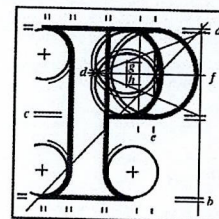


Our Case Number: ABP-310286-21

Your Reference: Trustees of the Dioces of Cloyne



**An
Bord
Pleanála**

McCutcheon Halley
6 Joyce House
Barrack Square
Ballincolig
Co. Cork
P31 YX97

Date: 21st July 2021

Re: Railway works and all works necessary to eliminate and, where necessary, upgrade seven numbered level crossings and carry out all associated and ancillary works along a 24-kilometre section of the Dublin to Cork Railway Line.
Fantstown, Thomastown, Ballyhay, Newtown, Ballycoskery (Ballyhea Village), Shinanagh and Buttevant, Co. Cork and Co. Limerick.

Dear Sir / Madam,

An Bord Pleanála has received your recent submission in relation to the above mentioned proposed railway order and will take it into consideration in its determination of the matter.

A receipt for the fee lodged is enclosed.

The Board will revert to you in due course with regard to the matter.

Please be advised that copies of all submissions / observations received in relation to the application will be made available for public inspection at the offices of Cork County Council and Limerick City and County Council and at the offices of An Bord Pleanála when they have been processed by the Board.

More detailed information in relation to strategic infrastructure development can be viewed on the Board's website: www.pleanala.ie.

If you have any queries in the meantime, please contact the undersigned officer of the Board.

Teil
Glaao Áitiúil
Facs
Láithreán Gréasáin
Ríomhphost

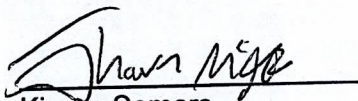
Tel (01) 858 8100
LoCall 1890 275 175
Fax (01) 872 2684
Website www.pleanala.ie
Email bord@pleanala.ie

64 Sráid Maoilbhríde
Baile Átha Cliath 1
D01 V902

64 Marlborough Street
Dublin 1
D01 V902

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

Yours faithfully,



Kieran Somers
Executive Officer
Direct Line: 01-873 7250

RA05

Teil
Glaao Áitiúil
Facs
Láithreán Gréasáin
Ríomhphost

Tel (01) 858 8100
LoCall 1890 275 175
Fax (01) 872 2684
Website www.pleanala.ie
Email bord@pleanala.ie

64 Sráid Maoilbhríde
Baile Átha Cliath 1
D01 V902

64 Marlborough Street
Dublin 1
D01 V902

The Secretary,
An Bord Pleanála
64 Marlborough Street
Dublin 1

AN BORD PLEANÁLA	
LDG-	<u>041555-21</u>
ABP-	
08 JUL 2021	
Fee: €	<u>50</u> Type: <u>cheque</u>
Time:	By: <u>post</u>

7 July 2021

Re: An Bord Pleanála Case Reference No. NA04.310286. Dublin to Cork Railway Line (Elimination and Upgrade) of Level Crossings between Limerick Junction and Mallow Order 2011

Dear Sir/Madam,

We act on behalf of the Trustees of the Diocese of Cloyne, Cloyne Diocesan Centre, Cobh, Co. Cork, who are the registered owners of the lands referenced as XC212.P02, XC212.P03 and XC212.P04 in the Second Schedule of the draft Railway Order and the lands referenced as XC212.T05 in the Third Schedule of the draft Railway Order.

We have been instructed by the Right Reverend Monsignor James O'Brien P.P., Parish Priest of Ballyhay, to submit the attached observations on the likely effects of the proposed works on the proper planning and development of the village of Ballyhay including the likely effects on the environment and built heritage of the Church property and on the protected habitats and species in the vicinity of the proposed site.

Yours sincerely,

Brian McCutcheon

Brian McCutcheon
McCutcheon Halley

 www.mhplanning.ie

McCutcheon Halley is a limited partnership registered under the Limited Partnerships Act, 1907, registration no. LP512. Registered in Ireland No. 326490. Registered office: 6 Joyce House, Barrack Square, Ballincollig, Co. Cork. Directors: Brian McCutcheon, BA(Econ) DipTP DipGIS MIPi (Chairman), Tom Halley, BA(Mod), MRUP BSc ARCH(Hons) Cert. Civil Eng. MIPi.

Also in DUBLIN
Kreston House, Arran Court
Arran Quay, Dublin 7
D07 K271
T. +353 (0) 1 804 4477
E. info@mhplanning.ie

CORK
6 Joyce House, Barrack Square
Ballincollig, Co. Cork
P31 YX97
T. +353 (0)21 420 8710
E. info@mhplanning.ie

Railway Order Application ABP Case Ref NA04.310286

Observations on behalf of the Trustees of the Diocese of Cloyne in regard to the proposal by Coras Iompair Éireann (CIE) to replace the manned level crossing at Ballycoskery XC212 with a new road and overbridge.

