IN THE MATTER OF DEVELOPMENT AT KINGSWEAR RAILWAY STATION, DARTMOUTH, DEVON

ADVICE

1. I am asked to advise South Hams District Council ("the Council") in connection with a building ("the Building") which has been constructed within the vicinity of Kingswear Railway Station, Dartmouth, Devon ("the Station")

2. In particular, I am asked to advise on the following matters:

   a) Whether the Building benefits from permitted development rights under the Town and Country Planning (General Permitted Development) Order 1995 ("the 1995 Order").
   b) Whether Dart Valley Railway Plc is a statutory undertaker within the meaning of section 262(5A)(b) of the Town and Country Planning Act 1990 ("the 1990 Act").
   c) Whether Dart Valley Railway Plc requires a licence as referred to in section 262(5A) of the Town and Country Planning Act 1990 in order to benefit from the permitted development rights contained in Schedule 2, Part 17 of the 1995 Order.
   d) Whether listed building consent is required for the Building.

3. I am also asked to advise on the following matters raised in "Report 7" contained in my Instructions and produced by the Kingswear Acton on Rail and Riverboat Development ("KAARD"):

   a) Whether the land on which the Building is sited is operational land for the purposes of Class A of Part 17 of Schedule 2 to the 1995 Order.
   b) Whether the Company should be regarded as a tourist attraction and riverboat enterprise of which rail operations form part.
   c) Whether statements made by the Company constitute an adequate assurance that the Company will comply in perpetuity with the provisions of the 1995 Order in so far as the
development is “in connection with the movement of traffic by rail”.

d) Whether the provisions of the 1995 Order exclude the offices being used for other purposes, such as the movement of traffic by (a) only river link passengers (b) river ferry passengers or (c) inter-modal transfers.

e) In the event that it is determined that the Building is within the railway station, and given the station has the status of a listed building, whether the developer is required to apply for listed building consent.

f) What is the legal extent of the curtilage of the Station.

4. I also advise on the following discrete points:


b) The procedures, if any, that the Council should take in relation to the Building in the light of the effect of the EIA Regulations.

**Factual Background**

5. On 12 March 2010, Dart Valley Railway plc (“the Company”) submitted an application for a development at the station entitled “rail control centre, Kingswear Station”. The site plan indicated the building annotated as “proposed rail/marine control centre”. That application was withdrawn.

6. In the documentation which was produced as part of the application, it was stated that the “design philosophy is to create an elegant and modern building suitable for contemporary office use, which echoes historic railway and maritime architecture”.

7. A plan (number 2803/12) was produced on behalf of the Company by MTA architects in March 2011. The location plan on that drawing appears to show the existing situation with a section of railway track in the location of the proposed building. That track is shown removed to facilitate the construction of the building proposed in that drawing. The location of the proposed building is in the location of the Building.
8. Certain structures at Kingswear Station are listed. The listing of those structures is as follows:

Railway station. Circa 1864. Painted horizontally boarded timber frame, and rendered plinth. Corrugated asbestos hipped roof with projecting eaves with moulded cornice. Rendered chimney stacks on ridge. Rectangular station building with entrance ticket office, waiting room and offices etc and platforms behind with train shed over and long platform extending to north east with canopy. Single storey regular but asymmetrical eight window entrance front with double set back to right. Tall two-light casements with glazing bars with plain unmoulded timber architraves and aprons. Two doors with similar surrounds, rectangular fanlights and panelled and glazed doors. Flat roofed wooden canopy over front with moulded cornice, zigzag fascia and boarded soffit probably concealing iron brackets. Train shed over platforms and line adjoining north west has boarded sides and timber trusses with iron road bracing and clad in corrugated asbestos with glazed ridge. Platform extends to north east has canopy on iron lattice piers. The Dartmouth and Torbay line was opened in 1859 and the section from Churston to Kingswear was began in 1862 and completed in 1864.

9. The station is situated in an area of outstanding natural beauty ("AONB") albeit within the built up area of Kingswear itself.

10. In October 2010, the solicitors acting for the Company wrote to the Council regarding the proposed construction of a new station operations control centre. The photographs sent with the brief show the Building prior to its completion surrounded in scaffold.

11. The works to construct the Building commenced on about 4 July 2011.

12. In August 2011, a residents group known as KARRD raised concerns with the Council that the Building was being erected without planning permission. There has, since that time, been a lengthy dialogue between Council officers and KARRD. Officers have advised that, in the opinion of the Council, the Company were entitled to erect the Building because they had the benefit of permitted development rights under Class A of Part 17 of Schedule 2 to 1995 Order.

13. Mr Pooley, the Group General Manager of the Company stated in a letter dated 7 October 2011:

To provide the best opportunity for success it was also deemed important that line of sight control should be incorporated into the solution along with a signal repeater panel and real time ticket sales information. Hence the need for a two storey building and the
position in relation to platform exit. The ground floor of the new control centre will be occupied by administration staff in lieu of using it as a store, thus providing greater space to provide educational services at Paignton. ... The River Board operations team are to be located in the existing station master’s office thus facilitating closer working relations between the two operations ... This investment in improving the flows of passengers round the system is an investment in improving real issues within the business.

14. The Company’s solicitors, Boyce Hatton, wrote to the Council on 14 October 2011 indicating the position of the Company:

[The Company] is a statutory undertaker pursuant to the powers conferred by the British Railways Board (Paignton and Kingswear) Light Railway Order 1972 made on the 13th July 1972 which came into operation on the 14th July 1972 and a Running Powers Agreement dated 21st March 1973 made between (1) British Railways Board and (2) The Dart Valley Light Railway Limited. ... . The Dart Valley Light Railway Limited is by change of name and conversion to plc status DVR

The station was acquired on the 30th December 1972 by Conveyance of that date made between the British Railways Board and the Dart Valley Light Railway Limited. The land was operational land in the hands of the British Railways Board immediately prior to the acquisition of DVR’s interest and the conveyance was made pursuant to the reorganizational provisions for the Transport Act 1968 and as such is operational land in the hands of DVR.

15. A further letter was written to the Council by Mr Pooley which stated:

Further to your letter dated 9th September 2011, I write to confirm that the office building at Kingswear will be used solely in connection with the movement of traffic by rail.

