Dermot Flanagan

OUTLINE LEGAL SUBMISSION ON BEHALF OF GOWAN GROUP

The Decision Making Process: EIA and CPO: role of An Bord Pleanala

Factual Background/Introduction: Summary

Figure 11.0 Drawing in our written submission extract indicates the approximate loss of lands resultant from the chosen Option 10.

The chosen Option 10 necessitates the loss of c. 2,055 sq. m of lands under the control of our clients and the adjacent landholders

In our submission, the proposed railway has been designed without due regard to the existing businesses located along the route, including that of our clients.

– see also report of TENT submitted to oral hearing re potential impacts;

The 2014 Directive: relevant extracts

Preamble

(7) Development consent for public and private projects which are likely to have significant effects on the environment should be granted only after an assessment of the likely significant environmental effects of those projects has been carried out. That assessment should be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the public likely to be concerned by the project in question.*

*(23**) With a view to reaching a complete assessment of the direct and indirect effects of a project on the environment, the competent authority should undertake an analysis by examining the substance of the information provided by the developer and received through consultations, as well as considering any supplementary information, where appropriate.*

*(25**) The objectivity of the competent authorities should be ensured. Conflicts of interest could be prevented by, inter alia, a functional separation of the competent authority from the developer. In cases where the competent authority is also the developer, Member States should at least implement, within their organisation of administrative competences, an appropriate separation between conflicting functions of those authorities performing the duties arising from Directive 2011/92/EU.*

(12) For projects which are subject to assessment, a certain minimal amount of information should be supplied, concerning the project and its effects.*

*(31**) The environmental impact assessment report to be provided by the developer for a project should include a description of reasonable alternatives studied by the developer which are relevant to that project, including, as appropriate, an outline of the likely evolution of the current state of the environment without implementation of the project (baseline scenario), as a means of improving the quality of the environmental impact assessment process and of allowing environmental considerations to be integrated at an early stage in the project's design.*

*(32**) Data and information included by the developer in the environmental impact assessment report, in accordance with Annex IV to Directive 2011/92/EU, should be complete and of sufficiently high quality. With a view to avoiding duplication of assessments, the results of other assessments under Union legislation, such as Directive 2001/42/EC of the European Parliament and the Council1 or Directive 2009/71/Euratom, or national legislation should, where relevant and available, be taken into account.*

*(33**) Experts involved in the preparation of environmental impact assessment reports should be qualified and competent. Sufficient expertise, in the relevant field of the project concerned, is required for the purpose of its examination by the competent authorities in order to ensure that the information provided by the developer is complete and of a high level of quality.*

*(9**) The Commission Communication of 22 September 2006 entitled 'Thematic Strategy for Soil Protection' and the Roadmap to a Resource-Efficient Europe underline the importance of the sustainable use of soil and the need to address the unsustainable increase of settlement areas over time ('land take'). Furthermore, the final document of the United Nations Conference on Sustainable Development held in Rio de Janeiro on 20-22 June 2012 recognises the economic and social significance of good land management, including soil, and the need for urgent action to reverse land degradation. Public and private projects should therefore consider and limit their impact on land, particularly as regards land take, and on soil, including as regards organic matter, erosion, compaction and sealing; appropriate land use plans and policies at national, regional and local level are also relevant in this regard.*

*(10**) The United Nations Convention on Biological Diversity ('the Convention'), to which the Union is party pursuant to Council Decision 93/626/EEC1, requires assessment, as far as possible and as appropriate, of the significant adverse effects of projects on biological diversity, which is defined in Article 2 of the Convention, with a view to avoiding or*

minimising such effects. Such prior assessment of those effects should contribute to attaining the Union headline target adopted by the European Council in its conclusions of 25-26 March 2010 of halting biodiversity loss and the degradation of ecosystem services by 2020 and restoring them where feasible.

