THE ROTHER VALLEY (BODIAM TO ROBERTSBRIDGE JUNCTION) ORDER

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RESPONSE TO LANDOWNERS' COSTS APPLICATION

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1. The Landowners apply for a partial award of costs based on alleged unreasonable conduct on the part of RVR. It is instructive to consider, in the first instance, what costs the application is actually concerned with. The Inspector correctly noted that the application as originally drafted was ambiguous but it has now been clarified as relating to "unnecessary abortive costs associated with the preparation of evidence based on the material submitted with the original application, which had to be reviewed and re-written following the late 2019 postponement and the very late delivery of material in 2021". It is these costs, and these alone, which are said to be attributable to unreasonable behaviour on the part of RVR.

2. Unusually, this response is being made before closing submissions at the Inquiry.

3. In short, RVR resists the application. There has been no unreasonable behaviour on its part. There is little evidence of any actual "abortive" costs. Further, when one considers the substance of the matters with which the application is concerned, the true position is that it is the Landowners who have unreasonably pursued arguments in the face of contrary evidence, and the contrary position of the relevant statutory consultees. A party cannot claim costs for work which was itself unreasonable.

4. The Landowners allege that RVR behaved unreasonably in two respects. First, it is said that RVR made the application prematurely when a number of matters of principle had yet to be resolved, with the result that RVR was forced to seek the late adjournment of public inquiry originally scheduled for 2019. Second, it is said that RVR failed to provide "highly relevant design and technical information and other supporting evidence until very late in the proceedings". On both grounds, the Landowners claim that they incurred abortive costs: i.e. costs of work done that

proved wasted because of RVR's conduct. RVR does not accept that either point gives rise to a claim for costs. Each is addressed in turn.

"Premature" application and "late adjournment"

5. In summary, the adjournment of the Inquiry in 2019 was wholly reasonable conduct on the part of RVR, and there is no evidence in any event that it caused any unnecessary costs to the Landowners. The application for the Order was made fully in compliance with the Rules and was accepted by the Secretary of State. It was supported by an Environmental Statement which was submitted following, and in accordance with, the Secretary of State's scoping opinion. The application followed a lengthy planning process which resulted in the grant of permission by the Local Planning Authority, including the imposition of conditions. Those conditions ensured, amongst other things, that any necessary further information to satisfy Highways England would be provided before the level crossing at the A21 was constructed and operated. In light of those conditions, Highways England did not object to the grant of planning permission. Highways England confirmed – as it did in this Inquiry – that it did not object to the principle of the proposals.

6. It is entirely reasonable to seek statutory authority for the construction and operation of a railway whilst leaving matters which require detailed design to be settled after such an Order is made. Such matters can be addressed by the terms of an Order, including Protective Provisions. Accordingly, it was reasonable to apply for the Order at the time RVR did. There was nothing "premature" about it – indeed the full proposals had been in the public domain for four years by the time of the application since they had been the subject of the planning application.

7. After the application for the Order was made, Highways England made an objection on the basis of the impacts of the proposal on the A21. Its position that these matters went to the *principle* of the making of the Order came as a surprise to RVR. There was no reason for RVR to think that relevant matters to be settled with Highways England could not be dealt with through the planning conditions and the process for obtaining a Level Crossing Act order, once statutory authority for the scheme had been granted and before the level crossing was fully designed and constructed. That was precisely the approach which it had taken in the context of the planning

application. It should be recalled that Highways England's own licence establishes as presumption in favour of allowing a "connection" on a road such as the A21, subject to satisfying conditions.

8. Pausing here, the Landowners can point to nothing to suggest that RVR should have known that this would be Highways England's position before making the application for the Order. This shows that there was in fact nothing premature about the application; the application followed from the grant of planning permission accompanied by very specific planning conditions to protect the safety and efficiency of the A21.

9. When it became apparent that Highways England's position was that (a) it would maintain an objection to the Order, regardless of any protective provisions, unless and until it had approved a "departure" and (b) it would not approve a departure unless and until the ORR had opined determinatively on the acceptability of the level crossing in railway safety terms, a different course was necessary. That Protective Provisions would not be sufficient to address HE's objection only became clear following discussions after the receipt of their Statement of Case, in September 2018. It was not until further discussions with HE and ORR that it became apparent that these matters were unlikely to be resolved in good time before an Inquiry in June 2019.

10. When it became apparent that Highways England would maintain an "in principle" objection to the Order which would not be capable of being resolved within a few months, RVR reasonably sought a postponement of the Inquiry. That was a reasonable request. If it was not, it would no doubt have been refused by the Secretary of State. Instead, it was promptly accepted. The adjournment was supported by both HE and the ORR.

11. The request for an adjournment was made more than 3 months before the date scheduled for the Inquiry, and 3 weeks before the Pre-Inquiry Meeting. It is unclear what work the Landowners had done by that date in preparation of proofs of evidence. The Landowners do not put forward any explanation on that point. It would seem surprising if substantive work had been done even before the PIM.

12. Moreover, if such work was done, it is unclear why it was "abortive". The Landowners' case does not seem to have changed much since their Statement of Case. It is unclear what work was done in early 2019 which was then thrown away when it came to filing proofs in 2021. It is correct to note that between early 2019 and the preparation of proofs in 2021, ORR had withdrawn its objection. However, through Mr Clarke, the Landowners continued with an objection on level crossing safety in the face of ORR's reasoned acceptance of the level crossing proposals. In other words, they put the same case in 2021 as they claim to have been preparing in 2019. It follows that those costs were not "abortive", even if (properly advised) the arguments should have been dropped by the Landowners before this Inquiry. The Landowners obviously did not incur costs on matters relating to the Departure submission (see below) in 2019, because that had not been made at that date. It is notable that in its objection to the adjournment (on 29 March 2019), the Landowners, did not identify work done on proofs by that date.

