded. This novel argument is unsupported by any previous decision. If it had any credibility, it is highly likely that it would have been noticed and pursued by the local planning authority, or the EA.

79. In summary therefore, the ST is met in this case because there is no other place in which the railway can be reinstated. The test has already been “passed” because the site has been allocated in the plan making process for precisely this development. Even if it the ST is applied again, there is only one answer to it. Thus on a proper analysis the extensive arguments presented by the Landowners on this point are wholly misconceived.

80. The second test is the exception test (“ET”). The ET is also summarised in the NPPF:

“To pass the exception test it should be demonstrated that:

- a) the development would provide wider sustainability benefits to the community that outweigh the flood risk; and
- b) the development 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.”

81. As to limb (a), the wider benefits of the scheme are addressed above, and not repeated here. As to limb (b), Mrs Callaway’s evidence was that the development would remain safe for its lifetime without increasing flood risk elsewhere. The Landowners’ contrary arguments are based on two points, neither of which has merit.

82. First, they observe that the railway itself may flood, and suggest that this means that the proposal will not be “safe for its users”. However, such an analysis is removed from

³⁷ PPG paragraphs 27 and 35

reality. As Mr Patmore accepted in cross examination, many developments may *contemplate* their being flooded. For example, a proposal for sports facilities which might properly be located in an area of high flood risk would not be regarded as *unsafe* just be reason of it being occasionally flooded. The football match would simply be cancelled. The risk of flooding of the railway is addressed through (a) not operating the railway in times of flood and (b) a suitable maintenance regime to ensure that the railway infrastructure is not damaged when it is inundated³⁸. As Mr Dewey explained in his evidence, such measures are already applied to the existing operations of KESR. The existing railway is already operated safely notwithstanding the risk of flooding of the line. The same, in fact, is true of many railways.

83. Second, the Landowners argue that there “will be areas where [the scheme] could increase flooding”. The FRA – which, importantly, is not challenged – in fact shows that the scheme would cause small changes in flood water levels. The flood extent predicted with the scheme is very similar to the baseline scenario for all modelled flood events. No new receptors will be affected by flood with the scheme beyond those that are currently affected by the same flood event. Flood depths may be reduced to the south of the railway. Accordingly, the Landowners’ case fails to address the actual test. It is not whether water levels would change, but whether “flood risk” would be increased. There is no increase in risk from the minimal changes in flood levels; and the propensity of the land to flood does not change. All of this is confirmed in the unchallenged FRA, the assumptions of which have been considered and accepted by the EA.³⁹

84. It follows that the proposed railway will be “safe for its lifetime” and will not increase “flood risk elsewhere”. The ET is therefore met.

85. Thus, contrary to the Landowners’ case, there is no flood risk policy objection to the proposals. The impacts on flooding are minimal and are essentially concerned with flood depth in areas which will already flood in the modelled events. It can scarcely be said that the EA would not raise concerns if a proposal to construct a railway in a flood plain did fail either of the planning tests. But there has been no objection on flood risk

³⁸ See RVR/W7/1, Section 4.6; and RVR/W9/1

³⁹ In fact, the updated FRA has been proved to be excessively precautionary by applying a 105% climate change allowance. The now published allowances show that this was overly pessimistic.

grounds from the EA, the local lead flood authority, or the local planning authority. That is notwithstanding the fact that the EA has pursued a minor objection to the terms of the Order, and attended the inquiry accordingly. Contrary to the Landowners' submissions, statutory bodies do not need to attend proceedings such as these to explain why they *do not* object: the fact that they do not object is in itself a matter to which the Secretary of State will wish to give weight and importance. Moreover, for the reasons explained above, it is obvious why the EA does not object to these proposals on the grounds of either the ST or the ET.

86. The FRA also provides a complete answer to the flood objections from third parties, including the Cricket Club and Professor Leigh. None of those objectors disputed the findings of the updated FRA on any technical level. Those findings demonstrate that the risk of flooding is not increased by the scheme. The only changes are minor changes to depths.

(b) Compensation storage

87. In its representations on the planning application, the EA sought the imposition of a condition regarding flood compensation storage⁴⁰. This requires that a “satisfactory scheme for compensatory flood storage” must be submitted to the local planning authority for its approval in consultation with the EA. The condition goes on to state that the applicant “will need to demonstrate that there will be no loss of floodplain storage post development with any loss of floodplain storage to be compensation for on a volume by volume, level by level basis and in a suitable location”. The purpose of the condition is to “prevent flooding elsewhere”. In fact, recent and ongoing engagement with the EA suggests that the need for compensatory storage will depend on the final assessment of the impact of the scheme on flood risk⁴¹. Thus it is possible that the EA will not seek compensatory storage at all. If such storage is not needed to “prevent flooding elsewhere”, then such an outcome can be expected.

