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AN BORD PLEANÁLA  
REF. NO. ABP-301908-18

GREATER DUBLIN DRAINAGE PROJECT

STRATEGIC DEVELOPMENT INFRASTRUCTURE APPLICATION

**OUTLINE LEGAL SUBMISSIONS**



**A. INTRODUCTION**

1. These legal submissions have been prepared on behalf of Irish Water in respect of issues arising on the application made directly by Irish Water to An Bord Pleanála on 20 June 2018, under section 37E of the Planning and Development Act 2000, as amended ("the 2000 Act"), for permission to develop the Greater Dublin Drainage Project [Ref. No. ABP-301908-18].
2. Certain of the submissions and observations made to An Bord Pleanála, on the application for permission in respect of the Greater Dublin Drainage Project raise issues of a legal nature. These written submissions address the principal issues of law which arise for consideration by the Board on the application for permission.
3. In deciding whether to grant planning permission, pursuant to section 37G(1) of the Planning and Development Act 2000, as amended, the Board may consider any relevant information before it or any other matter which, by virtue of the Planning and Development Acts, the Board is required to have regard.
4. Specifically, but without prejudice to the generality of section 37G(1), the Board is required by section 37G(2) to consider a number of matters including:
  - the Environmental Impact Assessment Reports [EIAR] and Natura Impact Statement [NIS] and any submissions or observations made to the Board (including the reports submitted by the planning authorities);
  - the provisions of the development plan or plans for the area;
  - the fact that the area or part of the area is a European site;
  - the fact that the proposed development would have an effect on a European site; and
  - the policies and objectives of the Government, State authority, the Minister for Housing, Planning and Local Government, planning authorities, any other body which is a public authority, the national interest, effect on issues of strategic economic or social importance to the State, the National Planning



Framework and regional planning guidelines/regional spatial and economic strategy.

5. Pursuant to the requirements of section 37B of the 2000 Act, Irish Water entered into pre-application consultations with An Bord Pleanála in relation to the Greater Dublin Development Project (under ref. no. PL06F.PC0152). On 16 May 2018, An Bord Pleanála issued a notice, confirming that the Project constitutes strategic infrastructure and would, if carried out, fall within certain paragraphs of subsection 37A(2) of the Act. In circumstances where that opinion formed by the Board, that the proposed development is strategic infrastructure, was not challenged, the opinion is valid and subsisting and, accordingly, Irish Water was required to make the application for permission directly to the Board, which it duly did on 20 June 2018 (under ref. no. ABP-301908). However, as held by the Supreme Court in *Callaghan v. An Bord Pleanála* [2018] I.E.S.C. 39, notwithstanding the fact that the Board formed an opinion as to the strategic importance of the Project, when considering whether to grant or refuse permission on foot of an application for S.I.D., the Board remains obliged to consider on the merits any questions concerning the strategic importance of the Project for which permission is sought.
6. The substantive consideration for the Board in adjudicating on the application for permission is "the proper planning and sustainable development of the area". Specifically, subsection 37G(1) requires the Board to consider "the likely consequences of the proposed development for proper planning and sustainable development in the area in which it is proposed to situate the development..."
7. The principle of sustainable development is referred to in a number of key provisions of the Planning and Development Act, 2000. For example, the long title to the 2000 Act states that the Act aims, inter alia, *"to provide, in the interests of the common good, for proper planning and sustainable development."* Moreover, sustainable development is a fundamental principle of EU environmental law and, accordingly, sustainable development now has a significant impact on the presentation of environmental policy and law in Ireland.
8. The relationship between sustainable development and the "need" for a development is a material consideration and it is very much a matter of planning judgement as to whether the proposed development is needed and would be worthwhile. In this context, it should be noted that, currently:
  - (a) 1.9 million people or 40% of Ireland's population live and work in the Greater Dublin Area;
  - (b) the population of the Greater Dublin Area is projected by the ESRI to increase by approximately 450,000 to 2.35 million persons in the period to 2040. Project Ireland 2040 projects that an additional 143,000 homes will be needed in Dublin by 2040;
  - (c) the amount of wastewater generated in the Greater Dublin Area is projected to increase by more than 50% in the period to 2050;
  - (d) existing wastewater treatment facilities need to be upgraded and investment in new infrastructure in order to meet this increased demand; and



(e) in this context, the Greater Dublin Drainage Project is essential to the delivery of the required wastewater treatment capacity and infrastructure.