*(11**) The measures taken to avoid, prevent, reduce and, if possible, offset significant adverse effects on the environment, in particular on species and habitats protected under Council Directive 92/43/EEC2 and Directive 2009/147/EC of the European Parliament and of the Council3, should contribute to avoiding any deterioration in the quality of the environment and any net loss of biodiversity, in accordance with the Union's commitments in the context of the Convention and the objectives and actions of the Union Biodiversity Strategy up to 2020 laid down in the Commission Communication of 3 May 2011 entitled 'Our life insurance, our natural capital: an EU biodiversity strategy to 2020'.*

*(34**) With a view to ensuring transparency and accountability, the competent authority should be required to substantiate its decision to grant development consent in respect of a project, indicating that it has taken into consideration the results of the consultations carried out and the relevant information gathered.*

Definitions:

*"**environmental impact assessment**" means a process consisting of:*

(i) the preparation of an environmental impact assessment report by the developer, as referred to in Article 5(1) and (2);

(ii) the carrying out of consultations as referred to in Article 6 and, where relevant, Article 7;

(iii) the examination by the competent authority of the information presented in the environmental impact assessment report and any supplementary information provided, where necessary, by the developer in accordance with Article 5(3), and any relevant information received through the consultations under Articles 6 and 7;

(iv) the reasoned conclusion by the competent authority on the significant effects of the project on the environment, taking into account the results of the examination referred to in point (iii) and, where appropriate, its own supplementary examination; and

(v) the integration of the competent authority's reasoned conclusion into any of the decisions referred to in Article 8a.

Article 8a

1. The decision to grant development consent shall incorporate at least the following information:

(a) the reasoned conclusion referred to in Article 1(2)(g)(iv);

(b) any environmental conditions attached to the decision, a description of any features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment as well as, where appropriate, monitoring measures.

....

4. In accordance with the requirements referred to in paragraph 1(b), Member States shall ensure that the features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment are implemented by the developer, and shall determine the procedures regarding the monitoring of significant adverse effects on the environment.

The type of parameters to be monitored and the duration of the monitoring shall be proportionate to the nature, location and size of the project and the significance of its effects on the environment.

Existing monitoring arrangements resulting from Union legislation other than this Directive and from national legislation may be used if appropriate, with a view to avoiding duplication of monitoring.

Transposed Legislation: the decision making process:

Transport Railway Infrastructure Act 2001 as amended including S.I. 743.2021 EU RO EIA Amend Regs

***'environmental impact assessment'**, in relation to proposed railway works, means a process -*

(a) consisting of -
(i) the preparation of an environmental impact assessment report by the applicant in accordance with section 39,
(ii) the carrying out of consultation required by or under this Part,
(iii) the examination by the Board of -
(I) the information presented in the environmental impact assessment report,
(II) any further information provided by the applicant under section 41 and, where applicable, section 47D, and
(III) any relevant information received through consultation under section 40, section 41 and, where applicable, section 47D,
(iv) the reaching of a reasoned conclusion by the Board in accordance with section 42B on the significant effects of the proposed railway works on the environment, taking into account the results of the examination referred to in subparagraph (iii) and, where appropriate, its own supplementary examination, and
(v) the integration by the Board of its reasoned conclusion into its decision under section 43,

and
(b) including an examination, analysis and evaluation by the Board under sections 42B and 43 in order to identify, describe and assess, in the light of each individual case, 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 -
(i) population and human health,
(ii) biodiversity, with particular attention to species and habitats protected under Council Directive 92/43/EEC of 21 May 19925 and Directive 2009/147/EC of the European Parliament and of the Council of 30 November 20096,
(iii) land, soil, water, air and climate,
(iv) material assets, cultural heritage and the landscape, and
(v) the interaction between the factors mentioned in subparagraphs (i) to (iv);
'environmental impact assessment report' shall be construed in accordance with section 39(1) and (2);",

Section 39 of the Act of 2001 as amended:

"(1) The applicant shall ensure that an environmental impact assessment report -
(a) is prepared by competent experts,
(b) subject to subsection (3), contains -

