

IN THE MATTER OF AN APPLICATION TO  
AN BORD PLEANÁLA

FOR APPROVAL OF (I) THE N6 GALWAY CITY RING  
ROAD PURSUANT TO SECTION 51 OF THE ROADS  
ACT 1993 (AS AMENDED); (II) THE N6 GALWAY CITY  
RING ROAD MOTORWAY SCHEME 2018; and (III)  
THE N6 GALWAY CITY RING ROAD PROTECTED ROAD  
SCHEME 2018

ABP Ref. ABP-302848-18 and ABP-302885-18

ORAL HEARING

OUTLINE LEGAL SUBMISSIONS OF GALWAY COUNTY COUNCIL  
RESPONDING TO LEGAL ISSUES RAISED IN SUBMISSIONS/OBJECTIONS

21 FEBRUARY 2020

## A. GENERAL

1. These written submissions have been prepared on behalf of Galway County Council in respect of certain legal issues raised in relation to three applications for approvals that are pending before An Bord Pleanála (the “**Board**”) namely:-
  - (1) the submissions on the application for approval of the N6 Galway City Ring Road under section 51 of the Roads Act 1993, received by the Board on 23 October 2018,
  - (2) the objections made to the N6 Galway City Ring Road Motorway Scheme 2018 in respect of which an application for approval under section 49 of the Roads Act 1993, as amended, was made to the Board; and
  - (3) the objections made to the N6 Galway City Ring Road Protected Road Scheme 2018, in respect of which an application for approval under section 49 of the Roads Act 1993, as amended, was made to the Board.
2. Galway County Council has submitted an Environmental Impact Assessment Report (“**EIAR**”) and Natura Impact Statement (“**NIS**”) to the Board with the application for approval under section 51 of the Roads Act 1993, as amended. In the event that the Board decides to grant approval for the schemes under section 51 of the Roads Act 1993, as amended, Galway County Council will have been granted development consent and may proceed with the proposed road development. If approved by the Board, under section 49, the N6 Galway City Ring Road Motorway Scheme 2018 and the N6 Galway City Ring Road Protected Road Scheme 2018 will authorise Galway County Council to acquire compulsorily the lands and interests in lands specified in those schemes.
3. The proposed N6 Galway City Ring Road (“**the proposed road development**” or “**N6 GCRR**”) comprises approximately 18 km of road infrastructure from a new junction with the R336 at the western side of Bearna to tie-in with the existing N6 to the east of Galway City at Coolagh, Briarhill.<sup>1</sup>

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<sup>1</sup> See a description of the major elements of the proposed road development in section 8.1 of Volume 1 (Non-Technical Summary) of the Environmental Impact Assessment Report Statement [EIAR] submitted to the Board on 23 October 2018.

## **B. ENVIRONMENTAL IMPACT ASSESSMENT**

4. A proposed road development that comprises the construction of a motorway must, pursuant to section 50 of the Roads Act 1993, as amended, be subject to an Environmental Impact Assessment (“EIA”). Accordingly, Galway County Council has submitted an EIAR to the Board with the application for approval under section 51 of the Roads Act 1993, as amended.
5. The EIA to be carried out by the Board is that required by provisions of Directive 85/337/EEC (as amended by Directives 97/11/EC and 2003/35/EC and codified as Directive 2011/92/EU, as amended by the provisions of Directive 2014/52/EU) (the “EIA Directive”), in circumstances where the application for development consent process commenced after the transposition date (i.e. 16 May 2017). The nature of the assessment required is that prescribed under Article 3 of the EIA Directive.
6. The EIAR contains the information prescribed by the relevant provisions of the Roads Act 1993, as amended. After the submission of the EIAR, the provisions of the European Union (Roads Act 1993) (Environmental Impact Assessment) (Amendment) Regulations 2019 (S.I. No. 279 of 2019) amended the provisions of section 51, in order to transpose the obligations under the EIA Directive into the development consent procedure under section 51 of the Roads Act 1993, as amended.
7. Notwithstanding the fact that the EIAR predated the amendments made to section 51 in this respect, the EIAR anticipated and was prepared in order to comply with the obligations under the amended EIA Directive.
8. Article 5(1) of the EIA Directive, as amended, requires Member States to ensure that:

*The information to be provided by the developer shall include at least:*

- (a) a description of the project comprising information on the site, design, size and other relevant features of the project;*
- (b) a description of the likely significant effects of the project on the environment;*
- (c) a description of the features of the project and/or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment;*

- (d) a description of the reasonable alternatives studied by the developer, which are relevant to the project and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the project on the environment;*
- (e) a non-technical summary of the information referred to in points (a) to (d); and*
- (f) any additional information specified in Annex IV relevant to the specific characteristics of a particular project or type of project and to the environmental features likely to be affected.*