16. KARRD have disputed many of the points raised in the Company’s representations and the Council officer’s assessment of the legality of the Building. KARRD’s essential point is that the development does not benefit from Class A of Part 17.

17. The matter was referred to the Council’s Executive Committee and two members of that committee investigated the legality of the Building. Their report of 24 October 2011 raised a number of matters:

a) Proof had been given that the Company was a “statutory rail operator”.

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b) Mr Pooley had been interviewed by the Councillors. He stated that Dartmouth Ferry Staff will be moved to Kingswear and housed in the existing platform office accommodation and that only rail staff, including Mr Pooley, will be housed in the new office block. He also stated that the “top of the range” train monitoring equipment will be installed into the new “offices” to prevent both overcrowding on the station platform and to indicated the position of trains to improve coordination between trains and ferries; he indicated that this would improve the safety of the general gravelling public by reducing overcrowding on the platform.

c) The Councillors recommended that no further action need be taken by the Council, but that specialist legal advice should be sought.

18. In the minutes of the Corporate Performance and Resources Scrutiny Panel meeting dated 27 October 2011, the monitoring officer indicated that the Company did not hold a licence under the Transport Act 2000.

19. KARRD have made the following specific points in their correspondence:

a) The Company is not a licence holder for the purposes of the Transport Act 2000 and therefore cannot benefit from the terms of Class A of Part 17.

b) Relevant documentation, including a letter from the Chairman of the company, Sir William McAlpine, has indicated that the purpose of the office development is to provide facilities for river boat operations and not purposes relevant to the application of Part 17. Sir William is quoted as stating “we are an active business needing control of our boats and railway from one central position” (quoting a letter dated 16 August 2011).

c) KARRD also quote the application documentation for the scheme as it was originally submitted, as follows:

to erect a new two-storey building to accommodate an administration office at the upper level with storage below ... the additional space will provide a much needed storage for the shop and café as well as railway equipment which has previously been stored in view and contributed to a generally
untidy appearance. It will also perform a necessary function of the Dart Valley Railway which is an important heritage attraction which brings thousands of tourists Kingswear and Dartmouth [sic].

d) A letter to Mr Richard Sheard of the Council is stated to have indicated: “Dr Wollaston has already been advised by the Company’s Chairman Sir William McAlpine that the offices will be used to provide facilities for river boat operations. River boat facilities are the raison d’etre for the offices”.

e) The Company is authorised by the British Railways Board (Paignton and Kingswear) Light Railway Order 1972 to operate a light railway; it does not have a licence to operate a railway.

f) The land on which the Building has been constructed is not used for the purposes of rail traffic movements and operations.

g) The site is within a conservation area.

h) The Building is not wholly within the railway station and thus cannot benefit from Part 17.

i) The construction of the Building has been on land that is non-operational land because the buffers have been moved up the track to create an area of non-operational land.

20. In its report No. 7, KARRD indicate that the company accounts show that 69% of the Company’s profit is derived from riverboat operations. KARRD contend that the development of the Building is to facilitate inter-modal passenger transfers onto its ferry and riverboats.

21. KARRD has indicated that the Council has been unable to identify any plan, deed, land registry entry or other documentation which identifies the development site as being within the railway station.

22. KARRD have also produced papers which have been produced by the Council. One of these papers indicates the following:

a) For the purposes of section 264 of the 1990 Act, the undertaker’s interest in the land should be acquired as a result of a transfer under the provisions of the Transport Act 1968 or
that there is or has been at some time a planning permission in force for the use of the land for the purposes of the statutory undertaking. The Council is satisfied that both of these tests have been met in that the land was acquired under a transfer under the Transport Act 1968 and there are at least two planning permissions in force for its development in connection with its use as a railway station.

b) As a result of a decision before an inspector relating to Cardiff County Council and Railtrack plc, the office buildings, being used for running the railway, are required in connection with the movement of traffic by rail. An assurance has been given to the Council that the operations centre will be used solely in connection with the movement of traffic by rail. KARRD indicate that this decision is inapplicable because in that case that development in question was outside the station.

c) The Railways Act 1993 defines "station" in a way that the land on which the Building is located would be within the Kingswear railway station.

23. My instructions have been seen by representatives of KARRD and they have requested that I consider the terms of their "Report 7" dated 22 November 2011.

Analysis

*Whether the development at Kingswear benefits from permitted development rights under the 1995 Order*

24. Class A of Part 17 of Schedule 2 to the 1995 Order states as follows:

Development by Statutory Undertakers

A. Permitted development
   Development by railway undertakers on their operational land, required in connection with the movement of traffic by rail.

A.1 Development not permitted
   Development is not permitted by Class A if it consists of or includes—
   (a) the construction of a railway,
   (b) the construction or erection of a hotel, railway station or bridge, or
(c) the construction or erection otherwise than wholly within a railway station of—

(i) an office, residential or educational building, or a building used for an industrial process, or
(ii) a car park, shop, restaurant, garage, petrol filling station or other building or structure provided under transport legislation.

A.2 Interpretation of Class A

For the purposes of Class A, references to the construction or erection of any building or structure include references to the reconstruction or alteration of a building or structure where its design or external appearance would be materially affected.

25. “Railway undertaker” is not specifically defined but, given that the title of Part 17 refers to development by statutory undertakers, the terms of section 262 of the Town and Country Planning Act 1990 are relevant to assessing the meaning of “railway undertaker”. Section 262 states:

262.— Meaning of “statutory undertakers”.

(1) Subject to the following provisions of this section, in this Act “statutory undertakers” means persons authorised by any enactment to carry on any railway, light railway, tramway, road transport, water transport, canal, inland navigation, dock, harbour, pier or lighthouse undertaking or any undertaking for the supply of hydraulic power and a relevant airport operator (within the meaning of Part V of the Airports Act 1986).

(2) Subject to the following provisions of this section, in this Act “statutory undertaking” shall be construed in accordance with subsection (1) and, in relation to a relevant airport operator (within the meaning of that Part), means an airport to which that Part of that Act applies.

