

IN THE MATTER OF AN APPLICATION TO
AN BORD PLEANÁLA

FOR APPROVAL OF THE FOYNES TO LIMERICK ROAD
(INCLUDING ADARE BYPASS) COMPRISING:

- (I) FOYNES TO RATHKEALE PROTECTED ROAD SCHEME, 2019;
- (II) RATHKEALE TO ATTYFLIN MOTORWAY SCHEME, 2019; AND
- (III) FOYNES SERVICE AREA SCHEME, 2019.

(ABP Refs. ABP-306146-19 & ABP-306199-19)

ORAL HEARING

OUTLINE LEGAL SUBMISSIONS OF
LIMERICK CITY AND COUNTY COUNCIL
RESPONDING TO LEGAL ISSUES RAISED IN SUBMISSIONS/OBJECTIONS

A. GENERAL

1. These written submissions have been prepared on behalf of Limerick City and County Council (“the Applicant”) in respect of certain legal issues raised in relation to two applications for approval pending before An Bord Pleanála (the “Board”), namely:
 - (1) the submissions on the application for approval of the Foynes to Limerick Road (including Adare Bypass), under section 51 of the Roads Act 1993, which application was received by the Board on 11 December 2019 (ABP-306146-19); and
 - (2) the objections made to the –
 - (i) Rathkeale to Attyflin Motorway Scheme 2019, in respect of which an application for approval under section 49 of the Roads Act 1993, as amended was made to the Board;
 - (ii) Foynes to Rathkeale Protected Road Scheme 2019, in respect of which an application for approval under section 49 of the Roads Act 1993, as amended, was made to the Board; and
 - (iii) the objections made to the Foynes Service Area Scheme 2019 in respect of which an application for approval under section 49 of the Roads Act 1993, as amended, was made to the Board on 16 December 2019 (ref. ABP-306199-19).
2. Limerick City and County Council has submitted an Environmental Impact Assessment Report [EIAR] and Natura Impact Statement [NIS] to the Board with the application for approval of the proposed Foynes to Limerick Road (including Adare Bypass) development under section 51. In the event that the Board decides to grant approval under section 51, Limerick City and County Council will have been granted development consent and may proceed with the proposed road development.
3. If approved by the Board, under section 49, the Rathkeale to Attyflin Motorway Scheme 2019, Foynes to Rathkeale Protected Road Scheme 2019 and Foynes Service Area Scheme will authorise Limerick City and County Council to acquire compulsorily the lands and interest in lands specified in those schemes.
4. The proposed Foynes to Limerick Road (including Adare Bypass) including all ancillary and consequential works (“the proposed road development”) comprises four elements:¹

¹ See a description of the major elements of the proposed road development in section 4 of Volume 1 (Non-Technical Summary) of the Environmental Impact Assessment Report Statement [EIAR] submitted to the Board on 11 December 2019.

- (1) 15.6km of Type 2 Dual Carriageway Protected Road extending from Foynes to Rathkeale;
- (2) 1.9km of Single Carriageway link road from Ballyclogh to Askeaton;
- (3) 17.5km of Dual Carriageway Motorway from Rathkeale to Attyflin east of Adare; and
- (4) A terminal Heavy Goods Vehicle service area adjacent to Foynes Port.