Legal and Procedural Issues

During the pre-application consultation, which was carried out under Case Ref. ABP 305149-19, An Bord Pleanála raised the issue as to whether an application for a railway order under Section 37 of the Transport (Railway Infrastructure) Act 2001 as amended by Section 49 of the Planning and Development (Strategic Infrastructure) Act, 2006¹ was the most appropriate legal mechanism for the approval of the proposed road works and the compulsory purchase orders which would be required to implement the proposed works.

According to the minutes of the initial consultation meeting on 17/10/2019:

"The Board's representatives enquired as to why a Railway Order application is being pursued in this particular instance. The prospective applicant replied that it was of the opinion that a Railway Order application under the Transport (Railway Infrastructure) Act 2001, as amended, would be the most appropriate legislative mechanism to pursue as the proposed works comprise of ancillary works necessary for a railway line. The Board noted this point but said that it would require further elaboration from the prospective applicant on this. The Board also noted that there is no precedent case where works of the scale and nature proposed were the subject of a Railway Order application. The prospective applicant replied that it had concluded a Railway Order application would be the best fit as other options such as Part 8 applications might prove to be restrictive. The prospective applicant made the point that it can only avail of CPO powers by way of a Railway Order application".

The initial response of the prospective Applicant did not refer to the fact that the development proposed at Ballycoskery XC212 had already been rejected by Cork County Council following the consultation and assessment process under Section 179 of the Planning and Development Act, 2000 (as amended) and Part 8 of the Planning and Development Regulations, 2001 (as amended)². Furthermore, while the prospective Applicant was correct in stating that CIE could only avail of the powers of compulsory purchase under a railway works order, the same powers would be available to a partnership between the roads authority and CIE if the works were carried out under the S.179/Part 8 process with the compulsory purchase orders served under Section 10(1) of the Local Government (No.2) Act 1960 (as inserted by section 86 of the Housing Act, 1966).

Under Board Direction BD-005902-20, An Bord Pleanála decided to accept the points put forward by the Applicant and the Board's Inspector, to the effect that the proposed works can be considered to be "railway works" as defined in the Transport (Railway Infrastructure) Act 2001, as amended, on the basis that "the works at the 7 locations identified pertain to the operation of the Dublin to Cork railway line" (emphasis added). As the Board Direction does not include detailed reasons and considerations, it is not clear how the Board addressed the concerns which were raised by the Board's representatives at the initial consultation meeting of 17/10/2019 in regard to the limited scope of railway orders and the option of using the S.179/Part 8 process. In particular there is no indication as to how the Board assessed the nature of the wide range of works proposed

¹ Hereafter referred to as the '2001 Transport Act'

² Hereafter referred to as the 'S.179/Part 8 process'

AN BORD PLEANÁLA	
08 JUL 2021	
LTR DATED	FROM Kreston House, Arran Court
LDG-	Arran Quay, Dublin 7
ABP-	D07 K271
	T. +353 (0) 1 804 4477
DUBLIN	
CORK OFFICE	
6 Joyce House, Barrack Square	
Ballincollig, Co. Cork	
P31 YX97	
T. +353 (0)21 420 8710	

across seven different sites and concluded that, in each case, all of the works proposed by CIE “pertained to the operation of the rail line”.

We would question whether the Board’s Direction has adequately addressed the requirement under Section 2 of the 2001 Transport Act that the works must be “required for the purposes of the railway or any part of a railway, including works ancillary to the purposes aforesaid” as the term “pertain to” is not synonymous with “required for” or “ancillary to”. We do not agree that a single Environmental Impact Assessment Report is appropriate for the seven sites and believe that the Board should have issued a separate Direction in regard to the specific works proposed in each of the seven crossings given the difference in the topography, settlement pattern and planning context and the development options for each site. As the Direction was issued at the pre-application stage, it should also have assessed the alternative options for each of the sites to determine the extent to which the works involved in each option were required for, or ancillary to, the purposes of the railway.

The Board may argue that a Direction is not required to present detailed reasons and consideration and that they are entitled to rely on the assessment and conclusions in the submission of the prospective Applicant and in the report of the Board’s Inspector. However, the report on which the Board relied was not published on the ABP website under Case Refs. ABP 305149-19 or NA04.310286. The Inspector’s Report of 22/02/2021 postdates the Board Direction of 08/06/2020 and does not explain the reasoning behind the Board’s decision. The reasons and considerations for the Board’s Direction must therefore be ascertained from the Legal Opinion of Mr. Conleth Bradley SC, which was submitted by the Applicant and accepted by the Board.

