

IN THE MATTER OF AN APPLICATION TO
AN BORD PLEANÁLA

FOR APPROVAL OF THE BUS CONNECTS GALWAY: CROSS CITY LINK (UNIVERSITY ROAD TO
DUBLIN ROAD) COMPULSORY PURCHASE ORDER NO. CCL-CPO-001, 2022

OUTLINE LEGAL SUBMISSIONS
ON BEHALF OF GALWAY CITY COUNCIL

INTRODUCTION

1. An application has been made to the Board by Galway City Council (the “Council”) for confirmation of the Bus Connects Galway: Cross City Link (University Road to Dublin Road) Compulsory Purchase Order No. CCL-CPO-001, 2022 (the “CPO”) which has been made pursuant to section 10 of the Local Government (No. 2) Act, 1960 (as substituted by section 86 of the Housing Act, 1966, as amended by section 6 and the Second Schedule of the Roads Act, 1993), section 76 of the Housing Act, 1966 and the Third Schedule thereto, the Planning and Development Act, 2000 (as amended), and section 184 of the Local Government Act, 2001.
2. The application for confirmation of the CPO was submitted in conjunction with an application under section 51(2) of the Roads Act 1993 (as amended) for approval of a proposed road development consisting of the BusConnects Galway: Cross-City Link (University Road to Dublin Road) Scheme (the “Scheme”).
3. By letter dated 9th January 2024, the Council was notified of the decision of the Board to hold an oral hearing in relation to the objections received in relation to the CPO. The application for approval of the Scheme will be dealt with by way of written procedure.
4. These written submissions have been prepared on behalf of the Council in order to identify the legal requirements to be satisfied and the principles to be applied by the Board when deciding whether to confirm the CPO and to respond to certain legal issues that have been raised in the objections to the CPO.
5. These Submissions should be read in conjunction with the Statements of Evidence on behalf of the Council.

THE POWER TO COMPULSORILY ACQUIRE LAND

6. Section 213 of the Planning and Development Act 2000 (as amended) (the “2000 Act”), provides that the power conferred on a local authority under any enactment to acquire land shall be construed in accordance with that section. Subsection (2) provides:

(a) a local authority may, for the purposes of performing any of its functions (whether by or under this Act, or any other enactment passed before or after the passing of this Act) including giving effect to or facilitating the implementation of its development plan or of its housing strategy under section 94 do all or any of the following:

- (i) acquire land, permanently or temporarily, by agreement or compulsorily;*
- (ii) acquire, permanently or temporarily, by agreement or compulsorily, any easement, way-leave or water-right or other right over or in respect of any land or water or any substratum of land;*
- (iii) restrict or otherwise interfere with permanently or temporarily, by agreement or compulsorily, any easement, way-leave, water-right or other right over or in respect of any land or water or any substratum of land*

and the performance of all or any of the functions referred to in sub-paragraphs (i), (ii) and (iii) are referred to in this Act as an “acquisition of land”.

(b) ...

(c) The functions conferred on a local authority by paragraph (a) may be performed in relation to:

- (i) land, or*

(ii) *any easement, way-leave, water-right or other right to which that paragraph applies,*

whether situated or exercisable, as the case may be, inside or outside the functional area of the local authority concerned.

7. Further, under section 213(4) of the 2000 Act, a local authority may be authorised by compulsory purchase order to acquire land for any of the purposes referred to section 213(2) of the 2000 Act and section 10 of the Local Government (No.2) Act, 1960 (as amended by Section 86 of the Housing Act, 1966) is to be construed so as to apply accordingly. Under subsection 212(2) of the 2000 Act, the purposes for which the power of compulsory acquisition can be exercised include to *“provide areas with roads, infrastructure facilitating public transport and such services and works as may be needed for development”*.
8. Having regard to the foregoing, it is clear that the Council can exercise the power of compulsory acquisition conferred on it for the purpose of the Scheme.

