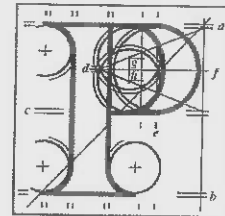


**Our Case Number:** ABP-314942-22

**Your Reference:** Trustees of Hermitage Golf Club



**An  
Bord  
Pleanála**

Kieran O'Malley & Co Ltd  
Town Planning Consultants  
2 Priory Office Park  
Stillorgan Road  
Blackrock  
Co. Dublin  
A94 P281

**Date:** 9th February 2023

**Re:** BusConnects Lucan to City Centre Core Bus Corridor Scheme  
Lucan to Dublin City Centre

Dear Sir / Madam,

An Bord Pleanála has received your recent submission in relation to the above-mentioned proposed road development and will take it into consideration in its determination of the matter. Please note that the proposed road development shall not be carried out unless the Board has approved it or approved it with modifications.

The Board has also received an application for confirmation of a compulsory purchase order which relates to this proposed road development. The Board has absolute discretion to hold an oral hearing in respect of any application before it, in accordance with section 218 of the Planning and Development Act 2000, as amended. Accordingly, the Board will inform you in due course on this matter. The Board shall also make a decision on both applications at the same time.

If you have any queries in relation to this matter please contact the undersigned officer of the Board.

Please quote the above-mentioned An Bord Pleanála reference number in any correspondence or telephone contact with the Board.

Yours faithfully,

Doina Chiforescu  
Executive Officer  
Direct Line: 01-8737133

HA02A

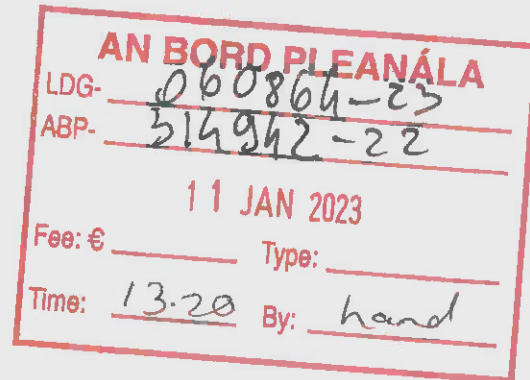
Teil	Tel	(01) 858 8100
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64 Sráid Maoilbhríde	64 Marlborough Street
Baile Átha Cliath 1	Dublin 1
D01 V902	D01 V902

11<sup>th</sup> January 2023

The Secretary  
An Bord Pleanála  
64 Marlborough Street  
Dublin 1

BY HAND



ABP Ref.: HA29N.314942

Re: Application under Section 51 of the 1993 Roads Act  
Lucan to City Centre Core Bus Corridor Scheme

Dear Sir or Madam,

We have been instructed by the Trustees of Hermitage Golf Club, Lucan Road, Lucan, Co. Dublin (hereinafter referred to as "Hermitage") to make a submission in respect of an application for the approval of what appears to be designated as a road scheme under Section 51 of the 1993 Roads Act, as amended (the "Roads Act").

The scheme is entitled "The Lucan to City Centre Core Bus Corridor Scheme" and has an overall length of approximately 9.7 km and commences at junction 3 of the M4 Lucan Road/Lucan Bypass, travels along the route of the old N4 through the Liffey Shopping Centre at junction 2 and then via the R148 along the Palmerstown Bypass, Chapelizod Bypass and Con Colbert Road to St James Road West and ends at the Frank Sherwin Bridge (the "Scheme").

The application is accompanied by an Environmental Impact Assessment Report ("EIAR") prepared by Jacobs, ARUP and Systra. The EIAR is intended to be an independent objective environmental analysis of the impacts of the Scheme but much of which reads as a justification or apologia for the Scheme where it refers to in parts of the document references that "the proposed scheme will significantly enhance travel by public transport" or later "the proposed scheme will improve both the overall journey times for buses and their journey time" and later "the proposed scheme will provide benefits for cyclists and pedestrians".

The report appears therefore to, in terms certainly of its tone, not to reflect the broad requirement which an EIAR should contain, namely the significant effects both direct and indirect and the mitigation measures where significant adverse effects are identified. We are therefore concerned that this fundamental document underlying the Scheme should be framed in its opening paragraphs in such a manner without reference to the broad critical obligations that these key documents are required to focus on.