Comments on the Applicant’s Legal Opinion

Paragraph 1 of Mr. Bradley’s Opinion states that his advices have been sought in regard to the issues raised at the initial consultation meeting of 17th October. It may therefore be assumed that the terms of reference for the Opinion are set out in the following bullet point from page 4 of the minutes:

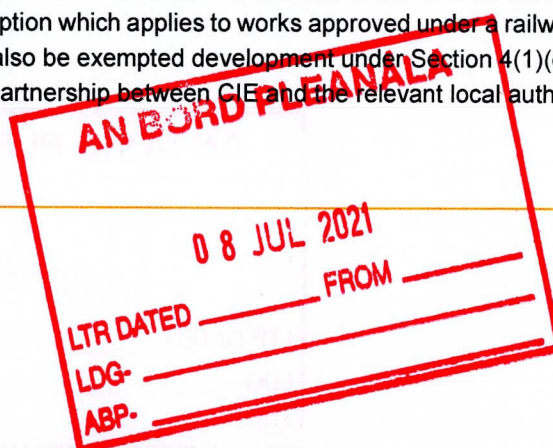
“The Board advised that the prospective applicant give careful consideration as to whether the proposed works could be considered to fall within the meaning ‘railways works’ which could be the subject of a railway order under the Transport (Railway Infrastructure) Act 2001. Any legal advice or submission in this regard could be submitted to aid the Board’s consideration of this matter.”

This issue is addressed by the conclusion reached in Paragraph 17 of the Opinion that:

“the proposed elimination (or de-manning) of the aforesaid seven manned level crossings on the public road and their replacement in most instances with overbridges and road improvements, and all associated works, is best achieved by CIE applying for a Railway Order to An Bord Pleanála.”

This conclusion goes beyond the query raised by the Board which was confined to advice on whether it was legally possible rather than preferable for some, or all, of the works to be approved under a railway works order.

Paragraph 12 of the Opinion notes in regard to Ballycoskery XC212, that “the significant issues which arise include the initial proposal and subsequent withdrawal of a Part 8 proposal by Cork County Council because of local opposition arising from the proximity to school and housing”. Paragraph 13 then refers to the fact that railway works are deemed to be exempted development under the Transport (Railway Infrastructure) Act, 2001. This seems to imply that the problems which arose as a result of the use of the S.179/Part 8 process might be avoided by availing of the planning exemption which applies to works approved under a railway order. However, the Project as proposed by CIE would also be exempted development under Section 4(1)(e) or (f) if carried out under the S.179/Part 8 process by a partnership between CIE and the relevant local authority.



In our opinion, the decision as to which procedural option should be used for the proposed elimination or de-manning of the seven level crossings should have regard to the nature and purpose of the various works and the need to consider alternative locations, layouts and designs for each site.

The nature of the works is assessed in Paragraph 23 of the Opinion, where Mr. Bradley advises:

"While I have only set out a very brief summary of the works encompassed as part of the proposed replacement of seven number manned level crossings on the main Dublin to Cork Railway Line, these proposed works are encompassed by section 2(1) of the 2001 Act which defines 'railway works' as meaning any works required for the purposes of a railway or any part of a railway, including works ancillary to the purposes aforesaid (such as parking by buses or by persons using vehicles who intend to complete their journey by railway) and relocation of utilities, and in this definition "works" includes any act or operation of construction, excavation, tunnelling, demolition, extension, alteration, reinstatement, reconstruction or making good, repair or renewal".

In our opinion the key issue in this case is the meaning of the word "ancillary" which is defined in the Concise Oxford Dictionary as "providing essential support to a service or activity". It may be argued that it is essential for the purposes of the railway that the existing level crossing be eliminated or upgraded to a higher safety standard but the mitigation of the impact of the closure or upgrade of the crossing on the surrounding road network does not directly affect the operation of the railway.

In summary we believe that the evidence and analysis cited by Mr Bradley in paragraphs 1-16 in support of his conclusion in paragraph 17 of his Opinion could also support the following conclusions:

1. The works involved to the closure (or upgrade to four barrier CCTV) of the level crossing at Ballycoskery XC212 and the demolition of the disused railway building could be considered to be works required for the safe operation of the railway and could therefore be approved under a railway works order.
2. The upgrade of the adjoining road network and the construction of a new car park for the school are specific planning objectives of the Fermoy Municipal District Local Area Plan (LAP), 2017³ which were adopted without any reference to the operation of the railway. While the implementation of these objectives would mitigate the effects of a complete closure of the level crossing, the proposed roads, footpaths and school car park will not be used by "persons intending to complete their journey by train" as there is no train station at Ballycoskery. These works cannot be approved under a railway order as they are not works which are required for, or ancillary to, the purposes of the operation of the railway. They should therefore be the subject of a parallel but separate S.179/Part 8 process.
3. All of the works proposed at Ballycoskery XC212 could be implemented under a single S.179/Part 8 process by CIE in partnership with Cork County Council. It could therefore be considered that this is the best way to achieve the parallel objectives of CIE and Cork County Council in a legally valid and integrated way.