13. In those circumstances:

    a. The application was not "premature" because it followed the grant of planning permission with protective conditions and without an objection by HE (or ORR);

    b. The application was made in accordance with the Rules and with an Environmental Statement that had been scoped by the Secretary of State;

    c. That HE's objection could not be addressed through Protective Provisions – as it had been addressed by conditions on the planning permission – came as a surprise to RVR. Further, only after it became apparent that HE would require a "departure" and would only contemplate such following a positive opinion from ORR was the likely length of time to resolve HE's position clear;

    d. Once it became clear that these matters would not be resolved before the programmed Inquiry date, RVR made a reasonable request for an adjournment which was accepted by the Secretary of State and supported by the two statutory bodies concerned;

e. There is no evidence as *what* work was done on proofs more than 3 months before the Inquiry. Moreover, such work would not have been "abortive" because the Landowners' case has not changed.

14. For those reasons, this aspect of the costs claim is completely without merit. There was no unreasonableness on the part of RVR, and no abortive costs.

15. Finally, the Landowners complain that they did not know about the adjournment until after it had been ordered. That is a matter for the Secretary of State, and not for RVR. In any event, the point was addressed in the Secretary of State's letter to the Landowners on 17 April 2019 [Appendix A]. The Landowners' complaints were also addressed at some length in RVR's letter of 8 April 2019 [Appendix B]. That response continues to be relied upon in response to this application.

"Late provision of information"

16. At the outset, some context is required. The Landowners are not the Strategic Highway Authority, nor do they claim to be affected by the A21 level crossing in any different way from other users of the road. They are not responsible for approving a "departure". As with any objector, they are entitled to make a case on highways impacts. However, such a case has to stand on its own two feet. What in fact has happened is that the Landowners have pursued a highways case, by reference to the A21, without any proper case to run on their own. That was apparent when Mr Fielding gave his evidence. The only two points which he was able to maintain on highway safety were concerned with Sight Stopping Distance on the northbound A21 and visibility/SSD at the A21 roundabout. He acknowledged that both points were concerned with the existing condition of the road – i.e. matters that should be addressed in any event by HE. No points were maintained about other roads. The Landowners have completely failed to substantiate a highways objection and, as a result. The way that the Landowners case has been pursued has increased the duration of the Inquiry and put RVR to significant additional costs associated with considering and challenging that objection.

17. The importance of this point is twofold. First, the Landowners cannot claim costs for running an unreasonable case. They should have withdrawn their objection on this

ground. Second, there is no explanation of what case the Landowners would have run *but for* the provision of information relating to the departure. It was not the job of Mr Fielding to check detailed highways designs. Even if it was, the bottom line is that he must have been satisfied on the basis of the information provided.

18. The principal complaint is about information shared with HE. However:

    a. That information in the departures submission is at a level of detail which is not required for the statutory authority sought in this order. That is so even if HE were reasonable in seeking to obtain that information before confirming their position. There is nothing in the Rules, or in any guidance, suggesting (for instance) that detailed drawings of road markings or carriageway alignments are required for an Order to be made. It follows that the information exchanged with HE went well beyond that which could reasonably be required to be provided to the Secretary of State, and thus beyond that which could reasonably be expected to be provided to third parties;

    b. The departures process is a technical approval process carried out by HE. It is not even carried out by HE's witnesses to the Inquiry, who had very little to say about it themselves (beyond reading back that which "SES" had already said). The Landowners in fact had nothing of substance to say about that information, as was clear from Mr Fielding's evidence. Even if they did, it is unclear where it would have gone: either SES will be satisfied or not, and Mr Fielding's (or other's) views on the matters would not assist the Secretary of State in knowing HE's position;

    c. An applicant is not required to share its engagement with objectors with other objectors. It is required to submit information to support the making of the Order. If a particular objector seeks a level of detail that is unnecessary for the making of the Order, it is entirely appropriate that the detail is provided to that objector but not to others;

    d. The information in question has not been requested by the Secretary of State (e.g. through a Rule 17 request).

19. In those circumstances, the Departures Submission information went to a level of detail far beyond that which would be appropriate for the Inquiry and thus which would be required to be shared with all other objectors. It was not "highly relevant" information for the purposes of the decision on whether the Order should be made. It was wholly irrelevant to the Landowners' actual interest in the proposals. However, the Landowners were in fact kept apprised of the process with HE. They were themselves speaking to HE. When the "final" Departures Submission was made, all of the relevant information was provided to the Landowners and, as noted above, they had very little to say about it. Providing every bit of engagement with HE would only have put the Landowners to more costs as they reviewed various iterations of technical submissions.

20. Moreover, none of this information was in fact required before the Inquiry. The Order contains Protective Provisions for HE which require details to be provided, in any event. Similarly, conditions on the planning permission allowed such matters to be provided at a later date. Again, the level of detail is wholly excessive for making an Order.

21. The reality is that there have been no changes to the scheme of significance since the application for planning permission was made. Such changes as have been contemplated relate to matters which cannot go to the acceptability, in principle, of the proposals. They go only matters of detailed implementation.

22. In fact, on 8 March 2021 a substantial body of information was made available to the Landowners via the Inquiry website. This was provided at the same time as the Further Environmental Information. The Landowners fail to particularise what part of any information provided later than that was necessary for them to make their case.

23. In short, the provision of information relating to the departures process was not required. The Landowners failed to substantiate a highways case at the Inquiry in any event. Moreover, information was shared in a proportionate and timely way. It was reasonable for RVR not to provide a running commentary to the Landowners and others on highly technical discussions with HE.

