

GLASGOW AIRPORT RAIL LINK ACT 2007

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 – Miscellaneous and general

Section 32 – Power to fell, etc. trees or shrubs

153. Subsection (1) enables the authorised undertaker to fell, lop or cut back the roots of any tree or shrub that is near either any part of the authorised work or any land proposed to be used for the authorised works. The power is exercisable if the authorised undertaker reasonably believes it to be necessary in order to prevent the tree or shrub–

from obstructing or interfering with the maintenance or operation of the authorised works or associated apparatus; or

from constituting a danger to those using the authorised works.

The powers are exercisable in relation to any tree or shrub that comes within the tests in subsection (1), whether inside or outside the limits of deviation and the limits of land to be acquired or used.

154. Subsection (2) requires that the authorised undertaker is not to damage a tree or shrub unnecessarily.
155. Subsection (3) requires the authorised undertaker to pay compensation to any person who suffers loss or damage arising from the exercise of this section.
156. Under subsection (4) any dispute as to compensation will be determined by the Lands Tribunal for Scotland in accordance with the Land Compensation (Scotland) Act 1963.
157. Subsection (5) disapplies any tree preservation order or prohibition on interfering with trees in conservation areas which might otherwise apply.

Section 33 – Powers of disposal, agreements for operation, etc.

158. **Section 33** is required because, although SPT is the promoter of the Act, it will not necessarily own or operate the railway. For instance the expectation is that ownership of the alterations to the existing rail network will be transferred to Network Rail as the national rail infrastructure operator. **Section 33** therefore gives effect to the intention that SPT may be no more than the procurer of the powers. In the absence of **section 33** the powers in the Act would not be transferable.
159. Subsection (1) provides that the authorised undertaker is competent to (i.e. lawfully can) make and implement agreements connected with the authorised works that provide for the things described in subsection (2). The matters listed in subsection (2) are:

the transfer to and vesting in another person of all or any of the authorised undertaker's functions under the Act, including the powers conferred by this section,

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(asp 1) which received Royal Assent on 15 January 2007*

the disposal of the whole or any part of the railway undertaking that the authorised works make up, and

the creation of any heritable security, charge or other encumbrance secured on that statutory undertaking.

The authorised undertaker does not need powers to transfer or dispose of non-statutory assets, but the matters described in subsection (2) all relate to interference with the statutory powers of the Act and so require legislation to authorise them.

160. Subsection (3) relates to any restrictions, liabilities or obligations that bind the authorised undertaker, either under this Act or under an undertaking or commitment (given before or after the Act passes) by SPT or any other authorised undertaker. Any such thing will be equally binding on any subsequent authorised undertaker.
161. Subsection (4) requires that where there is an agreement under subsection (1) to transfer functions, the authorised undertaker making the transfer must serve a notice on the Scottish Ministers stating the name and address of the transferee and the date when the transfer is to take effect. The notice must be served within 21 days after such an agreement has been completed. The purpose is to ensure that the Scottish Ministers have a record of who is entitled to exercise statutory functions and, reflecting the importance of the notice requirement, subsection (5) makes it a criminal offence to fail without reasonable excuse to comply with the requirement.
162. Subsection (6) makes clear that an agreement under subsection (1) made in connection with the authorised works can include any agreement relating to funding, construction, maintenance and operation of the authorised works or any supplementary or ancillary matters
163. Subsection (7) contains definitions. “Functions” includes powers, duties and obligations: in short, in relation to the statutory functions under the Act, anything arising under the Act.

Section 34 – Statutory undertakers, etc.

164. Subsection (1) introduces **schedule 7** to the Act. This schedule is concerned with the rights of the providers of water, gas, electricity, sewerage and telecommunications services to maintain their supplies through apparatus that will or may be affected by the Act. These providers (frequently described in legislation as “undertakers”) have historically been legislated for as “statutory undertakers”. In particular, “statutory undertakers” is the expression used in sections 224 to 227 of the [Town and Country Planning \(Scotland\) Act 1997 \(c.8\)](#) (in the Act called “the 1997 Act”). Sections 224 to 227 provide a statutory code that applies in certain cases where the use of land for planning purposes makes it necessary to extinguish undertakers’ rights to maintain apparatus.
165. This code provides for the acquiring authority to be able to serve notice to require the relocation of apparatus of the undertaker, and for the statutory undertaker to object to the proposal (disputes being determined by Scottish Ministers). Alternatively the statutory undertaker can serve notice on the acquiring authority if it considers that a relocation will be necessary. In either case the compensation is payable by the acquiring authority.
166. **Schedule 7** is well precedented. Legislation authorising infrastructure provides protection for undertakers’ apparatus in one of two ways. Either it applies the statutory code in the 1997 Act or it sets out at length the arrangements between the promoter and each of the affected undertakers. The latter course would call for the Act to include detailed provisions concerning the approval or agreement of detailed works, the methods of carrying them out and the provision of alternative undertakers’ apparatus. These are all matters that can be agreed privately between the parties and recorded in formal agreements. **Schedule 7** seeks to put in place a baseline framework that will

ensure that the authorised undertaker is obliged to make the necessary arrangements, and which will operate in the absence of any separate private agreement.