Strategic Environmental Impact Assessment

Section 37(2)(e) of the 2001 Transport Act states that an application under subsection (1) shall be made in such form as the Board may specify and shall be accompanied by:

a statement of the likely effects on the environment (referred to subsequently in this Part as an "environmental impact assessment") of the proposed railway works.

³ Hereafter referred to as the 'LAP'

AN BORD PLEANÁLA

08 JUL 2021

LTR DATED _____ FROM _____

LDG- _____

ASP- _____

The Act does not address the issue as to whether the impact assessment should also be carried out at the strategic level. The Applicants EIAR Screening and Scoping Report, which was prepared for the pre-application public consultation stated that the requirement under Section 37(2)(e):

"effectively negates the screening stage for EIA as it is mandatory to submit a 'statement of the likely effects on the environment' to accompany the application for a Railway Order. For the purposes of the proposed project and this report, the 'statement' is interpreted as an Environmental Impact Assessment Report (EIAR)".

The minutes of the first consultation meeting with the Board on 17/10/2019 note that

"The Board enquired as to whether consideration had been given to applying for a separate consent for each individual site as opposed to applying for a Railway Order application for all seven sites. It also remarked that it considered an EIAR for all seven sites as the best approach in terms of efficiency and with respect to the assessment of cumulative effects".

The minutes also note that in response to the prospective Applicant's query on the matter of EIA Scoping:

"the Board said that it does not respond formally to scoping reports forwarded to it during the pre-app process. A formal application for a scoping opinion may be made to the Board separate to the pre-app process".

Although no formal application for a screening or scoping opinion was made, the Board's Direction of 08/06/2020 included the statement that:

"The Board also agreed with the Inspector that an EIAR will be required, in which the cumulative impacts of the works will be considered".

In our opinion, the fact that the cumulative impact of the seven separate projects would be considered in a joint EIAR does not remove the requirement for a formal screening for strategic environmental impact assessment. The scheme proposed by the Applicant is composed of separate projects which claim justification under a national railway strategy and are only related to the extent that they adjoin the same railway line and are proposed by the same statutory authority.

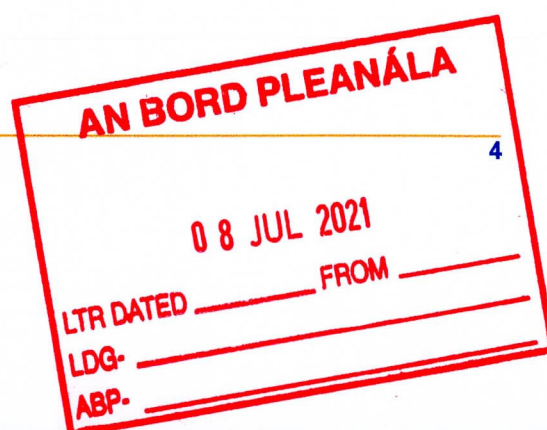
While EIAR may be mandatory for any railway order, each of the seven projects project is located in a different planning, environmental and ecological context which requires a separate project-specific scoping exercise. In our opinion, the use of a single EIAR to assess all seven projects has precluded a proper consideration of the alternatives and mitigation measures appropriate to each site. At the same time no significant cumulative impacts between the seven projects emerged in Chapter 17 of the EIAR.

While the seven projects differ in terms of their locational context and their interaction with the local environment, the need for each project, as set out in Section 1.4 of the Applicant's Planning Compliance report, is based on national strategies adopted for Coras Iompair Éireann under:

- 2030 Iarnród Éireann Rail Network Strategy Review, 2011
- Commission for Railway Regulation Railway Safety Performance in Ireland, 2018
- Commission for Railway Regulation Statement of Strategy 2018 – 2020

In our opinion a Strategic Environmental Impact Assessment should be required by the Board in this case because the Applicant has relied on these strategic policy documents:

- (a) to limit the range of alternatives considered;
- (b) to determine the relative weight given to the safety criteria used to assess the alternatives considered; and
- (c) to limit the range of mitigation measures proposed.



Planning Assessment

The application for the railway order under NA04.310286 includes a planning compliance statement by Jacobs which notes in regard to XC212 Ballycoskery that:

"The majority of the proposed Project is within the Ballyhea Development boundary ('Existing Built Up area') with some eastern extents of the proposed road outside this designation (see Appendix F). Applicable zoning objectives include C-01 Community (National School) "Use for School Expansion" is located outside and further to the north of the proposed Project. A proposed road alignment (U-01) runs from the south of the existing housing estate to the east across the railway line and outside the Ballyhea Development Boundary in a similar location to that of the proposed Project.