9. It is the position of Galway County Council that the EIAR submitted with the application for approval under section 51 presents a compendium of information on the likely environmental effects of the proposed development and a detailed and comprehensive appraisal of impacts.
10. The information and appraisal contained in the EIAR and presented during the course of the oral hearing is robust and complies with the requirements of both the EIA Directive and domestic statutory provisions and, it is submitted, self-evidently surpass the test of adequacy which the Board will apply in its consideration of the EIAR.
11. Ob\_695 contends that there has been an inadequate consideration of alternatives, contrary to the provisions of the EIA Directive. This is not the case as is evident from chapter 4 of the EIAR which sets out a full description of the reasonable alternatives studied relevant to the project and its specific characteristics, and an indication of the main reasons for the option chosen by Galway County Council, taking into account the effects of the project on the environment. The alternatives studied and a response to the submissions made relating to alternatives, are dealt with in section 4.3 of the statement of evidence of Eileen McCarthy.
12. As set out in the EIAR, in circumstances where Galway County Council concluded that additional road infrastructure is required, numerous alternatives for connecting the east and west of Galway City and County were considered. The development of alternatives included an assessment of the previous 2006 Galway City Outer Bypass (“**GCOB**”) scheme, as well as new route options which included an upgrade of the existing road network known as the on-line upgrade, a partial on-line upgrade coupled with new road infrastructure and a totally new road.
13. The Board will also have to take into account the cumulative effect of the proposed road development with other projects and plans in respect of which in combination effects arise. These cumulative impacts have been considered in the EIAR relating to the different environmental effects.

14. The project the subject of the applications before the Board is the N6 GCRR and each element of the proposed road development has been included as part of the applications so that there is no question of project splitting.
15. Insofar as it has been suggested that there is an obligation to carry out an EIA of the entirety of the Galway Transport Strategy (“GTS”) on the basis that the N6 GCRR is a project that is identified as part of the GTS,<sup>2</sup> this is based on a misapprehension as to the nature of the environmental assessments to be conducted in relation to a “plan”, on the one hand, and a “project” on the other. When it comes to environmental assessments, there is a clear distinction drawn between a plan or programme and a project and it is important not to conflate these two very distinct concepts.
16. A plan or programme is required to be the subject of strategic environmental assessment under the provisions of the Directive 2001/42/EC on strategic environmental assessment (“the SEA Directive”) whereas a project is required to be the subject of EIA under the EIA Directive. The fact that a specific development is contemplated by a plan or programme does not mean that the entire plan or programme constitutes the project for the purposes of the EIA Directive.
17. This distinction was drawn in *Kavanagh v. Ireland* [2007] I.E.H.C. 296 where the High Court had to determine whether, *inter alia*, the National Development Plan and decisions of the Government to develop a prison at Thornton Hall was a “plan or programme” to which the SEA Directive applied. Smyth J. distinguished between a “plan” and a “stand alone project” and considered the requirement that the plan or programme set the “framework for future development consent”.
18. The judgment in *Kavanagh*, which was recently approved by the High Court in *Martin v. An Bord Pleanála* [2018] I.E.H.C. 4, reflects the view of the European Commission in its document entitled “Implementation of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment” which sets out some guidance as to how to determine whether the Directive applies. Indeed, the Commission Guidance was referred to in the judgments in *Kavanagh* and *Ballinasloe Chamber of Commerce Ltd. v. Ballinasloe Town Council* [2012] I.E.H.C. 273. These judgments of the Irish courts are in accordance with the jurisprudence of the CJEU, including the decisions in Joined Cases C-105/09 and C-110/09 *Terre Wallonne* [2010] ECR I-5611 and Case C-43/10 *Nomarchiaki* [2013] Env. L. R. 453.
19. As a plan or programme, the GTS was the subject of a Strategic Environmental Assessment, carried out in accordance with the requirements of SEA Directive. The N6 GCRR is not and could not itself be regarded as a plan or programme within the meaning of the SEA Directive. It is quite clear

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<sup>2</sup> Ob\_602\_698\_699\_704.

that it is a separate and distinct project to the other projects within the GTS. As such, the applications made to the Board quite properly relate to the N6 GCRR project only and not to the GTS plan/programme.

20. It is important to underscore that the process presented by this oral hearing is iterative, interactive and flexible. Reference is made in this regard to the judgment of the High Court in *Klohn v. An Bord Pleanála* (No. 2) [2008] I.E.H.C. 111 which states:-

*“It is also worth emphasising that the environmental impact statement is a document submitted by the developer, the terms of which are set when it is submitted. In contrast, the environmental impact assessment is a process which is an ongoing exercise undertaken by the decision maker. A great deal can happen, and a great deal of information can be accumulated, between the lodging of the environmental impact statement by a developer and the final decision by the planning authority or by An Bord Pleanála...”*