(3) Subject to subsections (5) to (5B), for the purposes of the provisions mentioned in subsection (4) any public gas transporter, water or sewerage undertaker, the National Rivers Authority, any universal postal service provider in connection with the provision of a universal postal service, the Civil Aviation Authority and a person who holds a licence under Chapter I of Part I of the Transport Act 2000 (air traffic services) shall be deemed to be statutory undertakers and their undertakings statutory undertakings.

(4) The provisions referred to in subsection (3) are sections 55, 90, 101, 108(3), 139 to 141, 143, 148, 170(12)(b), 236(2)(a), 237 to 241, 245, 247(4)(b), 253, 257(2), 263(1) and (2), 264, 266 to 283, 288(10)(a), 306, 325(9), 336(2) and (3), paragraph 18 of Schedule 1 and Schedules 8, 13 and 14.

(5) Subsection (4) shall apply—
(a) as respects a universal postal service provider in connection with the provision of a universal postal service, as if the reference to sections 55, 247(4)(b), 253 and 257(2) were omitted; and

(b) as respects a universal postal service provider in connection with the provision of a universal postal service, the Civil Aviation Authority and a person who holds a licence under Chapter I of Part I of the Transport Act 2000 (air traffic services) as if—

(i) the references to sections 245, 263(1) and (2) and 336(2) and (3) were omitted; and

(ii) after the words "266 to 283" there were inserted the words "(except section 271 as applied by section 13 of the Opencast Coal Act 1958)".

(5A) For the purposes of this Act—

(a) a person who holds a licence under Chapter I of Part I of the Transport Act 2000 shall not be considered to be a statutory undertaker unless the person is carrying out activities authorised by the licence;

(b) the person's undertaking shall not be considered to be a statutory undertaking except to the extent that it is the person's undertaking as licence holder.

(5B) The undertaking of a universal postal service provider so far as relating to the provision of a universal postal service shall be taken to be his statutory undertaking for the purposes of this Act; and references in this Act to his undertaking shall be construed accordingly.

(6) Any holder of a licence under section 6 of the Electricity Act 1989 shall be deemed to be a statutory undertaker and his undertaking a statutory undertaking—

(a) for the purposes of the provisions mentioned in subsection (7)(a), if he holds a licence under subsection (1) of that section;

(b) for the purposes of the provisions mentioned in subsection (7)(b), if he is entitled to exercise any power conferred by Schedule 3 to that Act; and

(c) for the purposes of the provisions mentioned in subsection (7)(c), if he is entitled to exercise any power conferred by paragraph 1 of Schedule 4 to that Act.

(7) The provisions referred to in subsection (6) are—

(a) sections 55, 108(3), 139 to 141, 143, 148, 236(2)(a), 237, 245, 253, 263(1) and (2), 264, 266 to 283, 288(10)(a), 306, 325(9) and 336(2) and (3), paragraph 18 of Schedule 1 and Schedule 13;

(b) sections 170(12)(b) and 238 to 241; and

(c) sections 247(4) and 257(2) and Schedule 14.

26. The evidence is that the Company has been authorised through an agreement with the British Railways Board to carry on the light railway undertaking which is authorised under the 1972 Act; I would like to see the agreement to confirm that position. Nevertheless, on the assumption (which I expect) that the use is authorised, the Company would fall under section 262(1) of the 1990 Act unless it was excluded by some other means.
In my view, section 262(5A)(b) does not apply in this case. My reasons are as follows:

a) Subsection (5A)(b) must be read as a whole. It is not seeking to require that an undertaker must be “licensed” in order to be a statutory undertaker. That is not a requirement of subsection (1) (which relates to authorisation under an enactment, not licensing) and provision could easily have been made in subsection (1) to make that requirement clear if that was the drafter’s intention.

b) Subsection (5A)(b), read naturally, is a conjunctive provision to be read alongside (5A)(a) and is dealing with the restrictions on persons licensed under Part 1 of Chapter 1 of the Transport Act 2000. Subsection (5A) was introduced by that Act as a whole and, read naturally, it is referring to the person referred to in subsection (5A)(a); that is why it refers to “the person”, rather than “a person” and why there is no definition in subsection (b) of the “licence”. Given that section 262 includes references to other sorts of licence holder, the drafter of the amendment would have been much clearer if the clause was to take general effect in the way contended for by KARRD.

In any event, even were my interpretation on this aspect to be wrong, the meaning of subsection (5A)(b) would not prevent the Company being a statutory undertaker under section 262(1). The clause is limited to those undertakings which are licensed. Given that the Company is not a licensee, the clause does not apply.

Nor does the clause mean, in my view, that an undertaker can only be a statutory undertaker if it is “licensed”. The wording is, in my view, too oblique to have that effect. For example, it is possible for an undertaking to be authorised directly under a local act to carry out the works. If only licensed undertakers could be statutory undertakers, such a person would not be a statutory undertaker in spite of the clear wording of section 262(1). In my view, that indicates that section 262(5A)(b) has, if at all, a more limited application relating only to those undertakers who are licensed.
30. As a result, in my view, the Company is a statutory undertaker.

31. Nevertheless, there are a number of other restrictions which must be overcome in order for the Company to take the benefit of Class A of Part 17. These are:

   a) The development is on the railway undertaker’s operational land and is required in connection with the movement of traffic by rail.

   b) If the development comprises an office, that it is constructed wholly within a railway station.

32. I deal with the second requirement first. On the assumption that the facts which have been described in my instructions indicate the current use of the building, I have considerable doubt that the building is properly to be described as an office. In the Cardiff County Council v Railtrack plc appeal (2000) 15 PAD 766, the Secretary of State took the view that given that there were two main uses of the building in question, the premises would not be an office building and, consequently, would not be within the meaning of Part 17. That approach derived from the decision in Railtrack plc v Secretary of State (1998) 76 P & CR 448 in which the High Court decided that the word “office” had to be read as an “office building” for the purposes of Part 17. Given that the current use is for two main purposes of storage and an office, and it appears that neither is incidental or ancillary to the other, the reasoning in Cardiff would appear to apply in this case: in short, the Building must be used as an office building and would not be since it is an office and storage building.

33. Nevertheless, for present purposes, I assume that the Building comprises an office. As was held in the Cardiff case, an “office” comprises rooms used for clerical or administrative work (see [67]); the office aspect described by the Company plainly falls within that definition; it houses a number of administrative activities which I consider are usually carried out in an office environment.