The core of the approach appears to be based upon the National Transport Authority's ("NTA") Transport Strategy for the Greater Dublin Area 2016 to 2035 and the procedures that were applied in terms of its adoption and would raise a concern as the extent to which this document is appropriate to be relied upon as the fundamental document guiding this Scheme.

We are furthermore concerned at the most fundamental level of the manner and extent to which this EIAR complies with the requirements of the Environmental Impact Assessment Directive 2011/92/EU, as amended by Directive 2014/52/EU (the "EIA Directive") and in particular the extent to which the EIAR describes the existing environment. The Scheme proposes a significant impact on Hermitage and envisages significant land areas being compulsorily acquired and put out of use, the removal of trees, the removal of boundary walls, the erection of walls and fences of considerable height and generally is likely to have a significant effect. Indeed, those effects will be almost universally negative on Hermitage and its operation. Yet in the documentation there is no description of the receiving environment, of the nature of Hermitage, its members, of the landscape, of the history of the landscape and there appears to be a complete absence of knowledge as to the nature of the receiving environment either on the part of the application documentation generally and certainly in the EIAR.

It is a fundamental requirement of the EIA Directive, that the nature of the receiving environment be described and that there be a clear and definitive analysis of that receiving environment. The absence of data in respect of the receiving environment and specifically that of Hermitage is a source of deep concern. This fundamentally undermines the entire basis of the EIAR which must, as a condition precedent to the preparation of such an analysis, have a detailed and intimate knowledge of the totality of the lands that are likely to be affected. The absence of such information renders any possible analysis of the environmental effects impossible.

Hermitage have engaged extensively with the promoters of the Scheme following the launch of the third public consultation on the Scheme in November 2020 when the significant impact on Hermitage became apparent from the publication of the preferred route option. Hermitage have subsequently sought to engage proactively and continuously with the promoters and, if such was required, to provide them with detailed information and gave them access to the lands for the purposes of minimising or avoiding the impacts which we are concerned will inevitably arise and which will lead to the complete destruction and obliteration of this facility.

Notwithstanding that level of cooperation there is no, and certainly no adequate, analysis of the nature of the receiving environment and the quantification therefore of impacts on Hermitage is impossible.

As set out, Hermitage sought to engage with the promoters to minimise the impact and genuinely and sincerely believed that the Scheme was being designed so as to avoid any such impacts. However, they sought towards the end of the process to have confirmed that this was the intention of the promoters but were informed that there was no other option being considered other than the option which has now been identified in the report. Therefore, it appears clear from these exchanges that the second fundamental defect is a failure to properly consider alternatives with the promoters having identified Hermitage lands as a location and had determined that this would be the land where the Scheme is to be developed at this point in the route and accordingly the fundamental obligation under the EIA Directive to consider alternatives equally has not been complied with.

It appears that the NTA (the "Road Authority") considered that the level of cooperation was equivalent to an acceptance of the Scheme and its effects which the Road Authority must, or at least should, know are devastating on Hermitage and which will render it incapable of functioning in the manner that it has heretofore, or at all, as a championship course and will as a minimum require a complete redesign and in addition require additional land if it is to continue to function as a championship golf course.

The Roads Authority have failed to demonstrate adequate consideration of various alternatives which would avoid any impact on Hermitage lands. In particular, given that the portion of the Scheme that is primarily required for Hermitage lands is that of a cycle way and a pedestrian way, this could have been accommodated within the existing road reservation through the implementation of a reduced speed limit on the N4 and consequent reduction in the width of the individual traffic lanes. Having regard to the Design Manual for Urban Roads and Streets, the preferred width of a traffic lane is 3.0m in areas with a posted speed limit  $\leq 60$  km/h. Applying the 60 km/h speed limit to the N4 would enable the 6 no. traffic lanes to be reduced from 3.4 metres to 3.0 metres thus 'freeing' a 2.4 metre corridor within the existing road reservation to accommodate the proposed two-way cycle track without any land take at Hermitage.

A further alternative that wasn't considered and would avoid Hermitage and possibly many other properties is to remove an existing inbound lane of traffic on the N4 or a lane in both directions. Affecting a modal shift in transport is one of the five most important decarbonisation measures for Ireland over the coming decade in the Government's Climate Action Plan. Projected traffic volumes in the EIAR are identified to reduce as a result of the scheme. Omitting a lane or lanes would comply with the Climate Action Plan and assist in the target of a 20% reduction in vehicle kilometres travelled.