B. ENVIRONMENTAL IMPACT ASSESSMENT

5. A proposed road development that comprises, *inter alia*, the construction of a motorway or service area must, pursuant to section 50 of the Roads Act 1993, as amended, be subject to an Environmental Impact Assessment [EIA]. Accordingly, Limerick City and County Council has submitted an EIAR to the Board with the application for approval under section 51.
6. 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.
7. The EIAR has been prepared in accordance with the relevant provisions of the EIA Directive and contains the information prescribed by the relevant provisions of the Roads Act 1993, as amended. Prior to 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] (“the 2019 EIA Regulations”) amended the provisions of the Roads Act 1993, in order to transpose the obligations under the EIA Directive into the development consent procedure under section 51.
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 Limerick City and County Council that, notwithstanding the contention advanced in certain submissions that the detail set out in the EIAR is somehow inadequate, 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. Moreover, the information provided in the EIAR is sufficiently detailed and comprehensive to allow the Board to carry out a robust and accurate assessment of the proposed road development for the purposes of EIA, pursuant to the provisions of Article 5 of the EIA Directive and the 2019 EIA Regulations.
10. The information and appraisals contained in the EIAR comply with the requirements of both the EIA Directive and Irish statutory provisions and, it is submitted, self-evidently surpass the test of adequacy which the Board will apply in its consideration of the EIAR. In *Klohn v. An Bord Pleanála* [2009] 1 I.R. 59, the High Court held that the content of an environmental impact statement (now an EIAR) is determined by the wording of the legislation and that “adequacy is determined by the decision maker”.²
11. Certain submissions/objections contend that there has been an inadequate consideration of alternatives, contrary to the provisions of the EIA Directive, or that alternative route options should have been brought forward as the preferred option.³
12. It is evident from Chapter 3 of the Main Volume 2 of EIAR, which sets out a full description of the reasonable alternatives studied relevant to the project and its specific characteristics, that the main reasons for the option chosen by Limerick City and County Council, taking into account the effects of the project on the environment, have been clearly set out. In addition, the alternatives studied, and a response to the submissions made relating to alternatives, were dealt with comprehensively in Part B of the Engineering Brief of evidence delivered at the oral hearing.

² Quoted with approval in *Redrock Developments Ltd. v. An Bord Pleanála* [2019] I.E.H.C. 792

³ See, for example, Submission SCH-8.

13. As set out in the EIAR, in circumstances where Limerick City and County Council concluded that additional road infrastructure is required, numerous alternatives for connecting Foynes to Limerick City were considered. The consideration of alternatives included, for example, the publication of a comprehensive route selection report in 2016 (which outlined the options considered – including the previous Adare Bypass scheme (Broad Route Corridor K) – and rationale for progressing with the preferred option),⁴ as well as new route options at a subsequent stage of consideration, including Route Option 1 and Route Option 4.
14. Separately, the project the subject of the applications before the Board is the Foynes to Limerick Road (including Adare Bypass) 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. It is clear from recent judgments of the Superior Courts that, while the Board must consider the reasonable alternatives studied by the developer,⁵ there is no obligation to conduct a full EIA of those alternatives considered by Limerick City and County Council.⁶
15. The cumulative impact assessment undertaken in Chapter 17 of the EIAR has been undertaken in line with the EIA Directive 2014/52/EU and guidance published subsequent to the 2014 EIA Directive coming into force and considers *“the cumulation of effects with other existing and/or approved projects, taking into account existing environmental problems relating to areas of particular environmental importance or the use of natural resources”*.
16. The EIA appraisals that have been presented by Limerick City and County Council are robust. It is important to underscore that the process presented by the application for approval under section 51, including this oral hearing is iterative, interactive and flexible. As appears from the briefs of evidence presented by Limerick City and County Council at the oral hearing, the road authority has taken account of the submissions made in the course of the application process. Of course, in addition to considering the briefs of evidence delivered on behalf of the road authority, the Board will 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. 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:

⁴ As referenced in section 3.4 of Volume 2 of the EIAR, the previous Adare Bypass scheme involved a Type 2 Dual Carriageway bypass south of Adare, connecting to the proposed M20 Route at its eastern end over a length of approx. 8.5km.

⁵ *Kemper v. An Bord Pleanála* [2020] I.E.H.C. 601

⁶ See the judgment of the Supreme Court in *North East Pylon Protest Company v. An Bord Pleanála* [2019] I.E.S.C. 8.

“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...”

17. The EIA process is, therefore by definition, an iterative process. Indeed, one of objectives of the EIA process is to elicit submissions and observations from members of the public concerned. The process is not, therefore, a static one, but is intended to gather information on the environmental impact of the proposed development.
18. 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”*.
19. Finally, and for the sake of completeness, 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(3).