9. Indeed, as set out in the evidence adduced at the oral hearing, inadequate wastewater treatment and drainage management will result in development constraints within the area covered by the strategy and local authorities in the Greater Dublin Area would be inhibited from effectively implementing their respective Development Plans. In this context, and in circumstances where the largest future treatment capacity deficit was predicted at Ringsend WwTP, it was concluded that the provision of additional wastewater treatment capacity would require the construction of a new wastewater treatment facility for the contributing catchment to Ringsend WwTP, to augment the treatment capacity provided at Ringsend WwTP. Accordingly, the "need" for the Greater Dublin Drainage Project is a material consideration for the Board in its assessment of the application for permission.
10. It should also be recognised that Ireland has obligations under a number of European Union Directives, including Council Directive 2000/60/EC ("the Water Framework Directive"), which provides the EU legislative framework for the protection of all waters including rivers, lakes, estuaries, coastal waters and groundwater, and their dependent wildlife and habitats. The Water Framework Directive sets objectives to reduce the discharge of pollutants to waters, to prevent deterioration in water quality and achieve 'Good Status' in all waters over time. As set out in the Planning Report submitted with the application for permission, the Greater Dublin Drainage Project will contribute significantly to the fulfilment of the obligations under the Water Framework Directive as it will protect the aquatic environment and enhance water quality.
11. In addition, the implementation of the Greater Dublin Drainage Project is necessary in order to fulfil Ireland's obligations under Council Directive 91/271/EEC ("the Urban Wastewater Treatment Directive") and other relevant EU Directives and Irish regulations related to water quality, by ensuring a higher quality wastewater discharge. The Project will also assist in ensuring the continued sustainable growth and development of communities and businesses within greater Dublin. In this regard, the Greater Dublin Drainage Project will:
  - safeguard public health;
  - improve and protect the environment; and
  - facilitate employment, social progress and economic growth in the wider Dublin region.
12. The assessments required to be conducted by the Board as competent authority under both the Environmental Impact Assessment and Habitats Directive are addressed separately below.



**B. OBLIGATION TO HAVE REGARD TO STATUTORY PLANS & POLICIES**

13. Pursuant to subsection 37G(2), in determining the application for permission, the Board must have regard to the provisions of the development plan or plans for the area. Accordingly, it is clear that, in considering and determining the application for permission in respect of the proposed development, the Board is required to have regard, in particular, to the policies and objectives of the Fingal County Development Plan 2017–2023.
14. In addition, pursuant to section 143, as applied by subsection 37G(2)(g), the Board is required to have regard to:
  - (a) the policies and objectives for the time being of the Government, a State authority, the Minister, planning authorities and any other body which is a public authority (such as Irish Water) whose functions have, or may have, a bearing on the proper planning and sustainable development of cities, towns or other areas, whether urban or rural,
  - (b) the national interest and any effect the performance of the Board's functions may have on issues of strategic economic or social importance to the State, and
  - (c) the National Planning Framework and any regional spatial and economic strategy for the time being in force.
15. In these circumstances, it falls to the Board to consider planning policy at the national, regional and local level, in addition to other policies (including those of Irish Water) which may have a bearing on proper planning and sustainable development. Accordingly, it is submitted that the Board should consider the strategic planning context for the development and implementation of the Greater Dublin Drainage Project.
16. In particular, it is submitted that there is very considerable policy support for the Project at national, regional and local levels. In assessing the application for permission, the Board is required to consider the relevant policies and objectives at national, regional and local level. In this context, relevant policy documents which fall for consideration by the Board in this context include:
  - (i) National Planning Framework (Ireland 2040) and associated National Development Plan (2018-2027);
  - (ii) River Basin Management Plan for Ireland 2018-2021;
  - (iii) Irish Water's Water Services Strategic Plan (2014-2021);
  - (iv) National Wastewater Sludge Management Plan (2016);
  - (v) Regional Planning Guidelines for the Greater Dublin Area 2010-2022;
  - (vi) Fingal County Development Plan 2017-2023; and
  - (vii) Dublin City Development Plan 2016–2022 .