88. The Landowners have seized upon this condition as an alleged impediment to the scheme. They have done so despite being told by the EA that they were not concerned

⁴⁰ RVR/07 condition 11

⁴¹ As explained in INQ/150. Contrary to Mr Brown's closing at 124, the EA has not been discussing possible sites for compensatory storage with RVR.

about the prospect of suitable compensation being provided if required. RVR's position is that it is premature to propose a detailed flood compensation storage scheme when the EA will not agree to it until final design work is carried out. It is for that reason that it did not present such a detailed scheme to the Inquiry: it would have been speculative.

89. Nonetheless, RVR has demonstrated that even on pessimistic assumptions it can deliver a scheme for flood compensation storage. It has land in its control to do so; additional land which can be used for compensatory storage is within the Order limits; and further parcels of land are available for such storage through agreement with a neighbouring landowner to the south of the railway. Taken with the fact that such storage may not be required at all, and the satisfaction of the EA on this issue, the Secretary of State can be satisfied that compliance with condition 11 presents no impediment whatsoever.

90. The detail of the *potential* need for compensation and how it could be met therefore sit, in RVR's submission, beyond that which it is necessary to resolve in this Inquiry. However, on scrutiny of the detail:

- a. Mr Patmore has materially overstated the potential need for compensatory storage in his assessment of volumes. He has assumed that the embankments extend to rail level. He has not accounted for the flood levels – rather just assuming the whole embankment is within those levels. He failed to consider areas of cut. He missed some of the culverts. He did not use the LIDAR data but rather spot heights;
- b. Capita's calculations demonstrate that even on pessimistic assumptions (including the 105% climate change allowance, which is not required) the volumes are significantly less than those claimed by Mr Patmore. When challenged on this by the Inspector, Mr Patmore's essential (if begrudging) answer was that he could not dispute Capita's calculations;
- c. The potential areas for compensation storage show volumes which vastly exceed that which would be required. As Mr Southon explained in the round table session, even taking Mr Patmore's flawed estimates, only about 35% of the available volume would be required;

- d. On the areas presented, Mr Patmore could not identify any reason why they could not provide compensatory storage as indicated. The only point he appeared to pursue was the area at the Salehurst “Halt” may not be suitable if the halt was constructed. But as RVR has explained, provision is simply made for land to accommodate a halt.⁴² A suitable scheme for flood compensation storage must be provided under condition 11. If that included this land, and it prevented it from being used as a halt, then obviously the planning condition would take precedence.

91. Finally, it is necessary to consider whether anything would prevent these compensation areas from being used for that purpose if so required. The potential compensation areas to the south of the railway are the subject of an agreement in principle with the landowner, if they are required for that purpose. It is not necessary, for the purposes of showing that there is a solution which is capable of addressing these concerns, to show a binding contract to construct the compensation areas in those locations. Indeed, that would be premature for the reasons canvassed above. Whilst works to alter ground levels and create channels might not meet the threshold of engineering operations, and may be carried out under permitted development rights, in certain circumstances the provision of flood compensation storage may require a further grant of planning permission. However, if it did:

- a. It would be to establish a “satisfactory scheme” under condition 11, and thus highly unlikely to be objectionable;
- b. It would serve the purpose of mitigating flood risk, and thus again highly unlikely to be objectionable.

92. For those reasons, if compensatory storage is needed it can clearly be delivered. There is no impediment to the scheme in this regard. The EA agrees.

⁴² See e.g. RVR/W/1/1, paragraph 7.7

(c) Protective provisions and conditions

93. Finally, it is important to note that these matters are the subject of both planning conditions and protective provisions for the EA. The protective provisions require the EA's approval for "specified works", which includes the works within the vicinity of the River Rother and its flood defences and any works designed to contain or divert floodwaters. Accordingly, the statutory authority granted by the Order would still require the approval of the EA to the detail of the works.

Ecology

94. The ecological impacts of the scheme were considered in detail at the planning application stage⁴³. Subject to detailed conditions requiring the submission of relevant management plans, those impacts were found to be acceptable. There is no evidence before the Inquiry to suggest that any different approach should be taken when considering these matters in the context of the Order.