The proposed Project is partially within Flood Zone A and the Blackwater SAC is 0.5km to the west. Specifically, in regard to Ballyhea the LAP sets out the following: "Over the lifetime of this Local Area Plan it is envisaged that Ballyhea will cater for a modest level of development, proportionate to its existing size and sensitive to the high landscape value of the area. The village is most suited to the development of individual dwellings, subject to the provision of adequate services. Water quality impacts and/or licence compliance issues associated with wastewater infrastructure serving Ballyhea may need to be addressed to accommodate further growth. Reservation is made for possible construction of a new road realignment as detailed on the accompanying map. This may result in the creation of a new parking area in front of the school." (p. 156) (original emphasis).

The MD LAP has specifically reserved an area for a new road alignment similar to the proposed Project. Also, it suggests that a car parking area is could possibly be created in front of the school, again, in line with the proposed Project".

It is therefore concluded in Appendix D of the compliance statement that:

"The proposed Project follows a similar alignment as that shown in the LAP and also makes provision for a car park to the front of the Ballyhea National School. The proposed Project is entirely in line with and will bring to fruition the objective of the LAP in regard to the creation of both the new road and car park in Ballyhea Village"

We do not agree that the proposed Project is "entirely in line" with the objective of the LAP for the following reasons:

The scheme as shown in the LAP extends to a point midway between the entrances to Beechwood and the Parochial House whereas the proposed Project affects the entire frontage of the Parochial house and the western part of the frontage to the Church. This alteration to the physical extent of the scheme is likely to result in a major increase in the impact on the built heritage of the Church properties and particularly the setting of the gates to the Parochial House

The revised road and parking layout as proposed in the LAP is clearly a roads project to be implemented by the County Council as roads authority for the area. There is no reference to any justification for the scheme on grounds of rail safety and there is no indication as to whether the proposed road would cross the railway by an overbridge, underbridge or a four gate CCTV level crossing.

The interpretation of the planning objectives in the LAP should have regard to the issues raised in the S.179/Part 8 process which are summarised in Appendix H of the compliance statement. This set out the concerns raised by the local community and the conclusion reached by the Planning Authority that:

"following recent public meetings and submissions received regarding the proposal, further assessment of alternative options needs to be examined. Accordingly, Cork County Council has terminated the Part 8 planning process. When and if an alternative solution requiring planning is identified, a new planning process will commence"

This statement clarifies that the purpose of Objective U-01, which was subsequently adopted in the 2017 LAP, was to provide the policy context for a new S.179/Part 8 planning process which would address the concerns raised in regard to the aborted scheme and allow the elected members of Cork County Council to decide whether or not to proceed with a revised scheme. In our opinion it is not appropriate to use a roads objective, which was adopted to support the S.179/Part 8 process for an alternative solution, to justify an application for a railway order for what is essentially the original layout and design.

Design Approach

The minutes of the first consultation meeting with the Board on 17/10/2019 note, in regard to the Applicant's design approach, that:

The Board's representatives commented that there is a need for a proportionate balance between the optimum engineering design and solutions which take account of planning and environmental matters. In particular, the possible solution (overbridges and roads) at Ballycoskery/Newtown needs very careful consideration in terms of the scale and extent of the works proposed and the impact on pedestrian/cycle movements and community connectivity.

In our opinion the Applicant has failed to address the Board's concerns as the design of the proposed structures is dominated by engineering considerations. The overbridge proposed at Ballycoskery is a generic design which is used on motorway projects throughout the country. There has been no attempt to arrive at a design solution which respects the topography, urban form or built heritage of Ballycoskery or the tradition of Victorian railway engineering in Ireland

It is plainly evident that no account has been taken of the interconnectivity of both sides of the existing crossing, the local population's daily need to use of the crossing, and in particular the local schoolchildren and their parents' and teachers' needs to do so. This does not even take account of the church and school interconnectivity, something that involves regular communication and travel (often en masse) between the two locations.

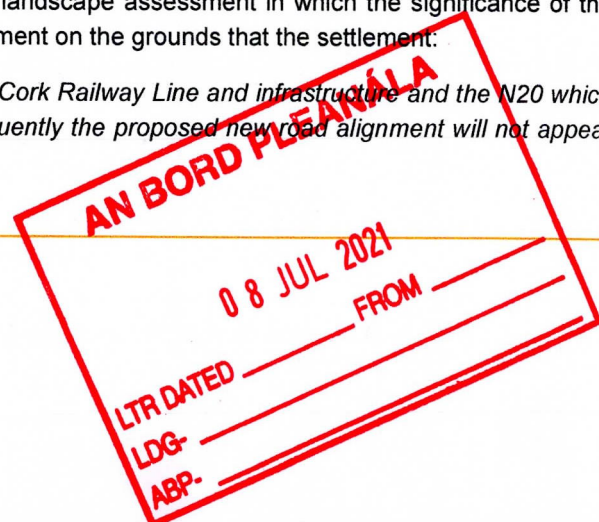
We also consider that the level of detail provided in the drawings and in the visual impact assessment is not adequate to allow the Board to assess the impact on of the village. Our comments on visual impact, built heritage and natural heritage in the following sections are made without prejudice to the argument that the Applicant has not provided the standard of architectural design and detailing which would be required if a planning application was made for the proposed works.

