

(S)

**LEGAL SUBMISSIONS OF EAMON GALLIGAN SC ON BEHALF OF LIDL TO AN  
BORD PLEANALA HEARING MODULE 2 – SITE AT BALLYMUN ROAD**

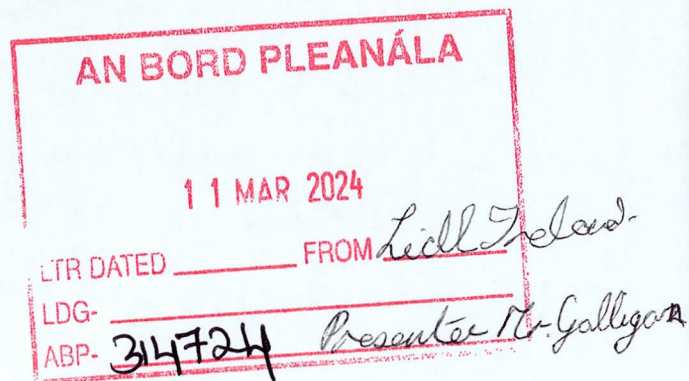
Appearances:

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

Mr. Tony Bamford, Planning Consultant

Mr. Tim Murnane, Punch Consulting

Damien Ryan, Lidl



**SUMMARY POSITION OF LIDL**

The terms and/or conditions of the Board's decision should make adequate provision to ensure that over station and adjacent station development can be achieved in accordance with the objectives and policies of the Fingal County Council Development Plan 2023-2029 and the National Planning Framework.

**PROPOSED RAILWAY WORKS DO NOT COMPLY WITH THE PROVISIONS OF  
THE DEVELOPMENT PLAN**

Under **section 43** of the Transport (Railway Infrastructure ) Act 2001, as amended, before deciding whether or not to grant a Railway Order, the Board is obliged to consider, *inter alia*, the following:

(g) the likely consequences for proper planning and sustainable development in the area in which it is proposed to carry out the railway works and for the environment of such works; and

(h) the matters referred to in section 143 (inserted by the *Planning and Development (Strategic Infrastructure) Act 2006*) of the Act of 2000.

[Emphasis added]

**Section 143(1)** of the Act of 2000 provides:

**143.—** (1) The Board shall, in the performance of its functions (other than functions conferred by *Chapter III* of *Part XXI*), have regard to—

(a) **the policies and objectives for the time being of** the Government, a State authority, the Minister, **planning authorities** and any other body which is a public authority whose functions have, or may have, a bearing on the proper planning and sustainable development of cities, towns or other areas, whether urban or rural,

(b) the national interest and any effect the performance of the Board's functions may have on issues of strategic economic or social importance to the State, and

(c) **the National Planning Framework** and any regional spatial and economic strategy for the time being in force.

It necessarily follows from the above provisions, that the Board is obliged to consider the provisions of the Development Plan and the National Planning Framework, before deciding whether or not to grant a railway order.

As indicated in the evidence of Tony Bamford, Planning Consultant, to the hearing,, the subject lands are zoned “**MRE**” Metro And Rail Economic Corridor.

***Objective:** Facilitate opportunities for high-density mixed-use employment generating activity and commercial development, and support the provision of an appropriate quantum of residential development within the Metro and Rail Economic Corridor.*

***Vision:** Provide for an area of compact, high intensity/density, employment generating activity with associated commercial and residential development which focuses on the MetroLink, or rail or light rail stations within settings of exemplary urban design, public realm streets and places, which are permeable, secure and within a high-quality green landscape. Landmark buildings will provide strong quality architectural features, which respect and enhance the character of the area into*



***which they sit.*** The designated areas will form sustainable districts which possess a high degree of connectivity and accessibility and will be developed in a phased manner subject to the necessary provision of social and physical infrastructure.