95. The Landowners and others have emphasised the high ecological value of the area around the railway. As Mr Coe confirmed in his evidence, that is not in dispute. However, the impacts on ecological receptors are limited and capable of being mitigated, and where necessary any loss can be compensated for. His evidence was virtually unchallenged at the Inquiry.

96. In terms of the sufficiency of ecological data, it is openly recognised that further survey work is required. That is a consequence of the Landowners' refusal to permit surveys to be carried out. However, the approach in the ecological appraisal and ES has been to adopt a precautionary approach. The assessment has been borne out by the survey work which has been possible, between Junction Road and Austen's Bridge. That section also demonstrates the workability, and benefits of, the mitigation measures established by the grant of planning permission.

97. Insofar as the ES anticipates the provision of replacement planting, as part of the objective of ensuring no net loss and seeking to achieve a net gain in biodiversity, Mr Coe explained how that planting can be delivered within the railway corridor, and on

⁴³ See e.g. RVR/56, paragraph 6.8

other parcels of land controlled by RVR. Any such compensatory planting would be secured through the approval of LEMP under planning conditions. Mr Coe explained that there is sufficient land to achieve this. As an aside, there is no inconsistency between using land for habitat replacement, and the same land being available as flood compensation storage (Area 1 being a case in point)⁴⁴. It is perhaps ironic that the Landowners who pray in aid the ecological value of Rother floodplain refuse to accept (without any expert evidence on the point) that an extended flood plain could also be of ecological value. Mr Brown suggests that there has been “last-minute scrabbling around” to present ecological mitigation land as flood compensation storage but this is simply a misrepresentation. Land which is, or will be, in RVR’s control can serve either or both purposes. The extent of land and its use will be determined through the discharge of planning conditions.

98. In summary, the ecological impacts of the scheme have been assessed in accordance with best practice – a point confirmed by Mr Coe and not disputed at the Inquiry. Appropriate mitigation measures have been secured by the imposition of planning conditions, which will necessarily have to be complied with in the implementation of the scheme. These measures are capable of being delivered and can avoid any net loss of biodiversity and seek to achieve net gains. Specific provisions for protected species will be made through the licensing process, as they have been for the section of the railway where works have already been undertaken.

Heritage

99. The impacts on heritage assets were fully assessed in the ES, and no serious issue is taken with that assessment. The proposals will have an impact on the setting of Robertsbridge Abbey, but the railway will run on an existing embankment, and there is substantial existing intermediate vegetation. As Bodiam Castle – one of the highest value scheduled ancient monuments in the area – demonstrates, the railway is capable both being accommodated in the setting, and better revealing the significance of the asset.

⁴⁴ See further INQ/150, Appendix A, and section 3.4 in particular.

100. In policy terms, whilst there is “less than substantial”⁴⁵ harm to the setting of the Robertsbridge Abbey which should be given significant importance and weight, there are countervailing heritage benefits of the scheme, as noted above. That explains the National Trust’s strong support for these proposals: allowing visitors to get to Bodiam Castle, in a sustainable way, and then experience its rich heritage is a clear and compelling benefit of the scheme. Thus any heritage harm caused by the reconstruction of the railway within the wider setting of Robertsbridge Abbey is outweighed by the heritage benefits of the scheme alone, and decisively outweighed by the further public benefits set out above.

Landscape

101. The reinstatement of the railway is in a protected landscape – the AONB. However, the presence of the historic railway in this location is expressly recognised for the positive contribution it makes, and can potentially make, to landscape character and visual amenity. As noted in [RVR-W5-2-1]⁴⁶ the “*Kent and East Sussex Steam Railway [which] runs from Bodiam to Tenterden in Kent*” is one of CLCA 13’s stated Key Positive Landscape Attributes. Similarly, the 2019-24 High Weald AONB Management Plan notes that the “89km of historic railway line” within the AONB contributes to the area’s natural and cultural capital.

102. The impacts on the landscape have been the subject of detailed assessment, both at the planning stage and then through further work in the context of this application. This included, specifically, considering the impact on the AONB’s objectives as sought by the AONB Unit and as directed by the Secretary of State in the scoping decision. Those assessments have been revisited in detail by Carly Tinkler, who gave reports in April 2020 and again in May 2021, following a site visit. Those assessments confirm that the scheme would not give rise to significant effects on landscape character. The detailed re-assessment in RVR/70-02 supports, through thorough assessment, the proposition that the railway itself would not give rise to significant effects on views, although there would be potential adverse effects from moving trains. Whilst there would be slight conflict with the AONB management plan objectives of “maintaining

⁴⁵ In terms of NPPF paragraph 202

⁴⁶ See paragraph 3.4

existing extent of woodland” (W1) and “secure agricultural productive use of fields” (FH1), the proposals otherwise accord with those objectives.⁴⁷

103. The Inquiry heard from Mr Webster who took issue with aspects of the LVIA methodology. In fact, many of his comments were also reflected in Ms Tinkler’s work. As explained in INQ/39, Mr Webster’s comments did not affect Ms Tinkler’s overall conclusions.