COMPLIANCE WITH THE DEVELOPMENT PLAN

9. Section 178 of the 2000 Act stipulates that a city council shall not effect any development in the city which contravenes materially the development plan. Accordingly, the Board has to be satisfied that the Scheme in furtherance of which the CPO has been made does not materially contravene the development plan.
10. No issue arises in this regard. As outlined in section 2.2.5.2 of the Environmental Impact Assessment Report (“EIAR”), the Scheme is supported by and gives effect to a number of objectives on the Galway City Development Plan (2023 – 2028) (the “Development Plan”). In particular:
 - Section 2.4 of the Development Plan, titled ‘Integrating Climate Action into the City Development Plan’ ‘supports the delivery of public transport and sustainable mobility projects in the Galway Transport Strategy (GTS) such as Cross City Link, Bus Connects and the National Greenway Network in the city’.
 - Chapter 4 of the Development Plan, titled ‘Sustainable Mobility and Transportation’ specifically references the GTS and states that *‘the core of the strategy is built around a ‘Cross-City Link,’ which provides a safe, coherent and attractive route through the city centre restricted to public transport, pedestrians, cyclists, and some local access routes’*.

CONSISTENCY WITH CLIMATE OBJECTIVES

11. Section 15 of the Climate Action and Low Carbon Act 2015 (as substituted by section 17 of the Climate Action and Low Carbon Development (Amendment) Act 2021) (“the Climate Act”) imposes a duty on State bodies in the following terms:

(1) A relevant body shall, in so far as practicable, perform its functions in a manner consistent with -

(a) the most recent approved climate action plan,

(b) the most recent approved national long term climate action strategy,

(c) the most recent approved national adaptation framework and approved sectoral adaptation plans,

(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.

12. In accordance with that section, when performing its functions, including its function in relation to the confirmation of the CPO, the Board has to do so in a manner which is consistent with the most recently approved climate action plan (“CAP”) and the other specified climate strategies, plans and objectives.
13. When the applications for approval of the Scheme and confirmation of the CPO were lodged with the Board, the relevant CAP was the Climate Action Plan 2021 (the “2021 CAP”) and this is referenced in section 2.2.3.8 of the EIAR. As explained in section 2 of the statement of evidence of Donal McDaid, the 2021 CAP has been superseded by the Climate Action Plan 2023 (the “2023 CAP”) and, most recently, by the Climate Action Plan 2024 (the “2024 CAP”) which was approved by Government on 20 December 2023, subject to strategic environmental assessment and appropriate assessment. Mr McDaid outlines in his statement of evidence why the Scheme is not only consistent with the 2023 CAP and the 2024 CAP but is important in terms of achieving Ireland’s climate change objectives.

14. Having regard to the information put before the Board, it is clear that, by confirming the CPO, the Board would be performing its functions in a manner which is consistent with the 2023 CAP, the 2024 CAP and the other specified climate strategies, plans and objectives.

CONFIRMATION OF THE CPO

15. The principles to be applied by the Board when deciding whether to confirm a compulsory purchase order were considered by the Supreme Court in *Clinton v An Bord Pleanála* [2007] 4 IR 701. The applicant was the owner of a site on O'Connell Street. The site was part of an area included in Dublin City Council's integrated area plan which sought to achieve the development and improvement of the O'Connell Street area. The City Council made an order for compulsory purchase of the site, the specified purpose in the order being "for development, and to secure and facilitate the development of land in exercise of its powers ...". This order was confirmed by An Bord Pleanála in terms that referred to the acquisition being necessary for "facilitating the implementation of the development plan". The City Council confirmed that it had no particular development chosen for the site; nor had it decided whether to undertake the development alone or in conjunction with a private developer. The applicant sought to quash the compulsory purchase order, contending that the City Council was obliged, pursuant to s. 213(3) of the 2000 Act, to specify in the order the particular development for which it required the site.
16. The applicant was unsuccessful both in the High Court and the Supreme Court. The Supreme Court held that the regeneration purpose under the development plan which the City Council had in contemplation when making the compulsory purchase order was expressly permitted by the Oireachtas and that the property was therefore required for a particular purpose within the meaning of s. 213(3)(a) of the Act of 2000 so that its compulsory acquisition was permitted. In the course of his judgment, Geoghegan J drew attention (at p.723) to the constitutional framework within which compulsory purchase orders are made:

"It is axiomatic that the making and confirming of a compulsory purchase order to acquire a person's land entails an invasion of his constitutionally protected property rights. The power conferred on an administrative body such as a local authority or An Bord Pleanála to compulsorily acquire land must be exercised in accordance with the requirements of the Constitution, including respecting the property rights of the affected landowner (see East Donegal Co-Operative Livestock Mart Ltd v Attorney General [1970] I.R. 317). Any decisions of such bodies are subject to judicial review. It would insufficiently protect

constitutional rights if the court, hearing the judicial review application, merely had to be satisfied that the decision was not irrational or was not contrary to fundamental reason and common sense.”