24. As to the range of other matters relied upon:

a. Red light cameras (5.39). This point went absolutely nowhere. Red light cameras are not required by any statutory body. The proposal for them was not a concession that there was some unassessed safety issue, and it could never have been reasonably understood as such. No abortive work would have been involved on this issue;

b. Location of floodplain storage (5.41 and 5.44). Floodplain storage is a matter which falls to be addressed under the planning conditions. RVR's case has consistently been that it will be addressed in that way, once the detail of the final FRA has been settled with the EA following detailed design. The EA has expressed itself wholly satisfied on this approach. It is premature to determine (a) the extent and (b) the location of such storage. All that is required for the purposes of the Order is to show that there is no impediment to the delivery of the scheme – and to do that, it is not necessary to show the detailed design and location of such provision. The Landowners cannot complain that, when asked about these points in cross examination, RVR's witnesses have given their answers;

c. Location of ecological mitigation (5.44). The same points apply as for (b), above;

d. Changes to detailed design (5.44). It is correct to note that some parts of the railway design have progressed, particularly at the A21. But there is nothing in this to suggest unreasonableness on the part of RVR: it has had to continue to work on the scheme as discussions with HE have progressed. That is to be expected in a scheme of this nature. None of the changes has any consequence for the Landowners or their case at this Inquiry;

e. Changes to level crossing specifications (5.44). The detail of the level crossings will be settled under the terms of Level Crossing Orders. All that RVR has done is specify its view of the appropriate technological solution *at present*. This is detail beyond that required for the Order;

f. Revised safety risk assessments (5.44). The narrative assessments have been updated as further work is carried out. Doubtless there would be complaint if they had not been. Again, the level of detail goes far beyond that required at Order stage;

g. Updated costs estimates (5.44). The costs estimates were revised to account for inflation and changes at the A21. Given an estimate had been provided in 2018, it was appropriate to do so. The Landowners did not take any point on these estimates during the Inquiry;

h. Footpath 31 (5.44). Drawings were provided during the course of the inquiry as a result of questions posed by the Inspector and by the Landowners. The questions are ones of detailed design of the underpass solution. As to the diversion over a level crossing, the issue arose because of the Inspector's questions and the comments of Mr Raxton of the ORR. It is entirely reasonable for the promoter of an order to produce such information when it has been identified as relevant during the Inquiry – even if (as here) it does so on a without prejudice basis;

i. Funding (5.44). The funding position has been entirely clear and consistent throughout. The proposal is for the railway to be funded by donations from benefactors and others. The fact that one benefactor has written in support is scarcely an example of unreasonable behaviour;

j. Accommodation crossing ramps (5.44). The Landowners have repeatedly misunderstood this issue. Accommodation crossings are provided <u>at the request of the landowner</u>. The landowner may require further works, such as ramps. It may carry out such works and claim the costs as compensation. It is not for the railway company to determine unilaterally how best to accommodate the landowner. This is a process which has been established for over 150 years, and which has been explained to the Inquiry. It is regrettable that, throughout, the Landowners have proceeded on a mistaken understanding of the law and assumed that it is for RVR to deliver an accommodation solution for them to critique.

25. Accordingly, none of these matters amounts to unreasonable conduct on RVR's part. Further and in any event, none of these matters in truth would have required evidence to be "re-written". Such an assertion is not borne out when the evidence produced by the Landowners is actually considered. It is notable that Mr Fielding and Mr Clarke confirmed that, whilst they had reserved their position in writing on what was said to be late information, they had nothing to add when it came to rebuttals or their oral evidence.

26. Finally, at paragraph 5.42 the Landowners refer to the Rules. There has been no allegation of any breach of the Rules, and none could be sustained. In fact, the Secretary of State can properly conclude that the Order application has been made in accordance with the Rules and relevant guidance.

27. For those reasons, this costs application is misconceived and should be refused.

Richard Turney

Landmark Chambers

13 August 2021

# APPENDIX A

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Department for Transport

David Warman
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17 April 2019

By email

Dear Mr Warman,

**TRANSPORT AND WORKS ACT 1992 (TWA): APPLICATION FOR THE PROPOSED ROTHER VALLEY RAILWAY (BODIAN TO ROBERTSBRIDGE JUNCTION) ORDER**

Thank you for your letters of 29 March 2019 and 12 April regarding the above.

As set out in our letter to Ms Jane Wakeham of 12 March 2019 (which you were copied in to), the Secretary of State under Rule 23 of the Transport and Works (Inquiries Procedure) Rules 2004 ("the Rules") agreed to a postponement of the above Public Inquiry. This was to allow for further information to be provided to address concerns raised by Highways England and the Office of Rail and Road. The Secretary of State considers that this information is necessary for proper consideration of the application and that parties should be allowed time to consider this. There is no requirement under the above Rules for the Secretary of State to seek views of any other party including statutory objectors and those who wish to give evidence at the Inquiry, in relation to the use of Rule 23. However, the Secretary of State was aware from previous submissions of your client's views, before any decision was made.

The Secretary of State appreciates that the delay of the inquiry is causing concern to your clients. He has asked that the Applicant keep him informed of potential dates for the re-arranged Public Inquiry and details of a suitable venue. Once these have been provided the Transport and Works Act Order Unit will liaise with the Planning Inspectorate regarding the availability of an appropriate inspector and confirm a revised date as soon as possible.

Regarding your request for the re-scheduling of the pre-Inquiry meeting, this is held mainly to discuss the practical arrangements for the Public Inquiry to set an inquiry programme. The Secretary of State therefore considers that it would not be appropriate to reschedule this meeting until a revised date for the Public Inquiry is confirmed.

Turning now to the award of costs, information is set out in our 2007 Guide and Circular 3/94, “Award of Costs in Applications Proceedings under Section 6 of the Transport and Works Act 1992”. These state that it will normally be the Inspector who considers the application for costs at the end of the Inquiry and that the Inspector will make a recommendation to the Secretary of State. Where an Inquiry is cancelled, due to the application being withdrawn then the application should be made to the Secretary of State. This is not the case here, where the Inquiry has just been postponed.

With regard to the Secretary of State requiring the applicant to provide either firm security or another form of legally binding enforcement to meet your client’s costs, should costs be awarded following refusal or withdrawal of the application, the Secretary of State has no power to impose such a requirement under the Transport and Works Act.

Regarding the adequacy of the Environmental Statement, our position remains as that set out in our previous letter to you of the 15 November 2018 and 8 August 2018.

We will keep you abreast when further information becomes available, so you can share this with your clients.