Visual impact Assessment

The Applicant's planning compliance statement acknowledges that Ballycoskery differs from the other sites in that the works are within the development boundary of the village and it is one of a limited number of sites which are designated as being of high landscape value. Chapter 13 of the EIAR acknowledges that during the consultation process concerns were raised in regard to noise, visual impact, light and overshadowing and the proximity of the proposed bridge to the houses at the front of the Beechwood Estate. It also notes that the proposed works will involve the removal of 15 mature trees.

We do not agree with the approach adopted in the landscape assessment in which the significance of the village setting is discounted in the landscape assessment on the grounds that the settlement:

"is already influenced by the existing Dublin-Cork Railway Line and infrastructure and the N20 which occurs immediately to the west, and consequently the proposed new road alignment will not appear incongruous within this small village"



The impact of the N 20 will be significantly reduced when the M20 is constructed.

The visual impact assessment concedes that the impact on the three selected vantage points will be moderate to high. In our opinion the scale of the proposed road and bridge is excessive in a village setting and the scheme should have been designed in accordance with the Design Manual for Urban Roads and Streets (DMURS). We do not accept that the mitigation measures proposed will reduce the residual impact to slight to moderate as the type of planting proposed will not provide adequate screening for the massive retaining structures and will not compensate for the permanent loss of distant views of the Ballyhoura Mountains. As the existing and proposed vegetation is mainly deciduous the photomontages do not provide an accurate indication the impact of the proposed structures during the winter months. We would also argue that the assessment should have included vantage points which would show the impact on the church and the parochial house which are of significant conservation value and are important elements of the village form.

Impact on Built Heritage

Chapter 12 of the EIAR, which deals with Cultural Heritage, acknowledges the importance of the group of ecclesiastical features in Ballycoskery including St Mary's Church (CO008-069/NIAH 20900804) [AH010] built in 1831 and the associated parochial house (NIAH 20900805) [AH011] built in 1905.

It is assumed that, during the construction phase, no impact will occur to the church (AY025/AH010) although groundworks have the potential to encounter skeletal remains from the burial ground. The significance of the effect is predicted to be slight negative.

Slight negative impacts are also predicted for the Parochial House (AH011) where it is acknowledged that curtilage features are likely to be impacted. There is no detailed assessment of the nature of these potential impacts but the fact that photographs of the gates of the parochial house have been included in Plate 12.9 and 12.10 implies that the entrance and road boundary wall may be affected. This would be a very significant potential impact as the importance of the gates is highlighted in the National Inventory of Architectural Heritage (NIAH 20900805).

Apart from the potential impact on the curtilage of the Parochial House, the proposed layout of the intersection between the existing and the proposed roads would have a significantly adverse impact on the historic setting of the gates. They would no longer have direct access to the main carriageway and would be isolated within a small layby. In our opinion the impact on the built heritage of the village is so severe that the scheme should be revised to an underbridge or a CCTV crossing so that there is no impact on the curtilage or setting of the Church or the Parochial House.

Impact on Natural Heritage

Chapter 7 of the EIAR notes that the wet ditch at the base of the existing railway embankment at Ballycoskery is hydrologically linked to the Newton River which falls within the habitat category of "depositing lowland rivers (FW2)" and provides a direct link to the Blackwater River (Cork/Waterford) Special Area of Conservation (SAC). This habitat category is valued as being of International Importance and the wet ditch in question supports the Annex I habitat (6430) Hydrophilous tall herb swamp communities, which is valued as being of National Importance and of high conservation concern.

Pressures on the habitat include invasive species; and agricultural intensification and drainage in the lowlands. Based on the latest Article 17 reporting 13 the Overall Status is assessed as Bad with a deteriorating trend. This change in trend since 2013 represents a genuine decline due to range contraction and a decline in structure and functions. No invasive species were recorded on site at Ballycoskery during the field surveys. If the existing crossing was upgraded to CCTV, it is unlikely then that there would be any change to this habitat given its location fenced off from grazing, and the topography of the site water draining from the field to the

north and from the railway embankment. The proposed construction of an overbridge would involve the direct loss of a substantial part of the habitat and there could be a risk to the integrity of the remaining habitat outside the footprint of the works due to change in the drainage regime.