17. He went on to refer with approval to the observation of Keane J in *O’Brien v Bord na Mona* [1983] IR 255 at 270 as to the role of a person tasked with deciding whether to confirm a compulsory purchase order:

“In each case, the person exercising the function is determining whether the constitutionally guaranteed rights of the citizen in respect of his private property should yield to the exigencies of the common good.”

18. Having referred to a number of authorities, he emphasised (at p.724) that a person could only be deprived of his constitutionally protected right to property if this was necessary and fair procedures were followed:

“In my view, the procedures at a compulsory purchase hearing must ensure that these principles are observed. The acquiring authority must be satisfied that the acquisition of the property is clearly justified by the exigencies of the common good.”

19. The principles to be applied when exercising a statutory power to compulsorily acquire land were also considered by the Supreme Court in *Reid v Industrial Development Authority* [2016] 1 ILRM 1. At issue in that case were the powers of compulsory acquisition conferred on the respondent by section 16 of the Industrial Development Act 1986. The applicant’s contention that the intended acquisition of his lands by the respondent was not authorised by section 16 in circumstances where the lands were not presently required by the respondent but rather were required for future use was upheld by the Supreme Court. In reaching that conclusion, reliance was placed on the contrast between the provisions of section 213 of the 2000 Act which expressly provided for the compulsory acquisition of land not immediately required for a particular purpose and section 16 which did not expressly so provide.

20. In his judgment, with which the other members of the Court concurred, McKechnie J laid down a number of principles in relation to how statutory powers for the compulsory acquisition of land should be interpreted and applied:

(i) *“The conferring and exercise of statutory powers in this regard, must accord with the Constitution and must respect and implement the principles of both natural and constitutional justice. There has never been any doubt but that such applies to any state interference with*

property rights (Foley v Irish Land Commission [1952] IR 118, Nolan v Irish Land Commission [1981] 1 IR 23).

- (ii) The impact on the right to private property, which can vary from the minimal to the absolute, as in this case where the entire holding including the family dwelling house is sought to be expropriated, must be justified or necessitated by the exigencies of the common good, which will of course have regard to the principles of social justice.*
- (iii) Even where so justified, compensation will virtually always be an important aspect of constitutional protection.*
- (iv) The conferring and exercise of such 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 sought 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.*
- (v) Such power must be expressly conferred by statute on the body which seeks to implement it. Further, where constitutional rights are abrogated by statutory intervention, such provisions must be construed in a way which gives full effect to above principles.*
- (vi) As the 1986 Act is a post-constitutional statute, there is a presumption, inter alia, that all steps taken within and as part of the compulsory process will be duly compliant with the aforesaid principles. (East Donegal Co-Operative Livestock Mart Ltd v The Attorney General [1970] IR 317)."*

21. Having regard to these decisions and other authorities in relation to the compulsory acquisition of land, and in circumstances where the CPO has been made in order to facilitate the implementation of the Scheme, the Council is required to satisfy the Board that:

- (1) There is a community need which will be met by the implementation of the Scheme.
- (2) There are no alternatives to the Scheme reasonably available that better meet the community need.
- (3) The acquisition of the property is necessary for the implementation of the Scheme.

- (4) The impairment of the property owner's rights from the acquisition of the property is not disproportionate in that it does not exceed that which is necessary to attain to the legitimate object sought to be pursued.

22. The application of these criteria to the CPO will be examined in turn.

Community Need

23. As emphasised by Geoghegan J in *Clinton*: *"The acquiring authority must be satisfied that the acquisition of the property is clearly justified by the exigencies of the common good."* Accordingly, there must be a community need that will be served by the Scheme for which the compulsory acquisition of the property is sought.
24. Here, there is a clear community need that is met by the Scheme. The need for the Scheme is outlined in detail in chapter 2 of the EIAR and is also addressed in section 2 of the Statement of Evidence of Brian Burke and in the Statement of Evidence of Uinsinn Finn.

