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## **LEGAL SUBMISSIONS OF EAMON GALLIGAN SC ON BEHALF OF EARL DEV PROPERTIES**

### **Appearances:**

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

Mr. Robert Coughlan, Punch Consultants

Mr. Conor O Donnell , AGL

Also attending to assist inspector if necessary:

Mr. Blaine Cregan, John Spain Associates

Pat Duffy, Arup, consultants

Earldev Properties UC, is the owner of the Arthur Cox building and is part of the Clancourt Group, which is the owner and developer of a significant number of properties that will be served by the proposed Metrolink. Earldev is, therefore, in principle extremely supportive of Metrolink major infrastructural improvement to the city wide transportation network. However, it has a number of urgent concerns relating to the Arthur Cox Building, in particular, and which it welcomes the opportunity of addressing in this module.

We are submitting under cover of a letter from JSA Planning Consultants, the requisite copies of the reports of Robert Coughlan, Punch and Conor O Donnell, AGL (which includes slides), in addition to brief legal submissions.

## EIA obligations

Article 3.1 of the EIA Directive provides:

*1. The environmental impact assessment shall identify, describe and assess in an appropriate manner, **in the light of each individual case, the direct and indirect significant effects** of a project on the following factors:*

- (a) **population** and human health;*
- (b) biodiversity, with particular attention to species and habitats*
- (c) protected under Directive 92/43/EEC and Directive 2009/147/EC;*
- (d) land, soil, water, air and climate;*
- (e) **material assets**, cultural heritage and the landscape;*
- (f) the interaction between the factors referred to in points (a) to (d).*

The requirement to describe the *the direct and indirect significant effects of a project*, “**in the light of each individual case**” means that the specific environment must be considered, including the specific built environment.

Mr. McGrath pointed out in his legal submissions on behalf of TII that the application for approval for the draft railway order does not attract the detailed requirements associated with a planning application, and that the 2001 Act was minimalistic in requiring merely a plan of the project, rather than the more detailed suite of drawings required by planning regulations. However, this statement ignores the fact that 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 information on environmental impacts resulting from differential settlement is not considered in the Building Damage Assessment in the EIAR by reference to the *specific characteristics of the buildings* which are impacted by the proposed railway works including tunnelling excavation, in particular, but by reference to a generic masonry building. The subject building is not a generic masonry building. It has a glass, stone and metal façade and is not of traditional construction.

In fact, the building damage assessment in the EIAR focuses on classifying the **risk of damage** to the building in terms of differential settlement and otherwise rather than the significance of those effects in terms of their **environmental impact** or in terms of adopting the methodology in Table 3.4 that is recommended in the EPA 'Guidelines on the Information to be contained in EIARs' (May 2022) to be use in terms of the description of the significance of effects. In addition to structural damage to the building, which can be viewed in this context as a 'material asset' for EIA purposes, the likely significant effects on human health, for example, have to be assessed in the context of the specific building in question and this has not been done. This is addressed further in the context of the Wider Effects Report below.

Furthermore, the information on environmental impacts on those individual buildings is not furnished in relation to the railway works at the Limits of Deviation (LoDs). This approach contravenes the provisions of the EIA Directive and Article 3.1, in particular, set out above.



In *Sweetman v. An Bord Pleanála* [2021] IEHC 390, Humphreys J discussed the so-called “*Rochdale envelope*” at §§60-66 [see Appendix for full extract]. At §66 he stated:

66. *Two points are notable. Firstly, the concept of the design envelope has, in English law, a written basis in national guidelines, albeit guidelines that build on case law. There is no such written basis in this jurisdiction, either in statute or in guidelines. And secondly, it is not simply a question of assessing a project by reference to a “worst case scenario” alone but “by reference to those parameters and any flexibility they involv[e]”. That involves considering the range of situations that could arise within the flexibility so provided, not just the top end of the scale.*

[Emphasis added]

The approach adopted by TII is to say simply that the likely effects in terms of the specific vertical and horizontal alignment of the tunnel which has been assessed in the EIAR is acceptable in so far as it is considered not to have any *negative* or *adverse* effects.

However, there is an obligation under the EIA Directive also to assess not only the adverse impacts of a project but also the positive impacts: ***O’Nualláin v Dublin Corporation*** [1999] 4 IR 137. TII are therefore obliged to provide information on the likely significant **positive** effects to the Arthur Cox Building and its occupants of lowering the tunnel by up to 10m in accordance with the LoD, not just in relation to mitigating building

damage but also in terms of facilitating the construction of additional storeys which would be permissible in principle under the provisions of the Development Plan.<sup>1</sup> Eardev are requesting that the Board would require that the tunnel be lowered by at least 5m, subject to the proviso that the Phase 3 assessment (which must be carried out prior to the approval of the proposed railway order) confirms that the building distortion and damage will be within acceptable limits as defined by Robert Coughlan in his evidence to the hearing.

It is noteworthy that TII have identified no technical reasons in the EIAR as to why the tunnel could not be lowered by 5 m or more. Item no. 9 of the TII initial response to the Eardev submission which is the Table appended to the back of the submission of Robert Coughlan, Punch, to the hearing states:

*“Please refer to Item 3, 4 and 7. An alteration of the horizontal alignment is not considered necessary and would introduce significant track alignment and operational constraints due to the proximity to the Charlemont station. A lowering of the tunnel alignment in this area within the bounds permissible by the limits of deviation may be feasible subject to more detailed engineering analysis.”*

## **The Wider Effects Report**

TII purport to address the effects on the environment at the LoDs in the Wider Effects Report. It is stated at §1.2 of that Report that -

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<sup>1</sup> This issue will be addressed further by Blaine Cregan of John Spain Associates in Module 2.