Yours sincerely,

**Shenaz Choudhary**

cc Highways England
Office of Rail and Road
Winckworth Sherwood

# APPENDIX B

Winckworth Sherwood

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8 April 2019

Our Ref: JEW/33916/00001/PFI

Dear Sirs

**Transport and Works Act 1992**
**Proposed Rother Valley Railway (Bodiam to Robertsbridge Junction) Order ("the Order")**

**Response on behalf of Rother Valley Railway Limited (RVR) to your letter to the Secretary of State for Transport dated 29 March 2019**

1. Thank you for letting us have a copy of your letter dated 29 March 2019, written in response to the Secretary of State's letter of 13 March, which announced the Secretary of State's decision to postpone the public inquiry into the Order.

2. We are writing directly to you because we do not accept the assertions made in your letter and cannot allow them to go unanswered. We are also sending a copy of this letter to the Transport and Works Act Orders Unit so that it may be taken into account when the Secretary of State considers the six requests on pages 10 and 11 of your letter.

***Of "...the Secretary of State did not seek our clients' views on the postponement..."***

3. The applications and inquiries procedures are governed by the statutory rules made pursuant to the Transport and Works Act 1992.Those rules allow for the exercise of the Secretary of State's discretion at every stage of the process. In particular, Rule 23 of the Transport and Works (Inquiries Procedure) Rules 2004 ("the Inquiries Rules") allows the Secretary of State at any stage of any particular case to allow further time for the taking of any step. It is expressed simply in terms of the Secretary of State's discretion in the matter, as described in paragraphs 4.115 and 4.116 of the Department for Transport's Guide to TWA Procedures ("the Guidance"). There is no requirement under the Rules or policy requirement in the Guidance for the Secretary of State to have consulted statutory objectors – or anyone else – before postponing the inquiry and pre-inquiry meeting.

4. We do note, however, that you had made your clients views on any potential delay of the proceedings known to the Secretary of State by your letter of 25 July so that, when

considering whether or not to postpone the inquiry, the Secretary of State was already apprised of your clients' opposition to any such delay.

***Of "...no revised date for the pre-inquiry meeting or public inquiry has been set"***

5. In this particular case, the purpose of the postponement is to allow time for further information to be provided by the applicant to address the concerns raised by Highways England and the Office of Rail and Road ("the ORR"). The Secretary of State determined that a postponement would be beneficial to allow the information to be gathered and properly considered by Highways England, the ORR and other interested parties. Highways England and the ORR are the bodies with statutory responsibility for the strategic road network and railway safety. Therefore, the outcome of those discussions will affect the scope and duration of any inquiry.

6. Having determined, in his discretion, that the gathering and proper consideration of additional information will be beneficial, the Secretary of State has asked to be kept informed about progress and proposed dates for an inquiry in early 2020. The second will flow from the first, and it is entirely reasonable that, in the particular circumstances of this case, the Secretary of State has not stipulated any particular date for the postponed inquiry.

***Of "...demonstrably unfair and unreasonable" and "contrary to both the spirit and letter of the Secretary of State's own published guidance"***

7. This is strong language, but the text that follows it does not indicate any way in which the Secretary of State's decision was less than fair and impartial. The Guidance makes it clear that the procedural rules are designed to secure maximum disclosure and exchange of information before the inquiry takes place, so that the proceedings can be conducted efficiently and effectively, and that the Secretary of State will be concerned to ensure both a smooth and efficient inquiry and that the application is considered fairly and impartially.

8. This is a case where planning permission has already been granted for the re-instatement of the "Missing Link" of the Rother Valley Railway, including the level crossings. RVR engaged with the Highways Agency and the ORR in advance of that application. (Indeed, the assertion in your letter that RVR had failed to engage adequately with either of those bodies is far from the truth.) The planning committee had concluded that a level crossing of the A21 was the only viable option, and the Highways Agency had directed Grampian conditions to ensure the safety, effectiveness and free flow of traffic on the A21. The ORR's stated position to RVR was that the level crossing of the A21 could be operated safely, that the ORR had no objection in principle to any of the proposed level crossings and that a bridge over or tunnel under the A21 at this location was not practicable.

9. In the circumstances, RVR anticipated that detailed design and technical information to discharge the planning conditions and to secure a Level Crossing Order under the Level Crossings Act 1983 would be worked up only after statutory authority for the railway, and powers to secure the necessary third party land, had been secured. This was entirely reasonable as it is accepted practice for powers to be obtained (both under the Transport and Works Act and hybrid Bills procedure) before detailed designs and assessments have been carried out.

10. It was only once the application for the Order had been made, and the objection of Highways England was received that the change of position of that statutory body became known. Similarly, although the ORR did not object to the Order, it became clear that it would require extensive information which it had not requested before the planning application was determined, in order for its internal expert panel to consider the crossings and report to the Inspector hearing the application for the Order.

11. It is only fair in the circumstances that further time is allowed before the inquiry is held to enable RVR to provide the information now required by the two bodies with statutory

responsibility for the safety and efficiency of the strategic road network and the safety of the railway.

12. We understand that your clients would have preferred the inquiry to be heard sooner rather than later. However, they are in the meantime able to carry on their farming business as before.

***Of "The purpose of this letter is to request that the Secretary of State reconsiders his decision..."***

13. There is no provision in the Rules or Guidance for the Secretary of State to "change his mind" once the decision to exercise his discretion to allow extra time has been made. Such decision may only be challenged by Judicial Review, which would not succeed unless the original decision was Wednesbury unreasonable. We do not believe that any such challenge in the High Court would succeed. Highways England was willing to make the application for postponement jointly with RVR. (We enclose with this letter a copy of the relevant email from Highways England which was passed to the Transport and Works Act Orders Unit.) The ORR expressly confirmed that it had no objection to the request. We note that no other objector has raised any concern about the postponement.

14. In the particular circumstances, we respectfully suggest that the Secretary of State's decision was manifestly reasonable and fair. To have done otherwise than postpone the inquiry would have materially prejudiced the applicant.