Alternatives

25. As part of an examination of whether the acquisition of the property is necessary, the Board is required to consider the alternatives to the Scheme and to be satisfied that there are no alternative means reasonably available that better meet the community need.
26. The alternatives to the Scheme have been considered in detail in Chapter 3 of the EIAR which demonstrates where there is no other alternative means reasonably available to meet the community need.
27. Section 3.2 of the EIAR examines the strategic alternatives and explains, by reference to the GTS, why this particular Scheme was chosen to meet the community need. As can be seen, consideration was given to bus alternatives, light rail alternatives, rail integration, demand management alternatives and technological alternatives and there is a detailed explanation as to why the Scheme was chosen as the best means of meeting the identified community need.
28. Section 3.4 of the EIAR goes on to set out in considerable detail the examination that was carried out of route alternatives. Further information in relation to this is contained in the Options Assessment Report (August 2022) which has been submitted with the

applications. As can be seen, potential environmental impacts including impacts on material assets were a key consideration in the selection of the route.

29. Section 3.5 of the EIAR deals with the design alternatives that were considered after the emerging preferred scheme was selected and identifies the various inputs to the detailed design development and the changes that were made to the design after the public consultation process.
30. Further information in relation to the assessment by the Council of strategic, route and design alternatives is to be found in the Statement of Evidence of Donal McDaid and section 3 of the Statement of Evidence of Brian Burke.
31. It is submitted that ample information has been put before the Board on the basis of which it can be satisfied that there are no alternative means reasonably available that better meet the identified community need.

Necessity for the Acquisition

32. The Board must be satisfied that the acquisition of the land included in the CPO is necessary for the implementation of the Scheme.
33. This requires the Board to review the information provided in relation to the Scheme to satisfy itself that each parcel of land sought to be acquired in the CPO is suitable for carrying out the Scheme and its acquisition is reasonably required for the construction and/or the operation of the Scheme such that the Scheme cannot be implemented without the acquisition of the land. With regard to the duration of the acquisition, the Board will also have to be satisfied that the period of temporary acquisition is as short as reasonably possible and that any land to be permanently acquired cannot reasonably be acquired for a temporary period only.
34. Considerable detail in relation to the Scheme and why the land sought to be compulsorily acquired is required for the Scheme is contained in chapter 4 of the EIAR, section 3 of the Galway City Council Observations on the Proposed Scheme Submissions and CPO Objections (February 2023) and in section 4 of the Statement of Evidence of Brian Burke. It is submitted that the Board should be satisfied on the basis of that material as to the necessity for the compulsory acquisition of each parcel of land included in the CPO.

Proportionality

35. The Board is required to apply a test of proportionality and to be satisfied that the impairment of the property owner's rights from the acquisition of the property is not disproportionate. As McKechnie J explained in *Reid*, the exercise of the power of compulsory acquisition *"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 sought to be pursued"*.
36. It is submitted that ample information has been put before the Board on the basis of which it can be satisfied that this test of proportionality is met because the Scheme and the CPO are a proportionate response to the community need that has been identified and the acquisition of the land identified in the CPO is reasonable, necessary to implement the Scheme and the impairment of the rights of property owners goes no further than reasonably required to meet the community need.

RESPONSE TO SUBMISSIONS

37. A number of submissions in relation to the CPO have raised legal issues which are addressed below.

Cecil McDonagh and Gabriel & Mary Grealish

38. In submissions made by Martin Lavelle on behalf of Cecil McDonagh and Gabriel & Mary Grealish (furnished by the Board under cover of letter of 8 November 2022), he has requested the Board to determine whether the land to be acquired has the potential for an 11 storey apartment block. However, it is not part of the function of the Board when deciding whether to approve the CPO to make a determination or give any view as to the development potential of the land to be acquired. This is something to be addressed as part of the claim for compensation which will be determined by the Property Arbitrator.

Fairgreen Coach Station Limited

39. In a submission received from Colliers International on behalf of Fairgreen Coach Station Ltd, issue was taken with the inclusion of Plots 108.a.101 and 108.b.201 in the CPO on the basis that the Council cannot permanently compulsorily acquire lands to which it already has title.