This lack of consideration of these and other alternatives demonstrates a clear breach of section 15 of the Climate Action and Low Carbon Development Act 2015 as amended by section 17 of the Climate Action and Low Carbon Development (Amendment) Act 2021. The Roads Authority failed to comply with their obligation, in so far as practicable, to perform its functions in a manner consistent with the matters stated in section 15, including (a) the most recent approved climate action plan, (the Climate Action Plan 2021), (d) the furtherance of the national climate objective, and (e) the objective of mitigating greenhouse gas emissions and adapting to the effects of climate change in the State.

Further, the absence of sufficient information in respect of real and substantial alternatives in a manner appropriate to an EIAR and the absence of any information as to the nature of the receiving environment renders any consideration of the impacts on Hermitage impossible, notwithstanding that this is the most fundamental obligation and the primary objective of an EIAR. The EIA Directive requires that all likely significant effects both direct and indirect, long term, short term, cumulative, be identified and there are significant adverse effects (falling within any of the categories identified above) that these be the subject matter of appropriate mitigation measures.

The absence of this information rendered that impossible because in the absence of proper consideration of alternatives and information on the receiving environment, it was impossible to properly identify the likely significant adverse effects and impossible to comply with the obligations in respect of alternatives which

require the environmental reasons why the particular alternative was adopted, and again these fundamental obligations under the EIA Directive were not complied with.

Accordingly, in our submission the EIAR is not fit for purpose, does not comply with the requirements of the EIA Directive, and cannot form the basis of an application under Section 51 of the Roads Act.

Further, there is a lack of particularity in the South Dublin County Development 2022 - 2028 (the "Development Plan") to justify the Scheme. The land use zoning map no. 2 in the Development Plan does not show an indicative alignment for either the busconnects or cycleway at Hermitage's southern boundary or within the golf course. No indicative route is shown for busconnects whereas the "Route 6 Lucan to City Centre" description in Table 7.2 of the Development Plan is imprecise and open to interpretation as to the actual route selection from Lucan to Dublin City Centre.

The land use zoning maps do include an orange and green dashed line to denote "Cycleway Proposal (Cycle South Dublin)" but there is none shown within or in close proximity to Hermitage's southern boundary at the N4. There is a lengthy list of Cycle South Dublin Routes and Projects in Table 7.1 of the Development Plan, and it is noted that these are indicated on Development Plan Maps. The cycleway proposal affecting Hermitage isn't specified in the Development Plan in table 7.1 or on land use zoning map no. 2.

It is well established in the authorities and leading textbooks on the subject that in order for a major development to proceed it must be specifically provided for in the statutory development plan. Indeed, in *Roughan V Clare County Council [unreported, High Court, 18 December 1996]* Barron J. held that all major development contemplated within the life of the plan must be provided for in the plan. This Scheme, although referenced in the Development Plan, has not been adequately afforded such status and to proceed to determine the matter and approve the Scheme under section 51 would be ultra vires the Board. In fact, in this case the position is much more serious as it appears that in identifying cycleways this route, that is the route proposed, has not been identified in the Development Plan and therefore to permit a cycleway, which is a fundamental part of the Scheme, in those circumstances would amount to a Material Contravention of the Development Plan, in accordance with the principles set out by the Supreme Court in the *AG (McGarry) V Sligo Coco [1989] I.L.R.M. 768*.

The Scheme is described in the EIAR as a bus corridor scheme, it is designed not to create in a sense any new infrastructure but to "enhance travel by public transport" by providing a substantial increase in bus priority as well as improved pedestrian and cycling infrastructure on the N4 and R148 roads to and front the city centre.

A Road Scheme is defined in Section 47 of the Roads Act as "a motorway scheme, a service way, a service area scheme, a busway scheme, a protected road scheme and a protected road scheme amending an approved protected road scheme". It is difficult to find any basis in respect of which the proposed development could fall into any of the categories identified in Section 47 and it cannot be characterised under any of the headings listed from (a) through to (e) of that provision, and as set out in the leading textbook entitled "Highways" by Peter Bland SC (RoundHall, 2020). The major emphasis on the provision of a bus lane reflects merely that there is already a bus lane provided and therefore this cannot be characterised as a busway scheme, and in

any event the juxtaposition of the cycleway immediately adjoining this facility and the pedestrian provision is inconsistent with a Road Scheme as defined in Section 47.

