

Re: Module 1 - ABP.314724: Metrolink Oral Hearing, Gresham Hotel.

Observer: Hines Real Estate Ireland Limited

Property: AerCap House, 65 St Stephen's Green, Dublin 2.

LEGAL SUBMISSIONS OF EAMON GALLIGAN SC ON BEHALF OF

HINES REAL ESTATE IRELAND LIMITED

Appearances:

Mr. Eamon Galligan S, instructed by Mason Hayes Curran

Mr. Richard Osborne, Waterman Moylan

Ms. Míde Neary, Mason Hayes Curran

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AN BORD PLEANÁLA

04 MAR 2024

LTR DATED _____ FROM Hines Real Estate

LDG- _____

ABP- _____

Hines Real Estate Ireland Limited ('Hines'), is in principle extremely supportive of Metrolink as a major infrastructural improvement to the city wide transportation network. However, it has a number of urgent concerns relating to the impact of the railway works on AerCap House, in particular, which it manages and which it welcomes the opportunity of addressing in this module.

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).

Section 2(1) of the Transport, Railway Infrastructure Act 2001, as amended (**'the 2001 Act'**) implements Article 3.1 of the EIA Directive and provides for a definition for environmental impact assessment which includes the following-

"environmental impact assessment", in relation to proposed railway works, means a process –

(a)

(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 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 into its decision under Council Directive 92/43/EEC of 21 May 1992¹ and Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009²*

(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);*

The requirement under Article 3.1 of the EIA Directive and under the 2001 Act to describe "*the direct and indirect significant effects of a project*", "***in the light of each individual case***" means that the particular project and its specific receiving environment must be considered, including its specific built environment.

Mr. O'Connell SC, for TII, suggested to the hearing (on Thursday 29 February last) that the phrase "***in the light of each individual case***" referred only to the project itself and not to the particular receiving environment in which it is located. However, an EIA cannot be carried out without assessing both and the particular case must therefore include both.

¹ OJ No. L 206, 22.7.1992, p. 7

² OJ No. L 20, 26.1.2010, p. 7

There is no rational basis for an EIA to be carried out on the basis of assessing the impact on generic buildings, as TII has done in relation to its Building Damage Report (BDR) in the EIAR any more than an EIA can assess the environmental impacts of a project on generic rivers, without regard to their 'individual' characteristics.

The information on environmental impacts resulting from differential settlement is not considered in the BDR in the EIAR by reference to the *individual 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.

Moreover, there is obviously no basis for assessing the environmental effects on buildings which have already been demolished (i.e. the former Canada House), as TII have purported to do in the EIAR in the present case.

Mr. McGrath SC 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.

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 [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]

Furthermore, 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 AerCap House and its occupants of lowering the tunnel by 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.

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 -

*“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.

CONCLUSION

Recital 32 of the EIA Directive 2014 provides as follows:

(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....

Where, as in the present case, the wrong building has been assessed, or where a generic building has been assessed, the data and information cannot be described as ‘complete’ and can hardly be described as of ‘high quality.’

TII state in their response to Item 1 in the Hines' submissions (as set out in Richard Osborne's submission to the hearing)–

"The purpose of the Stage 1 and Stage 2a assessments has been to provide/ensure confidence that the Works will not induce unacceptable damage to buildings/structures along the Route. The primary objective has been to confirm that the structural integrity of each building/structure will not be compromised by the Works."

(Emphasis added)

Neither Hines nor their advisors, Waterman Moylan, have any confidence in the Phase 1 and Phase 2a assessments referred to in the EIAR in circumstances where TII in its EIAR assessed an already demolished building, Canada House, and carried out the assessment of the risk of building damage in relation to all building as if they were generic masonry structure.³

A detailed Phase 3 assessment using the correct building geometry and structural form must be completed and independently verified, ensuring the maximum damage caused to AerCap House is limited to 0.1mm cracking. The proposed tunnel elevation may require to be lowered up to or beyond the current LoD downwards.

This Phase 3 assessment should be carried out prior to approval being granted so that it can be reviewed by Waterman Moylan and/ or any other experts acting on behalf of Hines. This will ensure that any necessary mitigation measures (including lowering of the tunnel elevation) can be adopted in any decision of the Board to approve the proposed railway works and/or in the conditions attached to the decision.

We therefore request that, following a detailed Phase 3 assessment, the elevation of the Metrolink tunnel be lowered to a level that ensures that no damage will be caused to any part of AerCap House, to be confirmed by the Phase 3 assessment referred to above.

Eamon Galligan SC

4 March 2023

³ As set out in the same TII response that "Table 5-4 of this Report shows that the building (AB-37) has been assessed as falling within the "Negligible damage" category".

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]