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9th May 2022

To: An Bord Pleanála
64 Marlborough Street,
Dublin 1.

Our Clients: John Conway of 91 St. Nicholas Avenue, Dundalk, Co. Louth; and the Louth Environmental Group of 91 St. Nicholas Avenue, Dundalk, Co. Louth.

Re: Proposed Strategic Housing Development (Case No. 313220)SHD Development comprising demolition of all existing buildings on site, construction of 881 no. apartments, creche and associated site works at old Dundrum Shopping Centre known as Dundrum Village Centre and adjacent properties to the west of Main Street, Dundrum, Dublin 14
Closing Date for Submissions – 9th May 2022 (5:30pm)

Dear Sirs,

On behalf of the above-named Clients, we wish to lodge the within written submissions/observations on the proposed Strategic Housing Development comprising demolition of existing buildings, 881 no. apartments and associated site works at the Old Dundrum Shopping Centre, Dublin 14, pursuant to s.8 of the Planning and Development (Housing) and Residential Tenancies Act 2016.

The grounds and reasons for our submission/observations are detailed hereinafter.

Planning and Development Act 2000, Section 28 of the Planning and Development Act 2000 (as amended) & Guidelines

(i) The Board should refuse to consider and cannot grant permission for the proposed development in circumstances where such grant would have to be justified by reference to the Guidelines for Planning Authorities on Urban Development and Building Height 2018 and the Apartment Guidelines, dated December 2020. These Guidelines and the specific planning policy requirements contained therein are *ultra vires* and not authorised by section 28(1C) of Planning and Development Act 2000 (as amended). In the

alternative, insofar as section 28(1C)) purports to authorise these Guidelines, including the specific planning policy requirements, such provision is unconstitutional/repugnant to the Constitution. The said Guidelines are also contrary to the SEA Directive, insofar as they purport to authorise contraventions of the development plan/local area plan, without an SEA being conducted, or a screening for SEA being conducted, on the variations being brought about to the development plan/local area plan as a result of same.

(ii) The proposed development materially contravenes the density requirements/provisions provided in the Development Plan and Local Area Plan. The aforesaid materially contravention cannot be justified by reference to s.37(2) of the Planning and Development Act 2000 or s.28 Guidelines.

(iii) The proposed development materially contravenes the Development Plan/Local Area Plan and the provisions relating to housing mix. The aforesaid materially contravention cannot be justified by reference to s.37(2) of the Planning and Development Act 2000 or s.28 Guidelines.

(iv) The proposed development materially contravenes the Development Plan/Local Area Plan in relation to the provisions for public open space. The aforesaid materially contravention cannot be justified by reference to s.37(2) of the Planning and Development Act 2000 or s.28 Guidelines.

(v) The proposed development materially contravenes the requirements of the Development Plan/Local Area Plan in relation to building height and visual impact. The proposed development cannot be justified by reference to the Guidelines for Planning Authorities on Urban Development and Building Height 2018 ('*the Height Guidelines*'), including the SPPR's set out therein. The aforesaid materially contravention cannot be justified by reference to s.37(2) of the Planning and Development Act 2000.

(vi) The proposed development and documentation presented does not comply with the requirements of the Guidelines for Planning Authorities on Urban Development and Building Height 2018 ('*the Height Guidelines*'), including the SPPR's set out therein and the Criteria and Specific Assessments identified therein, including SPPR's 1, 2 and 3 referred to in

the Material Contravention Statement submitted. The Board cannot grant permission for the proposed development in circumstances where the relevant criterion under the Height Guidelines, which are mandatory in nature, cannot be satisfied.

(vii) The proposed development materially contravenes the Development Plan and/or Local Area Plan ('LAP'), in respect of car parking. The aforesaid materially contravention cannot be justified by reference to s.37(2) of the Planning and Development Act 2000.

(viii) The proposed development materially contravenes the Development Plan and/or LAP, in respect of the provision of childcare. The aforesaid materially contravention cannot be justified by reference to s.37(2) of the Planning and Development Act 2000.

(ix) The proposed development materially contravenes the Development Plan and/or LAP, in respect of Architectural Conservation Area. The aforesaid materially contravention cannot be justified by reference to s.37(2) of the Planning and Development Act 2000.

(x) The proposed development materially contravenes the Development Plan and/or LAP, due to non-compliance with of Local Area Plan/Masterplan/Urban Design Framework (Policy Objectives SS02a & PM17). The aforesaid materially contravention cannot be justified by reference to s.37(2) of the Planning and Development Act 2000.