C. HABITATS DIRECTIVE ASSESSMENTS

20. Following screening, Limerick City and County Council determined that an Appropriate Assessment of the proposed Foynes to Limerick Road (including Adare Bypass) development is required as it cannot be excluded, on the basis of objective scientific information and in view of their conservation objectives that, individually or in combination other plans or projects, the proposed road development will have likely significant effects on four European Sites, namely: Lower River Shannon cSAC, River Shannon and River Fergus Estuaries SPA, Curraghchase Woods SAC and Askeaton Fen Complex SAC.

21. Accordingly, in its consideration of the application made to it by Limerick City and County Council under section 51 of the Roads Act 1993, as amended, the Board is required prior to granting any approval for the scheme to carry out an Appropriate Assessment of the proposed road development pursuant to Article 6(3) of Directive 92/43/EC (“the Habitats Directive”) and the provisions of Part XAB of the 2000 Act,⁷ which have been considered on a number of occasions by the Court of Justice of the European Union [CJEU] and the Irish courts.⁸
22. 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.
23. Secondly, it is clear that Article 6(3) envisages a two-stage process: Stage One Screening and Stage Two Appropriate Assessment.
24. In the present case, as the competent authority at the screening stage, Limerick City and County Council has determined that the proposed road development, either individually or in combination with other plans and projects, has the potential to significantly affect four European Sites. Accordingly, Limerick City and County Council submitted a Natura Impact Statement [NIS] with the application for approval under section 51 to inform the Stage Two Appropriate Assessment to be carried out by An Bord Pleanála on the application for development consent.
25. 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 400,⁹ the High Court has 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

⁷ “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.

⁸ See, for example, 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*.

⁹ 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

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.”

26. 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.

27. 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.
28. 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 European site”*. Again, this determination must be made before consent is given for a proposed development.¹⁰
29. In *Connelly v. An Bord Pleanála & Ors.* [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

¹⁰ 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*.

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.”

30. 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.
31. 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 and the response to the request for further information submitted to the Board.
32. 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.
33. For the reasons set out in detail in the NIS, and summarised in section 8 (page 97), in view of the best scientific knowledge in the field and the precautionary principle and on the basis of objective information, having regard to the conservation objectives of the relevant European sites, the Board is enabled to determine that the proposed Foynes to Limerick Road (including Adare Bypass) development, 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.
34. The AA appraisal that have been presented by Limerick City and County Council in the NIS, additional information submitted in response to the request for additional information, and at the oral hearing are robust.
35. 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 proposed road development 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.
36. 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.
37. 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 (for the sake of completeness) that the Board has the jurisdiction to consider modifications to a proposed road development pursuant to subsection 51(3), subject to environmental conditions as is considered appropriate.
38. In these circumstances, firstly, and notwithstanding the AA Screening Determination made by Limerick City and County Council, the Board is required to conduct a Stage One Screening for AA. In this respect, as stated in the Biodiversity and Natura Impact Statement Brief of Evidence, it is recommended that the Board “screen in” Sea Lamprey in making its Stage One Screening determination. In this context, information has been provided to the Board at Item 13 of the Further Information Response (“RFI Response”) submitted to the Board. The RFI response identifies the changes to sections 3, 4, 5 and 6 of the NIS, so as to enable the Board to incorporate the presence of Sea Lamprey into the Stage Two Appropriate Assessment to be undertaken by the Board. It is also noted in the RFI Response that, in light of the similarities in the ecology and movements of Sea Lamprey and River Lamprey, the mitigation measures proposed in respect of River Lamprey will provide the same level of protection to the Sea Lamprey.
39. In a 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.”*

40. 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.
41. In the event, having conducted its Stage One Screening assessment, the Board determines (as Limerick City and County Council has done) 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.
42. 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.”*