(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 the applicant 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,

Section 41 of the Act of 2001 as amended provides for Further Information and a further round of consultation with the public where such information is significant;

"Coordinated assessments
42A. *In carrying out an environmental impact assessment in respect of an application made under section 37 the Board shall, where appropriate, co-ordinate the assessment with any assessment under Council Directive 92/43/EEC of 21 May 19927 or Directive 2009/147/EC of of the European Parliament and of the Council of 30 November 20098.*

Reasoned Conclusions

42B. *Whenever an application is made under section 37, before deciding whether or not to grant the order to which the application relates, the Board shall –*

(a) duly take into account -

(i) the environmental impact assessment report submitted under section 37, and any revised environmental impact assessment report submitted under section 47D,

(ii) any additional information furnished to it under section 41 and, where applicable, any information submitted on foot of a notice under section 47D(4),

(iii) any submissions or observation made in relation to the likely significant effects on the environment of the activity to which the application relates duly made to it –

(I) under section 40(3) or 41(4), and not withdrawn, or

(II) by an authority referred to in section 40(1)(c) or (e),

(III) on foot of a request under section 47D(1) or a notice under section 47D(6).

(b) consider any other evidence that it has obtained under this Part in relation to the likely significant effects on the environment of the activity to which the application relates, and

(c) taking into account the results of the examination referred to in paragraphs (a) and (b), reach a reasoned conclusion on the significant effects on the environment of the activity to which the application relates.".

s. 45 of 2001 Act as amended:

(2) *Where the Agency or CIE proposes to acquire land pursuant to subsection (1) and, in the opinion of the Agency or CIE, as the case may be, it is more efficient and economical to acquire additional adjoining land, the Agency or CIE, as the case may be, may do so with the consent of the Minister and of any person having an interest in or right in, under or over the adjoining land notwithstanding the fact that the adjoining land is not specified in the railway order.*

Section 47D of 2001 Act as amended

(2) *The Board may, if it is provisionally of the view that it would be appropriate to grant the railway order concerned were certain alterations (specified in the notification referred to in this subsection) to be made to the terms of the application in respect of it or the proposed 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 and, if the applicant makes those alterations, to furnish to it such information (if any) as it may specify in relation to the proposed application or order, in the terms as so altered, or, where necessary, a revised environmental impact statement in respect of it.*

(3) *If the applicant makes the alterations to the terms of the application or proposed order specified in a notification given to the applicant under subsection (4), the terms of the application or order as so altered shall be deemed to be the application or order for the purposes of this Part.*

See examples of modifications and exclusion from CPO ;

10.HA0014 Central Access Scheme Kilkenny

CH 2044. Carlton Cinema Site: see also Clinton v An Bord Pleanala

04 MA0010 M20 Cork – Limerick Motorway Scheme

Relevant Caselaw on Principles to be applied for EIA

See ***Balz v an Bord Pleanála*** **[2016] IEHC 134 at paras. 24 and 25:**

It was accepted on the facts of this case that the Board was obliged to carry out an EIA. The obligations of the Board in this regard are to be found in Part 10 of the PDA which implements the EIA Directive. The nature and extent of the obligation imposed by Article 3 was considered by the CJEU in Commission v. Ireland (case C-50/09) where at para. 37 the court stated:

'In order to satisfy the obligation imposed on it by Article 3, the competent environmental authority may not confine itself to identifying and describing a project's direct and indirect effects on certain factors, but must also assess them in an appropriate manner, in light of each individual case'.
25.

Commenting on the obligation as well as the nature and extent of the assessment which was required to be undertaken at the end of the decision making process, the Court at para. 40 stated:

'...however, that obligation to take into consideration, at the conclusion of the decision making process, information gathered by the competent environmental authority must not be confused with the assessment obligation laid down in Article 3...indeed, that assessment, which must be carried out before the decision making process...involves an examination of the substance of the information gathered as well as a consideration of the expediency of supplementing it, if appropriate, with additional data. The competent environmental authority must thus undertake both an investigation and an analysis to reach as complete an assessment as possible of the direct and indirect effects of the project concerned and the factors set out in the first three indents of Article 3 and the interaction between those factors

Commenting on the EIA process: Barton, J states:

54.