It is submitted in those circumstances that the entire proceeding by embarking on a Scheme which while devastating in its consequences does not fall within the strict definition of a Road Scheme under Section 47 of the Roads Act entirely undermines the entire legal basis upon which the application is made, and therefore the Scheme must be rejected on the grounds that it is ultra vires the Authority who have made the application.

Equally and without prejudice to what is set out above, if the said Scheme falls within Section 51 of the Roads Act, then it is appropriate that any compulsory acquisition be brought under Section 49 of the said Act, and it appears that this is not the provision relied upon. Indeed, the provision that appears to be relied upon is primarily the 1966 Housing Act, and while this legislative Scheme has been used in the past to ground applications brought by local authorities in respect of the compulsory acquisition of land, given that this Scheme is being proposed by the NTA a different approach must be adopted.

It is submitted that it is entirely incongruous and inappropriate that Housing legislation, which is the statutory basis relied upon in the application for an Order authorising the compulsory acquisition of Hermitage lands, should do so in respect of a Road Scheme, and it is inappropriate that the Housing legislation should be used to facilitate the compulsory acquisition of lands identified specifically for the purpose of road construction or in this case a pedestrian facility which is encompassed within the primary element of the compulsory acquisition element of the procedure.

There are specific compulsory acquisition powers vested in the Roads Authority under the Roads Act and where the land has been identified as specifically being required for road construction, then it is not appropriate that one proceeds primarily under Section 76 and the Third Schedule of the Housing Act to effect such acquisition.

While this submission raises significant and substantial issues of law relating to procedures, it is critical that these matters be determined before the formal process proceeds any further and in that regard it is submitted that it would be appropriate for the Board to conduct a preliminary hearing in respect of the legal issues that arise in respect of the proposed acquisition with the intention of stating a case for the consideration of the High Court as to the manner in which it is appropriate for it to proceed. This would deal inter alia whether it is appropriate that the NTA, operating under the Housing legislation is entitled to compulsorily acquire lands for a Road Authority and whether it is appropriate for that the NTA as either Housing or Road Authority can apply Section 51 to the particular scheme that is the subject matter of this application.

It would be completely unacceptable and contrary to appropriate procedures and inconsistent with the statutory scheme if such a preliminary application for a case stated would not be made, and in the event that the Board is not disposed to proceed along the lines set out in this submission we would ask that we be notified to this effect and we can take whatever steps that may be necessary in order to vindicate the position that is set out in this submission and not to incur the expense of engaging in an oral hearing and awaiting to the end of the process to have these issues determined, which is neither fair nor appropriate or consistent with fair

procedures, with natural and/or constitutional justice and with the vindication of the property rights enshrined both in the 1937 Constitution and in the European Convention on Human Rights.

It is impossible to determine the full extent and impact of the said acquisition on Hermitage lands given that these are matters which are fundamental to the inclusion in any EIAR. It will not be contradicted it is presumed, that the effect on Hermitage will be devastating and will be such as to render any continued use of the facility impossible but it may be that at the date upon which the application was made this was not within the knowledge of the acquiring Authority / Road Authority. The EIAR is entirely deficient in considering the impacts of Hermitage and little or no analysis has been conducted either of the impact of the construction works or the operational works on the lands and on the operation of the facility. It is of course far too late for that exercise now to be adequately conducted, or if it has been conducted for its inclusion within the EIAR because that report must be in the form and be of such content that complies with the mandatory requirements of the EIA Directive particularly arising from the amendments made in the 2014 provisions which brought into effect the obligation to prepare an EIAR.

The oral hearing to be conducted is not an opportunity to mend the hand but rather an opportunity to engage with the formal legal document comprised in the EIAR and engage in a consideration as to whether that report is or is not adequate. It is not consistent with the scheme of the legislation that these lacunae be supplemented by way of additional material at a stage where the type of public participation and consultation procedures required the type of engagement in the preparation and correlation and investigation of this material is provided for. If such were to be carried out it would be an express acknowledgement of the EIA Directive.

Arising from the inadequacy of the documentation Hermitage will now have to engage in an identification of the effects which the Scheme will have on the facility and seek to produce that evidence as part of the analyses which is required to be considered in the event that the Board were to consider this application. This is an intolerable position for a voluntary organisation whose land is to be compulsorily acquired to be put in, and the clear statutory imperative on the acquiring authority or the Roads Authority if the Board were to permit such a bifurcated approach, to provide all the necessary information and conduct in an appropriate manner the type of examination required to be contained within the EIAR, and we urge the Board to reject the application on the basis of the fundamental inadequacy of the EIAR in that regard.