[Emphasis added]

The TII/ Jacobs Idom updated Planning Report (at p. 116) states:

#### 4.5.1.6 Project Response

*The section of the alignment passes under lands zoned as Metro and Rail Economic Corridor within the functional area of FCC in the FDP 2023-2029.*

*Under this zoning objective, ‘Rail Infrastructure’ does not come within either ‘Permitted in Principle’ or ‘Not Permitted’ uses. **The FDP notes that ‘Uses which are neither ‘Permitted in Principle’ nor ‘Not Permitted’ will be assessed in terms of their contribution towards the achievement of the Zoning Objective and Vision and their compliance and consistency with the policies and objectives of the Development Plan.’***

*In principle, once constructed the tunnel will not affect the ability to develop on the land directly above the alignment and allows for oversite development in line with the land use zoning objectives. The tunnel alignment is therefore, consistent with the zoning objectives for the lands overhead.*

[Emphasis added]

The highlighted statement on behalf of TII above merely purports to indicate consistency with the zoning objectives of the Development Plan. However, the zoning of land relates to its use for particular purposes as provided for under s. 10(2)(a) of the Planning and Development Act 2000, as amended. The case law establishes that the meaning of a zoning objective does not extend to any policies or other objectives which are applicable to lands so zoned.<sup>1</sup>

In any event, in order to be acceptable under the Development Plan in the context of the Use Zoning Matrix, “Rail Infrastructure” must demonstrate its “compliance and consistency with the policies and objectives of the Development Plan.” The Use zoning matrix indicates that a

---

<sup>1</sup> See, for example, **Redmond v An Bord Pleanála** [2020] IEHC 151.



Public Transportation Station is permissible in principle, although this does not appear to have been identified in the TII updated Planning Report. However, as stated in that report it does not otherwise cover “*Rail Infrastructure*”, such as the tunnel on its own.

In any event, in the context of the subject lands, compliance and consistency with the objectives of the Development Plan cannot be demonstrated either in the context of Northwood Station or the tunnel as the proposal simply does not facilitate development of the type envisaged for the site under the objectives and policies of the Development Plan, particularly in terms of height and density.

As has been indicated in the submissions to the hearing from Punch Consulting Engineers, the Draft Guidance Note for Developers (May 2023) issued by TII indicates that the tunnel design has been prepared on the basis that the cut and cover tunnels are able to carry an oversite load of just 20 kN/m<sup>2</sup>. This draft Guide is dated May 2023 but was only available to the public and landowners after the commencement of the oral hearing and it remains in draft form. However, even assuming the design of the scheme in accordance with this figure (although it is contained in a draft document which TII have expressly reserved the right to alter) this load bearing capacity is clearly not sufficient to achieve the ambitions for this strategically important site under the objectives and policies of the Development Plan and the NPF.

In the alternative, if this is not the design that is proposed in terms of the load bearing capacity of the tunnel (in circumstances where the Guide is only *draft*), the Board does not have sufficient information before it to determine that the proposed railway works comply with the policies and objectives of the Development Plan.

The Board is obliged to consider the provisions of the Development Plan. It cannot discharge its obligation to consider “*the likely consequences for proper planning and sustainable development in the area*”, “*the policies and objectives for the time being*” of Fingal County Council (as planning authority) and the NPF. If it does not have sufficient information to determine whether or not the railway works order comply with the Development Plan in terms of facilitating the type of over station / oversite development it cannot consider whether the



proposed railway works accord with the development objectives and policies under the Development Plan and NPF.<sup>2</sup>

Moreover, as the Punch report indicates at p.10, §(e) - the Draft Guide appears to be largely silent on how future subterranean services on the Lidl site will be treated i.e. constraints on how services such as watermains, gas mains, electrical/IT services, foul drainage, storm drainage etc will or will not be permitted to cross over the MetroLink assets. If such services were not to be permitted to traverse the site, or constrained in doing so, it would have a further major negative impact on the development potential of the site and effectively sever it from a services connectivity perspective. No development consistent with the objectives and policies of the Development Plan can be achieved if adequate provision is not made for services in the proposed Railway Order and the Board does not have enough information to determine whether the proposed railway works order makes adequate provision for services for this strategically important site.

‘Rail Infrastructure’ (unless it is a Public Transportation Station) does not come within either ‘Permitted in Principle’ or ‘Not Permitted’ categories of uses for the purposes of the Use Classes Matrix under the Development Plan, as highlighted in the TII updated Planning Report

—

***“The FDP notes that ‘Uses which are neither ‘Permitted in Principle’ nor ‘Not Permitted’ will be assessed in terms of their contribution towards the achievement of the Zoning Objective and Vision and their compliance and consistency with the policies and objectives of the Development Plan.”***

Given that the 20kN loading provision will not facilitate compliance with the high-density objectives for the subject site, the railway works cannot be deemed compliant with the provisions of the Development Plan. In so far as this 20kN loading provision does not form part of the design or the proposed railway works, the load bearing capacity of the tunnel is unknown, and the Board simply does not have adequate information to determine whether the proposed railway works comply with the policies and objectives of the Development Plan.