The planning process involved in this case required the provision of an EIS by Cleanrath and the carrying out by the Board of an EIA in order to enable the Board to assess, evaluate, make findings and reach a conclusion in relation to the likely significant effects on the receiving environment of the proposed development. The EIS and EIA are part of the planning process but are not the sole basis upon which the Board reaches its decision. Commenting on the difference between these in the context of the planning process, McMahon J. in Klohn observed that:

'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.'

Compulsory Acquisition of Land; Alternative

see ***Lord Ballyedmond v. Commission for Energy Regulation***, Clarke J. 2006.

3.3 I should also emphasise the point made at para. 5.9 of the judgment in Ashford Castle that there is, nonetheless, an overriding requirement to ensure that any party who may, potentially, be affected adversely by the result of the process is entitled to a reasonable opportunity to deal with any factors which might influence the decision. The fact that an expert body can, therefore, bring to bear its own expertise on the matter under consideration, does not absolve it from ensuring that any party potentially affected has a reasonable chance to deal with any factor that might mitigate against its interest. In my view, in coming to an assessment in respect of whether such a reasonable opportunity has been given, the court should look at the process as a whole. The process should not be viewed in a manner that places undue emphasis on a comparison with a court process or, indeed, the sort of process that may be necessitated where an expert body has to make a true finding of fact in a hearing which falls at the other end of the spectrum which I identified in Ashford Castle.

.....

3.5 As pointed out by Murphy J. in The State (Haverty) v. An Bord Pleanála*[1987] I.R. 485 while speaking of the requirements of natural justice:-*

> *"What will be required must vary to the circumstances in the case. At one end of the spectrum it will be sufficient to afford a party right to make informal observations and at the other constitutional justice may dictate that a party concerned should have the right to be provided with legal and to cross examine witnesses supporting the case against him".*

Murphy J. placed an objector in the planning process at the former end of the spectrum. A person from whom land might be acquired by compulsory purchase, while not fully at the other end, is at least well beyond the centre. The spectrum spoken of by Murphy J. is concerned with the separate role of an individual in the process and can even in the case of the same process, differ from one party to another. The spectrum that I spoke of in Ashford Castle *is concerned with the role of the deciding body. There is no necessary coincidence between the two principles*

.....

4.7 Therefore, in summary, it seems to me that the facts need to be assessed for the purposes of answering two questions namely:-

(a) were there materials before the Commission sufficient to justify the decision which the Commission actually made (and to the extent that it arises to justify the recommendation of the Inspector); and

(b) did the process, taken as a whole, give Lord Ballyedmond a reasonable opportunity to deal with the issues which influenced the Commission's decision

.....

6.7 However the specific issue which the Commission has to decide is not whether an alternative may be preferable but whether the acquisition sought should be made. Clearly if there were a demonstrably better route with significant advantages and/or significantly less adverse effects on a range of material factors then, at a certain point, it might be said that a body such as the Commission was acting irrationally or disproportionately in making an acquisition order for property along a route which was demonstrably less favourable. The question which the Commission had to ask itself was not, therefore, a narrow one of deciding whether Route A was necessarily better than Route B, but rather whether it was inappropriate to make acquisition orders in respect of Route A because of any demonstrated superiority of an alternative. In that context it seems to me that grounds (i) and (iii) as set out above were entirely proper considerations for the Commission to take into account and were sustained on the evidence.

....