43. 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 MOTORWAY, PROTECTED ROAD & SERVICE AREA SCHEMES

44. The substance of the objections to (i) Rathkeale to Attyflin Motorway Scheme 2019, (ii) Foynes to Rathkeale Protected Road Scheme 2019, and (iii) Foynes Service Area Scheme 2019, and the compulsory acquisition of lands and interests thereunder, and Limerick City and County Council's response to each objection, have been detailed in documentation submitted to the Board. Module 2 of the oral hearing convened by the Board concerns the approval under section 49 of the Roads Act 1993 (as amended) of the Motorway, Protected Road and Service Area schemes made by Limerick City and County Council.
45. If approved, the Motorway, Protected Road and Service Area schemes will authorise Limerick City and 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 Motorway Scheme, Protected Road Scheme and Service Area 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, lessee or reputed lessee and occupier listed in the various schedules to: (i) Rathkeale to Attyflin Motorway Scheme 2019, (ii) Foynes to Rathkeale Protected Road Scheme 2019, and (iii) Foynes Service Area Scheme 2019.
46. The fact of the making of the Motorway, Protected Road and Service Area schemes was advertised in a notice published in two newspapers circulating in the area of the lands which are proposed to be compulsorily acquired, namely: *Irish Independent* (published on 12 December 2019) and *Limerick Leader* (published on 14 December 2019).
47. In addition, each of the owners (or reputed owners), lessees (or reputed lessees) and occupiers, were informed of the making of the Motorway Scheme, Protected Road Scheme and the Service Area Scheme, respectively and the process by which an objection/submission could be made to the Board.
48. The substance of objections to the making of the three Schemes and Limerick City and County Council's response to same has been detailed in the briefs of evidence delivered on behalf of Limerick City and County Council at the oral hearing.

49. Section 47 of the Roads Act 1993 (as amended) contains a general acquisition provision and applies to: (i) a protected road scheme, (ii) a motorway scheme, and (iii) a service area scheme and, pursuant to all three 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.

50. 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 all land, substrata of land or rights in relation to land required for access roads, ramps...

51. Section 52 of the Roads Act 1993, as amended and applied, provides that whenever a Motorway Scheme, Protected Road Scheme or Service Area Scheme is approved (with or without modifications) under section 49,¹¹ 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, Protected Road Scheme or Service Area Scheme shall have the same effect as a compulsory purchase order [CPO] made in respect of that land, substratum of land or any rights in relation to land. Thus, in response to submissions raising formalities in relation to references to the Land Clauses Consolidation Act 1845 and other statutes, section 52 is a “deeming” provision, which has the effect of applying the procedure under the Housing Act 1966, subject to a number of modifications. Thus, pursuant to the provisions of 47 and 52 of the Roads Act 1993, as amended, Limerick City and 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.

52. Section 213 of the Planning and Development Act 2000 (as amended), the provisions of which are applicable to Limerick City and County Council in its capacity as a local authority, makes clear that Limerick City and County Council may, for the purposes of performing any of its functions acquire land or rights in relation to land by agreement.

¹¹ 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.

53. Whilst not a matter for consideration for the Board in deciding whether or not to approve (i) Rathkeale to Attyflin Motorway Scheme 2019, (ii) Foynes to Rathkeale Protected Road Scheme 2019, and (iii) Foynes Service Area Scheme 2019, 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.
54. In addition to the lawfulness of the proposed compulsory acquisitions (as coming within the powers of Limerick City and 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.
55. 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.
56. With regard to "works of public utility", the authors of *Compulsory Purchase Law in Ireland* (2nd 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."*
57. Under section 47(2) of the Roads Act (as amended), land can be compulsorily acquired pursuant to a motorway, protected road or service area 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.
58. A number of objections to the Motorway Scheme and Protected Road Scheme contend that the acquisition of certain lands or interests in land is disproportionate or unnecessary.

59. 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* (2nd 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.

60. 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."

61. In addition, the Supreme Court (*per* McKechnie J.) held in *Reid v. Industrial Development Agency* [2015] 4 I.R. 494, that interference with a property right must "be justified or necessitated by the exigencies of the common good" and that the impairment of such 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".

62. Accordingly, in applying the proportionality test, it is submitted that Limerick City and County Council did (in making the Motorway, Protected Road and Service Area Schemes) the Board should (in confirming those three 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.