The EIAR also acknowledges that, during construction, there is a risk of release of contaminated surface water runoff and sediments into the River Blackwater SAC which would be likely to result in a significant effect on this European site at a local to county geographic scale. While there is a hydrological link to the Freshwater Pearl Mussel colonies in the SAC, the EIAR concludes that any pollution events due to the works would be likely dissipate long before reaching the freshwater pearl mussel population downstream. In our opinion this is not an adequate response as the objective for this SAC is to restore the population of the Freshwater Pearl Mussel throughout the SAC and not just to maintain existing colonies.

In regard to the Annex I habitat (6430) Hydrophilous tall herb swamp, the indicative Mitigation Strategy in Appendix 7H of the EIAR is based on translocating the area of tall herb swamps (FS2), which will be lost under the footprint of the proposed Project to an unspecified receptor site based on a like for like area basis. In our opinion the significant potential impact of the proposed works on a habitat which is of National Importance and of high conservation concern should be avoided rather than compensated by considering alternative options for the proposed works.

In regard to bats, the EIAR identified one tree as having moderate potential to support a bat roost and one building as having high bat roost potential. The EIAR acknowledges that a total of 349m of treeline and 103m of hedgerow will be permanently lost under the footprint of the proposed road but concludes that there is suitable alternative habitat available in the immediate vicinity. As a result, the loss of available foraging habitat and hedgerows/treelines used by commuting bats is only considered to be a significant impact at the local geographic scale.

We have been advised that there is a maternity bat roost in the attic of the Parochial House which immediately adjoins the proposed works. This was not identified in the EIAR even though there is clear external evidence to the presence of a roost which would be directly affected by the loss of the adjacent treeline. In our opinion the potential impact on this roost warrants consideration of alternative layouts and design, as there is real possibility that the varied species of bats that roost there may include Habitats Directive protected species.

Consideration of Alternatives

We believe that the consideration of alternatives has not been adequately addressed in the design, assessment and presentation of the development proposed at Ballycoskery. This is an important issue not only in relation to the EIA Directive but also in regard to the planning objectives for the site and the legitimacy of any future compulsory purchase procedure.

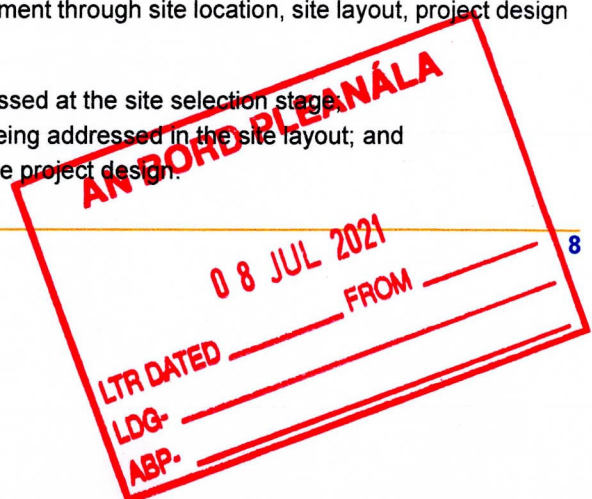
The EIA Directive

Section 3.4 of the 2017 draft EPA Guidelines on EIAR notes that Annex IV(2) of the amended EIA Directive requires an EIAR to include

'A description of the reasonable alternatives (for example in terms of project design, technology, location, size and scale) studied by the developer, which are relevant to the proposed project and its specific characteristics, and an indication of the main reasons for selecting the chosen option, including a comparison of the environmental effects.'

Fig 3.4 of the Guidelines illustrates a sequence of assessment through site location, site layout, project design and process design with, for example:

- avoidance of environmental impacts being addressed at the site selection stage;
- potential to affect off site environmental assets being addressed in the site layout; and
- likely effect on neighbours being considered in the project design.



We are not satisfied that a proper consideration of alternatives for the Ballycoskery Crossing was carried out by CIE because:

- (a) the option of upgrading the crossing to 4 Barrier CCTV was excluded at the preliminary stage;
- (b) the planning history and planning policy context were not reflected in the assessment criteria.

These factors influenced the conclusion reached in regard to Ballycoskery that:

"The high risk ranking for the site as a result of a high number of sensitive receptors ruled out CCTV as a potential solution at this site. As a result, an overbridge was determined to be the Preferred Solution".

In our opinion the option of a CCTV crossing should have been included in the comparative assessment in Table 2.14 of the EIAR and the secondary criteria should have included planning considerations, as well as rail safety and the extent of compulsory purchase required. We also believe that the decisions not to carry out a Strategic EIA and to prepare a single EIAR for seven sites precluded a site-specific approach to the consideration of alternatives, the assessment criteria and the avoidance or mitigation of effects. As a result, the planning history of Ballycoskery and its location within a village were not given due consideration in the design and assessment of the Project.

The Planning Objectives for the Site

The S.179/Part 8 process for the Ballycoskery Crossing, which was terminated in 2010, concluded that further assessment of alternative options was needed and that the planning process should only recommence if and when an alternative solution was identified. The current proposal for Ballycoskery is so similar to the previous proposal that it could not be described as an alternative solution.

