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Our Ref: JEW/33916/00001/PFI

Dear David

### **Rother Valley Railway**

Thank you for your letter of 22 February. I see three elements to your letter: detailed design, funding of the scheme and how any costs order in favour of your clients would be met. I address each of them below.

#### *Detailed design information*

The salient point here is that you are requesting detailed design information at the pre-authorisation stage of this scheme. You must surely be aware that there is a long-established principle that only outline design is required for the purposes of statutory authorisation of railway schemes.

This principle was re-stated by Tim Mould QC, leading counsel for the Department of Transport on its recent hybrid Bill rail promotions, and rehearsed by the House of Lords Select Committee on the High Speed Rail (West Midlands to Crewe) Bill for Phase 2a of High Speed 2 at paragraphs 44 and 45 of its Report dated 19 October 2020:

*“As Mr Mould explained, it is well established that where a national project is promoted through a measure of this kind the level of detail that must be provided to Parliament should be sufficient to enable it to scrutinise whether the scheme is acceptable and its promoters ought to be given the powers that are needed to carry it out. This means that it must be sufficient for an assessment of the environmental effects of the scheme. For example, the engineering design must be developed to the degree necessary to enable a traffic impact assessment to be undertaken and a noise impact assessment to be carried out and design policies formulated for the specification of noise levels and matters of that kind. But it has never been regarded as necessary for the scheme to be developed to the level of design detail that would enable contracts to be let for the construction of the railway. The bill itself is essentially an enabling bill. It is designed to give local control over these matters to the planning and highway authorities following its enactment. .... We are satisfied that the promoter’s understanding of the level of detail that is required of them for our purpose was well-founded, and that there was no sound basis for demands that further details should be provided.”*

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The Government's Command Paper for the same Bill dated November 2020 states at paragraph 4.8:

*"The design of HS2 Phase 2a to date provides the level of detail necessary for the purposes of the HS2 Phase 2a Bill and the requirements of the Environmental Impact Assessment Regulations. The level of detailed design necessary to enable HS2 Phase 2a to be constructed has yet to be carried out, and will not be completed until after the HS2 Phase 2a Bill has secured Royal Assent."*

The same principle applies not just to large national schemes promoted by Hybrid Bill but to all local schemes promoted under the Transport and Works Act regime, which is of course derived from the private Bill process through which all railways used to be promoted.

By way of example, please see references to matters being taken into account at "detailed design" stage in the Inspectors Report and the Secretary of State's decision letter for the recent Network Rail (East West Rail) (Bicester to Bedford Improvements) Order 2020. To mention a couple of the many references in this recent Inspectors Report: para 7.19 "*Further surveys will be undertaken in the future for purposes of detailed design and to refine the mitigation, which is standard practice*"; para 7.257 "*NR has not yet completed the detailed design of the earthworks and drainage in the area, but will look to minimise the impact on the existing property...*" Paragraph 34 of the Secretary of State's decision letter states: "*Furthermore the Secretary of State notes that NR has indicated that during detailed design it will look for opportunities to...*" and the planning conditions appended to the decision also refer to detailed design: "*No .... Shall be constructed until the detailed designs....have been approved.*"

The reason for this is common sense (and has nothing to do with any "reluctance" on the part of RVR): promoters of infrastructure schemes do not carry out detailed design unless and until they know they have the statutory powers required to implement the scheme. That is the same whether it is the Government, Network Rail or a heritage railway society that is the promoter. It is the same for waterways and harbour schemes. Your clients have seen the environmental statement, planning drawings and the order plans. In the ordinary progress of infrastructure applications, regardless of whether the order includes compulsory powers, they can expect no more. RVR has made provision for accommodation crossings and farm tracks in its proposals and remains happy to discuss such provision with your clients if they would like to take up that offer.

In this case, it happens that there is some detailed design information worked up over recent months in collaboration with Highways England which relates to the tie in of the railway to the A21 and the level crossing. Your clients were to receive this, at the same time as the Inspector and other interested parties, on 8 March along with the further environmental information requested by the Inspector, and some 4 months ahead of the start of the Inquiry. However, I am pleased to be able to provide this to you now and I enclose with this letter the following detailed technical drawings recently worked up with Highways England:

- A21 level crossing. Road modification design. Arup. December 2020
- Embankment design adjacent to A21. Arup. December 2020

I also enclose, as promised, a copy of Replacement Sheet 3 of the order plans.

#### *Funding of the scheme*

You state that the significant cash holding of the Rother Valley Railway Heritage Trust represents "*a very small proportion*" of the Estimate of Costs provided with the application. Not only is the amount involved a rather more significant proportion than your letter suggests, but I am sure you are aware that there is no requirement for an applicant to demonstrate that it has secured the necessary funds to implement the proposed works before the TWAO is determined, let alone to have cash in the bank for this purpose. The burden on the applicant is to persuade the Secretary of State that there is a reasonable prospect of the proposed powers being implemented.

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In this case, the applicant can point to the extensive works that have been carried out, to a high standard, elsewhere on the line and at Robertsbridge station which provide ample evidence of the commitment of the principal donors, and, indeed, of the many others who have contributed to the project and which demonstrate that this scheme is reasonably capable of attracting the funds required to implement it.

It is for the applicant to make its case on funding to the satisfaction of the Secretary of State, and this it will do in whatever manner it thinks fit and adducing such evidence as it considers appropriate to the Inquiry.

*How any order for costs would be met*

I suspect this is really the nub of the matter and it is an issue that has already been considered by both our clients and the Secretary of State in correspondence with you in March/April 2019.

It seems to me that the threats in your letter are unnecessarily provocative. They do not get your clients anywhere. Those instructing me would not be pursuing this application if they did not expect to secure the requisite powers to implement the scheme, based on its merits.

However, because those instructing me are sensitive to your clients' concerns and have a genuine commitment to co-operating with those who will be their neighbours, I am instructed to confirm that, should the Secretary of State determine to make an order for costs in your clients' favour following the Inquiry (which we do not accept will happen), it will be met either by the applicant or by the Trust.

*Agreement*

Finally, your letter makes no reference to the draft agreement relating to the land either side of the A21 that is currently sitting with you, although I note that the covering email states that you are taking instructions and hope to respond to me shortly. Given the overall tone and content of your letter, those instructing me are understandably worried that your clients may be seeking to use these negotiations to obtain information and assurances that are unrelated to that agreement, and that they ultimately have no intention of entering into any arrangement with RVR, even though the terms of the agreement are uncontentious and conditional upon the TWAO being made.

For this reason, I am instructed to prepare a "mini-TWAO" for compulsory powers relating to the relevant slivers of land. If we are unable to execute and complete the agreement by 12 March, my client will be compelled to submit this further application.

I do hope it will not come to that (as I do not think it will impress the Inspector or Secretary of State if our clients are unable to reach agreement on such a simple matter) and look forward to a positive response.

Yours sincerely



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**Partner**

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