

OPINION

Querist: C oras Iompair  ireann

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Date: 28th May 2018

Re: Proposed replacement of seven manned level crossings on the main Dublin to Cork Railway Line

Introduction

1. My advices have been sought in relation to proposed works at seven manned level crossings on the main Dublin to Cork Railway Line.
2. Essentially it is proposed to replace these seven manned level crossings with bridges. My understanding, subject to confirmation, is that the crossings are on the public road.
3. While these advices address the proposed works to the seven manned level crossings, I understand that Querist is also giving consideration to the closing of a further eleven numbered pedestrian, User Worked (Field, Occupation, etc.) and CCTV level crossings which are also on the main Dublin to Cork Railway Line.
4. I am instructed that the Iarnr od  ireann Board approved the preparation of a feasibility study into the proposed elimination (and replacement) of the seven manned level crossings on the main Dublin to Cork Railway Line and that issues which arose included *inter alia* property related matters such as

potentially seeking to compulsory purchase land, planning and environmental considerations, safety, costs and risk profile. I am further instructed that none of these schemes were previously progressed due to a lack of funding. In 2017, it was estimated that it would cost in the region of €12.3 million to automate all of the said seven manned level crossings.

The designations

5. Helpfully, the briefing note which accompanied the request for advices, set out four different types of designations for manned level crossings, as follows:

- (1) C type- gates normally closed to road traffic;
- (2) CX type- gates normally open to road traffic;
- (3) CD type-gates normally open to road traffic by day and normally closed at other times;
- (4) CN type- gates normally open to road traffic by night and normally closed at other times.

The seven manned level crossings

6. The first of the manned level crossings examined is located at Fantstown, Limerick. It is a C type. It is noted that a process was initiated by Limerick County Council pursuant to section 73 of the Roads Act 1993 which sought to close the crossing by extinguishing the public right of way. At an oral hearing the inspector appointed recommended closure which was supported by the management/executive of Limerick County Council. However, some of the Local Elected Members/Councillors objected despite an offer of €250,000 to the Council to upgrade an alternative route. Essentially, progress has been halted since 2009 and the 'section 73' motion was never put before the Council. It is noted that the area is close to archaeological monuments. An outline overbridge scheme was developed in 2011 at a cost estimate of €1.6 million.

7. The second of the manned level crossings examined is located at Thomastown, Limerick. Again it is a C type. An outline overbridge scheme was developed in 2011 at a cost estimate of €1.6 million and it, too, is close to archaeological monuments. A significant issue here relates to the necessity to acquire lands from a landowner who is not willing to dispose of the required lands and therefore may involve the compulsory purchase of certain lands.
8. The third of the manned level crossings examined is located at Ballyhea, Cork. It is a CD type. An outline overbridge scheme was developed in 2011 at a cost estimate of €3.4 million. Three significant issues which arise here are the (i) the refusal of access by a landowner into lands required for the purpose of carrying out survey works and (ii) the proximate location to the River Blackwater SAC (iii) the proximate location of known archaeological monuments.
9. The fourth of the manned level crossings examined is located at Newtown, Cork. It is a CD type. It is a joint scheme with the fifth of the manned level crossings examined located at Ballycoskery, Cork (which is also a CD type). Thus a new alternative access road at Newtown is proposed to be connected to a new overbridge at Ballycoskery. The estimated cost of the scheme proposed by Iarnród Éireann is €2.75m. 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.
10. The sixth of the manned level crossings examined is located at Shinanagh, Cork. It is a CD type. The level crossing is directly adjacent to the existing N20 which is due to be downgraded on the completion of the M20 in 2027. My understanding, subject to clarification, is that the proposal is for a new overbridge and a new alternative access route via an existing overbridge. The cost estimate of the alternative access is €2.0m and the overbridge is €3.0m. The issues which arise here are (i) the fact that no discussions have taken place with affected landowners (ii) the proximate location to the River

Blackwater SAC (iii) the proximate location of known archaeological monuments.