21. The EIA process is not, therefore, a static one, and one of its objectives is to elicit submissions and observations from members of the public concerned on the environmental impact of the proposed development.
22. As appears from the statements of evidence presented by Galway County Council at the oral hearing, it has taken account of the submissions made in the course of the application process and the Board will, of course, consider the submissions made by all parties at the oral hearing, the public and the public concerned, in its consideration of the application for approval under section 51 of the Roads Act 1993, as amended.
23. Pursuant to the provisions of section 51(5)(c) of the Roads Act 1993, as amended, having considered the EIAR, the additional information furnished in response to the request from the Board, the submissions made in relation to the likely effects on the environment of the proposed road development and the Inspector’s report and any recommendations made, the Board is required to *“reach a reasoned conclusion on the significant effects of the proposed road development on the environment”*.
24. In the context of the EIA to be conducted by the Board on the application for approval of the proposed road development it is noted that the Board has the jurisdiction to consider modifications to a proposed road development pursuant to subsection 51(6). Indeed, the Board is expressly empowered to *“approve a proposed road development, with or without modifications and subject to whatever environmental conditions... it considers appropriate....”*
25. Accordingly, it is clear that the Board has the jurisdiction to modify the proposed road development, whether on the application of the road

authority, or otherwise. In this regard, as confirmed on the first day of the oral hearing convened by the Board, Galway County Council has proposed a modification to the proposed road development and requests the Board to approve the proposed road development with the proposed modification to the Parkmore Link Road as identified on the drawing entitled "*Proposed Road Development Plan City East Junction Sheet 14 of 15, Drawing No. 5.1.14, Issue 12*", dated 17 February 2020. An assessment of this proposed modification has been conducted by all relevant experts and is set out in the various briefs of evidence.

26. It is important to emphasise that information on the modification of the Parkmore Link Road has been submitted at the oral hearing so as to enable the Board to conduct an EIA of all aspects of the project.
27. Galway County Council confirms that it has entered into a binding contract for the purchase of the third party lands required for the proposed modification and has annexed extracts from that Contract and the Contract map to evidence this binding contract.

### C. HABITATS DIRECTIVE ASSESSMENTS

28. Following screening, Galway County Council determined that an Appropriate Assessment of the N6 Galway City Ring Road is required as it cannot be excluded, on the basis of objective scientific information and in view of the conservation objectives of the Lough Corrib cSAC, Lough Corrib SPA, Galway Bay Complex cSAC and Inner Galway Bay SPA, individually or in combination other plans or projects, will have a significant effect on the Lough Corrib cSAC, Lough Corrib SPA, Galway Bay Complex cSAC and Inner Galway Bay SPA.
29. Accordingly, in its consideration of the application made to it by Galway County Council under section 51 of the Roads Act 1993, as amended, the Board is required, prior to granting any approval for the proposed road development, to carry out an Appropriate Assessment pursuant to Article 6(3) of Directive 92/43/EC (“**the Habitats Directive**”) and the provisions of Part XAB of the 2000 Act,<sup>3</sup> which have been considered on a number of occasions by the CJEU and the Irish courts.
30. In submissions/objections S\_058; Ob\_451\_489; S\_006 and S\_010, an issue was raised in relation to compliance with the requirements of the Habitats Directive and CJEU judgments in relation to Appropriate Assessment. In particular, it is asserted that it is not possible to grant approval for the proposed road development having regard to the decisions of the Court of Justice of the European Union (CJEU) in Case C-258/11 *Sweetman v An Bord Pleanála*, Case C-164/17 *Grace and Sweetman v An Bord Pleanála* and Case C-461/17 *Holohan v An Bord Pleanála*.
31. In considering this issue, it should be noted, firstly, that notwithstanding any other provision of the Roads Acts 1993, as amended, the Board (as competent authority) shall give consent for proposed development only after having determined that the proposed development shall not adversely affect the integrity of a European site.
32. Secondly, it is clear that Article 6(3) of the Habitats Directive envisages a two-stage process: Stage One Screening and Stage Two Appropriate Assessment. In the present case, as the competent authority at the screening stage, Galway County Council determined that likely significant effects could not be ruled out. Accordingly, Galway County Council submitted a Natura Impact Statement (“**NIS**”) with the application for approval under section 51 of the Roads Act 1993, as amended to inform the Stage Two Appropriate Assessment to be carried out by An Bord Pleanála on the application for development consent.

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<sup>3</sup> “Proposed development” is defined to include development under section 51 of the Roads Act 1993, as amended,, in sections 177R and 177U of the 2000 Act.

33. Third, in the context of a Stage Two Appropriate Assessment, required under section 177V, in *(Ted) Kelly v. An Bord Pleanála* [2014] I.E.H.C 400,<sup>4</sup> the High Court held, having conducted a detailed consideration of the leading judgments of the CJEU, in contrast to an environmental impact assessment, that:

*.... the Board, in carrying out an appropriate assessment under Article 6(3) and s. 177V, is obliged, as part of same, to make a determination as to whether or not the proposed development would adversely affect the integrity of the relevant European site or sites in view of its conservation objectives. The determination which the Board makes on that issue in the appropriate assessment determines its jurisdiction to take the planning decision. Unless the appropriate assessment determination is that the proposed development will not adversely affect the integrity of any relevant European site, the Board may not take a decision giving consent for the proposed development... Hence for the purposes of these appeals, the Board was precluded from granting consent for the proposed developments unless, having conducted an appropriate assessment in accordance with Article 6(3), as construed by the CJEU, it reached a determination that the proposed development will not adversely affect the integrity of the European site.*

34. Subsection 177V(1) of the Planning and Development Act 2000, as amended, provides that:

*An appropriate assessment carried out under this Part shall include a determination by the competent authority under Article 6(3) of the Habitats Directive as to whether or not a ... proposed development would adversely affect the integrity of a European site.*

35. Pursuant to the provisions of subsection 177V(1), in order that the determination to be made by the Board as part of the appropriate assessment is to meet the requirements of Article 6(3), the full appropriate assessment must meet those requirements of the Habitats Directive as construed by the CJEU.