7.6 An inquiry into a possible compulsory purchase is not like a criminal trial where the defendant is entitled to require proof of each and every element of the criminal offence charged. It is a general inquiry into the appropriateness of making the compulsory purchase order sought. It was open to any objector, such as Lord Ballyedmond, to address the cost issue in more specific terms if it wished. However it does not seem to me that the Commission was required, as a necessary part of the process, to reach a specific view as to cost. It was entitled to act upon a general view. If Lord Ballyedmond wished to have the Commission consider the matter on a more specific basis then it was incumbent upon him to lead what ever evidence he felt it appropriate to that end.

[underline added for emphasis]

See also **Christian v Dub City Co ClarkeJ [2012] IEHC 163 @ para . 7.3:**

7.3 On the other hand, statutory bodies, which are given the legal power to make binding decisions affecting a person's rights, have no inherent jurisdiction, but rather are confined by the terms of the relevant statutory regime. In many such cases the statutory regime concerned will set out what circumstances need to be present to enable the body concerned to exercise its

legal power. For example, legislation may provide that the relevant statutory body must be "satisfied" of a certain state of affairs in order to exercise a statutory power. Likewise, the relevant body may have to consider whether a particular measure is "necessary" in order to achieve some specified statutory end. A range of other terms and concepts are also frequently encountered. In such cases the well travelled jurisprudence in respect of irrationality under the principles identified in O'Keeffe v. An Bord Pleanála*[1993] 1 I.R. 39 are applicable.* The statutory body must take into account all matters which the statute requires, exclude from its consideration all matters not permitted, and come to a conclusion which is reasonably open on the available materials.

[underline added for emphasis].

See also **Prest v SoS for Wales [1982] EWCA Civ J09243**

Role of Court in review of CPO issues: Having regard to Relevant Material and Consideration

Master of the Rolls

The matters to be taken into account

The third principle asks this question: What matters is the Secretary of State to take into account? Is he limited to those canvassed before the Inspector? or should he go beyond them and consider other matters, if they are relevant?

This was one of the principal points made by the Minister and by the Water Authority. They said that the trustees and Sir Brandon never raised the point about the cost of acquisition of the land, nor did they give any evidence upon it. So they should be shut out from canvassing it now.

To my mind this is a mistake. It treats a public inquiry—and the Minister's decision—as if it were a lis inter partes. That it certainly is not. It is a public inquiry—at which the acquiring authority and the objectors are present and put forward their cases—but there is an unseen party who is vitally interested and is not represented. It is the public at large. It is the duty of the Minister to have regard to the public interest. For instance, in order to acquire the land the acquiring authority has to use the taxpayers' money or the ratepayers' money. The Minister ought to see that they are not made to pay too much for the land—especially where there is an

alternative site which can be acquired at a much less price. So also with the planning and development of this land. It is the public at large who are concerned. If planning considerations point to the alternative site rather than to the site proposed by the Authority, the Minister should take them into account, cf. Hanks & ors. v. Minister of Housing & Local Government (1963) 1 Q.B. 999 .

The principle was implicit in the decision of the House of Lords in Board of Education v. Rice (1911) A.C. 179 . It was expressed by Lord Greene, M.R., in a single sentence in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation (1948) 1 K.B. 223 at page 229:

"He must call his own attention to the matters which he is bound to consider.

This was put a little more fully by Lord Diplock in Education Secretary v. Tameside (1977) A.C. 1014 at page 1065:

"Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"

The power of the court

The fourth principle is the power of the court to intervene. Often we are referred to the classic judgment of Lord Greene, M.R., in the Wednesbury case (1948) 1 K.B. 223 , but I ventured to restate it in my own words in Ashbridge Investments v. Minister of Housing (1965) 1 W.L.R. 1320 at page 1326, which has been repeatedly applied. This was in relation to the very statutory words applicable here:

"Seeing that that decision is entrusted to the Minister, we have to consider the power of the court to interfere with his decision. It is given in Schedule 4, para. 2 (of the Housing Act 1957). The court can only interfere on the ground that the Minister has gone outside the powers of the Act or that any requirement of the Act has not been complied with. Under this section it seems to me that the court can interfere with the Minister's decision if he has acted on no evidence; or if he has come to a conclusion to which on the evidence he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account, or vice versa; or has otherwise gone wrong in law."