11. The seventh of the manned level crossings examined is located at Buttevant, Cork. It is a CX type. Notwithstanding that this overbridge scheme was developed to planning stage in 2011 in conjunction with Cork County Council and that engagement took place with landowners and their solicitors and engineers, the application was not progressed due to funding constraints. The issues which arise here are (i) the proximate location to the River Blackwater SAC (ii) the proximate location of known archaeological monuments. The estimated cost is €2.5m.

Railway Order

12. The Transport (Railway Infrastructure) Act 2001 (as amended)¹ provides for the application for a Railway Order by *inter alia* Coras Iompair Éireann² to An Bord Pleanála³. The prior written consent of the Dublin Transport Authority⁴ is required before an application is made when an application is within the DTA's functional area.
13. In my opinion, the proposed replacement of the aforesaid seven manned level crossings on the public road (or otherwise) with bridges, and all associated works, would be best achieved by CIÉ applying for a Railway Order to An Bord Pleanála.
14. For example, section 2(1) of the 2001 Act 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,

¹ Hereafter referred to as "the 2001 Act".

² Hereafter referred to as "CIÉ".

³ Hereafter also referred to as "the Board".

⁴ Hereafter referred to as "the DTA".

alteration, reinstatement, reconstruction, making good, repair or renewal. Furthermore, 'railway' is defined as meaning a railway (whether above, on or under the ground) whose operation is authorised by a railway order and 'railway infrastructure' means any land, buildings, structures, equipment, systems, vehicles, services or other thing used in connection with, or necessary or incidental to, the movement of passengers or freight by railway.

15. In addition, all of the issues identified as significant matters arising from the consideration of the replacement of the seven manned level crossings can, in my view, be suitably addressed in a Railway Order.

16. For example, section 36 of the 2001 Act allows CIÉ to appoint authorised persons to carry out surveys and inspections on any land and do the following: (a) inspect and survey the land and make any inquiry, investigation or examination for the purpose of ascertaining whether or not the land is suitable for the purposes of the construction of a railway; (b) carry out any preliminary or incidental investigation or examination (c) bring onto the land such other persons or equipment as may reasonably be considered as necessary for the purposes of his or her functions under section 36; (d) line sight, drill, bore, probe or excavate, or take such samples and carry out such tests as he or she reasonably considers necessary or expedient for the purposes of such functions.

17. The provisions of a proposed Railway Order would also address any planning and environmental issues.

18. Arising from amendments to the 2001 Act, by the Dublin Transport Authority Act 2008, certain development consisting of the carrying out of railway works described therein are deemed to be exempted development for the purposes of the Planning and Development Act 2000 (as amended)⁵ and Part IV of the 2000 Act (dealing with *inter alia* architectural heritage, protected structures,

⁵ Hereafter referred to as "the 2000 Act."

architectural conservation areas and areas of special planning control) is dis-applied.

19. As presently enacted, the 2001 Act requires an application for a Railway Order to be accompanied by (what is now known as) an Environmental Impact Assessment Report⁶ (previously referred to as an Environmental Impact Statement) which provides *inter alia* for a statement of the likely effects on the environment of the proposed railway works.

20. In addition (and while further details of these matters will be required) given the proximity of the River Blackwater SAC, a Natura Impact Assessment⁷ under the Habitats Directive may also be required. Helpful guidance on the application of the Habitats Directive is set out in the NPWS Guidance Document in relation to the carrying out of an Appropriate Assessment⁸.

21. There have been quite a number of recent decisions of the Irish Supreme Court and the Court of Justice of the European Union⁹ dealing with issues concerning the EIA and Habitats Directives. For example, in *Case C-323/17 People Over Wind/Peter Sweetman v. Coillte Teoranta* (12th April 2018), the CJEU decided that Article 6(3) of the Habitats Directive (Council Directive 92/43/EEC) must be interpreted as meaning that, in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site. In one respect this decision is not at all surprising and in this regard it is noted that the NPWS Guidance Document (pp 27-28) (2010) had *inter alia* described in the context of screening for AA (Stage 1) that “screening should be undertaken without the inclusion of mitigation, unless potential impacts clearly can be avoided through the modification or redesign of the plan or project, in which case the screening process is repeated on the altered plan. The

⁶ Also referred to as “EIA” arising from the provisions of the EIA Directive 2014/52/EU.

