

**Uimhir Thagarta Uathúil:** SD-C226-31

**Stádas:** Submitted

**Submission:** Echelon  
Submission

**Údar:** A&L

Goodbody

**Comhairliúchán:**

Proposed Material Amendments to the Draft South Dublin  
County Development Plan

**Dáta a cuireadh isteach:** 26.04.2022 -  
10:06

---

## Chapter 13: Implementation and Monitoring

**Caibidil:** Volume 1 » Chapter 13: Implementation and  
Monitoring

**Select Proposed Amendment on which you are commenting:** Amendment 13.1, Amendment 13.2, Amendment 13.3

Dear Sir or Madam

We make this submission on behalf of our client, Echelon Data Centres (**Echelon**), The Cubes Offices, Beacon South Quarter, Dublin 18, in respect of the South Dublin County Council's (**SDCC**) Draft Development Plan 2022 - 2028 (the **Draft Plan**) and certain proposed material amendments, which are set out below (the **Material Amendments**).

We refer to the submission of John Spain Associates (the **JSA Submission**), which addresses the planning implications of the Material Amendments on Echelon. To the extent that the issues raised by John Spain Associates are relevant to this submission, we adopt the same position. A copy of the JSA Submission is enclosed at Appendix A.

### 1. Background

Echelon is the owner of certain lands at Crag Avenue, Clondalkin Industrial Estate, Clondalkin, Dublin 22 and lands in the townland of Milltown, Newcastle, Co. Dublin. These lands are within the functional area of SDCC and are zoned Objective 'EE' under both the current County Development Plan 2016-2022 (the **Development Plan**) and the Draft Plan, inclusive of the Material Amendments. They are also subject to several extant planning permissions for data centre development.

The purpose of this submission is to set out Echelon's objections to the Material Amendments made by the Elected Members of SDCC to Chapter 13 of the Draft Plan, which, if adopted, will have the effect of precluding any future data centre development on land with a zoning objective of 'REGEN', 'EE' or 'MRC'.

### 2. Proposed Material Amendments

The Material Amendments relevant to this submission are as follows:

#### 2.1 Amendment Ref. 9.5

Amendment Ref. 9.5 is relevant to data centre development, as it amends EDE7 Objective 2, which is set out below (added text in **green**, and omitted text in **red** and struck through):

“To require that space extensive enterprises demonstrate the following:

- The appropriateness of the site for the proposed use having regard to EDE7 Objective 1;
- Strong energy efficiency measures to reduce their carbon footprint in support of national targets towards a net zero carbon economy, including renewable energy generation;
- Maximise on site renewable energy generation to ensure as far as possible 100% powered by renewable energy, where on site demand cannot be met in this way, provide evidence of engagement with power purchase agreements **in Ireland** (PPA);
- Sufficient capacity within the relevant water **and**, wastewater **and electricity** networks to accommodate the use proposed;
- Measures to support the just transition to a circular economy;
- Measures to facilitate district heating or heat networks where excess heat is produced;
- A high-quality design approach to buildings which reduces the massing and visual impact;
- A comprehensive understanding of employment once operational;
- A comprehensive understanding of levels of traffic to and from the site at construction and operation stage;
- Provide evidence of sign up to the Climate Neutral Data Centre Pact.”

**2.2 Amendment Ref. 13.1**

Chapter/Section	Section 13.1 Land-Use Zoning Objectives, Table 13.4
Amendment ref	13.1
Page No.	506
Policy/Objective no.	Amend Table 13.4

Amend Zoning Objective ‘REGEN’ such that “Data Centre” development is “Not Permitted”.

**2.3 Amendment Ref. 13.2**

Chapter/Section	Section 13.1 Land-Use Zoning Objectives, Table 13.9
Amendment ref	13.2
Page No.	510
Policy/Objective no.	Amend Table 13.9

Amend Zoning Objective 'MRC' such that "Data Centre" development is "Not Permitted".

### 2.4 Amendment Ref. 13.3

Chapter/Section	Section 13.1 Land-Use Zoning Objectives, Table 13.10
Amendment ref	13.3
Page No.	512
Policy/Objective no.	Amend Table 13.10

Amend Zoning Objective 'EE' such that "Data Centre" development is "Not Permitted".

### 3. Submission

There are many reasons why Echelon may need to obtain further planning permissions for data centre development on its land. The Material Amendments outlined above could present a significant barrier to achieving permission for data centre development on these lands in future. As such, the Material Amendments are particularly discriminator, as against Echelon. As noted in the JSA Submission, if the Draft Plan is adopted with Material Amendment 13.3 (and consequently 13.1 and 13.2) included, it would be in direct conflict with national and regional planning policy, Government policy, and the relevant legislation.

#### 3.1 Statutory Obligations in the Preparation of Development Plans

Section 12 of the Planning and Development Act 2000, as amended (the **PDA**), sets out a Planning Authority's statutory obligations relative to the making of a new development plan. Section 12(11) provides as follows:

*"In making the development plan under subsection (6) or (10), the members shall be restricted to considering the proper planning and sustainable development of the area to which the development plan relates, the statutory obligations of any local authority in the area and any relevant policies or objectives for the time being of the Government or any Minister of the Government."*

Under section 12(18) of the PDA, those '*statutory obligations*' referred to in section 12(11) are specifically stated to include an obligation to ensure a Development Plan is consistent with the national and regional policy objectives of the National Planning Framework and the relevant Regional Spatial and Economic Strategies, together with the Specific Planning Policy Requirements of any section 28 Guidelines issued by the Minister.

