

**LEGAL SUBMISSIONS OF EAMON GALLIGAN SC ON BEHALF OF  
LIDL – SITE AT BALLYMUN ROAD**

<b>AN BORD PLEANÁLA</b>	
12	21 FEB 2024
LTR DATED _____	FROM <u>Lia</u>
LDG- _____	

Appearances:

Mr. Eamon Galligan S, instructed by Mr. ~~Fergal Ruane, Byrne Wallace~~

Mr. Tony Bamford, Planning Consultant

Ms. Marie-Claire Daly, Punch Consulting

Tim Murnane, Punch Consulting, is also present

We have submitted to the inspector multiple copies of a cover letter from Tony Bamford, planning consultant which includes the report of Punch consultants. As appears from that letter the Punch report addresses Item no. 10 in the Table which sets out the TII response to Lidl to submissions which have been made to the Board during the consultation period.

The format of our presentation is that first, Marie-Claire Daly will present her brief report and I will make some submissions. These have been a work in progress until now due to the evolving nature of the hearing and information available to us.

Lidl broadly welcome the implementation of Metrolink but have a number of urgent concerns relating to the Lidl Ballymun site: and in relation to waste management issues which we welcome the opportunity of addressing in this module.

Part of the proposed Northwood station is located on the Lidl lands as is the Northwood Station and Portal Compound which is intended to be used of the storage of excavated materials

It is appropriate that we raise at the outset certain concerns regarding fair procedures in light of the significant amount of new information addressed for the first time on the first day of the hearing and second, in relation to those matters which TII have promised to furnish the inspector with but were not available for the purposes of our preparations for presentation in this module and the second module: this includes the agreements with DCC and FCC. TII have made available a Draft Guidance Note for Developers dated May 2023 which was only made available yesterday and is subject to change.

Fair procedures also arises in that TII have not furnished information on the likely significant impacts of the proposed railway works on the North West Irish Sea cSAC on which Lidl have not an opportunity to comment at this stage and would seek an opportunity to comment on this information. Item no. 6 in appendix 1 of the inspector's Agenda has not been addressed –

*6. Address potential implications of the designation of the North West Irish Sea cSPA with regard to both Appropriate Assessment and the Biodiversity assessment contained in the EIAR. Identify if there have been any changes (e.g. Conservation Objectives or qualifying interests) for any relevant European Site.*

The initial Agenda for the hearing indicated that this was to be addressed by Metrolink on the first day of the hearing. We will certainly need that information well in advance of Module 2 which we understand is the

module in which issues relating to the protection of European Sites are to be addressed.

### **Transport (Railway Infrastructure) Act 2001**

**47D.—(1) Before determining an application for a railway order, *the Board may, at its absolute discretion and at any time—***

***(a) request further submissions or observations from the applicant, any person who made submissions or observations in relation to the application or any other person who may, in the opinion of the Board, have information which is relevant to the determination of the application,***

***(b) without prejudice to section 41, make any information relating to the application available for inspection, notify any person or the public that the information is so available and, if it considers appropriate, invite further submissions or observations to be made to it within such period as it may specify, or ... [Emphasis added]***

Fair procedures must be read into the above provisions relating to seeking additional information both from the perspective of constitutional justice and access to justice requirements of Article 9 of the Aarhus Convention.

### **The DCC and FCC agreements and related draft conditions**

In particular, in the context of this module, we refer to the fact that agreements have been reached or largely agreed with DCC and FCC which has not been furnished to the hearing or made available to the parties to this process.

The status of these agreements are different to those agreements reached with private parties which are typically submitted to the inspector towards the end of the hearing and do not receive much discussion at the hearing.

DCC is the competent authority charged with the responsibility, inter alia, for planning and waste management within its functional area as is FCC within its functional area. The Lidl site is just within the FCC administrative area. We do not know the extent to which these agreements and the related draft conditions address mitigation measures in relation to impacts of waste, in particular.

The draft conditions referred to on the first day of the hearing by the representatives of DCC and FCC form part of the application going forward, which TII is asking the Board to approve, and fair procedures requires that Lidl should be afforded an opportunity to comment on them.

The mitigation measures in these conditions are relevant to both EIA and to AA and are, therefore, measures which must be made available to parties to the process, including Lidl, having regard to their right to participate in relation to EIA and AA issues.

Although Mr. McGrath pointed out in his legal submissions that the application for approval for the draft railway order does not attract the detailed requirements associated with a planning application, the application must be sufficiently detailed to enable both the public concerned and the Board to determine whether the project is likely to have significant effects on the environment. If it is not, then it does not accord with the requirements of EU law relating to EIA as transposed into Irish law. The issue as to what mitigation measures are now being proposed at

the behest of DCC and FCC must be known in order to determine the likelihood of residual significant effects on the environment.

### **Article 27 notification**

In that regard, I want to address the issue of the Article 27 notification which was referred to by TII on the first day of the hearing.