40. The Council is the freeholder owner of Plots 108.a.101 and 108.b.201 which are located within the lands known as "Fairgreen Coach Station, Galway" comprised within Folios 85074F and 86710F. However, the Council's freehold interest in those plots is subject to an indenture of lease dated 7 December 2017 between (1) Galway City Council and (2) Fairgreen Coach Station Limited granted for a term of nine hundred and ninety-nine (999) years from 1 January 2007 (the "Lease"). The area demised to Fairgreen Coach Station Limited pursuant to the Lease is set out in the First Schedule thereto and is more particularly outlined in the plan annexed to the Lease. The demise includes Plots 108.a.101 and 108.b.201. The Council is not legally entitled to unilaterally alter the extent of the demise. In the circumstances, it is both necessary and appropriate to include Plot 108.a.101 on Part 1 of the Schedule and Plot 108.b.201 on Part II of the Schedule to the CPO.

Jacinta McCaul and Ruby McCaul

41. The submissions by Jacinta McCaul and Ruby McCaul dated 30 June 2023 raise a question in connection with the proposed amendment to the Scheme in relation to the Casual Trading Area as to whether the Council can provide a guarantee that it would not exercise an entitlement granted by the Bye-Law in relation to casual trading in Galway City to move the Casual Trading Area to an alternative location.
42. No such guarantee can be provided by the Council because it is not lawful for a public body, by agreement or representation, to fetter its discretion as to how it will exercise its statutory functions or powers in the future (*Re Park Davis & Co's Trade Mark Application* [1976] FSR 195).

Sean and Phil Scahill

43. A submission was received from R.G. Emerson & Co., on behalf of Sean and Phil Scahill, dated 18 November 2022 (the "First Submission"). A further submission from R.G. Emerson & Co., on behalf of Sean and Phil Scahill, dated 4 July 2023 (the "Second Submission"). These submissions raise a number of legal issues which are responded to briefly below.
44. In the First Submission, the EIAR submitted with the application for approval of the Scheme is criticised on the basis that it is not an independent report, prepared by persons other than the designers of the Scheme. No authority is cited in support of the proposition that the EIAR has to be prepared independently of the design team and this is plainly incorrect. Indeed, Article 5 of the EIA Directive (Directive 2014/52/EU as

amended by Directive 2011/92/EU) stipulates that the EIAR is to be prepared and submitted by the developer.

45. In the First Submission, it is suggested that the GTS was not the subject of strategic environmental assessment. That is not correct. As recorded in the GTS itself, it was the subject of strategic environmental assessment.
46. In the First Submission, it is contended that the Scheme conflicts with the provisions of the 2021 CAP. There is no basis for that contention. As noted above, Mr McDaid outlines in his statement of evidence why the Scheme is not only consistent with the 2023 CAP and the 2024 CAP (which have superseded the 2021 CAP) but is important in terms of achieving Ireland's climate change objectives.
47. The First Submission also asserts that it was inappropriate to address the need for the Scheme in the EIAR and that there is a confusion between the two separate statutory procedures for approval of the Scheme and confirmation of the CPO. That is not so. In determining whether to grant approval for the Scheme, the Board is entitled to have regard to the need for the Scheme when deciding whether the environmental impacts of the Scheme are acceptable. Furthermore, section 220 of the Planning and Development Act 2000 (as amended) provides as follows:
 - “(1) The person holding an oral hearing in relation to the compulsory acquisition of land, which relates wholly or in part to proposed development by a local authority which is required to comply with section 175 of any other statutory provision to comply with procedures for giving effect to the Environmental Impact Assessment Directive, shall be entitled to hear evidence in relation to the likely effects on the environment of such development.*
 - (2) Where an application for the approval of a proposed development which is required to comply with section 175 is made to the Board and a compulsory purchase order or provisional order has been submitted to the Board for confirmation and where the proposed development relates wholly or in part to the same proposed development, the Board shall, where objections have been received in relation to the compulsory purchase order, make a decision on the confirmation of the compulsory purchase order at the same time.”*
48. Thus, it is clear that, where local authority development is subject to both a compulsory purchase process and environmental impact assessment, the two procedures should run in parallel and the two decisions should be made at the same time.

49. In the First Submission, it is contended that the Scheme involves an impermissible attack on the constitutional rights of Mr and Mrs Scahill. For the reasons set out above, the impairment of their property rights is no more than is necessary and is proportional to the legitimate aim being pursued as is the impairment of any other constitutional rights.

Declan McGrath SC