**Secretary of State's Guidance "Guide to TWA Procedures"**

***Of "...the applicant's consistently dismissive approach to our clients..."***

15. This sort of language is inappropriate and very misleading given that RVR has, over a period of years, sought to engage with your clients concerning its proposals and has been continually and consistently rebuffed. I am instructed that RVR has exchanged no fewer than 12 emails with your clients and/or their land agents over the past two months alone in an effort to engage with them to assess the impact of the proposed works on their farming business and how any adverse impact might be reduced. I understand that a meeting was arranged for 2 April and then cancelled by your clients' land agent. These 12 emails are a fraction of the correspondence that has taken place since the project was conceived, and there have a number of meetings over the years.

16. Your clients cannot reasonably expect to be consulted by RVR in relation to its engagement with other interested parties. The request for postponement was something that arose out of discussions with Highways England and the ORR.

17. There really was no need, or policy justification, for the Secretary of State to canvas the views of your clients – or other objectors – about the request. Paragraph 4.116 of the Guidance explains that although, as a general principle, the Secretary of State would not wish to extend any of the time limits set out in the Rules, it is recognised that there may be occasions where there is a good reason to do so. The very example given in the Guidance is where allowing more time would serve to ensure a smooth and efficient inquiry. In this case, RVR has produced a programme for completion of further information, which Highways England will wish to consider and may then wish to respond to. The ORR, which is the body with responsibility for safety of the level crossing, will also want time to consider relevant information. There is a cogent and persuasive argument that allowing more time for that information is in the interests of ensuring a smooth and efficient inquiry and will save more time at the inquiry itself. RVR fully anticipates that, once the further information requested by Highways England and the ORR is to hand, and has been considered by them, that Highways England will withdraw its objection to the application for the Order, which will considerably shorten the Inquiry and that the ORR will be able to make a favourable

submission to the Inspector. There is no reason why, in these particular circumstances, the Secretary of State should have consulted more widely, or at all, and his decision to postpone the Inquiry is entirely consistent with the Guidance.

18. We respectfully suggest that your reliance on the word "exception" is misguided. The mere fact that there has been one extension of time in relation to another aspect of the application process does not mean that there can be no other.

19. As mentioned above, your clients' position on any delay to the inquiry was known to the Secretary of State. This is apparent from your reference to your letter of 25 July 2018 to the Secretary of State (which we have not previously seen). It would appear that the Secretary of State would have been aware of your clients' objection to any delay in the process but nevertheless determined that it was in the interests of the inquiry to allow the postponement.

**Response to Winckworth Sherwood letter**

20. As mentioned above, the decision of the Secretary of State has been made and the only available route by which to challenge it would be a judicial review of that decision. However, there are clear benefits to the postponement which will ensure that the Inspector has before him the best and fullest information, whilst there is a lack of any actual harm or prejudice to your clients from allowing the additional time before the inquiry.

21. We strongly refute the assertion that the reasons put forward by this firm on behalf of RVR were based on a "misleading and selective" explanation of RVR's discussions with Highways England and the ORR. We answer the various points you make below:

***(i) The need for postponement to provide comfort to Highways England***

The passage you quote from our letter to the Secretary of State of 8 March 2019 is an accurate reflection of where matters rested with Highways England at the date of that letter. Highways England continues to maintain its objection to the Order, but RVR anticipates that it will be possible, with the assistance of its specialist transport consultant, to provide Highways England with all the further information and comfort that Highways England reasonably requires to secure the withdrawal of its objection. As previously explained, much of this information/assessment is associated with detailed design which would usually only be carried out once an Order has been granted and the relevant statutory authority to proceed with a project has been confirmed. That this is the correct – and usual – approach is borne out by the planning conditions appended to the grant of planning consent at the behest of the Highways Agency.

We note that you invite the Secretary of State to "reflect" at this stage upon various statements in Highways England's objection and Statement of Case. Those points either have been (or will be) responded to, and rebutted, by RVR in the usual way, and engagement with Highways England continues. It is not for the Secretary of State to determine at this point the accuracy or otherwise of points made by Highways England in either its letter of objection or Statement of Case.

What we will point out is that, at a time when there were also ongoing discussions between the Highways Agency and RVR, the Highways Agency issued directions to Rother District Council for Grampian conditions, setting out the extent of information it required which had to be provided prior to the commencement of the relevant works but, importantly, not until then.

Thereafter, there was no reason for RVR to expect to prepare further detailed assessments etc. for use by Highways England in advance of depositing its application for the Order. The change of position of Highways England was unexpected and only known once its objection was submitted. Since then, the parties have been engaging constructively with one another to ensure that Highways England is given all the information it reasonably requires in advance of the inquiry.

22. We would add that points made in your letter regarding delivery of information to Highways England and the ORR rehearse those already made in your clients' Statement of Case. Insofar as relates to the decision to postpone the Inquiry, the Secretary of State had access to the objections and to the Statements of Case of both Highways England and your client, as well as to the representation of the ORR, and the opportunity to take your client's case into account if considered reasonably necessary to do so before coming to the decision to postpone the inquiry.

***(ii) The need for postponement to address ORR's Expert Panel***

23. Again, the text quoted from Winckworth Sherwood's letter accurately sets out the position in relation to the ORR's expert panel. It does not "distort the true sequence of events" and is not "disingenuous", as you have suggested to the Secretary of State. The ORR's stated position was that the level crossing of the A21 could be operated safely, that the ORR had no objection in principle to any of the proposed level crossings and that a bridge over or tunnel under the A21 at this location was not practicable.

24. We agree that it has long been ORR's policy to support new level crossings only in exceptional circumstances. Indeed, as explained in ORR's internal guidance, this has been the policy position since 2007. In other words, the policy context in which the ORR operates now is unchanged from that which applied at the time of the planning consent (and before). (Likewise, the policy context in which Highways England operates has been unchanged since 2013.)