34. I turn, therefore, to the question whether the Building is wholly constructed within a railway station.
35. In my view, the Building is constructed wholly within a railway station. My reasons are as follows:

a) Section 83 of the Railways Act 1993 defines station as:

any land or other property which consists of premises used as, or for the purposes of, or otherwise in connection with, a railway passenger station or railway passenger terminal (including any approaches, forecourt, cycle store or car park), whether or not the land or other property is, or the premises are, also used for other purposes.

b) That is a broad definition which suggests that land used in connection with a terminal building itself would be part of the station. It is not a directly applicable definition but it does indicate how a related item of legislation has approached the meaning of a station.

c) A broad approach was taken towards the meaning of station in a dissenting judgment in *South Eastern Railway v. Railway Commissioners* (1880) LR 6 QBD 586. The Court of Appeal considered the jurisdiction of the Railway Commissioners in an application made to the Commissioners for an order that the South Eastern Railway had to provide better facilities at Hastings Station. Lord Justice Brett, who dissented on the issue of jurisdiction, considered the legal limitations of the terms used in the statute which imposed the obligation on the railway company; he stating (at p. 601-2):

The terms ‘railway’ and ‘railway station’ are not mere legal terms; they are the descriptions in ordinary phraseology of well understood things of an ordinary kind. These terms, as used in the statute, are therefore to be construed as such descriptions. If there is an omission of some reasonable facility within the Act in the working of the railway, which omission can be reasonably supplied without altering the railway, using the term “railway” as a description of that which is ordinarily understood by people of ordinary sense to be “a railway,” there is nothing in the Act which says that it would be an answer on the part of the company to an order to supply the omission, that it could not be supplied without some structural alteration or addition...So as to a “station,” the term is not in ordinary sense used as a description merely of the actual existing structures at a station; but as the description of a space actually set apart for, and generally used as, a resting-place for traffic, or a place for dealing with it in a particular way, although
every part of the space is not covered with structures or used for passing along or for deposit.

d) A similar approach was taken in *Re Ruthin etc Railway Act* (1886) LR 32 ChD 438 (a case concerning when compensation could be claimed by landowners affected by the abandonment of a railway and the breach of a covenant to build a station) in which it was stated (at p. 443):

...a station meant not a mere building but a place where the trains were to stop on the railway.


...there is no other definition of what that thing is than that which is involved in the necessary meaning of the words "a station." I apprehend that that expression is definite to this extent—it means a stopping-place on the line of railway, that is, a place at which traffic of some description may in a reasonable manner be taken up and set down by and from the carriages moving upon the line. To that extent it is definite and not vague, but the moment you suggest any considerations as to the nature and degree of the convenience and accommodation intended by the parties, then it is wholly vague and indefinite, and there are no elements which can enable the Court, adhering simply to the agreement, and not going beyond it, to determine how those uncertainties are to be reduced to certainties.

f) In the present case, it appears that railway track was situated in the location of the Building until shortly before the erection of the Building. Indeed, it may be that the track may have been taken up in order to accommodate the building. While the track was in place, that would certainly be land used in connection with the railway station.

g) In any event, even if the track had been removed a considerable time before the construction of the Building and the land was not specifically used at that time, it is, in my view, nevertheless within the railway station itself. It is located very close to the railway buildings themselves and surrounded on two sides by rail track. This indicates, in my view, a close connection between
land which is plainly part of the railway station and the relevant parcel of land. Consequently, even had the land not been used, it is land that would have been regarded as within the station itself.

36. Given the above, the exclusion contained in Part A.1(c) does not apply.

37. I turn, therefore, to the last criteria: whether the development is carried out on the Company’s operational land and required in connection with the movement of traffic by rail.

38. In my view, the land on which the Building has been erected is “operational land”. Sections 263 and 264 of the 1990 Act state, in part, as follows:

39. Section 263(1) provides that land will be operational land if:

a) The land is used for the purpose of carrying on the statutory undertaker's undertaking;

b) Subject to the terms of section 264, land in which an interest is held for that purpose.

40. The concern which has been raised by KARRD is that the land was not, at the time of the construction of the Building, operational land because the rail tracks were not then in place. Even if that is right, I do not consider that this would stop the land being land which is “used for the purpose of carrying on the statutory undertaker’s undertaking”. Land which has been part of the operational land, through having track situated on it, does not stop being used for the carrying on of the undertaking once it is removed if it is part of the land holding of the station and has some connection with the area which is used; for the reasons I have given in respect of why the land in question is part of the railway station, I consider it would amount to operational land. I accept, however, that there is an ambiguity on this point; in particular, section 263(1)(a) refers to land that is “used” and it may be held by a Court that the land must be in active use to fall within that subsection; I have found no case law on this point.

41. As a result, I consider the second criterion. If the land ceased to be used for the purposes of section 263(1)(a) when the track was taken up, it will in my view have been held by the Company for the purpose of carrying on
the statutory undertaker’s undertaking within the meaning of section 263(1)(b). That subsection covers land which is currently not in use but is held for those purposes. In my view, the land, with the track removed, was plainly held for those purposes, not least because of the use that it has now been put to.

42. The terms of section 263(1)(b) is subject to section 264 if the land was acquired after 6 December 1968; that appears to be so in the present case. Section 264 prevents land in which an interest is held being operational land unless one or more criteria are satisfied.

43. In my view, the circumstances of the present case fall under subsection (4). As a result of the letter from Boyce Hatton, the Company received the land under the provisions of the Transport Act 1968 and it appears that the land at that time contained track which would have made it operational land of the previous undertaker.

44. Given the above, the remaining question is whether the land is required in connection with the movement of traffic by rail. In my view, the Council is right to accept the statement made in the letter of Mr Pooley, that the building is required solely in connection with the movement of traffic by rail. I note that there have been some earlier statements to the effect that the Building would be used for both river boat and railway operations. However, the position has been clarified and the office use is capable of being used for such purposes. As for the storage purposes, that use is, again, plainly capable of being required in connection with the movement of traffic by rail.

45. As a result of the above, I am of the view that, but for the matters I deal with below in respect of the effect of the 1999 Regulations, Class A of part 17 of Schedule 2 to the 1995 Order would apply.

