IN THE MATTER OF AN APPLICATION TO

AN BORD PLEANALA

FOR APPROVAL OF THE RAILWAY (METROLINK – ESTUARY TO CHARLEMONT VIA DUBLIN AIRPORT) ORDER

ABP-314724-22

OUTLINE LEGAL SUBMISSOINS ON BEHALF OF TRANSPORT INFRASTRUCTURE IRELAND

I. Introduction

1. An application has been made to An Bord Pleanála ("**the Board**") by Transport Infrastructure Ireland ("**TII**") for approval of the Railway (Metrolink – Estuary to Charlemont via Dublin Airport) Order (the "**Metrolink Railway Order**") pursuant to the Transport (Railway Infrastructure) Act, 2001 as amended ("**the 2001 Act**").

2. These written submissions address the following:

   - *first*, the statutory framework for the grant of a Railway Order and the legal principles to be considered and applied by the Board as part of the assessment of the Railway Order application;

   - *second*, certain legal issues which have been raised as part of the public consultation process, and

   - *third*, the principles to be applied to the compulsory acquisition of land.

3. These legal submissions should be read in conjunction with the Statements of Evidence, other documentation and oral evidence which will be given on behalf of TII in the course of the oral hearing.

II. The statutory framework for the grant of a Railway Order

4. A Railway Order is a development consent which is granted following a bespoke statutory process under the 2001 Act which regulates the development consent process, the land acquisition process and the operation of railways.

5. It is important to note that the 2001 Act has been amended, revised and substituted in a number of instances including by, *inter alia:*

    a. The Railway Safety Act 2005,

    b. The Planning and Development (Strategic Infrastructure) Act 2006,

    c. The Local Government (Roads Functions) Act 2007,

    d. The Dublin Transport Authority Act 2008,

    e. The Public Transport Regulation Act 2009,

    f. The Planning and Development (Amendment) Act 2010 (No. 30 of 2010)

    g. The Roads Act 2015 (No. 14 of 2015)

    h. The Public Transport Act 2016 (No. 3 of 2016),

    i. The European Union (Railway Orders) (Environmental Impact Assessment) (Amendment) Regulations 2021 (Statutory Instrument No. 743/2021).

6. Prior to 2006, Railway Orders were granted by way of Statutory Instrument. In 2006, the Board assumed the role of the Minister for Transport where the granting of Railway Orders was concerned. Section 49 of the Planning and Development (Strategic Infrastructure) Act 2006 amended the 2001 Act by substituting new sections 37 to 47A for sections 37 to 47. These new sections were primarily intended to transfer responsibility for the approval of a Railway Order from the Minister for Transport to the Board and to make certain related amendments.

7. On 20 December 2021 the European Union (Railway Orders) (Environmental Impact Assessment) (Amendment) Regulations 2021 (SI No. 743/2021) gave further effect to the

transposition of the EIA Directive (EU Directive 2011/92/EU as amended by Directive 2014/52/EU) in the context of Railway Orders.

8. A book of legislation has been prepared, to include the 2001 Act and the legislation by which it has subsequently been amended, for the assistance of the Board.

Disapplication of the Planning and Development Act 2000

9. Section 38 of the 2001 Act, as inserted by section 115 of the Dublin Transport Act, 2008, provides:

> *"(1) Each of the following shall be exempted development for the purposes of the Act of 2000:*
>
> *(a) development consisting of the carrying out of railway works, including the use of the railway works or any part thereof for the purposes of the operation of a railway, authorised by the Board and specified in a railway order or of any incidental or temporary works connected with such development;*
>
> *(b) development consisting of the carrying out of railway works for the maintenance, improvement or repair of a railway that has been built pursuant to a railway order.*
>
> *(2) Part IV of the Act of 2000 does not apply and is deemed never to have applied to developments specified in subsection (1)."*

10. Thus, the grant of a Railway Order is an authorisation by which the works the subject of that order are deemed to be exempted development by the terms of the 2001 Act. Further, section 38(2) disapplies Part IV of the Planning and Development Act, 2000 (the "**2000 Act**") to developments which fall within sub-section (1), which includes all railway works.

11. Part IV of the 2000 Act addresses architectural heritage in the context of applications for planning permission. Consequently, Part IV of the 2000 Act (which incorporates sections 51 – 92 of the 2000 Act), as it relates, for example, to protected structures has no application to the consideration of whether approval for a Railway Order should be granted.

12. It is suggested in certain submissions to the Board that the grant of approval for Metrolink would be a material contravention of either the Fingal County Development Plan or the Dublin City Council Development Plan. It is important to emphasise that the concept of material contravention of a development plan is not one which has any application to the grant of

approval under the 2001 Act. Section 37(2) of the 2000 Act establishes the jurisdiction of the Board to grant planning permission in material contravention of a development plan. However, that section is only relevant in the context of an application for planning permission made under the 2000 Act. It has no application to the consideration of an application for approval of a Railway Order under the 2001 Act.

13. However, it is accepted, having regard to section 43(1)(h) of the 2001 Act which requires the Board, when considering whether to grant a Railway Order, to consider the matters referred to in section 143 of the 2000 Act, that the Board is required to have regard to the development plans of the local authorities in whose areas the railway works are located.

Application for a Railway Order

14. Section 37 of the 2001 Act requires that an application be made to the Board for a railway order and that the application must be accompanied by:

    a. a draft of the proposed order;

    b. a plan of the proposed railway works;

    c. in the case of an application by the Agency or a person with the consent of the Agency, a plan of any proposed commercial development of land adjacent to the proposed railway works,

    d. a book of reference to a plan required under this subsection (indicating the identity of the owners and of the occupiers of the lands described in the plan), and

    e. an EIAR in respect of the proposed railway works.

15. The application submitted by TII comprehensively addresses the matters specified in section 37 of the 2001 Act. In addition, a Natura Impact Statement ("NIS") has been submitted with the application.

The Railway Order

16. The basis for the power to grant a railway order is section 43 of 2001 Act (as first substituted by section 49 of the Planning and Development (Strategic Infrastructure) Act, 2006 and then amended by regulation 12 of the European Union (Railway Orders) (Environmental Impact Assessment) (Amendment) Regulations, 2021 (S.I No. 743 of 2021)).

17. The contents of the Railway Order are provided for in section 44 of the 2001 Act, which provides that *"[a] railway order shall contain such provisions as the Board considers necessary or expedient for the purpose of the order."*

18. Without prejudice to the generality of this provision, section 44(2) further provides that a Railway Order may:

a. specify any land or any substratum of land, the acquisition of which is, in the opinion of the Board, necessary for giving effect to the order;

b. specify any rights in, under or over land, water or any public road, the acquisition of which is, in the opinion of the Board, necessary for giving effect to the order;

c. specify the manner in which the railway or the railway works or any part thereof to which the order relates are to be constructed;

d. fix the period within which the construction of the railway works is to be completed;

e. contain provisions as to the manner in which the railway works are to be operated and maintained,

f. contain such provisions as the Board thinks proper for the protection of the public generally, of local communities and of any persons affected by the order,

g. contain provisions requiring (i) the construction or the financing, in whole or in part, of the provision of a facility, or (ii) the provision or the financing, in whole or in part, of the provision of a service, in the area in which the railway works are to be constructed, being a facility or service that, in the opinion of the Board, would constitute a gain to the community,

h. provide for the determination by arbitration of any specified questions arising thereunder;

i. contain such provisions ancillary or incidental to any of the matters aforesaid as the Board considers necessary and proper; and

j. designate the railway to which the order relates as a light railway or as a metro.