The same rationale applies to the Natura Impact Statement ("**NIS**") submitted whereby this document furthermore does not comply with Council Directive 92/43/EEC (the "**Habitats Directive**"). The fundamental requirement of the NIS is to consider whether the proposed development by itself or in combination with other plans and projects would be likely to adversely effect the conservation objectives of certain European Sites which are located in the vicinity of or likely to be effected by the proposed development. There is no dispute but that such an Appropriate Assessment ("**AA**") is required but rather that the information that has been submitted does not allow for such an assessment to be adequately carried out. Indeed it is particularly problematical in the case of Hermitage which lies immediately adjoining and includes within its lands the River Liffey, and where that River is hydrologically connected to Dublin bay which is both a Special Area of Conservation ("**SAC**") and Special Protection Area ("**SPA**") under Directive 2009/147/EC (the "**Birds Directive**") and the issue of in combination effects in that regard has not been considered adequately or at all in the NIS.

Furthermore, there is a complete absence of detail in respect of the Scheme, in respect of how it is to be implemented, the sequencing and the detailed design of the Scheme such as to allow for the precise and definitive findings that are obliged to be determined under any assessment for the purpose of the Habitats Directive. Accordingly, the application is fundamentally in breach of the obligations of the Habitats Directive and in breach of European and domestic law, and therefore could not form the basis of an AA to be conducted by the Board as competent authority. The application must be rejected on this basis also.

On the basis of the matters set out above we request the Board determine as a preliminary matter that this application is invalid, that it is not of sufficient detail to allow for the Board to conduct the range of processes required and which arise under Section 51 of the Roads Act, namely the carrying out of an EIA, the carrying out of an AA and the approval of a Scheme under Section 51, all of which require separate and distinct and detailed considerations of a type which the information required is not available. We would request that this be determined at the earliest possible stage and thereby avoid Hermitage having to engage a range of expertise at significant cost which it is the obligation of the Road Authority / Acquiring Authority to prepare.

It is fundamentally in breach of both European and domestic law to require a landowner to engage in these types of exercises that is to, in effect, prepare a NIS and an EIAR when it has neither the capacity nor access to the requisite documentation to do so and which would, in any event, be impossible within the time available. The absence of this information and the obligations imposed on Hermitage given the absence of the requisite information is contrary to the EIA and Habitats Directives. The Board may, notwithstanding that it would be inappropriate to do so identify matters set out in this submission and apply these to the objection made to the compulsory purchase of the land. The two procedures are entirely separate and distinct and the considerations to be applied to each are entirely different. Furthermore, the proposal to include Hermitage lands even of itself has effectively sterilised the land and for as long as the Scheme is being considered and until it is implemented, and it is intolerable that Hermitage lands have been blighted in the manner that it has on the basis of the information which has been submitted.

Given the absence of any or any appropriate level of detail, it is not appropriate to engage in the minutiae of impacts and these will, following the determination of the Board in respect of the preliminary application, be required to be conducted. There must therefore be afforded adequate time following the decision made if the application procedure is to continue, either to allow this decision to be challenged or to allow for the engagement of experts to engage on a without prejudice basis in the exercise, and the Board will immediately see the incongruity and inappropriateness of such procedure if that is ultimately the decision that they adopt.

It is important to emphasise that these are matters which relate to the functions of the Board and must be the subject matter of a Board decision, and therefore it is critical that the issues identified in this submission, as well as the issues in the accompanying submission on the compulsory acquisition, be brought to the Board so they can determine definitively on the matters raised or they can refer the matter to the High Court in the manner suggested earlier in this submission.

In those circumstances we await the Board's decision on our preliminary objections and in the event that the Board consider the application should proceed then we would obviously be entitled to elaborate on and furnish further particulars in the light of the inadequacy of the documentation which lacunae is required in




these circumstances to be filled by the landowners and in particular by Hermitage. To facilitate this, without prejudice to the position set out above, we formally request that the Board hold an Oral Hearing.

We look forward to hearing from you at your earliest convenience.

Please acknowledge receipt of this submission and direct all future correspondence to our office.

Regards,



~~Raymond O'Malley~~

Kieran O'Malley & Co. Ltd.