25. The only new policy element has been the introduction of the ORR expert panel and it is worth remarking that the requirement for the matter to be considered by an expert panel was not referred to in the ORR's representation to the Secretary of State in response the application for the Order.

26. It was as recently as 13 February that the ORR first advised RVR of the full extent of information that it required and the criteria by which exceptional circumstances will be judged in practice. In particular, the term "grossly disproportionate" is not explained in the policy but was a matter discussed at the meeting on 13 February together with brand new information pertaining to the technical specifications required for the crossings themselves (which RVR had, entirely reasonably, anticipated would be the subject matter of an order under the Level Crossings Act following making of the Order).

27. It is clear from the above that the ORR's "letter of no objection in principle" referred to in the report to the planning committee in 2017 does not pre-date the ORR's exceptional circumstances policy. Moreover, correspondence with the ORR since then, not only demonstrates that RVR, as a competent applicant, had indeed continued to engage with the ORR but that the ORR gave no indication that it had changed its requirements. In 2012 the ORR wrote to RVR in the following terms:

"*When an out of use railway line is being brought back into use with wider benefits to the locality there is a persuasive argument that a crossing can be reinstated with modern crossing controls, and if used properly by all users, as a "safe" option for crossing the highway.*"

It went on to say:

"*Any proposal to build a crossing would have to be shown to be the most practicable option which means demonstrating that constructing a bridge, either for road or rail, would be disproportionately expensive compared to the benefit achieved.*"

*"Having considered the arguments that you have put forward I believe that in each of the three crossings it is not practicable to have grade separated crossings of road and rail and that an at-grade crossing of the highway is the practicable option.*

Having considered the speed limit that would apply to the railway, the letter stated:

*"There is no reason why if the crossings are constructed to modern standards that risks should not be tolerable. As a result I think that in the case of all three crossings I would not make any objection to their reinstatement."*

The ORR concluded as follows:

"*Having reviewed the report produced by Mott MacDonald I believe that it will be possible to create a safe at-grade crossing at all three sites if designs along the lines of those set out in the report are provided."*

28. We understand that no correspondence from the ORR since then has contradicted that letter. It has been long acknowledged that the level crossings over Northbridge Street, the A21 and Junction Road are in principle acceptable and can be operated safely using modern standards of technology and that it has long been appreciated by the ORR (as it was by the local planners) that there are no viable alternatives to the level crossing at this location. It was against that background that RVR submitted its application.

***(iii) The postponement will not prejudice any interested parties***

29. You state that "*Had the applicant genuinely believed the postponement would not prejudice our clients' position there would have been no reason for it not to seek their views prior to making the request to the Secretary of State."* With respect, this is a self-serving comment. There is a considerable gulf between disliking an outcome and being prejudiced by it. The letter seeking a postponement was concerned with the status of engagement with Highways England and the ORR, and was clearly a matter for the Secretary of State in the exercise of his discretion. RVR did not suggest to the Secretary of State, or intimate either that your clients had been consulted or that it believed your clients would have no objection.

30. It is correct that, in common with other transport schemes, the re-instatement of the railway requires the acquisition of a modest corridor of land; in this case an area of land at the bottom of the valley alongside the route of the river Rother. RVR understands that the land was purchased for a nominal sum of £1 and that there was nothing in the sales agreement or title to rule out a future re-instatement of the railway. RVR first started talking to your clients about the scheme in 1991 and it has been in the local plan since the draft was circulated in 2003. Andrew Hoad attended the inquiry into that plan in 2004, at which your client's objections were heard and nevertheless the Inspector determined that the railway would have significant benefits for tourism and sustainable travel. He went on to suggest that, were the landowners to remain opposed to the scheme, the Council could consider whether it wished to seek the use of compulsory powers. That plan was adopted in 2006 and the reinstatement of the Missing Link remains current Rother District policy.

31. We are sorry that your clients have found the application process for the Order distressing. However, that does not mean that RVR has disregarded your clients concerns - unless you mean that RVR should not seek to re-instate the railway at all because of their opposition, (despite the fact that it is local planning policy that it should be re-instated). RVR dearly wishes your clients were not so opposed to the railway, as the proposal comes with many benefits to the local area, as evidenced by the local policy support, economic impact report, and support from many bodies such as the National Trust, local authorities, local tourism organisations, Network Rail and others. RVR has made clear to your clients its desire to acquire the necessary land by private treaty in advance of the Inquiry at more than the market value and to fully accommodate your clients' access across the railway corridor. In the absence of such private treaty, should the Order be made, your client will be entitled to

compensation in accordance with the statutory code. If it is not made, your clients can expect to be awarded their costs in accordance with paragraph 4.126 of the Guidance. That is the way that the statutory process has been set up.

32. We also take issue with your assertion that the planning information provided to Rother District Council was inadequate and we understand that no such complaint was made by the council. We would remind you that the application for planning permission was made in accordance with the relevant procedural rules and accompanied by an environmental statement prepared by one of the leading consultancies in that field. Further work was carried out in consultation with the Environment Agency (in fact, very substantial and detailed flood modelling work in close co-operation with the Agency) and with the County Council ecologist to ensure that the Environment Agency was satisfied and the planning authority had all the information to make its decision. When it came before the planning committee, the decision to grant consent for the railway development was unanimous, despite the explicit opposition of your clients. This is hardly indicative of a careless approach to the application. RVR continues to liaise with the county ecologist in relation to the discharge of planning conditions in relation to the consented development on land already acquired to the west of Junction Road.

33. We note that your clients have been fully preparing for the public inquiry. Those preparations apply equally to an inquiry in 2020 as they do to one in 2019. It is not uncommon for inquiries to take many months to be heard and determined; particularly where they raise complex issues. We stand by our view that the postponement of the Inquiry will save public money. We envisage that the negotiations with Highways England, and those with the ORR, both of which are bound by considerations of managing public money will indeed produce savings because, one way of the other, they will reduce the scope and duration of the public inquiry, the need for counsel to be instructed and so on. Further, the information will be of assistance to the other objectors who have raised concerns about the potential impact of the level crossing of the safety and free flow of traffic on the A21.