⁷ Hereafter referred to as an “NIS.”

⁸ Hereafter referred to as an “AA.”

⁹ CJEU.

greatest level of evidence and justification will be needed in circumstances when the process ends at screening stage on grounds of no impact.”

22. While these matters can be addressed at a later stage, in summary there are four stages as part of the AA process:

- Stage 1- screening for AA (Article 6(3)). If the effects are deemed to be significant, potentially significant, or uncertain, or if the screening process becomes overly complicated, then the process must proceed to Stage 2 (AA);
- Stage 2 – AA (Article 6(3)) – whether a development proposal alone or in combination with other projects or plans, will have adverse effects on the integrity of a Natura 2000 site, and includes any mitigation measures necessary to avoid, reduce or offset negative effects and this requires the submission of an NIS, which has been helpfully described by the NPWS Guidance document as “the report of a targeted professional scientific examination of the plan or project and the relevant Natura 2000 sites, to identify and characterise any possible implications for the site in view of the site’s conservation objectives, taking account of in combination effects” and should provide information to enable the competent authority (i.e. An Bord Pleanála) to carry out the appropriate assessment. The NPWS Guidance states that “if the assessment is negative, i.e. adverse effects on the integrity of a site cannot be excluded, then the process must proceed to Stage 4, or the plan or project should be abandoned.
- Stage 3-alternative solutions- the NPWS Guidance document states that Stage 3 examines any alternative solutions or options that could enable the plan or project to proceed without adverse effects on the integrity of a Natura 2000 site. If so identified, the process must return to Stage 2 as alternatives will require appropriate assessment in order to proceed. It further provides that demonstrating that all reasonable alternatives have been considered and assessed, and that the least

damaging option has been selected, is necessary to progress to Stage 4.

- Stage 4- this is the derogation stage provided by Article 6(4) of the Habitats Directive which examines whether there are “Imperative Reasons of Overriding Public Interest” (IROPI) for allowing a plan or project that will have adverse effects on the integrity of a Natura 2000 site to proceed in cases where it has been established that no less damaging alternative solution exists. Importantly, as the NPWS Guidance document points, out extra protection measures for Annex I priority habitats come into effect when making the IROPI case. Compensatory measures must be proposed and assessed and the Commission must be informed of the compensatory measures. Compensatory measures must be practical, implementable, likely to succeed, proportionate and enforceable, and they must be approved by the Minister for the Environment, Heritage and Local Government.

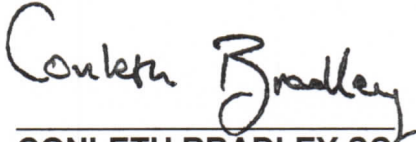
23. It is important to point out that while CIÉ would prepare and submit the documents comprising an EIA (EIA) and NIS (AA) as part of its application for a Railway Order, it is An Bord Pleanála –as the competent authority- which carries out the environmental assessment and the appropriate assessment.

24. A Railway Order granted by An Bord Pleanála under the 2001 Act also has effect as if it was **a compulsory purchase order** referred to in section 10(1) of the Local Government (No.2) Act 1960 (as inserted by section 86 of the Housing Act, 1966).

25. Further, the provisions of a Railway Order (in its articles and schedules) can address land over which rights of way and other easements may be acquired, public and private rights of way which may be required to be extinguished, new roads which may require to be constructed, public roads which may require to be altered, agreements with the relevant planning authorities, as well as containing conditions which An Bord Pleanála may prescribe in the event of granting a Railway Order.

Conclusion

26. In summary, therefore, having regard to the issues involved and identified by Querist in the proposed development to replace seven manned level crossings with bridges on the main Dublin to Cork Railway Line, I am of the opinion that this would best be achieved by CIÉ applying for a Railway Order to An Bord Pleanála under the provisions of the Transport (Railway Infrastructure) Act 2001 (as amended).
27. I can advise further in relation to the overall process involved in the making of the application to An Bord Pleanála (including publication and notification requirements before an application is made for a Railway Order) and in the drafting of the proposed Railway Order having regard to the nature of the proposed development.


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