36. Subsection 177V(1) also expressly requires the appropriate assessment to be carried out before consent is given for a proposed development. Further, subsection 177V(3) provides that, notwithstanding any other provision of the 2000 Act, or the Roads Acts 1993 (as amended), *“the Board shall give consent to a proposed development only after having determined that the ...proposed development shall not adversely affect the integrity of a*

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<sup>4</sup> The decision of the High Court in *(Ted) Kelly v. An Bord Pleanála* was recently approved by the Supreme Court in *Connelly v. An Bord Pleanála* [2018] 2 I.L.R.M. 453

*European site*". Again, this determination must be made before consent is given for a proposed development.<sup>5</sup>

37. In *Connelly v. An Bord Pleanála* [2018] 2 I.L.R.M. 453, having considered the relevant judgments delivered by the European and Irish courts in relation to the nature of an Appropriate Assessment to be conducted under Article 6(3) of the Habitats Directive and Irish legislation, Clarke C.J. concluded:

*The analysis in Kelly shows that there are four distinct requirements which must be satisfied for a valid AA decision which is a necessary pre-condition to a planning consent where an AA is required. First, the AA must identify, in the light of the best scientific knowledge in the field, all aspects of the development project which can, by itself or in combination with other plans or projects, affect the European site in the light of its conservation objectives. Second, there must be complete, precise and definitive findings and conclusions regarding the previously identified potential effects on any relevant European site. Third, on the basis of those findings and conclusions, the Board must be able to determine that no scientific doubt remains as to the absence of the identified potential effects. Fourth and finally, where the preceding requirements are satisfied, the Board may determine that the proposed development will not adversely affect the integrity of any relevant European site.*

38. Moreover, and as noted in particular in *Connelly*, the Board is under an obligation to give reasons for the determination made under Article 6(3) of the Habitats Directive as to whether or not the proposed development would adversely affect the integrity of a European site. In that context, the Supreme Court noted that there are, in reality, two different stages to the process which must take place in an appropriate sequence. First there must be an Appropriate Assessment and an appropriate decision must be made as a result of the Appropriate Assessment in order that the Board have jurisdiction to grant consent. Thereafter, assuming the Board has jurisdiction, the Board may go on to consider whether it should, in all the circumstances, actually grant approval and, if so, on what conditions.
39. In conducting the Stage Two Appropriate Assessment required under Article 6(3) of the Habitats Directive and Part XAB of the Planning and Development Act (as amended), the Board has the benefit of the NIS submitted with the application for approval under section 51 of the Roads Act 1993, as amended and the response to the request for further information submitted to the Board.

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<sup>5</sup> Such a determination is consistent with the approach to implementing the requirements of Article 6(3) set out by the C.J.E.U. in *Sweetman*.

40. Of course, in addition to considering the statements of evidence delivered on behalf of the Applicant, the Board will consider the submissions made by all parties at the oral hearing, the public and the public concerned.
41. As noted in section 13 (page 381) of the NIS, it can be concluded that, in view of the best scientific knowledge, on the basis of objective information, and having regard to the conservation objectives of the sites, the Board is enabled to determine that the proposed N6 Galway City Ring Road, will not adversely affect the integrity of any European site. As set out in the NIS, it is submitted that there is no reasonable scientific doubt in relation to this conclusion.
42. The AA appraisal that have been presented by Galway County Council in the NIS, additional information submitted in response to the request for additional information, and at the oral hearing are robust.
43. Accordingly, in conducting the Stage Two Appropriate Assessment required under Article 6(3) of the Habitats Directive and section 177 of the Planning and Development Act, as amended, the Board is enabled to:
  - (a) identify, in the light of the best scientific knowledge in the field, all aspects of the development project which can, by itself or in combination with other plans or projects, affect the European site in the light of its conservation objectives;
  - (b) make complete, precise and definitive findings and conclusions; and
  - (c) determine that the proposed development will not adversely affect the integrity of any relevant European site where no reasonable scientific doubt remains as to the absence of the identified potential effects.
44. Pursuant to the provisions of subsection 51(10), in carrying out an EIA on the proposed road development, the Board shall coordinate the EIA with any assessment of the proposed development under the Habitats Directive.
45. Finally in the context of the Appropriate Assessment to be conducted by the Board on the application for approval of the proposed road development under section 51 of the Roads Act 1993, as amended, it is noted again that the Board has the jurisdiction to consider modifications to a proposed road development pursuant to subsection 51(6), subject to environmental conditions as is considered appropriate. Information on the modification to the proposed road development has been submitted at the oral hearing so as to enable the Board to conduct a Stage two Appropriate Assessment of the project.
46. Having regard to the foregoing, it is important to note that, notwithstanding the AA Screening Determination made by Galway County Council, as a first step, the Board is required to conduct a Stage One Screening for AA.

