Planning update

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Permitted Development rights and airports

Scotland edition: this planning update explains key airport-related Permitted Development rights, how they apply to airports in Scotland 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. Part 14 (Aviation Development), Class 44 of the Town and Country Planning (General Permitted Development Order) (Scotland) Order 1992 (Scotland GPDO) enables airports to undertake certain operational development without the need for a formal planning application, and is the focus of this article. Classes 45 and 46 deal with air navigation development at an airport; Classes 47 – 51 deal with development by the Civil Aviation Authority (CAA) and Class 52 the use of airport buildings managed by relevant airport operators for purposes connected with air transport services.

Establishing entitlement to Class 44 PDR

In practice it is not always clear if PDRs can be used or who they apply to. It is not always clear who or what constitutes a relevant airport operator, what constitutes operational land, what level of consultation is required between the airport and local planning authority and who in practice can act as an agent of the relevant airport operator. Part 14, Class 44 of the (GDPO) classifies airport-related permitted development 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'.

Benefiting from 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 it consists of: the carrying out of works, or the erection or construction of a structure or of an ancillary building, or the placing on land of equipment; the works, structure, building or equipment must not exceed 4 metres in height or 200 cubic metres in capacity.

Development is not permitted by Class 44 if it would consist of or include the construction or extension of a runway, the erection of a building other than an operational building or the alteration or reconstruction of a building other than an operational building, where its design or external appearance would be materially affected.

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.

CONTENTS

[1] The GDPO 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. Experience suggests wide variations exist in practice but most airports work closely with their respective local planning authority on consultation arrangements.

If a project constitutes environmental impact assessment (EIA) development, 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".

Each criterion is briefly described below.

a) What is a 'relevant airport'?

To qualify as a 'relevant airport', an airport must be able to demonstrate an annual financial turnover exceeding £1 million in at least two of the previous three financial years, and must not be owned by a local authority, or a metropolitan county passenger transport authority and a local authority (s57A of the Airports Act 1986).

b) Who is the 'relevant airport operator'?

The "relevant airport operator" is the airport operator of a relevant airport. The Airports Act 1986 defines "airport operator" as *"the person for the time being having the management of an airport, or, in relation to a particular airport, the management of that airport"* (s82).

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" means a building, other than a hotel, required in connection with the movement or maintenance of aircraft, or with the embarking, disembarking, loading, discharge or transport of passengers, livestock or goods at a relevant airport. Specified Class 44 PDR exclusions include the construction or extension of a runway and the erection, reconstruction or material alteration of non-operational buildings.

d) What constitutes 'operational land'?

The PDR only applies to development on operational land. This generally means the area within which airport operations take place. In practice establishing what constitutes operational land is 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 215 (1) of the Town and Country Planning (Scotland) Act 1997 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'.

Section 215(2) of that Act explains that this does not include land *"which, in respect of its nature and situation, is comparable rather with land in general than with land which is used, or in which interests are held, for the purpose of the carrying on of statutory undertakings".*

There are, however, other legal qualifications relating to operational land which serve to narrow its definition.

Prior to the Town and Country Planning Act 1969 land acquired by statutory undertakers for the purpose of carrying on their undertaking 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 s70 of the Town and Country Planning Act 1969, now reflected in similar terms in Section 216 of the Town and Country Planning (Scotland) Act 1997.

This section of the 1997 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 8 December 1969 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 216 (3) or (4) of the 1997 Act are satisfied. Section 216 does not apply if land is held by the CAA or an air navigation provider with the licence, or a company associated with such a person.

Section 216 (3) requires that a specific planning permission has been in force for development related to the purpose of the statutory undertaker. Section 216 (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.

Therefore, establishing whether the land in question constitutes operational land, particularly where the interest was acquired post-1969 can be problematic. It is necessary to show that either all of the land in question benefits from a planning permission specifically related to the purpose of the statutory undertaker (i.e. airport use in this case), 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 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 Lawfulness under sections 150 or 151 of the Town & Country Planning (Scotland) Act 1997. If refused, the option of an appeal is available.

In some circumstances, such as where an airport expands onto adjacent land (for example agricultural land), it may be necessary to establish the planning status in order to qualify as operational land unless certain conditions can be satified. 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 none previously existed.

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

Part 14, Class 44 applies to the relevant airport operator or its agent of development. No definition is provided in the GDPO 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 14, Class 44, 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 14, Class 44 (3) 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 operator would need to be fully aware of what is proposed, to give its specific approval to the development in question being carried out and to be satisfied that its agents 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.

Alternative to Part 14 PDRs

Where an airport is wholly local authority owned and controlled it does not have the benefit of Part 14 PDRs. Whilst it is possible for the local authority under the Town and Country Planning (Scotland) 1997 Act and the Simplified Planning Zone (Scotland) Regulations (1995) for the local authority to consider the making of a Simplified Planning Zone (SPZ), unlike the English equivalent system, SPZs are rarely adopted in Scotland and may not be considered an appropriate option for local authorities in all cases[2].

Loss of the Class 44 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.

[2] An SPZ scheme grants planning permission for the types of development it specifies within the zone without the need for any individual planning permission and therefore has the potential to authorise similar development to Part 14 of the GDPO within a defined area of operational land.

b. An Article 4 Direction made by a local planning authority provides a mechanism for withdrawing PDRs if the local planning authority or the Scottish Ministers believes it is expedient to do so. If a Direction is in force, a planning application is required. When removing the PDR of a statutory undertaker, any Direction requires the approval by Scottish Ministers.

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.

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

Whilst there is provision for PDRs for Crown development under the England GDPO, there is no such provision under the Scotland GDPO. The 2011 GDPO consultation draft introduced PDRs for Aviation Development by the Crown, however this legislation was not made.

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.

However, care needs to be exercised in understanding if PDRs apply, and in their 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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