LORD JUSTICE WATKINS

So long as all those persons who are going to be affected by his decision are aware of the information he expects to take account of, so that they are given full opportunity to make representations to him about it at public inquiry or through correspondence either before or after public inquiry, he is not restricted in his sources of gathering relevant information. A public inquiry is the best known, most used and most useful means at his disposal to ensure that he is fully equipped to decide the matter in hand.

There are times, however, when a vital point, as it seems to him later, has either been insufficiently ventilated or not touched upon at all at an inquiry.

In either of these circumstances, if he is going to allow the point to affect him, he must cause enquiries to be made into it even to the extent of re-opening the public inquiry. Lord Greene M.R. in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation (1948) 1 K.B. 223* at page 229 said:

"He must call his own attention to the matters which he is bound to consider."

What he may not do is to proceed to exercise his discretion and allow it to be swayed by a factor which is inadequately presented to him. It matters not, so it seems to me, that he could reasonably have expected an objector or a supporter of his ultimate decision to have fully exposed for him that factor in all its facets at public inquiry or in some other way. He conducts a process of administrative decision which is quite unlike that conducted by courts and some, if not all, tribunals. Nevertheless, it is a process which is governed by disciplines vital to the public interest.

In *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council (1977) A.C. 1014* at page 1065 Lord Diplock said:

"Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"

It could be said that the Secretary of State did ask himself the right question, although Lord Hooson submits to the contrary in the circumstances, namely whether the financial implications alone could allow him to confirm the compulsory purchase order. But whether, as on any view

he should have done, he acquainted himself with all the relevant information or, I would add, all the relevant considerations indispensable to correctly answer the question, has not to my mind been established by anything we have read or heard in this court.

LORD JUSTICE FOX

I can only conclude that, in a case where the Secretary of State decided to confirm the Compulsory Purchase Order primarily on considerations of cost, and where shortly before his decision he was asked to take account of land acquisition costs, he confirmed the Order without material as to what the latter costs were. Accordingly, I do not think that he can have given the proper degree of consideration to the overall question of cost. The onus of establishing that a Compulsory Purchase Order has been properly made must be on the acquiring authority. The question of cost was a material issue. One of the elements in the total cost was land acquisition cost. I am not satisfied that the Secretary of State had adequate material to judge the latter cost when he made his decision. I would allow the appeal.

[underline added for emphasis]

Compulsory Acquisition: Discussion of Need and/or Justification

See generally the 'test' referred to in the Outline Legal Submission of the County Council at paras:

(i) there is a need that advances the common good which is to be met by the acquisition of the lands in question;

(ii) the particular property is suitable to meet that need;

(iii) any alternative methods of meeting the need have been considered; and

(iv) that the landowner is entitled to be compensated.

See also **Reid v IDA Supreme Court, November 2015, McKechnieJ** re certain principles pertaining to compulsory acquisition powers:

44. Whilst the existence of such a power, which apparently stretches as far back as 1541, has been upheld by the Courts, across a wide variety of public bodies or bodies performing public functions for many years, nonetheless certain well described principles have now been established, which depending on circumstances, will be applied in determining the outcome of any challenge, to the invocation of such a power. For the purposes of this case the following can be said:-

(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] I.R. 118 ,* ***Nolan v. Irish Land Commission*** *[1981] 1 I.R. 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] I.R. 317).*

[underline added for emphasis]

Re Modifications: see **O Connell v O Connell and the Minister for the Environment, High Court Finnegan,J March 2001**, as follows:

Arising out of these circumstances the Applicant now contends that the alternative proposal, constitutes a different scheme and that this vitiates the public local inquiry. I am satisfied that underlying this application is a misapprehension as to the nature and effect of a public local inquiry pursuant to the Roads Act 1993 Section 49. It is quite clear from Section 49(2) that the function of the inquiry is for the inspector conducting the same to consider the scheme and to make recommendations. The object of the recommendations is to assist the Minister in carrying out his function under Section 49(3) of the Act, that is to approve the scheme with or without modifications or to refuse to approve the scheme. The recommendation of the inspector is properly directed towards the Minister's function and may recommend approval with or without modifications or refusal.

