Planning update

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Permitted Development rights and airports

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England edition: this planning update explains key airport-related Permitted Development rights, how they apply to airports in England and some common pitfalls in establishing applicability.

Permitted Development rights (PDRs) are enjoyed by airports and certain other bodies allowing them to undertake operational development at airports without the need to apply for planning permission. They provide the ability to respond to the requirements of regulators, operators and passengers, attract business investment and in the case of the Crown, provide development needed for national security. Schedule 2, Part 8, Class F of the Town and Country Planning General Permitted Development Order 2015 (England GPDO) deals with development at an airport and is the focus of this article. Classes G to N deals with the provision of air traffic services, the carrying out of surveys by the CAA and the use of airport buildings. Part 19 deals with development by the Crown.

Establishing entitlement to PDRs

In practice it is not always clear if PDRs can be used or who they apply to. It is not always clear who and what constitutes a relevant airport operator, what constitutes operational land, what level of consultation is required between the airport and local planning authority, who in practice can act as an agent of the relevant airport operator, and how airports held solely in local authority ownership can benefit from their own equivalent PDR. Schedule 2, Part 8 Class F of the (England GPDO) classifies airport-related permitted development (PD) as:

"The carrying out on operational land by a relevant airport operator or its agent of development (including the erection or alteration of an operational building) in connection with the provision of services and facilities at a relevant airport."

This Permitted Development Right (PDR) is subject to consultation with the local planning authority[1] unless the development is urgently required for the efficient running of the airport and relates to proposals no greater than four metres in height or 200 cubic metres in capacity.

The PDR, which amounts to the grant of planning permission, does not override the requirement for listed building consent, scheduled monument consent or the requirement for consent for any tree protected by a Tree Preservation Order. If a project requires screening for environmental impact assessment (EIA), the PDR does not apply.

To be able to benefit from the PDR, an airport must have an interest in the land and be able to satisfy four criteria – namely that any development:

a. Takes place at a "relevant airport";

b. Is carried out by a "relevant airport operator" or its agent;

c. Is required in connection with the provision of services and facilities at an airport; and

d. Takes place on "operational land".

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[1] The England GPDO does not specify the form consultation should take. In practice wide variations exist in how airports consult with their respective local planning authority. For some it is a simple process of notification, while others adopt a protocol defining how the process should work in both parties' interest. One London Borough has a formal system of raising "considerations" and can introduce "conditions" with a formal sign off covered by a letter of "no objection". Procedurally this can resemble the processing of a planning application with similar statutory timescales and consultation applied. Some include a fee payable to the local planning authority while others do not charge. Experience suggests wide variations exist in practice but most airports work closely with their respective local planning authority on consultation arrangements.

LICHFIELDS

Each criterion is briefly described below.

a) What is a 'relevant airport'?

A relevant airport is one able to levy airport charges under Part 5 of the Airports Act 1986 and is certified by the CAA to do so. An airport must be able to demonstrate an annual financial turnover exceeding £1 million in at least two of the previous three financial years to qualify.

b) Who is the 'relevant airport operator'?

The relevant airport operator must have permission to levy airport charges and manages the airport under Section 57A of the Airports Act 1986. Section 57 excludes from this definition airports which are wholly owned by a local authority[2].

c) What are 'airport operational facilities'?

These cover all development required in connection with the provision of services and facilities at a relevant airport. Operational buildings are those required in connection with the movement or maintenance of aircraft, and the embarkation, disembarkation, loading, discharge or transport of passengers, livestock or goods.

Specified PDR exclusions include a new passenger terminal with floorspace exceeding 500 m2, the extension of an existing passenger terminal to increase its floorspace by more than 15%, a new runway or runway extension, and the erection, reconstruction or material alteration of non-operational buildings.

d) What airport land constitutes 'operational land'?

The PDR only applies to development on operational land. This generally means the area within which airport operations take place e.g. the area covered by the Aerodrome Licence. In practice establishing what constitutes operational land is far more complex because such land has a specific meaning within the planning system.