104. It is important to note that there is no objection on landscape and visual grounds from the planning authority, the AONB Unit, or Natural England. Policy EM8, which supported the reinstatement of the railway, identified the impact on the AONB as a key issue to be resolved. The local planning authority concluded that the impacts of the scheme would be acceptable in that context: “it is considered that the limited impact of the proposal with the proposed mitigation measures would have an acceptable impact on the High Weald AONB.”⁴⁸ Accordingly, the Inspector can report to the Secretary of State that the impacts of the scheme on landscape and on visual amenity have been properly assessed, including against the objectives of the AONB, and found to be acceptable.

Car parking

105. The provision of a connection at Robertsbridge serves the direct purpose of avoiding car travel. The mode shift assumptions which underpin Mr Higbee’s assessment were not challenged by Mr Fielding or Mrs Evans – or anyone else. It is assumed that 85% of the *new* customers will use the rail link – that being the key to opening up new catchments and inducing new demand. However, it is recognised that there will be some new customers who drive to the Robertsbridge Junction terminus. It is also assumed that some of the existing demand, which arrives by car, would drive to Robertsbridge rather than Tenterden or Bodiam. As a result, the mode share of arrivals at Robertsbridge is in fact assumed to be 43% by train and 57% by car – very close to the 50/50 split advanced by Mr Brown QC in cross examination of Mr Hamshaw. It follows that the anticipated maximum parking demand at Robertsbridge is c. 33 cars per day⁴⁹.

⁴⁷ See RVR/70-02 at 5.7.20-35

⁴⁸ RVR-56, para 6.6.4

⁴⁹ RVR-09, Table 5-4 (pdf p 65)

106. It will be readily apparent that the existing station car park has more than adequate space to accommodate such a level of demand. On Mr Fielding's survey, the details of which were not provided, there would clearly be sufficient space to accommodate this additional parking demand when account is taken of the substantial areas of unmarked bays within the car park. Parking controls have already been deployed on surrounding streets in Robertsbridge, and if problem parking did occur that would be the obvious solution. The planning permission is subject to a Travel Plan condition through which appropriate measures can be agreed with the local planning authority to address parking at Robertsbridge, if required. Accordingly, there are no parking issues which undermine the case for the Order.

Appraisal against NPPF and local policy

107. The starting point here is to repeat the fact that this is a scheme which benefited from express policy support in the development plan. Policy EM8 stated that the extension "will be supported" along the route identified in the Proposals Map⁵⁰ – i.e. the route of the Order scheme. The policy was subject to three criteria relating to the integrity of the floodplain and flood defences at Robertsbridge, the impact on the AONB, and "appropriate" arrangements for crossing the A21, B2244 (Junction Road), Northbridge Street and the River Rother. The policy was subject to independent examination, where the Landowners' objections were considered. The examining Inspector noted that the use of compulsory purchase powers could be considered should those objections be maintained.⁵¹ This express development plan support is clearly a matter to be given significant weight. It is right to observe that through recent changes to the development plan the policy has not been saved, but that is because the permission it envisaged has been granted.

108. Accordingly, the local planning authority's conclusion that the proposal is in accordance with the development plan should be followed by the Secretary of State. The proposals are also consistent with the now made Salehurst and Robertsbridge Neighbourhood Plan: see the review at RVR/W1/5-2. Mr Gillett's evidence on these points was not challenged at the Inquiry.

⁵⁰ RVR/02

⁵¹ RVR/16

109. In terms of the NPPF, the scheme aligns with a range of objectives in national planning policy.⁵² Paragraph 84(c) states that planning decisions should enable “sustainable rural tourism and leisure developments which respect the character of the countryside”. The reinstatement of a heritage railway, providing sustainable access to Bodiam, Tenterden and the wider area through a mainline connection, is the paradigm example of such a development. The scheme also promotes sustainable transport, in accordance with paragraph 104 of the NPPF. For the reasons addressed above, the proposal is also consistent with paragraph 111 (highways impacts). Similarly, for the reasons recorded above the Secretary of State can note that the proposals are consistent with NPPF policies on flood risk (section 14), heritage (section 16), landscape (174) and AONB protection (176), and biodiversity (180). In those circumstances, the proposal should be regarded as being for “sustainable development”, and benefit from the presumption in favour of such development in paragraph 11 of the NPPF. Notably, the Landowners do not argue to the contrary.