167. It is known that there is undertakers' apparatus in some of the land required for the authorised works. The Act when enacted will therefore give rise to the situation for which sections 224 to 227 are designed. **Schedule 7** accordingly applies the code in sections 224 to 227 to the authorised works.
168. **Paragraph 1** of **schedule 7** provides for those sections to apply. Paragraph 2 applies all other provisions of the 1997 Act that are needed for the operation of sections 224 to 227, including the provisions regarding compensation.
169. **Paragraphs 3** and **4** provide for compensation to be payable to owners and occupiers of premises who have to make alternative connection arrangements because of the removal of apparatus in accordance with the code. Paragraph 3 deals with connections in order to retain a supply of water, electricity, gas or electronic communications services and paragraph 4 deals with connections with sewers.
170. Part IV of the New Roads and Street Works Act 1991 is a separate code governing works in roads. It covers works involving the removal or laying of undertakers' apparatus in roads, and it applies automatically. Accordingly, paragraph 5 of **schedule 7** provides that this schedule will not apply to cases that are governed by Part IV.

Section 35 – Arbitration

171. **Section 35** lays down the procedures applicable in cases where the Act provides for disputes (other than those to which the Lands Clauses Acts apply¹) to be settled by arbitration. The arbiter is to be agreed by the parties to the dispute or, failing agreement, by the President of the Institution of Civil Engineers. By subsection (3) the arbiter is entitled to obtain a ruling on points of law from the Court of Session. This is standard practice for resolving such disputes. It will cover disputes arising under sections 5, 9, 10, 11 and 29. These are all potentially matters of a technical nature for which arbitration is considered a more appropriate procedure than recourse to the courts.
172. Subsection (4) disapplies section 108 of the **Housing Grants, Construction and Regeneration Act 1996 (c.53)** and any regulations made thereunder so that the dispute resolution mechanisms contained therein do not apply in respect of a dispute arising under this Act (for which a mechanism is provided under section 35). There is an exception for any contract where a party other than the authorised undertaker is to construct or fund the works authorised by the Act (subsection (5)).

Section 36 – Service of notices, etc.

173. **Section 36** lays down detailed procedures for the services of notices under the Act. The section allows notices to be served in person, by hand to someone's address or by post. It also specifies how notices and letters may be properly addressed.

Section 37 – Listed buildings

174. **Section 37** introduces **schedule 8**. The schedule makes special provisions as to the listed building (Glasgow Central Station) which will be affected by the railway works.
175. As explained in **paragraph 8** above, the Act will grant planning permission for the authorised works. It is appropriate that all planning issues should be considered at the same time, but the way in which the legislation is framed means that, but for **section 37** and **schedule 8**, the authorised undertaker would have to obtain listed building consent separately from the Act. This section and schedule 8 accordingly disapply this separate statutory requirement so that the Act will, effectively, also grant these consents.

¹ Disputes under these Acts are referred to the Lands Tribunal for Scotland (see paragraph 62).