34. Whilst you state that it would have been possible for the applicant to have withdrawn the application at an earlier stage, your statements assume that it would have been a sensible move for RVR to have withdrawn its application in its entirety at an earlier stage. This was not the case. RVR could have known at that time how its negotiations with Highways England and the ORR over that period would pan out. Withdrawal of the application would obviously be a remedy of last resort. The sensible course was, once the position was clear, to seek a postponement of the inquiry and associated pre-inquiry meeting. The Secretary of State agreed that this was desirable.

35. In any event, as stated above, the decision to postpone was a matter for the exercise of the Secretary of State's discretion. The Secretary of State had access to the documents referred to in your letter and exercised that discretion in favour of a postponement. There is nothing to indicate that such decision was Wednesbury unreasonable and your assertion that it was made on the basis of misinformation is simply wrong.

**Costs**

36. You describe your letter as an "interim application for costs" on the basis of unreasonable behaviour. We consider such a request to be misconceived and will be writing to the Secretary of State to make our position on this point known.

37. Section 11(5) of the Transport and Works Act 1992 confers power on the Secretary of State to award costs. The exercise of this power is explained in the Department for Transport Circular 3/94 "Awards of Costs in Applications Proceedings under Section 6 of the Transport and Works Act 1992" and the Guide to TWA Procedures. We refer you first to the entirety of paragraph 4.125 of the Guidance which provides as follows:

*An application for an award of costs on grounds of unreasonable behaviour should normally be made to the Inspector before the close of the inquiry or hearing. The Inspector would then be able to set aside time, probably at the end of the inquiry or hearing, to consider the costs application and any submissions by the party against whom the application has been made. Also, the Inspector will be able to make a report and recommendation on the costs application to the Secretary of State when submitting a report on the inquiry or hearing. Any person who applies for costs after the close of the inquiry or hearing will be expected to show good reason for not having applied at the inquiry or hearing. If the costs application arises from the late cancellation of an inquiry or hearing, it should be made immediately to the Secretary of State; or, if some delay is unavoidable, within 4 weeks of receiving confirmation of cancellation. It will then be dealt with on the basis of written exchanges.*

38. In this case, the Inquiry has not been cancelled – it has been postponed. We find nothing in the Rules or Guidance that contemplates an interim "in principle" decision, even if it could be established that there are any abortive, duplicated or additional costs arising at a result of the postponement. The additional information provided to Highways England and the ORR will be circulated to all interested parties at the appropriate time. At that time, your clients will then be able to take a view as to the extent, if any, of additional work required by their professional advisors and will be at liberty to make an application for costs to the Secretary of State which will fall to be determined in the usual way, at the end of the Inquiry, as you describe on page 8 of your letter. Further, we cannot see that RVR's conduct could remotely be described as unreasonable. In particular, the Guidance states that provided that parties comply with the procedural requirements and otherwise behave reasonably, they should have no fear of costs being awarded against them on this ground.

39. We have also considered the content of the DfT Circular 3/94. There is nothing in the Circular that supports and interim costs award. Annex 4 sets out the appropriate time at which an application for costs may be made. The Annex explains that the Inspector will usually hear the application at the end of the inquiry and before it is closed. It is only if an inquiry is cancelled as the result of the late withdrawal of an application or objection that an earlier application will be entertained.

40. Further, whilst your letter states that the Circular provides that one possible reason for justifying an award of costs after an inquiry is the introduction of new or amended evidence late in the proceedings, it refers the reader to the criteria in paragraph 4 of Appendix 2 to the Circular which demonstrate that the context is that of an inquiry that is imminent or underway such that, for example, it has to be cancelled (due to the withdrawal of the application), or adjourned. RVR has sought to avoid any inconvenience and expense for objectors by requesting a postponement of the inquiry prior to the pre-inquiry meeting.

**Your clients concerns about the ability of the applicant to meet any award of costs**

41. It is unusual, although not without precedent, for a heritage railway to seek compulsory powers and for such application to go all the way to an opposed inquiry.

42. The Funding Statement and RVR's Statement of Case both deal with how the scheme will be funded but we accept that neither deals with the question of how an order for costs would be funded in the event that the application for compulsory powers was unsuccessful. The reason for this is that it is not contemplated by the procedural rules that the documents should do so.

43. Your suggestion that that the estimate of costs is inadequate is based on a misunderstanding of the relevant procedural requirements. The Estimate is in the form required by the Applications Rules (see Rule 10 (3)(b)(ii) and the form in Schedule 3 to those Rules). We note that this is a matter raised in paragraph 6.24 of your client's Statement of Case where you rely on information provided by your clients' consultants in apparent ignorance of the requirements of the Applications Rules. RVR can have confidence in the breakdown of the costs of implementing the works because it has recent experience of construction works at

the Robertsbridge terminus and running down to Northbridge Street, as well as works associated with extensions to the Kent and East Sussex Railway. It also has recent costings for the level crossing of the A21. It therefore enjoys a good, up to date, understanding of the costs of implementing works of the kind to be authorised by the Order.

44. The scheme's key donors are, quite properly, providing their financial support through the Rother Valley Heritage Trust. The general law on data protection recognises that benefactors to charitable are entitled to their privacy. We are aware that your clients have been keen, for some years, to confirm the identities of the main donors to the Rother Valley Railway Project but they have no entitlement to, or need for, that information as their land, were it to be acquired, would be acquired by the applicant and not by individual donors.

45. Were the donors identities in the public domain they would undoubtedly be inundated with requests for money and, we suggest, there would be nothing to prevent opponents to the re-instatement of the Rother Valley Railway from seeking to make their lives miserable whether via social media or other means.

46. There is no provision in the Rules, Guidance or DfT Circular for the Secretary of State to conduct a review of costs matters in advance of the Inquiry, as your letter suggests. Nor is there any provision in the Transport and Works Act 1992 (as amended), or the Rules or Guidance for security of costs. You quite properly do not seek to maintain in your letter that such power exists.