The Environmental Statement

110. The adequacy of the ES was extensively scrutinised prior to the Inquiry. First, the local planning authority concluded that it was adequate for the purposes of determining the planning application. Second, the Secretary of State issued a scoping opinion which confirmed its adequacy for the purposes of the application for the Order, subject to one issue (relating to the AONB, see above). Unusually, that “scoping” had the benefit of a full ES since it had already been accepted for the purpose of the planning application. Third, the Inspector gave a direction under rule 17 requiring *further* information on various matters which was complied with in March 2021. The further environmental information was consulted upon. No further requests were made. Fourth, the ES was reviewed and revalidated at the same time as the rule 17 request was complied with. Although the Landowners made various submissions at that time, none of them went to the legal adequacy of the ES. Fifth, the Landowners have had a full opportunity to take any issue on the adequacy of the ES at this Inquiry, including through questioning Mr Slatcher (who gave his expert view that the ES was, as a whole and with the benefit of the revalidation and further environmental information,

⁵² See RVR/W1/1, 6.4 and following.

adequate). They have not done so, and thus can be taken to have dropped the points previously pursued in correspondence.

111. The Inspector should therefore report to the Secretary of State that the environmental information necessary to determine the application was before the Inquiry, and was adequate for the purposes of determining the application.

Procedural requirements

112. RVR has confirmed that all relevant procedural requirements have been met. No objection has been taken by others on such grounds. Accordingly, the Inspector can report the Secretary of State that the application has been made in accordance with the Rules and there is no procedural objection to the Order being made.

Proposed changes

113. The only change to the Order proposed by an objector is from the EA. The change sought is to allow for a deemed refusal if a decision is not made within the required period. It remains open to the EA to refuse an application, including on the basis that insufficient information has been provided. The approach here is wholly consistent with standard protective provisions applied in many cases. Pennie Yorath explained that there was nothing in particular in this order which would mandate a different approach. She explained that the EA was “lobbying to get the standard protective provisions changed”.
114. It is not for RVR to change the established approach to protective provisions, or to address the EA’s “lobbying” on the point. It would be surprising if this were the case where precedent was not followed on this issue. In those circumstances, RVR submits that the Order should be made as proposed,

The case for compulsory purchase

(i) The compelling case: general approach

115. There is no dispute that the land which is the subject of compulsory acquisition is needed for the scheme. RVR has been able to acquire some of the land required for the scheme by agreement – and indeed has constructed part of the railway on the land which it controls. However, two landowners whose land was crossed by the original railway oppose its reinstatement and oppose the acquisition of their land. Recent correspondence confirms that their objection is to the principle of the scheme, as Mr Highwood also confirmed in his evidence. There appears to be no prospect of acquiring the land in question by agreement.

116. In those circumstances, the authorisation of compulsory acquisition of the land is both necessary and appropriate to deliver the scheme and the benefits it brings. Those benefits amount to a compelling case in the public interest for the use of CPO powers. There is no alternative means by which those benefits can be delivered without the use of the land where the original railway ran. RVR recognises the interference with the landowner interests, and the impacts that such an interference will have on the farming operations. It has carefully assessed those impacts.⁵³ However, those impacts can be largely mitigated through working together to agree accommodation crossings. Compensation will be payable to put the landowners in the position they would have been but for these proposals.

117. The landowner's approach to the "compelling case" is a slightly odd one. Perhaps realising that the benefits of the scheme decisively outweigh the acquisition of land which until 1961 was part of an operational railway, and which until 1981 was owned by the British Railways prior to its sale to the current owners, Mr Highwood (and Mr Brown) seek to pray in aid a range of claimed "disbenefits" of the scheme which are unrelated to the interference with the landowner's rights. Such an approach is not supported in the CPO Circular or elsewhere, despite Mr Brown's arguments to the contrary. It involves, on the facts of this case, sweeping up a series of notional "disbenefits" which are not said to reach a threshold which justifies withholding

⁵³ RVR/67 and 68

consent for the scheme on those grounds, and putting them forward as a reason to resist the Order through the back door. Put another way, the Landowners appear to suggest that if the Secretary of State finds, for example, the highways impacts of the scheme to be acceptable, he should nonetheless find that highways impacts undermine the “compelling case” for the acquisition of land.

