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

Observer: Hines Real Estate Ireland Limited ('Hines')

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 SC, instructed by Mason Hayes Curran

Mr. Richard Osborne, Waterman Moylan

Mr. Colman Billings, Billings Design Associates Ltd., Facade Consultants

Ms. Míde Neary, Mason Hayes Curran

SUMMARY POSITION OF HINES

Hines Real Estate Ireland Limited ('**Hines**') welcomes Metrolink as an important addition to the city wide public transportation network and is very supportive of this important project. However, it has a major concern in that the proposed Railway Order does not make adequate provision to ensure that development over the tunnel can be achieved in accordance with the objectives and policies of the Dublin City Council Development Plan 2023-2029 and the objective of establishing a compact city under National Planning Framework. Neither the inspector nor the Board have been provided with *any* information in relation to the load bearing capacity of the tunnel to enable them to make this assessment.

PROPOSED RAILWAY WORKS DO NOT ALLOW THE BOARD TO DISCHARGE ITS STATUTORY OBLIGATION TO ASSESS COMPLIANCE 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.

The **Draft Guidance Note for Developers (May 2023)** issued by TII indicates that the tunnel design has been prepared on the basis that the bored tunnels are able to carry an oversite load of just 75 kN/m². 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 if one were to assume 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 the objectives and policies of the Development Plan and the NPF.

In reality, the proposed Railway Order and accompanying reports provide no information in relation to the load bearing capacity of the tunnel. In circumstances where the Guide is only *draft*, the Board does not have *any* information in relation to load bearing capacity and, accordingly, 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 Dublin City Council (as planning authority) and the NPF. if it does not have sufficient information to determine whether or not the proposed railway works order complies with the Development Plan in terms of facilitating development over the Metrolink tunnel it cannot consider whether the proposed railway works accord with the development objectives and policies under the Development Plan and NPF.¹

§4.5.17.6 of the TII updated Planning Report states as follows:

“4.5.17.6 Project Response

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

¹ See, by analogy, **Calor Teoranta Sligo County Council** [1991] 2 IR 267.

land use zoning objectives. The tunnel alignment is, therefore, consistent with the zoning objectives for the lands overhead in the DCDP. ...”

This statement is unsupported and unsubstantiated.

The railway works cannot be deemed compliant with the provisions of the Development Plan. In so far as this 75kN loading provision does not form part of the design of 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.

In the case of AerCap House, Hines have been advised by Brady Shipman Martin, planning consultants, that the development of one or two additional storeys would be in accordance with the provisions of the Dublin City Development Plan 2022-2028.

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: see **In Re Article 26 and Part V of the Planning and Development Bill 1999** [2000] 2 IR 321, and **Heaney v Ireland** [1994] 3 IR 593.

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 of such a power [namely, compulsory purchase power]*”. 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.²*

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, the Draft Guidance to Developers sets out major limitations, as described above, on vertical loading that can be imposed on the tunnel proposed to run underneath AerCap House which is disproportionate in terms of its restrictions on further development.

Second, the combined effect of development exclusion and protection zones cannot be regarded as proportionate or complying with the constitutional law principle of least intrusion in property rights.

CONCLUSION

Neither the inspector nor the Board have been provided with any information in relation to the load bearing capacity of the tunnel to enable them to assess whether development over the tunnel can be achieved in accordance with the objectives and policies of the Dublin City Council Development Plan 2023-2029 and the National Planning Framework. In these circumstances, the Board has no jurisdiction to approve the proposed Railway Order.

The proposed Railway Order does not make any provision to ensure that there can be further development of AerCap House in accordance with the objectives and policies of the Dublin City Council Development Plan 2023-2029 and the National Planning Framework.

² Emphasis added.

It is essential that the Board's decision ensures that that the tunnel does not restrict development in accordance with the provisions of the Development Plan in any way. Moreover the site of AerCap House could be redeveloped in the future. The design of the tunnel in terms of load bearing capacity makes no allowance for the replacement of the existing building on the site.

Eamon Galligan SC

29 March 2024