**Whether Dart Valley Railway Plc is a statutory undertaker within the meaning of section 262(5A)(b) of the 1990 Act**

46. As will be clear from the assessment above, in my view, the Company is a statutory undertaker under the Town and Country Planning Act 1990 and section 262(5A)(b) of the 1990 Act does not apply.
Whether Dart Valley Railway Plc requires a licence as referred to in section 262(5A) of the Town and Country Planning Act 1990 in order to benefit from the permitted development rights contained in, Part 17 of Schedule 2 to the 1995 Order

47. In my view, the Company does not require a licence referred to in section 262(5A) of the 1990 Act to benefit from the permitted development rights contained in Part 17.

Whether the land is operational land for the purposes of Part 17, Class A of the 1995 Order

48. In my view, as will be clear from the above, the land on which the Building was constructed was operational land at the material time.

Whether the Company should be regarded as a tourist attraction and riverboat enterprise of which rail operations form part

49. It is difficult, on the information before me, to conclude that the Company should be regarded as a tourist attraction and/or riverboat enterprise. Nevertheless, the question does not bear on the issues which need to be determined. Given that the Company is a statutory undertaker and that the other criteria are fulfilled, the fact that the Company may be carrying out other activities does not affect the degree to which Class A of Part 17 can be relied upon.

Whether statements made by the Company constitute an adequate assurance that the company will comply in perpetuity with the provisions of the 1995 Order in so far as the development is "in connection with the movement of traffic by rail"

50. As I have indicated above, in my view, the Company’s statements are sufficient to be relied upon for the purposes of deciding whether the development is permitted under Class A of Part 17.

51. As to the requirement that it should be used for such purposes in perpetuity, there is no such requirement within this part of the 1995 Order. Class A of Part 17 of Schedule 2 to 1995 Order operates to grant permission for the construction of the Building. A change of use of the Building is possible so long as it does not constitute a material change of use for the purposes of section 55 of the Town and Country Planning Act 1990. Whether it does so must be judged at the time of any change.
Whether the provisions of the 1995 Order exclude the offices being used for other purposes, such as the movement of traffic by (a) only river link passengers (b) river ferry passengers or (c) inter-modal transfers

52. Once the construction is permitted, as I have indicated in the previous answer, the 1995 Order itself does not preclude a change of use. Whether a change of use is authorised falls to be determined by the general planning legislation.

The implications of the EIA Regulations in respect of the issue of whether the Building benefits from permitted development right and the procedures, if any, that the Council should take in relation to the development in the light of the EIA Regulations

The general position

53. The current provisions of Article 3 of the 1995 Order came into force on 23 August 2011. The previous article was in essentially the same form save that Article 10 referred to the Town and Country Planning (Environmental Impact Assessment) Regulations 1999 ("the 1999 Regulations") instead of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("the 2011 Regulations"). There are differences between the 1999 Regulations and the 2011 Regulations in relation to what amounts to Schedule 2 development. Given that the 1995 Order is granting permission for works to be carried out (as I deal with below) and since the construction process was carried out as a single continuous set of works, in my view, the correct version of the 1995 Order and the EIA Regulations is that in force at the time of the commencement of construction. I have therefore analysed below the 1999 Regulations and article 3 of the 1995 order as it was in force prior to August 2011.

54. Article 3 of the 1995 Order states as follows:

(1) Subject to the provisions of this Order and regulations 60 to 63 of the Conservation (Natural Habitats, &c.) Regulations 1994 (general development orders), planning permission is hereby granted for the classes of development described as permitted development in Schedule 2.

(2) Any permission granted by paragraph (1) is subject to any relevant exception, limitation or condition specified in Schedule 2.

1 Together, I refer to these as the EIA Regulations below.
(3) References in the following provisions of this Order to permission granted by Schedule 2 or by any Part, Class or paragraph of that Schedule are references to the permission granted by this article in relation to development described in that Schedule or that provision of that Schedule.

(4) Nothing in this Order permits development contrary to any condition imposed by any planning permission granted or deemed to be granted under Part III of the Act otherwise than by this Order.

(5) The permission granted by Schedule 2 shall not apply if—
(a) in the case of permission granted in connection with an existing building, the building operations involved in the construction of that building are unlawful;
(b) in the case of permission granted in connection with an existing use, that use is unlawful.

(6) The permission granted by Schedule 2 shall not, except in relation to development permitted by Parts 9, 11, 13 or 30, authorise any development which requires or involves the formation, laying out or material widening of a means of access to an existing highway which is a trunk road or classified road, or creates an obstruction to the view of persons using any highway used by vehicular traffic, so as to be likely to cause danger to such persons.

(7) Any development falling within Part 11 of Schedule 2 authorised by an Act or order subject to the grant of any consent or approval shall not be treated for the purposes of this Order as authorised unless and until that consent or approval is obtained, except where the Act was passed or the order made after 1st July 1948 and it contains provision to the contrary.

(8) Schedule 2 does not grant permission for the laying or construction of a notifiable pipeline, except in the case of the laying or construction of a notifiable pipeline by a [public gas transporter]¹ in accordance with Class F of Part 17 of that Schedule.

(9) Except as provided in Part 31, Schedule 2 does not permit any development which requires or involves the demolition of a building, but in this paragraph “building” does not include part of a building.

(10) Subject to paragraph (12), Schedule 1 development or Schedule 2 development within the meaning of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (“the EIA Regulations”) is not permitted by this Order unless:

(a) the local planning authority has adopted a screening opinion under regulation 5 of those Regulations that the development is not EIA development;

(b) the Secretary of State has made a screening direction under regulation 4(7) or 6(4) of those Regulations that the development is not EIA development; or
(c) the Secretary of State has given a direction under regulation 4(4) of those Regulations that the development is exempted from the application of those Regulations.

(11) Where:

(a) the local planning authority has adopted a screening opinion pursuant to regulation 5 of the EIA Regulations that development is EIA development and the Secretary of State has in relation to that development neither made a screening direction to the contrary under regulation 4(7) or 6(4) of those Regulations nor directed under regulation 4(4) of those Regulations that the development is exempted from the application of those Regulations; or

(b) the Secretary of State has directed that development is EIA development, that development shall be treated, for the purposes of paragraph (10), as development which is not permitted by this Order.