(xi) The Board cannot grant planning permission for this development under Section 37(2)(b) of the Planning and Development Act 2000. The proposed development is not of strategic or national importance – the Developer has not adduced any objective basis for asserting that the proposed development is of strategic or national importance. Purported reliance in the definition of "*strategic housing development*" under the 2016 Act as a basis for asserting that the proposed development is of strategic or national is erroneous.

(xii) The application and application documentation does not comply with the requirements of the Planning and Development Regulations 2001 (as amended) in terms of the particulars to be provided with the application in respect of the proposed development, including in relation to the plans and

particulars lodged. The application documentation does not comply with the requirements of the 2016 Act and the associated Regulations in relation to the requirements for detailed plans and particulars.

(xiii) The daylight and shadow impact assessment report is insufficient in that is does not address the impact of the over shadowing of this development in its entirety.

(xiv) If the Board purports to justify the non-compliance with the objectives of the LAP, Development Plan, Masterplan and/or Urban Design Framework – same will amount to a unlawful breach of the requirements of the SEA Directive.

Screening for Environmental Impact Assessment ('EIA Screening')

Article 2(1) of Directive 2011/92 (as amended by Directive 2014/52/EU) governs the relationship between giving consent and the assessment of the environmental effects:

> "Member States shall adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects on the environment...."

The EIAR is inadequate and deficient and does not permit an assessment of the potential environmental impacts of the proposed development.

Screening for Environmental Impact Assessment

Notwithstanding that the proposed development is sub-threshold for the purposes of requiring a mandatory EIA, by way of general overview, it is submitted that due, *inter alia*, to the nature of the development site (*which includes the fact that it currently contains identified contaminants, including asbestos*), the nature of the proposed development (*including the proposed height of same*) and locus of the proposed development adjacent to a protected habitat, it should have been subjected to a full EIA. Article 2(1) of Directive 2011/92 (as amended by Directive

2014/52/EU) governs the relationship between giving consent and the assessment of the environmental effects:

> "Member States shall adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects on the environment...."

Furthermore, the Screening for EIA presented by the Developer, including the Ecological report submitted by Bryan Deegan of Altemar Limited, is inadequate and deficient and does not permit an assessment of the potential environmental impacts of the proposed development.

(i) The Application, and application documentation, does not comply with the mandatory requirements of the Planning and Development Regulations 2001 (as amended), including in relation to EIA Screening.

(ii) The Planning Report, and the EIA Screening contained therein, when read together with the Construction and Waste Management Plans, provides insufficient information to enable a proper and complete assessment of pollution and nuisances arising from the proposed development. Similarly, there is insufficient information to assess the impact on risk to human health arising in respect of the proposed development. Furthermore, it is impermissible for the purposes of EIA Screening for certain matters, not detailed in the documentation presented, relevant to the impact of the development on human health (such as noise/dust etc) to be left over to be determined by the Contractor.

(iii) The Board lacks ecological and scientific expertise and/or does not appear (in light of the information available on the Board's website) to have access to such ecological/scientific expertise in order to examine the EIA Screening Report as required under Article 5(3)(b) of the EIA Directive, which states that in order to ensure the completeness and quality of the environmental impact assessment report, *inter alia*, "*the competent authority shall ensure that it has, or has access as necessary to, sufficient expertise to examine the environmental impact assessment report.*"

(iv) The Proposed Development, and documentation submitted, including the Planning Report, does not comply with the requirements of the Planning and Development Act 2000, the Planning and Development Regulations 2001, or the EIA Directive. The information submitted by the developer is insufficient and contrary to the requirements of the EIA Directive (Directive 2011/92/EU as amended by Directive 2014/52/EU) and the provisions of national law, including the Planning and Development Act 2000 (as amended) and the Planning and Development Regulations 2001 (as amended).

(v) There is insufficient information contained within the application documentation in relation to the impact of the proposed development (during both the construction phase and built/operational phase) on the impacts on bird and bat flight lines/collision risks for the purposes of the EIA Screening Report, AA Screening Report, and the Height Guidelines (and the Specific Assessments detailed therein), and the relevant assessments required to be carried out by the Board in respect of same cannot therefore be completed in the absence of same.

(vi) The criteria considered in the EIA Screening Report does not comply with the requirements of the Planning and Development Act 2000, 2016 Act and the associated Regulations. The Application, and application documentation, does not comply with the mandatory requirements of the Planning and Development Regulations 2001 (as amended).