63. It is submitted by Limerick City and County Council that there is overwhelming evidence to satisfy the requirement that need that advances the common good. In particular, Part A of the Engineering Brief of Evidence, as well as other briefs of evidence delivered at the oral hearing, have identified the need for the three Schemes and the compulsory acquisitions required under those schemes.
64. 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, it has been confirmed to the Board at the oral hearing, that Limerick City and County Council is applying to modify, firstly, Schedule 1, Part 1; Schedule 1, Part 2; and Schedule 4 of the Foynes to Rathkeale Protected Road Scheme 2019, so as to reflect the interest of the Cragg Barrigone Group Water Scheme Ltd. in the plots indicated in Table 1 below.

Schedule 1, Part 1	Schedule 2, Part 2	Schedule 4
110a.102	109a.104	109a.104
109a.102	110a.103	109a.401
109a.110		110a.401
109a.113		110a.402
109a.114		110a.103

Table 1: Plots to be Amended in Schedule1, Part 1; Schedule 1, Part 2; & Schedule 4 of the Foynes to Rathkeale Protected Road Scheme 2019

65. Secondly, it is proposed to correct a typographical error in the Deposit Map as it relates to Plot 309 in the Rathkeale to Attyflin Motorway Scheme.
66. It is axiomatic that the acquisition of land and rights over land will result in interference with the use of those lands by owners/lessees/occupiers. However, it is submitted that such interference is proportionate to the legitimate aim being pursued in the interests of the common good.
67. Further in this regard, in the event that (i) Rathkeale to Attyflin Motorway Scheme 2019, (ii) Foynes to Rathkeale Protected Road Scheme 2019, and (iii) Foynes Service Area Scheme are approved, and Limerick City and County Council exercises its powers of acquisition pursuant to those approved schemes, the owners 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.

68. In making the Schemes, Limerick City and 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, lessees 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.
69. 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 Foynes to Limerick Road (including Adare Bypass) project 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.
70. In all the circumstances, as addressed in these submissions and the material before the Board, Limerick City and County Council respectfully submits that the Board should approve: (i) Rathkeale to Attyflin Motorway Scheme 2019, (ii) Foynes to Rathkeale Protected Road Scheme 2019, and (iii) Foynes Service Area Scheme, 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 the Schemes.

F. MISCELLANEOUS

71. 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. However, the Inspector may also:
- 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 the Board 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.
72. 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*”.

73. 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.
74. In the context of the TEN-T designation, it should be noted that Article 17(3) of Regulation (EU) No. 1315/2013 specifies the requirement for high quality roads on the TEN-T network and Article 39(2) provides that only (a) a motorway or (b) an express road may be considered as road option types on the Core Network. Therefore, it follows that, in order to fulfil the policy requirements under Regulation (EU) No. 1315/2013 in respect of the EU TEN-T transport network, the minimum and only permissible standard of road infrastructure required to extend the Core Network to Shannon Foynes Port is a motorway or an express road.
75. In addition, it is noted that section 2.2.1.2 of the EIAR, as well as the Planning Policy Brief of Evidence delivered at the oral hearing, examines the TEN-T Regulation and Guidelines and notes the requirement for multi-modal transport at maritime ports on the Core Network pursuant to Article 41(2) of Regulation (EU) No. 1315/2013.

G. CONCLUSION

76. In all the circumstances as addressed in these submissions and the material before the Board, Limerick City and County Council submits that the Board should:
- (A) approve, under section 51 of the Roads Act 1993, as amended, the proposed Foynes to Limerick Road (including Adare Bypass) development, with the modifications proposed by Limerick City and City Council;
 - (B) approve, under section 49 of the Roads Act 1993, as amended, the following three schemes, with the modifications proposed by Limerick City and City Council;
 - (i) Rathkeale to Attyflin Motorway Scheme 2019;
 - (ii) Foynes to Rathkeale Protected Road Scheme 2019; and
 - (iii) Foynes Service Area Scheme.

JARLATH FITZSIMONS S.C.

DECLAN McGRATH S.C.

FEBRUARY, 2021

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