(12) Paragraph (10) does not apply to—

(b) development which consists of the carrying out by a drainage body within the meaning of the Land Drainage Act 1991 of improvement works within the meaning of the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999

(d) development for which permission is granted by Part 7, Class D of Part 8, Part 11, Class B of Part 12, Class F(a) of Part 17, Class A or Class B of Part 20 or Class B of Part 21 of Schedule 2;

(e) development for which permission is granted by Class C or Class D of Part 20, Class A of Part 21 or Class B of Part 22 of Schedule 2 where the land in, on or under which the development is to be carried out is—

(i) in the case of Class C or Class D of Part 20, on the same authorised site,

(ii) in the case of Class A of Part 21, on the same premises or, as the case may be, the same ancillary mining land,

(iii) in the case of Class B of Part 22, on the same land or, as the case may be, on land adjoining that land, as that in, on or under which development of any description permitted by the same Class has been carried out before 14th March 1999;

(f) the completion of any development begun before 14th March 1999

(g) development for which permission is granted by Class B of Part 13.

(13) Where a person uses electronic communications for making any application required to be made under any of Parts 6, 7, 22, 23, 24, 30 or 31 of Schedule 2, that person shall be taken to have agreed—
(a) to the use of electronic communications for all purposes relating to his application which are capable of being effected using such communications;

(b) that his address for the purpose of such communications is the address incorporated into, or otherwise logically associated with, his application; and

(c) that his deemed agreement under this paragraph shall subsist until he gives notice in writing that he wishes to revoke the agreement (and such revocation shall be final and shall take effect on a date specified by him but not less than seven days after the date on which the notice is given).

55. “EIA development” and “Schedule 2 development” are defined in Regulation 2 of the 1999 Regulations as follows:

“EIA development” means development which is either—
(a) Schedule 1 development; or
(b) Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location;

“Schedule 2 development” means development, other than exempt development, of a description mentioned in Column 1 of the table in Schedule 2 where—
(a) any part of that development is to be carried out in a sensitive area; or
(b) any applicable threshold or criterion in the corresponding part of Column 2 of that table is respectively exceeded or met in relation to that development;

56. A “sensitive area” is defined in Regulation 2 of the 1999 Regulations in part as follows:

“sensitive area” means any of the following—

...  
(f) an area of outstanding natural beauty designated as such by an order made by the Countryside Agency as respects England ... under section 87(1) (designation of areas of outstanding natural beauty) of the National Parks and Access to the Countryside Act 1949 as confirmed by the Secretary of State”.

57. Schedule 2 development is defined in the 1999 Regulations in part, as follows:

2. The table below sets out the descriptions of development and applicable thresholds and criteria for the purpose of classifying development as Schedule 2 development.

<table>
<thead>
<tr>
<th>Column 1</th>
<th>Column 2</th>
</tr>
</thead>
</table>

22 I have assumed in this case that this designation has properly occurred.
<table>
<thead>
<tr>
<th>Description of development</th>
<th>Applicable thresholds and criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>The carrying out of development to provide any of the following—</td>
<td></td>
</tr>
<tr>
<td>10 Infrastructure projects</td>
<td></td>
</tr>
<tr>
<td>(b) Urban development projects, including the construction of shopping centres and car parks, sports stadiums, leisure centres and multiplex cinemas; The area of the development exceeds 0.5 hectare</td>
<td></td>
</tr>
<tr>
<td>13 Changes and extensions</td>
<td></td>
</tr>
<tr>
<td>(a) Any change to or extension of development of a description listed in paragraphs 1 to 12 of Column 1 of this table, where that development is already authorised, executed or in the process of being executed, and the change or extension may have significant adverse effects on the environment</td>
<td></td>
</tr>
</tbody>
</table>

58. The following principles apply to a determination as to whether a development is an "urban development project" for the purposes of Schedule 2 to the EIA Regulations:

a) The EU directive 85/337, which the EIA Regulations transpose, has a wide scope and a purposive approach could be taken to the interpretation of the directive.

b) The assessment by the authority as to whether a development falls within a category of Schedule 2 to the EIA Regulations is not simply a finding of fact or of discretionary judgment. It involves the application of the authority’s understanding of the meaning in law of the expression used in the Regulations.

c) The meaning in law may itself be sufficiently imprecise that applying it the facts of the case, as opposed to determining the meaning of the category in the first place, a range of different conclusions may be legitimately available; the phrase “urban development project” is such a phrase.

d) It is wrong in law to simply seek to compare the development under consideration with the list of projects set out under the urban development projects category since they are only examples of such projects and not an exhaustive list.

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4 R (oao Goodman) v Lewisham LBC [2003] EWCA Civ 140 [8]
5 Ibid [8].
6 R (oao Warley) v Wealden [2012] Env LR 4 [60].
e) It is to be noted that the words “urban development project” are words of description, not words of limitation.\textsuperscript{7}

59. The Court in \textit{Wealden} also considered the case of \textit{Save Britain’s Heritage v Secretary of State for Communities and Local Government} [2011] EWCA Civ 334. The case primarily dealt with the meaning of “project” for the purposes of Article 1.2 of Directive 85/337 (which the 1999 Regulations transpose into English law) and particularly whether demolition amounted to the “execution of other … schemes”. Sullivan LJ held that the directive should be read in a purposive manner so that if works are capable of having a significant effect on the environment the definition of “project” should be construed to include rather than exclude such works. The Court then found that if demolition is capable of being a “scheme” for the purposes of Article 1.2 of the Directive, it was also capable of being an “urban development project”.

60. The effect of that decision is that if there is the potential for significant effects on the environment from the type of project in question, then that project should be construed as falling within the category under which it could be identified.

61. The difficulty with the decisions both in \textit{Goodman} and \textit{Wealden} is that they do not actually indicate what is an “urban development project” as a matter of law; they provide only guiding factors. On the face of \textit{Wealden}, the process that needs to be gone through is to assess the meaning of the phrase “urban development project” and then consider whether the development in question would amount to that.