19. While TII has, in accordance with section 37 of the 2001 Act, submitted a draft Railway Order to the Board as part of the application, it is ultimately a matter for the Board, if it decides to grant the Railway Order, to do so in terms which comply with section 44.

The draft Railway Order

20. The draft Railway Order is divided into four parts together with a preamble and thirteen schedules.

21. Part I of the draft Railway Order deals with preliminary matters.

22. Article 2 of the draft Railway Order contains relevant definitions, including definitions of "plan" or "plans", "authorised works", and "Railway Works".

23. Article 3 of the draft Railway Order deals with the "incorporation of enactments", and refers to its status as a 'Special Act':

> *"The Regulation of Railways Acts, 1840-1893 and any other Act relating to railways shall apply to the railway so far as they are applicable for the purposes of and are not inconsistent with or varied by the conditions of this Order, and the Principal Act* ***together with the Order shall be deemed to be the Special Act for the purposes of those enactments****."*

24. The Principal Act referred to is the 2001 Act. In ***Garnett v. Bradley*** (1878) 3 App Cas 944, Lord Hatherley explained that a Special Act, as an "*Act directed towards a special object, or special class of objects, will not be repealed by a subsequent general Act embracing in its generality those particular objects, unless some reference be made directly or by necessary interference to the preceding special Act*." The designation of the Railway Order as a "Special Act" status is significant in terms of the CPO process.

25. Article 4 designates the railway as a metro, as required by section 44(2)(j) of the 2001 Act.

26. Part II, Articles 5 to 17 (the First, Ninth and Tenth Schedules) of the draft Railway Order, addresses the nature and extent of the railway works and deals with:

- the construction, operation, improvement and maintenance of railway works and works and power to execute works (Article 5),
- deviation (Article 6),
- temporary closure of the Royal Canal (Article 7),
- roads (Articles 8 to 10),
- bridges and culverts (Article 11),

- the fixing of brackets, etc., to buildings and erection of poles (Article 12),
- the fixing of monitoring equipment (Article 13),
- the strengthening and underpinning of structures or buildings (Article 14),
- the discharge of water (Article 15),
- the characteristics of the railway, which will be operated by electrical or any other mechanical motive power (Article 16), and
- the period within which TII is authorised to carry out the construction of authorised and scheduled works (Article 17).

27. Part III, Articles 18 to 24 (and the Second to Eighth Schedules) of the draft Railway Order addresses the acquisition and possession of land and rights.

28. Part IV, Articles 25 to 29 of the draft Railway Order addresses miscellaneous and general matters.

Amendments to the draft Railway Order

29. A number of amendments have been made to the Railway Order since the application was filed. The reasons for these amendments are as follows:

a. Preamble, pp. 4-5: amendment to 'additional information' language to better track the Transport (Railway Infrastructure) Act 2001, as amended.

b. Preamble, p. 5: amendments have been made to update the plans and policies to be considered by An Bord Pleanála given the passage of time since the submission of the draft RO.

c. Preamble, pp. 6-7: the Appropriate Assessment Screening has been updated to include the following additional European sites which have been screened in when preparing the updated NIS for the purpose of the oral hearing: North-West Irish Sea cSPA [004236]; Seas off Wexford cSPA [004237]; Saltee Islands SPA [004002]; and Wicklow Head SPA [004127].

d. Preamble, p. 8: additional text has been inserted to record the address the requirements of section 15 of the Climate Action and Low Carbon Development Act 2015, as amended.

e. Preamble, p. 9: additions have been made to the reasoned conclusion to include all of the matters specified in section 43 of the Transport (Railway Infrastructure) Act 2001, as amended.

f. Article 6: Amendments have been made to the Limit of Deviations where works form part of an underground tunnel / underground, such that TII can only now deviate vertically 1 metre upwards. This change has been made in light of concerns raised by interested parties in respect of the settlement effects of the LODs.

g. Article 29: Amendment to insert the text "or under" to reflect an omission / typographical error.

30. As can be seen from the foregoing, the amendments proposed are consistent with the 2001 Act and largely reflect legislative and policy updates since the application was submitted.

31. While TII has, in compliance with the requirements of the 2001 Act, submitted a draft Railway Order (and now an updated draft Railway Order), it is ultimately a matter for the Board, if it decides to grant approval for the railway works, to determine the contents of the Railway Order.

Public Consultation

32. In accordance with section 40 of the 2001 Act, TII deposited (and kept deposited) the application for the Railway Order at places directed by the Board, published the requisite newspaper notices, served copies of the newspaper notices and the relevant extracts of the application documentation on the various planning authorities and on landowners and occupiers and presented the application in electronic format on a dedicated website.

33. The purpose of the notification and consultation provisions in the 2001 Act is to provide landowners, occupiers, statutory consultees and members of the public with an opportunity to make submissions in relation to the application for the Railway Order.

34. This was achieved and many interested parties have made submissions. This oral hearing is not, of course, concerned with compensation arising from the CPO process and that, in default of agreement, is addressed in another forum before a Property Arbitrator.

35. Consistent with the provisions of the 2001 Act, the submissions received from all stakeholders arising from the public consultation in response to this Railway Order application have been carefully considered and responded to. In this regard, TII has sought to engage meaningfully with the submissions of all stakeholders.

Environmental Impact Assessment

36. In accordance with section 39 of the 2001 Act, the EIAR for this Railway Order Application was prepared by competent experts and contains, *inter alia* :-

i. a description of the proposed railway works comprising information on the site, design, size and other relevant features of the proposed works;

ii. a description of the likely significant effects of the proposed railway works on the environment;

iii. the data required to identify and assess the main effects which the proposed railway works are likely to have on the environment;

iv. a description of any features of the proposed railway works, and of any measures envisaged to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment;

v. a description of the reasonable alternatives studied by TII which are relevant to the proposed railway works and their specific characteristics and an indication of the main reasons for the option chosen, taking into account the effects of the railway works on the environment; and

vi. a summary in non-technical language of the above information.

37. The examination, analysis and evaluation is carried out by the Board (including the Report and recommendation of the Inspector to this oral hearing) in order to identify, describe and assess the direct and indirect significant effects of the proposed railway works, including significant effects derived from the vulnerability of the activity to risks of major accidents and disasters relevant to it, on: population and human health; biodiversity, including species and habitats protected under the Habitats and Birds Directives; land, soil, water, air and climate; material assets, cultural heritage and the landscape, and the interaction between the above factors.

38. It is important to note that the EIA process, of which this oral hearing forms part, is iterative, interactive and flexible. Reference is made in this regard to the judgment of the High Court in ***Klohn v. An Bord Pleanála (No. 2)*** [2008] IEHC 111 which states:

> *"It is also worth emphasising that the environmental impact statement is a document submitted by the developer, the terms of which are set when it is submitted. In contrast, the environmental impact assessment is a process which is an ongoing*

exercise undertaken by the decision maker. A great deal can happen, and a great deal of information can be accumulated, between the lodging of the environmental impact statement by a developer and the final decision by the planning authority or by An Bord Pleanála…"

39. The EIA process is not, therefore, a static one, and one of its objectives is to elicit submissions and observations from members of the public concerned on the environmental impact of the proposed development. It is relevant to note in this context, the power conferred on the Board by section 41 of the 2001 Act to seek further information for the purpose of the EIA process, not only where it considers the EIAR to be inadequate, but also where it "*considers it necessary to do so*".