47. In a very recent judgment, *Sweetman v. An Bord Pleanála* [2020] I.E.H.C. 39, (which concerned a challenge to the decision made by An Bord Pleanála to grant permission for the development of a solar energy farm at Fiddane, Ballyhea, County Cork), McDonald J. summarised the relevant principles arising for consideration by a competent authority when conducting a Stage One screening assessment:

- (a) in carrying out a screening exercise, the precautionary principle must be applied;*
- (b) a Stage Two Appropriate Assessment must be carried out if, on a screening exercise, it is not possible to exclude the risk that a proposed development will have a significant effect on a Natura site;*
- (c) the appropriate time to consider measures capable of avoiding or reducing any significant effects on the site concerned is at the Stage Two Appropriate Assessment when a comprehensive analysis of those measures can be carried out and a determination reached as to whether they will or will not be effective;*
- (d) taking account of such measures at the Screening Stage is liable to undermine the protections afforded by the Habitats Directive. To take account of the measures at the Screening Stage runs the risk of circumventing the Stage Two Appropriate Assessment which constitutes an essential safeguard under the Habitats Directive;*
- (e) it is, accordingly, impermissible at the Screening Stage, to take account of measures intended to avoid or reduce the harmful effects of a proposed development;*
- (f) the question of the intention underlying the measures in question is to be assessed objectively. Thus, the language used in any document generated in the course of the screening exercise is not determinative;*
- (g) on the other hand, there may be cases where, having regard to the language used it is obvious that the measures in issue were designed to avoid and reduce any impact on the relevant site. As Simons J. observed in Heather Hill, this is what happened in People over Wind where the measures concerned were expressly described as “protective” with reference to the relevant site;*
- (h) on the other side of the coin, there may be cases where it is clear that the measures in question were adopted not for the purpose of avoiding or reducing the potential impact on the relevant site but were adopted solely and exclusively for some other purpose. This is exemplified in the decision of Barniville J. in Kelly where the relevant measures were found, as a matter of fact, to be a standard component in virtually all projects; they were not in any way directed to the protection of any Natura site.*
- (i) on the other hand, the fact that one of the purposes of the measures in question may have no connection with a Natura site does not exclude the possibility that there may be more than one purpose for*

*the measures. In cases where such an unconnected purpose is identified, it is therefore necessary to consider whether, as a matter of fact, the measures were also intended to avoid or reduce the impact of the development on the Natura site.*

- (j) that said, it is not legitimate to work backwards from the existence of measures and to assume from their existence that the proposed development must be likely, in the absence of such measures, to have a significant effect on the relevant site. As Simons J. observed in Heather Hill, any such temptation to take that course must be resisted;*
- (k) In considering whether measures fall foul of the People Over Wind principle, it is not usually helpful to consider whether the measure is “integral” to the project or is something “additional”. This is because it may be difficult in practice to draw a meaningful distinction between the two. A developer may well anticipate the need for particular mitigation measures and arrange for those to be “built in” to the project; and*
- (l) In each case, it is essential to analyse the measures in question in the context of the Screening exercise carried out by the competent authority (and any documents relevant to that exercise) and to determine, on an entirely objective basis, whether the measures can be said to have been intended to avoid or reduce harmful effects on a Natura site or whether the measures were designed solely for some other purpose.”*

- 48. It is necessary for the Board to apply these principles – or so many of the principles as are relevant – to the particular circumstances of the application for approval of the proposed road development.
- 49. In the event that, having conducted its Stage One Screening assessment, the Board determines (as Galway County Council did) that it is not possible to exclude the risk that a proposed development will have a significant effect on a Natura site, then the Board must carry out a Stage Two Appropriate Assessment.
- 50. As set out above, the Supreme Court in *Connelly v. An Bord Pleanála* has provided a summary of the key requirements which must be satisfied for a valid AA determination:
  - (a) *the AA must identify, in the light of the best scientific knowledge in the field, all aspects of the development project which can, by itself or in combination with other plans or projects, affect the European site in the light of its conservation objectives;*
  - (b) *there must be complete, precise and definitive findings and conclusions regarding the previously identified potential effects on any relevant European site;*

- (c) *on the basis of those findings and conclusions, the Board must be able to determine that no scientific doubt remains as to the absence of the identified potential effects; and*
- (d) *where the preceding requirements are satisfied, the Board may determine that the proposed development will not adversely affect the integrity of any relevant European site.”*

51. It is submitted that, having conducted its assessment, the Board is enabled to determine that the proposed development will not adversely affect the integrity of any relevant European site, and thereafter proceed to grant approval for the proposed road development.