Section 12(18) provides as follows:

*"In this section 'statutory obligations' includes, in relation to a local authority, the obligation to ensure that the development plan is consistent with -*

*(a) the national and regional development objectives specified in -*

*(i) the National Planning Framework, and*

*(ii) the regional spatial and economic strategy,*

and

*(b) specific planning policy requirements specified in guidelines under subsection (1) of section 28."*

Accordingly, SDCC is legally bound not to make, adopt or agree to Development Plan objectives that are in direct conflict with the section 12(8) 'statutory obligations'.

As noted in the JSA Submission, the Material Amendments are in direct conflict with national and regional planning policy, Government policy, and relevant legislation, and are therefore *ultra vires* the Planning Authority.

### **3.2 Lack of Planning Justification for Material Amendments**

The Elected Members of SDCC who have introduced the Material Amendments have not provided any rationale or reasoning as to why data centre development should not be permitted within lands zoned as 'REGEN', 'EE' or 'MRC', which represents such a radical change from the position taken in the current Development Plan. With the Material Amendments, lands zoned as 'REGEN', 'EE' or 'MRC' are now unnecessarily restrictive insofar as it affects land owned by Echelon.

### **3.3 Breach of Constitutional and Human Rights**

In the case of the *Sisters of Charity v Dublin City Council*, the High Court upheld a challenge by the Sisters of Charity to the imposition of more restrictive conditions on development of their lands in the new Dublin City Development Plan. The Sisters of Charity alleged that there was a breach of discrete articles of the Constitution, namely Art. 40 on personal rights and Art. 43 on private property. The specific provisions of those articles relied on are in the following terms:

*"Article 40... 3.2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen..."*

*"Article 43 1.1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods. 1.2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property. 2.1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice. 2.2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good."*

The entitlement of corporate bodies to invoke the constitutional guarantee of private property was asserted by Keane J in the High Court in *Iarnród Éireann v Ireland*. Keane J held that the availability of Article 40.3, as well as Article 43, to protect property rights meant that the property rights of corporate bodies enjoy constitutional protection.

Article 1 (Protection of Property) of the European Convention on Human Rights (**ECHR**) states as follows:

*"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".*

Mr Justice Clark noted that it was not possible to determine whether there was a breach of the above rights, as Dublin City Council had not provided sufficient reasons for their proposals. As such Mr Justice Clarke was not able to determine if the interference was disproportionate.

As noted above, Elected Members of SDCC who have introduced the Material Amendments have not provided any rationale or reasoning as to why data centre development should not be permitted within lands zoned as 'REGEN', 'EE' or 'MRC'. Accordingly, we are not able to consider whether the interference is unlawful. That said, we are not aware of any specific justification (as noted above) and accordingly if the Material Amendments are adopted, SDCC's approach may amount to a breach of Echelon's Constitutional rights and rights under the ECHR.

### **3.4 Irrationality and Natural Justice/Fairness**

There is no relevant material to support a decision to change the zonings of 'REGEN', 'EE' or 'MRC' to exclude data centre development (*O'Keeffe v An Bord Pleanála*). Indeed, for the reasons set out above, any change of zoning would be so unreasonable that no reasonable authority could ever have come to it. As such, its unreasonableness makes it unlawful.

Furthermore, a decision which adversely affects rights without objective justification may be open to review on the basis that it is 'disproportionate'. This may be a breach of the principle of fairness in judicial review and we would assert that the proposed changes to the zonings of 'REGEN', 'EE' or 'MRC' to exclude data centre development contravenes this principle.

### **4. Conclusion**

If the Material Amendments are adopted, those changes will place significant restrictions on our Echelon's ability to obtain future planning permissions. Echelon owns a substantial area of land zoned as 'EE', which is suitable for data centre development.

Furthermore, there are other uses that remain open for consideration within the relevant area that are likely to give rise to the same level of planning impact as data centre development. There is a complete lack of justification for why data centre development has been singled out in these circumstances.

The proposed change to the zonings of 'REGEN', 'EE' or 'MRC' to exclude data centre development will significantly impede how Echelon will be able to deal with its land. It appears to amount to a disproportionate interference and breach Articles 40 and 43 of the Constitution and Article 1 of the ECHR. We are not able to consider this further until and unless the Elected Members of SDCC who have introduced the Material Amendments provide sufficient reasons for the proposed changes.

Furthermore the proposed changes are not based on any supporting material, and are unreasonable. They are also disproportionate in their effect on Echelon.

For the reasons set out above, the proposed amendments to the zonings of 'REGEN', 'EE' or 'MRC', such that data centre development is not permitted in those areas, appear to be unlawful. Accordingly, the zonings of 'REGEN', 'EE' or 'MRC', which include data centre development as being "Open for consideration", as set out in the Development Plan and as set out in the Draft Plan as issued by the Chief Executive Officer, should be retained.

Yours faithfully

**Documents Attached:** Níl