These issues were not addressed because the planning history and the current planning status of the site are not accurately reflected in Table 2.4 of the EIAR. The previous S.179/Part 8 process is described as "withdrawn" when it would be more accurate to state that it was decided not to proceed with the project in accordance with Section 179(4) of the Planning Act. Furthermore, the reference to the LAP should have clarified that the purpose of Objective U-01 was to achieve an alternative to the overbridge which was previously proposed and not a reapplication of a proposal which was unacceptable to the planning authority.

The Compulsory Purchase Procedure

Paragraph 8 of the legal opinion prepared in support of the application for the railway works order highlights the fact that "one of the main aspects of a Railway Order is the power to compulsorily acquire land". The Board should therefore have regard to the case law in regard to the compulsory purchase procedure, including for example the decision of the Supreme Court in *Thomas Reid v Industrial Development Agency, Ireland and the Attorney General* [2015 IESC 82]. In paragraph 44, McKechnie J. emphasised that the statutory power to compulsorily acquire land must be:

"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"

The question to be addressed in this case is whether the legitimate object of improving rail safety at the existing Ballycoskery crossing justifies the extent of the compulsory acquisition which is proposed by CIE in this case. We have already made the case that the works involved in the provision of a road, overbridge and school car park are outside the scope of a railway works order as they are not required for the purposes of a railway or any part of a railway, including works ancillary to the purposes aforesaid. Without prejudice to that point we would also argue that the failure to include the option of a CCTV crossing in the comparative assessment in Table 2.14 of the EIAR undermines the case for a compulsory purchase order as the CCTV option could be delivered with little or no requirement for compulsory acquisition. While the proposed overbridge may result in a higher

standard of rail safety than a CCTV crossing, the extent of the compulsory acquisition required would be disproportionate to the reduction in risk.

Summary and Conclusion

In considering the proposal by CIE under NA04.310286 to build a new road and overbridge at Ballycoskery, the Board is obliged by Section 42(1)(g) of the 2001 Transport Act (as amended) to have regard to the likely consequences for proper planning and sustainable development of Ballyhea village. The relevant planning objectives for the village are set out in the Fermoy Municipal District Local Area Plan and in the decision made by Cork County Council not to approve an overbridge under the S.179/Part 8 process and to seek an alternative solution.

Notwithstanding the Board Direction issued on 08/06/2020 under ABP 305149-19, we believe that most of the works proposed by CIE at Ballycoskery are outside the scope of a railway works order as they are not "required for the purposes of a railway or any part of a railway, including works ancillary to the purposes aforesaid". We also believe that the Board should have screened the seven projects for Strategic Environmental Impact Assessment before advising that separate EIARs should be prepared for each site.

We do not accept that the works proposed at the Ballycoskery XC212 level crossing are "entirely in line with" the objective of the LAP in regard to the creation of a new road and car park in Ballyhea Village. The relevant objective in the LAP was adopted in order to achieve an alternative solution to the overbridge proposed by CIE.

The Applicants' planning compliance statement and EIAR fail to address the concerns raised by the Board at the pre-application consultation that, unlike the other six sites, the works proposed at Ballycoskery are within the development boundary of a designated settlement and could have a significantly adverse impact on the existing character and future development potential of the village. The design proposed is a generic engineering solution which is not properly detailed from an architectural viewpoint and fails to have regard to the sensitivity of the location.

While it is acknowledged in the EIAR that there will be significant effects on:

- (a) the visual character of the area;
- (b) the built heritage of the ecclesiastical sites and particularly the gates of the parochial house; and
- (c) the Annex I habitat (6430) Hydrophilous tall herb swamp;

the approach adopted is to mitigate rather than to avoid these effects. The bat roost in the attic of the Parochial House has also been overlooked.

The failure of the project design to avoid (rather than mitigate) significant effects on the village is primarily due to the fact that the potential effects were not adequately addressed during the consideration of alternative site locations, site layouts and project designs. In particular the integrity of the assessment process was undermined by the decision to exclude the option of a CCTV crossing at the preliminary stage. We also believe that the criteria used for the comparative analysis did not give appropriate weight to visual character, built heritage and biodiversity and this resulted in a lower ranking for the underbridge option.

Finally, we ask the Board to have due regard to the fact that the approval of the proposed railway order would result in the compulsory acquisition of a substantial amount of the development land within the village including the property of the Trustees of the Diocese of Cloyne. Case law requires that any compulsory purchase orders should be used to the least possible extent and for purposes which are clearly within the powers of the statutory body. In our opinion the Applicant has failed to give due consideration to the option of upgrading the Ballycoskery crossing to 4 Barrier CCTV and this would undermine the validity of any decision to approve the railway works and the compulsory purchase order as currently proposed by CIE.