40. The EIAR considers the available results of other relevant assessments under European Union or national legislation with a view to avoiding duplication of assessments.

41. The EIAR, in addition to addressing the matters set out in section 39(1) of the 2001 Act, contains information specified in Annex IV to the EIA Directive relevant to the specific characteristics of the particular railway works and type of railway works proposed here. The application documentation contains a detailed description of the Railway Works which has enabled the public to participate effectively in the decision-making process before the Board and which also allows the Board to identify, describe and assess the likely significant effects on the environment of Metrolink.

42. Annex IV of the EIA Directive sets out the information which must be included in the EIAR, which includes the following:

"A description of the likely significant effects of the project resulting from, inter alia: ... (e) ***the cumulation of effects with other existing and/or approved projects****, taking into account any existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources; ..."*

43. It is also relevant to note that the EPA's "Guidelines on the information to be contained in Environmental Impact Assessment Reports" state, in para. 3.4.2:

"It should cumulatively consider the effects of projects which already have consent but are not yet implemented. It may also be appropriate to consider other projects that are planned but not yet permitted. For example, it would be prudent to consider a significant project for which a planning application has been lodged even if the consent decision has not been issued."

44. In light of the foregoing, the EIAR has taken a conservative approach and included an assessment of the cumulative impacts of Metrolink and existing/approved projects and significant projects in respect of which applications for development consent have been lodged.

45. Section 42A of the 2001 Act provides that, in carrying out an EIA in respect of an application made under section 37 of the 2001 Act the Board shall, where appropriate, co-ordinate the assessment with any assessment under the Habitats Directive (Council Directive 92/43/EEC of 21 May 1992) or the Birds Directive (Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009). For the assistance of the Board in that regard, the assessments contained in the EIAR have been co-ordinated with the assessment under the Habitats Directive and Birds Directives in the NIS which has been prepared for this Railway Order application.

46. Section 42B of the 2001 Act includes provisions in relation a "reasoned conclusion" and the reasoned conclusion must be integrated into the Railway Order. This is a matter to be addressed by the Inspector and the Board as provided for in the Preamble and in the Final Schedule to the draft Railway Order, both of which are to be inserted. Accordingly, before deciding whether to grant a Railway Order the Inspector and the Board consider inter alia the following matters:

- the EIAR;
- additional information, if any;
- any submissions or observations made in relation to the likely significant effects on the environment of the activity to which the application relates duly made to it;
- any other evidence it has obtained in relation to the likely significant effects on the environment of the activity to which the application relates, and
- taking into account the results of the examination of matters referred to above and reach a reasoned conclusion on the significant effects on the environment of the activity to which the application relates.

Appropriate Assessment

47. An appropriate assessment in respect of railway works is carried out in accordance with Article 6(3) of the Habitats Directive and Part XAB of the 2000 Act. Section 177R of the 2000 Act includes in the definition of “proposed development” to which that Part applies, development under section 43 of the 2001 Act.

48. Section 177U(4) and (5) of the 2000 Act provides for screening for Appropriate Assessment:

> *(4) The competent authority shall determine that an appropriate assessment of a draft Land use plan or a proposed development, as the case may be, is required if it cannot be excluded, on the basis of objective information, that the draft Land use plan or proposed development, individually or in combination with other plans or projects, will have a significant effect on a European site.*
>
> *(5) The competent authority shall determine that an appropriate assessment of a draft Land use plan or a proposed development, as the case may be, is not required if it can be excluded, on the basis of objective information, that the draft Land use plan or proposed development, individually or in combination with other plans or projects, will have a significant effect on a European site.*

49. Where required, appropriate assessment is provided for by section 177T of the 2000 Act. In particular section 177T(1) requires that an appropriate assessment shall include a determination by the Board as to whether or not the proposed development would adversely affect the integrity of a European Site and that the appropriate assessment shall be carried out before consent is given for the proposed development

50. Section 177V(2) requires the Board to take account of the following matters:

> *(a) the Natura impact report or Natura impact statement, as appropriate;*
>
> *(b) any supplemental information furnished in relation to any such report or statement;*
>
> *(c) if appropriate, any additional information sought by the authority and furnished by the applicant in relation to a Natura impact statement;*
>
> *(d) any additional information furnished to the competent authority at its request in relation to a Natura impact report;*
>
> *(e) any information or advice obtained by the competent authority;*
>
> *(f) if appropriate, any written submissions or observations made to the competent authority in relation to the application for consent for proposed development;*
>
> *(g) any other relevant information.*

51. Section 177V(3) stipulates that the Board can give consent for a proposed development only after "*having determined that the…proposed development shall not adversely affect the integrity of a European site*".

52. The application for the Metrolink Railway Order has been accompanied by an Appropriate Assessment Screening Report and Natura Impact Statement, both of which identify the European Sites in respect of which a screening for appropriate assessment is required and those in respect of which it is necessary to carry out an appropriate assessment. It is submitted that the information contained in the application documentation is sufficient to allow the Board to make a screening decision and conclude whether the project is likely to have a significant effect on the specified or any other European Sites and, having made that decision, to determine that the project will not have an adverse impact on any European Site in light of their conservation objectives.

53. Article 6(3) of the Habitats Directive requires a screening for appropriate assessment and appropriate assessment to consider the impact of the project both alone and in combination with other plans or projects.

54. The Commission's Guidance on "***Assessment of plans and projects in relation to Natura 2000 sites – Methodological guidance on Article 6(3) and (4) of the Habitats Directive 92/43/EEC"*** (2021/C 437/01) (2021) provides as follows in respect of in-combination assessments:

> ***"Assessing cumulative effects at the screening stage***
>
> *A series of individually low-level impacts may, in combination, produce a significant impact. When determining likely significant effects, the combination with other plans and/or projects should also be considered to take account of cumulative impacts during the assessment of the plan or project.*
>
> *The in-combination provision concerns other plans or projects that have been already* ***completed, approved but uncompleted, or proposed*** *(i.e. for which an application for approval or consent has been submitted). In addition, it is important to note that the assessment of cumulative effects is* ***not restricted to the assessment of similar types of plans or projects*** *covering the same sector of activity. All types of plans or projects that could, in combination with the plan or project under consideration, have a significant effect, should be included during the assessment.*
>
> *Similarly, the assessment should look at the cumulative effects, not just between projects or between plans but also* ***between projects and plans (and vice versa)****. For*

example, a new project to build a major motorway may on its own not adversely affect the site, but when considered in combination with an already approved housing development plan for the same area, the impacts may become significant enough to adversely affect the site. By contrast, a plan may have no significant impact on Natura 2000 sites on its own but may be assessed differently if considered in combination with an already proposed or authorised major development project not included in that plan.

See further details in the Article 6 Guide – section 4.5.3."

55. The in-combination assessment contained in the AA Screening Report and the NIS reflects those requirements and includes an assessment of projects completed, projects approved, projects proposed.

56. The requirement to complete a screening for appropriate assessment and appropriate assessment prior to the grant of approval for the Metrolink Railway Order is reflected in the Preamble to the draft Railway Order.