Role of Competent Authority: EIA and CPO: relationship between Law of Compulsory Acquisition and EIA reasoned conclusions:

The exercise by An Bord Pleanala of authorising a Railway Order involves the interrelationship between acquisition powers under the domestic order and subject to the ECHR] and the assessments under EIA.

Impacts on the community under EIA also require an assessment of impact of acquisition;

Discussion ; Alternatives Chapter 3 of EIAR

If the information sought by the Inspector and provided by the Promoters had been sought by way of FI, it is submitted that same would be regarded as significant and a further round of public participation would ensue.

Chapter 3 from pages 43 – 81 examines alternatives. A reference to the chosen route, Option 10, first appears at pages 70. At page 79, it is stated:

As can be seen from the above Option 10 – The underpass offline to the west of the listed mill building has been identified as the preferred option over Options 4+4b, 11, 12 and 13.

Thereafter, at page 80, after the choice of Option is decided, the chapter 3 goes on to say:

This option impacts most heavily on the Burke Brothers and Son Ltd., wholesale business located along the southwestern boundary of the site. The impacts on this property are profound in that it would need to operate on a significantly smaller site or relocate to remain in business should

Option 10 be adopted as preferred option for DART+ West at Ashtown.

Discussion ; Common Appraisal Framework

Page 2

The purpose of this document is to develop a common framework for the appraisal of transport investments that is consistent with the Public Spending Code (PSC) and also elaborates on the Public Spending Code in respect of the appraisal of transport projects and programmes to assist scheme promoters in constructing robust and comparable business cases for submission to Government.

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4.5 Project Appraisal Balance Sheet

The output of the above analysis should be included in a Project Appraisal Balance Sheet. A PABS contains three elements:

- *A Qualitative Statement summarising the impact of the project in qualitative terms;*
- *A Quantitative Statement that sets out quantified; and monetised indicators of the impact; and*
- *A Scaling Statement that ranks the project on a seven-point scale in terms of each criterion.*

The Qualitative Statement should be backed up with research that allows for a justification of the summary comments made to be justified. This may be in the form of environmental assessments where undertaken, benchmarking against previous experiences where appropriate, or review of policy documentation as required.
While the quantitative indicators used will often be specific to the type of proposal being appraised, the PABS, as set out, includes some indicators of a general nature.
With regard to the Scaling Statement, this should be based on impacts relative to the scale of the project. Where impacts are monetised a Scaling Statement is not required.

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7.4 Project Appraisal Balance Sheet

The PABS will contain three elements:

- *A Qualitative Statement summarising the impact of the project in qualitative terms;*
- *A Quantitative Statement that sets out quantified and monetised indicators of the impact; and*
- *A Scaling Statement that ranks the project on a seven-point scale in terms of each criterion.*

Table 7.5 presents an outline of the components of the Project Appraisal Balance Sheet (PABS).

Comment/Analysis

The CAF is not a document found in the EIA Directive; it is not a document to assess the impacts on the environment, in the manner contemplated by the EIA Directive:

No data has been provided to support the choice of Option; No cost benefit analysis has been provided; the cost of land acquisition as a material asset issue has not been included in the information on Alternatives.

The impacts on the environment are to be assessed at the community wide basis not in the specific impact on the Ashtown Stables. This is a legal error in the decision of the Promoters.

The impact on the wider community includes public safety, employment, cost of relocation of established businesses including the Burke Brothers and Gowan group.

In **Malster v Ipswich Borough Co 17 August 2001 Sullivan, J QB,** the High Court of England was dealing with a challenge to a Screening Opinion that EIA was not required. The factual issue was the shadowing effect on the end of a terrace as a result of the redevelopment of the Ipswich Town football stadium.