118. This approach risks creating absurd results, as demonstrated by the way it emerged through the Landowners’ evidence. Their highways expert largely conceded the highways case, but Mr Highwood felt that he could reinvigorate the arguments as a “subjective sense check” based on his “perception” of impacts which the experts have found to be acceptable. The impacts on the A21 are nothing to do with the Landowners, who use the roads only as members of the public. If the impacts are judged to be acceptable, applying well-established planning tests which are not disputed in this inquiry and on the basis of objective expert evidence, the point cannot be resurrected as an objection to compulsory purchase. As Mr Highwood (and Mr Brown) should have recognised, this is not a proper approach to the determination of the issues arising from this Order, nor to his own expert evidence.

119. In fact, and in any event, the disbenefits of the scheme are limited, for the reasons set out above. Even taking Mr Brown’s approach of revisiting every possible disbenefit, no matter how minor or how comprehensively outweighed by benefits of a similar kind, the disbenefits do not undermine the compelling case. They do not cut across the substantial benefits articulated above. This point is perhaps best demonstrated on the highways case, which Mr Brown seeks to resuscitate in closing submissions. Mr Brown contemplates and dismisses a “complex calculation”⁵⁴ of weighing benefits and disbenefits, but in highways terms that is precisely what has been done. The quantified economic disbenefits of delay on the A21 are trivial. As noted above, they are outweighed by the transport benefits of the scheme alone, without having to consider the benefits to the local economy from new visitors.

120. Thus Mr Brown’s core argument in both opening and closing should not be allowed to disguise the true position that the Landowners have failed to substantiate at this Inquiry actual objections to the scheme itself. Again, that is perhaps unsurprising

⁵⁴ Closing 10e

given the decisions of the local planning authority to (a) support it through a specific policy in the development plan and (b) thereafter to grant permission for it.

(ii) *Impacts on landowners*

121. Mr Highwood agreed in cross examination that it is right to consider the relative cost and benefit of the scheme in assessing whether there is a compelling case. The scale of the interference with the landowners' rights thus needs to be weighed against the benefits of the scheme. It is recognised that there will be impacts on the Landowners' farming operations. However, none of those impacts will undermine the viability of the farm enterprises. They will continue to operate, with the loss of the areas taken for the railway and with the consequential impacts on severance. In the case of Moat Farm, the land to be acquired largely remains as it was when the railway closed but overgrown in the intervening years. It is not in productive use. The loss of land, even where the embankment is removed, is in fact limited.

122. The impacts of severance are firmly recognised and were carefully assessed by Mr Hodges in reports with which Mr Highwood did not substantially take issue. Those impacts can be mitigated through accommodation crossings. That such crossings can be delivered in a way which is reasonably convenient and tolerably safe has been explained above. It is also borne out by the experience of other farmers, whose operations coexist with crossing the railway. Losses will be compensated in full.

123. The promoter of an Order seeking compulsory purchase powers must take care to ensure that any impacts on landowners are given their proper weight, recognising the compulsion with which their property would be acquired. But the Secretary of State must be alive to the true impacts. As is perhaps reflected in the amount of time spent by Mr Highwood, and by Mr Brown in closing and cross examination, on those actual impacts as against other issues which do not concern the farm operations, the impacts are *relatively* limited. None of the landowners saw fit to give evidence themselves as to the impacts on their farming operations, presumably because they did not take issue with Mr Hodges' assessment.

(iii) *Prospect of funding*

124. The CPO Guidance explains that the acquiring authority “should address”:

“a) sources of funding - the acquiring authority should provide substantive information as to the sources of funding available for both acquiring the land and implementing the scheme for which the land is required. If the scheme is not intended to be independently financially viable, or that the details cannot be finalised until there is certainty that the necessary land will be required, the acquiring authority should provide an indication of how any potential shortfalls are intended to be met. This should include:

- the degree to which other bodies (including the private sector) have agreed to make financial contributions or underwrite the scheme; and
- the basis on which the contributions or underwriting is to be made

b) timing of that funding - funding should generally be available now or early in the process. Failing that, the confirming minister would expect funding to be available to complete the compulsory acquisition within the statutory period (see section 4 of the Compulsory Purchase Act 1965) following the operative date, and only in exceptional circumstances would it be reasonable to acquire land with little prospect of the scheme being implemented for a number of years.