57. Finally, it should be noted that, as is addressed in the statement of Ronan Hallissey, the evidence in relation to otter and bat species does not identify the need for a derogation licence pursuant to Regulation 54 of the European Communities (Birds and Natural Habitats) Regulations 2011.[1]

Notification, Monitoring and Enforcement of Environmental Conditions

58. S.I. No. 743 of 2021 inserted sections 43A to 43F into the 2001 Act which make provision for the notification, monitoring and enforcement of environmental conditions imposed by the Board with an enhanced supervisory role for the Minister for Transport.

59. Section 43A defines "environmental condition" as follows: "*An environmental condition in relation to a Railway Order means any condition, modification, restriction or requirement to which a Railway Order is subject that relates to:- (a) features of the railway works or measures envisaged to avoid, prevent, reduce or offset significant adverse effects on the environment, or (b) the monitoring of significant adverse effects on the environment, (including conditions regarding monitoring measures, parameters to be monitored and the duration of monitoring)*".

60. Section 43B imposes an obligation on a railway undertaking to comply with any environmental conditions imposed by the Board. Section 43B also imposes a duty to notify the Minister for

[1] Accordingly, the decision in Case C-166/22 *Hellfire Massey Residents Association v. An Bord Pleanála* is not engaged.

Transport of the imposition of such environmental conditions. Section 43C provides that the Minister for Transport shall take all reasonable steps to ensure that a railway undertaking complies with environmental conditions. To facilitate this, the Minister can request information in relation to compliance with the conditions (section 43D), carry out an assessment of whether there has been compliance (section 43E) and issue a direction requiring the railway undertaking to take such action as the Minister considers necessary to ensure that it complied with the environmental conditions (section 43F). A failure to comply with a direction is a criminal offence (section 43F(4)).

The Climate Action and Low Carbon Act 2015 (as amended)

61. Section 15 of the Climate Action and Low Carbon Act 2015 (as substituted by section 17 of the Climate Action and Low Carbon Development (Amendment) Act 2021) ("**the 2015 Act**") imposes a duty on State bodies in the following terms:

> *(1) A relevant body shall, in so far as practicable, perform its functions in a manner consistent with -*
>
> *(a) the most recent approved climate action plan,*
>
> *(b) the most recent approved national long term climate action strategy,*
>
> *(c) the most recent approved national adaptation framework and approved sectoral adaptation plans,*
>
> *(d) the furtherance of the national climate objective, and*
>
> *(e) the objective of mitigating greenhouse gas emissions and adapting to the effects of climate change in the State.*

62. In accordance with that section, when performing its functions, including its function in relation to the approval of a Railway Order, the Board has to do so in a manner which is consistent with the most recently approved climate action plan ("CAP") and the other specified climate strategies, plans and objectives.

63. Paragraph 17.3.2 of the EIAR identifies the relevant polices and programmes which were in place at the time that the EIAR was prepared. Those included the National Mitigation Plan (2017), the National Adaptation Plan and the Climate Action Plan 2021 (the "**2021 CAP**"). However, the 2021 CAP has been superseded by the Climate Action Plan 2023 (the "**2023 CAP**") and, more recently, by the Climate Action Plan 2024 (the "**2024 CAP**") which was

approved by Government on 20 December 2023, subject to strategic environmental assessment and appropriate assessment.

64. The Statement of Evidence of Dr. Avril Challoner addresses the requirements of both the 2023 CAP and the 2024 CAP and the other specified climate strategies, plans and objectives and demonstrates why Metrolink is:

    a. consistent with the most recent approved climate action plan and national long term climate action strategy and furthers the national climate objective;

    b. consistent with the most recent approved national adaptation framework and approved sectoral adoption plans, ensuring that the impact of future climate change has been considered and adaptation has been applied to reduce vulnerability to such impacts, and

    c. consistent with the objective of mitigating GHG emissions and adapting to the effects of climate change in the State.

65. As is explained in that statement, by reason of the additional mitigation measures to which TII has committed in the updated assessment, the embodied carbon in the proposed Scheme has been reduced by 51.7%.

66. In light of the information which has been placed before the Board, it is clear that, by approving the Railway Order, the Board would be performing its functions in a manner which is consistent with the 2023 CAP, the 2024 CAP and the other specified climate strategies, plans and objectives.

The power to grant a Railway Order

67. Section 43(1) of the 2001 Act identifies the matters which must be considered by the Board before deciding whether to grant a railway order, which include:

    a. the application;

    b. the draft order and documents that accompanied the application;

    c. the report of any oral hearing held under section 42 and the recommendations (if any) contained therein;

    d. the likely consequences for proper planning and sustainable development in the area in which it is proposed to carry out the railway works and for the environment of such works; and

e. the matters referred to in section 143 (inserted by the Planning and Development (Strategic Infrastructure) Act 2006) of the Act of 2000.

68. The matters referenced in section 143 of the 2000 Act include policies and objectives of the Government, a state authority, the Minister, planning authorities or other parties whose functions have or may have a bearing on the proper planning and sustainable development of areas, the national interest and any effect on issues of strategic economic or social importance to the State and the National Planning Framework or any regional, spatial or economic strategy.

69. Thus, in taking any decision on the application made for the Metrolink Railway Order, regard should be had to relevant national and regional policies of the Government, guidelines published by the Minister and the Development Plans for the relevant local authorities, Fingal County Council and Dublin City Council. The policies and Development Plans to which the Board are to have regard in taking its decision are those in force at the time that the decision is taken.[2] The updated plans and policies which are now in force and to which regard is to be had in taking the decision on the application are addressed in the Statement of Evidence of John Kehoe.

70. The decision of the Board must also take into account the reasoned conclusion reached in respect of environmental impact assessment in accordance with section 42B of the 2001 Act (section 43(2)).

71. Section 43(2)(a) provides that, having considered these matters, the Board:

> "*… if it is of opinion that the application should be granted, shall make an order authorising the applicant to construct, maintain, improve and, subject to section 11(7) in the case of the Agency, operate the railway or the railway works specified in the order or any part thereof, in such manner and subject to such conditions (including conditions regarding monitoring measures, parameters to be monitored and the duration of monitoring), modifications, restrictions and requirements (and on such other terms) as the Board thinks proper and specifies in the order, …*"

72. It can be seen that the Board enjoys a wide discretion in this regard.

The reasoned conclusion (EIA Directive)

73. A Railway Order is required, in accordance with section 43(2A) of the 2001 Act, to include:

[2] See *Crofton Building Management CLG v. An Bord Pleanála* [2022] IEHC 704.

a. the reasoned conclusion in respect of environmental impact assessment,

b. any environmental conditions, including conditions regarding monitoring measures, parameters to be monitored and the duration of monitoring, to which the authorisation is subject, and

c. a description of any features of the proposed railway works, or any measures envisaged to avoid, prevent or reduce or offset significant adverse effects on the environment.

74. While a draft Railway Order has been submitted with the application, as required by the 2001 Act, it is necessarily silent on certain matters. For example, the draft Railway Order does not include the "reasoned conclusion", which is a matter for the Board.

Reasons for the Decision

75. It is noted that section 43(2B) of the 2001 Act indicates that a decision to refuse to grant a Railway Order shall include the main reasons for the refusal. Notwithstanding that this statutory obligation is limited to circumstances where the application for a Railway Order is being refused, if the Board decides to approve the Railway Order, its decision should also include the main reasons for the grant of the Order.