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176. Paragraph 1 of **schedule 8** refers to the **Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (c.9)** (in the schedule called “the Listed Buildings Act”). This is the Act that requires special consent (called listed building consent) for works and operations affecting buildings that are listed under the Act as being of special architectural or historic importance and conservation area consent for the demolition or alteration of the external appearance of buildings in areas that are listed under the Act as being of special architectural or historic importance.
177. Paragraph 1(1) of the schedule specifies the provisions in the Listed Buildings Act and the actions that may be taken under the Act which are not to apply. They are—
- section 6 (the requirement for listed building consent);
 - any notice under section 34(1) (in the Listed Buildings Act called an enforcement notice) by which the local planning authority may require actions in relation to any of the buildings specified in the table which would render ineffective, or substantially ineffective, the works authorised by the Act;
 - in relation to an enforcement notice to which paragraph 1(1)(b) above applies, the power under section 38(1) of the Listed Buildings Act for the local planning authority to do the things required by an enforcement notice if the recipient of the notice fails to comply; and
 - the ability under section 49 for the local planning authority to carry out urgent preservation works if those works would render ineffective, or substantially ineffective, the works authorised by the Act.
178. The purpose of disapplying these statutory controls in relation to the building specified in the table is only to allow the construction of the authorised works. Accordingly, paragraph 1(2) of **schedule 8** makes clear that the only works that are not affected by the controls mentioned in paragraph 1(1) are the works described in column (4) of the table at the end of paragraph 1.
179. The purpose of **schedule 8** is to give listed building consent in all cases where it is needed. The building mentioned in the table is the only building that was listed as at 1st September 2004. Paragraph 1(3) ensures that if any further buildings are listed the schedule will apply to them, as well.
180. Paragraph 1(4) of **schedule 8** makes clear that objects or structures fixed to or within the curtilage of a building (for example, lamp brackets or door furniture) are to be treated as a part of the building for the purpose of this schedule².
181. The listed buildings and the works to which the schedule will apply are described in the table at the end of paragraph 1.

These Notes relate to the Glasgow Airport Rail Link Act (asp [no]) which received Royal Assent on [date]

182. Paragraph 2 of **schedule 8** disapplies section 53 of the Listed Buildings Act in relation to the works authorised by Part 1 of the Act. Section 53(1) of the Listed Buildings Act makes it a criminal offence to do or permit anything which causes or is likely to result in damage to a listed building. The works described in the table would amount to damage giving rise to an offence. Section 53(3) provides that subsection (1) does not apply (which means that the offence is not committed) to the execution of works authorised by a planning permission or for which listed building consent has been given. As the Act amounts to an effective grant of planning permission, and the effect of **section 37** of and **schedule 8** to the Act is effectively to grant listed building consent for the specified works, section 53 ought not to apply to the works.

² *The Listed Buildings Act provides that these things are deemed to be part of a listed building, but only for the purposes of that Act (Listed Buildings Act, s.1(4)).*

183. **Paragraph 3** of the schedule applies the definitions of “building”³ and “listed building”⁴ in the Listed Buildings Act.
184. In the absence of this section it would be necessary to obtain separate listed building consent and conservation area consent in respect of works affecting the specific listed buildings or certain works in the conservation areas in which they are situated. This section enables the principle of the listed building issues to be dealt with at the same time as the rest of the scheme. However the details of any modifications to listed buildings will require prior approval by the local planning authority in accordance with the conditions attaching to the permitted development rights which apply to development authorised by the Act (see **paragraph 8** for an explanation of these permitted development rights).

Section 38 – Saving for Town and Country Planning

185. Subsection (1) provides for planning legislation to apply in relation to the works authorised by the Act.
186. As explained in **paragraph 8** above, development authorised by the Act is permitted development i.e. under class 29 of Schedule 1 to the Town and Country Planning (General Permitted Development) (Scotland) Order 1992 (in the Act referred to as “the 1992 Order”). Subsection (2) imposes three restrictions on the planning permission conferred by the 1992 Order.
187. First, subsection (2) lays down a 10-year limit in respect of these permitted development rights. By subsection (3) the time limit does not apply to the alteration, maintenance or repair of the authorised works, or the substitution for those works of new works. The Act therefore operates to grant planning permission for the works subject to a condition that development must be begun within 10 years.
188. Subsection (2)(b) imposes a restriction on the extent of the permission given for new fuel farm facilities at Glasgow Airport (the ancillary works identified in paragraph 2 of **schedule 2** to the Act). The intention is that the Act should authorise a replacement which is equivalent to the existing fuel farm facilities which will be displaced by the railway works, and that is all that has been assessed in the Environmental Statement accompanying the Act. The purpose of this provision is to ensure that the permitted development conferred by the 1992 Order is consistent with what has been considered in the Environmental Statement. If the operators of the fuel farm decide that expanded facilities are in due course required an application would need to be made for planning permission in the normal way.
189. The purpose of subsection (2)(c) is to ensure that Renfrewshire Council will have the right to approve the detailed plans and specifications of the viaduct to be constructed over St James’ Park. Under paragraph (2) of Class 29 of Schedule 1 to the 1992 Order the planning permission conferred by that Order for certain types of development is subject to the prior approval by the local planning authority of detailed plans and specifications. This provision adds “viaduct” to this list of types of development and thus removes any doubt as to whether construction of a viaduct would otherwise have been treated as being included within the types of development for which prior approval is required.