Evidence should also be provided to show that sufficient funding could be made available immediately to cope with any acquisition resulting from a blight notice.”

125. It is clear from that Guidance that certainty as to funding is not required. What is required is an “indication” of how shortfalls in funding will be met; the basis on which contributions will be made; and that funding will be available “early in the process” or within the statutory period. Heritage railway schemes are supported by charitable donations and grant funding. That is established practice, and it is not suggested that a scheme such as this could be funded in any other way. Accordingly, the Secretary of State should consider the prospect of funding in that context. Charitable donations cannot be taken back. Thus no scheme funded by such donations would be reasonably able to show that such funding existed before the authority to grant the scheme has been granted.

126. On the facts here:

- a. RVR has been substantially supported to date by both public contributions and by the generosity of two significant benefactors;

- b. Those benefactors have confirmed their commitment to the scheme. Whilst it was not necessary for him to do so, Mr Broyd has put that commitment in writing to the Secretary of State. There is no doubt whatsoever that Mr Broyd has the means to meet that commitment, as Mr Brown accepted;
- c. The record of funding schemes such as this is very good. Mr Broyd has explained that the Welsh Highland Railway was funded by his own generosity to the tune of £10m, but also by wider public donations to the same amount;
- d. The scheme also has benefited from a recent substantial legacy, as confirmed by Mr Gillett;
- e. There is no better of evidence of the commitment to fund the scheme than the construction of the Robertsbridge Junction station and associated track, together with the works between Austen's Bridge and Bodiam Castle. The donors have already paid for those parts of the scheme, and would inevitably fund the remainder of it.

127. It follows that the Secretary of State can be confident that, if authorised, the scheme will be fully funded in the manner that its promotion and construction has been funded to date, no doubt with the charitable support of many others. The prolonged commitment to the scheme, and its partial construction, puts this beyond reasonable doubt.

(iv) Impediments

128. A very large proportion of the Landowners' case is based around what they suggest amount to impediments to the delivery of the scheme. These turn, essentially, on matters relating to planning permission. The extent of the time spent on these points both at the Inquiry and in Mr Brown's closing risk losing sight of the relevant tests. The test is in the CPO Guidance: "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". The primary test is therefore one of likelihood – not certainty. The potential impediments identified in the Guidance include "any need for planning permission or other consent or licence". Further guidance is then given:

“Where planning permission will be required for the scheme, and permission has yet to be granted, the acquiring authority should demonstrate to the confirming minister that there are no obvious reasons why it might be withheld. Irrespective of the legislative powers under which the actual acquisition is being proposed, if planning permission is required for the scheme, then, under section 38(6) of the Planning and Compulsory Purchase Act 2004, the planning application will be determined in accordance with the development plan for the area, unless material considerations indicate otherwise. Such material considerations might include, for example, a local authority’s supplementary planning documents and national planning policy, including the National Planning Policy Framework.”

129. Here, of course, planning permission has been granted. That in itself is the strongest indication of the absence of any planning impediment to the scheme. Given that planning permission is not required in advance of the promotion of an order which acquires land, it would be surprising if such an order could be resisted on the grounds that planning permission had already been granted but where the implementation of that permission was questioned. The inexorable conclusion must be that the fact that permission has already been granted is the strongest possible indicator that, if necessary, permission would be granted again. In any event, the Landowners’ objections on these grounds are exaggerated for the reasons set out below.

a. Discharge of planning conditions

130. First, a planning condition can only be imposed if it is reasonable⁵⁵. A planning condition which cannot be complied with is not reasonable. It can therefore be properly assumed that if the local planning authority saw fit to impose conditions, it must have regarded them as capable of being complied with. The PPG expressly notes that “Grampian” style conditions should not be imposed where there is no prospect of them being met. Thus the Secretary of State should assume that the conditions were judged by the planning authority, and by the statutory consultees who requested them, to be capable of being discharged.

131. Second, the conditions in issue relate to matters which have been addressed in detail above. The restrictive condition on the development of the A21 crossing will inevitably be discharged when HE approves the departure. For the reasons explained

⁵⁵ See NPPF paragraph 56 and the PPG

above, that can be expected to be soon. The EA's requested conditions are also, clearly, capable of being met for all the reasons set out above. There is no doubt that a satisfactory scheme for flood compensation storage can be achieved on the identified land if such compensation is required at all. The same goes for ecological mitigation and the approval of the relevant management plans. The land is available to provide replacement habitat in the form and to the extent required.