## **E. OBJECTIONS TO THE PROTECTED ROAD & MOTORWAY SCHEMES**

52. The substance of the objections to (i) the N6 Galway City Ring Road Protected Road Scheme 2018 and (ii) the N6 Galway City Ring Road Motorway Scheme 2018 and the compulsory acquisition of lands and interests thereunder, and Galway County Council's response to each objection, have been detailed in documentation submitted to the Board. Module 3 of the oral hearing convened by An Bord Pleanála concerns the approval under Section 49 of the Roads Act 1993 (as amended) of the (i) Protected Road Scheme and (ii) the Motorway Scheme respectively made by Galway County Council.
53. If approved, (i) the Protected Road Scheme and (ii) the Motorway Scheme respectively will authorise Galway County Council to, *inter alia* acquire compulsorily the land or substratum of land, the rights in relation to land, and extinguish any public and private rights of way as described in the schedules to the Protected Road Scheme and Motorway Scheme. The lands and interests in lands proposed to be acquired are shown coloured on the Deposited Maps, with individual plots identified on the Deposited Maps and the description of each owner/reputed owner, leasee or reputed leasee and occupier listed in the various schedules to (i) the Motorway Scheme and (ii) the Protected Road Schemes.
54. The fact of the making of the (i) Protected Road Scheme and (ii) Motorway Scheme was advertised in a notice published in three newspapers circulating in the area of the lands which are proposed to be compulsorily acquired, namely the (i) Irish Independent and (ii) Galway Advertiser on 25 October 2018 and the Connaught Tribune on 26 October (although this newspaper was in circulation on 25 October 2018). In addition, each of the owners (or reputed owners), leasees (or reputed leasees) and occupiers, were informed of the making of the Protected Road Scheme and the Motorway Scheme, respectively and the process by which an objection/submission could be made to the Board.
55. On 18 February 2020, at the oral hearing, it was confirmed that NUIG and Boston Scientific Limited, had withdrawn their objections/submissions as made to An Bord Pleanála.
56. With regard to the objections/submissions in respect of Boston Scientific Limited as Galway County Council proposes a modification which would obviate the need to acquire lands in their ownership, meaning that the N6 Galway City Ring Road Motorway Scheme would be approved by the Board on the basis that those plots would be excluded from the schedules to the N6 Galway City Ring Road Motorway Scheme. In relation to NUIG, the changes to the mitigation strategy results in the removal of certain plots that were to be acquired for the mitigation strategy of Pitch 9 from the N6 Galway City Ring Road Motorway Scheme 2018.

57. In the circumstances, it is submitted that the need to address issues raised by the owners of these plots does not arise where the Board is being requested to remove those plots from the schedules when approving the N6 Galway City Ring Road Motorway Scheme 2018.
58. The substance of all other objections and Galway County Council's response to same has been detailed in the statements of evidence delivered on behalf of Galway County Council at the oral hearing.
59. Section 47 of the Roads Act 1993 (as amended) contains a general acquisition provision and applies to both (i) a protected road scheme and (ii) a motorway scheme and, pursuant to both schemes, a road authority may acquire, *inter alia*:
- (a) any land or any substratum of land;
  - (b) any rights in relation to land;
  - (c) any public and private rights of way proposed to be extinguished.
60. Section 47(2)(c) of the Roads Act 1993, as amended, further provides that:
- The land or substratum of land... and the rights in relation to land... shall include all land or substrata of land and rights in relation to land necessary for or incidental to the construction or maintenance of a motorway...or a protected road and al land, substrata of land or rights in relation to land required for access roads, ramps...*
61. Section 52 of the Roads Act 1993, as amended, provides that, whenever a Motorway Scheme or a Protected Road Scheme is approved (with or without modifications) under section 49<sup>6</sup>, the road authority shall thereupon be authorised to compulsorily acquire any land or any substratum of land or any rights in relation to land specified in such a scheme as approved and, for that purpose, an approved motorway scheme and an approved protected road scheme shall have the same effect as a compulsory purchase order made in respect of that land, substratum of land or any rights in relation to land.
62. Thus, pursuant to the provisions of 47 and 52 of the Roads Act 1993, as amended, Galway County Council, as a road authority, may acquire land, substratum of land and rights in relation to land, thereby providing for a power of compulsory purchase.
63. Section 213 of the Planning and Development Act 2000 (as amended), the provisions of which are applicable to Galway County Council, in its capacity

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<sup>6</sup> Pursuant to subsection 214(1) of the Planning and Development Act 2000, as amended, the functions conferred on the Minister in relation to the compulsory acquisition of land by a local authority under the Roads Acts has been transferred to, and vested in, the Board.

as a local authority makes clear that Galway County Council may, for the purposes of performing any of its functions acquire land or rights in relation to land by agreement.