**Request for Pre-Inquiry Meeting**

47. The Secretary of State has, in the exercise of his judgement, determined that the pre-Inquiry meeting called by the Inspector is postponed. This is unsurprising as the purpose of a pre-Inquiry meeting is to deal with the practical arrangements for the Inquiry such as organisation, accommodation, clarification of main areas of agreement and disagreement, conduct, timetabling and numbering of documents. It is not a forum for consideration of contentious issues in advance of the Inquiry itself. That is not its purpose, nor is there precedent for such a hearing. We would also remind you that the question of the adequacy of the environmental statement was considered by the Secretary of State when he gave his scoping opinion.

48. With regard to your request to be kept abreast of RVR's discussions with Highways England and the ORR, RVR will be required to comply with Rule 17 of the Applications Rules in relation to the publication of new information but cannot be expected to keep your client informed about the details of its negotiations with other objectors.

**Action required**

49. We fail to see that your letter demonstrates any unfairness in the decision of the Secretary of State to postpone the inquiry, let alone anything that would qualify as "Wednesbury unreasonable". In particular, you do not demonstrate any material prejudice to your clients by a postponement of the Inquiry. We therefore see no basis upon which the Secretary of State should reconsider his decision to postpone the public inquiry and we would strongly resist such a move.

50. To re-convene the inquiry now, after this delay would, however, materially prejudice the applicant as it would not have time to produce, deliver and discuss the information discussed with Highways England so as to ensure that any concerns it has about the Order scheme are allayed and to ensure that the ORR expert panel can consider all the relevant information before submitting its opinion to the Inspector hearing the inquiry. It would also disadvantage the Inspector hearing the Inquiry as he would not have the benefit of the full information and feedback thereon from the relevant bodies with statutory responsibility.

51. The Secretary of State has already given his reasons for the postponement with a sufficient level of detail in his letter to Winckworth Sherwood of 13 March, a copy of which was provided to you at the same time. The same reasons apply to why it would not be appropriate to seek to re-instate the original inquiry date, even if that were practicable. The majority of the issues raised in your letter are not new. They are already rehearsed in the Statements of Case, save for the question of security for costs, and are matters for the Inquiry.

52. The Secretary of State has, quite properly, not sought to set a revised date for the public inquiry. This justification for the length of delay was clearly explained in the request and is needed so that information may be produced, delivered and considered by the relevant bodies, for further information to be published and for time to be allowed pursuant to Rule 17 of the Applications Rules for further representations, as well as for the ORR's expert panel to sit and then prepare a report to the Inspector. That will all need to be done before the pre-inquiry meeting and preparation of evidence. As stated earlier in this letter, having determined, in his discretion, that the gathering and proper consideration of additional information will be beneficial, the Secretary of State has asked to be kept informed about progress and proposed dates for an inquiry in early 2020. The second will flow from the first, and it is entirely reasonable that, in the particular circumstances of this case, the Secretary of State has not stipulated any particular date for the postponed inquiry.

53. We have already explained both in this letter and our letter to you of 8 March that there is no provision in the Transport and Works regime for an interim costs order, even if it were justified (which it clearly is not) and that there is no provision for security for costs in the statutory rules governing the application and inquiry procedure.

54. We have already dealt with the adequacy of the Environmental Statement in this letter and note that the Secretary of State has already refused to consider the matter as a preliminary issue. Rather, it is one of the matters specifically for the inquiry, as set out in the Secretary of State's Statement of Matters.

55. As explained above the purpose of a pre-Inquiry meeting is to deal with the practical arrangements for the Inquiry such as organisation, accommodation, clarification of main areas of agreement and disagreement, conduct, timetabling and numbering of documents. It would not be appropriate to hold a pre-inquiry meeting before the further information is to hand and the date of, and venue for, the inquiry is known. (We would add that the June booking for the proposed inquiry venue was released as soon as the Secretary of State's decision was received.) In particular, there is no basis for a meeting to "establish a protocol" for the sharing of information. The statutory rules already regulate this through the requirements for publication of further information where appropriate and for documents intended to be relied upon at inquiry to be served on interested parties and put on deposit. There is, therefore, absolutely nothing to justify holding an earlier than normal pre-inquiry meeting.

Yours faithfully

Winckworth Sherwood LLP

**Winckworth Sherwood LLP**

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## Jane Wakeham

**From:** Jane Wakeham
**Sent:** 12 March 2019 16:18
**To:** Colin Dunn (Colin.Dunn@dft.gov.uk); Shenaz Choudhary
**Cc:** Natasha Kopala (Natasha.Kopala@dft.gov.uk); Caroline O'Neill (Caroline.O'Neill@dft.gov.uk); Angela Foster (Angela.Foster@dft.gov.uk); Paul Irving; Chris Mayne
**Subject:** FW: Rother Valley TWAO - support for postponement from HE

Good afternoon

Please see the email from the Highways England's lawyer. Unfortunately, this was received too late for the request on Friday to be made jointly with Highways England, but you will note the support for Rother Valley Railway's request.

Kind regards

Jane

**Jane Wakeham**
**Senior Associate**

Winckworth Sherwood

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**From:** Weatherstone, Susanna [mailto:Susanna.Weatherstone@highwaysengland.co.uk]
**Sent:** 12 March 2019 16:09
**To:** Jane Wakeham
**Cc:** Harwood, Paul
**Subject:** Rother Valley TWAO

**This message originated outside Winckworth Sherwood**

Dear Jane

We have now had an opportunity to discuss this matter with Richard Honey. I am also aware of developments as regards the fact that a programme has been produced for the production of further information.

HE continues to maintain its objection. Whilst we are encouraged by the appointment of transport consultants, we do not consider that there will be enough time to deal with the information properly

to allow HE to respond. We would therefore support the suggestion of a joint request to the Secretary of State to adjourn this inquiry.

I am not available to discuss further today but available tomorrow if needed.

Kind regards

Susanna
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