Operational land as it relates to statutory undertakers (a status which specifically applies to a relevant airport operator) within the planning system is defined by Section 263 (1) of the Town and Country Planning Act 1990 as:

"(a) land which is used for the purpose of carrying on their undertaking, and (b) land in which an interest is held for that purpose."

There are, however, other legal qualifications relating to operational land which serve to narrow its definition. Airport land acquired from a local authority since 1968 is excluded from being treated as operational land, unless it satisfies certain planning requirements.

Prior to the Town and Country Planning Act 1968, land acquired by statutory undertakers for the purpose of carrying on their undertaking planning automatically became operational land with the PDRs that this conferred. This also applied to land already owned by the statutory undertaker and that was not intended to be used for their undertaking but where an intention to use it in this way was subsequently formed. In practice establishing operational land in this manner led to such land sometimes not being used for the statutory undertakers 'purpose'. However, the automatic conferment of operational status of land by acquisition was removed by the introduction of Section 264 of the Town and Country Planning Act 1990.

This section of the 1990 Act applies where an interest in land is held by a statutory undertaker specifically for the purposes of their undertaking and the interest was acquired on or after 6 December 1968 or was held before that date but did not fall to be treated as operational land. In these circumstances the land cannot be treated as operational land unless sections 264 (3) or (4) of the 1990 Act are satisfied.

Section 264 (3) requires that a specific planning permission has been in force for development related to the purpose of the statutory undertaker. Section 264 (4) relates to land transferred under the Airports Act 1986 and, immediately prior to the transfer, the land was operational land of the statutory undertaker.

Establishing whether the land in question constitutes operational land, particularly where the interest was acquired post-1968 can be problematic. It is necessary to show that either all of the land in question benefits from a planning permission[3] specifically related to the purpose of the statutory undertaker i.e. airport use, or otherwise was part of a formal transfer under the Airports Act 1986 and was operational land at that time. Unless one or other can be satisfied entitlement to PDR will not exist.

Where an airport expands by acquiring adjacent land which might for example be agricultural land, even if it is brought within the boundary of the Aerodrome Licence this land will not constitute operational land, and PDRs will not apply unless the conditions set out above can be satisfied.

[2] The Secretary of State (SoS) considered the question of airport ownership in 1996 in an appeal relating to London Biggin Hill Airport (APP/X/95/G5180/2444). The SoS found that as the local authority held the freehold ownership but a private company held a lease and operated the airport day-to-day and levied airport charges then the airport was not wholly owned by a local authority, and as such the private company was "the relevant airport operator" and had the benefit of PDRs.

[3] Qualifying "planning permissions" for the purpose of section 264 (3) include:

a. a specific planning permission granted on application which can include a temporary planning permission;
b. permission granted by a development order authorised by a private or local Act of parliament or Parliamentary Order;
c. specific permission granted by a special development order; and,
d. permission deemed to be granted under Section 90 of the TCPA upon the granting of an authorisation by a government department.

Where there is a lack of clarity or agreement with the local planning authority as to whether an airport benefits from PDRs it is possible to make an application for a Certificate of Proposed Lawful Use or Development under Section 192 of the Town & Country Planning Act 1990. This requires evidence to show that the use and operations are lawful having regard to the above legal provisions. If refused the option of an appeal is available.

In some circumstances, such as where an airport expands onto adjacent land, it may be necessary to establish the planning status in order to qualify as operational land. This could require the submission of a planning application seeking approval for airport use. This can sometimes bring with it the risk of constraining planning conditions and obligations where non previously existed.

Alternative to Part 8

Where an airport is wholly local authority owned and controlled it does not have the benefit of PDR. It is however possible for the local authority under the Town and Country Planning Act 1990 and the Town and Country Planning (Development Management Procedure) Order 2015 to make a Local Development Order authorising similar development to Part 8 of the England GPDO within a defined area of operational land. This puts such airports on a level playing field with other privately owned airports in attracting business investment and carrying out operational development[4].

Who is the relevant airport operator's 'agent of development'?