---

<sup>2</sup> See, by analogy, **Calor Teoranta Sligo County Council** [1991] 2 IR 267.



## CONSTITUTIONAL LAW REQUIREMENT FOR PROPORTIONALITY IN LAND TAKE

The proportionality principle is an essential element of the balancing of the protection to be afforded to the personal rights of the citizen with the justifiable needs of the common good. In **Re Article 26 and Part V of the Planning and Development Bill 1999** [2000] 2 IR 321, the Supreme Court held that the principle of proportionality is central to the analysis of whether a compulsory purchase scheme breaches Articles 40.3 or Art 43 of the Constitution.<sup>63</sup> The Court approved the following passage from **Heaney v Ireland** [1994] 3 IR 593:

*'In considering whether a restriction on the exercise of rights is permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society. This is a test frequently adopted by the European Court of Human Rights (see, for example, Times Newspapers Ltd. v United Kingdom (1979) 2 EHRR 245) and has recently been formulated by the Supreme Court in Canada in the following terms. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:*

*(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;*

***(b) impair the right as little as possible;** and*

*(c) be such that their effects on rights are proportional to the objective.'*<sup>3</sup>

In **Reid v. Industrial Development Agency** [2015] 4 IR 494, McKechnie J. referred to “certain well-described principles [that] have now been established, which depending on circumstances, will be applied in determining the outcome of any challenge, to the invocation

---

<sup>3</sup> Cited at [2000] 2 IR 321, 349–350 in **Re Article 26 and Part V of the Planning and Development Bill 1999**. The principle had previously been adopted by Keane J (as he then was) in the High Court in **Iarnród Éireann v Ireland** [1995] 2 ILRM 61, 198.

of such a power [namely, compulsory purchase power]<sup>i</sup>. These principles include the following:

- *The impact on the right to private property, ....., must be justified or necessitated by the exigencies of the common good, which will of course have regard to the principles of social justice. [emphasis added]*
- *The conferring and exercise of such [compulsory purchase] 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 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.*
- *Further, where constitutional rights are abrogated by statutory intervention, such provisions must be construed in a way which gives full effect to the above principles.*

McKechnie J. also explained in **Reid** that “in addition to the matters listed in the previous paragraphs, any condition(s) precedent must be strictly adhered to before the exercise of such power can be regarded as valid”.<sup>4</sup>

There are a number of reasons why the proposed railway works, in terms of their impact on this subject site, do not respect this principle of least intrusion in property rights.

First, as demonstrated in the evidence of Punch, Engineering Consultants to the hearing, the Draft Guidance sets out major limitations on vertical loading that can be imposed on the MetroLink Northwood station and connecting tunnels on the Lidl site.

As Punch state at p. 9 of their report –

*“Considering the uniformly distributed load calculated from the proposed Lidl 15 storey structure on the site equates to 210kN/m<sup>2</sup> (165kN/m<sup>2</sup> + 45kN/m<sup>2</sup>) plus additional point and line loads – Refer Section 3A-D of this report – it is clear the*

---

<sup>4</sup> Emphasis added.



*proposed Lidl development cannot proceed if the loading conditions in this TII document are applied to the Lidl site.”*

Second, the combined effect of development exclusion and protection zones appear to effectively render major parts of the Lidl site undevelopable. The extent of these constraints cannot be regarded as proportionate or complying with the constitutional law principle of least intrusion in property rights.

## **ENVIRONMENTAL IMPACT ASSESSMENT**

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 of lowering the tunnel by 10m in accordance with the Limits of Deviation (LOD). The EIAR has not addressed this at all or the effects of a different horizontal alignment using the full extent of the LODs.

## **CONCLUSION**

It is essential the Board’s decision ensures that that the Northwood MetroLink station and connecting tunnels at the Lidl Ballymun site are designed to take full account of future development of the Lidl site and that they do not restrict such development in accordance with the provisions of the Development Plan in any way.

The TII draft Guidance Note for Developers indicates that the design of the tunnel and station will not facilitate development in accordance with the Development Plan and the NPF.

The terms and/or conditions of the Board’s decision should therefore make adequate provision to ensure that over station and adjacent station development can be achieved in accordance



with the objectives and policies of the Fingal County Council Development Plan 2023-2029 and the National Planning Framework.

**Eamon Galligan SC**

11 March 2024

---