In our view, TII have not made the information available which would enable the inspector or the Board to assess the potential for significant effects on the environment in this scenario where the EPA determines that excavated material the subject of the TII notification *“should be considered as waste and not as a by-product”*. [Article 27(3)]

Article 27(3) of the European (Waste Directive) Regulations 2011 (SI No. 126 of 2011) provides:

*(3) The Agency—*

*(a) may determine, **in consultation with the relevant local authority and the economic operator concerned**, whether a substance or object notified to it as a by-product in accordance with paragraph (2)(a) should be considered as waste, and*

*(b) shall notify the local authority and the economic operator concerned in circumstances where a determination is made that a substance or object **should be considered as waste and not as a by-product.***

[Emphasis added]

## **Additional provisions of Article 27 relating to “by -products”**

The meaning of by products can be understood by considering Article 27

### **By-products**

27. (1) A substance or object, resulting from a production process, the primary aim of which is not the production of that item, may be regarded as not being waste but as being a by-product only if the following conditions are met:

- (a) further use of the substance or object is certain;
  - (b) the substance or object can be used directly without any further processing other than normal industrial practice;
  - (c) the substance or object is produced as an integral part of a production process; and
  - (d) further use is lawful in that the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts.
- (2) (a) Where an economic operator makes a decision in accordance with paragraph (1) that a substance or object is to be regarded as a by-product, he or she shall notify the Agency of the decision and the grounds for the decision.

The storage of excavated waste would have the potential to cause likely significant negative effects relating to the ground conditions at the Lidl Ballymun site and also at nearby ecological receptors identified in the EIAR, in particular the Santry River and the Santry Demesne pNHA.

The issue of how excavated materials are classified and managed is of particular concern for Lidl. You have already heard from **Marie Claire Daly**, Punch, as to the concerns about potential for contamination of the site as a consequence of the railway works on Lidl's site and how that should be addressed by way of conditions to be attached by the Board in terms of remediation of the site when it is being handed back to Lidl following completion of the works.

However, there is a very significant concern around the issue of the failure of TII to address the full potential effects of the storage of waste materials at the Northwood Station and Portal Compound.

The Excavated Materials Management Strategy [**Pg 26, Appendix A24.1 Excavated Material Management Strategy**] identifies that the Northwood Station and Portal Compound will be used as a storage location for all excavated materials during the construction phase.

According to the Excavated Waste Management Strategy submitted by TII...*"it is predicted that approximately 3,025,588 m3 of excavated materials will be generated during the construction phase of the proposed Project based on the reference design and the vertical alignment determined for both the tunnelling and surface works."*

It is predicted in the Strategy that **89.6%** of the **3 million m3** would be **classified as a by product for the purposes of Article 27** of the European Communities (Waste Directive) Regulations 2011 which is

approximately **2.7 million m3** (4,887,488 tonnes); and **10.4%** would be classified as **waste** which is approximately 310,137m3 (558,571 tonnes).

The EIAR also notes: *"If a **bentonite slurry** is used for the TBMs (tunnel boring machines), the excavated material which is brought to the surface during tunnelling will contain bentonite as well as the excavated soil and stone material. Any bentonite which is no longer required after tunnelling activities are completed will require separate disposal as a non-hazardous waste."*

If a much higher proportion of material excavated cannot be categorized as a by-product under the provisions of Article 27 and has to be defined as "waste", how is this addressed in the TII Waste Management Strategy because it does not seem to us to be addressed adequately or at all in the context of the Excavated Material Management Strategy.

We would ask the inspector to raise with TII the issue as to what mitigation measures can be detailed to the Board to take into account the increased pollution risks posed by long-term storage and stockpiling of a greater proportion of contaminated soil or waste at the Northwood Station and Portal construction compound than that which is contemplated or anticipated by TII in their article 27 notification.

If there is a much higher amount of waste in the materials excavated than is allowed for in the Article 27 notification submitted to the EPA: supposing it is 50% or 60% waste and the balance by-products, a number of questions arise:



- what are the disposal options for such a volume of waste and where are they located?
- Will there be a longer storage time for waste which cannot be taken to Storage Recovery Facilities (SRFs) and a greater amount stored at any one time?
- what will be the duration of the storage of waste at Northwood Station and Portal construction compound following their excavation?
- What will the maximum quantity of waste stored at the Northwood compound be at any one time?
- How is this quantity of waste to be addressed in terms of a waste management strategy?
- What are the likely significant effects relating to the ground conditions at the Lidl?
- What are the likely significant effects at nearby ecological receptors identified, in particular the Santry River and the Santry Demesne pNHA?
- What are the likely significant effects at Natura 2000 Sites in Dublin Bay and/or the?
- Where is the information that would enable the inspector and the Board to be in a position to answer these questions?
- Why was the Article 27 notification not made at an earlier stage so as to provide the inspector and the Board with the data necessary to enable to carry out a proper EIA and AA in respect of waste issues?

The inspector may come up with further questions, but these are the ones that immediately occur to us.

We do not propose to address the related AA issues in this module which arise from the fact that the nearby Santry River flows into Dublin Bay (at Raheny, close to Bull Island) and forms a pathway to the Natura 2000 Sites in Dublin Bay.

In conclusion, Lidl is concerned that TII have not made the information available which would enable the inspector or the Board to assess the potential for significant effects on the environment in the scenario where the proportion of waste in the excavated materials the subject of the TII Article 27 notification is much greater than the 10% figure presented in the notification to the EPA.

We reserve the right to return to this issue to the extent that it is necessary to do so when the DCC and FCC agreements and related draft conditions are made available. We also reserve the right to refer to any traffic or appropriate assessment issues which arise from waste in the next module.

**Eamon Galligan SC**

**21 February 2023**