17. By way of example only in this context, it is noteworthy that the Greater Dublin Development Project is expressly referenced in the National Planning Framework as a “key future growth enabler for Dublin”, ensuring that wastewater needs are met by new national projects to increase waste water treatment capacity. It is also a relevant consideration for the Board that the Greater Dublin Drainage Project is acknowledged by the four Dublin local authorities as critical infrastructure that is required to meet the identified need for additional sustainable wastewater treatment in the Greater Dublin Area.
18. In relation to the consideration of the Fingal County Development Plan, it is noted that, as set out in the Planning Report submitted with the application, there are a number of provisions in section 7.2 of the Development Plan, in particular, which are supportive of the Greater Dublin Development Project and the development of a waste water treatment plant in the Clonsaugh area in Fingal and a pumping station at Abbotstown.
19. It is submitted that in, considering the provisions of a development plan, it is necessary to read the Development Plan as a whole and to give effect to all of its provisions. In this context, Irish Water notes the conclusions contained in Fingal County Council Chief Executive’s report submitted to the Board on the application for permission. The Board is also required to consider the submissions and observations made by third parties when considering whether the Project is in conformity with the policies and objectives of the Fingal County Development Plan. In this context, in discharging its statutory obligation under subsection 37G(2), the Board will also consider the submissions and observations which assert that the Project materially contravenes the policies and objectives of the Development Plan. Of course, as stated in Section 4.1.10.1 of the Planning Report, in the event that the Board considers any aspect of the Proposed Project to materially contravene any of the provisions or zoning objectives of the Fingal Development Plan (2017-2023), it is submitted that the Board should consider the application under the provisions of subsection 37G(6):

*The Board may decide to grant a permission for development, or any part of a development, under this section even if the proposed development, or part thereof, contravenes materially the development plan relating to any area in which it is proposed to situate the development.*

20. In conclusion in relation to the consideration of statutory plans and policies, Irish Water submits that the delivery of the Greater Dublin Drainage Project is fully supported by national, regional and local planning policies and objectives.



## SECTION C: ENVIRONMENTAL IMPACT ASSESSMENT

21. It is submitted that the Environmental Impact Assessment [EIA] to be carried out by An Bord Pleanála is that required by the provisions of Directive 2014/52/EU, in circumstances where the initiation of the consent process commenced after the transposition date of the 2014 Directive (i.e. 16 May 2017).
22. Article 5 of the 2014 EIA Directive requires Member States to ensure that, where an environmental impact assessment is required, the developer shall prepare and submit an environmental impact assessment report. In this regard, Article 5(1) requires that the information to be provided by the developer, which provisions are now mirrored in section 172 and the Planning and Development Regulations 2001, as amended. In any event, it is the position of the applicant that the EIAR submitted with the application for permission is much more than adequate, as it is comprehensive and complies fully with the requirements of EU and Irish law.
23. The nature of the assessment required is that prescribed under Article 3 of the EIA Directive and section 172 of the 2000 Act. In that context, the Board will also have to take into account the cumulative effect of the proposed project with other projects and plans in respect of which in combination effects arise. These cumulative impacts have been considered in the EIAR under the headings relating to the different environmental issues.
24. The EIA process is by definition, an iterative process. Indeed, one of objectives of the EIA process is to elicit submissions and observations from members of the public concerned. The process is not, therefore, a static one, but is intended to gather information on the environmental impact of the proposed development. Reference is made in this regard to the judgment of the High Court in *Klohn v. An Bord Pleanála* (No. 2) [2008] I.E.H.C. 111.
25. As held by the High Court in *Kelly v. An Bord Pleanála* [2014] I.E.H.C. 400, in carrying out an environmental impact assessment, the Board is required to conduct an examination, analysis and evaluation of and identify the direct and indirect effects of the proposed developments on the matters specified. However, the outcome of that examination, analysis, evaluation and identification informs rather than determines the planning decision which should or may be made. The Board has jurisdiction in its discretion to grant consent regardless of the outcome of the EIA, although of course it impacts on how it should exercise its discretion.