73 *The 1999 Regulations are concerned to protect the environment in the public interest. Whilst this may have the effect of avoiding harm to residential amenity, the purpose of the 1999 Regulations is not to protect the amenity of individual dwelling-houses. There may be a "significant" impact upon a particular dwelling or dwellings without there being any likely "significant effect on the environment" for the purposes of the Regulations.*

74 *In Rochdale (above) it was argued that reserve matters were capable of having an effect on the environment; that was why they were reserved for subsequent approval. It followed, it was submitted, that an outline application with some matters reserved for subsequent approval could not adequately describe the "design" of the proposed development for the purposes of the 1999 Regulations. In para 113 I rejected that submission in these terms:*

"That ignores the fact that the environmental statement does not have to describe every environmental effect, however minor, but only the 'main effects' or 'likely significant effects'. It is not difficult to see why this should be so. An environmental statement that attempted to describe every environmental effect

of the kind of major projects where assessment is required would be so voluminous that there would be a real danger of the public during consultation, and the local planning authority in determining the application, 'losing the wood for the trees'. What is 'significant' has to be considered in the context of the kinds of development that are included in Schedules 1 and 2. Details of landscaping in an application for outline planning permission may be 'significant' from the point of view of neighbouring householders, and thus subject to reserved matters of approval, but they are not likely to have 'a significant effect on the environment' in the context of the assessment regulations."

Comment/Analysis

The reaction to the effect on an individual property by abandoning Option 2 and thereafter adopting Option 10 is a flawed approach.

The Promotors failed to properly assess by way of examination, analysis and conclusion all the impacts on the received environment in the community wide sense. This includes all the land uses in the area of Option 10 including Burke Brothers and Gowan Group and to the existing use rights.

Ashtown Stables also fundamentally disagree with this Option. In short, the Promoters has created a solution to a problem of their own making, and which is objected to by the landowners having regard to their existing use rights.

For example, Option 9 has not been properly considered or assessed. A temporary 3 year period of disruption, in the context of a 39 month project is not significant for a project of electrification for a railway line first build in or around the 1850's.

As public works, the impact of the RPS must be considered in the public interest of the wider community for a rail project to last the next 150 years and beyond.

Summary and Conclusions:

It is submitted on behalf of Gowan Group that –

1. While supporting the DART project at the level of principle, in terms of compulsory acquisition, excessive land has been acquired from Gowan Group – see **Reid v IDA Supreme Court McKechnieJ ; Prest v SoS for Wales [1982] EWCA Civ J09243.**

2. The proposed land acquisition is not the minimum required having regard to the material before An Bord Pleanala and the community need to be met by the acquisition in question.

3. The Promoters of the Undertaking have not provided 'reasons' for the choice of Option at the Ashtown location for road access. This Option is not fundamental to the objective of rail electrification.

4. Chapter 3 of the EIAR provides limited justification for the choice of Option 10. The data for the choice of Option 10 is not provided. In the legal sense, there is a lack of reasons for the choice of Option 10.

5. It is acknowledged that Option 10 arose from a 'starting all over again'. Thus pages 43 – 69 of Chapter 3 are not redundant and ought not be included the material within those pages was not relevant to the 'examination and analysis of Options. There are no reasoned conclusions as to the choice of Option 10. In fact, the Promoters provide eleven [11] pages on the proper consideration of Alternative options.

6. The Competent Authority has the power to seek further information pursuant to s. 41 of the 2001 Act as amended.

7. The Competent Authority has the power pursuant to s. 47D of the 2001 Act as amended to direct a revised solution at this location, whilst provisionally being of the view that the project as a whole ought to be approved.

8. The question of the benefit in terms of the impact on the receiving environment from the perspective of planning policy, material assets and land acquisition does not support the acquisition in question from either an EIA or CPO perspective for Option 10.

DERMOT FLANAGAN S.C.

4 OCTOBER 2023