132. For those reasons, and the detailed reasons explored above, there are “no obvious reasons” why the conditions cannot be discharged.

b. Time limit on planning permission

133. The 2017 permission contains a five year time limit which will pass in March 2022. RVR has explained, in INQ/52, the ways in which this issue can be addressed. First, RVR submits that the permission has in fact been implemented.

134. The Landowners' response to this makes the ambitious submission that the principles relied on depend on Agecrest which is “no longer good authority”. However, in doing so they ignore the endorsement of the principles in Greyfort, which is the most recent Court of Appeal authority before the Inquiry concerned with the exceptions to the “Whitley” principle. The question is not simply one of “waiver”, but whether if works are carried out pursuant to a permission with the approval of the local planning authority it would be reasonable for that authority to take enforcement action against them. As noted by the Court of Appeal in Greyfort (at paragraph 11), the Court of Appeal endorsed the view that “irrationality of enforcement action falls with the public law exception to the Whitley principle” in Prokopp – as well as in Greyfort.

135. Standing back from that, in this case the approval of the local planning authority to the Junction Road to Austen's Bridge works would clearly make it irrational for the authority to enforce against those works. It follows that the permission has been implemented.

136. In any event, and as explained in INQ/52, RVR does not intend to rest on this matter. It proposes to seek to “amend” the permission to identify the works which have taken place as a first phase. This can undoubtedly be achieved under s 73, even if

it cannot be achieved under s 96A. Doing so will mean that the permission has been implemented in accordance with its terms.

c. Need for further permission or non-material amendments

137. As confirmed at the Inquiry, certain scheme changes related to the developed design proposals at the A21 will mean that the 2017 permission either needs to be amended (under s 96A) or an application for a s 73 permission or other further permissions will be required. There is no reason to think that such minor changes would not be approved by the local planning authority, especially since they would be the product of RVR's continued engagement with HE to agree satisfactory detailed design for the A21 crossing. It would be absurd to suggest that such minor variations, to ensure that the safest solution for the design of the A21 crossing is achieved, have any "obvious reasons" why they would not be approved. A similar issue arises in respect of flood compensation storage areas, if required (see above). In reality, these are just further steps through the implementation of the scheme, and not "impediments" at all.

138. Given that the scheme has been supported in a local plan, granted planning permission, supported by the relevant local authorities, approved by the ORR, and is not the subject of any in principle objection by any statutory consultee save for HE, the Secretary of State can be confident that any further approvals or consents required for its delivery will be forthcoming. As for HE, it is clear from Mr Westmoreland Smith's closing submissions that HE finds itself very close to be satisfied on any outstanding mitigation issues. There is no longer any dispute of principle. Once the mitigation points are resolved, HE has confirmed in closing that it will withdraw its objection.

Conclusion

139. The Order scheme will complete the reinstatement of a railway line that will bring significant benefits to the local area and beyond. It will reconnect an existing heritage railway and a number of important visitor destinations to the national rail network, promoting both tourism and sustainable travel. In completing a "missing link" it will generate significant economic and social benefits, funded by private donations. These are public benefits, from private generosity.

140. The scheme comes with the express approval of the local authority, including through its development plan, and with the ringing endorsement of the National Trust, Network Rail and many others including the local MP. The benefits of the proposal have already been recognised and endorsed through the planning system, and this Order will enable their realisation.
141. As they are entitled to do, the Landowners have fought hard to resist the scheme. But in reality, the grounds for doing so are not there. Planks of the Landowners' case have simply fallen away. All relevant issues have been addressed by RVR.
142. RVR has been forced to go to a level of design detail that is unprecedented for a TWAO of this nature to meet the requirements of HE. Contrary to the Landowners' submissions it has engaged fully with statutory consultees for a decade. It could never have imagined that, before the Order establishing the principle of the scheme was made it would be required to descend to a level of detail on matters such as road markings. Contrary to the Landowners' submissions, none of those matters changed the Order scheme.⁵⁶ But it has gone into that detail, repeatedly and protractedly, and has shown the scheme to be workable and compliant with all statutory and policy requirements.
143. In all the circumstances, the Secretary of State should now firmly endorse these proposals. The Inspector is therefore invited to recommend that the Order is made.

Richard Turney
Landmark Chambers

3 September 2021

⁵⁶ Despite Mr Brown suggesting a “parade of changes”, the only changes actually proposed have been minor and inconsequential corrections relating to Order plans.