## SECTION D: HABITATS DIRECTIVE ASSESSMENTS

### Introduction

26. Habitats are protected by virtue of the provisions of Directive 92/43/EC [the Habitats Directive]. As far as the application for permission before the Board is concerned, the key requirements of the Habitats Directive are contained in Article 6(3), which states:

*Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.*

27. Article 7 of the Habitats Directive provides that the provisions of, inter alia, Article 6(3) are to apply to SPAs under Directive 2009/147/EC ("the Birds Directive").
28. The two stages in the Appropriate Assessment process have been considered by the Irish courts in a number of judgments, including by the High Court (Finlay Geoghegan J.) in *Kelly v. An Bord Pleanála* [2014] I.E.H.C. 400 and by the Supreme Court in *Connelly v. An Bord Pleanála* [2018] I.L.R.M. 453. Both the High Court in *Kelly* and the Supreme Court in *Connelly* made clear that the Board does not have jurisdiction to grant permission for development unless the appropriate assessment provisions are correctly applied.
29. Part XAB of the 2000 Act implemented Article 6 of the Habitats Directive into Irish law. The Stage 1 screening stage in Article 6(3) was implemented by section 177U of the 2000 Act, whilst the Stage 2 appropriate assessment stage was implemented by section 177V.

### Stage One Screening

30. The possibility of there being a significant effect on a European site will generate the need for an AA to be carried out by the competent authority for the purposes of Article 6(3). Accordingly, a Stage One Screening for AA in respect of an application for consent for proposed development must be carried out by the competent authority (in this case, An Bord Pleanála) in order to assess, in view of best scientific knowledge, if the proposed development, individually or in combination with another plan or project is likely to have a significant effect on any European site.



31. A Stage Two AA is required if it cannot be excluded, on the basis of objective information, that a proposed development, individually or in combination with other plans or projects, will have a significant effect on a European site.
32. Thus, the Screening stage operates merely to determine whether a full Appropriate Assessment must be undertaken on the implications of the plan or project for the conservation objectives of relevant European sites. At the screening stage, the competent authority is not entitled to consider mitigation measures: Case C-323/17 *People Over Wind v. Coillte*.
33. The requirements for a Stage One screening have been recently summarised by the High Court in *Kelly (Eoin) v. An Bord Pleanála* [2019] I.E.H.C. 84.

*68. It seems to me that for present purposes, the following principles applicable to the screening stage for appropriate assessment (stage 1 screening) can be derived from Article 6(3) of the Habitats Directive, as interpreted and applied by the CJEU, and from s.177U of the 2000 Act, as interpreted and applied by the Irish courts:*

- (1) The threshold test in Article 6(3) of the Habitats Directive and s.177U (1) of the 2000 Act is that an appropriate assessment will be required if the proposed development is "likely to have a significant effect" on the protected site (i.e. a "European site" under part XAB of the 2000 Act), either individually or in combination with other plans or projects. That this is the threshold test is clear from the decision of the High Court (Finlay Geoghegan J.) in Kelly (at para. 40), as approved by the Supreme Court in Connelly (at para. 8.14).*
- (2) It is not necessary, in order to trigger the requirement to proceed to stage 2 appropriate assessment, that the proposed development will "definitely" have significant effects on the protected site but such a requirement will arise if it is a "mere probability" that such an effect exists (Waddenzee, para.41). This was developed by the CJEU in Waddenzee (at para.43) where the court stated that the requirement to carry out an appropriate assessment will be satisfied if there is a "probability or a risk" that the development will have "significant effects" on the protected site.*
- (3) In light of the precautionary principle, such a "risk" will be found to exist if "it cannot be excluded on the basis of objective information" that the particular development "will have significant effects" on the protected site (Waddenzee, para. 44)(see also People over Wind, para. 34).*
- (4) Under s177U(4) of the 2000 Act an appropriate assessment will be required if, on the basis of objective information, a "significant effect" on a European site "cannot be excluded".*
- (5) Under s177U(5), an appropriate assessment will not be required if, on the basis of objective information, a "significant effect" on a European site "can be excluded".*
- (6) In the case of "doubt as to the absence of significant effects" an appropriate assessment must be carried out (Waddenzee, para. 44). The requirement to conduct an appropriate assessment will arise where, at the*