76. In ***Connelly v An Bord Pleanála*** [2018] IESC 31, §6.15, Clarke J identified the following two requirements regarding the adequacy of reasons given by a decision maker:

> "*First, any person affected by a decision is at least entitled to know in general terms why the decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions and also contributes to transparency. Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision. Closely related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review*."

77. As can be seen from the foregoing, the provision of reasons for the grant, as well as the refusal, or a Railway Order is consistent with good administration.

Other matters not finalised in the draft Railway Order

78. The draft Railway Order also includes the following:

- *Scheduled conditions* including environmental conditions, modifications, restrictions and requirements, and on such other terms, as the Board may direct, are presently referred to in the Eleventh Schedule of the draft Railway Order; and

- *Agreements* including those with landowners, local authorities (including planning authorities) are set out in the Thirteenth Schedule of the draft Railway Order.

79. These are subject to change and will be updated over the course of the oral hearing, as scheduled conditions and other agreements with public and prescribed bodies are reached.

Alterations

80. The Board may, if it is provisionally of the view that it would be appropriate to grant the railway order concerned, were certain alterations to be made to the terms of the application or the proposed railway order, notify the applicant that it is of that view and invite the applicant to make to the terms of the application or the proposed order alterations specified in the notification (which is then published and forms part of a further consultation and information process including, where necessary, a further EIAR) (section 47D(4)-(7) of the 2001 Act)).

III. Legal Issues raised in Submissions

The level of design detail required provided in the application documentation

81. A number of the submissions made during the public consultation process suggest that there is a lack of sufficient detail in the Railway Order documentation in respect of the design of the railway works. This is not the case.

82. It is important to note that a Railway Order is not a grant of planning permission. As such, the Planning and Development Regulations 2001, which were made pursuant to section 33 of the 2000 Act, do not apply to an application for a Railway Order.

83. In recognition of the nature and scale of the works required to construct a rail project, the 2001 Act is less prescriptive that the Planning and Development Regulations 2001 as to the contents of an application for approval. Section 37(3) of the 2001 Act merely requires that the application include *"a plan of the proposed railway works*". Also relevant is section 39 of the 2001 Act which requires that the EIAR submitted with an application for a railway order contain, *inter alia*:

- *a description of the proposed railway works comprising information on the site, design, size and other relevant features of the proposed works;* and

- *a description of any features of the proposed railway works, and of any measures envisaged, to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment.*

84. The application documentation undoubtedly meets the requirements of the 2001 Act. The draft Railway Order prepared in respect of the application defines "plan" or "plans" as including:

> *"… the plan of the proposed railway works together with all documents that accompany the application, including (but not limited to) alignment drawings/plans, structural drawings/plans, utility drawings/plans, property drawings/plans, landscape drawings/plans together with a plan of any proposed commercial development of land adjacent to the proposed railway works submitted to the Board pursuant to section 37(3) of the Principal Act and deposited or to be deposited at the head office of TII pursuant to section 46(a) of the Principal Act*"

85. The draft Railway Order defines the "authorised works" as:

> "*… all works described and all works authorised in this Order and in the schedules thereto (also referred to as the "scheduled works") and includes railway works, works, or any part of them*;"

86. "Railway works" are further defined as:

> "*any works required for the purposes of the railway or any part of the railway, including works ancillary to the purposes aforesaid such as parking by buses, bicycles or by persons using vehicles who intend to complete their journey by railway, and relocation of utilities and in this definition "works" includes any act or operation of construction, excavation, tunnelling, demolition, extension, alteration, reinstatement, reconstruction, making good, repair or renewal*".

87. There is also a definition of "scheduled works" which are:

> "*the works and plans specified in the schedules to this Order and shall also include all such other works and railway works referred to in this Order and the schedules to this Order including any addendum thereto or any part of them*"

88. The draft Railway Order further states that:

""works" includes any act or operation of construction, excavation, tunnelling, demolition, extension, alteration, reinstatement, decommissioning of any equipment, reconstruction, making good, repair or renewal and includes railway works as defined in the Principal Act but also includes where the context so requires or admits other works authorised by this Order including such acts or operations as are included in the meaning assigned to "works" in the definition of "railway works" contained in the Principal Act and, for the avoidance of doubt, includes surveys and investigations and the methods by which such said acts or operations are executed and cognate words shall be construed accordingly"

89. Part 2 of the Railway Order is entitled "railway works, works and related provisions". It provides that:

> *1) Subject to the provisions of this Order, TII may, on the lines, in the places and according to the levels shown on the Plan (and plans), execute the authorised and the scheduled works or any part thereof, including those works described in the First Schedule and the Plan (and plans) and in all other Schedules referred to in this Railway Order and all other necessary, consequent or ancillary works or things.*
>
> *2) Without prejudice to the matters referred to paragraph (1) hereof and to the generality of the foregoing, the authorised works include inter alia: construction of a railway approximately 18.8 kilometres in length which is mostly underground comprising inter alia 9.4 kilometres section of single bore tunnel running beneath Dublin City Centre from Charlemont to Northwood Station, 2.3 kilometres section of single bore tunnel running beneath Dublin Airport; tunnel sections include intervention access facilities for emergency services at Dublin Airport, Albert College Park and just south of Charlemont Station, tunnel Portal structures will be provided at Northwood, Dardistown and Dublin Airport; north of Dublin Airport the railway will emerge from tunnel and will run at surface level and in cut and cover structures to Estuary Station; surface running sections and cut and cover sections will include earthworks, the use of retained cut and cover structures, elevated sections plus miscellaneous drainage and accommodation works; a new 99m long bridge will be constructed over the M50 and a 261m long multi-span Viaduct over the Broadmeadow and Ward River; the construction of 16 stations, including 11 underground stations at Dublin Airport, Northwood, Ballymun, Collins Avenue, Griffith Park, Glasnevin, Mater, O'Connell Street, Tara, St. Stephen's Green and Charlemont; 4 retained cut stations at Seatown, Swords Central, Fosterstown and Dardistown and 1 at grade station at Estuary; a multi-storey 3000 space park and ride close to the M1 Motorway will be provided at*

Estuary Station, a maintenance depot is located near Dardistown Station which will house all the facilities required for the maintenance and operation of the MetroLink and its rolling stock and the Operational Control Centre; the works will also inter alia include railway signalling, command and control and communications systems; provision of electrical substations; establishment of temporary construction compounds; establishment of temporary traffic management and road diversions; new and realigned access routes and road junction improvements; diversion of existing utilities; provision of new drainage infrastructure; provision of environmental mitigation measures; and other infrastructural modifications to facilitate the overall project.

90. As can be seen from the foregoing, the draft Railway Order essentially provides for the grant of consent to carry out the works described in the schedules, plans and drawings.

91. More than sufficient detail in respect of the design of the proposed railway works has been furnished to enable the Board to carry out an EIA and an AA and to enable the public to participate effectively in any decision-making process and to allow the competent authority to carry out an adequate assessment:

92. In so far as the EIA Directive is concerned, the description of the proposed Scheme provided in the application documentation is more than sufficient to facilitate effective public consultation as can be seen from the extent of the submissions received during the public consultation process. It also provides all of the information required to enable the Board to identify, describe and assess the likely significant effects which the proposed railway works are likely to have on the environment and, where necessary, to identify impacts on the environment in respect of which mitigation is required.