*“The assessment presented in this report is **an overview** of the potential environmental impacts that could be realised should the proposed project deviate within the extents of these limits.” [Emphasis added]*

However, as in the case of the EIAR, there is no assessment in Wider Effects Report by reference to the specific characteristics of the buildings which are impacted by the proposed railway works. In fact, the Wider Effects Report including Table 1.2 (Screening of LOD Impacts by EIAR discipline) does not give any consideration to Ground Settlement other than a passing reference to two buildings in §1.6.7.

At §1.6.7 of the Wider Effects Report, the following statement appears under the heading of “Architectural Heritage”:

*“In terms of potential for indirect impacts, **settlement analysis** has identified that locations where this may occur is limited to just two locations along the MetroLink alignment and at both of these locations’ mitigation will be sufficient to ensure there are no permanent impacts. Therefore, following the implementation of these mitigation strategies as outlined in Chapter 26 of the EIAR, the overall residual impacts would not vary from that presented in the EIAR.”*

However, the Wider Effects Report does not identify any buildings other than those two buildings, as being subject to potential permanent impacts as a consequence of differential settlement. It appears that the report confined itself to dealing with buildings of architectural heritage and not other buildings that are occupied by “human beings”, the impact on whom must be considered in the context of EIA.

In failing to address the building specific characteristics of the Arthur Cox building (and, indeed, multiple other buildings which intersect with the route of the tunnel) neither the EIAR nor the Wider Effects Report address the potential permanent impacts arising from differential settlement.

**A list of conditions is attached to this submission which Earldev is recommending to the inspector and the Board.**

**Eamon Galligan SC**

**29 February 2023**

## **APPENDIX**

**Extract from *Sweetman v. An Bord Pleanála* [2021] IEHC 390, in which Humphreys J discussed the so-called “*Rochdale envelope*” at §§60-66:**

“60. Reliance is also placed on the fact that design envelope permissions have been granted in other situations *e.g.* *Carroll v. An Bord Pleanála* [2016] IEHC 90, [2016] 2 JIC 1102 (Unreported, High Court, Fullam J., 11th February, 2016); but if the challenges made previously don’t raise this specific point in this specific context, then they are self-evidently not determinative. *Craig v. An Bord Pleanála* [2013] IEHC 402, [2013] 8 JIC 2602 (Unreported, High Court, Hedigan J., 26th August, 2013), is relied on by the notice party, but that was viewing the point as an EIA point only: see para. 37.



61. Beating back all of the overgrowth of detail, pleading objection and legal irrelevancy here, at the heart of the case is a clear question as to whether planning law envisages the outer contours what the board calls the “well-known” concept of the “Rochdale envelope” (namely an application for development consent that is of variable dimensions up to a specified maximum), although how well-known that really is may be up for debate because, according to justis.com, that phrase is only making its debut in the Irish caselaw in the current sentence of the current judgment.
62. Holgate J. discussed the concept recently in *Raymond Stephen Pearce v. Secretary of State for Business Energy and Industrial Strategy* [2021] EWHC 326 (Admin), noting at para. 25 an express National Policy Statement for England relevant to the application: NPS EN-1 (Overarching National Policy Statement for Energy).
63. Para. 4.2.7 of NPS EN-1 says that “[i]n some instances it may not be possible at the time of the application for development consent for all aspects of the proposal to have been settled in precise detail. Where this is the case, the applicant should explain in its application which elements of the proposal have yet to be finalised, and the reasons why this is the case.”
64. Paragraph 4.2.8 goes on to say that “[w]here some details are still to be finalised, the ES [Environmental Statement] should set out, to the best of the applicant's knowledge, what the maximum extent of the proposed development may be in terms of site and plant specifications, and assess on that basis, the effects which the project could have to ensure that the impacts of the project as it may be constructed have been properly assessed.”



65. At para. 30, Holgate J. commented that “[p]aragraph 4.2.8 of EN-1 accords with well-known principles set out in *R v Rochdale Metropolitan Borough Council ex parte Milne* [2001] Env. L.R. 406. In the present case NVL [Norfolk Vanguard Ltd.]’s application proposals for the Vanguard infrastructure at Necton were presented as a ‘Rochdale envelope’. That is, because certain design details remained to be determined subsequently, the DCO [development consent order] application defined the parameters within which the buildings would be constructed, and the ES assessed the environmental effects of the proposals by reference to those parameters and any flexibility they involved. The DCO granted by the Defendant authorised the “Works” within those parameters ...”.
66. Two points are notable. Firstly, the concept of the design envelope has, in English law, a written basis in national guidelines, albeit guidelines that build on case law. There is no such written basis in this jurisdiction, either in statute or in guidelines. **And secondly, it is not simply a question of assessing a project by reference to a “worst case scenario” alone but “by reference to those parameters and any flexibility they involv[e]”. That involves considering the range of situations that could arise within the flexibility so provided, not just the top end of the scale.”**

[Emphasis added]