*screening stage, it is ascertained that the particular development is "capable of having any effect" (albeit this must be any "significant effect") on the European site (para.46 of the opinion of Advocate General Sharpston in Sweetman).*

- (7) The "possibility" of there being a "significant effect" on the European site will give rise to a requirement to carry out an appropriate assessment for the purposes of Article 6(3). There is no need to "establish" such an effect and it is merely necessary to determine that there "may be" such an effect (para. 47 of opinion of Advocate General Sharpston in Sweetman).*
- (8) In order to meet the threshold of likelihood of significant effect, the word "likely" in Article 6(3) and S. 177U(1) should be read as being less than the balance of probabilities. The test does not require any "hard and fast evidence that such a significant effect was likely". It merely has to be shown that there is a "possibility" that this significant effect is likely (per Haughton J in Alen-Buckley, para. 83).*
- (9) The assessment of whether there is a risk of "significant effect" on the European site must be made in light, inter alia, of the "characteristics and specific environmental conditions of the site concerned" by the relevant plan or project (see, most recently, People Over Wind, para. 34).*
- (10) Plans or projects or applications for developments which have "no appreciable effect" on the protected site are excluded from the requirement to proceed to appropriate assessment. If all applications for permission for proposed developments capable of having "any effect whatsoever" on the protected site were to be caught by Article 6(3) (or s.177U) "activities on or near the site would risk being impossible by reason of legislative overkill" (Opinion of Advocate General Sharpston in Sweetman, para. 48).*
- (11) While the threshold at the screening stage of Article 6(3) and s.177U is "very low" (Opinion of Advocate General Sharpston in Sweetman, para.49; judgment of Finlay Geoghegan J. in Kelly, para.30), nonetheless it is a threshold which must be met before it is necessary to proceed to the stage 2 appropriate assessment stage."*

34. In terms of this application for permission, Irish Water submits that the Board, as competent authority, should consider and have regard to the sections of the Natura Impact Statements which comprise the screening statement for appropriate assessment submitted with the application for permission in respect of the Project. Following screening, the Board is invited to conclude (*per* the developer's screening statements for appropriate assessment) that, it is not possible to rule out significant adverse effects on a number of European sites and, accordingly, the Board should proceed to conduct a Stage Two Appropriate Assessment.



### **Requirements for Stage Two Appropriate Assessment**

35. In Case C-127/02 *Waddensee*, the European Court of Justice held that an “appropriate assessment” means that “all the aspects of the plan or project which could affect the site’s conservation objectives must be identified in the light of the best scientific knowledge in the field”. Moreover, in assessing the potential effects of a project, its significance must be established in the light of, inter alia, “the characteristics and specific environmental conditions of the site concerned by that plan or project.” In other words, the appropriate assessment of the proposed development project must be site-specific, rather than generic in nature.
36. As regards the nature of the appropriate assessment to be undertaken by the decision-maker, the European Court stated in *Waddensee* that (i) such an assessment must precede the approval of the project, (ii) take into account cumulative effects, (iii) identify those aspects of the project which can affect the site’s conservation objectives “in the light of the best scientific knowledge in the field.” In relation to the conditions under which a project may be authorised, the European Court of Justice held that, “*it lies with the competent national authorities, in the light of conclusions of the assessment of the implications of the plan or project for the site concerned, to approve the plan or project only after having made sure that it will not adversely affect the integrity of that site.*”
37. In this context, the concept of the “integrity of the site” is the substantive consideration for a competent authority in conducting its appropriate assessment. Article 6(3) of the Habitats Directive integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites as a result of the plans or projects being considered.
38. According to settled case-law, the appropriate assessment of the implications for the site that must be carried out pursuant to Article 6(3) implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect the objective of site protection must be identified in the light of the best scientific knowledge in the field. The assessment carried out under Article 6(3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned.
39. The case-law of the CJEU was considered by the High Court in *Kelly v. An Bord Pleanála* – a judgment which was recently approved by the Supreme Court in *Connelly v. An Bord Pleanála* [2018] I.E.S.C. 31. In *Kelly*, Finlay Geoghegan J. considered the nature of an Appropriate Assessment, taking into account both the decisions of the CJEU in *Waddensee*, Case C-404/09 *Commission v. Spain* and *Sweetman* (Case C-258/11) and the provisions of section 177V of the 2000 Act and concluded:



*"Section 177V(1) must be construed so as to give effect to Article 6(3) of the Habitats Directive, and hence, an appropriate assessment carried out under the section must meet the requirements of Article 6(3) as set out in the CJEU case law. If an appropriate assessment is to comply with the criteria set out by the CJEU in the cases referred to, then it must, in my judgment, include an examination, analysis, evaluation, findings, conclusions and a final determination."*

40. The High Court went on to summarise what is required in order to carry out an Appropriate Assessment in compliance with EU law:

*"It must be recalled that the appropriate assessment, or a stage two assessment, will only arise where, in the stage one screening process, it has been determined (or it has been implicitly accepted) that the proposed development meets the threshold of being considered likely to have significant effects on a European site. Where that is the position, then, in accordance with the preceding case law, the appropriate assessment to be lawfully conducted in summary:*

- (i) Must identify, in the light of the best scientific knowledge in the field, all aspects of the development project which can, by itself or in combination with other plans or projects, affect the European site in the light of its conservation objectives. This clearly requires both examination and analysis.*
- (ii) Must contain complete, precise and definitive findings and conclusions and may not have lacunae or gaps. The requirement for precise and definitive findings and conclusions appears to require analysis, evaluation and decisions. Further, the reference to findings and conclusions in a scientific context requires both findings following analysis and conclusions following an evaluation each in the light of the best scientific knowledge in the field.*
- (iii) May only include a determination that the proposed development will not adversely affect the integrity of any relevant European site where upon the basis of complete, precise and definitive findings and conclusions made the Board decides that no reasonable scientific doubt remains as to the absence of the identified potential effects."*

41. As a result of that analysis, Clarke C.J. held for the Supreme Court in *Connolly* that:

*"the overall conclusion which must be reached before the Board has jurisdiction to grant a planning consent after an AA is that all scientific doubt about the potential adverse effects on the sensitive area have been removed. However, there seems, as a matter of EU law, to be a separate obligation to make specific scientific findings which allow that conclusion to be reached."*



42. In summary, the analysis of the EU and Irish case-law shows that there are four distinct requirements which must be satisfied for a valid Appropriate Assessment decision:
- (a) the AA must identify, in the light of the best scientific knowledge in the field, all aspects of the development project which can, by itself or in combination with other plans or projects, affect the European site in the light of its conservation objectives;
  - (b) there must be complete, precise and definitive findings and conclusions regarding the previously identified potential effects on any relevant European site;
  - (c) on the basis of those findings and conclusions, the competent authority must be able to determine that no scientific doubt remains as to the absence of the identified potential effects; and
  - (d) where the preceding requirements are satisfied, the competent authority may determine that the proposed development will not adversely affect the integrity of any relevant European site.
43. In conducting the Stage Two Appropriate Assessment, the applicant further submits that the Board, as competent authority, should consider and have regard to the Natura Impact Statements [NIS] submitted with the application for permission in respect of the proposed development. Following the Stage Two Appropriate Assessment, the Board is invited to conclude (as demonstrated in the NIS) that, on the basis of the best scientific evidence, it can be clearly demonstrated that no elements of the project will result in any impact on the integrity or qualifying interests/special conservation interests of any relevant European site, either on their own or in-combination with other plans and projects, in light of their conservation objectives.
44. Thus, the Board is enabled to reach a determination that the proposed development will not affect the integrity of any relevant European site. In circumstances of such an Appropriate Assessment decision having been made by the Board, the Board is entitled to grant the permission sought.