62. Given that approach, in my view, the words in question (being given their descriptive meaning as \textit{Wealden} indicates) can be construed according to the dictionary meaning:

\begin{itemize}
\item[a)] “Urban” is defined as “occurring in or characteristic of a city or town”\textsuperscript{8}.
\item[b)] “Development” is defined as “the action of developing land”\textsuperscript{9}.
\item[c)] “Project” is defined as a “planned or proposed undertaking; a scheme”\textsuperscript{10}.
\end{itemize}

\textsuperscript{7} \textit{Wealden}, [62]
\textsuperscript{8} Shorter Oxford English Dictionary.
\textsuperscript{9} Ibid.
\textsuperscript{10} Ibid.
Additionally, on the basis of the Save case, a further question is whether the type of development in question (rather than the actual development in question) has the potential to have significant effects on the environment. If it does, the phrase "urban development project" should be construed to include the development in question if that is possible. In my view, Save is wrong to the extent that it takes the position that a development of the "type" of development actually being considered should be assessed. In my view, consideration should be given to the specific development in question; the comments made in that case on the meaning of "urban development project" are arguably obiter. Nevertheless, it is a Court of Appeal decision by Sullivan LJ and plainly highly persuasive on this point.

I note one further aspect of Wealden that is not adequately resolved in my view which concerns the relevance of the scale of the development to the question of whether the development falls within the meaning of "urban development project". In Wealden the Court made a passing reference to the question of scale in a way that suggests that this issue might be relevant to the question of what would amount to an "urban development project". Overall, however, and particularly in the light of the fact the phrase is to be regarded as descriptive rather than one of limitation, the judgment appears ultimately to discount the relevance of that.

In my view, the question of whether scale is imported into the notion of an "urban development project" is a difficult one. The scale (or lack of it) of a development can only significantly bear on the question of whether the development is an "urban development project" when the development in question is very small scale; I have in mind a situation where what is being proposed is a building in the curtilage of a dwellinghouse within an AONB that is below the permitted development tolerances. My reasons for that view are as follows:

a) As I have said, Wealden indicates that the phrase in question is a descriptive one, not one that seeks to limit the type of development which may be a schedule 2 development.

b) Scale is incorporated into the assessment of whether a development is an "urban development project" sufficient to

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11 See [66].
amount to Schedule 2 development as a result of tolerances included in column 2 of the Schedule. However, there are no tolerances for sensitive areas (see the definition of Schedule 2 development). The fact that tolerances are required for non-sensitive areas suggests that, generally speaking, “urban development projects” are capable of being small in scale.

c) Nevertheless, very small developments (like my example above) are unlikely to be regarded as a “project”; that phrase connotes something of more scale than a very small development which in all probability will have no impact on the environment. There is support for that approach in Circular 2/99\(^\text{12}\).

66. As a result of the above, in my view, scale is of significance in understanding the meaning of “urban development project” but only such as to discount developments which are very small scale.

67. It is to be noted, of course, that in Wealden the Court was dealing with a small number of 9 static floodlighting poles; it was not a significant development and, although the Court did not say that the Council could not conclude that the development was not an urban development project, the implication of the decision suggests such development could be an urban development project.

68. The second issue concerns the application of paragraph 13 of Schedule 2 which requires an assessment of the Station itself. Under paragraph 13, it is necessary to consider, first, whether the Station amounts to an “urban development project”. If it does, the authority will then need to consider whether the Building amounts to a change to or an extension to the Station and whether the change or extension may have significant effects on the environment\(^\text{13}\).

Assessing whether the EIA Regulations Apply in this Case

69. In applying the approach taken in Wealden and Save to the present case, the Council will need to consider whether the Station or the Building in

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\(^\text{12}\) See paragraphs 62-69.

\(^\text{13}\) The change between the 1999 Regulations and 2011 Regulations is important here in that paragraph 13 no longer has a requirement that the change or extension should be one which may have adverse effects on the environment.
question amounts to an “urban development project” taking into account the following points:

a) Whether the construction of the Building amounts to an “urban development project”.

b) Each of those words should be given their natural meaning.

c) An assessment should be given as to whether an office/operations centre in this location has the potential to have significant effects on the environment. If so, the interpretation of “urban development project” should be construed to include rather than exclude construction of the Building.

d) Whether the development is of such a small scale that it cannot properly be regarded as a “development project”.

70. If it is concluded that the Building is not an “urban development project”, the Council must then consider the paragraph 13 question; that involves the following assessment:

a) It must assess whether, applying the above factors, the Station as a whole amounts to an urban development project.

b) If the Council considers that it does, it must then consider whether the construction of the Building would amount to a change to or extension to the Station taking into account such factors as its size, location and purpose.

c) If it considers that it would, it must then consider whether the change or extension (the construction of the Building) may have significant effects on the environment.

d) Only if it considers that it may, should it conclude that the development falls under paragraph 13.

Procedure

71. If the Council reaches the conclusion that either the Building amounts to an “urban development project” or is an extension or change to an “urban
development project” which may have significant effects on the environment, and is thus Schedule 2 Development for the purposes of the EIA Regulations, the question then arises as to whether the Council is, first, entitled and/or required to assess whether the development amounts to EIA Development and, second, if it concludes that it does not, whether the development will nevertheless be retrospectively permitted under the 1995 Order.

72. In my view, once the authority reaches the conclusion that the development amounts to Schedule 2 development, and the development has been carried out, the production of a negative screening opinion cannot retrospectively authorise the development under the 1995 Order and Class A of Part 17 of Schedule 2 to the 1995 Order will not permit the Building. My reasons are as follows:

a) The 1995 Order does not, as a generality, operate retrospectively. The Order is made under section 59 of the Town and Country Planning Act 1990 which refers simply to the grant of planning permission rather than a permission for development already carried out. The general provisions for express grants of permission do identify a distinction between development to be carried out and development being retrospectively permitted (see sections 70 and 73A of the 1990 Act).

b) Article 3(10) of the 1995 Order is consistent with that approach since it indicates that Schedule 2 development is permitted if the authority “has” issued a negative screening opinion that the development is not EIA development. The word “has” suggests the issuing of the screening opinion must occur before the construction of the development benefits from the deemed permission.

c) Although there is a specific provision in article 3(2) that a permission is subject to a relevant exception, limitation or condition, the limitations identified in the Schedule, if exceeded or if not otherwise complied with, will result in the development in question having been constructed without planning permission (see Garland v Minister of Housing (1969) 20 P & CR 93). The
legal position is then set out in the Planning Encyclopaedia\textsuperscript{14} that, unless the works in question can be separated out into two separate operations (with the first benefitting from permitted development rights), the development will be without permission in its entirety and the authority is entitled to require the removal of the entire development. The limitation included in Part A, for example, is “development not permitted”; that is a similar form of wording as is included in Article 3(10). The similarity in wording suggests that a development carried out without having gone through the prior stage of a screening opinion will amount to development without permission.