93. With regard to the Habitats Directive, the description of the proposed Scheme provided is sufficient to enable the competent authority to determine whether a development is either likely to have a significant effect or adversely affect the integrity of a European Site.

Matters left over for determination after the Railway Order is granted

94. Certain submissions make a complaint that certain matters such as construction methodologies and the procurement of plant and machinery have been left over for determination following the making of the Railway Order. However, it is permissible, both as a matter of national and EU law, to allow for certain parameters to be left over for determination following the grant of development consent, such as that which is envisaged in the application documentation.

95. Section 44(1) of the 2001 Act stipulates that a Railway Order shall contain *"such provisions as the Board considers necessary or expedient for the purpose of the order"*. Without prejudice to the generality of that subsection, a Railway Order may *"specify the manner in which the railway or railway works or any part thereof to which the order relates are to be constructed"* (section 42(2)(c)) and *"contain such provisions ancillary or incidental to any of the matters aforesaid as the Board considers necessary or proper"*. In accordance with those provisions, it is clearly within the jurisdiction of the Board to permit certain matters to be left over for agreement with the appropriate competent authorities, in accordance with the principles articulated in ***Boland v An Bord Pleanála*** [1996] 3 IR 435 and subsequent case law. [3]

96. Moreover, insofar as the EIA Directive is concerned, it is recognised that a degree of flexibility may be permitted provided that it remains possible to identify the likely significant effects on the environment from a particular development.[4] It is recognised that the Board must be in a position to identify the likely significant effects on the environment from the proposed development and care has been taken to ensure that any flexibility in the design does not (i) undermine the ability of the Board to assess any significant effects on the environment or (ii) undermine public participation.

97. With regard to the Habitats Directive, the CJEU confirmed in Case C-461/17**, *Holohan*** that leaving matters over for determination or agreement post-consent is not precluded by the Habitats Directive provided that the Board "*is certain that the development consent granted establishes conditions that are strict enough to guarantee that those parameters will not adversely affect the integrity of the site*".[5]

98. In conclusion, therefore, insofar as any matters have been left over for agreement following the grant of approval for the Railway Order, this is consistent not just with the requirements of the 2001 Act but also with the requirements of both the EIA Directive and the Habitats Directive.

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[3] *Kenny v An Bord Pleanála* [2001] 1 IR 565, *Krikke v Barranafaddock Sustainable Electricity Ltd* [2021] IECA 217, *Sweetman v. An Bord Pleanála (Derryadd Wind Farm)* [2021] IEHC 390, *Shadowmill Ltd v An Bord Pleanála* [2023] IEHC 157.
[4] *R v. Rochdale Metropolitan Borough Council ex p. Milne* [2001] Env. L.R 22, *Advice Note No. 9* (UK), EU Commission *Guidance Document on Wind Energy Developments and EU Nature Legislation* (November 2020), *Sweetman v. An Bord Pleanála (Derryadd Wind Farm)* [2021] IEHC 390 and [2021] IEHC 662.
[5] See also *Coyne v An Bord Pleanala* [2023] IEHC 412, [347].

Alternatives

99. As certain submissions raise issues with regard to possible alternatives to either the entirety of the Metrolink project or individual parts of the project, it is necessary to briefly address the nature of the obligation to consider alternatives arising from the EIA Directive.

100. Article 5(1)(d) of the EIA Directive requires an environmental impact assessment report to include:

> *"a description of the reasonable alternatives studied by the developer, which are relevant to the project and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the project on the environment;"*

101. Annex IV of the EIA Directive also requires that the following is included in an environmental impact assessment report:

> *"A description of the reasonable alternatives (for example in terms of project design, technology, location, size and scale) studied by the developer, which are relevant to the proposed project and its specific characteristics, and an indication of the main reasons for selecting the chosen option, including a comparison of the environmental effects."*

102. The nature of that obligation was considered by the CJEU in Case C-461/17***, Holohan***, in which it was concluded that the obligation placed on a developer is to provide information on the main alternatives to a development, with the decisive factor in identifying those alternatives being: "*whether or not those alternative influence the environmental effects of the project*." The Court held that the point in time at which the alternative is rejected is not relevant. The Court also held that there was no requirement for the main alternatives to be "*subject to an impact assessment equivalent to that of the approved project*" but rather the developer is required to:

> *"indicate the reasons for his choice, taking into account at least the environmental effects. One of the aims of imposing on the developer the obligation to outline the main alternatives is that reasons for his choice should be stated".*

103. The purpose of this exercise, as identified by the CJEU at §67, is to enable the competent authority to carry out a comprehensive EIA that:

> *"catalogues, describes and assesses, in an appropriate manner the effects of the approved project on the environment, in accordance with Article 3 of the EIA Directive".*

104. Chapter 7 of the EIAR addresses the consideration of the alternatives studied by TII relating to Metrolink. That analysis demonstrates the decision making process which led to the identification of the Metrolink route, the integration of environmental analysis into the development of the project from the earliest stage and the main reasons (including environmental reasons) for choosing the Metrolink project or specific elements of Metrolink.

105. Having regard to the information which is contained in the EIAR, the obligation arising from Article 5 of the EIA Directive has clearly been discharged.

St Stephen's Green

106. Section 15 of the St. Stephen's Green (Dublin) Act, 1877 provides that the Commissioner of Public Works shall maintain St. Stephens Green as an ornamental park or pleasure ground for the recreation of enjoyment of the public.

107. Section 116 of the Dublin Transport Act, 2008 provides that section 15 of the 1877 Act does not apply:

(a) to anything done for the purposes of surveys and inspections under section 36 of the Act of 2001,

(b) to any railway works (within the meaning of section 2 of the Act of 2001) carried out on or under St Stephen's Green pursuant to a railway order under section 43 (inserted by section 49 of the Planning and Development (Strategic Infrastructure Act, 2006) of the Act of 2001, or

(c) to restrict the operation of a railway, light railway or metro (within the meaning of section 2 of the Act of 2001) on or under St Stephen's Green.

108. The railway works to be carried out on foot of the Railway Order come within section 116(b) and (c) of the 2008 Act and, consequently, section 15 of the 1877 Act is disapplied for the purposes of this application.

National Monuments

109. The route of Metrolink will be close to or under three national monuments, St. Stephen's Green, Lissenhall Bridge and the buildings at 14 – 17 Moore Street. The impacts of the project on those monuments are addressed in Chapters 25 (Archaeology and Cultural Heritage) and 26 (Architectural Heritage) of the EIAR.

110. As national monuments they are subject to the requirements of the National Monuments Act, 1930 as amended (the "**1930 Act**"). In particular, section 14 of the 1930 Act (as amended by section 5 of the National Monuments (Amendment) Act, 2004) requires the prior consent of the Minister to be obtained for certain works at national monuments. In particular, a person cannot demolish, remove, disfigure, deface, alter, or in any manner injure or interfere with, or excavate, dig, plough or otherwise disturb the ground within, around, or in proximity to a national monument, renovate or restore it without obtaining prior ministerial consent.