## SECTION E. PLANNING CONDITIONS

45. An Bord Pleanála is empowered to attach conditions to any permission granted in respect of the proposed development: subsections 37G(3) and 37G(7). Subsection (7) provides:

*(7) Without prejudice to the generality of the Board's powers to attach conditions under subsection (3) the Board may attach to a permission for development under this section—*

*(a) a condition with regard to any of the matters specified in section 34(4),*  
*(b) a condition requiring the payment of a contribution or contributions of the same kind as the appropriate planning authority could require to be paid under section 48 or 49 (or both) were that authority to grant the permission (and the scheme or schemes referred to in section 48 or 49, as appropriate, made by that authority shall apply to the determination of such contribution or contributions),*

*(c) a condition requiring the applicant to submit further information to it or any other local or state authority, as the Board may specify before commencing development, or*

*(d) a condition requiring—*

*(i) the construction or the financing, in whole or in part, of the construction 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 proposed development would be situated, being a facility or service that, in the opinion of the Board, would constitute a substantial gain to the community.*

### **Development Contributions**

46. Section 48 of the Planning and Development Act 2000 contains the general power of a planning authority to levy development contributions: *Cork Institute of Technology v. An Bord Pleanála* [2013] 2 I.R. 13. Accordingly, pursuant to subsection 48(1), a planning authority or the Board may, when granting permission, include conditions for *"requiring the payment of a contribution in respect of public infrastructure and facilities benefiting development in the area of the planning authority and that is provided, or intended to be provided, by or on behalf of a local authority"*. Pursuant to subsection 48(2)(a), the basis for the determination of such a contribution *"shall be set out in a development contribution scheme made under [section 48]"*.
47. As noted in the Planning Report submitted with the application for permission, Irish Water's statutory role and core function, is that of a water services authority. The Greater Dublin Drainage Project will provides "public infrastructure and facilities which will benefit development in the area of County Fingal", and which will be provided by Irish Water.



48. In this regard, the provision of “public infrastructure and facilities” is defined in section 48 to include, *“the provision of roads, car parks, car parking places, sewers, waste water and waste water treatment facilities, service connections, watermains and flood relief work”*.
49. It has been noted that the Fingal County Council Development Contribution Scheme is stated to be applicable to the following classes of development: “residential class and industrial/ commercial”. The Greater Dublin Drainage Project does not come within any of these classes of development. The recommendation for the imposition of a development contribution by Fingal County Council in the Chief Executive’s report dated 17 September 2018 is not applicable to the GDD Project. It is submitted that the recommendation to impose a development contribution “in accordance with Section 48(2) of the Planning and Development Act 2000 (as amended)”, is incorrect as a matter of law.
50. However, as identified in evidence, in the event that the Board is minded to attach a special development contribution in accordance with section 48(2)(c), the provisions of Section 7.1.3 of the Draft Water Services Guidelines for Planning Authorities should apply and, accordingly, if a development contribution is to be applied based on the area of administrative buildings, for example, excluding site or plant areas, then the sum pursuant to any special contribution should be left over for agreement between Irish Water and Fingal County Council and, in default of any agreement, referred to the Board for determination.

### ***Community Benefit***

51. As set out above, subsection 37G(7)(d) does provide a mechanism by which the Board may, in an appropriate case, attach a condition requiring (i) the construction or financing of a facility, or (ii) the provision or financing the provision of a service that would constitute a substantial gain to the community.
52. However, unlike many private sector strategic infrastructure developments, the Greater Dublin Drainage Project has a host of intrinsic benefits to the communities along the route of the Project. In addition, however, Irish Water has proposed the GDD Community Benefits Scheme as submitted with the application documentation, which is designed to leverage the significant public expenditure associated with the project, so as to maximise the benefits for communities in proximity to the proposed infrastructure.
53. Irish Water’s commitments, as set out in the GDD Community Benefits Scheme are summarised in Table 2 of the Response to Submissions Report (January 2019). Irish Water is of the view that the proposed community benefits scheme provides a fair and proportionate benefit for the effects associated with developing this vitally important piece of regional wastewater infrastructure and there is no necessity for any additional community benefit condition to be imposed by the Board.



**SECTION F      CONCLUSION**

54.     In all the circumstances as addressed in these submissions and given the material before the Board, Irish Water submits that the Board should grant permission for the proposed Greater Dublin Drainage Project.

**DECLAN McGRATH S.C.**

**JARLATH FITZSIMONS S.C.**

**22 MARCH, 2019**

Filed by A&L Goodbody,  
Solicitors for Irish Water