Part 8 applies to the relevant airport operator or its agent of development. No definition is provided in the England GPDO or the Planning Acts as to who might constitute an 'agent of development' and a practical interpretation suggests this can have a very wide definition. Agency legal principles suggest there should be a clear relationship between the principal party (the relevant airport operator) and the agent who is authorised to work under the control of and on behalf of the principal party. It can be a formal arrangement (with an agency agreement in place) or informal based on verbal undertakings. It can be a one-off event or an on-going arrangement. This would suggest that some qualifying conditions need to exist to establish the status of an 'agent of development'.

These might include:

a. Any development must fall within the terms of Part 8, Class F namely that it is operational development and takes place on operational land. With regard to the need to consult with the local planning authority, Part 8, Class F.2 puts the requirement on the relevant airport operator and not its agent of development. The airport operator would need to undertake the required consultation or to have an agreement in place with the local planning authority allowing the agent to undertake the consultation.

b. The relevant airport operator would need to be fully aware of what is proposed and to give its specific approval to the development in question being carried out and to be satisfied that its agent of development can utilise the PDR and work in a way which benefits the principal party.

c. The responsibilities of each party need to be made explicit in taking forward any development.

Removing the PDR

The PDR can be removed or cannot be used in the following circumstances:

a. If the proposed development triggers the need for an environmental impact assessment (EIA) a planning application will be required. To ensure the PDR applies and to avoid any risk of legal challenge it is prudent to obtain a formal screening opinion from the local planning authority for any environmentally sensitive operational development under the EIA Regulations to confirm that assessment is not required.

b. An Article 4 Direction made by a local planning authority provides a mechanism for withdrawing PDRs if the local planning authority or the Secretary of State believes it is expedient to do so. For example Part 8 rights can take place on Green Belt land, within an Area of Outstanding Natural Beauty (AONB) and in a conservation area. In specified circumstances, a Direction can bring a compensation entitlement. If a Direction is in force, a planning application is required. When removing the PDR of a statutory undertaker, any Direction requires the approval of the Secretary of State[5].

[4] Newquay Cornwall Airport, owned by Cornwall Council introduced an LDO which mirrors Part 8 of the GDPO, thus allowing the airport to operate and expand as if it benefitted from PDR.

[5] 'An Article 4 Direction can bring a compensation entitlement payable by the local planning authority following refusal of a planning application and an unsuccessful appeal. The London Borough of Bromley introduced an Article 4 direction at London Biggin Hill Airport citing issues relating to impact on an adjacent conservation area. Following a successful appeal no claim for compensation was possible.

c. In some instances a condition may be attached to a planning permission made for non-operational development removing PDRs within a specified area for all development including operational development.The National Planning Policy Framework advises against introducing such restrictions, when it states at paragraph 200:

"The use of Article 4 directions to remove national permitted development rights should be limited to situations where this is necessary to protect local amenity or the wellbeing of the area (this could include the use of Article 4 directions to require planning permission for the demolition of local facilities). Similarly, planning conditions should not be used to restrict national permitted development rights unless there is clear justification to do so."

d. Where the annual turnover of the airport falls below £1 million in two consecutive years the Secretary of State can determine that the airport shall cease to be regulated calling into question its status as a 'relevant airport', and as such if PDRs can be used.

PDR and the Crown

Schedule 2, Part 19 of the England GPDO provides PDRs for Crown development. Part 19 Class E deals specifically with operational Crown land relating to an airbase and mirrors Part 8 of the England GPDO relating to civil airports. Specified exceptions include the construction or extension of a runway, a passenger terminal with floorspace exceeding 500m2, the extension or alteration of an existing passenger terminal as existing at 7 June 2006 would be exceeded by 15 percent, the erection, reconstruction or material alteration of a non-operational building.

The PDRs are subject to the relevant airbase operator consulting with the local planning authority before carrying out any development unless it is urgently required and meets scale thresholds.

Conclusion

For airport operators having to confront a strict and changing airport regulatory environment, to provide operational development to support passengers and operators and attract inward investment it is vital to have the speed and certainty which PDRs confer.

The rights are not however automatic and care needs to be exercised in understanding if they apply and in their and execution. The key for an airport operator and a local planning authority is to understand the requirements and ensure such rights are consistently administered.

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