111. The 1930 Act has been repealed by the Historic and Archaeological Heritage and Miscellaneous Provisions Act 2023 (the "**2023 Act**"), the majority of which has not yet been commenced. Once commenced, Chapter 6 of Part 2 of the 2003 Act will provide for an application to be made to the Minister for Housing, Local Government and Heritage in respect of "relevant works", defined as "*works at, on, in, under, to, or within the immediate surroundings of, a monument*".

112. Insofar as any consents are required, whether under the 1930 Act (or the 2023 Act when commenced) in order to carry out the railway works, TII will make an application to the Minister for the necessary consent.

113. To the extent that it may be suggested, it is not necessary or appropriate for the Board to determine whether an application for any particular consent is required under the 1930 Act (or the 2023 Act when commenced), nor would it be appropriate for the Board to direct that such an application be made by way of condition. The position is similar to that in ***Dunne v Dublin County Council*** [1975] IR 45 where the Council was found to have acted *ultra vires* in imposing conditions directed towards noise issues which were properly addressed by Building Regulations. The 1930 Act is a separate legislative framework in respect of which the Board does not have a role. Any legal obligations in the 1930 Act (or the 2023 Act when commenced) arise independently and irrespective of the view of the Board as to whether a consent is required under that legislative framework.[6]

Construction of Station Box at Charlemont

114. The submission made by Charlemont and Dartmouth Community Group includes an Opinion of Senior Counsel in which it is asserted that works relating to the station box for the Charlemont have already been undertaken and are unauthorised. That is not correct.

[6] See, by analogy, *Redmond v An Bord Pleanála* [2020] IEHC 151.

115. On 11 April 2019, the Board granted planning permission to Grant Parade Property Trading Company in respect of the refurbishment of the old Carroll's building at 2 Grand Parade, Dublin 6 (ABP-300873-18). Included in the scope of that permission were certain enabling works comprising the construction of a structural deck founded on bored secant piles which forms part of the Charlemont station box roof slab which was designed to facilitate the possible construction of a Metrolink station at Charlemont.

116. The factual premise to the effect that no consent has been granted for those enabling works is incorrect. The planning permission granted by the Board authorises those works. Insofar as complaint is made that it was not lawful for those works to be included within the scope of that planning permission, that is not correct. Moreover, this is not a contention which can be considered as part of the assessment being undertaken by the Board. The planning permission granted by the Board is valid and cannot be challenged as part of the approval process for this Railway Order.

117. The works required for the construction of the Charlemont Station have been included in the Railway Order and it will be a matter for the Board to determine whether approval for them should be granted or whether any alterations to those works are required. In that regard, the Board is not constrained by the earlier grant of planning permission for the enabling works in its consideration of the Railway Order and must determine, in accordance with the 2001 Act, whether approval should be granted for the Railway Order, including the proposed station at Charlemont, irrespective of the earlier grant of planning permission made in respect of the enabling works. In that regard, the location of the station box has not been pre-empted and any decision on that location is wholly within the jurisdiction of the Board in the context of this application.

118. It should be noted that those enabling works have been included in the assessment for the purposes of the EIA to be completed by the Board (see, Chapter 4 of the EIAR which references the structural deck that forms part of the station box roof slab).

119. Insofar as it is suggested that those works are unauthorised development for the purpose of the 2000 Act, it can be noted that the Board has no role to play in the assessment of whether unauthorised development has occurred. Any such allegation would have to be addressed to the developers of 2 Grand Parade and it is not relevant to the decision which will have to be made by the Board in respect of this application. As already explained, railway works are exempted development for the purpose of the 2000 Act and, as such, the sections of the 2000 Act cited in the Opinion are not relevant to the issues to be determined by the Board.

120. Further, as that allegation is premised on the mistaken contention that the works were not authorised by the grant of planning permission made in respect of 2 Grand Parade, it has no basis in fact. The enabling works were permitted as part of that grant of planning permission.

121. Moreover, any challenge to the validity of the planning permission to Grant Parade Property Trading Company in respect of the refurbishment of the old Carroll's building at 2 Grand Parade, Dublin 6 is plainly out of time and it is not now open to members of the public to seek to mount a collateral attack on the validity of that permission at this remove.[7]

122. It is submitted, therefore, that there is no impediment to the Board granting approval for the Railway Order by reason of a structural deck having been the subject of an earlier grant of planning permission in respect of the development of lands over the location of the proposed Charlemont Station.

III. The principles to be applied in confirmation of a CPO

123. Section 45 of the 2001 Act provides that, upon the commencement of a Railway Order, TII shall thereupon be authorised to acquire compulsorily "*any land, or rights in, under or over land or any substratum of land specified in the order"* and provides that a Railway Order shall have effect as if it were a compulsory purchase order under section 10(1) of the Local Government (No. 2) Act 1960 (inserted by section 86 of the Housing Act 1966), with appropriate constructions of references. Further:

- section 44(2)(a) of the 2001 Act provides that a Railway Order may specify any land or any substratum of land, the acquisition of which, is in the opinion of the Board, necessary for giving effect to the order, and

- section 44(2)(b) provides that, without prejudice to the generality of section 44(1), a railway order may specify any rights in, under or over land or water or, subject to the consent of the Minister in the case of a national road or the Minister for the Environment, Heritage and Local Government in the case of any other public road, in, under or over any public road, the acquisition of which is, in the opinion of the Board, necessary for giving effect to the order.

124. The reference in section 45 of the 2001 Act to section 10(1) of the Local Government (No.2) Act 1960 (as inserted by section 86 of the Housing Act 1966) includes a reference to section

[7] See, for example, *Goonery v. Meath County Council* [1999] IEHC 15, *Sweetman v. An Bord Pleanála* [2018] 2 IR 250 ('Sweetman Houston') and *An Taisce v. An Bord Pleanála* [2020] IESC 39.

10(4), which refers to section 79 of the Housing Act 1966, which itself is referred to in section 217(6) of the Planning and Development Act 2000.

125. The purpose of section 86 of the Housing Act 1966 was to enable local authorities to effect compulsory acquisitions for the purposes of any of their powers and duties. Section 76 of the Housing Act 1966 confers compulsory acquisition powers on housing authorities for the purposes of that legislation, while section 86 of the Housing Act 1966, in substituting a new section 10 of the Local Government (No.2) Act 1960, grants such compulsory acquisition powers to local authorities for non-housing or partially housing purposes. Thus, it provides for a compensatable acquisition and the compensation provisions of Housing Act 1966 and the Land Clauses Acts have to be seen in that context. For example, section 79(2) of the Housing Act 1966 deems the notice to treat to be so for the purposes of the Acquisition of Land (Assessment of Compensation) Act 1919.

126. The Schedules to the Book of Reference and the various Plans referred to in the draft Railway Order address these matters in detail. These Schedules and Plans are referred to in and accompany the draft Railway Order and detailed specifications are contained in the actual volumes of Schedules and Plans comprising the application for a Railway Order.

127. The oral hearing will be provided with the updates of the Schedules and Plans (the suite of technical documentation and drawings which accompany the draft Railway Order).