Section 39 – Blighted land

190. **Section 39** applies the planning blight provisions of sections 100 to 122 of the **Town and Country Planning (Scotland) Act 1997 (c.8)** (which applies in cases mentioned in

3 “Building” includes any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building (*Town and Country Planning (Scotland) Act 1997 (c.8), s.277(1), applied by Listed Buildings Act s.81*).

4 “Listed building”: A building which is for the time being included in a list compiled by the Secretary of State under section 1 of the Listed Buildings Act (*Listed Buildings Act, ss.1 and 81*).

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Schedule 14 to the Act). These provisions ordinarily apply where compulsory purchase is authorised by a variety of legislative instruments, including a private Act of the UK Parliament, but on devolution this was not extended to apply automatically where the authorisation is by a private Act of the Scottish Parliament. This section is therefore needed to ensure that these provisions apply to the works authorised by the Act.

191. The effect of **section 39** is that–
- a resident owner-occupier of a residential dwelling;
 - an owner-occupier of land with an annual (i.e. in most cases rateable) value of (currently) £28,000⁵; or
 - an owner-occupier of an agricultural unit,
- whose land is subject to compulsory purchase under the Act may require the authorised undertaker to purchase the land at market value if, having tried to sell the property, the landowner has been unable to sell except at a substantially lower price than might reasonably have been expected had the land not been subject to compulsory purchase.

Section 40 – Method of vesting land

192. The compulsory purchase procedures under the Lands Clauses Acts as outlined in **paragraphs 58 to 61** above provide for land to be vested in the acquiring authorised undertaker by means of a conveyance or in certain circumstances a notarial instrument executed by the authorised undertaker. **Section 40** applies a further procedure that is available generally to vest land that has been compulsorily acquired.
193. Section 195 of and Schedule 15 to the **Town and Country Planning (Scotland) Act 1997 (c.8)** apply to any Minister or any local or other public authority that is authorised to acquire land by means of a compulsory purchase order (called an acquiring authority). Where a compulsory purchase order has come into operation, the acquiring authority may execute a general vesting declaration (for which there is a prescribed form) vesting in themselves any of the land which they are authorised to acquire. A single declaration may relate to all or any of the land subject to compulsory purchase. Schedule 15 includes requirements as to the giving of prior notice and the date on which any declaration takes effect.
194. The effect of a general vesting declaration is to vest the land to which it relates in the acquiring authority. The making of the declaration has the same effect as service of a notice to treat in triggering the landowner's right to claim compensation.
195. Subsection (1) applies this procedure to compulsory acquisition under the Act.
196. Paragraph 2 of Schedule 15 makes detailed provision for the giving of notice to trigger the vesting declaration procedure. Subsection (2) adopts this for the Act. The vesting declaration provisions will apply on publication of a notice that the Act has received Royal Assent, giving details about the general vesting declaration procedure and stating that compensation may be payable. Subsection (2) provides that such a notice may be given at any time after the Act comes into force. The requirements for publication and service referred to in subsection (2)(c) are for newspaper publication and service on landowners who previously received notice of the proposals.

Section 41 – Certification of plans, etc.

197. **Section 41** requires that the authorised undertaker shall as soon as practicable after the Act comes into force submit copies of the book of reference, Parliamentary plans and Parliamentary sections to the Clerk of the Parliament for certification. Subsection (2)

⁵ *Town and Country Planning (Limit of Annual Value) (Scotland) Order 2005/(SSI 2005/594) designed to catch small businesses.*

provides that the Clerk of the Parliament must be satisfied as to the accuracy of the documents before certifying them. The certificate is that they are the documents referred to in the Act. Such certified copies will be admissible in proceedings as evidence of the contents of these documents. In the absence of this provision the authorised undertaker could be required to prove the authenticity of copy documents.