64. Whilst not a matter for consideration for the Board in deciding whether or not to approve (i) the N6 Galway City Motorway Scheme 2018 and (ii) the N6 Galway City Protected Road Scheme 2018, compensation is payable in the same manner as for acquisitions under the Housing Act 1966 (as amended), with a claim for compensation being determined by an arbitration, in default of agreement.
65. In addition to the lawfulness of the proposed compulsory acquisitions (as coming within the powers of Galway County Council), the acquisitions must be proportionate. In this latter regard, the courts have established that the power conferred to compulsorily acquire land must be exercised in accordance with the requirements of the Constitution, including respecting the property rights of the affected landowner: *East Donegal Co-Operative Livestock Mart Ltd. v. Attorney General* [1970] I.R. 317 and *O'Brien v. Bord na Móna* [1983] I.R. 255. It was confirmed in *Clinton v. An Bord Pleanála (No.2)* [2007] 2 I.L.R.M. 81 that the procedures at a compulsory purchase oral hearing must ensure that these principles are observed. The confirming authority must be satisfied that the acquisition of the property is clearly justified by the exigencies of the common good.
66. In this respect, it is noted that NUIG's objection/submission (since withdrawn) asserted that "[t]he proposed N6 GCRR does not recognise or take account of our University's rights as enshrined in Article 44.2.6 of *Bunreacht na hÉireann*". In response, it is acknowledged that there exists a constitutional restriction on the compulsory acquisition of lands from religious and educational institutions. The Constitution states at Article 44.2.6°:

*"The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation."*

67. Accordingly, the restriction on acquisition of the property of an educational institution is not absolute: rather, as the provisions of Article 44.2.6 make clear, such acquisition may be pursued where (i) the acquisition is necessary as works of public utility, and (ii) on payment of compensation.
68. With regard to "works of public utility", the authors of *Compulsory Purchase Law in Ireland* (2<sup>nd</sup> ed.) opine that:

*"Of the various works provided by local authorities, some are clearly of general public utility - such as roads, bridges and public open spaces in that every member of the community can use them."*

69. Moreover, as set out above, compensation is payable in respect of compulsory acquisitions specified in a Motorway Scheme. Accordingly, the two conditions which authorise acquisition of lands in the ownership of an educational institution are satisfied.
70. Two objections have been received (Ob\_713 and Ob\_691\_713) which contend that the power of compulsory acquisition cannot be used for the permanent acquisition of lands to the north east of the Racecourse, currently occupied by Brooks Timber and Building Supplies Ltd, on which it is proposed to construct replacement stables to mitigate the impact of the proposed road development on the Racecourse.
71. Under section 47(2) of the Roads Act, as amended, land can be compulsorily acquired pursuant to a motorway or protected road scheme if that land is required “for the purposes” of the scheme and that includes “land necessary or incidental to the construction or maintenance” of the proposed road development. In that regard, it is evident from the use of the disjunctive “or”, that it will be sufficient if it can be demonstrated that the land to be acquired is either necessary or incidental to the scheme. Land which is required in order to mitigate the impacts of a proposed scheme is clearly land the acquisition of which is incidental to the scheme. In that regard, it should be noted that it is common for land to be compulsorily acquired in order to mitigate the impacts of a proposed road development.
72. The need to acquire these lands for the scheme has been outlined in the statements of evidence of Eileen McCarthy and Michael Sadlier. That evidence demonstrates that it is necessary to acquire these lands and that their acquisition is certainly incidental to the Motorway Scheme. In his evidence, Mr. Sadlier has explained why constructing the replacement stables in this location is the only viable option to effectively mitigate the impact on the construction of the tunnel and the creation of a buffer/restriction on either side of the tunnel on the continued operation of the Racecourse.
73. A number of other objections to the Motorway Scheme and Protected Road Scheme contend that the acquisition of certain lands or interests in land is disproportionate or unnecessary.
74. In this respect, one of the consequences that the European Convention on Human Rights Act 2003 may have for the confirmation of compulsory purchase orders is that the Board may be required to apply a test of proportionality. According to the author of *Planning and Development Law* (2<sup>nd</sup> ed.), the test of proportionality involves a two-stage test. In particular, it seems that a distinction is to be drawn between proportionality of means and proportionality of ends. Proportionality of means requires consideration of whether the objective may be achieved by means which are less

interfering of an individual's rights. This seems to involve a consideration of alternative statutory powers, which may be available to the decision-maker. On the other hand, proportionality of ends requires consideration of whether the measure will have an excessive or disproportionate effect on the interests of affected persons.

75. In *Blascaod Mór Teo v. Commissioners of Public Works (No.3)*, Budd J. linked the concept of the exigencies of the common good' (in Article 43.2.2° of the Constitution) with the doctrine of proportionality when he said:

*"[The] word 'exigencies' has a connotation of more than 'useful', 'reasonable' or 'desirable', it means 'necessary' and implies the existence of a pressing social need."*

76. Accordingly, in applying the proportionality test, it is submitted that Galway County Council did (in making the N6 Galway City Ring Road Motorway Scheme 2018 and the N6 Galway City Ring Road Protected Road Scheme 2018) and An Bord Pleanála should (in confirming both those schemes) ensure that:

- (i) there is a need that advances the common good which is to be met by the acquisition of the lands in question;
- (ii) the particular property is suitable to meet that need;
- (iii) any alternative methods of meeting the need have been considered; and
- (iv) that the landowner is entitled to be compensated.