128. The principles to be applied by the Board when deciding whether to confirm a compulsory purchase order were considered by the Supreme Court in ***Clinton v An Bord Pleanala*** [2007] 4 IR 701. The applicant was the owner of a site on O'Connell Street. The site was part of an area included in Dublin City Council's integrated area plan which sought to achieve the development and improvement of the O'Connell Street area. The City Council made an order for compulsory purchase of the site, the specified purpose in the order being "*for development, and to secure and facilitate the development of land in exercise of its powers …*". This order was confirmed by An Bord Pleanála in terms that referred to the acquisition being necessary for "*facilitating the implementation of the development plan*". The City Council confirmed that it had no particular development chosen for the site; nor had it decided whether to undertake the development alone or in conjunction with a private developer. The applicant sought to quash the compulsory purchase order, contending that the City Council was obliged, pursuant to s. 213(3) of the 2000 Act, to specify in the order the particular development for which it required the site.

129. The applicant was unsuccessful both in the High Court and the Supreme Court. The Supreme Court held that the regeneration purpose under the development plan which the City Council had in contemplation when making the compulsory purchase order was expressly permitted by the Oireachtas and that the property was therefore required for a particular purpose within the meaning of section 213(3)(a) of the Act of 2000 so that its compulsory acquisition was permitted. In the course of his judgment, Geoghegan J drew attention (at p.723) to the constitutional framework within which compulsory purchase orders are made:

> "*It is axiomatic that the making and confirming of a compulsory purchase order to acquire a person's land entails an invasion of his constitutionally protected property rights. The power conferred on an administrative body such as a local authority or An Bord Pleanála to compulsorily acquire land must be exercised in accordance with the requirements of the Constitution, including respecting the property rights of the affected landowner (see East Donegal Co-Operative Livestock Mart Ltd v Attorney General [1970] I.R. 317). Any decisions of such bodies are subject to judicial review. It would insufficiently protect constitutional rights if the court, hearing the judicial review application, merely had to be satisfied that the decision was not irrational or was not contrary to fundamental reason and common sense."*He went on to refer with approval to the observation of Keane J in *O'Brien v Bord na Mona* [1983] IR 255 at 270 as to the role of a person tasked with deciding whether to confirm a compulsory purchase order:
>
> > *"In each case, the person exercising the function is determining whether the constitutionally guaranteed rights of the citizen in respect of his private property should yield to the exigencies of the common good."*

130. Having referred to a number of authorities, he emphasised (at p.724) that a person could only be deprived of his constitutionally protected right to property if this was necessary and fair procedures were followed:

> *"In my view, the procedures at a compulsory purchase hearing must ensure that these principles are observed. The acquiring authority must be satisfied that the acquisition of the property is clearly justified by the exigencies of the common good."*

131. The principles to be applied when exercising a statutory power to compulsorily acquire land were also considered by the Supreme Court in <u>*Reid v Industrial Development Authority*</u> [2016] 1 ILRM 1. At issue in that case were the powers of compulsory acquisition conferred on the

respondent by section 16 of the Industrial Development Act 1986. The applicant's contention that the intended acquisition of his lands by the respondent was not authorised by section 16 in circumstances where the lands were not presently required by the respondent but rather were required for future use was upheld by the Supreme Court. In reaching that conclusion, reliance was placed on the contrast between the provisions of section 213 of the 2000 Act which expressly provided for the compulsory acquisition of land not immediately required for a particular purpose and section 16 which did not expressly so provide.

132. In his judgment, with which the other members of the Court concurred, McKechnie J laid down a number of principles in relation to how statutory powers for the compulsory acquisition of land should be interpreted and applied:

> *(i) "The conferring and exercise of statutory powers in this regard, must accord with the Constitution and must respect and implement the principles of both natural and constitutional justice. There has never been any doubt but that such applies to any state interference with property rights (Foley v Irish Land Commission [1952] IR 118, Nolan v Irish Land Commission [1981] 1 IR 23).*
>
> *(ii) The impact on the right to private property, which can vary from the minimal to the absolute, as in this case where the entire holding including the family dwelling house is sought to be expropriated, must be justified or necessitated by the exigencies of the common good, which will of course have regard to the principles of social justice.*
>
> *(iii) Even where so justified, compensation will virtually always be an important aspect of constitutional protection.*
>
> *(iv) The conferring and exercise of such power must be granted and carried out in such a way that the impairment of the individual's rights must not exceed that which is necessary to attain the legitimate object sought to be pursued. In other words, the interference must be the least possible consistent with the advancement of the authorised aim which underlines the power.*
>
> *(v) Such power must be expressly conferred by statute on the body which seeks to implement it. Further, where constitutional rights are abrogated by statutory intervention, such provisions must be construed in a way which gives full effect to above principles.*

(vi) As the 1986 Act is a post-constitutional statute, there is a presumption, inter alia, that all steps taken within and as part of the compulsory process will be duly compliant with the aforesaid principles. (East Donegal Co-Operative Livestock Mart Ltd v The Attorney General [1970] IR 317)."

133. Arising from the foregoing, it can be said that prior to the confirmation of the compulsory purchase order, it is necessary for the Board to be satisfied of the following matters:

(i) That there is a legitimate object in terms of community need which will be met by the implementation of the Railway Order.

(ii) That there are no alternatives to the Railway Order reasonably available that better meet the community need.

(iii) Having regard, to the design of the scheme and the requirements for its construction and operation, that the acquisition of the lands proposed to be acquired is necessary for the implementation of the Railway Order.

(iv) That the impairment on the rights of property owners from the acquisition of the property is not disproportionate in that it does not exceed that which is necessary to attain the legitimate object sought to be pursued.

134. Addressing each of those factors in turn, the following submissions can be made.

Legitimate object in terms of community need

135. There is a clear community need which will be met by the approval of the Railway Order which is addressed in Chapter 3 of the EIAR.

Alternatives

136. The alternatives to the scheme are addressed in Chapter 7 of the EIAR. The assessment of alternatives in Chapter 7 of the EIAR includes an assessment of alternative route options and explains the evolution of the design of the route of Metrolink. A copy of the Metrolink Preferred Route Design Development Report 2019 has also been provided.

137. The evidence before the Board demonstrate that there are no alternative means reasonably available that better meets the identified community need.

Necessity for the Acquisition

138. As part of this analysis, the Board has to be satisfied that each parcel of land which is the subject of acquisition is suitable for carrying out the scheme and its acquisition is reasonably required for the construction and/or operation of the scheme such that Metrolink cannot be constructed and/or operated without the acquisition of the land. The Board will also have to be satisfied that any period of temporary acquisition is as short as reasonably possible and that any land to be permanently acquired cannot reasonably be acquired for a temporary period only.

139. Chapter 21 of the EIAR addresses the "land take" required for Metrolink and provides the basis for the Board to be satisfied that it is necessary for each of the parcels of land identified to be acquired.

Proportionality

140. The Board is required to apply a test of proportionality and to be satisfied that the impairment of the property owner's rights from the acquisition of the property is not disproportionate. As McKechnie J explained in *Reid*, the exercise of the power of compulsory acquisition "*must be granted and carried out in such a way that the impairment of the individual's rights must not exceed that which is necessary to attain the legitimate object sought to be pursued"*.

141. There is sufficient information before the Board on foot of which the Board can be satisfied that the approval of the Metrolink Railway Order and the confirmation of the acquisition of the identified lands are a proportionate response to the community need that has been identified and the acquisition of the land identified in the CPO is reasonable, necessary for the construction and/or operation of Metrolink and the impairment of the rights of property owners goes no further than reasonably required to meet the community need.

Aoife Carroll BL
Michael O'Donnell BL
Emily Egan McGrath SC
Micheál O Connell SC
Declan McGrath SC
19 February 2024