73. As a result, should the authority conclude that the Building is an urban development project or is a change or extension to an urban development project which may have significant effects on the environment, the Building will not benefit from permitted development rights.

74. On the basis of that analysis, the authority may, in my view, then take two alternative steps. First, it may nevertheless produce a screening opinion and, if it is in the negative, decide that, because it would have concluded in the same way at the stage before the development commenced, it will not take the matter further by requiring a planning application. The essential basis is that, had the proper procedures been gone through, the permitted development rights could have been relied upon. In my view, there are risks of a legal challenge if that approach is taken on the basis that the decision not to require a planning permission is \textit{Wednesbury} unreasonable\textsuperscript{15}. In my view, given that the development is not at the present time permitted and the 1995 Order is not retrospective, it is difficult logically to decide not to require a planning application on the basis that, had the procedures been followed, the Council could not have required a planning application. Put simply, the authority now does have the opportunity to require a permission and there does not seem to be a reason why that alternative process should not be proceeded with unless the authority considers that the development is acceptable; there has, as yet, however, been no final consideration as to whether it is acceptable.

75. The second option is to decide that a planning application is required.

\textsuperscript{14} See para. 3B-2061.
\textsuperscript{15} In the sense of a decision defying logic, see \textit{Fenton v Secretary of State for the Environment, Transport and the Regions}, Transcript, 30 March 2000, para 16
Whether listed building consent is required for the development

76. Section 7 of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Building Act") provides in part as follows:

(1) Subject to the following provisions of this Act, no person shall execute or cause to be executed any works for the demolition of a listed building or for its alteration or extension in any manner which would affect its character as a building of special architectural or historic interest, unless the works are authorised under section 8.

77. A listed building is defined at section 1(5) as follows:

(5) In this Act “listed building” means a building which is for the time being included in a list compiled or approved by the Secretary of State under this section; and for the purposes of this Act—

(a) any object or structure fixed to the building;

(b) any object or structure within the curtilage of the building which, although not fixed to the building, forms part of the land and has done so since before 1st July 1948, shall be treated as part of the building.

78. In the present case, the construction of the Building did not take place to a listed building itself. The question is, rather, whether works have been done to an object in the curtilage (which has been there since 1 July 1948) of a listed building which would affect the character of a building of special architectural or historic interest.

79. As I have said, the proper question when dealing with works to an object in the curtilage is whether those works have affected the character of a building of special architectural or historic interest.

80. In the present case, the only works which may have been undertaken to an object in the curtilage of a listed building are to the rail tracks. It is unclear whether they were in place immediately prior to the works or at some earlier stage. The question for the Council as a matter of judgment is whether the removal of some of the track – if it is in the curtilage of a listed building (which I turn to next) – affected the character of the special architectural or historic interest of the listed building (as defined). In my view, given the limited track which was removed and its location on the
outer limit of the station, I consider that to be unlikely, but that is ultimately a matter for the authority.

81. In my view, the construction of the Building over the line of track is not of itself something that required listed building consent. The relevant alteration was to the object in the curtilage; the erection of a structure in the location of where the object formerly was situated (since it was removed) does not fall within the terms of the Listed Buildings Act; that is not to say, however, that the Council is not entitled to require the reinstatement of the track through a listed building enforcement notice under section 38 of the Listed Buildings Act should that be considered appropriate.

82. On the basis, nevertheless, of a conclusion that the works to the railway track did affect the character of a listed building (including the relevant objects within its curtilage), the question is whether the track was situated within the curtilage of those structures and has done so since 1 July 1948.

83. The meaning of "curtilage" was considered in Secretary of State v Skerrits of Nottingham [2000] 2 PLR 84. It pointed out that the relevant criteria for determining what is the curtilage of a structure (following A-G (on the relation of Sutcliffe) v Calderdale BC (1982) 46 P&CR 399) are:

a) the physical ‘layout’ of the listed building and the structure;

b) their ownership, past and present;

c) their use or function past and present. Where they are in common ownership and one is used in connection with the other, there is little difficulty in putting a structure near a building or even some distance from it into its curtilage.

84. While the matter is essentially one of fact for the decision-maker, on the basis of the above factors, I am of the view that the track which was situated in the location of the Building was within the curtilage of the listed structures. The track was located close to those structures; it was operationally connected to them and had historically been so. The more difficult issue is whether the tracks were there since 1948. If it is considered that the removal of the tracks did affect the character of the listed buildings as buildings of
special historic or architectural appearance, this would need to be assessed. At the present time, I assume that the tracks had been in that location since that time.

85. Consequently, if it is considered that the removal of the track over which the Building is situated affected the character of either the track or the buildings as structures or objects of special architectural and historic interest, listed building consent was required for their removal.

**What is the legal extent of the curtilage of the Station**

86. As will be clear from the analysis above, in my view, the land on which the Building has been erected is within the curtilage of the listed structures.

**Summary of Conclusions**

87. In summary, I have reached the following conclusions:

a) On the basis of the evidence before me, but for the effect of the 1999 Regulations, Class A of part 17 would apply to the Building.

b) Given the location of the Building and the Station within an AONB, the Council is required to consider whether the Building amounts to an “urban development project” or whether it is an extension or change to an urban development project which may have significant effects on the environment for the purposes of the 1999 Regulations.

c) If it concludes that it is such a development, Class A of Part 17 will not have permitted the construction of the Building. Additionally, the Council may produce a screening opinion and, if it is in the negative, decide not to take the matter further. Alternatively, the Council should require a retrospective application for planning permission.

d) On the assumption which I have made as to age of the railway track which was formerly in the location of the Building, if the removal of those tracks affected the character of the listed building their removal will have required listed building consent,
but the construction of the Building will not require listed building consent.

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30 March 2012