Section 42 – Registration of new rights

198. **Section 42** addresses two issues in relation to positive servitudes that is, rights relating to the doing of some positive thing in relation to property (“burdened property”) for the benefit of other property (“benefited property”). Subsection (1) provides that a servitude or other right acquired compulsorily under the powers to be conferred by the Act benefits all the land held by the authorised undertaker for the purposes of the authorised works. In the case of a linear work such as a railway, the benefit of a positive servitude (such as a right of access to the railway) may be capable of benefiting significant parts of the railway system, considerably more than the land immediately adjoining the burdened property. It is a principal of Scottish land law that a servitude is construed restrictively. This means that the servitude must be clear and precise. If the deed creating a servitude does not define land as being benefited by the servitude then the servitude cannot be used to benefit that land. In the context of the Act, an access servitude that defines the benefited property as being only some of the land comprised within the railway could not be used to access other land belonging to the authorised undertaker further down the route. Subsection (1) ensures that statutory servitudes acquired under the powers in the Act for the benefit of the railway will have that effect and are not reduced in scope by this principle of general Scots property law.
199. Subsection (2) provides that such a servitude is effective whether or not the deed creating it is registered against both the benefited property and the burdened property. Section 75 of the **Title Conditions (Scotland) Act 2003 (asp 9)** requires that a deed creating a positive servitude must be registered against both the burdened and the benefited property. An ordinary reading of section 75 leads to the conclusion that if registration is against only some of the benefited property, the deed will not be enforceable for the benefit of the remainder of the benefited property, against which it has not been registered. This subsection therefore ensures that statutory servitudes acquired under the powers in the Act for the benefit of the railway will have that effect in relation to all the land occupied by the authorised works, whether or not they are registered against all that land. Servitudes must still be registered against the burdened property.

Section 43 – Mitigation of environmental impacts

200. **Section 43** imposes a positive duty on the authorised undertaker regarding the environmental impacts of the authorised works. The environmental statement lodged with the Act on introduction proposes that certain mitigation measures will be taken. The effect of these measures will be to prevent or reduce environmental impacts being caused by the authorised works. Subsection (1)(a) obliges the authorised undertaker to ensure that the environmental impacts of the construction or operation of the authorised works are no worse than the residual impacts identified in the environmental statement. Subsection (1)(b) obliges the authorised undertaker either to carry out any additional mitigation measures identified in the undertakings given by SPT as promoter of the Act or to ensure that the environmental impacts are no worse than they would have been if those additional mitigation measures had been carried out. The test for the authorised undertaker to apply is that of using all reasonably practicable means.
201. Subsection (2) contains definitions of environmental statement, the promoter’s undertakings and residual impacts. For the purposes of this section, the environmental statement is identified as the accompanying document lodged with the Act and residual impacts means the environmental impacts of the construction or operation of the

authorised works after the mitigation measures proposed in the environmental statement have been carried out.

Section 44 – Application of Crichton Down Rules

202. **Section 44** requires the authorised undertaker to implement the rules (known as the “Crichton Down Rules”)⁶. The rules provide that in certain circumstances former owners will, as a general rule, be given the first opportunity to repurchase, at the current market value, land previously in their ownership which was acquired by or under threat of compulsion and which is no longer required for the purpose of providing the authorised works. The Circular applies to public authorities and makes clear that the rules (so called) are to be regarded as guidance rather than imposing an absolute requirement. By providing that this obligation to offer back surplus land will automatically apply, the Act overcomes any uncertainty concerning the identity (and hence public status) of the authorised undertaker and commits the authorised undertaker to implementing rules that would not otherwise be mandatory.

Section 45 – Compliance with code of construction practice and noise and vibration policy

203. The purpose of **Section 45** is to ensure that the authorised undertaker complies with the code of construction practice and noise and vibration policy for the authorised works which may, from time to time, be amended or replaced. The test for the authorised undertaker to apply in complying is that of using all reasonably practicable means.
204. Subsection (3) refers to **schedule 9** which sets out the detailed procedure for approval, amendment and replacement of the code of construction practice. The schedule provides that the authorised undertaker must not commence construction of the authorised works in the area of a local planning authority until it has submitted to that local planning authority the code of construction practice for their approval. Paragraph 2 of the schedule requires a local planning authority to send a copy of the code, including any amendment or replacement to both Scottish National Heritage and the Scottish Environment Protection Agency. Those bodies are not obliged to respond but, if they do so, the local planning authority must take account of their representations.
205. Subsection (2) provides that the code of construction practice and the noise and vibration policy may not be amended or replaced so as to reduce the standards of mitigation or protection provided for in the earlier version. If they are not amended or replaced they are the documents dated 7th November 2006 and lodged with the Clerk of the Parliament.

Section 46 – Regulation of mitigation measures

206. The purpose of this section is to provide a mechanism for the provision of mitigation measures to be regulated. Subsections (1) and (2) provide for the requirements imposed by sections 43 and 45 and schedule 9 of the Act to be enforced by the local planning authority as though they were planning conditions imposed on a normal grant of planning permission. They also apply the normal provisions for appeal against the refusal of a local planning authority to grant an approval which is required under a planning condition. By subsection (3) each of the local planning authorities is obliged to appoint an Environmental Clerk of Works to monitor the authorised undertaker’s compliance with the mitigation measures.

⁶ Set out in Scottish Development Department Circular 38 of 1992 in relation to the disposal of surplus land.