77. It is submitted by Galway County Council that there is overwhelming evidence to satisfy the requirement that there is a need that advances the common good. The statements of evidence of Eileen McCarthy, John O'Malley and Andrew Archer have identified aspects of the need for the Motorway Scheme and Protected Road Scheme and the compulsory acquisitions required under those schemes.

78. Moreover, in terms of its jurisdiction to consider modifications to protected road schemes and motorway schemes, subsection 49(3) as applied to the Board, provides that the Board may "*approve the scheme with or without modifications*". Accordingly, it is clear that the Board has the jurisdiction to modify the schemes, whether on the application of the road authority, or otherwise. In this regard, as confirmed on the first day of the oral hearing convened by the Board, Galway County Council has proposed a modification to the N6 Galway City Ring Road Motorway Scheme 2018. In the latter context, Galway County Council has withdrawn its proposal to compulsorily acquire certain lands in the ownership of Boston Scientific Limited.

79. It has been confirmed to the Board, at the oral hearing, that Galway County Council is applying to modify the N6 Galway City Ring Road Motorway

Scheme 2018 so as to delete those lands and interests in the ownership of Boston Scientific Limited from the Schedules and Deposit Maps to the Motorway Scheme. Moreover, by way of *corrigenda* submitted to the Board, certain lands and interests in the ownership of other parties, for example, Plot 473a.201 (Gael Scoil Mhic Amhlaigh landscaped areas), are proposed to be deleted from the N6 Galway City Ring Road Motorway Scheme 2018 and the N6 Galway City Ring Road Protected Road Scheme 2018, respectively.

80. It is axiomatic that the acquisition of land and rights over land will result in interference with the use of those lands by owners/leases/occupiers. However, it is submitted that such interference is proportionate to the legitimate aim being pursued in the interests of the common good.
81. Further in this regard, in the event that (i) the N6 Galway City Ring Road Motorway Scheme and the (ii) N6 Galway City Ring Road Protected Road Scheme are approved, and Galway County Council exercises its powers of acquisition pursuant to those approved schemes, the owners, leasees and occupiers of those acquired lands and interests in land will be entitled to submit a claim for compensation which, in default of agreement, will be determined by a Property Arbitrator, pursuant to a separate statutory scheme.
82. In making the Schemes, Galway County Council was satisfied that there is a need that advances the common good which is to be met by the acquisition of the lands/interests in lands in question; that the particular land is suitable to meet that need; that any alternative methods of meeting the need have been considered; and that the affected owners, leasees and occupiers will be entitled to be compensated for such interference. In such circumstances, any encroachment of the property rights of owners/leases/occupiers is proportionate and necessary for the exigencies of the common good.
83. In conclusion, it is submitted that the need and justification for the proposed road development, and the underlying Motorway Scheme and Protected Road Scheme, have been adequately established. The compulsory acquisitions are necessary in that they facilitate the delivery of the N6 Galway City Ring Road and significantly advance the common good. The purpose for which the lands and interest in lands is being acquired is lawful and the acquisitions are proportionate to the legitimate aim being pursued in the interests of the common good.
84. In all the circumstances, as addressed in these submissions and the material before the Board, Galway County Council respectfully submits that the Board should approve (i) the N6 Galway City Ring Road Motorway Scheme 2018 as modified and (ii) the N6 Galway City Ring Road Protected Road Scheme 2018 as modified, in the manner presented at the oral hearing and illustrated on the amended deposit maps and schedules submitted at the

oral hearing for both the Motorway Scheme and the Protected Road Scheme.

**F. MISCELLANEOUS**

85. Section 135 of the Planning and Development Act 2000 (as amended) gives to the person conducting an oral hearing wide discretion as to the procedure to be adopted. In particular, he/she shall conduct the hearing without undue formality. In that regard, the Inspector may:

- decide the order of appearances of the witnesses at the hearing;
- permit any person to appear in person or be represented by any other person;
- hear a person who has not made a submission to an Bord Pleanála where it is considered appropriate in the interests of justice to hear that person; and
- refuse to allow the making of a point or an argument if the point or summary of the argument has not been submitted in advance.

86. Section 143 requires the Board to have regard to the policies and objectives of, *inter alia*, a Minister and the Government and any other body which is a public authority and whose functions have a bearing on “*proper planning and sustainable development*”.

87. In this respect, a detailed statement has been delivered which sets out, *inter alia*, the significance of TEN-T designation and compliance with various policies at national, regional and local levels.

**G. CONCLUSION**

88. In all the circumstances as addressed in these submissions and the material before the Board, Galway County Council submits that the Board should:

- (i) approve the N6 Galway City Ring Road under section 51 of the Roads Act 1993, as amended, with the modifications proposed by Galway City Council;
- (ii) approve the N6 Galway City Ring Road Motorway Scheme 2018 under section 49 of the Roads Act 1993, as amended, with the modifications proposed by Galway City Council;
- (iii) approve the N6 Galway City Ring Road Protected Road Scheme 2018 under section 49 of the Roads Act 1993, as amended, with the modifications proposed by Galway City Council.

**JARLATH FITZSIMONS S.C.  
DECLAN McGRATH S.C.**

**21 FEBRUARY, 2020**