(vii) Having regard to the potential cumulative impacts arising from the proposed development and other similar SHD Developments, and noting the size of the proposed development, the EIAR has failed to provide a comprehensive cumulative assessment of the project in the EIAR.

(viii) The Population and Human Health chapter of the EIA Screening Report is inadequate in that it fails to assess the impact of an increased population in the area on services including schools, childcare and medical care.

(ix) The impact on biodiversity and human health arising from the proposed development, during both the construction and operational phases, is inadequate and lacking in terms of detail – the EIA Screening Report is deficient in this regard.

(x) The EIA Screening is deficient and flawed insofar as it is based on an incomplete description of the proposed development – including those aspect of the development pertaining to the construction phase.

(xi) The proposed development does not comply with and is not in accordance with BRE Guidelines. The proposal is not in compliance with the said Guidelines.

Screening for Appropriate Assessment

By way of general summary, the information presented by the Developer is insufficient, contains lacunae and is not based on appropriate scientific expertise – as such the Board cannot comply with the requirements of the Habitats Directive and relevant provisions of national law under the Planning and Development Act 2000. Under Article 6(3) of the Habitats Directive, an Appropriate Assessment of the implications of a plan or project for the site concerned implies that, before the plan or project is approved, all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect the conservation objectives of that site must be identified, in the light of the best scientific knowledge in the field. The competent national authorities are to authorise an activity on the protected site only if they have made certain that it will not adversely affect the integrity of that site. That is so when there is no reasonable scientific doubt as to the absence of such effects (see Case C-461/17, *Holohan & Ors v. An Bord Pleanála, Preliminary Reference*, 7 November 2018, para.33; see also Case C-243/15, *Lesoochranárske zoskupenie VLK*, 8 November 2016, para.42; *Commission v. Spain*, Cace C-404/09, 24 November 2011, para. 99; and *Grüne Liga Sachsen and Others*, Case C-399/14, 14 January 2016, paras. 49 and 50). An Appropriate Assessment carried out under Article 6(3) may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of dispelling all reasonable scientific doubt as to the effects of the proposed works on the protected area concerned.

(i) The Proposed Development does not comply with the requirements of the Planning and Development Act 2000 (as amended) (*under Part XAB of the 2000 Act (ss.177R-177AE)*) and the Habitats Directive. Due to inadequacies and lacunae in the AA Screening Report prepared by the Developer the

Board does not have sufficient and/or adequate information before it to carry out a complete AA Screening in relation to the proposed development.

(ii) The AA Screening assessment does not provide sufficient reasons or findings, as required under Art.6(3) of the Habitats Directive and national law, to the requisite standard – the conclusions/statements made therein do not identify any clear methodology and no analysis is offered in respect of the AA Screening conclusions in respect of the protected sites "screened out" at the said AA Screening stage – there is an absence of reasoning provided in this regard by reference to scientific information.

(iii) The AA Screening is flawed insofar as it does not consider all aspects of the proposed development – including relevant aspect arising during the construction phase, such as construction compounds and haul roads etc.

(iv) Insufficient surveys have been carried out to assess the potential impacts arising from bird collision/flight risks insofar as the proposed development may impact bird flight paths.

(v) The "Zone-of-Influence" referred to in the AA Screening Report is not reasoned or explained – it is unclear how such a zone was so determined – the criteria for determining a "zone-of-influence" has no basis in law. Furthermore, the limitation of the consideration of protected sites to a 15km radius is not explained and it is unclear how such a limitation was determined.

(vi) The AA Screening fails to identify and consider all potential impacts on protected bird species – including by reference to potential collision flight risk during both the construction and operation phase of the proposed development.

(vii) No regard and/or inadequate regard has been given to the cumulative effects of the proposed development, in combination with other development in the vicinity, on the protected sites.

(viii) The AA Screening Report impermissibly has regard to 'mitigation measures' for the purposes of carrying out an AA Screening, contrary to the requirements of Art.6(3) of the Habitats Directive.

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(ix) Insufficient site specific surveys were carried out for the purposes of the AA Screening – same is based on an absence of site specific scientific evidence.

(x) Reliance on the Ringsend WWTP is flawed given the precarious status of same.

(xi) It is impermissible to rely on mitigation measures/measures designed to negate the impact of a proposed development on the conservation status of a protected site – see AA Screening Report consideration of the is a potential hydrological connection between the Site of the Proposed Development and North Dublin Bay SAC and North Bull Island SPA

(xii)

Yours faithfully,

Christine O' Connor,
BKC Solicitors